The Legal Relationship Between the Australian Stock Exchange and Listed Companies

This article will examine the legal relationship between the Australian Stock Exchange (ASX) and listed companies. It will be argued that the legal framework of this relationship is so indeterminate as to raise the question of whether it creates a binding obligation upon either the ASX or listed companies. The indeterminacy of the framework is caused in part by an assumption that contract forms the basis of the relationship. That assumption will be disputed.

The assumption has given rise to two distinct approaches by the judiciary in interpreting the listing relationship. One approach — the narrow school — tends to deny the efficacy of both the contract and the legal framework built upon it. By contrast, the wide school embraces the assumption as to the efficacy of the contract. In the result, the legal obligations arising from the relationship are very unclear.

There have been various attempts by the legislature to bolster the operation of the contract, such as the enactment of s 777 of the Corporations Law and its predecessors. The most recent example is the passage of the Corporate Law Reform Act 1994. This Act uses the listing rules as the basis of the obligation upon listed companies to make disclosures under the continuous disclosure regime. It will be argued that these provisions only build upon the quandary and create further but dependent obligations which are confounded by the indeterminacy of the core.

Introduction

The purpose of this article is to examine the law governing the relationship between the Australian Stock Exchange (ASX) and listed companies. This body of law presents itself as a conundrum, and raises more questions than can be satisfactorily answered. One important causative factor in the development of this conundrum has been the view that the relationship should be defined by private law, particularly by contract. This view asserts that the relationship is governed by contract, as embodied in the listing rules, but that the contractual relationship must be augmented by legislation, particularly s 777 of the Corporations Law. ¹

However, this legal construct, which the courts have used to interpret the listing relationship, is based on an illusion. The illusion is that a binding contract exists at the core of the relationship. Various

¹ All references are to the Corporations Law, unless otherwise stated.

* The author wishes to thank Angus Corbett, for his guidance and many helpful suggestions; Ian Cameron, for the useful comments he made on an earlier draft; and Stephen Bottomley, for graciously responding to a constant stream of inquiries and hypotheticals.
aspect of the relationship, such as the absolute discretion which the ASX reserves for itself in administering the listing rules, mean that the relationship cannot be accommodated within the traditional doctrinal boundaries of contract.

In interpreting the legal nature of the listing relationship, the judiciary has paid varying degrees of attention to the viability of the underlying contract. The consequence has been an apparently inconsistent judicial interpretation, cloaking the global obligation of the listing relationship with many indeterminate features. Although the judiciary is able to provide a wide ambit of interpretations of the obligation, these interpretations can be categorised according to the extent to which the court adopts a wide or narrow view of the contractual doctrine which is said to underpin the relationship. The outcome of each case will differ significantly according to which approach is adopted.

Reform of the legal aspects of the listing relationship has proceeded by way of minor legislative tinkering in response to perceived inadequacies in the judicial interpretation of the listing contract. An example is the obligations created by s 777 of the Corporations Law, which will be demonstrated to be too dependent upon the pre-existing private law construct to resolve the indeterminacy of that construct.

Another important example of the minor legislative tinkering is the introduction of a regime of continuous disclosure by listed companies contained in the Corporate Law Reform Act 1994 (Cth). The Act's regime for continuous disclosure by listed companies relies entirely upon the listing rules of the ASX to provide the content of the obligation to disclose. Thus, the disclosure regime contained within the Act relies upon the pre-existing contractual relationship between the ASX and listed companies to determine the ambit of the obligation to disclose. The Act also makes some incidental repairs to the relationship in an attempt to make it more legally coherent. It is submitted that this attempt has failed, and has probably created greater confusion.

Arguably, then, the legal effect of the above is that the listing rules are not binding upon listed companies or the ASX. Both s 777 and the continuous disclosure legislation build upon the illusory core in a way that cannot give substance to the illusion. The legislative changes do not seek to disturb the fundamental flaw in the private law core. Since the core is illusory and the legislation has not remedied this weakness, legislative attempts to uphold the listing rules will ultimately be ineffectual.

The nature of the contract between the ASX and listed companies

Introduction

The listing rules have evolved from a premise that they form the terms of a highly unusual contract which has been described as “one for which it is hard to find analogy elsewhere in Australian law”. The ASX considers that the rules facilitate the various functions of the equities market such as assisting the trading and settlement of equities, keeping the market informed and ensuring that listed entities maintain a high level of integrity and accountability to their shareholders.

Because the ASX has traditionally regarded its relationship with listed companies as based on a contract which is formed by each company applying to be admitted to the Official List, the mechanics of contract formation by each company will now be examined. Thereafter, two characteristics of the contract which render it difficult to legally analyse will be highlighted:

- the language of the listing rules, which is commercial rather than legal; and
- the extremely wide discretion which may be exercised by the ASX in carrying out its listing function.

It will then be argued that these characteristics, and particularly the width of this discretion, invalidate the presumption that the relationship of the ASX and listed companies is based on contract.

The formation of the listing contract

A company which desires admission to the Official List generally first consults a stockbroker who arranges a preliminary discussion with officers of the relevant exchange. Thereafter, the company must make application to the ASX on the forms set out in the appendices to the listing rules.

The Foreword to the listing rules states that the rules impose strict requirements on companies which, if not complied with, render them liable to removal from the Official List and the securities to lose Official Quotation. The Foreword goes on:

“As such the Listing Rules are the strongest element in the regulation of Listed Companies in Australia.”

It is in the Foreword of the listing rules that the vast reservation of discretion by the ASX is first encountered. It states:

“The Exchange in its absolute discretion (without qualification whatsoever) may accept or reject any application for admission to the Official List and has absolute discretion in administering the Listing Rules and in so doing looks to companies to comply with the spirit as well as the letter of those Listing Rules.”

This statement is qualified by the decision of Brolga Minerals NL v The Stock Exchange of Perth Ltd and Ors.\(^3\) In that case the plaintiff company applied for listing on the Stock Exchange of Perth. While the application was under consideration, certain intimations were made to the directors of the company that the application was likely to succeed. A prospectus was issued by the company indicating that listing was to be sought. The prospectus was subject to s 44 of the Uniform Companies Act which provided that where a prospectus indicated that application had been made by the issuing company for listing of its shares on the exchange, an allotment of shares issued pursuant to the prospectus would be void unless listing was granted within a certain period. The company alleged that because its prospectus indicated that a listing had been sought, the stock exchange was under a legal obligation to the company to consider the application in a proper manner and to exercise properly its discretion to grant listing.

It was held by Virtue SPJ of the Supreme Court of Western Australia that there could be a contractual duty imposed upon a stock exchange to give fair and honest consideration to any application by a...
company where there could be said to have arisen a contract between the stock exchange and the company. He considered that the exchange's act of giving consideration to a prospectus lodged by the company and demanding payment of $150 to cover perusal fees, together with the company's payment of the demanded sum, gave rise to the requisite contractual obligation to consider the application.

The court, however, did not consider whether the stock exchange owed a duty to grant listing to a company that appeared to satisfy the criteria laid down by the Corporations Law and the listing rules but which the stock exchange, in the exercise of its discretion, considered should not be listed. The foreword to the listing rules contemplates an exercise of discretion.

Appendix 1 of the listing rules contains the Form of Application which sets forth in general terms the obligations of the company and incorporates the listing rules into the alleged contract between the ASX and the company.\(^4\) This provision is supplemented by Listing Rule 1a(2)(c) which reiterates that acceptance of an application for admission to the Official List and admission to the Official List shall be at the discretion of the ASX.

**Characteristics of the listing rules**

Certain characteristics of the listing rules make them elusive to legal analysis, particularly to analysis based on the traditional model of contract.\(^5\) Two characteristics will be dealt with here; the drafting of the rules and the extent of the discretion reserved by the ASX under the rules.

**The drafting of the listing rules**

The listing rules have been drafted in the language of commerce rather than law.\(^6\) An example of this type of drafting is Rule 3R(1), which deals with takeovers. This rule states:

"Where the directors are having discussions which may lead to an offer being made, it is important that secrecy be maintained."

Clearly statements such as this are not intended to have contractual force.

Some of the listing rules are expressly directed at associates of the listed company. For example, Listing Rule 3l(6) is addressed to the directors of the listed company. It states:

"A director (including an alternate director) shall not vote at a meeting of directors in regard to any contract or proposed contract or arrangement in which he has directly, or indirectly a material interest."

The term "associate" is not defined and it may be that it has the meaning in common usage, that is, persons acting jointly or for a common purpose. The other possibility is that it has the meaning of s 15 of the Corporations Law, which extends the notion of associate to cases (together with a few statutes) organised in a very similar way from one book to another, is taken to represent the law of contract: "The Logics of Contract" (1987) 7 Legal Studies 205 at 206.

For the purposes of this article the traditionalist view will be adopted, therefore the ambit of the Australian law of contract will be that which is taught in the law schools from such casebooks as Carter and Harland,
to certain vendors or purchasers where the consideration is in excess of 5 per cent of the shareholders funds of the listed company without the prior approval of the shareholders of the listed company in general meeting.

The term "entity" is defined in the definitions section of the listing rules as "any legal, administrative, or fiduciary arrangement, organisational structure or other party (including a person) having the capacity to deploy scarce resources in order to achieve objectives". The term "certain vendors and purchasers" includes an entity which:

- is or was in the preceding six months a director or officer of the company or any of the entities with which it is associated;
- is or was in the preceding six months a substantial shareholder in the company;
- is an associate of the listed company or its related corporations under the Corporations Law, Pt 1.2, Div 2; or
- whose association with any of the above persons or companies is such that, in the opinion of the exchange, the acquisition or disposal should be referred to the shareholders of the listed company in general meeting.

Of greater difficulty though are the rules which do not identify the person on whom the obligation is placed. For example, Listing Rule 3(1)(5) begins by stating:

"To advise the Home Exchange without delay of any material contract involving directors' interests."

It is not clear whether this obligation is placed upon the directors or the company.

As stated by Brewster:

"It is clear that for the enforcement of the Listing Rules, there is an obligation upon the exchange to clearly identify in each Listing Rule who is under the relevant obligation and thus to whom they purport to apply. Many of the Listing Rules are deficient in this regard and should be redrafted." 8

The significance of these provisions is not only that they are drafted in a way that complicates legal interpretation, but also that they widen the ambit of persons whose rights are affected by the listing rules well beyond the parties to the listing contract. This complicates the characterisation of the relationship as contractual and widens enormously the standing available to parties under s 777 of the Corporations Law.

The extent of the discretion reserved by the ASX

The highly unusual nature of the contract is typified by the foreword of the listing rules which states:

"A the Exchange has absolute discretion in administering the Listing Rules and

B the Exchange looks to listed companies to comply with the spirit as well as the letter of the Listing Rules."

Until the mid-1970s, the listing rules included the ability to alter the remedies available to the exchange for breach of contract. The exchange also had complete discretion to terminate the contract at any

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6 House of Representatives Standing Committee on Legal and Constitutional Affairs (the Lavarch Committee) recommended in Corporate Practices and the Rights of Shareholders (Australian Government Printing Service, Canberra, 1992) that the listing rules should be re-drafted in a style which accords with statutory drafting. Its Recommendation 13 stated:

"The Committee recommends that the ASX Listing Rules be redrafted by those versed in statutory drafting so as to have the rules expressed in a language and style which both facilitates clear interpretation and increases the ability to enforce such rules in the courts. The Committee further recommends that the Attorney-General announce that he will disallow, under s 774 of the Corporations Law, any further alterations to the Listing Rules which do not comply with the Committee's recommendation on the matter of style."

