

NON-STATUTORY REVIEW OF PRIVATE DECISIONS BY PUBLIC BODIES

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The decision in *Griffith University v Tang*¹ is primarily a question of statutory interpretation: what does it mean for a decision to be 'made under an enactment' for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the 'ADJR Act') and its State and Territory equivalents. The majority² held that requirement involved two elements: 'first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment.'³ Legal rights and obligations can be derived from general law or statute, or arise from decisions authorised by the enactment in question. On the basis of this interpretation, the majority held that the exclusion of a student, Ms Tang, from the PhD Program by Griffith University, a statutory authority, was not 'made under' any relevant enactment and hence not reviewable under the Queensland equivalent of the ADJR Act. The decision was based on 'a consensual relationship, the continuation of which was dependent upon the presence of mutuality.'⁴ As this was the only basis for review relied on by the student in seeking judicial review the application was summarily dismissed.⁵

The impact of the decision on the operation of statutory schemes such as the ADJR Act, however, reveals an underlying concern over the scope of judicial review. In *Enfield City v Development Assessment Commission*,⁶ Gaudron J suggests there are three factors informing comprehensive statutory schemes such as the ADJR Act⁷: the potential for executive and administrative decisions to affect adversely individual rights, interests and legitimate expectations; accountability and the need to ensure executive government and administrative bodies observe relevant limitations on the exercise of their powers; and the inadequacy of the prerogative writs as general remedies to compel that observance.⁸ The scope of the ADJR Act and other statutory schemes therefore reflects the operation of other mechanisms in setting and enforcing limits placed on the exercise of power by public bodies.

This paper considers the extent to which classifying a decision as public, and hence subject to judicial review, depends upon both the nature of the decision-maker (whether they are a public or private body) and the nature of the function under examination (whether they are performing a public or private function). It begins with the role of the threshold requirement for review under the ADJR Act that there be a decision of an administrative character made under an enactment and its application to the distinctions between public and private decisions. It then looks at the availability of the prerogative writs and equitable remedies and

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whether the distinction between public and private decisions is also reflected in other avenues for judicial review. The impact of UK decisions on decisions with a public function and the impact of consensual relationships is then examined before considering the role natural justice plays in these contexts. The paper concludes that the decision to exclude review under statutory schemes such as the ADJR Act in circumstances judged to be a consensual relationship is made in the context of considerable uncertainty over the applicability of other forms of judicial review. The operation and assessment of the approach taken in *Tang* is similarly uncertain.

Role of threshold requirements

One of the concerns arising out of *Tang* is that it is intended to return us to a consideration of whether the decision affects rights or obligations in a legally enforceable sense and not merely interests or perhaps legitimate expectations. It could be argued that the majority included decisions which are a condition precedent to the valid exercise of authority conferred by an enactment regardless of the characterisation of the decision as affecting rights, interests, or expectations per se.⁹ However, the reference to rights and obligations clearly indicates that it is not sufficient for a decision to merely be authorised by an enactment. Having a statutory source is not sufficient in itself to give rise to the availability of the statutory schemes for review.

Restricting the ADJR Act to 'decisions of an administrative character made under an enactment' has perhaps proven more complex than the drafters may have anticipated.¹⁰ As Mason J emphasised in *Australian Broadcasting Tribunal v Bond*,¹¹ the threshold requirements go beyond the separation of powers implications in 'administrative decisions' or the limits of federal jurisdiction in restricting the ambit to Commonwealth and not State Acts. There is also what may be termed an 'efficiency' aspect, balancing the need to provide access to redress for persons aggrieved or affected by decisions against undue impairment to the administrative process.¹² In *Salerno v National Crime Authority*¹³ the court described the need to limit access to ADJR Act review in this way:

If a general authorisation in a statute for a decision by an organisation set up under that legislation is sufficient to make it a decision under the statute, and thus open to judicial review, every intra vires action of that organisation that has decisional effect and every kind of conduct engaged in for the purpose of making a decision will be examinable by the Court. The potential for massive disruption of the organisation's activities that would be the consequence of such a conclusion is manifest.¹⁴

As applied in cases like *Bond* and *Salerno*, this rationale operates as a temporal limit on access to ADJR Act review, depending when in the decision-making process, review was appropriate. However, as applied in *Tang* the threshold requirements may also have a fundamental role in distinguishing public from private decisions. The threshold requirements do not admit review of all decisions that may be classified as public, particularly decisions under prerogative powers,¹⁵ but the restriction of the ADJR Act to decisions outside of a consensual relationship provides one form of delineation between decisions whose affects should be redressed through private law remedies, including contract, property, tort, and those for whom the public law remedies of judicial review may be appropriate. In this context the threshold requirements serve not to prevent undue review of intra vires decisions but to determine the appropriate basis on which limitations on the decision can be assessed and enforced. The question therefore arises whether this restriction is also inherent in the availability of judicial review under non-statutory review.

Alternative avenues of jurisdiction

Under Part 5 of the *Judicial Review Act 1991* (Qld) (the 'JR Act') the Supreme Court of Queensland retains the jurisdiction to provide remedies in the nature of the prerogative writs of certiorari, prohibition and mandamus and equitable remedies of declaration and injunction. The rights conferred by the JR Act, under which Ms Tang brought her application for review and which in relevant respects are respectively similar to those provided at the Commonwealth level by the ADJR Act,¹⁶ are in addition to any other right to seek judicial review. The ADJR Act similarly does not displace the right to seek judicial review through any other means.¹⁷ This suggests that statutory schemes such as these may be intended to provide recourse to judicial review through different, albeit overlapping, means to that provided by non-statutory review.

