GRIFFITH UNIVERSITY v TANG—COMPARISON WITH *NEAT DOMESTIC,* AND THE RELEVANCE OF CONSTITUTIONAL FACTORS

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Introduction

This paper considers two issues arising out of *Griffith University v Tang*:[1]

(1) whether the reasoning in *Tang* is consistent with the reasoning in *NEAT Domestic Pty Ltd v AWB Limited*;[2] and

(2) whether the constitutional factors relied on in the joint judgment of Gummow, Callinan and Heydon JJ in *Tang* support their Honours' interpretation of the phrase 'decision … made under an enactment'.

I suggest that the joint judgment in *Tang* does not engage sufficiently with all of the reasoning in *NEAT Domestic*, although there is certainly no conflict between the two cases. More significantly, I argue that constitutional factors referred to in *Tang* are of marginal relevance in construing the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the AD(JR) Act'), and by extension the *Judicial Review Act 1991* (Qld) ('the Qld Judicial Review Act').

Comparing Tang and NEAT Domestic

In one sense, *Tang* and *NEAT Domestic* are the mirror images of each other. Simplifying greatly, *Tang* concerned an exercise of 'private' power by a 'public' body; conversely, *NEAT Domestic* concerned an exercise of 'public' power by a 'private' body. The High Court held in both cases that the relevant decision was not made 'under an enactment' and therefore was not subject to statutory judicial review. Despite this similarity in outcome, the two cases seem to contain quite different approaches to determining whether a decision is 'made under' an Act.

Different approaches to 'under an enactment'

NEAT Domestic – three related considerations

As is well known, *NEAT Domestic* considered whether judicial review was available for decisions by AWB (International) Ltd ('AWBI'). Under s 57(1) of the *Wheat Marketing Act 1989* (Cth) ('the Marketing Act'), a person cannot export wheat without the written consent of the Wheat Export Authority ('the Authority'), a Commonwealth statutory authority. Section 57(3B) provides further that the Authority cannot give a 'bulk-export' consent without the written approval of AWBI, a wholly-owned subsidiary of a company controlled by wheat growers. AWBI did not approve the bulk export of wheat by NEAT Domestic Trading Pty Ltd ('NEAT'), and NEAT sought judicial review of that decision. A majority of the High Court (McHugh, Hayne and Callinan JJ) held that any decision by AWBI was not made 'under' the Marketing Act and therefore was not reviewable under the AD(JR) Act.

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The joint judgment in *NEAT Domestic* relied on three 'related considerations'.[3]

- First, AWBI's power to give or refuse approval derived from its incorporation and the *Corporations Act 2001* (Cth), not the Marketing Act.[4]

- Secondly, AWBI was a 'private' company, in the sense that its directors owed duties under its corporate constitution and the corporations legislation to maximise returns to wheat growers who sold wheat through pool arrangements.[5] (I will call these duties 'corporations law duties'.)

- Thirdly, these corporations law duties could not be sensibly accommodated with any administrative law obligations imposed by the AD(JR) Act.[6]

Tang – two criteria

These three considerations can be contrasted with the two criteria relied on by the joint judgment in *Tang*. Gummow, Callinan and Heydon JJ held that a decision is not made 'under an enactment' unless:[7]

- the decision is expressly or impliedly required or authorised by the enactment; and

- the decision itself confers, alters or otherwise affects legal rights or obligations.

Their Honours concluded that Griffith University's decision was authorised by the *Griffith University Act 1998* (Qld) ('the University Act'), but the decision did not itself affect rights and obligations.[8] Therefore the decision was not made 'under' the University Act.

Discussion of NEAT Domestic in Tang

Although the joint judgment in *Tang* expressly relates its approach to the decision in *NEAT Domestic*, *Tang* seems to treat *NEAT Domestic* as turning entirely on the first consideration mentioned above (the source of AWBI's power to give or refuse an approval).[9] Gummow, Callinan and Heydon JJ state in *Tang* that any approval by AWBI was therefore made '*dehors* the federal statute, although, once made, it had a critical effect for the operation of the federal statute'.[10]

I would suggest, with respect, that this is an incomplete analysis of *NEAT Domestic*. It is difficult to conclude that AWBI's decision was '*dehors*' the Marketing Act, given that the only legal effect given to AWBI's decision was by the Marketing Act, and there was no reason for AWBI to make this decision other than the effect that the decision would attract under that Act.[11] In this sense, *NEAT Domestic* is quite different from *Glasson v Parkes Rural Distributions Pty Ltd*[12] (also referred to in *Tang*), because in *Glasson* the decision had legal effect under the State Act in the scheme.[13] The situation in *NEAT Domestic*, as described in *Tang*, seems to be exactly like an example given in *Australian Broadcasting Tribunal v Bond*[14] – the decision to issue or refuse an approval 'controls the coming into existence … of a statutory licence [in *NEAT Domestic*, the licence to export wheat] and is itself a decision under an enactment'.