To date this recommendation has not been implemented, although the ASX has engaged in a revision of the rules in the last few years. In January 1994, a senior official of the ASX, Mr R Sherr, stated its policy on this point: "We're really consolidating and simplifying the rules to make them more readable — we won't change much." R Webb, Australian Financial Review, 10 January 1994, p 17.


8 Brewster, op cit n 2, at 328. Note however, that Brewster goes on to argue that this problem can be overcome by the powers of the court in s 777(1) which states that the court may make an order giving directions to "[a] person against whom the order is sought". Therefore, the section literally empowers the court to make orders against any person, upon breach of the rules by a listed company.
time, whether or not the strict provisions of the listing rules had been breached, by suspending, trading or delisting the company.

The listing rules, which are alleged to form the terms of the contract, contain the following examples of the discretion reserved by the ASX.

- Under Listing Rule 3s(3)(a) the ASX may suspend trading in the securities of a company when a company contemplates changing its activities or when, in the opinion of the ASX, control of the company is likely to change, until such time as the ASX is satisfied that shareholders and the investing public have been adequately informed of such changes.

- Under Listing Rule 3i(3)(a), a listed company is prohibited from disposing of its securities or assets where the consideration receivable or the consideration which the ASX in its absolute discretion deems to be receivable is in excess of 5 per cent of shareholders’ funds, unless certain requirements are fulfilled.

- Listing Rule 3i(3)(10), which states that where a document has been lodged by a listed company with the ASX marked “not for public release”, the ASX may still release the document to the public, the media or any other interested party where the ASX has formed the view that the information should be released and has given notice to the company to that effect.

- Listing Rule 3e(8) sets forth the circumstances in which certain persons may participate in an issue by the company of equity securities or other securities with the right of conversion to equity. Rule 3e(8)(a)(i) and (ii) refer to directors and associates for the purposes of the Corporations Law, Pt 1.2, Div 2. However, Rule 3e(8)(a)(iii) allows the ASX to extend the ambit of “associates” under the rule to any person or company whose association with any of the persons above is such that, in the opinion of the ASX, that person or company should be regarded as an associate. Clearly, the scope of “associate” under Rule 3e(8)(a)(iii) is far wider than under the provisions of the Corporations Law, but it is not clear how far the opinion of the ASX could extend this notion.

It is to be noted that all these examples are subject to the overriding effect of the declaration of absolute discretion in the foreword. This declaration preserves the absolute quality of the discretion exercisable by the ASX in all aspects of the listing rules. The incompatibility of this discretion with contractual doctrine will be discussed later in order to demonstrate the inappropriateness of the use of the legal category of contract to describe the relationship.

The private law framework of the listing relationship

Introduction to the judicial interpretation of the listing contract

"[The Listing Rules are] a flexible set of guidelines for commercial people to be policed by commercial people . . . [which] are never intended to be inflexible rules but rather principles to be
administered and applied by an expert body in accordance with the prevailing ethos of those chosen to administer them."9

An examination of the authorities on the interpretation of the listing contract reveals that the courts have not yet given a definitive statement regarding the nature and the terms of the contract which is alleged to exist between the ASX and listed companies. Perhaps the reason may have been pinpointed by Justice Young in the above quote. There is no doubt that the listing rules were originally created as a flexible set of guidelines or principles, although their drafting has become increasingly technical. Nevertheless, the listing rules do create problems of interpretation and this has been reflected in the disparate approaches adopted by the courts to this task. At best one can discern a number of different approaches of the courts which reflect:

(a) the extent to which contractual doctrine has been used strictly in the court's analysis of the case before it; or 10
(b) where a remedy is also sought under s 777 or s 1114 of the Corporations Law, the view taken by the court as to whether these sections can bolster deficiencies in the contractual analysis.

The reader should note that the analysis of the judicial interpretation of s 777 will proceed on the basis of its text prior to the amendments effected by the Corporate Law Reform Act 1994. At the time of writing, the changes made by that legislation have not been judicially considered, therefore the new form of s 777 will be examined separately under the heading "Legislative Reform" (at 268). 11

The following analysis has divided the reported cases into those which are dominated by the use of contractual doctrine and those where the court has relied upon s 777 and its predecessors in providing a remedy. However, the demarcation between the two categories is necessarily fuzzy for two reasons:

(a) the cases have all been decided since the enactment of s 777 and its predecessors, therefore the presence of the statutory provision infiltrates the contractual analysis; and
(b) although s 777 and its predecessors contemplated the power of the court to award a remedy which was not provided for by contract, the remedies sought and granted under the section have not diverged from those available in contract. Therefore the contractual analysis infiltrates the statutory analysis.

In light of this, the following terminology will be adopted to explain the differential emphasis given by judicial pronouncements concerning the obligations created under the listing rules and nature of the obligation which is created or deemed by s 777.

(1) **Primary obligation** refers to the obligation pursuant to which a body corporate must comply with the listing rules. This obligation gives the court jurisdiction under s 777(1). It may arise out of contract, estoppel, or possibly the obligation may be imposed, for example, a restitutionary obligation. It is a plenary obligation arising independently, of s 777, but s 777 operates to supply a remedy to the securities exchange or a person aggrieved by the breach of the obligation.

(2) **Deemed obligation** is the obligation contained in s 777(2). The body corporate is deemed to be under an obligation to...
comply with the listing rules because, due to its agreement, consent or acquiescence, it is included in the Official List.

(3) A component of the deemed obligation in s 777(2) is the obligation flowing from the agreement, consent or acquiescence of the body corporate to being listed on the Official List. This obligation is referred to as the prerequisite obligation.

There will be a substantial overlap between these categories because the source of the primary obligation, even without the benefit of s 777(2), may require that the listed company comply with the listing rules. And, of course, if s 777(2) is to do its work, the deemed obligation creates an enforceable right to compliance or enforcement of the rules. However, the scope of the deemed obligation is more narrow than the primary obligation, since it is dependent on the operation of the prerequisite obligation.

Most importantly, because the deemed obligation always piggy back on the prerequisite obligation, the efficacy of the deemed obligation will always be dependent on the substantive rights flowing from the agreement, consent or acquiescence of the listed company. Therefore the scheme of obligations set forth in s 777 has an inherent weakness in that factors which vitiate the primary obligation will often vitiate the prerequisite obligation. If the deemed obligation is deprived of its substratum, it cannot operate.

The cases analysed hereunder have been grouped in various categories which demonstrate the differing emphasis adopted by the court involved, using the approach set out above. The cases have been grouped in the following way, according to the approach adopted by the particular court in adjudicating a dispute.

Cases in which the court only relies on the primary obligation: in this group there are wide and narrow approaches.

(1) The narrow school: in this group, primacy is given to traditional contractual doctrine to determine the scope of the relationship between the parties.

(2) The wide school: in these cases, formal contractual doctrine is still the focal point of the inquiry by the courts but the courts, in adjudicating the dispute between the parties, have assumed that the relationship is contractual and this assumption has then formed the basis for further deliberations based on that assumption. In these cases there is no independent inquiry as to the juridical basis of the relationship.

The latter cases can be further grouped into those where the assumption is implicit and where it is explicit. In the implicit category, there will be little or no discussion as to how the court arrived at the conclusion that a contract existed. In the explicit category, the courts expressly regard the relationship as contractual, then adapt aspects of the traditional contractual model to explain facets of the relationship.

Cases where the court relies on section 777: there are also wide and narrow approaches in this group.

(1) The narrow school: this gives primacy to the prerequisite obligation and determines the ambit of the deemed obligation by first determining the appropriate ambit of the prerequisite obligation.
(2) The wide school: this gives primacy to the deemed obligation and if necessary recasts the prerequisite obligation so as to give effect to the deemed obligation.

Cases in which the court only relies on the primary obligation

In these cases, it is not necessary for the court to have recourse to the deemed obligation in s 777, therefore the cases provide an insight into the private law construct with relatively little influence from the legislation. As stated above, this relationship is regarded as contractual. In the narrow school, contractual doctrine operates narrowly and strictly and generally in accordance with the traditional model of contract. In this school, the relationship is more likely to be regarded as not regulated by contract. On the other hand, the wide school has a more inclusive approach. The relationship is regarded as being contractual either expressly or impliedly and the court will readily adapt the traditional model of contract to explain facets of the relationship.

The narrow school

In *Brolga Minerals NL v The Stock Exchange of Perth Ltd and Ors,* 13 Virtue SPJ of the Supreme Court of Western Australia had to decide whether lodgment by a company of an application for listing gave rise to an obligation on the part of the Perth Stock Exchange to give consideration to the application. As discussed above, it was held that there was a contractual duty imposed on the exchange to give fair and honest consideration to the application because the court was satisfied that a contract existed between the exchange and the applicant company.

In reaching this conclusion his Honour adopted a traditional approach of empirically determining whether the constituent elements of contract formation were present, that is, offer, acceptance and consideration. 14 He considered that the exchange’s act of perusing and giving consideration to a prospectus lodged by the company and demanding payment of $150 to cover perusal fees, together with the company’s payment of the demanded sum, gave rise to the requisite contractual obligation.

*Repco v Bartdon* 15 involved an action against two unlisted companies under a predecessor to s 777 of the Corporations Law (s 31 of the *Securities Industry Act 1975* (Vic)). Section 31 provided a remedy against a person “under an obligation to observe . . . the Listing Rules of a stock exchange”, therefore it was necessary for the Full Court of Victoria to determine the nature of this obligation. It was held that a person could only come under the obligation referred to in s 31 if he or she is bound by contract to do so. Although listed companies *may* have been under a contractual obligation to observe the listing rules, the legislature had indicated by the definition of “listing rules” in s 4 of the *Securities Industry Act* that it did not contemplate that the listing rules impose obligations on anyone other than listed companies.

Implicit in the court’s analysis is the doctrine of privity in contract. 16 If the nature of the obligation to observe the listing rules was derived

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13 (1973) CCH-ASLC 85,164.
16 As typified in cases such as *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 62 ALJR 508; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.
from contract, then an unlisted company who was not privy to the contract could not be subject to this obligation. The statutory definition of listing rules underlined this reasoning.

Powell J in Designbuild Australia Pty Ltd v Endeavour Resources Ltd \(^{17}\) was called upon to decide the point left unresolved by the Repco case, namely, whether the obligation under s 31 of the Securities Industry Act applied to listed companies. His Honour held that, unless the contract arising from the acceptance by the exchange of an application for listing, either expressly or by necessary implication, imposes on the applicant company a positive obligation to observe the listing rules, the mere fact that a company is listed does not mean that it is subject to the relevant “obligation” for the purposes of s 31.

Powell J’s analysis was similar to that of Virtue SPJ in Brolga in that he tested for the existence of a contractual relationship empirically, that is, he looked at the documents alleged to form the contract in this particular case to see what in fact had been promised. Here, none of the forms contained an express promise to observe the listing rules and it was not necessary in order to give business efficacy to the relationship between a listed company and the exchange that such an obligation be implied. Powell J was reticent to imply such a term because he considered that the applicant company may prefer to submit to suspension or delisting rather than comply with a listing requirement.

