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the High Court

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Mark Aronson

Abstract

This article will argue that the pessimism about the sustainability of some of the 'core' achievements of judicial review in the last 30 or so years has missed the mark. Specifically, there is no clear and present danger to Australia's expansionist cases regarding standing to sue and the expansion of natural justice beyond the realm of strict legal rights. Pessimism on those scores is misplaced. Secondly, however, this article will argue that the recent cases will make it very difficult for those seeking some purchase out of the internal guidelines, rule books and practice manuals of both public and private authorities. These are the 'soft laws' that abound in both public and private spheres 'rules' with neither statutory nor contractual force. Australia's version of the rule against fettering statutory discretions has led its courts to decline to enforce soft law as such, whether overtly or via natural justice principles.

Speaking very broadly, the critical issue for Australia concerns judicial review's adaptability to the changing forms of public power. This article would not advocate following all of the English developments. Our courts should nevertheless recognise that public power is increasingly exercised from places within the private sector, by non-government bodies, and according to rules found in management manuals rather than statute books. If judicial review is about the restraint of public power, it will need to confront these shifts in who exercises public power, and in the rules by which they exercise it.

PRIVATE BODIES, PUBLIC POWER AND SOFT LAW IN THE HIGH COURT

Mark Aronson*

PART I – INTRODUCTION

For the last 40 or more years, academic administrative lawyers have advocated an ever-more expansionary role for judicial review of administrative action, and their urgings have usually been well-attuned to similarly expansionist tendencies on the part of the judges. Expansionists grew accustomed to being on the winning side, both in Australia and England, but we in Australia are beginning to learn that nothing lasts forever, even while the English expansions continue at almost break-neck speed. Three High Court cases are especially noteworthy. They are *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*¹ ('Lam'); *NEAT Domestic Trading Pty Ltd v AWB Ltd*² ('NEAT Domestic'); and *Griffith University v Tang*³ ('Tang').

There will be ups and downs, of course, and it would take more than just three High Court decisions to turn around the ship of judicial review. There is nevertheless some considerable portent in those decisions. This article will examine only three sets of issues arising from the cases.

The first set of issues derives from *Lam*, so far as it scorned the language of legitimate expectations. That was entirely understandable and need have been nothing more than a repudiation of inarticulacy, were it not for the way it was used in *Tang*.

The second set of issues derives from *NEAT Domestic*, which ruled that the statutory privileges of Australia's monopolist bulk wheat exporter were unrestrained by any considerations of public interest. That was said to follow from the premises that the company concerned was subject neither to review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ('ADJR') nor common law judicial review. Both the premises and their relevance to the conclusion need examining.

The third set of issues is more complicated, because it comes bundled up with a number of other issues from which this article will attempt to keep its distance. *Tang* denied ADJR coverage of university decisions made under contract or any other

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1 (2003) 214 CLR 1.

2 (2003) 216 CLR 277.

3 (2005) 221 CLR 99.

consensual arrangement. That was relatively uncontroversial because *ADJR* is limited to decisions made under enactments, and there was a long line of authority that this meant (in part) that the enactment itself must be the source of the decision's force or effect. A contract's legal force comes from the general law, not statute. However the Court added a minimum force requirement – the decision's force or effect must be such that it creates or alters legal rights or obligations. That requirement was said to come from Queensland's equivalent of *ADJR*, but the Court suggested that in the field of federal judicial review, it could also be found in the constitutional concept of 'matter'. That need not have raised concerns either, because there can be no 'matter' before a federal court in a constitutional sense unless some kind of legal rights, duties or liabilities are at stake, and there can be no federal jurisdiction without a 'matter'. However *Tang* ruled that while the University's non-statutory student misconduct code promised natural justice, the Court would not enforce that promise, which was (applying *Lam*) a mere expectation rather than a legal entitlement.

Tang spells long-term trouble in two respects. First, it is the strongest indication so far that the High Court will resolve the long-running debate about the provenance of natural justice against the 'common law' school led originally by Mason CJ and in favour of the 'implied or imputed intention of Parliament' school, led originally by Brennan CJ. This is because *Tang*'s result would have been different if the misconduct code had been subordinate legislation. Secondly, and following on from this, *Tang* also signals doubts about the possibility of seeking judicial protection of any kind under relationships covered only by 'soft law' – guidelines, procedure manuals, internal disciplinary codes, and so forth.

Lam, *NEAT Domestic* and *Tang* have already generated an unusually large number of articles and comments, each presenting a somewhat different take on what the cases decided and therefore on their possible consequences. Many of the comments on *Lam* focused on its reversal of an earlier decision's attempt to patch over the dualist divide⁴ between domestic and international law, and they are irrelevant to this article.⁵ In any event, *Lam* can no longer be called a recent case. Even if one were to focus only on *NEAT Domestic* and *Tang*, however, there have been over 25 articles and comments so far,⁶ the great bulk of them extremely critical of the majorities' reasoning, both in

⁴ Namely, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁵ See *In re McKerr* [2004] 1 WLR 807.

⁶ For example: Christos Mantziaris, 'A "Wrong Turn" on the Public/Private Distinction: *NEAT Domestic Trading Pty Ltd v AWB Ltd*' (2003) 14 *Public Law Review* 197; Madeline Campbell and Peter Nicholas, 'Public Law Remedies and Private Bodies' (2003) 10 *Litigation Notes* 10; Ron Fraser, 'Developments in Administrative Law' (2004) 40 *AIAL Forum* 1; Andrew Buckland and Jayne Higgison, 'Judicial Review of Decisions by Private Bodies' (2004) 42 *AIAL Forum* 37; Neil Arora, 'Not so Neat: Non-statutory Corporations and the Reach of the *Administrative Decisions (Judicial Review) Act 1977*' (2004) 32 *Federal Law Review* 141; Graeme Hill, 'The *Administrative Decisions (Judicial Review) Act* and "Under an Enactment": can *NEAT Domestic* be reconciled with *Glasson*?' (2004) 11 *Australian Journal of Administrative Law* 135; Mark Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202; Caspar Conde, 'Accountability for the Exercise of "Public" Power: a Defence of *NEAT Domestic*' (2005) 46 *AIAL Forum* 1; Margaret Allars, 'Public Administration in Private Hands' (2005) 12 *Australian Journal of Administrative Law* 126; Graeme Hill, '*Griffith University v Tang*: Comparison with *NEAT Domestic*, and the Relevance of Constitutional Factors' (2005) 47 *AIAL Forum* 6; Daniel Stewart, '*Griffith University v Tang*, "Under an Enactment" and

doctrinal and policy terms. Underlying those criticisms is what appears to be a profound pessimism as to where the High Court is going in administrative law. The commentators are keeping excellent company. Kirby J condemned *NEAT Domestic* as a 'wrong turning'⁷ and 'alarming' for its 'serious reduction in accountability for the exercise of governmental power'.⁸ Combined with *Tang*, his Honour saw the two decisions as 'an erosion of one of the most important Australian legal reforms [namely, the *ADJR Act*] of the last century'.⁹ By contrast, his Honour was largely unfussed by *Lam's* disparagement of the terminology of 'legitimate expectations', a disparagement he saw as essentially semantic.¹⁰

One might well ask whether there is room for yet another article. Readers must judge that for themselves, but this article will differ in two respects. It will argue that the pessimism about the sustainability of some of the 'core' achievements of judicial review in the last 30 or so years has missed the mark. Specifically, there is no clear and present danger to Australia's expansionist cases regarding standing to sue and the expansion of natural justice beyond the realm of strict legal rights. Pessimism on those scores is misplaced. Secondly, however, this article will argue that the recent cases will make it very difficult for those seeking some purchase out of the internal guidelines, rule books and practice manuals of both public and private authorities. These are the 'soft laws' that abound in both public and private spheres — 'rules' with neither statutory nor contractual force. Australia's version of the rule against fettering statutory discretions has led its courts to decline to enforce soft law as such, whether

Limiting Access to Judicial Review' (2005) 33 *Federal Law Review* 526; Melissa Gangemi, 'Griffith University v Tang: Review of University Decisions Made "Under an Enactment"' (2005) 27 *Sydney Law Review* 567; Stephen Gageler, 'The Legitimate Scope of Judicial Review: the Prequel' (2005) 26 *Australian Bar Review* 303; Michael Will, 'Judicial Review of Statutory Authorities' (2005) 47 *AIAL Forum* 1; Daniel Stewart, 'Non-Statutory Review of Private Decisions by Public Bodies' (2005) 47 *AIAL Forum* 17; Patty Kamvounias and Sally Varnham, 'Doctoral Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?' (2005) 10 *Australian and New Zealand Journal of Law and Education* 5; Raymond Finkelstein, 'Crossing the Intersection: How Courts are Navigating the "Public" and "Private" in Judicial Review' (2006) 48 *AIAL Forum* 1; Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after *Griffith University v Tang*' (2006) 17 *Public Law Review* 22; Anthony E Cassimatis, 'Statutory Judicial Review and the Requirement of a Statutory Effect on Rights or Obligations: "Decisions Under an Enactment"' (2006) 13 *Australian Journal of Administrative Law* 169; and Michael D Kirby, 'Public Funds and Public Power Beget Public Accountability' (Paper presented at the Corporate Governance in the Public Sector conference, University of Canberra, 9 March 2006) available via <http://www.hcourt.gov.au/publications_05.html#MichaelKirby> at 23 March 2007.

