HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

GRIFFITH UNIVERSITY APPELLANT

AND

VIVIAN TANG RESPONDENT

Griffith University v Tang [2005] HCA 7
3 March 2005
B19/2004

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 19 December 2003 and in its place order:*

   a) *the appeal to that Court is allowed;*

   b) *set aside the orders of the Supreme Court of Queensland (Mackenzie J) made on 14 February 2003 and in their place order that the application for a statutory order of review is dismissed;*

   c) *the University pay the costs of the appeal to the Court of Appeal;*

   d) *the question of the costs of the application before Mackenzie J is remitted to the Supreme Court of Queensland.*

3. *The appellant pay the respondent's costs of the appeal to this Court.*

On appeal from the Supreme Court of Queensland

Representation:

P A Keane QC with S E Brown for the appellant (instructed by Minter Ellison)

A J H Morris QC with J P Murphy for the respondent (instructed by Dibbs Barker Gosling)

CATCHWORDS

Griffith University v Tang

Administrative law – Judicial review – Exclusion of respondent from PhD candidature programme conducted by appellant – Where appellant is a body created by statute – Power of appellant to function as a university and to confer higher education awards derived from statute – Whether exclusion was a decision to which the *Judicial Review Act* 1991 (Q) applied – Whether exclusion was a decision made under an enactment – Relevance of nature of relationship subsisting between parties.

Words and phrases – "decision", "under an enactment", "of an administrative character", "required or authorised", "aggrieved by".

Judicial Review Act 1991 (Q), ss 4, 5, 7(1)(a), 16(1), 20, 48.
Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 3, 5(1).
Griffith University Act 1998 (Q), ss 5, 6, 8, 9, 11.

1 GLEESON CJ. The respondent brought proceedings in the Supreme Court of Queensland seeking review under the *Judicial Review Act* 1991 (Q) of a decision to exclude her from the PhD candidature programme conducted by the appellant. The decision was made on the ground that she had "undertaken research without regard to ethical and scientific standards" and had thereby engaged in "academic misconduct". The finding that there had been misconduct, and that exclusion was the appropriate response, was made by an Assessment Board, which was a sub-committee of the Research and Postgraduate Studies Committee of Griffith University. The respondent pursued an appeal procedure within the University. An Appeals Committee concluded that misconduct had occurred, that exclusion was appropriate, and that the appeal should be dismissed. The respondent contends that, at both levels, there were breaches of the requirements of natural justice, failures to comply with mandatory procedural requirements, improper exercises of power, and errors of law.

2 In her application for review, the respondent said that she was aggrieved by the decision because she had been excluded from her PhD candidature with the appellant and, in consequence, her prospects of following a professional career in her chosen fields (molecular biology and bioscience) had been destroyed.

3 The issue in the present appeal is whether the decision to exclude the respondent was a decision to which the *Judicial Review Act* applied. By virtue of s 4 of the *Judicial Review Act*, the answer depends upon whether it was "a decision of an administrative character made ... under an enactment". That formula was borrowed from the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). It is common ground that the considerations bearing on the meaning of the Commonwealth Act also apply to the State Act. The appeal is concerned solely with the application under the *Judicial Review Act*. Whether, if the allegations made by the respondent were correct, she would be entitled to a remedy under the common law, for breach of contract, or pursuant to the powers of the Supreme Court of Queensland which are preserved by s 41 of the *Judicial Review Act*, or otherwise, is not a question that arises. If the *Judicial Review Act* applies, it provides its own procedures for judicial review and its own remedies. It is those statutory procedures that have been invoked by the respondent, and those statutory remedies that are sought. Because the *Judicial Review Act* picked up the language of the ADJR Act, and because of the history of judicial interpretation of the ADJR Act, it could be that the statutory scheme, in some circumstances, provides a more restricted form of judicial review than is otherwise available.

4 In the Supreme Court of Queensland, the appellant applied for summary

dismissal of the proceedings under s 48 of the *Judicial Review Act*. That application failed at first instance[1] and before the Court of Appeal[2].

5 The argument turns upon whether the decision to exclude the respondent was a decision "under an enactment", the relevant enactment being the *Griffith University Act* 1998 (Q).

6 The *Griffith University Act* 1998, which replaced the *Griffith University Act* 1971 (Q), provides that the functions of the appellant include providing education at a university standard, providing facilities for and encouraging study and research, providing courses of study and instruction, and conferring higher education awards (s 5). That Act gives the appellant all the powers of an individual, including the power to enter contracts, acquire and deal with property, fix charges and other terms for the services it supplies, and do anything necessary or convenient in connection with its functions (s 6). The appellant's governing body is a Council, which has wide powers to manage the University's affairs (ss 7, 8, 9). It may delegate its powers to an appropriately qualified committee (s 11). The Council is empowered to make university statutes, which may cover, among other things, the admission, enrolment and disciplining of students and other persons undertaking courses, fees, and the making and notifying of university rules (s 61). There are no such statutes of relevance to this appeal.

7 In the Queensland Court of Appeal, Jerrard JA described the chain of authority pursuant to which the respondent's case was considered as follows:

> "On 4 August 1997 the council approved a constitution (a revised one) for a body described as The Academic Committee. Its central function described in its constitution is that of being responsible to the Council for assuring the quality of academic activities across the University. Its responsibilities included the apparently delegated one of developing and monitoring the academic policies and procedures of the University and making recommendations to the Council on those matters; advising the Council on the policies and procedures pertaining to research higher degree programs; and advising the Council on the conduct, evaluation and enhancement of teaching and research. It has specific delegated authority to approve the content of academic courses and detailed requirements for awards, and to determine the University's academic policy in the areas of student administration, assessment, progress, credit and timetabling. On 1 March 2001 the Academic

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1 *Tang v Griffith University* [2003] QSC 22.

