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ARTICLES

JUDICIAL REVIEW OF DECISIONS OF NON-GOVERNMENTAL BODIES EXERCISING GOVERNMENTAL POWERS: IS DATAFIN PART OF AUSTRALIAN LAW?

Justice Emilios Kyrou

In *R v Panel on Take-overs & Mergers; Ex parte Datafin plc* [1987] 1 QB 815, the English Court of Appeal held that a decision of a private body that was not made in the exercise of a statutory power may be amenable to judicial review if the decision is, in a practical sense, made in the performance of a “public duty” or in the exercise of a power which has a “public element”. *Datafin* has been considered by a large number of Australian cases since it was decided in 1987 and it was widely thought that the *Datafin* principle applied in Australia. However, its application in Australia has been questioned recently by the New South Wales Court of Appeal and the Full Court of the South

Australian Supreme Court. This article discusses the ambit of the Datafin principle, judicial consideration of the Datafin principle in Australia, whether the Datafin principle applies in Australia and whether the Datafin principle should apply in Australia.	20
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THE PRACTICE OF THE ADMINISTRATIVE APPEALS TRIBUNAL IN RELATION TO MEDICAL EVIDENCE

D G Jarvis

The Administrative Appeals Tribunal has jurisdiction to review the merits of a very wide range of decisions of the Australian Government and its agencies. Many such decisions involve technical issues which are the subject of complex expert evidence, including in particular medical evidence. This article refers to the principal areas of the Tribunal’s jurisdiction where medical issues arise, the Tribunal’s practice as to the receipt of medical evidence, and the important role of the specialist members of the Tribunal who are medical practitioners. The article concludes with a general discussion of practical considerations relevant to the evaluation of medical evidence, whether by the Tribunal or in forensic proceedings generally.	34
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TWO “SIMPLE” PROBLEMS WITH THE “UNCOMMERCIAL TRANSACTION”

Lee Aitken

There is a Delphic simplicity in stigmatising a transfer of property made by an insolvent company as an “uncommercial transaction”. Nevertheless, the statutory concept does not lend itself to easy analysis since a “transaction” may be comprised of many separate parts, and it may be “uncommercial” even if it does not diminish the company’s ultimate asset position. This article examines three recent cases of high authority in which the courts have attempted to explicate the statutory concept and where they have hesitated to lay down any categorical approach to the question. Those explications are necessarily highly fact specific which underscores the difficult task faced by advisers to a company when the liquidator seeks to recover from a payee or transferee on the ground of “uncommerciality”.	47
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WESTERN EXPORT SERVICES V JIREH INTERNATIONAL: AMBIGUITY AS THE GATEWAY TO SURROUNDING CIRCUMSTANCES?

Derek Wong and Brent Michael

In <i>Western Export Services Inc v Jireh International Pty Ltd</i> (2011) 86 ALJR 1; [2011] HCA 45, it was submitted by the applicant that ambiguity was no longer required before a court may have recourse to surrounding circumstances in construing a contract. In refusing special leave to appeal, three members of the High Court said that this would require reconsideration of the position stated by Mason J in <i>Codelfa Construction Pty Ltd v State Rail Authority (NSW)</i> (1982) 149 CLR 337, and that judges were bound to follow that decision. This article argues that ambiguity is no longer a precondition to the use of extrinsic evidence and that the statements in <i>Jireh</i> do not alter that position.	57
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