The jurisdictional requirements of other forms of judicial review go beyond reference to a statutory source of power to make the decision. Section 4 of the JR Act expands review under the Queensland statutory scheme to include executive decisions involving the expenditure of public funds¹⁸ which would seem to incorporate many prerogative decisions. The limit on the ADJR Act's applicability to prerogative decisions reflects the uncertainty over the availability of the prerogative writs to exercises of prerogative power at the time of its introduction.¹⁹ The reference to 'matters arising under' a Commonwealth enactment in s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) is more closely aligned to the ADJR Act's reference to the source of the power to make the decision, but the full extent of any distinction is perhaps uncertain.²⁰

Access to judicial review at the Federal level is also available under s 75(v) of the Constitution and s 39B(1) of the *Judiciary Act* when the remedies of the writs of prohibition or mandamus or an equitable injunction are available against an 'officer of the Commonwealth'. This institutional focus does not include statutory or government owned or controlled corporations,²¹ although they may still be classified as 'the Commonwealth' for the purposes of s 75(iii) of the Constitution. Such bodies allow for jurisdiction on the basis of private law as well as public law remedies provided the Corporation representing the Commonwealth is appropriately a party to the relevant matter. The nature of the action being brought, and the remedy sought, is therefore the basis of any distinction based on the public or private character of the decision.

Availability of alternative remedies

Developments in the availability of certiorari have largely involved the ability to review exercises of prerogative or executive power.²² Recent acceptance of the proposition that certiorari could issue against a tribunal lawfully established under prerogative power has generally been traced²³ to *R v Criminal Injuries Compensation Board; Ex parte Lain*²⁴, where Lord Parker CJ stated:

We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.²⁵

The need for a body to have a duty to act judicially was deleted in *O'Reilly v Mackman*.²⁶ Lord Diplock put the test for amenability to certiorari to quash a decision as whether the decision-maker was a 'statutory tribunal or other body of persons having legal authority to determine questions affecting the common law or statutory rights or obligations of other persons as individuals'²⁷

The requirement of a determination of 'rights or obligations' was applied by the High Court in *Ainsworth v Criminal Justice Commission*.²⁸ There the Queensland Criminal Justice Commission monitored, investigated and reported on the administration of the criminal justice system in Queensland. Its reports were published in Parliament. The Ainsworth group of companies was heavily criticised in a report considering the introduction of poker machines, with the Commission recommending that they not be allowed to participate in the introduction. However, the recommendation had no legal effect. Ainsworth was not prevented from obtaining a gaming licence by the recommendation, nor was it subject to prosecution because of the recommendation. Certiorari was not available for a breach of natural justice in making the recommendation because it did not have 'a discernible or apparent legal effect upon rights.'²⁹

The principles in *Ainsworth* were developed in *Hot Holdings v Creasy*,³⁰ a decision that held that certiorari could issue to quash a recommendation from the Mining Warden about the priority of applications for a mining licence issued by the Minister. It was held that a 'preliminary decision or recommendation, if it is one to which regard must be paid by the final decision-maker, will have the requisite legal effect upon rights to attract certiorari.'³¹ The judgement seemed to approve of the decision in *Lain* and its scheme to provide a benefit,³² suggesting that certiorari is concerned with the legal effect of the decision in question rather than the categorisation of the ultimate decision as going to rights, interests or expectations.³³ The decision in *Hot Holdings* is therefore relevantly analogous to the situation described in *Australian Broadcasting Tribunal v Bond*³⁴ which was referred to by the majority in *Tang* as an example of a decision going to statutory rights and duties.³⁵

Even in the absence of a decision which had any legal effect, the court in *Ainsworth* was prepared to order a declaration. Issuing a declaration does not depend on an effect on legal rights. There must only be a justiciable controversy. A declaration is available to answer real, rather than abstract or hypothetical, questions where it will produce foreseeable consequences for the parties.³⁶ In *Ainsworth* this consequence was merely the ameliorating effect on the reputation of Ainsworth of a declaration that there had been a breach of natural justice in making the report. There was no obligation to reconsider the report or issue a corrected version.

Where the decision in question acts as a precondition to a subsequent action then a declaration of the invalidity of the decision can be coupled with an injunction preventing the subsequent action from being taken.³⁷ Even though it is based in equity rather than statute³⁸ an injunction is not restricted to any classification of the legal effect on rights or interests. Even though regard must still be had to the 'existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights'³⁹ this may not be determinative.

As Gaudron, Gummow and Kirby JJ stated in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited*,⁴⁰ '[i]t would be an error to proceed on any basis which assumed, as a governing principle, that in its auxiliary jurisdiction equity intervenes solely to protect a proprietary or other legal right advanced by a plaintiff.'⁴¹ Instead their Honours pointed to 'the public interest in the observance by such statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed.'⁴² Any reference to the classification of rights and interests that can be protected by an injunction may therefore only be relevant to considerations of standing, and even then only for the purposes of identifying the special character of the interest affected.⁴³

It is not clear how far an injunction may be available to protect public, as opposed to private, rights and interests beyond those established and limited by statute. It has been suggested that for an interest, duty, wrong or obligation to be 'public', it must directly affect or benefit a

large number of people.⁴⁴ The discussion in *Bateman's Bay* extends injunctions to establishing and enforcing the limitations imposed by statute. The ability to injunct action being taken on the decision to exclude an individual PhD student would therefore depend on relevant limitations imposed on the decision by statute, such as through the enactment of a University statute, or a private action based on contract or other private law remedy. It remains to be seen whether an injunction to enforce public rights and duties can be extended to statutory authorities based on the effect of their decisions rather than limitations implied through the statutory source.

The majority in *Ainsworth* also referred to the possibility of prohibition being available had relief been sought prior to publication of the report, regardless of the report's lack of legal effect. The availability of prohibition requires that there has been a jurisdictional error, which is always involved with a breach of natural justice, but is only available while there is something still remaining to prohibit.⁴⁵ Prohibition may therefore act in similar circumstances as an injunction, acting to restrain the taking of further action based on limitations imposed by statute. Whilst an injunction may not involve classification of a decision as going to jurisdiction,⁴⁶ it similarly avoids classification of the decision as a relevant right or obligation. Both go to bodies that have a limited capacity to affect others, regardless of how that effect is classified. The classification of a decision as being based on a consensual relationship, however, would seem to preclude the establishment of any such limits.

As the decision in *Tang* concerned the ability to review a decision, the power for which was granted under the relevant statute, but for which it was not contended there was any relevant duty involved, the writ of mandamus will not be considered in detail here. It is hopefully sufficient to note that the focus of mandamus is on the nature of the duty rather than the body upon whom the duty is imposed, but classifying a duty as public involves similar concerns as the other remedies. A non-statutory source of a duty to consider eligibility for a grant may lead to a refusal to grant mandamus,⁴⁷ and duties imposed by contract may generally be classified as private.⁴⁸

'Public' functions

Recent decisions in the UK have provided for public law remedies where the body in question performs a 'public function' regardless of the nature of the body. Contractual decisions, however, remain private. Recent Australian cases have applied these decisions, but to varying extents.