2 *Tang v Griffith University* [2003] QCA 571.

Committee approved a revised Policy on Academic Misconduct, and on 6 September 2001 a revised Policy on Student Grievances and Appeals. There was no suggestion made on the appeal that those approvals were not intra vires the Academic Committee.

Also on 4 August 1997, a Research and Postgraduate Study Committee was established by the council; it is described in the material before this court as a sub-committee of the Academic Committee. The functions of the Research and Postgraduate Studies Committee include ... those of approving the eligibility of students to receive higher degrees including a PhD ... The learned judge found that this function was a direct delegation from the council."

8 There is nothing in the *Griffith University Act* which deals specifically with matters of admission to or exclusion from a research programme or any course of study, academic misconduct, or intra-mural procedures for dealing with issues of the kind that arose in the case of the respondent. The powers that were exercised in establishing policies and procedures relating to research higher degrees, academic standards, investigation of alleged academic misconduct, and exclusion from programmes, all appear to flow from the general description in s 5 of the *Griffith University Act* of the University's functions, the general powers stated in s 6 and the general power to do anything necessary or convenient in connection with those functions, and the powers of the Council as the University's governing body, including its powers of delegation.

9 In argument, reference was also made to s 8 of the *Higher Education (General Provisions) Act* 1993 (Q), which, in effect, confers upon universities the exclusive right to confer higher education awards, by prohibiting a "non-university provider" of educational services from conferring such awards.

10 Placing reliance upon *Australian National University v Burns*[3] and *Australian National University v Lewins*[4], the appellant argued that, to satisfy the description of a decision of an administrative character made under an enactment, a decision must be authorised or required by a statute and, in addition, it must be the statute which gives legal force or effect to the decision. Those cases, and other decisions of the Federal Court extending over many years, establish, in relation to the ADJR Act, that it is not enough that the decision be within power. The legislation does not provide for review of all decisions of an administrative character made in pursuance of any power or authority which has its foundation

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3 (1982) 43 ALR 25.

4 (1996) 68 FCR 87.

11 in a statute. As Lehane J put it in *Australian National University v Lewins*[5], a decision meets the test "only if it is one for the making of which the relevant statute either expressly or impliedly provides and one to which the statute gives legal force or effect."

12 The structure of the *Griffith University Act* follows a familiar form. In all Australian jurisdictions there are statutes which establish or incorporate particular institutions, such as schools, or hospitals, or universities, or charitable organisations, describe their functions, confer on them powers appropriate to those functions, and provide for their governance. Whatever the principal functions of such an institution may be, the statute by which it is established ordinarily confers upon some governing authority general powers appropriate to the discharge of those functions. It does not follow that any administrative decision made in the exercise of those powers is a decision made under the relevant enactment for the purposes of the ADJR Act, or legislation expressed in the same terms.

13 The effect of the decision presently in question was to exclude the respondent from the appellant's PhD research programme. There was no finding in the Supreme Court of Queensland as to exactly what was involved, in terms of legal relations, in admission to, or exclusion from, the programme. There was no evidence of a contract between the parties. There may well have been such a contract, but, if there was one, we were not told about it, and it was not relied upon by either party. The silence in the evidence about this matter, which bears upon the legal nature and incidents of the relationship between the parties, is curious. If the decision to exclude the respondent had been made pursuant to the terms of a contract, then, on the authorities, that would have been a consideration adverse to the respondent on the issue with which we are concerned. In *Australian National University v Burns*[6], the question to be decided was whether a decision of the Council of the Australian National University to dismiss a professor was a decision made under an enactment within the meaning of the ADJR Act. The Full Court of the Federal Court answered the question in the negative. There was a contract between the University and the professor, and in dismissing the professor the University relied on the terms of the contract. Bowen CJ and Lockhart J said[7]:

"In one sense every decision of the Council may be said to be made 'under' the University Act namely, in the sense of in pursuance of or under

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5 (1996) 68 FCR 87 at 101, citing Neaves J in *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 51 FCR 329 at 333.

6 (1982) 43 ALR 25.

7 (1982) 43 ALR 25 at 31-32.

its authority. Section 23 is, in effect, the charter of the Council. It confers the widest powers upon the Council including the power of appointing professors and other University staff. ...

Although s 23 confers no power in express terms to remove or suspend professors and others, such power arises from the more general powers conferred by the section on the Council after the express reference to the powers of appointment. In our opinion the control and management of the affairs of the appellant must include the suspension or removal of its deans, professors and others.

Notwithstanding that s 23 was the source of the Council's power to appoint and dismiss the respondent in 1966, it does not follow that the decision to dismiss him was made under the University Act. The answer to the question lies in the true characterization of the decision itself. It was not a decision to dismiss the respondent *simpliciter*. It was a decision to dismiss him on a particular ground namely, that he had become permanently incapacitated from performing the duties of his office. This was one of the grounds expressly provided for in condition 2(b)(ii) of the conditions of appointment which formed part of the respondent's contract of engagement. The University Act prescribes no essential procedural requirements to be observed before a professor is dismissed and lays down no incidents of a professor's employment.

In our opinion the rights and duties of the parties to the contract of engagement were derived under the contract and not under the University Act. Section 23 empowered the Council to enter into the contract on behalf of the appellant. Even if the Council, in considering the position of the appellant under the contract, might be said to be acting under s 23, the effective decision for dismissal taken and notified to the respondent was directly under the contract."

