JUDICIAL REVIEW OF STATUTORY AUTHORITIES

Michael Will*

Introduction

I will give you a brief excursion of the facts and the history of the case of *Griffith University v Tang*[1], take you through each of the three judgments, give you some of my thoughts as to whether I consider it to be a new test or not and then raise a couple of issues about the effect of the decision on the administration of universities.

Vivian Tang was a PhD student at Griffith University. In 2002, an Assessment Board which was a sub-committee of a research and post graduate committee established under the Council of Griffith University, found that she undertook research without regard to ethical or scientific standards on the basis that she presented falsified or improperly obtained data as if the result of laboratory work. In essence, it was found that she was involved in ongoing fabrication of experimental data. As a result of that finding, the decision was made to exclude her from her PhD candidature as her conduct amounted to a breach of the policy on academic misconduct at Griffith University. She applied internally for review of that decision to a University appeals committee and that appeal was dismissed in October 2002.

Ms Tang then went to the Supreme Court of Queensland on an application for judicial review of both decisions under the *Judicial Review Act 1991* (Qld). It is important to note that that Act is the same in all material respects as the Commonwealth *Administrative Decisions (Judicial Review) Act 1977.* (The two Acts are referred to collectively in this paper as the ADJR Act). Ms Tang claimed that there had been breaches of natural justice, that procedures required by law were not observed, that there were errors of law, that there was an improper exercise of power and that there was no evidence or other material to justify the decision to exclude her. It is also important to note that the Queensland ADJR Act, given that it repeats the words from the Commonwealth ADJR Act, applies to a decision of an 'administrative character made under an enactment'.

Within a month, Griffith University applied under s 48 of the Queensland ADJR Act to the Supreme Court for an application to dismiss or stay the application made by Ms Tang. For present purposes that application was on the basis that the decision was not one made under an enactment, but was a policy decision of the University. It is also important to note that it was an interlocutory application.

So how did the case end up in the High Court? Ms Tang succeeded at first instance, that is on the interlocutory application by the University: that application was dismissed by McKenzie J. The University appealed that decision to the Supreme Court of Queensland, Court of Appeal, and that appeal was dismissed by a unanimous decision. The Court found that it was a decision under an enactment applying *ABT v Bond*[2] and *Blizzard v O'Sullivan*[3]. The University then sought, and was granted special leave to appeal to the High Court. The

* *Partner, Sparke Helmore, Canberra.*

High Court was composed of Gleeson CJ and Gummow, Kirby, Callinan and Heydon JJ. Gleeson CJ delivered a separate judgment, Gummow, Callinan and Heydon JJ delivered a joint judgment and, with the Chief Justice, allowed the appeal. Kirby J wrote a dissenting judgment.

Coming first to the Chief Justice's judgment, its starting point was that the Griffith University Act provided no specific power dealing with admittance, exclusions or academic misconduct. The powers exercised in establishing policies and procedures about these issues all flowed, first, from a general description in s 5 of the functions of the University, that is, to provide education, to confer higher education awards and to disseminate knowledge, second, from general powers in s 6 which gave the University all the powers of an individual to enter into contracts, deal with property, appoint agents and consultants, and fix charges, Associated with those two sources of power was the incidental power granted to the University to do anything necessary or convenient in connection with its functions.

The Chief Justice acknowledged the University's argument that it must be the statute that gives the decision in question legal force or effect for it to be reviewable under the ADJR Act. He noted the familiar form of the conferral of power in the Griffith University Act and commented that in all jurisdictions throughout Australia, there were similar Acts incorporating a range of institutions, including Universities. Such legislation incorporates those bodies, describes their functions, confers powers, and provides for governance. But all of that, he said, does not mean that all decisions made by those bodies are 'under' those enactments. He also commented that there was no finding in the courts below about what the legal relations were between the parties. In particular, there was no evidence of a contract between Ms Tang and the University. That is an important point to which the joint judgment returns.

The Chief Justice pointed out that it was important to note Justice Ellicott's approach in *Australian National University v Burns.*[4] That approach involved a professor being dismissed and a finding by the Full Federal Court that that was not a decision reviewable under the ADJR Act. That was a decision which arose under a contract of employment, but Ellicott J's approach at first instance in that case, that, for a matter to be reviewable, it had to be a matter at the heart of a university's existence and one of the fundamental decisions essential to the fulfilment of its basic functions, had been rejected by the Full Court and the High Court was not being asked to reconsider it.