Instead, in my view, the second and third considerations in *NEAT Domestic* explain why it was 'neither necessary nor appropriate'[15] to read s 57(3B) of the Marketing Act as impliedly authorising AWBI to issue an approval.[16] The fact that AWBI had power to issue approvals under the Corporations Act (the first consideration) did not preclude the possibility that the Marketing Act also authorised AWBI, impliedly, to issue an approval for the purposes of s 57(3B). For example, in *Minister for Immigration and Ethnic Affairs v Mayer*,[17] a

Commonwealth Act was held to authorise the Minister (by implication) to make a determination, even though the office of Minister presumably already carries with it a power to issue determinations.[18] What seems to distinguish the situation in *NEAT Domestic* from the situation in *Mayer* is the private nature of AWBI, and the existence of competing Corporations Law obligations. Therefore, the second and third considerations were in my view linked to the meaning of 'under an enactment', even though the joint judgment in *NEAT Domestic* did not make this link expressly.[19] To this extent, I would suggest that the joint judgment in *Tang* did not engage sufficiently with all of the reasoning in *NEAT Domestic*.

Applying the NEAT Domestic *approach to* Tang *facts*

Consistently with this analysis of *NEAT Domestic*, all of the considerations relied on in that case seem to be highly relevant to the situation considered in *Tang*. Applying those three related considerations:

- The source of power for Griffith University to make its decision necessarily derived from the University Act. As Kirby J noted,[20] there was no independent source of power for the University to make its decision.

- Griffith University is a 'public' decision-maker,[21] and

- There were no separate and potentially conflicting private law obligations imposed on the University. In particular, no-one in *Tang* contended that there was a contractual relationship between Ms Tang and the University.[22]

These considerations seem to favour judicial review being available. However, the situation in *Tang* invites closer attention to the second consideration.

Determining the 'public' character of a decision-maker

I have argued elsewhere that the second consideration referred to in *NEAT Domestic* (the 'private' nature of AWBI) should include consideration of the nature of the decision, as well as the character of the decision-maker.[23] In *Tang*, the majority judgments stress the voluntary (and therefore 'private') nature of the relationship between Ms Tang and Griffith University.[24] In my view, this approach is entirely consistent with *NEAT Domestic*. Although the actual decision in *NEAT Domestic* seems to downplay the nature of the particular decision made by AWBI, McHugh, Hayne and Callinan JJ emphasised that their conclusion was not to be understood as an answer to whether public law remedies were ever available against private bodies.[25] To that extent, their Honours accepted the possibility that an otherwise 'private' decision-maker could make decisions that are 'public' and thus amenable to judicial review.

The question then is how to determine which decisions are 'public' in nature and which are 'private'. Experience with other areas of the law suggests that any attempt to define 'governmental' functions is unlikely to be helpful.[26] The joint judgment in *Tang* asks whether legal rights and obligations owe, in an immediate sense, their existence to the decision, or depend on the presence of the decision for their enforcement.[27] As I will explain, I have some reservations about that test. An alternative test is that a 'public' decision is one that alters rights or creates obligations without consent.[28] That test should at least avoid the problems identified by Gleeson CJ with asking whether the decision was something anyone in the public could do.[29]

Nature of decision not determinative

Although *Tang* confirms that public decision-makers can sometimes make decisions that are 'private' in nature, there would have been merit in going on to consider the third consideration relied on in *NEAT Domestic* – whether the decision-maker was subject to existing legal obligations that could not be reconciled with administrative law obligations. It is one thing to say that a decision by a public body spending public money is not made 'under' an Act when the decision is subject to the constraints of contract law. It is another to say that this sort of decision is not made 'under' an Act when there are no other 'private' legal constraints.[30]