14 The decision was characterised as a decision under the contract rather than a decision under the Act. It was based on the terms of the contract, and there was nothing in the University Act that dictated the procedures to be followed, or the grounds to be applied. Obviously, one consequence of the dismissal was that the professor would no longer be a professor at the Australian National University, but that did not mean the dismissal was under the Act. It should also be noted that the Full Court expressly declined to distinguish between the position of academic staff, on the one hand, and "librarians, groundsmen or security officers", on the other hand, for the purposes of relating the Act to the decision[8].

15 This was one of the early decisions under the ADJR Act. For present purposes, it is important to note an approach to the ADJR Act that was

8 (1982) 43 ALR 25 at 35.

considered, and rejected, by the Full Court. Ellicott J, at first instance, had held that the University's decision was under an enactment. He said it was wrong to exclude from the operation of the ADJR Act "fundamental decisions of the University (a body created by statute) through its Council about matters lying at the very heart of its existence and essential to the fulfilment of the basic function for which the University was set up by Parliament."[9] If the approach of Ellicott J had prevailed, it would have provided support for the respondent in the present case. It directed attention to the nature of the power being exercised rather than to its immediate source. The approach was rejected by the Full Court, and the subsequent course of authority makes it inappropriate to reconsider the decision. We were not invited to do so.

16 The functions of the appellant include providing education, providing facilities for study and research, and conferring higher education awards. Its powers include the power to do anything necessary or convenient in connection with its functions. Subject to any other legal constraint, it may establish a PhD research programme, and decide who will participate in the programme and on what terms and conditions.

17 Exclusion from a research programme might take the form of refusing admittance in the first place. There is nothing in the statute to oblige the appellant to accept an applicant, although there may well be other laws which could come into play depending upon the reason for a refusal.

18 In the present case, the exclusion was in accordance, or purported to be in accordance, with the terms and conditions as to academic behaviour which had previously been established. It appears to be accepted that, by applying to join the programme, the respondent was bound by those terms and conditions, at least in the sense that the appellant could lawfully apply them to its relationship with the respondent. If there were a contract, presumably the contract, either expressly or by implication, included those terms and conditions. The case was argued on the assumption that the appellant was entitled to invoke and apply its policies in relation to academic misconduct, and its procedures for deciding whether academic misconduct had occurred and for internal review of such a decision. The precise legal basis of that common assumption was not examined in argument. There is no reason to doubt that the assumption is correct. There is a dispute, on the merits, as to whether the policy and procedures were fairly and regularly applied, but that is presently beside the point. The character of the decision, for purposes of the *Judicial Review Act*, would be the same even if it were clear beyond argument that there had been academic misconduct, and that the decision to exclude the respondent had been fairly and properly made in every respect. Would it

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9 *Burns v Australian National University* (1982) 40 ALR 707 at 717.

have been a decision that took its legal force or effect from statute?

19 In *Scharer v State of New South Wales*[10] Davies AJA, referring to questions under the ADJR Act as to whether a decision is under an enactment, said:

> "The crux of the issue in each case is whether the enactment has played a relevant part in affecting or effecting rights or obligations. A grant of authority to do that which under the general law a person has authority to do is not regarded as sufficient."

So, to revert to *Australian National University v Burns*, a grant of authority to make contracts and employ staff does not mean that when a staff member is dismissed for breach of contract the statute under which the employer is operating has played a relevant part in the legal force or effect of the decision.

20 In the Supreme Court of Queensland, importance was placed upon the considerations that the *Higher Education (General Provisions) Act* conferred upon universities an effective monopoly to confer higher education awards, and that, under the *Griffith University Act*, the appellant enjoyed the benefit of that monopoly. That is undoubtedly important to the assertion that the respondent is a person aggrieved by the decision in question, and had standing to bring review proceedings. That assertion is not in controversy in this appeal. Undoubtedly, from a practical point of view, it is unrealistic to regard the decision to exclude the respondent from the PhD programme as no different from the decision of any service provider to withdraw future supply from a consumer of those services. Yet the legal effect of an otherwise lawful decision to terminate a relationship, contractual or voluntary, may be described accurately and sufficiently as a termination of the relationship, even if the statutory or other context in which the relationship exists confers particular benefits, or potential benefits, upon one of the parties.

21 So far as appears from the evidence, the relationship between the appellant and the respondent was voluntary. Neither party was bound to continue in the relationship, although the respondent would have had a legitimate expectation that certain procedures would be followed before the appellant terminated the relationship. The *Griffith University Act* provided the legal context in which the relationship existed. The *Higher Education (General Provisions) Act* also provided part of the wider context. On the other hand, the decision of the appellant, which was to terminate that relationship, was not a decision which took legal force or effect, in whole or in part, from the terms of either statute.

22 Subject to one qualification, the parties accepted the line of authority in

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10 (2001) 53 NSWLR 299 at 313.

the Federal Court as providing the test to be applied in deciding whether a decision is under an enactment. The qualification is as follows. Counsel for the respondent, while accepting that a decision is not a decision made under an enactment unless the decision draws its legal efficacy from a statutory provision, proposed as an additional (or, perhaps, alternative) test the question whether such efficacy could be achieved by an exercise of power or rights by "anyone in the public". The test was said to be whether the legal force or effect of a decision is of such a kind that it could result from the exercise by any member of the public of a power or capacity not derived from statute.