The Datafin decision

The reference in *Lain* to bodies being susceptible to certiorari that have a public, rather than a private or domestic, character was expanded upon in *Council of Civil Service Unions v Minister for the Civil Service*.⁴⁹ Lord Scarman suggested that 'the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.'⁵⁰ This focus on the nature of the power and the effect of the decision, rather than its source in legislation or prerogative power, was adopted by the Court of Appeal in *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc*.⁵¹

Datafin concerned a decision made by the Panel on Takeovers and Mergers, an unincorporated association without legal personality or statutory, prerogative or common law powers. The Panel devised, administered and enforced the Code on Takeovers and Mergers. The members of the Panel included representatives of the major participants in the UK securities markets. Breach of the Code could be enforced through private reprimand, public censure, or in a more flagrant case, through further action designed to deprive the offender of the ability to enjoy the facilities of the securities market. The Panel could refer certain aspects of the case to the Department of Trade and Industry, the London Stock

Exchange or other appropriate body. The Stock Exchange, for example, included breaches of the Code as found by the Panel as an act of misconduct leading to expulsion from the Official List of securities traded on the Exchange. Importantly, the listing of securities is a statutory function provided for under government regulations.

The decision by the Panel that there had been a breach of the Code was held to be susceptible to judicial review, including to the grant of certiorari where there was a breach of natural justice, because it was carrying out a 'public' function. As suggested by Lloyd LJ:

The source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of the power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: ... but in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power ...⁵²

Donaldson MR suggested that 'it is possible to find [in the cases] enumeration of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors.'⁵³ The factors included: whether the body was government owned, controlled or funded; is subject to generally applicable state regulation; carries out functions also carried out by public authorities; and whether it can only be restrained effectively through public law remedies. He concluded:

Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction [of the courts to provide judicial review] of bodies whose sole source of power is a consensual submission to its jurisdiction.⁵⁴

Here, because the 'panel regulates not only itself, but all others who have no alternative but to come to the market in a case to which the code applies'⁵⁵ and the public nature of the interests affected by the decision, namely listing on the stock exchange and its importance to commerce, the Panel was sufficiently public to provide jurisdiction for judicial review.

Consensual submission to jurisdiction

The exclusion of 'bodies whose sole source of power is consensual submission to its jurisdiction' is derived from the decision of Parker LJ in *Lain*⁵⁶ where he stated that '[p]rivate or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is from the agreement of the parties concerned.'⁵⁷ This aspect of *Datafin* was considered in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*.⁵⁸ There the disciplinary committee of the Jockey Club, a body incorporated by Royal Charter, disqualified a horse for failing a blood test. The owner claimed that this damaged his reputation. However, although the Jockey Club regulated a significant national activity which affected the public, there was a consensual element to its power. Although the acceptance of the Jockey Club's regulation was so widespread that anyone who wished to race their horse in England had 'no choice but to submit to the Jockey Club's jurisdiction'⁵⁹ it was still based on consent rather than through the action of any legislative scheme. The rules of the Jockey Club were incorporated into contracts required between racecourses and owners, and it was held that remedies in private law available to the owner were an adequate form of redress.

Reference to the consensual element of a decision-maker's power is therefore one factor that goes to establishing whether a body is subject to judicial review. As Scott Baker LJ suggested in *R v Director General of the National Crime Squad; Ex parte Tucker*⁶⁰:

Whether a decision has a sufficient public law element to justify the intervention of the administrative court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met.⁶¹

Although many cases rely on *Datafin* where a private body is involved in carrying out a public function, 'the logic of *Datafin's* "public function" test cuts both ways⁶² and has been used to exclude judicial review of public bodies, including statutory authorities, exercising private power. Even commercial decisions on entering or terminating commercial contracts can, however, be sufficiently 'public'.⁶³ The circumstances giving rise to the public element in cases involving consensual decisions, such as an obligation to have regard to the public interest, rarely, however, involve the imposition of limitations leading to a breach of a ground of review.⁶⁴

The distinction between public and private functions discussed in *Datafin* and *Aga Khan* was required by the procedures for initiating review under what was then Order 53 of the Rules of the Supreme Court⁶⁵ which provided for judicial review of the lawfulness of an enactment or 'a decision, action or failure to act in relation to the exercise of a public function'. As Lord Diplock sets out in *O'Reilly v Mackman*,⁶⁶ the introduction of O53 'drastically ameliorated' the differences under the previous procedural requirements between seeking the prerogative writs and remedies in private law.⁶⁷ The new rules provided a procedure 'by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding'⁶⁸ including injunctions and declarations, and, in appropriate circumstances, damages. However, the purpose of O53 remained to provide additional forms of protection for public decision-makers to prevent the undue disruption of administrative decision-making. Order 53 provided for leave to apply for the order, discovery of documents and cross-examination of witnesses. Affidavits sworn on oath setting out the material facts relied upon are required before leave can be given. Additionally there was a requirement that proceedings be instigated within 3 months of the decision instead of the lengthy limitation periods in private law actions so as to protect 'the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law.'⁶⁹

The distinction drawn in UK cases between public and private functions is therefore required to prevent abuse of the judicial process through inappropriate choice of initiating procedure. In *Cocks v Thanet District Council*,⁷⁰ handed down on the same day as *O'Reilly*, it was held that private law rights which depended on prior public law decisions would also ordinarily have to be litigated through the procedure for judicial review, highlighting the need to select the correct procedure or risk being out of time.⁷¹

However, recent cases have suggested a relaxation of the distinction at least in cases involving a statutory body.⁷² In *Clark v University of Lincolnshire and Humberside*⁷³ the court considered the case of a student being awarded only a third class degree, due to accusations of plagiarism. The proceeding was brought for breach of contract even though the Court seemed to accept that the University was a statutory body with public functions in conferring degrees and hence may have been judicially reviewed. However, the court emphasised that there was no need to rigidly apply a demarcation between public and private functions. Lord Woolf MR said:

If it is not possible to resolve the dispute internally, and there is no visitor, then the courts may have no alternative but to become involved. If they do so, the preferable procedure would usually be by way of judicial review. If, on the other hand, the proceedings are based on the contract between the student and the university then

they do not have to be brought by way of judicial review. The courts today will be flexible in their approach.⁷⁴

The court held that it was possible to review the decision on the basis of the contractual agreement between the University and the student. The court cautioned that there may be decisions involving 'issues of academic or pastoral judgement which the university is equipped to consider in breadth and in depth, but on which any judgement of the courts would be jejune and inappropriate.'⁷⁵ This included such question as what mark or class a student ought to be awarded. However, where the dispute lies, as in this case, with whether the dispute resolution procedures set out in the contract have been followed, the courts were well able to adjudicate, whether through judicial review or through enforcing the contract. Review of the decisions by a body established by statute, even when based on contractual agreement, was dependent on the nature of the decision in question rather than any categorisation of the nature of the decision-maker or the effect of the decision as going to legal rights or obligations.

Procedure v substance

As the decision in *Clark* indicates, the distinction between public and private functions discussed in *Datafin* may now go more to the procedural form the application takes rather than the substance of the review provided. In Australia, it is not clear whether this same flexibility will be available.

In *Typing Centre of New South Wales v Toose*⁷⁶ Mathews J held that decisions of the Advertising Standards Council (ASC) that there had been a breach of the Advertising Code of Ethics (the code) was susceptible to judicial review. The ASC was established by private charter by representatives of the advertising and media industries. Television stations, as members of a representative body, were contractually bound to comply with the terms of the code as interpreted by the ASC. Mathews J considered that the ASC was acting in interpreting the code, which in many respects merely restated the existing law, in the same way as courts in interpreting and moulding Acts of parliament. Someone attempting to place an advertisement who was not party to the contract should be able to have the decision of the ASC reviewed. However, the jurisdictional basis of the decision is unclear.

In *Dorf Industries Pty Ltd v Toose*⁷⁷ Ryan J discussed *Typing Centre* in refusing to grant a declaration that various television advertisements did not contravene clause 6 of the code. He held that to do so would leave two contrary decisions, one by the court and the other by the ASC. Whilst the declaration would prevent any disciplinary action being taken against any television channel that played the advertisements, it would not result in the invalidity of the ASC's decision. 'It is only when the supervisory as distinct from the original determinative or appellate jurisdiction of the court is invoked that different discretionary considerations apply.'⁷⁸

Therefore, one of the matters going to the discretion of the court as to whether to make a declaration was whether an appropriate action had been brought to quash the decision through the writ of certiorari. If there continues to be a distinction drawn between decisions that are susceptible to judicial review on the basis of carrying on a public function then selecting the appropriate remedy may be required.

An example of the possible importance of the distinctions relied on in *Dorf Industries v Toose* may be found in the recent decision of *D'Souza v RANZCP*.⁷⁹ This case concerned the refusal to accept D'Souza as a Fellow of The Royal Australian and New Zealand College of Psychiatrists (the College). The College was an incorporated body limited by guarantee. D'Souza was an Associate of the College, involving a contractual relationship between him and the College, subject to which he could sit examinations to be considered for election as

a Fellow. The Articles of the College provided for the governing body of the College, the Council, to establish by-laws made binding on Associates for the qualifications needed for election as a Fellow. D'Souza claimed judicial review on the basis that the decision not to award him a pass grade for his examinations involved apprehended bias, otherwise breached procedural fairness, or was not reasonably open.

Ashley J briefly reviewed *Datafin* and various decisions that have referred to *Datafin* in Australia and concluded that 'on the present state of Australian authority certiorari is not available in respect of a decision of a body whose powers derive only from private contract.'⁸⁰ Ashley J goes on to consider, if that conclusion was wrong, whether the College's decision, if not made in the exercise of a public function, at least had public consequences.⁸¹ Fellows of the College were recognised under the *Health Insurance Act 1973* (Cth) and given de facto recognition as a 'qualified psychiatrist' under the *Mental Health Act 1986* (Cth) which affected their ability to occupy certain positions within hospitals and participate in the Medicare system. The refusal to pass the examination acted as a condition precedent to election as a Fellow, giving rise to the principle in *Hot Holdings*.⁸² Therefore, had the decision not been 'the working out of a contractual relationship between the parties', the decision would have been subject to judicial review'.⁸³

Ashley J goes on to establish that there may have been a breach of procedural fairness.⁸⁴ The only other basis argued was an action for restraint of trade, which was ultimately rejected by the Court as the rules relating to the examination procedure were a reasonable restraint not exercised unreasonably. The form of relief sought, namely certiorari on the basis that the decision was a public one, led to the denial of relief.

Exercising a private power

The difficulties faced by applicants seeking certiorari against decisions made by public bodies such as Griffith University is demonstrated by *Whitehead v Griffith University*,⁸⁵ a case concerning the censure of a senior lecturer and refusal to convene a misconduct panel after allegations of soft marking for international students. Chesterman J declined certiorari on the basis that the University was exercising powers under a contract of employment between the parties. The case appeared to be 'entirely in the domestic or private' realm rather than the public, in the sense of governmental.⁸⁶ A declaration was also refused, but as an exercise of discretion because of the availability of 'ample alternative means of relief open to the applicant pursuant to the agreement' governing the employment contract.⁸⁷

McClellan J took a similar approach to decisions by universities in *Hall v University of NSW*.⁸⁸ There an independent external inquiry was set up by the University to investigate allegations made against Hall of scientific misconduct and scientific fraud, not unlike the allegations against Ms Tang in *Tang*. The report may have been made public, and was to be used by the university to consider whether disciplinary action could be taken under the relevant enterprise agreement that formed part of the contract of employment.

McClellan J, after referring to cases including *Datafin*, held that

Judicial review is not available in respect of a public body [here one established by statute] exercising a private power, such as that derived from property or contract, even where the consequences of such a decision may be thought of as 'public' [given the severe impact on Hall's reputation]. However, public bodies exercising private powers are amenable to declaratory and injunctive relief for a breach of procedural fairness in the same way that private organisations and associations are amenable to such relief.