Taking that point further, I would suggest that the nature of the decision does not always provide a clear indication of whether the decision should be reviewable. It may be accepted that a decision is 'public' in nature if it alters rights and obligations without consent. However, it does not follow that every other decision should be regarded as 'private' and therefore outside the scope of statutory judicial review.[31] Instead, with these 'non-public' decisions, courts should give more weight to factors such as the nature of the decision-maker and whether the decision-maker is subject to other legal obligations that cannot be sensibly accommodated with administrative law obligations. That is because, if there is some connection between a decision and an Act, it is appropriate to have regard to the whole statutory context to determine whether Parliament intended the decision to be subject to statutory judicial review.[32]

Applying the Tang approach to NEAT Domestic facts

The approach of the joint judgment in *Tang* can also be tested by applying the two criteria from that case to the facts of *NEAT Domestic*.

Did the Marketing Act require or authorise AWBI's decision?

As noted earlier, the first criterion from *Tang* asks whether the decision is expressly or impliedly required or authorised by the enactment. This first criterion was not satisfied in *NEAT Domestic* – it was 'neither necessary nor appropriate' to read s 57(3B) of the Marketing Act as impliedly authorising AWBI to issue an approval. I suggested earlier that this conclusion relied on the private nature of AWBI, and the difficulty of accommodating administrative law obligations with corporations law duties (the second and third considerations).[33]

My interpretation of *NEAT Domestic* may be significant if it became necessary in a future case to determine whether a decision by a non-Commonwealth body was required or authorised by a Commonwealth Act. Although *Tang* seems to lay down a general test for determining whether a decision is 'made under' an enactment, that test does not provide any clear guidance on when a private decision-maker's decision will be '*dehors*' a Commonwealth Act. Similar uncertainty may arise when a State officer makes a decision that has significance for the operation of a Commonwealth Act. In a sense, *Glasson* was an easy case, because the Commonwealth Act neither provided for the appointment of the decision-maker, conferred power to make the decision, nor gave legal effect to the decision.[34] If, however, a Commonwealth Act provided for one of those things (say, the State officer held a dual appointment under Commonwealth law), the reasoning in *Glasson* would not be determinative and the test in *Tang* would not seem to provide clear guidance. In these situations, I would suggest, a court could legitimately have regard to each of the various considerations referred to in *NEAT Domestic* to determine whether the decision was required or authorised by the Commonwealth Act.[35]

Did AWBI's decision confer or alter legal rights and obligations?

The second criterion from *Tang* would ask whether AWBI's decision itself conferred, altered or otherwise affected legal rights or obligations. Of course, that question would not strictly arise in *NEAT Domestic*, because the situation there did not satisfy the first criterion. Even so, the facts in *NEAT Domestic* illustrate some tension in the reasoning of the joint judgment in *Tang* on this point.

On the one hand, the *Tang* joint judgment states that it is a mistake to search for the 'proximate' source of power to make a decision, because decisions can have a dual character.[36] On the other hand, the *Tang* joint judgment also states that the rights or duties must owe 'in an immediate sense' their existence to the decision.[37] However, rights and obligations do not derive from a decision 'itself', but rather from the legal effect given to a decision.[38] And the legal effect of a decision may derive from more than one source. The second criterion from *Tang* therefore seems to require a choice between these different sources that cumulatively, give legal effect to a decision, to determine which is the 'immediate' source of the rights and obligations.

Turning to *NEAT Domestic*, the Marketing Act attached consequences to an approval by AWBI, but the approval could not have had that effect unless the Corporations Law also conferred power to give the approval in the first place. Presumably it would be in error to ask whether the Corporations Act or the Marketing Act is the 'proximate' source of power to make AWBI's decision. However, the *Tang* test would ask which Act is the 'immediate' source of the decision's legal effect. These seem to be very similar questions. To take another example, if a statutory authority makes a decision under a contract, the legal effect of the decision depends on the contract, but also depends on the authority having power to enter into the contract. Asking whether rights and duties owe their existence 'in an immediate sense' to the contract, or the Act, seems to raise the same problem as asking which is the 'proximate source' of power to make the decision. Both tests run counter to the idea that a decision can have a dual character.[39] It may be therefore that the second criterion in the *Tang* joint judgment is not very different from the question posed by Gleeson CJ: that is, whether the Act is the source of the decision's legal force or effect.[40]

Tang and NEAT Domestic – conclusions

It is apparent from this comparison that there are some differences of approach between *NEAT Domestic* and *Tang*. I have suggested that the reasoning in *Tang* would have benefited from considering all of the considerations relied on in *NEAT Domestic*. However, there is no contradiction between the two cases. Indeed, these differences of approach may in fact shed light upon one another – *Tang* confirms that it is relevant to consider the nature of the decision, as well as the nature of the decision-maker, and *NEAT Domestic* provides guidance on when a decision by a non-Commonwealth body will be taken to be required or authorised by a Commonwealth Act.