⁷ *NEAT Domestic* (2003) 216 CLR 277, 300 [68]; and *Tang* (2005) 221 CLR 99, 133 [100].

⁸ *Tang* (2005) 221 CLR 99, 133 [100] (citations omitted).

⁹ *Ibid.* His Honour's respect for *ADJR* was not new. He said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94 [157] that the Act was 'overwhelmingly beneficial', although he did have one complaint, which was that he thought that *ADJR's* codification of the grounds of review might have 'retarded' (at 94 [157]) or 'arrested' (at 97 [166]) the common law's development. The author disagrees with that complaint. See Aronson, above n 6.

¹⁰ *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, 22-3 [67]-[68]. His Honour thought the term might retain some value, as indicating an objective judicial assessment of the content of procedural fairness.



overtly or via natural justice principles.¹¹ The natural justice consequences which Australian courts give to soft law are strictly procedural, so that soft law can be 'broken' if procedural unfairness is avoided (usually by giving prior warning).¹²

England's case law has been handling soft law issues for over 40 years now.¹³ Perhaps the greatest accelerant to their case law was the overthrow of their once-total prohibition against estoppel in public law.¹⁴ Decisions under the soft law of public authorities have been judicially reviewed on a number of grounds. These include procedural unfairness, error of law or misinterpretation of the rules,¹⁵ irrationality, abuse of power, and (very occasionally) substantive unfairness. The soft law decisions of private bodies exercising large disciplinary powers are also subject to judicial supervision in England on the same grounds, although procedurally that exercise is not called 'judicial review',¹⁶ because the soft law is given a somewhat fictional contractual status.

Speaking very broadly, the critical issue for Australia concerns judicial review's adaptability to the changing forms of public power. This article would not advocate following all of the English developments. Our courts should nevertheless recognise that public power is increasingly exercised from places within the private sector, by non-government bodies, and according to rules found in management manuals rather than statute books. If judicial review is about the restraint of public power, it will need to confront these shifts in who exercises public power, and in the rules by which they exercise it.

PART II – LAM

The issues in *Lam* are too well known to need more than a very brief sketch. Whilst serving a lengthy prison sentence for heroin trafficking, Mr Lam was officially warned that he might be deported because of his undoubtedly 'bad character'. He was given a chance to explain why he should not be deported, and he presented a comprehensive submission. This included material from the woman caring for his two children. The Department had told him that they wanted to contact the carer, but they changed their minds without warning him. He wanted to say that this was itself a breach of procedural fairness, not because he would have done anything different (because he would not), but simply because it was a promise broken without any prior warning, and therefore a negation of a 'legitimate expectation'. The argument was hopeless because there was no 'practical injustice',¹⁷ although there has understandably been

¹¹ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 128–9.

¹² *Ibid* 132–6, 359–64.

¹³ Since *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864; see Aronson, Dyer and Groves, above n 11, 115–17, 132–6.

¹⁴ Aronson, Dyer and Groves, above n 11, 351–8.

¹⁵ *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815 ('Datafin'). There are signs of unease with this approach, because it appears to treat soft law rules as if they had legal force: *R (Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd* [2002] EWHC 2379 (Admin), [68]–[74].

¹⁶ With the consequences that its originating process is different, and it is not heard in the Administrative Court (a Division of the High Court).

¹⁷ *Lam* (2003) 214 CLR 1, 14 [38] (Gleeson CJ).

some concern since *Lam* as to the circumstances in which 'practical injustice' might be considered a live issue and as to who might bear the evidential and legal burdens.¹⁸

The Court gave a range of reasons for rejecting Mr Lam's appeal to the concept of 'legitimate expectations'. Most of those reasons are not strictly germane to this article. As used in the cases, the 'expectation' was often something that the subject had not entertained in fact. Rather, the subject could more accurately be said to have 'naturally'¹⁹ or 'reasonably' assumed a certain course of conduct on the decision-maker's part or taken it for granted.²⁰ It is submitted that in such cases, it might be more straightforward to talk of 'reasonable assumptions'.

Where the decision-maker actually created the relevant expectation in the subject's mind (for example, by promising a certain course of conduct), then it is strictly superfluous to refer to a 'legitimate expectation'. Its legitimacy is not relevant. Its existence is indeed relevant, but only because the decision-maker was its cause. The focus should be on whether the decision-maker's conduct in making and then breaching the expectation was fair in the circumstances. Of course, there will usually be no unfairness if the subject was adequately forewarned of the decision-maker's change of course.²¹ However, *Lam*'s bottom line was that it is not necessarily a breach of natural justice to disappoint the expectation without prior warning. The focus must remain on whether the departure from the promised conduct was unfair in the circumstances, and it was clearly not in *Lam* itself, because Mr Lam had in effect conceded that he had not been misled into presenting anything less than his full case.

So far as 'legitimate expectation' was meant to indicate something akin to a vested legal right or interest deserving of natural justice protection, *Lam*'s judgments said that it was both unconvincing and unnecessary.²² Kirby J took no part in *Lam*, but he subsequently agreed that this usage of the term was a 'fiction' that is no longer necessary.²³

Acknowledging the redundancy of this particular usage of 'legitimate expectations' was welcome. Lord Denning had invented the term to describe the nature of a putative deportee's interest in his unexpired visa, but *Kioa v West*²⁴ had since delivered natural justice to putative deportees who had no semblance of legal entitlement because their visas had expired. *Lam*'s insistence that this use of 'legitimate expectations' was redundant was surely a win for administrative law's expansionists, although 'reaffirmation' might strictly be more accurate than 'win', because there were earlier judgments giving strong support to the view that there was a prima facie entitlement to natural justice whenever state administrative power was aimed directly at an

¹⁸ See: *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346; *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117, [80]-[83]; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162, 184-5 [81]-[84]; *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208; *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171, 174 [10], 197 [106], 200-1 [120]-[124].

¹⁹ *Lam* (2003) 214 CLR 1, 30-2 (McHugh and Gummow JJ).

²⁰ *Ibid* 45-7 (Callinan J).

²¹ As in *A-G (NSW) v Quin* (1990) 170 CLR 1.

²² *Lam* (2003) 214 CLR 1, 27-8, 36-8.

²³ *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, 22-3 [67]-[68].

²⁴ (1985) 159 CLR 550 ('*Kioa*').

individual on grounds personal to that individual.²⁵ In other words, natural justice had expanded from the protection of a person's interests, to the protection of a person. In *Kioa* itself, Brennan J had supported this expansion so that judicial review would keep pace with the extension of state power.²⁶ His Honour had argued that state power intruded into many facets of individual autonomy (an 'almost infinite variety of interests')²⁷ which were simply beyond meaningful analogy to 'legal rights or interests'. He had concluded that they were nevertheless equally deserving of natural justice protection, and that the terminology of 'legitimate expectations' gave him no assistance in coming to that conclusion.

Finally, and most importantly for *Tang*, all of *Lam's* judgments emphatically insisted that whatever may be said for or against a subject's 'legitimate expectations' (whether actually held or reasonably assumed), it was wholly impermissible that they be enforced as such. Although Mr Lam had disclaimed any argument to the contrary, the judgments correctly observed that his argument came very close. Mr Lam had argued that the only circumstance in which the promise could *not* be broken was where the subject was given adequate prior warning. In essence, the Court reasoned that if breaking a promise is fair if forewarned, then the critical test is fairness, not warning. Were it otherwise and fairness was to be irrelevant to Mr Lam's circumstances, then the Court would indeed have been enforcing expectations generated by promises.

Lam therefore rejected enforcement of expectations as such, and it explained this by saying that expectations were not 'substantive rights'. Whether the case was one where expectations would trigger a natural justice entitlement otherwise lacking,²⁸ or was simply a situation where they would assist in determining what might be procedurally fair in any particular context, the highest protection that natural justice gives to legitimate expectations is procedural. This will usually amount to a warning, and if natural justice is breached, the decision will be quashed, leaving the decision-maker free²⁹ to come to the same conclusion after warning the subject that the promise no longer holds. The Court said that to go further (as the English cases have done)³⁰

²⁵ See, eg, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 652; and *Annetts v McCann* (1990) 170 CLR 596, 598.