He then went on to consider whether there had been a breach of the obligation of procedural fairness, having decided that the obligation to accord procedural fairness could give rise to declaratory relief regardless of the characterisation of the decision under review as public or private.

The suggestion that judicial review is not available against a public body exercising a private power was also accepted in *Victoria v Master Builders Association of Victoria*.⁸⁹ Each of the judges considered the need to establish the public nature of the decision of a non-statutory taskforce established by the Victorian Government under executive power to 'blacklist' potential contractors and thus deny them the opportunity of being awarded contracts by government departments. The 'blacklist' was part of a regulatory scheme established as part of a 'scheme designed to induce former contractors and tenderers ... to atone for their presumed past misconduct'⁹⁰ including being involved in collusive practices in relation to the awarding of Government contracts.

Eames J held that determining a public element in the decision of the task force involved 'a comprehensive analysis of the power being exercised, the characteristics of the body making the decision, and the effect of determining that the exercise of the power is not amenable to review.'⁹¹ In completing this analysis, his Honour concluded that the integrity and efficiency of the building industry was plainly a matter of public importance, the Government was intending to address this through the establishment of the taskforce and that the Government's dominance of the building and construction industry in question meant that 'the task force is applying the coercive force of the state'⁹² and hence should be susceptible to judicial review.⁹³

The factors discussed by Eames J are based on those adopted by Lord Diplock in the *CCSU* case and by the judgements in *Datafin*. They are also similar to those adopted in *NEAT Domestic Pty Ltd v AWB Limited*.⁹⁴ There the court was considering whether the refusal of AWBI, a private corporation, to grant approval, which was a condition precedent to the grant of a licence to export wheat, could be invalidated. The majority concluded that although AWBI had an effective veto under the legislation over the export of wheat it was acting in its own capacity as a corporation based on its own self-interest to consider the interests of its shareholders. This self-interest was an integral part of the legislative scheme and it would not be possible to impose public law obligations on AWBI while accommodating pursuit of its private interest. The majority decision does not refer to *Datafin* or the analysis of the cases under it.⁹⁵ A full analysis of whether the decision in *NEAT* is contrary to the approach taken in *Datafin* is beyond the scope of this paper. However, the approach of the majority in *NEAT* illustrates the range of considerations that may go towards establishing whether a body is carrying out public functions and the difficulty of predicting the outcome of any such analysis.⁹⁶

The obligation of natural justice

On the limited facts presented, it is likely that the primary ground relied on by Ms Tang in her application to review the University's decision to exclude her from the PhD program was likely to relate to a breach of natural justice. Her application referred to various breaches of natural justice including the bias of the decision-maker as prosecutor and judge and the denial of representation where that was permitted under the University policy.⁹⁷ As the decision in *Clark v University of Lincolnshire and Humberside*⁹⁸ demonstrates, contractual obligations may also give rise to obligations of natural justice akin to those arising under judicial review. If the ability to enforce those obligations does not depend on the form of action taken, then there is an issue about the purpose of drawing distinctions based on the public or private nature of the decision.

It has long been accepted that the obligation of natural justice can be imposed on private organisations in Australia. Generally, the obligation of natural justice arises from the implication that fair procedures are intended by the parties to a contract, often incorporating the rules of the organisation.⁹⁹ However, this approach recognises 'the possibility that express words or necessary implication in the rules could exclude natural justice in whole or part.'¹⁰⁰ Therefore, it may be possible for a detailed procedure for the hearing of disputes adopted as part of the contract to imply no further procedures are necessary.¹⁰¹

Courts have declined to intervene by way of an declaration of the invalidity of a decision in breach of the rules of voluntary unincorporated organisations and an injunction to prevent giving effect to the decision.¹⁰² Thus in *Cameron v Hogan*¹⁰³ it was stated that:

[R]ules made by a political or like organisation for the regulation of its affairs and the conduct of its activities have never been understood as imposing contractual duties upon its officers or member. Such matters are naturally regarded as of domestic concern. The rules are intended to be enforced by the authorities appointed under them. In adopting them, the members ought not to be presumed to contemplate the creation of enforceable legal rights and duties so that every departure exposes the officer or member concerned to a civil sanction.¹⁰⁴

However, in *Edgar v Meade*¹⁰⁵ it was suggested that membership of non-contractual organisations may be enforced by declaration and injunction where membership was a matter of public policy. The court was able to intervene to enforce rules of membership, even though non-contractual, where the organisation had been registered as part of a legislative scheme on the basis of those rules. Echoes of this approach may be seen in the way the issue of whether the organisation was carrying out a public function under *Datafin*.

The question of whether a private body was carrying out a public function was also used in *Forbes v New South Wales Trotting Club Ltd.*¹⁰⁶ Although the applicability of the rules of natural justice had been conceded, Gibbs J offered the comment that the concession seemed to be correctly made:

The [Trotting Club], although not granted statutory powers, was in fact the body whose function was to control trotting in New South Wales, and trotting is a public activity in which quite large numbers of people take part, whether as spectators or otherwise. Members of the public have the legitimate expectation that they will be given permission to go on to courses when trotting meetings are being held provided that they pay the stipulated charge and provided of course that they are not drunk, disorderly, or otherwise unfitted by their condition of behaviour to be admitted. The [Trotting Club] had power to defeat this expectation ...and was accordingly required to observe the rules of natural justice.¹⁰⁷

Therefore, there is authority for the proposition that even decisions made on the basis of consensual non-contractual relationships may be subject to the obligations of natural justice, especially where the decision involves a public function. However, there are a number of aspects of the application of natural justice to private decisions that should be noted.

The first is that the doctrine of legitimate expectations is currently uncertain. The majority in *Tang* refer to several statements which suggest that a legitimate expectation based on the conduct of the decision-maker does not give rise to the obligation of natural justice but merely to its content once the obligation arises.¹⁰⁸ A legitimate expectation may arise only in circumstances where it suggests that, in the absence of some special or unusual circumstance, the person concerned will obtain or continue to enjoy a benefit or privilege.¹⁰⁹ It may be difficult to satisfy this criterion in circumstances where the discretion whether to make the decision is relatively unconfined, as is common in situations involving private or

consensual decisions. A legitimate expectation may not, of itself, be sufficient to give rise to any entitlement to judicial review.