Constitutional factors and 'under an enactment'

The second issue considered in this paper is whether the constitutional factors referred to by the joint judgment in *Tang* support their Honours' interpretation of 'under an enactment'. The reasoning in the joint judgment contains two steps:

(1) federal constitutional factors are said to require a particular interpretation of 'under an enactment' for the purposes of the AD(JR) Act, and

(2) the phrase 'under an enactment' is intended to have the same meaning in the Queensland Judicial Review Act as the AD(JR) Act, even though these federal constitutional factors do not apply to a State Act.[41]

Step (2) may well be correct, particularly in the light of s 16 of the Queensland Act.[42] However, I disagree with step (1) in the reasoning. As I will explain, the constitutional factors referred to in *Tang* are not in my view particularly relevant to the meaning of 'under an enactment' in the AD(JR) Act.

Two constitutional factors – dual characterisation, 'matter'

The joint judgment in *Tang* uses constitutional factors to make three points. Two of these points can be dealt with fairly quickly.

Analogies with dual characterisation and s 76(ii)

First, in rejecting any suggestion that a decision must have a single character, the joint judgment points out, by analogy, that a Commonwealth law will be valid if one of its descriptions is within a subject-matter of power.[43] In addition, their Honours observe that a matter may 'arise under' a Commonwealth Act within the meaning of s 76(ii) of the Constitution even though the cause of action itself derives from another source of law (such as an action for breach of contract where the subject-matter of the contract concerns an entitlement under federal law).[44]

The point being made here – that there is no sharp division between 'administrative' and, say, 'commercial' decisions – is supported by the well-known difficulty in distinguishing between 'governmental' and other functions in determining the scope of the privileges and immunities of the executive government.[45] The two analogies relied on by the joint judgment in *Tang* may not be the most obvious, but the point is a sound one.

Need for a 'matter'

Secondly, in concluding that a decision is not 'made under' an Act unless the decision affects legal rights or obligations, the joint judgment refers to the fact that federal judicial power is limited to resolving 'matters'. That is, an application under the AD(JR) Act must involve the court determining some immediate right, duty or liability.[46]

This second point seems to be something of a red herring. It is certainly true that federal judicial power is limited to resolving 'matters' and that a 'matter' requires there to be an immediate right, duty or liability to be determined by the court. However, this description of a 'matter' is to ensure that courts only rule on issues that can be properly resolved by an exercise of judicial power (thus ruling out, for example, advisory opinions[47]). Accordingly, the requirement for an 'immediate right duty or liability' need not exclude, say, the 'interests' that have traditionally been protected by natural justice.[48]

Consider, for example, the situation in *Ainsworth v Criminal Justice Commission*.[49] As is well known, a report of the Criminal Justice Commission was tabled in the Queensland Parliament, which made adverse recommendations about persons involved in the poker machine industry. Mason CJ, Dawson, Toohey and Gaudron JJ held that, although the report did not have any legal effect or consequence, it had the 'practical effect' of blackening the appellants' reputations.[50] Given that the 'interests' which attracted natural justice included a person's reputation,[51] their Honours were prepared to grant declaratory relief that the appellants had been denied natural justice.[52] Although *Ainsworth* was concerned with a State decision, the discussion of whether that case raised hypothetical issues suggests that a similar case in federal jurisdiction would involve a 'matter'.[53] Therefore, in my view, there

would be nothing to prevent Commonwealth judicial review legislation from validly applying to a similar situation (noting that AD(JR) Act review would require that there be a 'decision' or 'conduct').