23 That might be a useful question to ask in a given case for the purpose of answering the question whether it is a statute (or something else, such as a contract or the general law) that gives legal force or effect to a decision. As Davies AJA said in *Scharer*, the necessary degree of connection between a statutory grant of authority and a decision may not exist if the authority is merely a grant of a power to do that which, under the general law, an ordinary member of the public has power to do. However, as a free-standing test it suffers from the defect that the answer to the question posed may depend upon the level of abstraction at which the decision, or its legal effect, is described. Any member of the public cannot admit a person to, or exclude a person from, a PhD course, much less a PhD course at Griffith University. On the other hand, any member of the public can enter into a voluntary association with another person, and (subject to any relevant legal constraints) terminate that association.

24 The question in the present case turns upon the characterisation of the decision in question, and of its legal force or effect. That question is answered in terms of the termination of the relationship between the appellant and the respondent. That termination occurred under the general law and under the terms and conditions on which the appellant was willing to enter a relationship with the respondent. The power to formulate those terms and conditions, to decide to enter the relationship, and to decide to end it, was conferred in general terms by the *Griffith University Act*, but the decision to end the relationship was not given legal force or effect by that Act.

25 There was reference, in the course of argument, to par (b) of the definition of "decision to which this Act applies" in s 4 of the *Judicial Review Act*. There was a suggestion that the respondent might seek to rely on that paragraph, although it was not argued in the Supreme Court of Queensland. However, as Senior Counsel for the appellant pointed out, there is no evidentiary basis for the argument and, in any event, it seems difficult to contemplate that the relevant decision could have been shown to be a decision of the kind referred to in par (b).

26 The appeal should be allowed. I agree with the orders proposed by Gummow, Callinan and Heydon JJ.

27 GUMMOW, CALLINAN AND HEYDON JJ. This appeal turns upon the construction of the *Judicial Review Act* 1991 (Q) ("the Review Act"). This Queensland legislation has its provenance in federal law. That is apparent from s 16(1) of the Review Act, which states:

> "If –
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> (a) a provision of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) ['the ADJR Act'] expresses an idea in particular words; and
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> (b) a provision of this Act appears to express the same idea in different words because of different legislative drafting practice;
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> the ideas must not be taken to be different merely because different words are used."

28 One consequence of the linkage between the text and structure of the federal and State statutes has been reliance in the present litigation upon various decisions construing the ADJR Act.

The federal legislation

29 In *Shergold v Tanner*[11], reference was made to the development of the federal system of administrative law, including the ADJR Act. The statement in par 390 of the *Report of the Commonwealth Administrative Review Committee*[12] ("the Kerr Committee") of its main recommendations and suggestions had included the exercise by a new federal court of jurisdiction to review on legal grounds "decisions, including in appropriate cases reports and recommendations, of Ministers, public servants, administrative tribunals ... but not decisions of the Governor-General".

30 The eventual translation of that recommendation into the terms of the ADJR Act had a significance for the later case law (and for the present case) in two respects. First, the term "decision" was ambiguous; many decisions are made by administrators in the course of reaching an ultimate determination. The Kerr Committee had not adverted to what Mason CJ

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11 (2002) 209 CLR 126 at 129-130 [2]-[4].

12 (1971) at 113.

later[13] discerned as competing policy considerations, enhancement of the administrative processes of government by providing convenient and effective means of redress, and impairment of efficient administration of government by fragmentation of its processes. Secondly, the adoption in the ADJR Act of the phrase "a decision of an administrative character made ... under an enactment" directed attention away from the identity of the decision-makers, the Ministers and public servants referred to by the Kerr Committee, and to the source of the power of the decision-makers. In contrast, s 75(v) of the Constitution fixes upon the phrase "officer of the Commonwealth". The resultant uncertainties generated by the case law on the ADJR Act have continued for more than 25 years.

The State legislation

31 Section 19 of the Review Act provides that the Supreme Court of Queensland has jurisdiction to hear and determine applications made to it under the statute. However, Pt 5 (ss 41-47) reforms and preserves the jurisdiction of the Supreme Court to provide remedies in the nature of those of the prerogative writs of mandamus, prohibition or certiorari and uses the term "prerogative order" to identify this reformed jurisdiction (ss 3, 41(2)). In addition, whilst informations in the nature of *quo warranto* are abolished by s 42, an injunctive remedy of that nature, called a "prerogative injunction" (s 3), is provided by s 42(2). Finally, s 43 provides revised procedures for the exercise of the Supreme Court's jurisdiction to administer the declaratory and injunctive remedy as developed in public law. To the foregoing, there may be added the potential for "public law" issues to found claims of redress for tortious conduct[14].

32 The federal system of administrative law, including the ADJR Act, operates in addition to the jurisdiction conferred on this Court by the Constitution. Section 8 of the ADJR Act confers jurisdiction on the Federal Court and the Federal Magistrates Court. Further, a significant measure of that jurisdiction with which the High Court is endowed by s 75(v) of the Constitution has been conferred on the Federal Court by s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act")[15].

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13 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-337.

14 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558.

15 Provision for transfer of proceedings from the Federal Court to the Federal Magistrates Court is made by s 32AB of the *Federal Court of Australia Act* 1976 (Cth).

33 In a similar fashion to the operation of the ADJR Act in the broader setting of the federal system of administrative law, so also, in Queensland, the new remedies provided by the Review Act are to be understood in the context of administrative law in the wider sense described above. It is undisputed that the Review Act does not exhaustively cover the whole of that field. Section 10(1) states that the rights conferred by the Review Act are in addition to any other right to seek review by the Supreme Court, any other court or a tribunal, authority or person. However, what the respondent sought was a statutory order of review.