²⁶ *Kioa* (1985) 159 CLR 550, 616-17.

²⁷ *Ibid* 617.

²⁸ As where an official gave an undertaking or promise.

²⁹ As in *A-G (NSW) v Quin* (1990) 170 CLR 1.

³⁰ The Court was highly critical of *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213; and *R v Secretary of State for Education and Employment; Ex parte Begbie* [2000] 1 WLR 1115. The English search for overarching principles has unearthed 'legitimate expectations', 'abuse of power', 'unfairness' per se, equality of treatment, and 'good administration', and converted those into review grounds in their own right. The real issue has become when the court chooses to order the administration to deliver a substantive outcome, and on that issue, the cases and commentary are understandably unclear. Their lack of clarity is not assisted by a proliferation of categories. In essence, the cases seem to allow such orders in exceptional cases, where the judge believes that only a few will benefit and where the cost to the state will not outweigh the fairness of enforcing the substantive outcome. See *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237; *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744; *Abdi v Secretary of State for the Home Department* [2005] EWCA Civ 1363; and Iain Steele, 'Substantive Legitimate Expectations: Striking the Right Balance?' (2005) 121 *Law Quarterly Review* 300.

would be tantamount to converting a 'procedural' protection into a 'substantive right'.³¹

Two conclusions are inevitable. First, *Lam's* distinction between the 'procedural' protections of natural justice and 'substantive rights' meant that even if one were to speak of an 'entitlement' or 'right' to natural justice, it would still be something different from a 'substantive' right. That is really only a semantic point, but it will be submitted that it must be borne in mind when reading *Tang*. The second conclusion is that a decision-maker's promise can generate an expectation sufficient in itself to trigger the procedural 'right' to natural justice, even though the subject has no substantive rights at stake. That too must be borne in mind when reading *Tang*, which adds a worrying proviso.

PART III – NEAT DOMESTIC

So far as it covers the export of wheat in bulk, Australia's wheat market has long been subject to federal regulation, on the hypothesis that the international wheat market is subject to entrenched market failures, including anti-competitive conduct on the part of the United States and the European Union, and a lack of market transparency. Federal and State regulation was also upheld for a number of years on the basis that it could be used to protect the growers, levelling out the troughs and spikes in an otherwise volatile market. Federal regulation used to be effected through a statutory creation called the Australian Wheat Board ('the Board'), which was the sole owner of the export wheat 'pool'. In other words, the Board was a classic case of regulation through the rights of ownership – a common style of regulation before the era of privatisation and outsourcing. The Commonwealth government still retains a large measure of control over the wheat export market, although this is no longer achieved through its rights as owner.

At the time relevant to the *NEAT Domestic* litigation, legislation had abolished the Board's domestic monopoly in 1984, and amendments in 1998 to the *Wheat Marketing Act 1989* (Cth) (*Wheat Marketing Act*) had transferred the Board's wheat to a private sector company which was subsequently listed as AWB Ltd, a company incorporated by registration under the generic *Corporations Law* then applying. Its constitution required it to look out for its profits and the interests of wheat growers, and those requirements applied equally to its wholly owned subsidiary, AWB (International) Ltd ('AWBI'). A new regulator was established to replace the old Board. This was the Wheat Export Authority ('the Authority'), a statutory authority with very limited functions. Section 57 of the *Wheat Marketing Act* provided that anyone other than AWBI needed the Authority's approval before they could export in bulk, and no approval could be given unless AWBI also approved. Refusals on AWBI's part to accede to requests for permission to export would have risked action against it for breach of the restrictive trade practices provisions of the *Trade Practices Act 1974* (Cth) (*TPA*) were it not for s 57(6). Subsection (6) deemed AWBI's exports and 'anything ... done by [AWBI] under this section or for the purposes of this section' to have been 'specifically

³¹ In context, the distinction made in the judgments between 'procedural' natural justice and 'substantive rights' is addressed to the outcome of the case – between insisting on fair procedures, or on a specific outcome. See *Lam* (2003) 214 CLR 1, 21, 34 [105], 37 [118], 48 [148].

authorised' for the purposes of s 57. Conduct so 'authorised' attracted no liability for breach of the *TPA*'s restrictive trade practices provisions.

The issue in *NEAT Domestic* was whether AWBI's persistent blocking of NEAT's applications to the Authority for export approvals was 'specifically authorised' for the purposes of s 57(6). If not, then there was a chance of suing AWBI for breaching the *TPA*. NEAT argued that the refusals were not 'authorised' because they were 'unlawful' or even 'invalid' on the administrative law ground that AWBI had applied a blanket policy of refusing all applications, and had not considered NEAT's applications on their merits. AWBI had certainly been perfunctory and downright rude in its treatment of NEAT's applications, but need it have been anything else? As a private sector company legitimately focused on the profit motive, was it entitled to take the view that *any* relaxation of its export monopoly could constitute a threat to its own markets? Gleeson CJ and Kirby J thought not.

The joint judgment of McHugh, Hayne and Callinan JJ appeared to be radically different on this point.³² It not only said that AWBI *could* regard all parallel exports as a threat to its bottom line; it even hinted that this was the only view possible.³³ Two separate pieces of amending legislation have since pulled the rug out from underneath that particular argument. The *Wheat Marketing Act* was amended in 2003³⁴ to provide that when deciding whether to grant export consents, the Authority had to 'seek to complement' AWBI's net returns 'while at the same time seeking to facilitate the development of niche and other markets where the Authority considers that this may benefit both growers and the wider community'.³⁵

The second amendment occurred in 2006, as a short-term response to a public scandal. A royal commission report had upheld many serious allegations against AWBI's parent company in relation to its wheat sales to Iraq in contravention of the UN's oil-for-food sanctions program.³⁶ Both the government and the Authority were found to have been asleep on the job, with serious repercussions for Australia's wheat exports. The government's short-term fix was to secure temporary legislation³⁷ which did two things. First, it empowered the Minister to override any decision of the Authority approving or rejecting an application for export consent. Secondly, it transferred AWBI's role under s 57(3B) to the Minister, with an explicit direction that it be exercised according to the Minister's view of the public interest. At the time of writing, the government had not decided whether it would relinquish the Minister's temporary veto power over other would-be bulk exporters, and if so, whether that power would be restored to AWBI or to any other company. It seems fairly clear, however, that if the monopoly power is to remain, the Authority will have to be

³² In a practical sense, however, one should note that even on the minority approach, someone wanting export consent would have had to persuade AWBI that the latter's markets were not under threat. As the Chief Justice delicately hinted, companies would have been reluctant to reveal too much for fear that AWBI would snaffle the deal for itself: (2003) 216 CLR 277, 287 [19].

³³ (2003) 216 CLR 277, 297 [51]: 'Thirdly, it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.'

³⁴ By the *Wheat Marketing Amendment Act 2003* (Cth).

³⁵ *Wheat Marketing Act*, s 5A, inserted in 2003.

³⁶ Commonwealth, *Inquiry into Certain Australian Companies in Relation to the UN Oil-for-food Programme, Report of the Inquiry* (2006).

³⁷ *Wheat Marketing Amendment Act 2006* (Cth).

prodded from its torpor. One might also predict that any longer term controls over wheat exporting will have to be exercised on public interest grounds. *NEAT Domestic*, therefore, may soon be of largely historical interest so far as it related specifically to the wheat marketing laws.

However, *NEAT Domestic's* potential impact remains large because its judgments went further than addressing whether NEAT's pleaded ground of review had been made out on the facts or was ever available. The joint judgment's reasons for concluding that AWBI could legitimately oppose all parallel exports led their Honours to two further and far more significant conclusions. The first was explicit, namely, that AWBI was immune from judicial review's remedies, whether under *ADJR* or at common law. The second was implicit, namely, that not only were judicial review's remedies unavailable, but also its grounds, even in a 'private law' action (such as NEAT's damages claim for breach of the *TPA*).³⁸ These conclusions were not required for the disposition of the case, and it is therefore submitted that it is worth testing them.

Kioa held that the fact that *ADJR* applied (in those days) to migration decisions was irrelevant to the question of which (if any) of its grounds of review conditioned the valid exercise of those decisions.³⁹ In other words, the grounds of judicial review do not always come as a package. That result surely cuts both ways, so that the fact that one ground of judicial review is unavailable does not necessarily entail the unavailability of judicial review on any other ground.