Interestingly, given what I will be saying in a moment about the joint judgment, Gleeson CJ[5] refers to the exclusion of Ms Tang being in accordance with the terms and conditions as to academic behaviour which had previously been established. Further, Ms Tang was bound by those terms and conditions and the University could lawfully apply them to its relationship with Ms Tang.

That is interesting because it appeared that the Chief Justice was struggling with the issue of what precisely the legal relationship was between Ms Tang and the University. I think he was minded to find that there might be a contract and then deal with it on that basis. However, he did not go down that route.

Gleeson CJ noted in passing the decision of Justice Davies in *Scharer v State of New South Wales*[6] where His Honour had said that the touchstone for reviewability under the ADJR Act was whether statute had played a relevant part in affecting or effecting rights or obligations. He said that the legal effect in Ms Tang's case was to terminate the relationship and that was the position even if the statute conferred other benefits on Ms Tang. The relationship was voluntary and the Chief Justice acknowledged that Ms Tang would have had a legitimate expectation that certain procedures would be followed before termination of her candidature, but that that was not enough. On the other hand, he said, the decision to

terminate her did not take legal force or effect from the statute. It took place under general law, and under the terms and conditions on which Ms Tang and the University entered into a relationship. The power to formulate terms and conditions and to enter, and end, the relationship came from the Griffith University Act, but the decision to terminate the relationship was not given legal force or effect by that Act.

I turn now to the joint judgment of Gummow, Callinan and Heydon. Their Honours referred to the difference between the position under s 75(v) of the Constitution which fixes on the question of whether a decision is made by an officer of the Commonwealth as the touchstone of reviewability, and the ADJR Act test of a decision of an administrative character made under an enactment. They commented that this had caused resultant uncertainty 'over 25 years'. That comment raised an expectation that this case might resolve some of those uncertainties. Their Honours acknowledged the continuation of the prerogative writs or common law system of judicial review under Queensland law which is expressly maintained under its ADJR Act. They then went on to say that the University in question was wholly a creature of statute and that the *Higher Education (General Provisions) Act 1993* of Queensland prohibited non-universities from awarding degrees and therefore one could only obtain a degree from a university. They pointed out that it was an offence to say that you had such a degree if you did not have one.

Their Honours then turned to the question of standing. Their point here was that the question of the standing of an applicant for review only arises if there is something that is a decision by which the applicant is aggrieved. So they took the step of saying before you get to the question of standing you look at whether there is a decision and it is only when you decide that there is a decision that you turn back to the question of standing. Standing comes after the question of whether there is a decision under an enactment.

Their Honours then looked at the three elements provided for in the ADJR Act to determine reviewability: whether there is a decision, whether it is of an administrative character, and whether it is made under an enactment, and pointed out there were dangers in treating these elements separately. They said you must look at the elements together and at the interrelation between those elements: it is a question of characterisation depending upon the scope, subject and purpose of the ADJR Act. They also cautioned against using approximate or immediate source of power tests, again emphasising the subject, scope and purpose of the ADJR Act.

Their Honours then turned to what I consider to be a new test. They said that it was necessary, but not sufficient, to decide that a decision be required or authorised by the enactment, but you need something else. The additional factor required is that the decision must affect legal rights and obligations. 'Does the decision derive from the enactment the capacity to affect legal rights and obligations?' is the test. The rights and obligations their Honours referred to may be ones founded in the general or unwritten law as well as statutory rights and obligations, and they can be pre-existing or new. Again, coming to the precise tests that they enunciated[7], whether a decision is made under an enactment requires determination of two issues. The first issue is, is the decision expressly or impliedly authorised by the enactment? The second issue, is that a decision must itself confer, alter or otherwise affect legal rights or obligations. The decision must derive from the enactment. Here they concluded there were no legal rights capable of being affected. There was just a consensual relationship between Ms Tang and the University which depended for its continuation on mutuality. It had been brought to an end but not under the Act. The joint judgment[8] acknowledged that Ms Tang might have had an expectation that her exclusion would be dealt with fairly but their Honours said that was not enough. There were no substantive rights existing under the general law and no presently existing statutory rights which were affected by this decision. They also commented, interestingly, that it was not to the point that the University had carried out this exclusion by a process of delegation of its

power rather than by internal statutes which the University had the power to make. They said that use of one method rather than another concurrent power is insufficient to attract the ADJR Act.