The second aspect of the application of natural justice to private decisions is that the content of the obligation may depend on the nature of the body in question. In *D'Souza*¹¹⁰ it was held that 'the trend of authorities seems to be that an allegation of apprehended bias is not in point in a case involving a domestic, consensual or private tribunal – by contrast with a Court, or a tribunal founded in statute.'¹¹¹ The nature of the body may imply, for example, that it was intended or necessary for decision-makers to have been involved in the events leading to the decision, even if this suggests they are acting as both prosecutor and judge.¹¹² The fact one of the parties to a contract is the government may mean an obligation of fairness will be readily implied in the contract, or indeed lead to the conclusion that contractual relations are formed at an earlier stage of the negotiations.¹¹³

It is interesting to compare the approach taken in *D'Souza*,¹¹⁴ with that in *Chiropractors Association of Australia (South Australia) Ltd v Workcover Corporation of South Australia*.¹¹⁵ That case also involved the recognition of qualifications, namely whether chiropractors were 'legally qualified medical practitioners' for the purposes of being able to make assessments of incapacity for the purposes of the Workers' Compensation scheme in operation in South Australia at the time. The assessment was made by the Workcover Corporation, a statutory authority, however the relevant legislation was 'silent as to the process of recognition by the Corporation and as to any other express criteria necessary to be met in order to obtain recognition.' The application for a declaration for breach of natural justice was dismissed, primarily because there was no legitimate expectation involved in the recognition process and the lack of any considerations personal to the particular applicants for natural justice involved in that recognition. However, the issue of whether the decision to grant recognition gave rise to the obligation of natural justice, or was properly the subject of judicial review, was not discussed.

The final aspect of the implication of natural justice is the role of reputation. In *Ainsworth*¹¹⁶ a declaration that there had been a breach of the obligations of natural justice was made on the basis that the decision had affected the applicant's reputation. Clearly a mere finding that might affect someone's reputation if it became public would not be sufficient to attract the obligation. There must be something inherent in the way the finding is used or disclosed before an effect on reputation will be present.¹¹⁷ Public bodies or those carrying out statutory functions may be liable for defamation, subject to the common law doctrine of absolute or qualified privilege.¹¹⁸ However, the presence of an alternative remedy is not sufficient to disqualify judicial review. In *Ainsworth* Brennan J contrasted the position of a person who, 'without purporting to perform any function or exercise power conferred upon him by statute',¹¹⁹ may publish a report subject only to the general law limitations on free speech. However:

conduct in which a person or body of persons engages in purported exercise of statutory authority must be amenable to judicial review if effect is to be given to the limits of the authority and the manner of its performance as prescribed by the statute. It is immaterial that the statute defines a mere function that requires no grant of power to enable its performance: what is material to jurisdiction in judicial review is that the function is conferred by statute.¹²⁰

Brennan J acknowledged¹²¹ that authority derived from the prerogative¹²² may also be sufficient to give rise to judicial review on the basis of the effect on reputation.¹²³ In the case of a statutory authority, Brennan J therefore suggested that the purported exercise of authority conferred by statute depends on identifying the limits of the authority and the manner of its performance. Not all actions of a statutory authority, including those that have an effect on reputation, are carried out in purported exercise of its statutory functions. Thus

there remains a need to distinguish between which activities of a statutory authority can give rise to judicial review for breach of natural justice.

Conclusion

The majority in *Tang*, required by the statutory scheme of review to establish that legislation was the source of any relevant limitations on the making of the decision, focused on the source of the legal effect of the decision in question. The need to ensure efficiency in the administration of regulatory schemes was perhaps reflected in the unwillingness of the court to imply limits based on the effect of the decision. Outside of statutory schemes such as the ADJR Act, it is unclear whether the public law remedies available would encourage a similar unwillingness.

The prerogative writs are clearly predicated on the public nature of the decision in question, but that does not mean that they are available against any decision by a statutory authority such as Griffith University. The decision in *Datafin* and the cases that have followed it have attempted to unravel the complex factors that go into establishing the 'publicness' of a decision, albeit encouraged by procedural requirements that protect the need for certainty and speed in relation to government decisions that is now a general goal for litigation reaching the courts. The introduction of the *Human Rights Act 1998* (UK) and the expansion of the grounds of review has extended this analysis.

In Australia, however, the basis for restricting an examination of the grounds of review is less clear. The suggestion that review under statutory schemes balance protection of the interests of individuals against the needs of efficient and effective administration does not provide a means to establish which interests are protected, and, given the range of possible approaches the government may take in regulating, or not regulating, what means of interference in individual interests are subject to judicial scrutiny. It remains uncertain whether it is more effective to approach these issues on a case by case basis, accepting judicial review is available, in the expectation that the cases will reveal the difficulty of establishing breach of a ground of review in all but the most serious of cases. Alternatively, if threshold requirements are imposed generally, protecting conduct from judicial scrutiny on the basis of the nature of the function being carried out, then the elements that go into the balance need to be sufficiently clear to prevent the very undue interference a threshold seeks to avoid.

Restricting review to decisions that are not based on a consensual relationship requires identification of those relationships that can be accepted as consensual. The decision in *Tang* indicates that the availability of private law remedies may not be determinative, leaving the possibility that the assessment of consent may be imposed at the interim stages of a dispute without evidence of the ways in which the basis of that consent was established and arguably been breached. The variety of elements that go to establishing coercion and the distinctions between legal and practical effect of a decision that are discussed in the cases described above suggest that even reliance on mutual consent may be a difficult distinction to make.

Endnotes

- 1 (2005) 213 ALR 724; [2005] HCA 7 ('*Tang*').
- 2 Gummow, Callinan and Heydon JJ (Gleeson CJ agreeing with the order made but through a separate judgement, Kirby J dissenting).
- 3 *Tang* at [89] per Gummow, Callinan and Heydon JJ.
- 4 *Id* at [91]. Gleeson CJ suggests that the relationship was 'voluntary'. Note that the absence of a contract had been conceded by the parties, see Kirby J's critique at [161]-[164].