Furthermore, one could make a case for the imposition of some of judicial review's principles even if one were to concede the unavailability of its remedies. Imagine, for example, that there had been two companies (NEAT and another) seeking approval to sell the same quantity and quality of wheat to the same buyer for the same price. Imagine further that NEAT's competitor won the approval because it bribed AWBI. The conduct surrounding the bribe would probably constitute a criminal offence even if the Authority were kept in the dark,⁴⁰ and one could surely argue that a criminally corrupt decision on AWBI's part was not 'specifically authorised' under s 57(6) of the *Wheat Marketing Act*, and therefore not protected from suit for violation of the *TPA*. Just as private sector clubs and sporting associations are often required to observe natural justice even though judicial review is not the vehicle for enforcing that requirement,⁴¹ there was room in *NEAT Domestic* for arguing that AWBI's conduct was subject to some of judicial review's grounds if not its remedies. Gleeson CJ's dissent raised similar concerns, when he supposed that AWBI would not be 'authorised' to act on the bases of personal animosity or favouritism.⁴²

The great bulk of the literature which is critical of *NEAT Domestic* has tended to focus on the reasons for its conclusion that judicial review was unavailable as against

³⁸ The joint judgment's view that AWBI was not amenable to administrative law remedies was made abundantly clear in two passages: *NEAT Domestic* (2003) 216 CLR 277, 297 [49]-[50], 300 [64]. Its view on the availability of judicial review's grounds was not so clearly expressed, although there was a statement at 297 [51] that 'it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.'

³⁹ (1985) 159 CLR 550, 566-7, 576-7, 593-4, 625, 630.

⁴⁰ See *Criminal Code Act 1995* (Cth) ss 135.4(7) and 141.1.

⁴¹ Aronson, Dyer and Groves, above n 11, 466-7.

⁴² *NEAT Domestic* (2003) 216 CLR 277, 288 [22].

AWBI, whether under *ADJR* or at common law. Taking *ADJR* first, the majority held that the company's power to grant or refuse its consent came from its status as a normal private sector company, rather than from the *Wheat Marketing Act*. That Act was seen merely as making consent a precondition to an approval from the Authority.⁴³ It is indeed valid to distinguish between Acts which empower or merely recognise a person's consent (or veto), but reasons need to be given for choosing either characterisation.

One could conceive of a planning law which conditions the success of my neighbour's development application upon my consent. That would hardly make my refusal an exercise of public power sufficient to require its exercise according to judicial review's principles. In *NEAT Domestic* itself, the majority said that it was 'neither necessary nor appropriate to read' AWBI's veto power as deriving from the *Wheat Marketing Act*.⁴⁴ It was certainly not 'necessary' because the Act did not explicitly address the point,⁴⁵ but one might question whether it was also inappropriate. The majority's only hint as to why it was inappropriate to read AWBI's decision as one made under the *Wheat Marketing Act* was that the Act carefully distinguished the roles of the company and the Authority, and that it was easier to imply 'public interest' limitations on the Authority's discretion than on AWBI's role. In contrast, Gleeson CJ thought that it was wrong to view AWBI as representing only its members' interests. Its monopoly was, in his Honour's view, conferred because the company was thought to represent wider interests, including those of other growers, and the general public.⁴⁶

The majority gave two more reasons for its conclusion that judicial review was unavailable, but it seems that these related more generally to common law judicial review than to *ADJR* review. Both reasons linked back to AWBI's nature as a private sector company focused on maximising its profits. This article has already mentioned one of those reasons, which was the view that the company could reasonably regard *all* parallel exports as constituting some sort of threat to its own profits. The other reason was that the company's private status and profit-maximising character pulled against interpreting the *Wheat Marketing Act* as imposing any enforceable duty upon the company even to consider an application (to the Authority) for export approval, let alone to consider it with some undefined public interests in mind.⁴⁷ It seems that their Honours thought it improbable that the *Wheat Marketing Act* would have intended to impose the same or similar requirements to consider 'public' interests on two bodies at two different stages.

It is submitted that the element common to each critical component in the majority's reasoning was not (as some have contended) that AWBI was 'private'. That fact was

⁴³ *NEAT Domestic* (2003) 216 CLR 277, 297–8. The joint judgment of Gummow, Callinan and Heydon JJ in *Tang* (2005) 221 CLR 99, 127–8 [77] confirmed this interpretation of *NEAT Domestic* in relation to *ADJR*. Mantziaris and McDonald, above n 6, 43–4 contended that *Tang*'s explanation had overlooked *NEAT Domestic*'s other reasons for denying the availability of judicial review. With respect, however, those other reasons went to the possibility of common law judicial review.

⁴⁴ *NEAT Domestic* (2003) 216 CLR 277, 298 [54] (emphasis added).

⁴⁵ Although one might point to s 57(6) which (as noted above) talked of 'anything ... done by [AWBI] under this section or for the purposes of this section' (emphasis added).

⁴⁶ *NEAT Domestic* (2003) 216 CLR 277, 290–1 [27]–[29].

⁴⁷ *Ibid* 298–9 [57]–[62].

taken as the starting point of an inquiry which assumed (for the sake of argument) that judicial review and its principles might sometimes apply to private bodies.⁴⁸ Rather, the common element was the perceived incompatibility of a profit-maximising company having to pay regard to the interests (including the profits) of others.

One of public law's classical building blocks has been the difference in starting points between public and private bodies. Provided they do not invade other people's rights or violate positive law, private actors are not legally obliged to consider the interests of others, let alone to further those interests. This assumes an overall public benefit (at least in the economic sphere) from a society composed of entirely self-regarding autonomous individuals. Public authorities start with an opposite presumption, that all public power is held on the public's behalf, to the exclusion of the personal interests of those who wield it. The assumption here is that office-holders can act without regard to their self-interests, an assumption, incidentally, which public choice theory would deny. Each assumption has its fierce supporters and detractors, but Anglo-Australian administrative law has rarely questioned this particular building block. Its best-known exposition appeared unchanged in the late Professor Wade's work through nine editions:

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. ... The whole conception of unfettered discretion is *inappropriate* to a public authority, which possesses powers solely in order that it may use them for the public good.⁴⁹

The word here italicised is axiomatic, just as it was in *NEAT Domestic* – the imposition of public law restraints upon private actors is axiomatically '*inappropriate*'. By contrast, European legal systems have long restrained private rights-holders with variants of an 'abuse of rights' concept,⁵⁰ a concept unknown to the common law.⁵¹

The trouble is that a binary divide between utter selfishness and saintly altruism cannot work in a world where power and the institutions which wield it are hybridised, being neither wholly private nor public. The imposition of other-regarding duties upon public actors, and the denial of such duties in the case of private actors, assumes that public actors perform only public functions, and that private actors perform only private functions. Private bodies performing public functions simply fail to accord with the traditional assumptions. Even if self-interest is the very essence of an ideal-type private *body*, it makes no sense to conclude that any governmental *functions* it might also be exercising are therefore immune from public law considerations.

⁴⁸ Ibid 297 [49]–[50].

⁴⁹ Most recently HWR Wade and CF Forsyth, *Administrative Law* (9th ed, 2004) 355 (citations omitted, emphasis added).

⁵⁰ See Gianluigi Palombella, 'The Abuse of Rights and the Rule of Law', and András Sajó, 'Abuse of Fundamental Rights or the Difficulties of Purposiveness', in András Sajó (ed), *Abuse: the Dark Side of Fundamental Rights* (2006) 5–27, 29–98 respectively.

⁵¹ See *Mayor of Bradford v Pickles* [1895] AC 587; Michael Taggart, *Private Property and Abuse of Rights in Victorian England: the Story of Edward Pickles and the Bradford Water Supply* (2002).



Hybrid bodies fit neither the public nor the private ideal types. One could add that even if the distinction were to work as a merely indicative criterion of the availability of judicial review's *remedies*, it could not work as any sort of criterion for determining which one or more of judicial review's *principles* should restrain the exercise of public power by private bodies.

Even if AWBI's commercial focus made that company an inappropriate repository of a duty to consider the commercial interests of others, that was no reason to remove the company entirely from the regime of judicial review and its remaining principles. AWBI had more than just the ordinary power of a company to say 'no' to a question from the Authority. It had more power than the Authority itself, which had no relevant function without the company's consent. Whether the *Wheat Marketing Act* granted or merely recognised that power was a distinction relevant only to the issue of *ADJR* coverage. It was not put forward as the test for determining the availability of common law judicial review. It seems that the common law's judicial review was held to be unavailable because the Court did not envisage any middle ground between utter selfishness and complete altruism.