Comparison between 'made under' and 'arising under'

The final constitutional point in *Tang* requires more detailed consideration. The joint judgment states that a decision will be made 'under' an enactment if legal rights or duties owe in an immediate sense their existence to the decision, or depend on the presence of the decision for their enforcement.[54] Subject to one important difference (discussed below), this test is derived from the test for determining when a matter 'arises under' a Commonwealth Act within s 76(ii) of the Constitution. That is confirmed by the fact that the joint judgment cites a case concerning s 76(ii) to support its test.[55]

Link between s 76(ii) test and second criterion in Tang

This statement of the joint judgment in *Tang* appears in the following context. Gummow, Callinan and Heydon JJ observe (undoubtedly correctly) that the meaning of 'under an enactment' must take account of the fact that AD(JR) Act review is limited to decisions 'of an administrative character', which is brought by 'persons aggrieved'.[56] According to their Honours, what warrants the conferral of a right of judicial review on persons aggrieved is 'in general terms the affecting of legal rights and obligations'.[57] Stated at that level of generality, the conclusion is unobjectionable – as a practical matter, it is unlikely that Parliament would confer judicial review rights on a person who is not affected by a decision.[58] However, it does not necessarily follow from this general conclusion that it must be legal rights and obligations that are affected (and not 'interests'), or that the rights affected must owe their existence to the decision 'in an immediate sense'.

Accordingly, it seems that the second criterion in *Tang* for determining when a decision is 'made under' an Act[59] is influenced by an analogy with the meaning of 'arising under' a Commonwealth Act in s 76(ii) of the Constitution.[60] Three short comments can be made.

Comments on s 76(ii) analogy

First, the joint judgment does not expressly acknowledge, or explain, this comparison between the meaning of 'made under' an Act and 'arising under' an Act in s 76(ii) of the Constitution. However, the comparison is not at all obvious. For one thing, the language is different ('made' under, as against 'arising' under).[61] Moreover, there is an important difference in context – s 76(ii) is of course a grant of jurisdiction, but the definition of 'decision to which this Act applies' in the AD(JR) Act sets the limits of statutory rights to judicial review.[62]

Secondly, in any event, a comparison with s 76(ii) of the Constitution does not support the requirement in *Tang* that legal rights or duties owe *in an immediate sense* their existence to the decision. A matter need not arise *directly* under a Commonwealth Act to come within s 76(ii). For example, as the joint judgment in *Tang* itself notes, an action for breach of contract will 'arise under' a Commonwealth Act if the subject-matter of the contract concerns an entitlement under federal law.[63]

Thirdly, the constitutional authority of the Federal Court to hear AD(JR) Act matters does not depend on the matter 'arising under' the Commonwealth Act under which the decision is made.[64] Thus, there is no functional link between the meaning of 'arising under' and 'made under' an Act.

- As a matter of *statutory construction*, the AD(JR) Act applies to some decisions that are made under State and Territory legislation.[65] Clearly, a State or Territory Act cannot provide the link with s 76(ii)-type jurisdiction.

- As a matter of *constitutional jurisdiction*, all AD(JR) Act applications 'arise under' the AD(JR) Act itself (although many applications also arise under the Commonwealth Act under which the decision is made). A matter 'arises under' a Commonwealth Act if, relevantly, 'the right or duty in question owes its existence to a federal law or depends upon federal law for its enforcement'.[66] To the extent that the AD(JR) Act creates new administrative law rights and obligations (such as the s 13 statement of reasons), those obligations owe their existence to the AD(JR) Act. To the extent that the AD(JR) Act provides remedies for the breach of administrative law obligations derived from elsewhere, these obligations depend on the AD(JR) Act for their enforcement. Of course, it is necessary to explain the Commonwealth's power to create these rights and obligations, and remedies.[67] But the jurisdiction of the Federal Court to determine AD(JR) Act applications does not depend on the application 'arising under' the Act under which the decision is made.

It remains to be seen whether this comparison between the meaning of 'arising under' an Act and 'made under an enactment' will be picked up and developed in future cases.

Conclusion

The situation raised in *Tang* (a 'public' body exercising 'private' power) has been described as a significant fissure in Australian jurisprudence.[68] In this comment, I have suggested that the joint judgment in *Tang* did not engage sufficiently with the reasoning in *NEAT Domestic*, which raised a comparable 'fissure' in public law (a 'private' body exercising 'public' power).[69] In particular, there would have been merit in discussing all of the considerations raised in *NEAT Domestic*, such as the public nature of the decision-maker and whether the decision-maker was subject to other legal obligations that could not sensibly be accommodated with administrative law obligations. These additional considerations would not necessarily require a different result in *Tang*, but they would give some content to the rather general test of asking whether a decision is required or authorised by an Act.