Further, from the point of view of the relevant exchange:

> "the undoubted and in my view, unexaminable discretion of the Exchange . . . whether with or without cause, to ‘suspend’ or ‘delist’ a company provides a far more powerful means of securing observance of the Official Listing Requirements than would a mere promise to observe them — for damages for breach of such a promise would be merely nominal, and specific performance of the promise . . . may well be singularly difficult to sustain.” \(^{18}\)

In the case of National Companies and Securities Commission v Industrial Equity Ltd, \(^{19}\) the issue for the court was whether a wholly-owned subsidiary of a wholly-owned subsidiary of a listed company was subject to the listing rules. The IEL Group began buying shares in Huttons Ltd in May-June 1981. Purchases were made on and off market by Portfolio Services Pty Ltd, a member of the IEL Group. Subsequently, Conquip Sales Pty Ltd, described by Holland J as “a mere shelf company” acquired shares, bringing its holding to 27.62 per cent at 26 June 1981. A notice was sent to Huttons advising of this share holding and Huttons sent a telex to IEL, asking whether IEL or an “associate” was intending to make an offer to all the shareholders to comply with Listing Rules 3s(4) and 3s(5). IEL responded on 30 June that it was prepared to consider a takeover offer, but the shares of IEL Ltd were suspended from Official Quotation on 8 July 1981. The National Companies and Securities Commission commenced proceedings under s 42 of the Securities Industry Act, inter alia, requiring IEL to make an offer.

Holland J found that Conquip Sales was intending to be the purchaser of the shares, therefore, following Repco v Bartdon and Designbuild, was under no obligation to comply with or observe the listing rules. Consequently, no power existed to order IEL to make a takeover offer. More importantly, his Honour echoed Designbuild in

\(^{17}\) (1980) 5 ACLR 610.
\(^{18}\) Ibid at 635.
\(^{19}\) (1982) 6 ACLR 1.
finding that even if IEL had acquired the shares in Huttons, there would still be no power to make the order because under:

"the terms of the 'contract' between IEL and Sydney Stock Exchange, no 'obligation' arose to comply with the listing rules. That contract recognises that the applicant for listing may be 'unwilling' to comply with the rules, and, in such event, permits the Exchange to remove that company from the official list."

This case mirrors the result of Designbuild, but in the context of s 42 rather than s 31.

These decisions are far-reaching in their impact on the theory that contract underpins the relationship between the ASX and listed companies, because they do not necessarily accept that the relationship is governed by a contract. Although Brolga demonstrates that contracts do arise in certain circumstances, it is necessary to test for the existence of a contract rather than to assume its existence. The remainder of the cases in this school recognise that either the ASX or a listed company or both may resort to extra-curial remedies, such as delisting, rather than be bound by contract. This approach greatly restricts the power of the court to grant a remedy, either under the general law or under the predecessors to s 777, due to the power of the ASX to enforce its rules without recourse to legal enforceability.

**The wide school**

As stated above, these cases can be grouped into those where the assumption is implicit and those where it is explicit.

**Explicit**

First is the judgment of Street J in *Kwikasair Industries Ltd v Sydney Stock Exchange Ltd,* a case which has been very influential in validating the discretionary powers of the ASX. In *Kwikasair* the Sydney Stock Exchange suspended the shares of Kwikasair because, in the view of the committee of the exchange, the activities of the company were not being carried on within the spirit of the rules of the exchange. The plaintiff sought an injunction restraining the exchange from suspending quotation of its stock units. Street J refused to overturn the decision of the exchange.

The parties conceded the existence of a contract between the company and the exchange and Street J held that the listing rules would form part of a contract implied by payment of the listing fees by the company on the assumption that it was obliged to conform to those listing rules. As stated by his Honour:

"I am of the view that Art 98 will form part of any contract implied by the circumstance of payment being made upon some assumed basis that the only obligation on the company concerned is to conform with the specified listing requirements. If such a contract is to be inferred, then the inference would include Art 98."

Article 98 stated the powers of the exchange to enter or remove securities from the Official List. It stated, inter alia:

"The Committee shall have the power to suspend for any period or withdraw altogether the name of any company or any security..."

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20 Ibid at 20.
21 (1968) CCH-ASLC 30,701.
22 Ibid at 30,708.
23 Ibid.
thereof from the Official List. Any decision by the Committee to admit to quotation, to refuse suspend or withdraw listing may be made by the Committee at any time and from time to time in its absolute discretion without assigning any grounds or reasons therefor and its decision shall be final and conclusive.”

One of the arguments made by the exchange was that the right to remain on the list, though undoubtedly a matter of great importance to the company and its shareholders, was expressly terminable either at the pleasure of the Committee or upon the summary decision of the Committee under Art 98. Because the relationship was purely contractual, there was no right to compel the Committee to enter or retain a security on the Official List. The exchange cited Jacobs J in Australian Blue Metal Ltd v Hughes24 to the effect that a Court of Equity will not restrain the breach or grant specific performance of an immediately terminable agreement because it would be a vain and useless action.25

Street J upheld this argument and the power of summary removal of the exchange. In coming to this conclusion, his Honour made the famous utterance that:

“so long as the Stock Exchange continues in this community to discharge . . . the important public duty expressed in its paramount and predominant object, . . . the members of the Committee should be left free to exercise honestly their powers . . . unfettered by any prospect of their having to face a litigious investigation of the correctness of their decisions. The powers of the Committee in this regard are arbitrary; they are intended to be exercised summarily and fearlessly in protecting the public interest.”26

The significance of the finding of such a wide discretion to perform contractual promises will be discussed shortly, but suffice to say presently that a party reserving to itself the discretion to perform promises may be said to have no intention to enter into legal relations.27 In this judgment Street J gave full force to the statement of discretion contained in Art 98. Of course, it was not necessary for his Honour to explore the question of whether the relationship was in fact based on contract, since that had been conceded by the parties, but he did not make an independent inquiry as to whether the width of the discretion upon which he relied was consistent with this “purely contractual relationship” or indeed reflected the intentions of the parties.

A further example of an explicit reliance on contract is provided by Zytan Nominees v Laverton Gold NL.28 In that case, the plaintiff company, Zytan, was a shareholder in the defendant company. It sought by the proceedings to continue an interim injunction to prevent the defendant, Laverton, from dispatching a takeover offer to the shareholders of a third company. The plaintiff argued that s 42 of the Securities Industry Act 1980 (Cth) conferred jurisdiction to restrain a threatened breach of the listing rules. Malcolm CJ was unwilling to decide whether s 42 extended to a threatened breach of the listing rules. But, importantly, his Honour considered that Zytan did not need to rely on s 42 as a source of jurisdiction to grant an injunction. He stated:

24 79 WN 498 at 511.
26 Ibid.
27 Roberts v Smith (1859) 157 ER 861; Re Richmond Gate Property Ltd [1965] 1 WLR 335; Placer Development Ltd v Commonwealth (1969) 121 CLR 353.
"Because Zytan is a shareholder of Laverton, Laverton is under a contractual obligation to Zytan to comply with the ASX Listing Rules, quite independently of s 42." 29

Thus the court had power to grant an injunction to restrain a breach of contract. The relevant breach of contract was a breach of Listing Rule 3J(3), regarded as a term of the contract between a company and its shareholder.

Note the reasoning here. Malcolm CJ is relying upon the primary obligation alone to found the jurisdiction to grant an injunction. He does not take advantage of the remedy provided by s 42 because of a perceived weakness regarding a threatened breach of the rules.

However, it is respectfully submitted that his Honour's analysis is incorrect. It hardly needs to be said that Zytan and Laverton are separate legal entities. Therefore, in terms of contractual doctrine, Zytan as shareholder is not privy to the contract made between the company, Laverton, and a third party (here the ASX). In other words, in the absence of equitable duties owed between the parties, if a contract exists between A and B and a further contract exists between B and C, how can A restrain a breach of the contract between B and C? The only circumstance in which A would have recourse would be if B's breach of the contract with C also amounted to a breach of its agreement with A.

Certainly the recent decision of Trident General Insurance Co Ltd v McNiece Bros Pty Ltd 30 indicated that, in the context of an insurance contract, a third party beneficiary can enforce a contract to which it is not a party. Moreover, the majority of the court was in favour of giving the decision a wider application to other third party benefit situations. However, it is submitted that an interpretation which characterises shareholders as third party beneficiaries is inconsistent with the doctrine of separate legal personality, as well as being out of step with commercial practice.

The contract between Zytan and Laverton (the listed company) to which Malcolm CJ refers would be the articles of association of the listed company. Therefore, superficially, his Honour's reasoning appears to be an adoption of the reasoning used by the courts in analysing s 180 of the Corporations Law. This provision states that the constitution of a company acts as a contract between the company and each member, the company and each eligible officer and between a member and each other member. However, this section does not apply because the terms of the listing rules do not automatically form part of the articles of a listed company. Certainly in some cases the ASX requires that a listed company's articles be consistent with the listing rules but such a necessary inclusion in the company's articles would be by way of express term. Arguably, an attempt to imply the terms of the listing rules into the contract constituted by the articles subverts the power of the members of the company to amend the articles under s 176 of the Corporations Law.

Thus it is submitted that his Honour did not establish the jurisdiction to grant an injunction under the listing contract because Zytan had no standing to complain of the breach due to its lack of privity.

29 Ibid at 156.
Implicit

In *Ampol Petroleum v RW Miller (Holdings) Ltd*, Street CJ stated “it is common ground that Millers [a listed company] was bound by contract to the Stock Exchange to observe this [listing] rule”. On appeal, the Privy Council agreed with Street CJ, without discussion of the merits. In *FAI Insurances Ltd v Pioneer Concrete Services Ltd and Ors*, Street CJ made the same assumption.

Conclusion

The cases which rely entirely on the primary obligation use contract as the basis of that obligation. The cases in the wide school above, that is, *Kwikasair* and *Zytan*, purport to use contractual doctrine as the core of the listing relationship. The contractual analysis used in these cases is either evasive (as in *Kwikasair*) or erroneous (as in *Zytan*). In the following section it will be demonstrated why contractual doctrine cannot operate as the basis of the listing relationship. As a consequence, the relationship remains elusive to contractual analysis and attempts to analyse it as a contract can only lead to a conclusion that the relationship is not contractual. Moreover, this theme will be echoed in the examination of the s 777 cases because of the way that the s 777 obligation piggybacks on the primary obligation.

Problems with the contractual analysis

Introduction

“It may be accepted that the Listing Rules are not to be given a technical interpretation so as to defeat their purpose, and that the Listing Rules should be construed and interpreted by the Court in such a way as to give effect to the spirit and purpose of the rule.”

Without heeding the warning of Jacob J, a purist’s eye will not be cast over aspects of the contract which is said to exist between the ASX and listed companies. The following matters present difficulties when the relationship is analysed in the context of traditional contractual doctrine.

- **Absolute discretion** — the discretion which is vested in the ASX may undermine the formation of a contract. The retention of an absolute discretion may indicate that the ASX has not promised to do anything, and failure of the ASX to make a promise negates the formation of a contract.

- **Compliance with spirit as well as letter** — the contract is uncertain, because each of the listed companies who has entered into the listing agreement with the ASX will be unsure how the ASX will interpret the listing rules on any particular occasion.

- **Power to waive compliance** — a party may only waive a condition in a contract if it is for her or his benefit. In contract, the concept of benefit is generally assessed inter partes. The benefit here might accrue to a number of persons, therefore it is questionable whether the ASX is bound by contract to observe this rule.