If *NEAT Domestic* is disappointing, therefore, it is not because it asked the wrong question, but because it posed the wrong test for answering it. The real question for common law judicial review should be whether AWBI was exercising public or private power.⁵² That is how the English cases frame the issue,⁵³ although *NEAT Domestic* framed it in terms of the distinction between self-centred and altruistic bodies.⁵⁴ Framed so obliquely, one should not be too surprised that the question received an answer so plainly wrong.

PART IV – TANG

Of the three major cases on which this article focuses, *Tang* is both the most complex and the most worrying, not because of its outcome (which was entirely predictable) but because of its reasoning. The University had terminated the enrolment of a doctoral student (Ms Tang) who had allegedly been caught fabricating her research results. Ms Tang alleged breaches of natural justice and of the University's disciplinary code. What sank her case was that the University's code was soft law – it was neither

⁵² See: Mantziaris, above n 6; Mantziaris and McDonald, above n 6, 45–7. Mantziaris and McDonald went further than this article, saying that the public/private distinction was the real issue for *Tang* and also, so far as *ADJR* was involved, for *NEAT Domestic*. It is submitted that *ADJR*'s jurisdictional requirement that there be an administrative decision under an enactment cannot be entirely morphed into the common law's public/private power inquiry. It must be taken seriously as an issue of statutory interpretation, albeit one that is inevitably influenced by normative considerations. That is an unfortunate consequence of *ADJR*'s design; see Aronson, above n 6, 207–9. If there is any part of *ADJR* which could serve to incorporate the function of the common law's public/private distinction, it must be found in ss 5, 6 and 7 which all allow applications for 'an order of review' for various grounds, and in s 16's description of those 'review' orders, a description which amounts to a list of the remedies typically available in judicial review at common law. Cf the case law on s 9 of *ADJR*: Aronson, Dyer and Groves, above n 11, 80–2.

⁵³ The leading English case is *Datafin* [1987] 1 QB 815. Australian reactions to *Datafin* are difficult to gauge: Aronson, Dyer and Groves, above n 11, 127–32.

⁵⁴ Only Kirby J saw *Datafin*'s relevance to the issues in *NEAT Domestic* (2004) 216 CLR 277, 313–14 [112]–[115].

primary nor subordinate legislation. She failed in her attempt to invoke the judicial review jurisdiction of Queensland's equivalent of *ADJR*, because the relevant decisions had not been made 'under an enactment'.⁵⁵

The same result would have been on the cards if the University rules which Ms Tang alleged were broken had been contractual. The Full Court of the Federal Court had long decided against *ADJR* coverage for contractual decisions, whether those were decisions about awarding contracts or decisions 'under' existing contracts.⁵⁶ However, neither party alleged a contractual relationship between Ms Tang and the University. Nor had Ms Tang sought common law judicial review.

In brief, *Tang's* joint judgment said that there were two components of *ADJR's* requirement that reviewable decisions be made 'under an enactment':

The determination of whether a decision is 'made ... under an enactment' involves two criteria: 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. A decision will only be 'made ... under an enactment' if both these criteria are met.⁵⁷

The majority's view of the first component is welcome.⁵⁸ Their Honours said that it is easily satisfied, because even if the relevant Act did not 'require' the decision,⁵⁹ or explicitly authorise it, it will frequently be appropriate to imply that a decision was 'authorised'. For example, a decision to make a contract is sufficiently 'authorised' by an Act which gave its maker contractual capacity. In that sense, statutes 'authorise' the contracts of all statutory authorities and all companies whose corporate status derives from statute. However, a statutory capacity to decide something is only half the battle. The second step is to ask whether the 'decision ... itself' has created, altered or imposed legal rights, duties or liabilities. The existence of this second step is not immediately obvious from *ADJR* itself, but *Tang's* implication of some sort of extra requirement was readily understandable.

If *ADJR* had extended to the contractual decisions of all companies incorporated under statute and to all statutory authorities, there would have been a huge disconformity between the scope of judicial review under *ADJR* and the common law. As already noted, English judicial review has extended to private bodies so far as they are exercising public power (the *NEAT Domestic* problem), an extension which has shifted focus from the nature or status of the decision-making body to the nature of its power. That in its turn has led to decisions rejecting judicial review coverage of government's contractual decisions, mainly (if not solely) because their power is consensual.⁶⁰ One can understand the High Court's attempt to keep the scope of *ADJR*

⁵⁵ *Judicial Review Act 1991* (Qld) s 4(a) ('JRA').

⁵⁶ *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164.

⁵⁷ (2005) 221 CLR 99, 130–1 [89].

⁵⁸ It is particularly welcome for overturning some Federal Court cases which were ambivalent about *implied* statutory authority for decisions, and others which turned on the proximity between the challenged decision and the relevant Act.

⁵⁹ If there is a dominant image of administrative power, it is that it is discretionary.

⁶⁰ *R v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan* [1993] 1 WLR 909 ('*Aga Khan*'); and *Hampshire County Council v Supportways Community Services Ltd* [2006] EWCA Civ 1035. *Aga Khan* has been frequently criticised for its treatment of *all* contracts as 'consensual', but it is still good law. See Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24; and *R (Mullins) v Appeal Board of the Jockey Club* [2005]



and common law judicial review roughly in parallel. It is that attempt which underpinned the joint judgment's explanation of why *ADJR* provides no coverage to contractual decisions.⁶¹ The judgment explained that a decision to make a contract has no binding consequences until the counterparty consents, at which point the consequences are provided by the general law and not by statute. Similarly, decisions under existing contracts generally owe their force only to the general law of contract, and not to statute. The judgment emphasised the consensual nature of contractual power, in contrast to a statutory power *unilaterally* to affect another's rights or obligations.⁶² There is an obvious parallel with the common law's reasons for refusing judicial review of contractual decisions.

It is submitted that the requirement that the decision should 'itself' affect rights or obligations was not intended to be taken literally. Whether it is a decision to make a contract or one made under an existing contract, it is submitted that the decision will 'itself' have the relevant effect if it *triggers* statutory consequences with impacts in the realm of legal rights or obligations.

The joint judgment's extended explanation of why *ADJR* provides no coverage of contractual decisions was relevant in *Tang*, even though neither party had alleged a contractual basis for the University's misconduct rules. The judgment characterised the relationship between Ms Tang and the University as merely 'consensual', although its consensual nature was weaker than that applying under contract, because it was terminable by either party at will, being based upon 'mutuality'.⁶³ If the University's relationship with its student was truly consensual and terminable at will, then the judgment reached the only conclusion available, because the University could hardly be said to have 'breached' a provision in a code which imposed no legal restraints on either party. Further, the same result would have applied even if Ms Tang had sought common law judicial review.

Tang's real disappointment, however, lies in its conclusion that there was nothing more to the university-student relationship than mutual consent. The relationship between universities and their students is notoriously unequal. That alone would not warrant calling universities' power 'public', but there are additional factors. Universities receive massive public support in specie and in kind from State and federal governments. Depending on the university's principal location, they pay the price of having State, Commonwealth or Territorial government nominees on their governing bodies. University degrees receive legislative 'brand' protection against non-accredited bodies handing out awards with the same or similar titles. Students can borrow against their future income tax liabilities to pay for their fees. Each jurisdiction's Ombudsman has jurisdiction over university decisions and conduct, and

EWHC 2197 (Admin) ('*Mullins* 2005'). The English courts assess the lawfulness of disciplinary decisions of professional organisations according to the same grounds (they call them 'supervisory'), regardless of whether the organisation is legislatively or contractually based. Only the procedure for invoking the court's jurisdiction is different. See: *Mullins* 2005 [2005] EWHC 2197 (Admin); *Bradley v Jockey Club* [2005] EWCA Civ 1056; *National Greyhound Racing Club Ltd v Flaherty* [2005] EWCA Civ 1117; *Mullins v McFarlane* [2006] EWHC 986 (QB); and *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 (QB).

⁶¹ *Tang* (2005) 221 CLR 99, 128–9 [81]–[82].

⁶² *Ibid* 129 [82].

⁶³ *Ibid* 131 [91].

each jurisdiction's Auditor General has jurisdiction. Many universities have their State Governor as official visitor. Ministers and oppositions alike freely offer their views on how universities should be run and even, on occasion, what they should teach. Even if one were to apply as an indicative test the old distinction between self-regarding and altruistic bodies, universities would surely be treated as bound to act in the public interest, and none of them would contend that they do otherwise.