I have also suggested that the constitutional factors referred to by the joint judgment in *Tang* do not greatly assist in interpreting the phrase 'made under an enactment'. In particular, there is no obvious reason to draw on s 76(ii) of the Constitution to interpret the phrase 'made under' an Act, as the *Tang* joint judgment seems to do. The *Tang* joint judgment also seems to suggest that the need for a 'matter' restricts AD(JR) Act review to decisions that confer or affect legal rights and obligations. If that suggestion in *Tang* were accepted in future cases (and I have argued that it should not be), it would seem to limit all judicial review of Commonwealth decisions, including common law review in the High Court under s 75(v) of the Constitution or in the Federal Court under s 39B(1) of the Judiciary Act. That is because the need for a 'matter' applies to *all* federal jurisdictions, including s 75(v) jurisdiction and statutory equivalents.[70]

Finally, *Tang* is similar in some respects to the decision in *Bond* – both decisions choose a relatively narrow interpretation of threshold requirements for obtaining review under the AD(JR) Act ('made under an enactment' and 'decision', respectively). I have argued elsewhere with Professor Creyke that one of the difficulties with *Bond* is that lower courts have applied the 'final and operative' test as a rigid and inflexible requirement, and that a preferable approach would have been to ask whether the decision or conduct that was sought to be reviewed had a real impact on rights or interests at the stage that review was sought.[71] Similarly, important as the High Court's decision in *Tang* is, its real effect may emerge from the manner in which it is applied by lower courts.

Endnotes

1 (2005) 213 ALR 724.
2 (2003) 216 CLR 277.
3 Ibid at 297 [51].
4 Ibid at 298 [54].
5 Ibid at 297 [51], 299 [61].
6 Ibid at 300 [63].
7 *Tang* (2005) 213 ALR 724 at 745 [89].
8 Ibid at 747 [96].
9 Ibid at 743 [77] (n 72), citing *NEAT Domestic* (2003) 216 CLR 277 at 298 [55].
10 *Tang* (2005) 213 ALR 724 at 745 [87]. '*Dehors*' means '[o]utside the scope of; irrelevant': Leslie Rutherford and Sheila Bone, *Osborn's Concise Law Dictionary* (8th ed, 1993) at 111.
11 In this sense, AWBI's decision could not be regarded as a mere 'factum' on which the Marketing Act operated: see Graeme Hill, 'The Administrative Decisions (Judicial Review) Act and 'under an enactment': Can NEAT Domestic be reconciled with Glasson?' (2004) 11 *Aust Jo of Admin Law* 135 at 142-143.
12 (1984) 155 CLR 234, cited in *Tang* (2005) 213 ALR 724 at 745 [87] (n 89).
13 A decision to issue an overpayment certificate created a debt payable to the State: see *Petroleum Products Subsidy Act 1965* (NSW), s 10.
14 (1990) 170 CLR 321 at 377 (Toohey and Gaudron JJ), cited in *Tang* (2005) 213 ALR 724 at 745 [86] (Gummow, Callinan and Heydon JJ).
15 *NEAT Domestic* (2003) 216 CLR 277 at 298 [54] (McHugh, Hayne and Callinan JJ).
16 Hill, above n 11, at 139-140. However, it could also be argued that these considerations (1) only affect whether a breach of a ground of review could ever be established: cf *NEAT Domestic* (2003) 216 CLR 277 at 287-289 [19]-[22] (Gleeson CJ); or (2) only determine whether AWBI's decision was of 'an administrative character': Neil Arora, 'Not so Neat: Non-statutory Corporations and the Reach of the *Administrative Decisions (Judicial Review) Act 1977*' (2004) 32 *Fed L Rev* 141 at 146.
17 (1985) 157 CLR 290 at 301 (Mason, Deane and Dawson JJ), cited in *NEAT Domestic* (2003) 216 CLR 277 at 298 [54] (n 51).
18 For example, the Attorney-General's power to make an extradition request derives from the executive power, not statute: see *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 511 [39] (the Court).
19 After referring to the second and third considerations, the joint judgment in *NEAT Domestic* simply concludes '[f]or these reasons, neither a decision of AWBI not to give an approval to a consent to export, nor a failure to consider whether to give that approval, *was open to judicial review under the AD(JR) Act or to the grant of relief in the nature of prohibition, certiorari or mandamus*': (2003) 216 CLR 277 at 300 [64] (emphasis added).
20 *Tang* (2005) 213 ALR 724 at 766 [159]-[160].
21 See particularly the factors mentioned by Kirby J (dissenting): ibid at 750-751 [108]-[110].
22 Ibid at 727 [12] (Gleeson CJ), 738 [57] (Gummow, Callinan and Heydon JJ), 755 [130] (Kirby J).
23 Hill, above n 11, at 140-142.
24 *Tang* (2005) 213 ALR 724 at 730 [20] (Gleeson CJ), 746 [91] (Gummow, Callinan and Heydon JJ). In dissent, Kirby J suggested that these issues could not be determined at this interlocutory stage, and required evidence: at 753-754 [120]-[123].
25 (2003) 216 CLR 277 at 297 [50].
26 See below, n 45.
27 *Tang* (2005) 213 ALR 724 at 744 [80].
28 See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed 2004) at 151: at common law '[i]t is said that the essence of public power is its non-consensual quality'. See generally Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 40 at 51-56.
29 Gleeson CJ stated that the difficulty with using this criterion as a free-standing test is that much would depend on the level of abstraction at which the decision, or the legal effect, was described: *Tang* (2005) 213 ALR 724 at 730 [22]. For example, was the decision in *Tang* a decision to terminate a voluntary relationship, or to terminate a Ph D program at Griffith University?
30 See ibid at 752-753 [116]-[119] (Kirby J, dissenting). The majority judgments in *Tang* were careful to avoid discussing whether review was available at common law: ibid at 725 [3] (Gleeson CJ), 732 [32] (Gummow, Callinan and Heydon JJ). And of course there may be other forms of scrutiny, such as making a complaint to the Queensland Ombudsman (noting that the *Ombudsman Act 2001* (Qld) is not limited to decisions made 'under' an Act: see the definition of 'administrative action' in s 7(1)). I am grateful to Professor Aronson for this point.
31 For example, it has been suggested that the Panel on Takeovers and Mergers (considered by the English Court of Appeal in *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815) was