32 Ibid at 881.
33 *Howard Smith Ltd v Ampol Petroleum and Ors* [1974] AC 821 at 838.
34 (1986) 4 ACLC 698.
35 Ibid at 702.
36 *TNT Australia Pty Ltd v Poseidon Ltd* (1989) 15 ACLR 80 per Jacobs J at 84.
entitled to waive a provision which was intended to protect, for instance, shareholders.

- **Privity** — in general a person who is not a party to a contract cannot enforce it or have obligations imposed upon herself or himself. The contract which contains the listing rules purports to impose obligations upon third parties. This creates a tension between contractual doctrine and the operation of the contract between the parties.

- **Equitable estoppel** — the characterisation of the relationship as being based in contract may invite more onerous responsibilities than anticipated by the ASX, since it may owe private law duties to listed companies and their shareholders to avoid unconscionable conduct.

Looking at the first three aspects globally, they all represent facets of the incongruity of absolute discretion in the context of contractual doctrine. Absolute discretion tends to undermine the conceptual model of a bilateral contract itself.

**Absolute discretion**

As stated above, the ASX is jealous of the discretion which is vested in it by the Foreword to the listing rules and in the form of application for admission to the Official List. That discretion is absolute in relation to the acceptance or rejection of any application for listing and administering the listing rules.

The difficulty of retaining an absolute discretion is that it undermines the likelihood that the ASX has promised to do anything, and failure of the ASX to make a promise negates the formation of a contract. In other words, there is no intention to create legal relations, the promise being binding in honour only. As stated by Grieg and Davis:

"a bilateral contract is based on the concept of mutuality in the form of a promise to do, or refrain from doing, something else. Where, in a bilateral arrangement, one of the parties is by the terms of the arrangement, granted an unfettered discretion whether to perform, it is arguable that no legal relations are created." 37

One way in which discretionary arrangements can be given legal effect is to regard the discretion as limited or fettered in some respects. 38 Although this construction is impeded by the comments made by Street J in *Kwikasair* effectively upholding the absolute quality of the discretion, nevertheless the ASX may be under an obligation in private law to afford procedural fairness to a party affected by a discretionary determination. 39

Generally speaking, the courts will read down the conferral of an absolute discretion by imposing the requirement that the discretion be exercised in good faith, not capriciously. However, the basis of this restriction is the presumed intention of the parties and it may be that the express intention of the parties here differs from and overrides the presumed intention of the parties. The express intention of the parties appears to require that the ASX should retain the width of its discretion. This might suggest that the legal characterisation of the relationship does not lie in contract at all.

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39 A Black, "Judicial Review of Discretionary Decisions of the Australian Stock Exchange Limited", (1989) 5 Australian Bar Review 91 at 91-92. The determination of procedural fairness in this context will be facilitated by the proposal of the ASX to publish its decisions to grant waivers. Ray Schoer stated that the proposal is intended to "enhance the transparency of the ASX decision making processes", quoted in "ASX Seeks a Replacement for Schoer" (1994) 22 BCLB 418.
Illusory Consideration

It is prudent to draw a distinction between undertakings which are vague, uncertain or ambiguous and undertakings which are illusory. The essence of an illusory promise is that it combines words of promise with "words which show that the promisor is to have a discretion or option whether he will carry out that which purports to be a promise".\(^4^0\) For example, a promise to pay, "if I still wish to pay on the due date" is not just too vague; it is illusory and incapable of having binding force.\(^4^1\)

Thus the essence of the objection which could be raised against the listing contract is that the ASX has reserved for itself such a wide discretion that it could not be said to have actually made a promise to the other party to the contract. Because the promise is illusory, it is unenforceable by the purported promisor. However, it also cannot constitute consideration for a counter-promise. The counter-promise would therefore also be unenforceable even though it may not itself be couched in illusory terms. The consequence is that either party can freely repudiate a contract which is illusory on one side.

Unfettered discretion

There are several cases which state that the granting of an absolute discretion negates the formation of contract. In *Placer Development Ltd v The Commonwealth*\(^4^2\) it was held by the majority that, where words constituting a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he or she will carry out that which purports to be a promise, the result is that there is no contract on which an action can be brought at all.

In that case, the plaintiff (Placer) and the defendant (the Commonwealth) arranged for a timber company to be formed which would produce timber products in Papua New Guinea. As part of its operations it would import and export timber. Clause 14 of the agreement provided that the Commonwealth would pay a subsidy to cover import duty which was not subsequently remitted by export.

The timber company was not paid a subsidy on timber products imported between 1959 and 1963 even though import duty had been paid and not remitted.

Both parties stated a case for the opinion of the High Court as follows:

(1) Was there an obligation to pay a subsidy?

(2) If so, was there a complete discretion as to amount (ie did it include a nominal amount)?

(3) If yes to (1) and no to (2), then on what basis should the calculation be made?

It was held by the majority (Kitto J, Taylor and Owen JJA) that a promise to pay an unspecified amount is not enforceable where it expressly appears that the amount to be paid is in the discretion of the promisor. Here there were no criteria by which the court could fix the amount, since this was left solely to the discretion of the Commonwealth. The clause amounted to no more than a promise to pay what the Commonwealth in its discretion thought fit, and as such was wholly unenforceable. Kitto J relied on a statement of the principle in *Leake v Cox Bros (Aust) Ltd* (1930) 25 Tas LR, per Clark J, citing Vaughan Williams LJ.

\(^4^0\) *Iken v Cox Bros (Aust) Ltd* (1930) 25 Tas LR, per Clark J, citing Vaughan Williams LJ.

\(^4^1\) *Stevenson v Ellis* (1912) 29 WN (NSW) 52.

\(^4^2\) (1969) 121 CLR 353.
on Contracts that "promissory expressions reserving an option as to the performance do not create a contract". 43

It was noted that Windeyer J had observed in the earlier case of South Australia v Commonwealth 44 that an agreement by which both parties intend to be bound may nevertheless not be an agreement which the courts will enforce for the reasons that the objective circumstances may show that the agreement was not intended to be subject to adjudication by the courts.

Certainly, the logic of the position propounded by the majority in Placer is irresistible, that is, it is clear that if the essence of contract is the enforcement of promises, a promise cannot be said to exist where the giver of the "promise" is indifferent to whether the promise will be fulfilled or a fortiori has formed an intention not to fulfill the promise. The situation is analogous to the childish game of making a promise with one's fingers crossed. Certainly, words of promise are uttered but the act of the finger-crossing is sufficient to negate the obligation inherent in the words of promise.

How useful is Placer for an analysis of the contract between the ASX and listed companies? One matter which clearly distinguishes the case is the policy question inherent in the opinion of the majority that government decision-making regarding policy should not be fettered. The same considerations would not apply to the ASX. However, the point was also made by the majority that it is impossible to substitute the decision of the court to that of the government in salvaging the contract. The court could not substitute its own decision because there were no criteria upon which the court could determine the amount of the subsidy. The notion of a reasonable subsidy was inherently contradictory.

Applying that here, there are certainly difficulties in determining the manner in which a reasonable stock exchange would act. However, there are probably sufficient stock exchanges to render the exercise unwieldy rather than impossible. The difficulty rather exists in the clear intention of the parties to allow the ASX to exercise its discretion without reference to external criteria. Hence, even though the court could substitute its own decision for that of the ASX and in so doing could draw upon criteria from external sources, this would contradict the intention of the parties.

Another example of this type of "Indian-giver of promises" approach (especially where the Commonwealth was not involved) is in MacRobertson Miller v Commissioner of State Taxation 45 where Barwick CJ held that an airline operator in issuing a ticket did not by the terms of that ticket assume or offer to assume any obligation to carry the intending passenger. This conclusion was bolstered by the fact that an exemption clause contained in the contractual conditions fully occupied the whole area of possible obligation, leaving no room for the existence of a contract of carriage. Due to the width of the exemption, there was no contractual promise made. It would be a question of construction whether the discretion vested in the ASX could go this far. It may be significant, however, that the rules are subject to the overriding proclamation of the operation of the discretion.

In the Kwikasair case, the court was prepared to uphold the absolute ambit of the discretion which had been granted by the listing rules to the ASX. This would not necessarily still apply because the cases

43 Ibid at 356.
44 (1962) 108 CLR 130 at 154.
45 (1975) 133 CLR 125.
suggest that absolute discretion is subject to qualification. For instance, in *Meehan v Jones*, the question for the court was whether the purchaser in a contract which was "subject to satisfactory finance" had been conferred with an absolute discretion or was required to act honestly and/or reasonably. The High Court found that the judgment of the purchaser as to what constitutes finance on satisfactory terms is not an unfettered discretion, it must be reached honestly or honestly and reasonably. Mason J commented that the cases appear to support the "honest" rather than the "honest and reasonable" requirement. This requirement takes the case out of the principle that "where words which by themselves constitute a promise are accompanied by words which show that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract upon which an action can be brought".  

It is not clear how the requirements of honest or honest and reasonable will translate to the ASX's exercise of its discretion. As stated above, the requirement of the ASX acting honestly would at the least require it to provide procedural fairness to listed companies affected by a discretionary decision. The reasonableness aspect may import a wider range of obligations which are more akin to the obligations of a public body in that it would be amenable to judicial review. A further dilemma is the extent to which the reasonableness and honesty requirements interact with the extra-curial powers of the ASX.

**Compliance by spirit rather than the letter**

Another provision in the foreword to the listing rules states that the ASX "looks to companies to comply with the spirit as well as the letter of the Listing Rules". If this was merely a motherhood statement it would not cause any difficulties, being purely a statement of policy. However, the ASX does exercise its powers in circumstances where the letter of the rules has not been breached.

For example, in February 1988, the ASX instituted proceedings against Elders IXL seeking a declaration that certain transactions forming part of the BHP restructuring fell within Listing Rule 3i(3), and therefore required the prior approval of Elders shareholders. Throughout the dispute Elders maintained that the transactions alleged to be in breach of the rule were not "disposals" because they were allotments of shares. According to the letter of Rule 3i(3) at that time, this was a strong argument. However, it appears that the ASX invoked the spirit of the rules in order to ground the action. The case settled out of court.

The power of the ASX to take action if it thinks the rule has been breached in spirit creates uncertainty. The argument here would be that the contract is uncertain, because each of the listed companies who has entered into the listing agreement with the ASX would be unclear as to how the ASX will interpret the listing rules on any particular occasion. The drafting of the rules exacerbates the problem because it results in the rules being less amenable to legal interpretation. As stated by Galbraith and Smallwood:

"What the Elders/ASX dispute has done is draw attention to the fact that the listing requirements in their current form need to be

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46 (1982) 149 CLR 571.
47 Ibid at 589-590, citing *Thorby v Goldberg* (1964) 112 CLR 597 at 605; *Lofthus v Roberts* (1902) 18 TLR 532 at 534; *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353; and *Godeke v Kirwan* (1973) 129 CLR at 647.
48 Although a contrary argument was made by the ASX in the case of *Chapmans Ltd v ASX Ltd* (1994) 14 ACSR 726 at 731. It argued that pursuant to a listing contract entered into in 1950, Chapmans Ltd remained on the Official List at the "pleasure" of the ASX and as a matter of the private law of contract, the ASX was entitled to withdraw its "pleasure" without assigning a reason.
49 Note the obiter comments of Beaumont J in *Chapmans v ASX*, ibid at 734: "[i]t may be possible to argue . . . that . . . there are imposed upon the [ASX] duties of a public character which may be susceptible of judicial review under the court's supervisory jurisdiction in the form of a prerogative writ issued under s 39b of the Judicatur Act."
50 For example, in *Kwikasair Industries Ltd v Sydney Stock Exchange Ltd* (1968) CCH-ASLC 30,701.
52 Ibid at 203.
redrafted rather than for the ASX to be forced to rely on some concept of the spirit of the rules.” 53

Power to waive compliance

The foreword to the listing rules contains another provision granting to the ASX the power of waiver of compliance with listing rules by a listed company. The foreword states:

“The Exchange may at any time and from time to time in its absolute discretion waive compliance by a company with a Rule or any part of a Rule contained in these Listing Rules.”