One could produce a tortured analysis of the relationship between each statute and each university to sustain each of these points in the argument, but the end result would be obvious. More importantly, it is submitted that the joint judgment itself would not deny the 'publicness' of the universities' power in a very general sense. What counted in that judgment was not whether the University was exercising power that could be called 'public', but whether that power's impact could be traced to a statute or subordinate legislation. In other words, what mattered was that the University's academic misconduct code lacked statutory force. The code could have been brought into force as subordinate legislation, and if it had, then *ADJR* would have provided coverage and, it is submitted, the judgment would also have seen no obstacle to common law judicial review. This appears reasonably clearly from the following passage:

Nor is it to the point that the Council, rather than exercise its powers of delegation to the Committees involved, might have exercised its power to make university statutes or rules. The exercise of one rather than another concurrent power available to the University is insufficient to attract the Review Act [Queensland's equivalent of *ADJR*] to decisions later made by the Committees.

The decisions of which the respondent complains were authorised, albeit not required, by the University Act. The Committees involved depended for their existence and powers upon the delegation by the Council of the University under ss 6 and 11 of the University Act. But that does not mean that the decisions of which the respondent complains were 'made under' the University Act in the sense required to make them reviewable under the Review Act. The decisions did not affect legal rights and obligations. They had no impact upon matters to which the University Act gave legal force and effect. The respondent enjoyed no relevant legal rights and the University had no obligations under the University Act with respect to the course of action the latter adopted towards the former.⁶⁴

Some important conclusions follow if this reading of *Tang* is correct, namely, that it was the lack of statutory force in the University's academic misconduct code which made all the difference. In one sense, that reading is obvious because *Tang*'s issue was whether the challenged decision was made 'under an enactment' for *ADJR* purposes. However, the joint judgment's conclusions in the second paragraph of the above quotation were also relevant to common law judicial review in the exercise of federal jurisdiction. The judgment rightly sought to give Queensland's *JRA* the same interpretation which would apply to cases brought under the Commonwealth's *ADJR Act*. In the Commonwealth context, the *Constitution* restricts the exercise of judicial power to the resolution of 'matters', a term which requires the presence of 'some immediate right, duty or liability to be established by the determination of the Court.'⁶⁵

⁶⁴ Ibid 132 [95]-[96].

⁶⁵ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

The judgment's exposition of the two components to *JRA*'s requirement that the challenged decision be made under an enactment stated that it drew 'support' from the need to construe the same term as it occurs in *ADJR* in a manner which accommodates the constitutional requirement that there be a 'matter' for judicial resolution.⁶⁶ The inference was that there were two reasons for saying that *Tang*'s result would have been the same, even if one were to hypothesise switching its facts from a Queensland university to the Canberra-based Australian National University ('ANU'). The ANU is subject to *ADJR*. The first reason would have been based purely in the statutory construction of *ADJR*. However, that construction would have received 'support' from the federal judiciary's restriction to the resolution of 'matters', because Ms Tang's allegations would have failed to raise a 'matter'. There would have been no 'matter' in a constitutional sense because the University neither created nor overrode any relevant legal rights of Ms Tang, and the University lacked any relevant legal obligations. On the other hand, there would have been a 'matter' if any one or more of those three factors were present. The inference that there would have been no 'matter' on the hypothesised facts means that both common law and *ADJR* review would have been unavailable against the ANU.

It is beyond the scope of this article to analyse the complexities of the constitutional learning on what is needed to constitute a 'matter' for the purposes of federal jurisdiction. One can note, however, that purely advisory opinions are said to lie outside the definition of 'matter' and, as importantly, it is not entirely clear when an opinion might be said to be purely advisory.⁶⁷ Declaratory relief used to be restricted to cases where other relief was either granted or claimable, but that changed over a century ago with the introduction of the new Judicature Rules, allowing the court to 'make binding declarations of *right* whether any consequential relief is or could be claimed, or not'.⁶⁸ The word here italicised has long been a puzzle, because the provision has been acknowledged as providing for declaratory relief even though there is no cause of action. In effect, the ability to seek declaratory relief *is* the 'right'. Gibbs ACJ said in *Sankey v Whitlam* that 'the word "right" ... is used in a sense that is wide and loose'.⁶⁹ The English Rules have dropped it,⁷⁰ but not before their courts started referring to 'the development of a new advisory declaratory jurisdiction'.⁷¹ In Australia, Hutley JA said that 'right' is used in a sense broad enough to go beyond any legal bonds between the parties, but is still confined to the 'sphere of legal relations'.⁷² That might even stretch to allowing declaratory relief against a club for breach of its rules at the instance of a non-member.⁷³ Until *Tang*, one would not have doubted the availability of at least declaratory relief to someone in Ms Tang's position. Even if her

⁶⁶ *Tang* (2005) 221 CLR 99, 131 [90].

⁶⁷ See Mantziaris and McDonald, above n 6, 30–41; Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188, 204–7.

⁶⁸ O 25, r 5 (UK) (emphasis added). Every Australian Supreme Court has an equivalent provision, as does the Federal Court.

⁶⁹ (1978) 142 CLR 1, 23.

⁷⁰ *Civil Procedure Rules 1998* (Eng) Pt 40.20.

⁷¹ *Re S* [1996] Fam 1, 18. See also *Re F* [2001] 3 Fam 38; *HL v United Kingdom* (2004) 81 BMLR 131 (ECtHR); but cf *Re V* [1997] 2 FCR 195.

⁷² *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corp* [1977] 1 NSWLR 43, 65.

⁷³ *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759.

relationship with the University was based upon 'mutuality', the University had always asserted its intention to abide by its own 'rules', and that would have sufficed for the declaratory jurisdiction of a State Supreme Court.⁷⁴ One of the concerns flowing from *Tang* must be whether it will lead to a narrowing of the availability of declaratory relief when it is sought in the exercise of federal jurisdiction.

PART V – DISENTANGLING TANG

Tang has come in for some fierce criticism on the ground that it effectively puts both statutory and common law judicial review off-limits for litigants without an existing or putative legal right, duty or liability. The argument is that *Tang* has narrowed the concept of 'matter' by ruling that 'legal rights, duties or liabilities' no longer include 'interests' falling short of those three terms. The critics conclude from this that *Tang* undermines the liberalisation of the rules about standing to sue, and that it undermines the expansion of natural justice to realms where (as in *Kioa*) the subject has no legal rights or interests to protect. It is submitted that these criticisms have missed their proper target.

Taking the standing rules first, it is submitted that those without legally recognisable rights, duties or liabilities will still have standing to sue if they are relevantly aggrieved or affected. *Tang* explicitly acknowledged that the cases on standing are no longer rights-focused.⁷⁵ Kirby J's dissent alleged that the majority's view of a 'matter' meant that there was no point in having liberalised standing rules, because a case would never get to that point if a case with interests less than rights would never meet the new test of 'matter'.⁷⁶ With respect, that is correct only if one were to treat the requirement that there be some legal right, duty or liability as one which falls only upon the subject who challenges the government party's decision or conduct. Despite some post-*Tang* confusion as to whether that was the majority's intent,⁷⁷ it is submitted that the requisite rights, duties or liabilities need not belong to⁷⁸ or be imposed upon the subject who is challenging the government action. It will remain sufficient to constitute a 'matter' if the subject is challenging a government party for breach of a legal restriction upon the latter's capacity or powers, although the challenge may have to be by common law judicial review or even a non-supervisory remedy rather than by review under *ADJR*. For example, a government party purporting to enter into a contract in breach of a legislative restriction can still be

⁷⁴ See Aronson, Dyer and Groves, above n 11, 785–8. However, Cooper J said in *Direct Factory Outlets Pty Ltd v Westfield Managements Ltd* (2003) 132 FCR 428, 433–4 that rights, duties or liabilities must still be at stake, although these can relate or belong to a third party. In other words, his Honour saw the liberalisation of the declaratory jurisdiction as going no further than freeing the need for the opposing parties to have correlative interests.

⁷⁵ (2005) 221 CLR 99, 117 [44].

⁷⁶ *Ibid* 144 [135], 152 [152].

⁷⁷ *Guss v Deputy Commissioner of Taxation* (2006) 152 FCR 88; SLR in *Guss v Deputy Commissioner of Taxation* [2006] HCATrans 628.