- 5 For a discussion of the judgments in *Tang* see the discussion by Michael Will in this volume, and Daniel Stewart 'Griffith University v Tang, 'under an enactment' and limiting access to judicial review.' (2005) 33(3) *Fed L Rev* (Forthcoming).
- 6 (2000) 1999 CLR 135.
- 7 Gaudron J also includes the *Administrative Law Act 1978* (Vic), *Judicial Review Act 1991* (Q), and the *Administrative Decisions (Judicial Review) Act 1989* (ACT): *Ibid* at fn 87.
- 8 *Id* at 156-7.
- 9 See Stewart, D above n 5.
- 10 See generally Mark Aronson, 'Is the ADJR Act hampering the development of Australian Administrative Law?' (2004) 15 *Pub L Rev* 202.
- 11 (1990) 170 CLR 321.
- 12 *Ibid* at 336-7.
- 13 (1997) 75 FCR 133 per Von Doussa, Drummond and Mansfield JJ.
- 14 *Ibid* at 143.
- 15 For a discussion of the availability of judicial review of decisions relying on prerogative power see the discussion below under 'Availability of alternative remedies'.
- 16 Section 16(1) of the *Judicial Review Act 1991* (Qld) explicitly states that ideas expressed in the ADJR Act are not taken to be different in the *Judicial Review Act 1991* (Qld) merely because different words are used. It was accepted that where the same words are used then the meaning was also relevantly the same.
- 17 ADJR Act s 10.
- 18 Under s 4(b) the JR Act also applies to:
 A decision of an administrative character made ... by an officer or employee of the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained ...
 (i) out of amounts appropriated by Parliament; or
 (ii) from a tax, charge, fee or levy authorised by or under an enactment.
- This suggests that, unlike the ADJR Act, the JR Act has application to at least some exercises of executive power by a public body, enhancing the implication that it is meant to augment the availability of judicial review provided by prerogative remedies.
- 19 See *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.
- 20 Margaret Allars, 'Public Administration in Private Hands' (2005) 12 *Aust J Admin L* 126 at 129. As Professor Allars suggests, there may not be any temporal restriction implied in s 39B(1A)(c) (*Ibid* at 130). For a discussion of the extent to which the requirement for a 'matter' may imply restrictions similar to those implied by the majority in *Tang* into the scope of 'decision ... of an administrative character made under an enactment' see Graeme Hill, 'Griffith University v Tang – Comparison with *NEAT Domestic*, and the Relevance of Constitutional Factors', in this volume, and Stewart, above n 5.
- 21 Eg *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563 at 575. See Nicholas Seddon *Government Contracts: Federal, State and Local*, (3rd ed, 2004) at 342. Note that it has been accepted by the High Court that institutions such as the Refugee Review Tribunal are also Officers of the Commonwealth for this purpose, see eg. *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24 at [43].
- 22 Prerogative power is used to refer to those rights, powers and privileges which are peculiar to the Sovereign and which are over and above those enjoyed by citizens. Executive power, however, includes the capacity of any juristic person to determine with whom and on what conditions it will enter into contracts. See *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121 at 136 per Tadgell J, 147 per Ormiston J and 157-8 per Eames J.
- 23 *Hot Holdings v Creasy* (1996) 185 CLR 149 at 162-3: See Allars, above n 20 at 128-9.
- 24 (1967) 2 QB 864.
- 25 *Ibid* at 882.
- 26 [1983] 2 AC 237: See *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121 at 134.
- 27 *Ibid* at 279.
- 28 (1992) 175 CLR 564.
- 29 See *Hot Holdings v Creasy*, above n.23 at 159 per Brennan CJ, Gaudron and Gummow JJ.
- 30 *Ibid*.
- 31 *Ibid* at 165. The minority of Dawson and Toohey JJ held that it was only the existence of the recommendation and not the content of the recommendation that was a precondition to the discretion of the Minister, and hence how priority was determined had no legal effect on the ultimate legal rights of the parties. Thus dissent based on a difference in statutory interpretation as to the status of the recommendation and the extent of its content has to be considered by the Minister.
- 32 This may even extend to circumstances where the benefit could lawfully have been provided through some other source of authority, such as executive or prerogative power. See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed 2004) at 712 discussing the criticisms of *Lain* made by Professor Wade in, for eg, HWR Wade and CF Forsyth, *Administrative Law* (8th ed, 2000) at 222-3 and 628-9.
- 33 See Aronson, et al, *ibid* at 709-712.
- 34 (1990) 170 CLR 321 ('*Bond*').
- 35 *Tang* at [86].