Although the notion of waiver is very familiar to contract, it is a very inexact term. The term has been used to denote different kinds of relinquishment or attempted relinquishment of rights and the effect of a suggested waiver in particular cases often gives rise to difficulties. 54

The relationship between the ASX and listed companies presents particular challenges for the doctrine of waiver. For one thing, it is said that a party may only waive a condition in a contract which is entirely for its benefit. 55 In contract, the concept of benefit is generally assessed inter partes. The ASX is clearly not the direct beneficiary of compliance with the listing rules. The benefit accrues to a far wider range of persons. Again, the question would turn upon which listing rule the ASX purported to waive but the doctrine of waiver in contract contemplates a bilateral arrangement. Most of the listing rules contemplate the involvement of investors. It is questionable whether the ASX is entitled to waive a provision which was intended to protect shareholders, for example Rule 3(3).

There are also indications that the waiver power of the ASX may be regulated. Following the controversy surrounding the plan by News Corp Ltd to issue super-shares in 1993, the Attorney-General wrote to the ASX to develop formal guidelines for the exercise of the waiver power. 56

Privy

As discussed above in relation to the Zyan case, in general it is an entrenched principle of contract that a party who is not a party to a contract is prevented from enforcing a contract or having obligations imposed upon her or him pursuant to that contract. The rules of privity focus on contract as having a bilateral character, therefore, in the absence of any obligation imposed by a trust, the parties may, at their option, vary or rescind the contract without reference, or even notification, to the beneficiary of the promise. 57

The decision of Trident General Insurance Co has eroded that general principle to some extent by holding that, in the context of an insurance contract, a third party beneficiary can enforce a contract to which it was not a party. However, when applied in the context of the ASX, the operation of the contract presents a number of difficulties, primarily because of the “investor protection” facet of the ASX’s functions.

If we adopt the Trident model of privity, shareholders could argue that they are third party beneficiaries, but it is not altogether clear that they are. Certainly the benefit derived by investors is far more nebulous than a third party beneficiary under an insurance contract,

53 Ibid.
55 See, for example, Maynard v Goode (1926) 37 CLR 529; George v Roach (1942) 67 CLR 253; Panoutsos v Raymond Hadley Corporation of New York [1917] 2 KB 473 at 477.
and given the width of the operation of the listing rules, how far could the operation of beneficiary extend? A particularly important exercise in this context would be classifying the status of associates of listed companies, since, as discussed above, there are several examples in the listing rules where obligations are placed upon associates. It could not be argued that they are third party beneficiaries, yet upon the traditional rule of privity, they cannot either enforce the contract or be bound by it.

This demonstrates once again the inadequacy of the traditional contract model to explain the relationship.

Equitable estoppel

Perhaps the most interesting aspect of characterising the ASX-listed company relationship as contractual is that it may mean that its discretion to admit companies to the Official List, administer the listing rules and waive compliance with rules would be subject to actions by listed companies on the ground of equitable estoppel, or more particularly promissory estoppel. If that was so, the exercise by the ASX of each of these discretions would be subject to an equitable obligation, owed to listed companies and those seeking listing, not to behave unconscionably.

Unconscionable behaviour in this context occurs where:

(a) A induces B to adopt an assumption or expectation;
(b) B acts or abstains from acting in reliance on the assumption or expectation to the knowledge of A;
(c) B’s action or inaction will occasion detriment if the assumption is not fulfilled; and
(d) A has failed to act to avoid that detriment, whether by fulfilling the assumption or expectation or otherwise.

Promissory estoppel can operate to restrain an unconscionable abandonment of a representation that the strict terms of the contract will not be enforced. In this sense, it operates to suspend contractual rights for a particular period. Estoppel in this sense could operate to restrain or modify the ASX’s power of waiver, for example, where it attempts to resile from a representation to a listed company that it would not enforce a listing rule. However, estoppel can also constitute a cause of action in its own right, therefore, in the absence of a contract, this facet of estoppel would be available to companies seeking listing and perhaps to third parties who rely on representations made by the ASX as to the enforcement of the listing rules. There would have to be reasonable proximity between the ASX and the shareholder, so that it could be said that the ASX would have some knowledge of the reliance of the shareholder in order for the ASX to be acting unconscionably. But if that was so, there would be a close convergence between the remedies available in equity and those available to a “person aggrieved” under s 777. The remedy available to the party relying on the assumption is only that which will cure the detriment suffered, which is not necessarily fulfilling the assumption or expectation. However, the scope of the remedies available where unconscionable conduct has been proved is as wide as judicial imagination can extend, for example, the creation of proprietary rights for a particular period. Estoppel in this sense could operate to suspend contractual rights for a particular period.
interests, \(^{65}\) fulfilment of the assumption \(^{66}\) or creation of a constructive trust. \(^{67}\)

For example, promissory estoppel may have been pleaded in \textit{Brolga Minerals NL v The Stock Exchange of Perth Ltd and Ors.} \(^{68}\) The detriment suffered in that case by the company was the nullifying of an allotment of shares because the stock exchange did not grant listing within the time required under the \textit{Uniform Companies Act}. While the application was under consideration, certain intimations were made to the directors of the company that there would be a favourable reaction to the application. Promissory estoppel may have been available to compel the stock exchange to consider the application in a proper manner and to exercise properly its discretion to grant listing.

\section*{Conclusion}

It is submitted that the discussion above demonstrates that use of the traditional model of contract is inadequate to explain the listing relationship. Describing the relationship as based on contract is merely a term of convenience, because the relationship has characteristics which defy the formal definition of contract. Therefore, in order to use that traditional model to make a finding that the relationship is contractual, it is necessary for the model to be distorted in some way. Using the analysis above, the cases in the narrow school remained loyal to contractual doctrine and therefore rejected the finding of a contract, whereas the cases in the wide school created distortions to explain the relationship within that framework. These distortions include the adoption of the absolute discretion in \textit{Kwikasair} and the evasion of privity and separate legal personality in \textit{Zytan}.

\section*{Cases where the court relies on section 777}

\subsection*{Introduction and overview of section 777}

The previous analysis examined contract alone as the legal basis of the listing relationship. Now it is necessary to determine whether s 777 of the Corporations Law resolves the dilemmas created by the contractual model.

At first it appears that s 777 may resolve any uncertainty because it clearly substitutes a statutory obligation for the purported contractual obligation. But the statutory obligation is still predicated upon the private law obligation discussed above. Moreover, that private law obligation is independent of the statute, so s 777 does not adopt a model like s 180 which would create a statutory contract between the ASX and listed companies. Therefore, where it is necessary for the court to have recourse to s 777 in resolving a dispute involving a listed company, the threshold to the court's jurisdiction is derived from the prerequisite obligation in s 777(1). \(^{69}\) The power to grant a remedy for failure to comply with the listing rules is thereafter derived from the deemed obligation in s 777(2). Notably, if the decision in \textit{Designbuild} is followed, a listed company's obligation to comply with the listing rules would arise almost exclusively from s 777(2).

The deemed obligation to comply with the rules piggybacks on the prerequisite obligation, that is, the inclusion of the body corporate on the Official List. That inclusion can arise out of the body corporate's

\(^{65}\) \textit{Crabb v Arun District Council} [1976] Ch 179.


\(^{67}\) \textit{Riches v Hogben} [1986] 1 Qd R 315.

\(^{68}\) (1973) CCH-ASLC 85,164.

\(^{69}\) For a discussion of the interaction between s 777 and s 1114, see later discussion.
agreement, consent or acquiescence to the listing. These circumstances are potentially wider than a contractual obligation placed on the listed company by virtue of the listing contract. Although characterisation of the relationship as a contract would contemplate the listed company agreeing or consenting to placement on the official list, the notion of the company’s obligations being derived from acquiescing to be on the list is an obligation which is more likely to be derived from estoppel.  

It may not be necessary for the court in granting a remedy under s 777 to categorise the prerequisite obligation as being based on contract or estoppel or some other legal obligation not derived from either of these sources. However, the courts have tended to synthesise this obligation into a species of contract. The result is a fairly haphazard obligation which is unclear in its ambit. In fact it is not even clear whether s 777 confers substantive rights. The judicial analysis also does not clearly differentiate between the prerequisite obligation which is the threshold to the court’s jurisdiction in s 777 and the basis upon which the court will order compliance with or enforcement of the listing rules.

There has been no attempt to systematically define the ambit of the obligation comprehended by s 777. Rather exploration of its ambit has developed in a piecemeal fashion. Judicial interpretation of the section again reveals narrow and expansive approaches to the operation of the section. The narrow school commences with the premise that the remedy provided by s 777 builds upon the pre-existing legal relationship; here called the prerequisite obligation. This approach gives primacy to the prerequisite obligation and determines the ambit of the obligation deemed by s 777(2) by first determining the appropriate ambit of the prerequisite obligation. Thus on this approach the remedy provided by s 777 is subordinate to the prerequisite obligation.

By comparison, the wide school gives primacy to the deemed obligation and if necessary recasts the prerequisite obligation so as to give effect to the deemed obligation. However, the wide approach is ultimately dependent upon the contractual core of the relationship. The approach is consistent with the preceding wide school because of the distortion of contractual doctrine which is utilised to give effect to this interpretation.

This development will now be plotted.

Judicial interpretation of section 777

The narrow school

As stated above, this approach gives primacy to the prerequisite obligation and determines the ambit of the obligation deemed by s 777(2) by first determining the appropriate ambit of the prerequisite obligation. Commentators have stated that this approach indicates that “the professions had a scant regard for the effectiveness of s 777’s predecessor”.  