⁷⁸ That much is obvious from *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.



corrected by court order, even though the unlawful decision to enter the contract was not a decision under an enactment for ADJR purposes.⁷⁹

Nearly 15 years before *Tang*, the High Court granted declaratory relief to a person and his company who were acknowledged to have no relevant legal rights. That was in *Ainsworth v Criminal Justice Commission* ('*Ainsworth*'),⁸⁰ where the Commission was held to have breached its natural justice obligations towards the applicants. Without giving them any warning, let alone a chance to defend themselves, the Commission had been highly critical of the applicants in a report it had sent to Parliament, but its Act protected it from defamation liability. Brennan J said that the Commission's report did not affect the [applicants'] ... rights or liabilities and it did not subject their rights or liabilities to any new hazard. There has been no exercise of a statutory power the setting aside of which would change the [applicants'] legal rights or liabilities. The only, though significant, way in which the Report affected the interests of the [applicants] was by damaging their reputations.⁸¹

The critical factor for Brennan J was whether the Commission was exercising statutory power. His Honour was extremely doubtful as to the availability of judicial review if the Commission had been exercising non-statutory or prerogative power.⁸² His judgment was in that respect simply one of several instalments in a debate that continues to this day as to whether some⁸³ or all of judicial review's grounds must be traceable to statute, or whether (and if so, in what circumstances) some grounds have a common law provenance such that they can restrict the exercise of non-statutory public power.⁸⁴ However, Brennan J had no doubt about the applicants' entitlement to declaratory relief, because the Commission was exercising statutory power, and:

the broad purpose of judicial review is to ensure that statutory authority, which carries with it the weight of State-approved action and the supremacy of the law, is not claimed for or attributed to decisions or acts that lie outside the statute.⁸⁵

His Honour was undeterred by the consideration that anyone could write a report, albeit without an immunity from defamation liability.⁸⁶ For Brennan J, therefore, judicial review's primary job was to enforce the statutory limits to the exercise of public power. It was neither limited to the protection of an applicant's rights,⁸⁷ nor limited to the protection of anyone's rights or interests. The latter proposition emerged only inferentially in *Ainsworth*, but his Honour had already made it explicit only two years earlier, in *Attorney-General (NSW) v Quin*.⁸⁸ His Honour there insisted that the court's role in judicial review was 'the declaration and enforcing of the law which

⁷⁹ *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, 173 had thought that ADJR might apply to such decisions, but critics have asked how a decision's illegality could make it a decision under an enactment when it is not under an enactment if made legally. See Mantziaris and McDonald, above n 6, 42-3.

⁸⁰ (1992) 175 CLR 564.

⁸¹ *Ibid* 582-3.

⁸² *Ibid* 584-5.

⁸³ Most of the cases concerned the natural justice grounds, but the debate extends in principle to other grounds.

⁸⁴ Aronson, Dyer and Groves, above n 11, 96-113.

⁸⁵ *Ainsworth* (1992) 175 CLR 564, 584-5.

⁸⁶ *Ibid* 585-6.

⁸⁷ And it could not have been, in either *Kioa* or *Ainsworth*.

⁸⁸ (1990) 170 CLR 1, 36.



determines the limits and governs the exercise of the repository's power', regardless of whether that might achieve the correction of 'administrative injustice or error'.⁸⁹ The focus on illegality would in his Honour's view take precedence over a focus on rights or interests:

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.⁹⁰

The 'consequence' to which his Honour referred in *Quin* was, with respect, fairly obvious – particularly in light of the liberalisation of the rules as to standing and *Kioa*'s extensions to the scope of natural justice. The fact that Gummow J quoted that passage with approval in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*⁹¹ therefore makes it even less probable that his Honour would have intended *Tang*'s joint judgment (in which he participated) to be taken as an implied repudiation of that aspect of *Quin*. There can still be a 'matter', therefore, even though the relevant government decision impacts only on mere interests.

The second major concern raised by *Tang*'s critics relates to the future of natural justice. Here the critics are closer to the mark, but still not directly on-target. The joint judgment said that 'under private law',⁹² Ms Tang's legal relationship with the University was unaffected by her expulsion, because she had 'at best a consensual relationship, the continuation of which was dependent upon the presence of mutuality'.⁹³ Her expulsion changed no legal rights or obligations as between the parties. In other words, Ms Tang had no private law right to delay that withdrawal, and the University had no private law obligation to maintain its consent. If it had been otherwise and either she or the University had private rights or obligations affected by the expulsion decision, there would have been one less hurdle to the conclusion that it was a decision 'under an enactment'. The joint judgment then stated:

It may, for the purposes of argument, be accepted that the circumstances had created an expectation in the respondent that any withdrawal from the PhD candidature programme would only follow upon the fair treatment of complaints against her. But such an expectation would create in the respondent no substantive rights under the general law, the affecting of which rendered the decisions she challenged decisions made under the University Act. What was said by Kiefel J⁹⁴ and Lehane J⁹⁵ on the point in *Lewins*, and subsequently by this Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*,⁹⁶ supports that conclusion.⁹⁷

⁸⁹ Ibid 35–6.

⁹⁰ Ibid 36.

⁹¹ (2005) 223 ALR 171, [16].

⁹² (2005) 221 CLR 99, 131 [91].

⁹³ Ibid.

⁹⁴ (1996) 68 FCR 87, 96–7.

⁹⁵ Ibid 103–4.

⁹⁶ (2003) 214 CLR 1, 27–8 [81]–[83], 48 [148].

⁹⁷ (2005) 221 CLR 99, 131–2 [92].



That is a difficult passage. It will be recalled that *Lam* characterised an 'entitlement' to natural justice protection as a 'procedural' right, rather than a 'substantive' right. Assuming the same distinction in *Tang*, therefore, the University's 'promise' (by way of its academic misconduct code) of fair treatment neither impaired nor regulated its capacity to withdraw its consent to their relationship at any time. If their relationship had been restrained by substantive rights or obligations, then the validity of any expulsion decision might well have depended upon the University either honouring its code or giving fair warning of impending dishonour.

It was one thing for *Lam* to say that bureaucrats' promises generate only procedural protections. *Tang* took this a step further by saying that they generate nothing at all, unless they are made to a rights-holder, or made by an obligation-holder, or both. *Tang* treated bureaucrats' promises of procedural fairness as effective only in the context of decisions affecting substantive rights or obligations. In effect, if the source of natural justice is merely a bureaucrat's promise, there must be something else that the promise protects or restricts – something which conforms to the constitutional requirement of a right, duty or liability. One of *Tang*'s results, therefore, is the contrast between the scope of procedural fairness in statutory and non-statutory settings. It is argued that in statutory settings, *Kioa* and *Ainsworth* remain unaffected by *Tang*, so that a statutory power can still be conditioned upon the observance of procedural fairness even where there are no rights to protect.⁹⁸ In non-statutory settings, however, natural justice cannot exist by itself – it needs something 'substantive' to protect or enforce. Beyond that, *Tang* did not explore whether (or in what circumstances) natural justice can exist in non-statutory settings where there is something substantive to protect or enforce.

Therefore *Tang* did not resolve the debate as to whether natural justice is a construct of statutory interpretation. *Tang* left unexplored those cases in which natural justice applies to contractually-based decision-making. Such cases have typically involved the disciplinary decisions of professional and sporting associations. In terms of procedure, contractually sourced natural justice obligations are not enforced by applications for 'judicial review', although there is an obvious cross-over of doctrine.⁹⁹

PART VI – SOFT LAW AND NON-STATUTORY POWER

If the procedural restraints of natural justice cannot exist in a vacuum, their context must be the restraint of 'power'. In the judicial review context, that appears to mean the decision-maker's power unilaterally to alter (and perhaps even to create) legal rights or obligations. *Tang*'s exclusion of consensually based power can be taken to limit the scope of judicial review, although it should not be taken to deny the availability of natural justice protections on a contractual basis.

Nor should *Tang* be taken as rejecting judicial review of the exercise of any other sort of non-statutory public power. Strictly speaking, *Tang* did not settle that particular

⁹⁸ Of course, a statute such as a Bill of Rights could impose natural justice obligations upon administrative decision-makers exercising non-statutory powers: see *Lamb v Massey University* [2006] NZCA 167.

⁹⁹ That cross-over is complete in England: *Mullins* 2005 [2005] EWHC 2197 (Admin); *Bradley v Jockey Club* [2005] EWCA Civ 1056; *National Greyhound Racing Club Ltd v Flaherty* [2005] EWCA Civ 1117; *Mullins v McFarlane* [2006] EWHC 986 (QB); and *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 (QB).

debate because the sole question on appeal was the scope of Queensland's version of *ADJR*. However this article has already noted the joint judgment's indications that Ms Tang would have lost a common law judicial review application in the exercise of federal jurisdiction if she had been an ANU student. Had the ANU's hypothetical university code been 'hard law', it would have constituted an 'obligation' upon the university sufficient to satisfy the constitutional requirement of a 'matter', and been judicially enforceable even if Ms Tang lacked any 'substantive' rights.¹⁰⁰ Had the ANU's hypothetical university code been 'soft law' (as in the case of the Griffith University code), it would have failed to engender substantive rights or obligations sufficient to meet the constitutional requirement of a 'matter'. In other words, soft law is not binding as such, even though it can generate the procedural obligations of natural justice if there are other substantive rights or obligations to protect or enforce. Those substantive rights or obligations can be sourced to statute or contract, but the question which now arises is whether they can also be sourced in other ways to the common law.