Griffith University

34 The litigation arises from the exclusion of the respondent from the PhD candidature programme conducted by Griffith University ("the University"). The University is not one of those educational institutions created by Royal Charter[16]. Rather, the University is wholly the creature of statute. It is established as a body corporate by s 4 of the *Griffith University Act* 1998 (Q) ("the University Act") and "has all the powers of an individual" (s 6). One of the functions of the University conferred by s 5 is the conferral of "higher education awards". The University Act is to be read with an understanding of the *Higher Education (General Provisions) Act* 1993 (Q) ("the Higher Education Act")[17]. The effect of s 8(1) of the Higher Education Act was to prohibit an unauthorised non-university provider of courses of higher education from conferring a "higher education award". That term was defined in s 3 so as to include "a degree, status, title or description of bachelor, master or doctor".

35 The result was that the PhD degree sought by the respondent could only be obtained in Queensland from a body such as the University established by the University Act. If the respondent, with a view to obtaining an advantage or benefit, were to attempt to induce the belief that she had been awarded that degree contrary to the fact, then she would commit an offence created by s 8(3) of the Higher Education Act.

36 The Council of the University is its governing body (the University Act,

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16 See, for example, *R v Aston University Senate, Ex parte Roffey* [1969] 2 QB 538 at 543.

17 Now repealed by s 91 of the *Higher Education (General Provisions) Act* 2003 (Q).

s 8). It may delegate most of its powers to committees but not its power to make university statutes or rules (s 11). Two of the committees established by the Council are the Research and Postgraduate Studies Committee and the University Appeals Committee.

37 By letter dated 19 July 2002 from the University addressed to the respondent, she was notified that the Assessment Board, a sub-committee of the Research and Postgraduate Studies Committee, had found that she had engaged in academic misconduct. Reference was made specifically to the presentation by the respondent of falsified or improperly obtained data as if they were the result of laboratory work. The respondent was invited to make further submissions to Professor Finnane, the Chair of the Assessment Board. By letter dated 9 August 2002, Professor Finnane wrote to the respondent indicating the receipt of further submissions by her and acknowledging that the Assessment Board had determined that she be excluded from her PhD candidature programme on the ground that she had undertaken research without regard to ethical and scientific standards. The letter notified the respondent that she had a right to appeal against this decision and enclosed a copy of the *Policy on Student Grievances and Appeals*.

38 Thereafter, on 21 October 2002, Associate Professor Healy, Chair of the University Appeals Committee, wrote to the respondent stating that, on 17 October 2002, the Appeals Committee had determined that the respondent's appeal be dismissed on grounds which were identified as follows:

> "• after a full review of the evidence presented to the University Appeals Committee, including the evidence and arguments provided by yourself in support of your appeal, the Committee was satisfied, on a strong balance of probabilities, that an ongoing fabrication of experimental data by yourself did occur over an extended period for a significant number of experimental results, as alleged in the initial complaint by Associate Professor Clarke and Dr Tonissen, and as found by the Assessment Board.
>
> • the procedures followed by the University which culminated in the Assessment Board's finding against yourself were consistent with the principles of procedural fairness and with the policies, practices and procedures for consideration of allegations of Academic Misconduct within the University. The Committee was satisfied that any perceived errors or omissions in these procedures were not such as to vitiate the fairness of the procedures, or result in a different outcome had alternative actions been taken to avoid the

perception of such errors or omissions."

The letter continued by stating that, in reaching its conclusion, the Appeals Committee:

> "noted that it had not been suggested at any stage in the complaints or appeals process that you had any motive for fabricating your data other than saving time and effort; or that the data presented [were] intended to yield a result which differed in a significant, systematic or scientifically interesting way from what would have been yielded by application of the proper procedures and protocols".

39 Nevertheless, the Appeals Committee had remained satisfied that exclusion of the respondent from the PhD candidature "was appropriate in the context of [her] responsibility as a professional scientist to adhere to ethical and scientific standards at all times".

40 Section 18 of the Review Act provides that that statute does not affect the operation of, or apply to decisions made under, enactments listed in Sched 1. The University Act is not listed there.

No University Visitor

41 This litigation concerns the engagement of the jurisdiction of the Supreme Court conferred by the Review Act. The University Act contains no provision for there to be a Visitor to the University[18]. Accordingly, in the conduct by the University of its affairs there is no occasion for the consideration of the case law concerning the content and exclusivity of the jurisdiction of a Visitor[19]. In particular, in *Thomas v University of Bradford*[20], the House of Lords did not accept for England the view expressed by Woodhouse P and Cooke J[21] in New Zealand that the

18 cf *Bond University Act* 1987 (Q), s 14.

19 *Ex parte King; Re The University of Sydney* (1943) 44 SR (NSW) 19 at 31; *Ex parte McFadyen* (1945) 45 SR (NSW) 200; *R v University of Saskatchewan, Ex parte King* (1968) 1 DLR (3d) 721 at 723; *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129; *Thomas v University of Bradford* [1987] AC 795.

20 [1987] AC 795 at 810-811.

21 *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129 at 135-136, 140. Somers J, the third member of the Court of Appeal, inclined to the

jurisdiction of the Visitor over disputes between the University of Auckland and one of its members was subject to, rather than exclusive of, the jurisdiction which otherwise might be exercised by the courts of justice. Their Honours had stressed the character in New Zealand of universities, not as the benefaction of a Founder, but as publicly funded institutions, constituted by statute and discharging an acknowledged responsibility of the State. Earlier, the Full Court of the New South Wales Supreme Court[22] had construed the legislation establishing the University of Sydney as vesting full power in the Senate, with the Governor as Visitor having "an official connection" with the University[23].