There are several cases where the remedy which was sought under s 777 was said to be subject to the exercise by the ASX of its discretion to waive compliance with the particular listing rule involved. In Harman v Energy Research Group Australia Ltd Brinsden J of the Supreme Court of Western Australia found that the listing require-

72 (1985) 9 ACLR 897.
ments do not have statutory force, only statutory recognition. The obligation in s 42 was an obligation to comply with such of the listing requirements that the stock exchange in its discretion had required the company to comply with. There was nothing to prevent the stock exchange from waiving strict compliance with the listing requirements, which by inference they had done here. Shortly after the decision, commentators stated the following:

"[T]his insistence that the section has no legal impact and that there may be no legal obligation on a listed company to observe the listing rules will place the court in a difficult situation when it comes to enforcing compliance under the terms of s 42(2). Section 42(2) deems there to be an obligation only for the purposes of s 42(1). It follows that if there is no contractual obligation, and the Exchange can waive compliance in the appropriate case, the only orders the court can make are those authorised by the legislation." 73

Another example of this approach is the judgment of Brooking J in Zephyr Holdings Pty Ltd v Jack Chia (Aust) Ltd.74 There, a minority shareholder brought an action under s 42 of the Securities Industry Act alleging a breach of Rule 3E(8)(a), which prohibits an associate of a director of a company from participating directly or indirectly in the issue by a company of equity securities or other securities with rights of conversion to equity unless certain exceptions apply. His Honour considered that the issue of options by the defendant company amounted to a potential breach of the rule. He further commented that the rule was an “important rule . . . and [p]rima facie is to be enforced, so as to prevent a breach on a matter of substance”. However, before proceeding to make any order under s 42, his Honour took into account the likely attitude of the exchange as to any future requirements for waiver. He stated that:

“It is true that the Stock Exchange has power, in its absolute discretion, to waive compliance with the Rule, and if I thought it likely that the Exchange would, once the Rule has been construed by me, proceed to waive it for the purposes of the present proposed issue of options, then I might well in the exercise of my own discretion decline to make any order under s 42.” 75

Rule 3E(8) was also the subject of the dispute in Devereaux Holdings Pty Ltd v Pelsart Resources NL76 before Cohen J in the Supreme Court of New South Wales. There, a notice of extraordinary general meeting was sent to shareholders containing a proposed resolution which, if passed, would have the effect of transferring an interest in the company. Rule 3E(8) was potentially contravened in that the notice did not clearly specify that a special resolution would be required. A shareholder applied for an injunction pursuant to s 42 of the Securities Industry Act to prevent the meeting taking place. His Honour found that the relevant breach of the listing rules was a proper matter for the exercise of the ASX's discretion to waive compliance. He stated:

“If the Stock Exchange of Perth has an absolute discretion, as it is stated to have under these requirements, then I think that [the] issue is a proper matter for the discretion of that exchange. I would expect that it would exercise that discretion in a responsible way and indeed, not only do I expect that, but there would be little doubt that would happen. [T]he matter as to the requirement of a
resolution, being a special resolution, or not, is the requirement of the Stock Exchange and one which it is entitled to waive if in its discretion it considers the facts warrant it.”

Cohen J therefore would not grant the injunction to prevent the meeting taking place since this was a matter for the exercise of the discretion of the exchange, however, an injunction would be granted to restrain the allotment of shares until the exchange had exercised its discretion.

The importance of these cases lies in the stark way in which they recognise the fragility of the structure created by s 777. They recognise that the remedies provided by s 777 are built upon a legal structure which gives complete power to the ASX to reformulate the operation of the listing rules. This interpretation means that the capacity of the listing rules to bind either party is dependent upon the power of the ASX to waive compliance. Woven through the judgments as well is the separate question of the possible futility of providing a curial remedy if the ASX in its discretion can waive the requirement of compliance that forms the basis of that remedy. The judgments in both this school and the wide school that follows tend to merge the question of compliance and the provision of a remedy.

The wide school

This approach gives primacy to the deemed obligation and if necessary recasts the prerequisite obligation so as to give effect to the deemed obligation. On this approach, the section will provide the greatest flexibility to the ASX in enforcing the listing rules.

The case of FAI Insurances Ltd v Pioneer Concrete Services Ltd and Ors represents the high point of judicial recognition of s 777. Although comments made by each of the members of the New South Wales Court of Appeal were obiter, the court was concerned to adopt a construction of the section which would give it some force.

In this case FAI Insurances Ltd (FAI) announced a takeover offer for Pioneer Concrete Services Ltd (Pioneer). Two days later, Pioneer issued 41 million shares to 19 persons other than FAI. FAI alleged that the issue had breached the stock exchange listing requirements and that s 42 of the Securities Industry Act allowed it to apply to the court for an order that this breach be remedied by removal from Pioneer’s share register of the names of the persons to whom Pioneer had issued the shares. Pioneer argued that it was a “person aggrieved”, therefore it was entitled to an order that the rules be complied with.

At first instance, Young J rejected the application for interlocutory relief, holding that s 42 only allowed orders directing a company to comply with the listing requirements. Once a listing rule had been breached, no order under s 42 could remedy it. Although the predecessor to s 1114 could remedy the breach, it could only be used on the application of the Commission or the exchange. He considered that the listing rules are a

“flexible set of guidelines for commercial people to be policed by commercial people...[which] are never intended to be inflexible rules but rather principles to be administered and applied by an expert body in accordance with the prevailing ethos of those chosen to administer them.”
In the Court of Appeal, leave to appeal on this ground was refused, but the court made some obiter comments on the scope of s 42. Both Street CJ and Kirby P considered that the orders available under the section would not necessarily be confined to those compelling compliance with the listing rules. 80

Street CJ stated that the legislature had by ss 777 and 1114 plainly indicated that the listing rules are to be of a "binding nature" and enforceable. The obligation to comply with them is expressly imposed by s 42(2). 81 He commented upon the drafting of the rules as follows:

“It is, of course, apparent that some of the rules by their very nature, are not capable of being enforced in terms. This may flow from the generality of their expression, the subject matter with which they purport to deal, or from some other consideration rendering it impracticable or undesirable for the Court to intervene." 82

Kirby P in a detailed judgment attempted to determine the meaning of s 42. His comments drew upon the difference between the drafting of s 42 and its predecessor in s 31. Section 42 was in language which was marginally more emphatic than s 31, because s 42(2) afforded a definition of the persons under the obligation. Therefore, under s 31,

“it was necessary to establish, outside the section, a contractual or statutory obligation to observe the listing requirements. But sec 42 . . . imposes its duties more clearly. By force of the section, it gives statutory recognition and significance to the listing requirements.” 83

In his Honour’s view, the consequence of the difference in drafting between s 31 and s 42 was that cases like Repco and Designbuild no longer applied. He considered that the approach taken by Young J had undervalued the “‘special statutory status’ now accorded to the rules. The rules are now more than the private rules of a public body". 84

Street CJ’s approach is perhaps the more straightforward in that he considered that the listing rules are “binding” and that the obligation to comply with them is expressly imposed by s 777. However, as stated above, s 777(2) is reliant upon a prerequisite obligation; therefore the “binding nature” of the rules cannot be derived from s 777(2) alone. This objection can also be made in relation to Kirby P’s rejection of the authorities decided under s 31. In order to get the benefit of the deemed obligation in s 777(2), it will be necessary to establish the prerequisite obligation by the agreement, consent or the acquiescence of the listed company. Therefore, much of the work of the plaintiff to prove obligations under s 777 remains, or, more importantly, matters which potentially vitiate that prerequisite obligation remain.

Part of the difficulty of interpreting the judgments in FAI v Pioneer is derived from the failure of the court to differentiate between the question of whether the listing rules are binding and the issue of the appropriate remedy. Street CJ gave perfunctory attention to the former question, stating that the “legislature had plainly indicated that [the Listing Rules] are to be binding and enforceable”. 85 However, he ultimately dealt with the dispute as a remedial matter. He stated:

“the question of whether or not the particular situation calls for a remedy is ultimately a matter of discretion.” 86

80 Note, however, that the relevant words in s 42 at that time were “compliance with, observance or enforcement or giving effect to those listing rules”.
81 FAI Insurances Ltd v Pioneer Concrete Services Ltd and Ors (1986) 4 ACLC 698 at 702.
82 Ibid.
83 Ibid at 707.
84 Ibid at 708.
85 Ibid at 702.
86 Ibid.
Kirby P adopted a similar reasoning. He first determined the existence of a power under s 42 to grant the relief sought, but then merged this substantive point into the question of the grant of a remedy. He stated:

“Although the considerations to which Young J referred can properly be taken into account in the exercise of the Court’s discretion to grant or deny relief under the section they are not, in my view, reasons for giving a narrow construction to the power which the legislature has conferred on the Court by the provisions of s 42.”

The “considerations to which Young J referred” is a reference to the view of Young J quoted above, that is, that the listing rules are not inflexible rules but a flexible set of guidelines to be administered in accordance with the absolute discretion reserved to the ASX. This interpretation undermined the “special statutory status” accorded to the rules under the predecessor sections to ss 777 and 114.

The point made by his Honour concerning the demarcation between power and remedy here is an important one, but it is submitted that it deflects one’s attention away from the essential problem of what is the nature of the power from which the discretion to grant the remedy is derived? Upon examination of the language used by Kirby P in what is both an adventurous and precise judgment, it is still unclear how s 777 works. For instance what is the meaning of “special statutory status” or “statutory recognition”? It is probable that his Honour’s choice of language is deliberately ambiguous and reflects the difficulties in interpreting the nature of the power conferred by s 777.

Another important case in this school is FAI Traders Insurance Company Ltd v ANZ McCaughan which addresses an important question of the extent to which the listing rules should be implied into contracts for the sale of shares formed on the stock exchange. In that case an agreement was reached in July 1989 between the plaintiff (FAI) and a company called Fulham Holdings Ltd (Fulham) pursuant to which FAI would sell 16 million shares which it owned in the Hooker Corporation to Fulham for a consideration of approximately $12 m. The defendant (ANZM) was acting as a broker for both the parties. Settlement was to take place on 29 December 1989. The shares of both FAI and Hooker were listed on the stock exchange and Fulham was a subsidiary of a listed company.

FAI held about 12 per cent of the shares in Fulham and because the consideration to be paid exceeded 5 per cent of the total issued capital and reserves of Fulham, Listing Rule 3i(3) applied. This required that a general meeting of shareholders of Fulham be called to consider the particular transaction, but prior to the meeting an independent report had to be obtained by the directors to be put to the shareholders which determined the fairness of the transaction.

Shortly after the agreement was entered into, Hooker’s fortunes slumped considerably and on 26 July it was placed into provisional liquidation. The independent report indicated that the purchase would not be fair to the shareholders of Fulham, but before the report could be put to the shareholders, the ASX ruled that the purchase should not be put to Fulham’s shareholders because the report did not establish that the purchase was fair. Fulham purported to cancel the contract note and ANZM issued notices which cancelled the transaction.

87 Ibid at 708.
sued ANZM as broker for the amount payable, arguing that ANZM was liable as principal.

The questions to be answered by Cole J in the Supreme Court of New South Wales were whether Listing Rule 3(i)(3) could be implied into the terms of the contract between FAI and Fulham and what was the basis upon which the ASX could be said to be intervening to prevent the transaction? ANZM put forward three terms which, in the alternative, it argued should be implied into the agreement between FAI and Fulham.

(1) The contract for sale was subject to compliance by Fulham with those provisions of the listing rules applicable to the transaction, that is, to Listing Rule 3(i)(3). Compliance with 3(i)(3) was not possible because the independent report contemplated by that section said that the transaction was not fair. The stock exchange had not waived compliance with the rule, therefore it remained a condition precedent to the sale. This was referred to by Cole J as the “primary submission”.

(2) That the contract terminated in the event of the stock exchange preventing the acquisition proceeding to completion.

(3) It was implicitly agreed that Fulham was obliged to perform and complete the transaction unless inhibited by law, including inhibition by the listing rules, those rules now having the force of law.