Queensland's *JRA* differs from the Commonwealth *ADJR* in only one material respect. It contemplates judicial review remedies against non-statutory decision-making where the decisions are taken under schemes or programs that receive funds appropriated by Parliament or raised pursuant to statute.¹⁰¹ The Court noted that provision, but left its meaning for another day because it was not pleaded.¹⁰² At some point, however, someone will have to explain the juridical basis of subjecting a soft-law scheme or program to at least some of judicial review's principles.¹⁰³ The explanation might be that it was this extension of *JRA*'s scope beyond that of *ADJR* that 'hardened' the soft law. Or it might be that programs in receipt of funding appropriated by Parliament are sufficiently connected to the legislature to overcome any concerns about the source of authority for judicial review of non-statutory power.¹⁰⁴

It is submitted that a third (and preferable) alternative would be to view this extension of Queensland's *JRA* as simply the adoption of a reform recommendation of the Commonwealth's Administrative Review Council,¹⁰⁵ which had wanted *ADJR* expanded to keep pace with some of the more recent expansions in the scope of common law judicial review. On this view of the common law powers of State Supreme Courts, judicial review of non-statutory public power never needed legislative authorisation, and does not need it now.¹⁰⁶ It is a jurisdiction which all of Australia's superior courts of general jurisdiction have inherited from their

¹⁰⁰ *Kioa* (1985) 159 CLR 550; *Ainsworth* (1992) 175 CLR 564.

¹⁰¹ *JRA* s 4(b).

¹⁰² *Tang* (2005) 221 CLR 99, 118–19 [48]–[49].

¹⁰³ Unless some judicial review principles apply, *JRA*'s subjection of non-statutory decision-making to judicial review's remedies would have been pointless.

¹⁰⁴ An argument advanced by Sir Gerard Brennan, 'The Review of Commonwealth Administrative Power: Some Current Issues' in Robin Creyke and Patrick Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002) 9, 9–37.

¹⁰⁵ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*, Report No 32 (1989) 40–1. The Council's timidity and the Commonwealth's response are discussed in Aronson, Dyer and Groves, above n 11, 79–80.

¹⁰⁶ The Administrative Review Council was proposing an extension of Federal Court power. Unlike the State Supreme Courts, the Federal Court has no inherent jurisdiction. Statute was therefore necessary to effect such an extension.



Westminster forebears. That is not to deny the differences between reviewing statutory and non-statutory power, because it is more difficult to locate and define the parameters of non-statutory power.

If one accepts the possibility of common law judicial review of non-statutory public power, one can then move to a consideration of the relevance (if any) of soft law in that context.¹⁰⁷ Furthermore, whilst recognising the possibilities for legal effects flowing from soft law, one must at the same time avoid committing to a theory of Executive legislative capacity.

There is a large literature debating the definitions of prerogative power, Executive power (if that is different at the Commonwealth level), and the scope (if any) for judicial review of such powers.¹⁰⁸ It would be relatively uncontroversial to allow for judicial review where a decision-maker has purported to act as the Crown's delegate in a non-statutory context but has in fact exceeded the terms of the instrument of delegation.¹⁰⁹ Other variants of non-statutory power can be imagined. These would include prerogative (or Executive) power which is unique to government, and non-statutory power by which government can create, change or affect legal rights or obligations. The oldest example would be the common law search warrant. Perhaps the most difficult variant would involve the government's exercise of a non-statutory power which is neither unique to government nor capable (without consent) of altering, creating or affecting legal rights or obligations.

Take the example of the non-statutory criminal injuries compensation scheme considered in *R v Criminal Injuries Compensation Board; Ex parte Lain*.¹¹⁰ Anyone can hand out money, and anyone can establish guidelines by which they will do that. It is submitted that if (as in England) a court were to characterise decision-making under the guidelines as an exercise of public power, then the government's decision-makers could be constrained by some at least of judicial review's principles. These would sometimes include natural justice, and the guidelines might sometimes be relevant in a natural justice inquiry. They might arguably also have relevance to other judicial review restraints upon the exercise of public power. Just as natural justice does not exist on its own, soft law has no relevance by itself, but might become relevant in ascertaining the limits of public power.

PART VII – CONCLUSION

This article has taken a less pessimistic view of the trilogy of High Court cases than most of the commentaries. However, it agrees with the principal criticism made by Mantziaris and McDonald,¹¹¹ which was that the real issues have tended to be submerged. They argued that the real issues were ultimately about the normative task of characterising power as public or private, and that the constitutional learning on what constitutes a Chapter III 'matter' is a poor tool to use for that task. Perhaps the

¹⁰⁷ Soft law's relevance to the exercise of *statutory* power raises other issues – principally estoppel and natural justice.

¹⁰⁸ Aronson, Dyer and Groves, above n 11, 140–6.

¹⁰⁹ As in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

¹¹⁰ [1967] 2 QB 864, discussed in Aronson, Dyer and Groves, above n 11, 115–17, 128, 133–6.

¹¹¹ Mantziaris, above n 6, 200–1; Mantziaris and McDonald, above n 6, 43, 45–8.

results would have been the same in any event, although the optimist might be permitted to doubt that.

Lam was right to deny judicial enforcement of government-induced expectations regardless of considerations of unfairness, but that is because judicial review's remedies are procedural, avoiding a usurpation of the decision-maker's powers. It is not because statute is the only way in which public power can be created or confined.

NEAT Domestic's turning point was the fact that AWBI had to focus on maximising its profits. That led to an unnecessary conclusion that the company need never think of anything else. It is still the case that public and private power are usually distinguished by reference to whether the decision-maker has always to be altruistic, but that binary distinction breaks down in the case of private bodies performing private and governmental tasks. If the question had been expressed as whether a private sector company was a hybrid exercising public power, the result may well have been different.

Tang's result was entirely predictable because if *ADJR's* restriction to statutory decision-making is to mean anything, then the odds are that it excludes coverage of government's commercial powers so far as these are truly consensual. *Tang's* fault, though, was in failing to see the realities of public power behind a consensual, non-statutory facade. Consensual power should not be subject to judicial review, not because it is non-statutory, but because it is not public. The classic image of a contract is as an instrument of exchange, whilst the classic image of judicial review is the enforcement of express or implied legal rules, where 'rules' are seen as commands.¹¹² However classical imagery can sometimes be misleading. Some government contracts are in reality rules, and the same is true of some non-contractual relationships adopting a seemingly consensual form. The characterisation of Ms *Tang's* relationship with her former university as merely consensual is nothing short of breath-taking.

This article has also discussed another concern flowing from *Tang*, which is the reviewability of exercises of public power which are in 'breach' of soft laws, constituted by practice manuals, procedure pamphlets, guidelines and so forth. *Tang's* implication that a soft-law right or obligation is never sufficient to satisfy the constitutional requirement of a 'matter' is unsatisfying because it avoids the principal question, which is whether there has been an exercise of public power in breach of legal restraints. Unless one were to subscribe to the view that judicial review cannot police the exercise of non-statutory power, one should recognise soft law's potential relevance as a source of restraints upon the exercise of public power. Just as the common law can be a source of public power, so too can it be a source of restraints upon public power.

In any event, there was undoubtedly a real dispute between the parties as to whether the University had adhered to its misconduct code. That would probably have been a sufficient basis for an application to a State Supreme Court for declaratory relief, and it is to be hoped that *Tang* will create no constitutional impediment to a similarly broad declaratory power being exercised in federal jurisdiction.

There is still time to back away from *Tang's* more serious implications. Strictly speaking, the case determined only the scope of *ADJR* review. Its disregard of the University's soft law need have no ramifications beyond the construction of *ADJR's*

¹¹² Jenny Stewart, 'Administrative Law in the Age of the Contract', in John McMillan (ed), *Administrative Law Under the Coalition Government* (1997) 152, 154.

requirement of a decision 'under an enactment'. Further, its resort to the constitutional concept of 'matter' was doubtless done with the best of intentions, to keep *ADJR* in synch with Queensland's *JRA*, and to keep both in synch with judicial review at common law and under s 75(v) of the *Constitution*. It is nevertheless essential that non-statutory judicial review retain sufficient flexibility to be able to check the legality of the exercise of public functions, whether they be exercised by public or private bodies, and whether their source of power be statute, Executive or prerogative power, or the common law. It is also essential to maintain some room for the operation of such of judicial review's principles as may be appropriate, in contexts where judicial review's remedies are not available.