The structure of the Review Act

42 Section 20(1) of the Review Act provides that a person "who is aggrieved by a decision to which this Act applies" may apply to the Supreme Court for a statutory order of review in relation to the decision. Section 20(2) lists in pars (a)-(i) the grounds of review. The text of s 20 has its provenance in the opening passage in the much litigated s 5(1) of the ADJR Act. It will be apparent that three distinct elements are involved: first, the existence of a decision to which the Review Act applies (because made "under" an enactment); secondly, an applicant to the Supreme Court who is "aggrieved" by that decision; and, thirdly, reliance upon one or more of the listed grounds of review.

43 The first element as it appears in the ADJR Act has been well described as its "linchpin" which governs the statute at all stages[24]. It is with its appearance in the Review Act that this litigation is concerned.

44 However, something more should be said of the other two elements in s 20. As to the requirement that the applicant be "aggrieved by" a decision, the question whether the applicant is such a person only arises if there can be shown to be a decision to which the Review Act applies. If

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view taken in England: [1984] 1 NZLR 129 at 148.

22 *Ex parte McFadyen* (1945) 45 SR (NSW) 200.

23 *Ex parte McFadyen* (1945) 45 SR (NSW) 200 at 205; cf *Murdoch University v Bloom and Kyle* [1980] WAR 193 at 198, 202; *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424, noted (1991) 65 *Australian Law Journal* 299. See also Matthews, "The Office of the University Visitor", (1980) 11 *University of Queensland Law Journal* 152.

24 Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 49.

the answer be in the negative, then there is nothing "by" which any applicant can assert a grievance. If the answer be in the affirmative, then a question of adequacy of "standing" may arise. Recollection of and reflection on many decisions construing the ADJR Act[25] indicate that, particularly with regulatory schemes, it is not the successful applicant for a permission or licence but a third party who seeks administrative review.

45 In dealing with this criterion of a person "aggrieved", the cases under the ADJR Act may be said, putting the matter very broadly, to have rejected a "rights-based approach" whilst "understandably [refusing] to go into specifics"[26]. But it is one thing to anchor the legislation in the criterion of a decision to which the review statute applies because it is made "under" an enactment; another to fix the legislative criterion for standing to enliven the Review Act. It is the first which is the precondition for the second, not vice versa.

46 With respect to the need to base an application for review upon one or more of the enumerated grounds, observations by Lehane J in *Botany Bay City Council v Minister of State for Transport and Regional Development*[27] are pertinent. Paragraph (a) of the listed grounds in s 5(1) of the ADJR Act and s 20(2) of the Review Act is concerned with a breach of the rules of natural justice in relation to the making of the decision in question. It was against this background that, in *Botany Bay City Council*, a case under the ADJR Act, Lehane J observed[28]:

"The argument, as I think is not uncommon, proceeded on the basis that there was a relationship between the questions of standing and, in the context of procedural fairness, of a right to be heard. Where, of course, a decision affects an individual interest it is highly likely that a conclusion on one matter will dictate a conclusion on the other: it is of course inconceivable that someone entitled to a hearing in relation to a proposed

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25 There is a collection and discussion of a number of the cases under both the ADJR Act and the Review Act in Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 683-686.

26 Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 684.

27 (1996) 66 FCR 537; affd (1996) 45 ALD 125.

28 (1996) 66 FCR 537 at 568.

deportation order would not, if denied a hearing, be entitled to challenge the order once made. It is, however, different I think in what may be described loosely as a public interest case, such as the present. In such a case it would not be at all unusual, I think, to find that a person with standing to challenge a decision once made had, nevertheless, no right to be heard in relation to its making: as will be apparent, I think this is such a case. *Ogle v Strickland*[29] was, I should think, another; and *North Coast Environment Council* [*Inc v Minister for Resources*[30]] may well have been a third. In reality, they are in my view separate questions, in relation to each of which there is a distinct set of principles, emerging from strikingly separate lines of authority."

47 The reference in s 20(1) to a person "aggrieved" includes "a person whose interests are adversely affected by the decision" (s 7(1)(a)). The respondent has maintained that she is a person aggrieved by the decision because her exclusion from the PhD candidature has destroyed her prospects of following a professional career in the fields of molecular biology and bioscience. The University does not put its case on the ground that the respondent was not a person "aggrieved". Rather, the question cannot arise unless it be shown that there was a decision to which the Review Act applied.

48 The orders which may be made on an application for a statutory order of review in relation to a decision are detailed in s 30(1) of the Review Act. They include orders setting aside the decision or part of it; an order referring the matter for further consideration by the decision-maker; and relief in the nature of a prohibitory or mandatory injunction.

49 As indicated above, it is the expression in s 20(1) "decision to which this Act applies" which provides the battleground in the litigation. The expression is defined in s 4 of the Review Act as meaning a decision falling within the description in par (a) or par (b). Paragraph (b) states:

"a decision of an administrative character made, or proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part) –

(i) out of amounts appropriated by Parliament; or

(ii) from a tax, charge, fee or levy authorised by or under an

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29 (1987) 13 FCR 306.

30 (1994) 55 FCR 492.

enactment".

50 This finds no counterpart in the ADJR Act. No issue is before this Court respecting par (b). The focus in debate has been par (a). This is in terms which follow those of the definition of "decision to which this Act applies" in s 3(1) of the ADJR Act. The provision in par (a) in the Queensland definition reads:

"a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion)".

The words within the brackets emphasise that the decision may be made in exercise of a power rather than an obligation, so that it is proper to speak of a decision required or authorised by an enactment.