Cole J preferred to deal with the question principally by reference to the primary submission, stating that the true question was whether the contract between FAI and Fulham was subject to compliance with Listing Rule 3(i)(3). A matter which was relevant to the question was the assumptions made by the principals of the companies when the transaction was entered into. His Honour relied upon assumptions made by Mr Adler, the principal of FAI, that a listed public company would comply with listing requirements. In the view of his Honour this assumption “accords with expectations of commercial morality and practice. A court would expect that senior executives of public companies transacting business affecting shareholders in their companies would do so upon the basis that their actions would accord with the listing requirements, and thus not put in jeopardy a company’s listing, which could affect all shareholders’ capacity to trade in the listed shares”. 89

In determining whether the second term above should be implied into the contract, his Honour made some interesting observations about the second question referred to above, that is, what was the basis upon which the ASX could be said to be intervening to prevent the transaction? His Honour stated that knowledge or recognition by the parties to the contract that the ASX may interfere to prevent completion of a transaction assists the implication of a term rendering the transaction subject to compliance with the listing rules. But, he considered that different consequences flowed depending on whether the obligation to comply with the rules was statutory or contractual. His reasoning turns upon the requirement that the term implied must be “necessary”. 90 Although parties in commercial transactions normally approach their dealings on the basis that all statutory obligations

89 Ibid at 293.
must be complied with, a *contractual* obligation on the part of one party will not prevent the implication of a term which is in conflict with that obligation.  

It was therefore necessary for ANZM to seek additional support from s 777(2), arguing that this section made it clear that the listing rules had a statutory recognition, placing obligations under them above mere contractual obligations between the listed company and the ASX. This submission was primarily based on *FAI Insurances Ltd v Pioneer Concrete Services Ltd*. FAI opposed the implication of a term by use of s 777, arguing that Listing Rule 3(3) was not a rule of law.  

Cole J concluded that, in determining whether a term can be implied that the transaction was subject to compliance with the listing rules, regard may be had to s 777, which requires a listed company to comply with such rules. If he was wrong in this view he held that the true term to be implied was the transaction be effected upon the terms and conditions of the usual contract note issued by brokers. His Honour did not comment upon the second and third terms argued by ANZM.  

It is to be noted that his Honour implied the term on the basis of a statutory obligation, that is, that s 777 requires a listed company to comply with the listing rules. There are a number of important facets to the decision.

1. His Honour considered that if the obligation to comply with the Rules was purely contractual, this would not necessarily be sufficient to support the implication of a term. Thus, in the terminology of this article, the primary and prerequisite obligations would not be sufficient of themselves to support that implication, highlighting the fragility of these obligations.

2. The main consideration in implying the term is the intention of the parties, and Cole J held that the parties knowing that Fulham was a listed public company would expect that company to comply with the listing rules. In this context, it is unclear why cognisance by the parties of a statutory obligation would supply the necessity which is the requirement for the implication of a term. One can only speculate that this is because there may be a greater obligation to comply with a statute than perform a contract.

3. His Honour does not explain how s 777 turns compliance with the listing rules into a statutory obligation. At the highest point, the judgments in *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (upon which Cole J relied) referred to s 777 as according the listing rules a “special statutory status” or being given a “statutory significance”. Does this amount to a statutory obligation?

It is submitted that this cannot amount to a statutory obligation because of the structure of s 777 discussed above, in particular, the dependence of the deemed obligation in s 777 on the prerequisite obligation. This applies with greater force, if the contractual obligation constituting the prerequisite obligation is too fragile to support the implication of a term that a listed company comply with the listing rules.

In a note on this case shortly after it was decided, Baxt stated that:

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*91* His Honour also stated that where the obligation is known to each of the parties, it may impact upon the question of whether the proposed term is “so obvious that it goes without saying”. It is not clear here whether his Honour is substituting the latter test for the “necessary” test. It is submitted that such an approach would be incorrect, since the High Court in *Codefay*, ibid and *BP Refinery Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26, used this test as only one of five criteria to apply in implying a term.


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the important issues thrown up by the operation of ... s 777 of the Corporations Law ... need clarification either by judicial statement or by statutory change.”  

FAI Traders v ANZ McCaughan was the last reported decision on s 777 at the time of writing, so there have been no judicial statements to provide that clarification.

**Conclusion**

In discussing the recommendations of the Lavarch Committee, Baxt wrote:

“The Committee recognised the frustration that had continued to be suffered by the ASX (and indeed the ASC) by the very restrictive interpretation of what is now s 777 of the Corporations Law.”

The discussion above has attempted to dissect the causative factors and consequences of this “very restrictive interpretation” and to show the confusion that has emanated from the legal construct that has been created for the listing relationship.

The judicial interpretation of the listing contract has evolved from both a private law obligation based on contract and some form of statutory remedy which is provided in s 777 of the Corporations Law. The contract which is said to form the basis of the relationship is not viable in terms of traditional contractual doctrine. The response of the legislature has been to attempt to maintain the integrity of the private obligation whilst effecting piecemeal changes to improve the legal efficacy of this obligation. Whilst some remedial possibilities are presented by s 777, they are too integrated to the substantive obligation in contract to operate independently.

As a consequence, the final obligation has many indeterminate features and the judiciary is able to provide a wide ambit of interpretations of the obligation. The approaches of the narrow and wide schools above demonstrate this wide ambit. The outcome of each case will differ significantly according to which approach is adopted. Although the schools have been categorised according to the primacy given to contractual doctrine, that is, the breadth of the definition of the primary obligation, the same outcome would result from a categorisation based on the ASX’s extra-curial powers, since the discretion vested and exercised by the ASX is an important part of the narrow school’s refusal to enforce the listing rules.

**Legislative reform**

**The history of the Corporate Law Reform Act 1994**

In June 1991 the federal Attorney-General, Michael Duffy, announced that the government was examining the need for a legislatively-based regime for continuous disclosure by listed companies. It was suggested that the “ravages of the 1980s” were due primarily to the failure of the existing legislation to provide adequate protection in the form of sufficient disclosure to shareholders. Pursuant to this examination, the Companies and Securities Advisory
Committee was asked to examine the need for such a regime and the appropriate form that such a regime should take.

The Advisory Committee delivered its report in September 1991. It recommended that directors of a disclosing entity, upon becoming aware of a “material matter”, should within 24 hours lodge a completed pro-forma statement with the ASC or issue, and lodge with the ASC, a press release outlining the material matter.

During October 1991, Duffy asked the business community and other interested parties to comment on the efficacy of this proposal. However, shortly after the announcement, the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Lavarch Committee) released a report which did not accept the Committee’s recommendations for a legislatively-based regime of continuous disclosure. In the view of the Lavarch Committee, the regime should be limited to listed companies and should be imposed through the listing rules rather than by amendments to the Corporations Law.

The choices open to the government at this stage involved either a statutory scheme administered by the ASC recommended by the Advisory Committee or a continuation of the private scheme of disclosure to the ASX which had been recommended by the Lavarch Committee.

On 26 November 1992 Duffy introduced the Corporate Law Reform Bill (No 2) 1992 into the Senate. The Bill contained proposals for enhanced continuous disclosure which were modelled significantly on those put forward by the Advisory Committee, although the Bill narrowed the range of entities subject to the scheme and made the ongoing disclosure requirements less onerous. The choice of the scheme recommended by the Advisory Committee was based, at least in part, upon the government’s desire that the scheme would have “statutory force”. In his Second Reading Speech, Duffy made the following comments, which are worth quoting in full:

“the Government is committed to a legislative scheme for enhanced disclosure. It does not believe that this is a matter which can satisfactorily be left to the discretion of the entities themselves or the Stock Exchange in respect of listed entities. With the enhanced role envisaged for the [ASC], legislative requirements will have greater force and effect than stock exchange rules. And it is appropriate that obligations with civil and criminal consequences of the kind involved here be contained in legislation — rather than in stock exchange rules which are, in essence, a private contract between the exchange and listed entities.”

In December 1992, the ASC and the ASX signed the first of several memoranda of understanding (MOU) regarding disciplinary or legal proceedings on market matters. The document provided that the ASC would furnish the ASX with relevant information on these matters. The ASX Chairperson, Mr Cox, was interviewed at the time of the signing of the MOU and when asked about the continuous disclosure regime proposed in the 1992 Bill, he stated that “the market has to be informed first . . . [If companies] want to stay listed they are going to have to comply with the stock exchange Listing Rules”.

The event which was of greater significance to most Australian early in 1993 was the impending federal election in March. This impacted
upon the continuous disclosure debate as well. In February 1993, the shadow Attorney-General, Peter Costello, launched the Opposition’s policy on the issue. The plan involved the grant of powers to the ASX to punish those that withheld price-sensitive information. In fact, Costello considered that the ASX itself should have the power to directly prosecute both companies and directors for breaches of Listing Rule 3A(1). The ASX, however, preferred to hand over the prosecution of directors to the ASC.

Although the Opposition lost the election, the proposal put forward by Costello that the ASX have responsibility for continuous disclosure received wide support in the business community. 102

Ironically, this move coincided with the appointment of Michael Lavarch (Chairperson of the Lavarch Committee) to the position of Attorney-General. The ASX and other business groups such as the Business Council of Australia and the Australian Institute of Company Directors began lobbying the new Attorney-General to “retain the ASX as the chief regulator of listed companies rather than adopt the proposed continuous disclosure legislation”. 103

But importantly:

“the group is shying away from the coalition’s election policy of allowing the ASX to police the rules in the courts, and to administer penalties, saying it would not be appropriate for a private organisation.” 104

Thereafter the process began in earnest of ousting the ASC as the recipient of disclosed information. However, the obstacle of the ASX’s position as a private body remained. This was dealt with by a “compromise proposal”. This proposal would involve the ASX having the responsibility for the maintenance of an informed market, effectively ousting the proposals put by Duffy, but the ASC would have the task of ensuring compliance. Therefore, concerns held by the ASX would be referred to the ASC for investigation and action. 105

In a subsequent interview, Lavarch stated that he aimed to make the ASX listing rules the main method of enforcing the new continuous disclosure regime. Such an approach would give the listing rules statutory force, so that failure to disclose the relevant information would represent a breach of the law.

Initially, the ASX was reluctant to fulfil its new obligation 106 to refer serious breaches of the Corporations Law or the listing rules to the ASC. A senior official of the ASX, Mr Schoer, stated in March 1994 that the power to refer matters should not be left with the ASX. He said that the issue left the ASX in “an uncomfortable position. Can a private body have a view on matters of law?” 107 This comment provoked an immediate response from the Chair of the ASC, who warned that the ASX was required to pass on information in the light of its new enhanced powers as watchdog. A further Memorandum of Understanding was entered into by the ASC and the ASX in September 1994, which set out how the ASX would meet its new regulatory obligations. In a media release issued by the ASC shortly after the agreement, it was stated that “the MOUs play an important part in defining the ASC/ASX relationship”. 108

Lavarch’s “compromise solution” may represent a political triumph, but the legal consequences of the solution are problematic. The major

104 Ibid.
105 Gill, op cit n 102.
106 Pursuant to s 776(2A) of the Corporations Law, created by the Corporate Law Reform Act 1994; discussed hereafter at 271.
The content of the Corporate Law Reform Act

The Corporate Law Reform Act 1994 introduced an irregular disclosure regime which requires material developments in operations to be reported on an ongoing and timely basis. It amended the Corporations Law to introduce the concept of a disclosing entity, which is required to give continuous disclosure of material information concerning its position. It also initiated measures designed to facilitate both the improved enforcement by the ASX of the listing rules and cooperation between the ASX and the ASC.108

The Act’s regime for continuous disclosure for listed companies relies entirely upon the listing rules, in particular Listing Rule 3A(1). This listing rule was redrafted to facilitate operation of the new regime and was released in its new form in September 1994. It requires immediate notification of any information which a reasonable person would expect to have a material effect on the price or value of the securities of the company. The rule creates exceptions to the general disclosure requirement where a reasonable person would not expect the information to be disclosed, or the information is confidential or is of the type set out in subparagraph (iii) of the Rule.110

Section 1001A of the Act is pivotal to the discussion in this article; therefore, it will be fully quoted as follows:

“(1) This section applies to a listed disclosing entity if provisions of the Listing Rules of a securities exchange:

(a) apply to the entity; and

(b) require the entity to notify the securities exchange of information about specified events or matters as they arise for the purpose of the securities exchange making that information available to a stock market conducted by the securities exchange.