exercising mixed powers, which bore both public and private aspects: Aronson, Dyer and Groves, above n 28, 119. It may also be noted, by analogy, that Selway J suggested that the categories of 'legislative' and 'administrative' decisions are not mutually exclusive, and that some decisions could be both: *McWilliam v Civil Aviation Safety Authority* (2004) 214 ALR 251 at 259-260 [39]-[42].

32 See Hill, above n 11, at 143-144: arguing that the third consideration from *NEAT Domestic* asks whether Parliament intended the decision to be subject to AD(JR) Act review.

33 See above, nn 10-19.

34 *Glasson* (1984) 155 CLR 234 at 241 (the Court).

35 See Graeme Hill, 'Will the High Court '*Wakim*' Chapter II of the Constitution?' (2003) 31 *Fed L Rev* 445 at 480-490.

36 *Tang* (2005) 213 ALR 724 at 741 [68]-[69].

37 Ibid at 744 [80].

38 The joint judgment seems to acknowledge as much, referring to '[t]he legal rights and obligations which are affected by the authority of the decision *derived from the enactment in question*': ibid at 745 [85] (emphasis added).

39 In a related point, it has been suggested that the test of whether an Act 'requires or authorises' the decision (which became criterion (1) in *Tang*) 'does not appear to exclude any more or any fewer decisions than the previous ['proximate source'] test': Damien O'Donovan, 'Statutory Authorities, *General Newspapers* and Decisions under an Enactment' (1998) 5 *Aust Jo of Admin Law* 69 at 74.

40 *Tang* (2005) 213 ALR 724 at 730 [23].

41 See ibid 731 [26]-[27], 746 [90].

42 Section 16 provides, broadly, that a provision in the Queensland Judicial Review Act should not be taken to have a different meaning from the corresponding provision in the AD(JR) Act merely because different words are used.

43 *Tang* (2005) 213 ALR 724 at 740 [66].

44 Ibid at 740 [67], citing *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575.

45 See eg *Townsville Hospital Board v Townsville City Council* (1982) 149 CLR 282 at 288-289 (Gibbs CJ, with Murphy, Wilson and Brennan JJ agreeing). The High Court has also rejected any distinction between governmental functions, and commercial and trading functions, in determining whether a statutory body or company is 'the State' or 'the Commonwealth' for constitutional purposes: see *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 231-232 (the Court).