51 Section 3 of the Review Act states that:

"'**enactment**' means an Act or statutory instrument, and includes a part of an Act or statutory instrument".

The term "statutory instrument" is comprehensively defined[31].

52 No statutory instrument is relied upon in this appeal[32]. However, the definition of "enactment" is not without significance. A decision made under a statutory instrument might, on one view, have been considered to have been made "under" the statute which conferred the power to make the statutory instrument. On that approach, it would have been unnecessary to give the fuller definition of "enactment".

The application to the Supreme Court

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31 *Acts Interpretation Act* 1954 (Q), s 36; *Statutory Instruments Act* 1992 (Q), s 7. The definition of "enactment" in s 3(1) of the ADJR Act includes "an instrument (including rules, regulations or by-laws) made under [statute]" and many cases under the ADJR Act have turned upon the question whether a decision was "made under" such an instrument.

32 A submission by the respondent relying upon the term "statutory instrument" was made to the primary judge but because other submissions succeeded it was unnecessary to deal with it. The submission has not been revived by a Notice of Contention.

53 By Application dated 18 November 2002, the respondent sought a statutory order of review setting aside the decisions culminating in and including that of the University Appeals Committee notified by the letter of 21 October 2002. The respondent identified in the Application the decisions in question as made by the University "under its Policy on Academic Misconduct" ("the Policy").

54 The respondent alleged various breaches of the rules of natural justice, failure to observe procedures required by various clauses of the Policy, errors of law, absence of evidence or other material to justify the decision, and the "improper exercise of the power conferred by the enactment" under which the action against her purportedly had been taken. The "enactment" was not specified but the evident intention was to identify the University Act.

55 The University applied for, but did not obtain, an order by the Supreme Court under s 48 of the Review Act dismissing the respondent's case. Under that provision, the Supreme Court may dismiss an application for review if it considers there is no reasonable basis for it (s 48(1)(b)). Mackenzie J expressed his rejection of the s 48 application by the University as follows[33]:

"[T]he tightly structured nature of the devolution of authority by delegation in relation to the maintenance of proper standards of scholarship and, consequently, the intrinsic worth of research higher degrees leads to the conclusion that, even though the Council's powers are expressed in a general (but plenary) way, the decision to exclude [the respondent] from the PhD program is an administrative decision made under an enactment for the purposes of the [Review Act]."

The appeal to the Court of Appeal

56 An appeal to the Queensland Court of Appeal (Jerrard JA, Dutney and Philippides JJ) was dismissed[34]. Dutney J (with whom Philippides J agreed) accepted the respondent's submission, renewed in this Court, that the question whether a decision was made under an enactment for the purposes of the definition in s 4 of the Review Act was answered by asking of the decision[35]:

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33 *Tang v Griffith University* [2003] QSC 22 at [25].

34 *Tang v Griffith University* [2003] QCA 571.

35 [2003] QCA 571 at [45].

"[i]s it something that anyone in the community could do, which is simply facilitated by the statute, or is it something which a person can only do with specific statutory authority?"

57 The other member of the Court of Appeal, Jerrard JA, referred to decisions in the Full Court of the Federal Court, in particular *General Newspapers Pty Ltd v Telstra Corporation*[36]. In that case, it was said that the term "decision" in the ADJR Act carried a meaning "of an ultimate or operative determination which has force and effect by virtue of an enactment"[37]. The Full Court had then continued[38]:

"A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute. The empowering statute merely confers capacity to contract, whilst the validity and effect of the contract is determined by the ordinary laws of contract."

58 It has been common ground throughout the present litigation that the enrolment of the respondent at the University as a PhD candidate did not give rise to a contractual relationship between the parties. In the Court of Appeal, Jerrard JA said[39]:

"In the instant appeal … there is no evidence of any payment made by [the respondent] to [the University] for admission to the PhD course, or of any terms or conditions agreed to between the parties when she was (presumably) admitted or accepted as a PhD candidate."

59 Had reliance been placed upon contract, then the occasion may have arisen to consider the apparent exclusion from justiciability of issues of academic judgment, including issues of competence of students, by the English Court of Appeal in *Clark v University of Lincolnshire and Humberside*[40]. The basis upon which the lack of justiciability was put in *Clark* appears not to depend upon the absence of contractual relations for

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36 (1993) 45 FCR 164.

37 (1993) 45 FCR 164 at 173.

38 (1993) 45 FCR 164 at 173.

39 [2003] QCA 571 at [29].

want of *animus contrahendi*[41]; rather, the basis appears to be that any adjudication would be, as Sedley LJ put it, "jejune and inappropriate"[42].

The definition

60 The defining expression "a decision of an administrative character made … under an enactment" has given rise to a considerable body of case law under the ADJR Act, some of it indeterminate in outcome. The focus has been upon three elements of the statutory expression. The first is "a decision"; the second, "of an administrative character"; and the third, "made … under an enactment".

61 The cases, particularly in the Federal Court, have tended to see these as discrete elements. But there are dangers in looking at the definition as other than a whole. The interrelation between them appears from the following passage in the joint judgment of Toohey and Gaudron JJ in *Australian Broadcasting Tribunal v Bond*[43] respecting the ADJR Act:

> "It does not follow that, because s 5 is not confined to acts involving the exercise of or a refusal to exercise a substantive power, the acts which constitute a decision reviewable under s 5 of [the ADJR Act] are at large. They are confined by the requirement in s 3(1) that they be made 'under an enactment'. A decision under an enactment is one required by, or authorized by, an enactment[44]. The decision may be expressly or impliedly required or authorized[45]. If an enactment requires that a particular finding be made as a condition precedent to the exercise of or refusal to exercise a substantive power, a finding to that effect is readily characterized as a decision 'under an enactment'. However, it is otherwise with respect to findings which are not themselves required by an enactment but merely bear upon some issue for determination or some issue relevant to the exercise of a discretion. Findings of that nature are not themselves 'decisions under an enactment'; they are merely findings on

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40 [2000] 1 WLR 1988; [2000] 3 All ER 752.