(2) The disclosing entity must not contravene those provisions by intentionally, recklessly or negligently failing to notify the securities exchange of information:

(a) that is not generally available; and

(b) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities [ie enhanced disclosure securities, as defined under section 111AD] of the entity.

(3) A contravention of subsection (2) is only an offence if the failure concerned is intentional or reckless.”
Therefore, under subss (2) and (3) of s 1001A a listed disclosing entity will be guilty of a criminal offence if it contravenes the ASX’s continuous disclosure requirements by intentionally or recklessly failing to notify the exchange of price-sensitive information. If it negligently fails to provide the information, it will be civilly liable.

The primary obligation to disclose under these provisions is placed upon the body corporate; however, by virtue of s 5 of the Crimes Act 1914 (Cth), the officers of disclosing entities or other persons who are involved in the contravention will also be criminally liable if they aid or abet or are in any way knowingly concerned in the commission of the offence contained within s 1001A. 111

Although listed entities must disclose information to the ASX, enforcement action will be undertaken by the ASC. As discussed above, the Act imposed two new obligations upon the ASX to ensure the necessary information flow between the ASX and the ASC.

First, where the ASX believes a person has committed, is committing or is about to commit a serious contravention of the listing rules or the Corporations Law, the ASX is required, as soon as practicable, to lodge with the ASC a statement setting out the particulars of the contravention and its reasons. 112 This obligation is set forth in s 776(2A) and complements the memoranda of understanding entered into between the ASX and the ASC with respect to market surveillance, monitoring of compliance by listed companies with the disclosure requirements, and related matters.

Further, under s 776(2B), where the ASX releases certain information about a listed disclosing entity, it will be required, as soon as practicable, to give the ASC a document which contains the information. 113

The obligations cast upon the ASX under the amendments to s 776 obviously assist the ASC in pursuing enforcement action. However, the Act also contemplates that the ASX should enforce the listing rules. Consequently, it states that the ASX should not have to give an undertaking as to damages when seeking a court order under s 777 or s 1114(1) of the Corporations Law for a breach of its rules. 114 Moreover, qualified privilege will be conferred upon the ASX when it publishes information provided to it. The operation of the privilege extends to information provided under any disclosure regime, whether legislative or pursuant to the listing rules or even if the information is published pursuant to the general function of the ASX in supervising listed entities. 115

The Act also effected various amendments to s 1114 to enhance the power of the court to make orders where there has been an alleged breach of the listing rules. Section 1114 now enables the ASC, the ASX and aggrieved persons to make applications in various circumstances where a breach of the rules is alleged. The power of ASX to make such an application is still limited to completed contraventions, but the range of orders which the court may make has been expanded. Most importantly, under s 1114(1)(ca)(ii) the court can make orders requiring disclosure of information where there has been a failure to do so under the listing rules.


112 Ibid.

113 Ibid.

114 Section 1114(3).

115 Section 779(5)-(10).
How significant are the reforms made by the Act?

The primary purpose of the Corporate Law Reform Act is to introduce a system of continuous disclosure. Its purpose is not to effect a radical overhaul of the legal problems which beset the listing relationship. Thus the reforms which have been effected are directed towards superficial aspects of the operation of s 777. They can be summarised as follows.

1. The ASX now need not give an undertaking as to damages when seeking an order under s 777.  

2. The ASX can plead qualified privilege if the information it publishes results in proceedings for defamation being instituted.

3. It overcomes the effect of the decision in Robox Nominees v Bell Resources by deeming shareholders to be "persons aggrieved" without the need to show actual prejudice.

4. It overcomes the decision in Hillhouse and Ors v Gold Copper Exploration NL and Ors by requiring directors to procure compliance by a body corporate with the listing rules under ss 777 and 1114.

These reforms will deal with the minor issues to which they are addressed. However, superficial finetuning of s 777 will not resolve the underlying indeterminacy of the obligation upon which s 777 piggybacks. Arguably, the Act has exacerbated the situation by creating a criminal offence to support the regime of continuous disclosure without sufficiently considering the type of obligations created by the listing rules and the listing relationship.

One argument in response to the above is that it is now not necessary to inquire into the type of obligations created by the listing rules because the court may circumvent this process by simply making an order under s 1114(1)(ca)(ii) to disclose information. Unfortunately, this is not the answer because the court's jurisdiction is still predicated upon a contravention. In order to prove a contravention it is necessary to establish that a legal obligation exists which has been contravened. Establishing the nature of the legal obligation necessitates entering into the above inquiry about the legal nature of the listing relationship.

Greater difficulties arise in relation to the criminal offence created by s 1001A. To reiterate, that section creates a criminal offence where a listed disclosing entity contravenes the ASX continuous disclosure requirements by intentionally or recklessly failing to notify the ASX of price sensitive information. The actus reus of the criminal offence, that is, the content of the obligation to disclose is contained within the listing rules, in particular Listing Rule 3A(1).

Since Listing Rule 3A(1) will be the principal basis of the continuous disclosure and the content of the actus reus of the criminal offence, it "must be able to withstand the most rigorous court examination ... [t]here is no doubt that this is its destiny". White argues that the new Listing Rule 3A(1) is still insufficiently clear and unambiguous, which may partly be the result of the philosophy of ASX in drafting its rules. He states:

"The ASX seems to expect a 'helpful' interpretation of its rules beyond the purposive construction required by s 109H of the

The Legal Relationship Between the Australian Stock Exchange and Listed Companies

116 Section 1114(3) of the Corporations Law places the ASX in the same position as the ASC in not having to give undertakings as to damages when seeking to enforce the listing rules. The reason for extending the immunity is because of the "co-regulatory role which the ASX has with the ASC in the enforcement of the Listing Rules". Explanatory memorandum, Corporate Law Reform Bill 1993, p 65.

117 Section 777(4).

118 (1986) 4 ACLC 164.

119 It was held in Robox Nominees v Bell Resources, ibid, that a "person aggrieved" must have suffered some actual prejudice as a result of the company's actions. The court in that case considered that the application by nominal shareholder in Bell Resources was a tactical measure in relation to that company's attempted takeover of BHP.

Section 777(4) is designed to overcome this decision. It provides that, if a body corporate fails to comply with or enforce provisions of the listing rules, a person who holds securities of the body corporate that are quoted on the stock market of the exchange is taken to be aggrieved by the failure. A further subsection, s 777(5), states that s 777(4) does not limit the circumstances in which a person may be aggrieved.

120 (1989) 7 ACLC 332. In that case it was held that that where the relevant listing rule applies to the company itself, directors will not come under a personal statutory obligation to comply with the rule.

121 For a discussion of whether proof of a contravention under s 1114 requires proof of an obligation see A Le, "Court Ordered Enforcement of the ASX Listing Rules After the CLRA 1994 — A New Beginning, or the Same Old Same Old?", a paper submitted for the Research Unit, Faculty of Law, The Australian National University, October 1994, p 25ff.

Corporations Law. The new LR 3A(1) may have been drafted with this in mind. It is suggested that such an approach is in error bearing in mind that the rules concerned now have the effect of law and that civil and criminal penalties now apply.\textsuperscript{123}

Apart from the difficulties of drafting, there are doctrinal problems inherent in this arrangement. The content of the criminal obligation is derived from the legal construct which has been explored above, that is, a contract between the ASX and each listed company of which the listing rules form the terms. Therefore the offence under s 1001A is a criminal offence which arises when a listed entity breaches the listing contract with a particular mental element, that is, where it breaches the contract recklessly or intentionally. The ASX as a party to the contract can seek the assistance of an investigative and prosecutorial agency in the form of the ASC to seek recourse for breach of the contract, presumably even to seek specific enforcement of the obligation to disclose by threat of prosecution.

This arrangement of piggybacking a criminal offence on to a contractual obligation is at least highly unusual, if not unique. However, the arrangement becomes curioser and curioser if the above analysis of the listing contract is taken into consideration. For example, s 1001A(1) states that the operation of that section is predicated upon the application of the listing rules to the entity and that the listing rules require the entity to notify the securities exchange of information. It is not clear what the source of that requirement would be. In the view of the writer, establishing the requirement by the listing rules necessitates an inquiry as to the legal basis of that requirement. This leads back to the earlier discussion. Is it a requirement based on contract, on s 777 or on both? On the above argument, such a requirement cannot be legally sustained.

Conclusion

In this article it has been argued that the legal framework which has been constructed around the listing relationship is illusory, since it is based on a contract which is not amenable to traditional contractual doctrine. This contract forms the core of the legal relationship and various statutory interventions form layers upon it. Each layer, such as s 777 and the Corporate Law Reform Act 1994, is dependent upon the preceding layer. But once the layers are peeled away, the core reveals a nullity.

However, the unwillingness of the parties, particularly the ASX, to depart from the private law framework means that the process of legal reform has been confined to minor adjustment rather than significant reappraisal of the legal construct. It is suggested that an entirely new construct is warranted, one that recognises the increasing role that the ASX plays as regulator, but also takes heed of the entrenched nature of the commercial relationships which exist within the stock market.

One crucial aspect of that market is the non-legal sanctions which are available to the ASX. The ASX has a number of informal mechanisms to deal with aberrant companies such as inquiries of companies and the issue of press releases. Its ultimate sanction is to suspend trading in a company's shares or to delist the company. Thus, the effectiveness of the ASX is predicated on it having a wide ambit of

\textsuperscript{123} Ibid.
formal and informal powers, only some of which will be encapsulated in the appropriate legal construct.

Although the ASX claimed in its 1991 Discussion Paper that it wished to regulate “only in those areas in which there is inadequate regulation in order to maintain the integrity of the market”, the history leading up to the passage of the Corporate Law Reform Act 1994 reveals the increasing profile of the ASX as a regulatory body. This increasing willingness, though, is qualified by its desire to maintain its private status.

Unfortunately, this article cannot provide answers to resolve the legal conundrum created by the relationship between the ASX and listed companies. Although the introduction of the continuous disclosure regime instituted significant amendments to the Corporations Law and listing rules, the development of a new construct is required and this cannot be effected by minor amendment. It is a complex matter involving a multi-disciplinary approach. Such a multi-disciplinary approach would also require an analysis of the institutional operation of the ASX, since it could be argued that one source of the legal problems is the continued characterisation of the ASX as a private body whilst it exercises functions which are more and more akin to public functions.

Whilst awaiting the amendments to Listing Rule 3A(1), Bob Austin described the continuous disclosure regime as follows:

“Until we know what the ASX will do, the new law is just a coathanger for new clothes which are still with the tailor.”

In the view of the writer, there is no point in asking the tailor to do more stitching. We need to start thinking in terms of an entirely new garment.