46 *Tang* (2005) 213 ALR 724 at 746 [90], citing (among other things) *In re Judiciary and Navigation Acts* (1929) 21 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

47 My preferred analysis is that advisory opinions do not involve an exercise of judicial power at all: see *R v Kirby; Ex parte Boilermakers' Society of Australia (The Boilermakers Case)* (1956) 94 CLR 254 at 273-275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). However, an alternative analysis is that advisory opinions are judicial, but do not come within the narrower concept of judicial power 'of the Commonwealth': *In re Judiciary and Navigation Acts* (1929) 21 CLR 257 at 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

48 Note that *In re Judiciary and Navigation Acts* also states that 'a matter under the judicature provisions of the Constitution must involve some right *or privilege or protection given by law* …': (1921) 29 CLR 257 at 266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ) (emphasis added).

49 (1992) 175 CLR 564.

50 Ibid at 581.

51 Ibid at 577-578.

52 Ibid at 582.

53 See ibid at 582.

54 *Tang* (2005) 213 ALR 724 at 744 [80].

55 Ibid (n 77), citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 (Latham CJ).

56 *Tang* (2005) 213 ALR 724 at 743 [79].

57 Ibid at 744 [80].

58 As a matter of constitutional power, however, it would be possible to alter the standing requirements for seeking judicial review: see generally *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

59 That is, whether the decision itself confers, alters or otherwise affects legal rights or obligations: see above, n 7.

60 In the course of argument, Gummow J asked whether in previous Federal Court cases there had been any mention of an analogy with s 76(ii) of the Constitution, and stated that '[p]erhaps there should have been': *Griffith University v Tang* [2004] HCATrans 227 (21 June 2004) at 15. Neil Arora has argued explicitly in favour of this analogy: Arora, above n 16, at 157-159.

61 By contrast, s 76(ii) may be relevant when a Commonwealth Act uses the phrase 'arising under'. For example, the s 76(ii) test is applied to s 347(1) of the *Workplace Relations Act 1996* (Cth), which deals with liability to pay costs for proceedings 'arising under' that Act: see eg *Re McJannet; Ex parte Australian Workers' Union of Employees (Qld) (No 2)* (1997) 189 CLR 654 at 656-657 (the Court).

62 Significantly, when 'arising under' is used to define the *exclusive* jurisdiction of a specialist court, that phrase may be interpreted more narrowly than in s 76(ii) of the Constitution: see eg *Carricks Ltd v Pizzarro*

(1995) 38 NSWLR 271 at 277 (Priestley JA, with Sheller JA agreeing), considering s 107 of the *Workers Compensation Act 1987* (NSW).

63 See above, n 44 (discussing *LNC Industries*).

64 Contrary to the suggestion in Arora, above n 16, at 158. The Federal Court can of course only be given jurisdiction over matters of the types set out in ss 75 and 76 of the Constitution.

65 See para (ca) of the definition of 'enactment' in s 3(1) of the AD(JR) Act, and Sch 3. Regulations made under s 19A can specify additional State and Territory legislation that is treated as an 'enactment'. However, only a decision by a Commonwealth authority or an officer of the Commonwealth under these State and Territory Acts is a 'decision to which this Act applies': see para (b) of the definition in s 3(1) of the AD(JR) Act.

66 See eg *LNC Industries* (1983) 151 CLR 575 at 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

67 Briefly, if the decision is made under a Commonwealth Act, then the application of the AD(JR) Act will be supported by whatever head of power supports that Commonwealth Act. If the decision is made under a *State* Act, then the application of the AD(JR) Act will be supported by whatever head of power supports the Commonwealth law authorising the Commonwealth body to perform the State function, and possibly by the Commonwealth's inherent executive power to regulate the conduct of its own officers and bodies.

68 *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 179 (Finn J).

69 This comparison between *Hughes Aircraft* and *NEAT Domestic* is made in Arora, above n 16, at 152.

70 Indeed, McHugh and Gummow JJ have expressed doubts whether s 75(v) of the Constitution would permit courts to review a denial of a 'legitimate expectation', because the constitutional separation of power is said to limit s 75(v) to review on the grounds of jurisdictional error: *Re Minister for Immigration and Multicultural and Ethnic Affairs; Ex parte Lam* (2003) 214 CLR 1 at 24-25 [76]-[77]. A similar argument might apply also to a decision which affected only 'interests'. I am grateful to Professor Creyke for this point.

71 Robin Creyke and Graeme Hill, 'A Wavy Line in the Sand: *Bond* and Jurisdictional Issues in Judicial and Administrative Review' (1998) 26 *Fed L Rev* 15 at 41.