

1. DATAFIN

KEY ISSUES

-Approach to jurisdictional review

Facts

-In regards to the Takeovers Panel, it wrote its own code of conduct to regulate mergers and acquisitions. It wrote rules about whether some codes have been breached. Ability to adjudicate cases. However, it does this function without visible means of legal support.

-Takeovers Panel through the code had a mechanism for controlling activity. It does to have any statutory, prerogative or common law powers and it is not in a contractual relationship with the financial market.

-In a sense it is a regulatory body that is private. It was a non-governmental body that was not established by statute, nor can it confer prerogative power.

Issue

-Is this remarkable body above the law? This question is seen through 3 principle issues:

1. Are the decisions of the panel susceptible to judicial review? (Jurisdictional issue)

-Court judicial review is a historic common law principle which gives the courts supervisory jurisdiction to some decision-makers.

2. If so, how in principle is that jurisdiction to be exercised given the nature of the panel's activities and the fact that it is an essential part of the machinery of a market in which time is money? (Practical issue)

3. What relief can be granted? In what form?

Held

Jurisdictional issue

-Donaldson argues that there is immense invisible or indirect support that Datafin receives to perform its function.

-The government decided that there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent. The courts argue that the regulatory body operates within the public domain. The court questions whether supervisory jurisdiction extends to this kind of body.

-The courts argue that the only essential element that is required is the public element.

-The judges argue that the self regulatory nature of the Takeover Panel may be a good idea because it is more effective for a participant in the market to regulate the market, instead of asking law makers who may not have the knowledge.

-Even though there was no hard law backing the regulatory power of the Panel, the Panel was a part of a much larger governmental framework in which the government relied on the Panel to make its own code and regulation system

-To determine whether the courts have the jurisdiction to review a body, the court does not look at the source of legal power, the identity of the decision maker, not to its institutional status, rather look at the nature of the function; is the function public?

1. How did the English court of Appeal define the scope or reach of administrative law (in particular JR) in this case?

• Test:

(i) Is the relationship contractual? If yes, not available

(ii) Is the function a public function? If yes, then available

Practical issue

-The court appreciates that in financial markets, speed is an important factor, and being able to rely upon decisions as a basis of dealings in the market.

- The body in this case combines all the functions of the court through interpreting legislation, investigating and imposing penalties.
- If judicial review can regulate the Takeover Panel, this may undermine the self-regulatory nature of the body, and reduce its flexibility, and speed of operation and clogs up the market with legal rules.
- The judges held that the Panel had de facto power, because it was working as part of the government framework. The government relies on the Panel to make its decisions. Furthermore, the government gives other additional bodies to account for breaches by the Panel.

2. KIRK

KEY ISSUES: State judicial review

State judicial review law has been constitutionalised whereas prior it was common law.

– ‘entrenched minimum provision of judicial review’ applicable to state DM.

3 features

1. s 73(iii) gives states SJ – courts found this provision will require state legislatures to maintain a body which is consistent with the ‘constitutional description’ of the supreme court.
2. Conceptual basis for entrenched provisions for state court’s SJ is the same as s 75(v); ‘power to grant relief on the account of jurisdictional error’
3. ROL emphasised that it is equally applicable to create an entrenched jurisdiction in determining the legality of state government decisions.

-Supreme State Courts can provide supervisory jurisdiction, and can grant certiorari, prohibition and mandamus for jurisdictional error under s73 (iii).

-RE: KIRK ... HC in *Public service association of south Australia Inc v industrial relations commission of south Australia*: ‘State legislative power does not extend to depriving a state supreme court of its supervisory jurisdiction in respect of jurisdictional error by the executive government of the state, its ministers or authorities’ HC believing the meaning and purpose of JR as being limited to decision making powers exercised only by government DM.

3. TANG

KEY ISSUES: What is a decision of an administrative character made under an enactment?

-Made under the Qld Judicial Review Act. However, the text is identical and thus should be interpreted in the same way.

Facts

-PhD Student was refused to be accepted in the PhD program because of Academic fraud

-First brought to Supreme Court, then the High Court. Sought judicial review on the decision to expel Tang.

-Using 'soft' law or policy which meant that it used policies just to facilitate University dealings. Did not have the force of law.

-Griffith University may not have argued a contract because it would have given Tang private law powers. Therefore the legal consequences of this is determined by contract law rather than the statute.

-There was voluntary association but no contract.

Held

-Court in *Griffith University v Tang* stated a new test for whether a decision is made under an enactment

1. 'expressly or impliedly required or authorised by the enactment'

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2. 'The decision must itself confer, alter or otherwise affect legal rights and obligations

-These rights and obligations must be 'new'/already in existence

-On the facts, Tang has no legal right or obligation to a PhD. Although there is policy in regards to 'giving students a fair hearing' this was soft law which means that there was no force of law.

-That there was no right or obligation under private law which were affected by the decisions, there was only a consensual relationship at best.

Dissent

-Kirby J argued that the whole decision only makes sense in the broader statutory authority to confer higher degrees, which in itself is hard law, which should flow down to mean that there was legal force in the policy.

-Kirby also argues that the ADJR act should not be limited to 'legal rights and obligations' but also to 'interests' as a broader notion.

-Furthermore, Kirby went on to argue that the university's power to provide education is conferred under the University Act and that the power to expel a candidate is also derived from this act and thus is a decision made under an enactment.