- 36 Eg NJ Young, 'Declarations and other remedies in administrative law' (2004) 12 *Aust Jo Admin Law* 35 at 36-7.
- 37 Eg *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 at 782ff.
- 38 *Mayfair Trading Pty Ltd v Dreyer* [1958] 101 CLR 428 at 454 per Dixon CJ. See also Young, above n 36 at 37.
- 39 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [31].
- 40 (1998) 194 CLR 247.
- 41 *Ibid* at [27]. See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628 per Gummow J; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 232 (at fn 153) where Gaudron J stated, 'it may be that, in the case of some public wrongs, an injunction will not issue notwithstanding that no equitable or legal right is infringed'; Young, above n 36 at 39.
- 42 *Bateman's Bay*, *ibid* at [50].
- 43 Aronson, et al, above n 32 at 813.
- 44 *Ibid* at 813-4.
- 45 *Ibid* at 691.
- 46 The distinction between statutory limitations going to jurisdiction and those enforceable by injunction may not be significant given the expansion of the grounds of review that may give rise to jurisdictional error evident in cases such as *Craig v South Australia* (1995) 184 CLR 163 and those following *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. See generally Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life After S157' (2005) 33 *Fed L Rev* 141.
- 47 *Barnett v Minister for Housing and Aged Care* (1991) 31 FCR 400.
- 48 Eg *Belcaro Pty Ltd v Brisbane City Council* (1963) 110 CLR 253 at 264. See generally Aronson, et al, above n 32 at 732.
- 49 [1985] AC 374.
- 50 *Ibid* at 407.
- 51 [1987] 1 QB 815. Cases that have cited *Datafin* also include *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121; *Minister for Local Government v South Sydney Council* (2002) 55 NSWLR at 381 at [7]; *Typing Centre of New South Wales v Toose*, Mathews J, Supreme Court of NSW, judgement 15 December 1988, unreported; *Dorf Industries Pty Ltd v Toose* (1994) 54 FCR 350; *Masu Financial Management Pty Ltd v Financial Industry Complaints Service*, Shaw J, Supreme Court of NSW, judgement 15 September 2004, unreported; *Adamson v NSW Rugby League* (1991) 31 FCR 242 per Gummow J at 292; *Australian Stock Exchange Ltd v Hudson Securities Pty Ltd* (1999) 33 ACSR 416 at [83].
- 52 *Datafin*, *ibid* at 847
- 53 *Ibid* at 838
- 54 *Datafin*, *ibid* at 838.
- 55 *Ibid* at 846 per Lloyd LJ.
- 56 Above n 24.
- 57 *Ibid* at 882.
- 58 [1993] 2 All ER 853.
- 59 per Farquharson LJ.
- 60 [2003] ICR 599.
- 61 *Ibid* at [13] as cited in *D'Souza v RANZCP* [2005] VSC 161.
- 62 Aronson, et al, above n 32 at 125.
- 63 Eg *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521. See also Aronson, et al, above n 32 at 126.
- 64 Aronson, et al, above n 32 at 126: cf the suggestion by Gleeson CJ in *NEAT Domestic Pty Ltd v AWB Limited* (2003) 216 CLR 277 at 288 that personal animosity or a desire to confer a personal benefit upon a particular person may invalidate through judicial review a decision of even a private company acting within a regulatory scheme premised on the company acting for the interests of its shareholders.
- 65 See now Pt 54 of the Civil Procedure Rules (SI 1998/3132).
- 66 [1983] 2 AC 237.
- 67 *Ibid* at 285.
- 68 *Ibid* at 283.
- 69 *Ibid* at 284.
- 70 [1983] 2 AC 287.
- 71 See *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at [16].
- 72 Professor Oliver has recently suggested that there is a distinction to be drawn between the classification of functions performed by statutory bodies and those performed by private bodies, at least when discussing the distinctions between the 'public function' test for judicial review under Pt 54 and 'a function of a public nature' which is required for private bodies to be susceptible to the Human Rights Act 1998 (UK): Oliver, D. 'Functions of a public nature under the Human Rights Act' [2004] *PL* 329 at 348. For a recent discussion of the continuing importance of the distinction before judicial review actions can be brought against private bodies see *R v Lloyd's of London; Ex parte West* [2004] EWCA Civ 506 where it was held that Lloyd's was not amenable to review under Pt 54 and the applicant would have to pursue Lloyd's for breach of contract or other private law action.
- 73 Above n 71.

- 74 Ibid at [32]-[33].
- 75 Ibid at [12]. This was cited in *Tang* at [58].
- 76 Above n 51.
- 77 (1994) 53 FCR 350, above n 51.
- 78 Ibid at 367. The lack of any challenge to the validity of a decision also went against the grant of a declaration in *Chiropractors Association of Australia (South Australia) Ltd v Workcover Corporation of South Australia* [1999] SASC 120, approved on appeal at [1999] SASC 470 at [20].
- 79 [2005] VSC 161.
- 80 Ibid at [112].
- 81 The basis for this distinction is not clear.
- 82 Above n 29. See the discussion of *Hot Holdings* above around n.30.
- 83 Ibid at [118].
- 84 But goes on to suggest that certiorari would have been refused on discretionary grounds anyway given the application for review was brought when internal review was still possible, *ibid* at [211]-[218].
- 85 [2003] Qd R 220.
- 86 Ibid at 225.
- 87 Ibid at 227.
- 88 [2003] NSWSC 669.
- 89 Above n 26 at 134.
- 90 Ibid at 137 per Tadgell J.
- 91 Ibid at 163 per Eames J.
- 92 Ibid at 164.
- 93 See also *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* [2000] ACTSC 89 where a decision of awarding a tender to was held to be a public function that could give rise to a declaration of breach of natural justice. The statutory authority in question was subject to ministerial direction, it was directed under the relevant legislation to provide for the social and economic needs of the community, and it operated on other than prudent commercial principles.
- 94 Above n 64. For a fuller discussion of the relationship between *NEAT* and *Griffith* see Daniel Stewart, '*Griffith University v Tang*, 'under an enactment' and limiting access to judicial review' (2005) *Federal Law Review* forthcoming and Graeme Hill, above n.20.
- 95 Unlike Kirby J who seems to implicitly accept the *Datafin* decision at [113].
- 96 See also '*Sydney Training Depot Snapper Island v Brown* (1987) 14 ALD 464 where it was held that a decision to issue a notice to quit under the terms of a lease was held to not give rise to public law remedies.
- 97 See *Tang*, at [53] per Gummow, Callinan and Heydon JJ, [116] per Kirby J.
- 98 Above n 71.
- 99 In *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 Campbell J states that there 'is a long line of judicial statements, explaining that the basis on which a court can prevent excess of power by a domestic tribunal is by enforcing the contract under which the tribunal operates', at 780-81.
- 100 Ibid at 785, [97].
- 101 But cf the approach adopted in *Re Minister for Immigration, Multicultural and Indigenous Affairs v Miah* (2001) 206 CLR 57.
- 102 Ibid at 783.
- 103 (1934) 51 CLR 358.
- 104 Ibid at 376 per Dixon, Evatt and McTiernan JJ.
- 105 (1916) 23 CLR 29.
- 106 (1979) 143 CLR 242.
- 107 Ibid at 264, citing *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487 where the Commission was a statutory authority.
- 108 *Tang* at [92].
- 109 See *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 681-2 per McHugh J.
- 110 Above at n 79.
- 111 Ibid at [123].
- 112 See *Australian Workers Union v Bowen (No 2)* (1948) 77 CLR 601 at 628 per Dixon J, as quoted in *McClelland*, above n.37 at 794-95.
- 113 See *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1.
- 114 Discussed above at n 79ff.
- 115 Above n 78.
- 116 Above n 28.
- 117 See *Victoria v MBA*, above n.22 at 140.
- 118 See *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296.
- 119 *Ainsworth*, above n.28 at 584.
- 120 Ibid at 585.
- 121 Ibid at fn 48.
- 122 Citing *CCSU*, above n.49..
- 123 Exercise of executive power did not prevent damage to reputation implying an obligation of natural justice in *Victoria v MBA*, above n 22.