I turn now to the strong dissenting judgment of Justice Kirby. His Honour said that the majority view was an unduly narrow approach to statutory judicial review of the deployment of public power. He said that, like the *NEAT* decision[9], it is an alarming decision. It extends the error made in the *NEAT* case and it involves the erosion of one of the most important legal reforms of the last century, namely the ADJR Act. He said that the Court should call a halt to such an erosion.

The main points of Kirby J's dissenting judgment are these. There is nothing in the ADJR Act to warrant a gloss that legal rights and obligations must be affected. The ADJR Act was reform legislation meant to encourage and make easier the process of judicial review. The new test of affecting legal rights and obligations was incompatible with standing requirements under the Act which involve a broader interest test. It was contrary to the text and purpose of the ADJR Act: nearly all Australian universities are public institutions, formed for public purposes, they are not private bodies able to enter into private arrangements as they please. Kirby J was also very critical of the method by which this decision had arrived before the High Court as a result of appeals from an interlocutory decision. As His Honour pointed out this meant the Court was faced with deciding on an important issue without all the evidentiary findings having been made below and teased out further on appeal.

The correct test for Kirby J would be this: Does the lawful source of power to make the decision lie in the enactment? That is the first point. Secondly, could a person, absent that source, derive the power outside the Act to make that decision? If yes, then it is not a decision under the enactment. If no, then it is. In this case the source of the power is the Act and the decision is made under it. That would be Kirby J's test. However, it is not the test that flows from this decision.

Finally Kirby J is quite critical of the new test imposed by the High Court because it goes against the broad connotation of 'decision' in the ADJR Act, the ambit of 'enactment' in the Act, and the wide scope of standing. In Kirby J's view, there were formerly three broad requirements and the Court had now imposed a narrow one. In his view, the interest test would be the broader and better test. Quite tellingly towards the end of his judgment, Kirby J makes the comment that if there was no contract between Ms Tang and the University, the only possible source of power to exclude her was the statute. There was no other competing source of power.

Does *Tang's* case establish a new test? In my view it does. I consider that this is the case for three reasons. The first is, as far as I can tell the High Court has not stated the test in these terms before. The second is, the Federal Court has made similar pronouncements but limited them, and the third is the comparison of the joint decision with that of the Chief Justice.

Coming to my second point about the Federal Court having used similar words before, I turn to *Scharer v State of New South Wales*.[10] In that case Davies J had said that the test was whether the Act played a relevant part in affecting rights or obligations. In my view the High Court has gone much further than that test in conclusively excluding an interest test and going back to a rights and obligations test. The Chief Justice did not go that far. He left it on the basis that the ADJR Act provided the legal force and effect for the decision. There is nothing new in that. In my view the joint judgment went further and put a High Court stamp on a new test which the Federal Court had tossed around but not really fixed upon. It is in my view a more restrictive test. However, we will need to wait to see how it is applied. It might produce some surprising results.

Some final comments on two issues about how this case might affect universities. University administrations may consider from this decision that they can avoid judicial review by avoiding reliance on internal statutes. Where they have the power to make internal delegated legislation, they may shy away from that, thinking that if they do so then the connection between their establishing legislation and the final decision will be harder to make. This would leave matters such as disciplinary provisions applying to academics more and more to policies. That in turn would lead to less judicial review of those sorts of decisions. That is a superficially attractive proposition. Evidentially it may present applicants with more problems if universities adopt the policy rather than the internal statute approach. But in principle there is no difference in the new test between a decision made under an internal statute and one made under a policy, which is in turn made under a delegated power. The route does not matter so long as rights and obligations are or are not affected. That is the test and the High Court says as much in the joint judgment[11].

The second point about universities is this. Would the view of Kirby J have opened the flood gates so that all academic decisions might have become reviewable? I think not. I think there is a difference between exclusion of a PhD candidate and, for example, marking of an undergraduate paper. It is a question of degree and that is important because there is always a discretion in a judge facing an application for judicial review not to allow the application on purely discretionary grounds.

Finally, there is the reluctance of courts, acknowledged again in this case, to interfere in academic as opposed to disciplinary decisions of universities.

Endnotes

1 (2005) 213 ALR 724; [2005] HCA 7.
2 (1990) 170 CLR 321.
3 [1994] 1QdR 112.
4 (1982) 43 ALR 25.
5 At [17].
6 (2001) 53 NSWLR 299 at 313.
7 At [89].
8 At [92].
9 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179.
10 Above note 6.
11 At [95].