41 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

42 [2000] 1 WLR 1988 at 1992; [2000] 3 All ER 752 at 756.

43 (1990) 170 CLR 321 at 377.

44 cf *Australian National University v Burns* (1982) 64 FLR 166; 43 ALR 25.

45 See *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302-303; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 404-406.

the way to a decision under an enactment."

62 *Bond*[46] concerned the exercise of a power vested by statute in the appellant to suspend or revoke licences under the statute. This Court decided that, to qualify as a reviewable decision, it will generally be necessary to point to a decision which is final or operative and determinative, at least in the practical sense, of an issue of fact falling for consideration; a conclusion reached as a step along the way in a course of reasoning to an ultimate decision ordinarily will not qualify as a reviewable decision[47]. The reasoning in *Bond*, particularly that of Mason CJ, apparently responded to an apprehension of misuse of the statutory review system by challenges at intermediate stages of decision-making processes.

63 However, as has been pointed out[48], there was left a number of "escape hatches" for such litigants. One of these was an absence of the *Bond* restrictions in the alternative avenues of review under s 75(v) of the Constitution or s 39B of the Judiciary Act. This possibility had been recognised at the outset by the Kerr Committee. In par 390 of its Report, the Committee had written[49]:

"The constitutional jurisdiction of the High Court in cases in which prohibition, mandamus or an injunction is sought against an officer of the Commonwealth is, of course, unaffected by our recommendations and the reasons why a Commonwealth Administrative Court is recommended with a somewhat parallel jurisdiction are set out in the report. The reasons are that many administrative decisions are not important enough to warrant the attention of the High Court; proceedings in the recommended Administrative Court should be less expensive and such a court should be readily available in a nearby locality; and the Court would be part of a comprehensive and integrated system of administrative law in relation to which the High Court would play its role in important matters either on appeal or where necessary in its original jurisdiction".

64 The second element of the definition to which attention is given by the

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46 (1990) 170 CLR 321.

47 (1990) 170 CLR 321 at 337 per Mason CJ; Brennan J and Deane J agreeing.

48 Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 60.

49 *Report of the Commonwealth Administrative Review Committee*, (1971) at 113-114.

case law is the expression "of an administrative character". The evident purpose here is the exclusion of decisions of a "legislative" or "judicial" character. The instability of the distinctions which the statute thus preserves may be appreciated by regard to two Federal Court decisions. In *Queensland Medical Laboratory v Blewett*[50], a ministerial decision which took effect by substituting a new table of fees for the table set out in a Schedule to the *Health Insurance Act* 1973 (Cth) was held to have a legislative rather than an administrative character. Thereafter, in *Federal Airports Corporation v Aerolineas Argentinas*[51], a determination by the Corporation in exercise of power conferred by the *Federal Airports Corporation Act* 1986 (Cth) to make determinations fixing aeronautical charges and specifying those by whom, and the times at which, the charges were due and payable was held to have an administrative rather than legislative character.

65 This appeal involves particular consideration of the third element; that presented by the requirement that the decision be "made … under an enactment". Here again, as with the earlier two elements just discussed, there is involved a question of characterisation of the particular outcome which founds an application for review under the statute. Questions of characterisation provide paradigm examples of the application of the precept that matters of statutory construction should be determined with regard to the subject, scope and purpose of the particular legislation, here the Review Act.

66 In considering the present case, some care is needed lest an answer is given at odds with the subject, scope and purpose of the Review Act. In a leading Australian text, the following passage is in point[52]:

> "Many of the difficulties stem from the fact that no statute could possibly spell out the detail of every single decision or step in the decision-making process, which it requires of its administrators. Some statutes are admittedly more detailed than others, whilst some do little more than stipulate the administrator's end goals and a few methods. But, whether the statute be detailed or broad brush, they all need to contain a provision which states in substance and in very broad terms that a Minister, bureaucrat or other agency has the power (or even the duty) to administer this Act, and to do all things necessary in that regard. The

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50 (1988) 84 ALR 615.

51 (1997) 76 FCR 582.

52 Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 73-74 (footnotes omitted).

recent trend is to treat decisions which can find no other statutory source of authority than such a clause as not being made *under* an enactment for *ADJR* purposes, although there has been scant attempt to identify why that approach should be adopted as a matter of principle." (original emphasis)

67 It is not necessarily an adequate answer to the suggested attribution to the outcome in question of one character, to urge the possession of additional or alternative attributes. Two examples from federal constitutional law may be given. Where a federal law, the validity of which is in issue, fairly answers the description of being a law of two characters, one of which is and the other of which may be not a subject-matter appearing in s 51 of the Constitution, the possession of the positive attribute is sufficient for validity and the other character is of no determinative significance[53].

68 Again, a matter may "arise under" a law made by the Parliament within the meaning of s 76(ii) of the Constitution if the right or duty in question owes its existence to federal law or if it depends upon federal law for its enforcement[54]; this is so notwithstanding that the action in question is brought, for example, for breach of a contract or to enforce a trust. Thus, in *LNC Industries Ltd v BMW (Australia) Ltd*[55], a declaration was sought that a trust existed in respect of property, being import quotas created by federal law. An order was sought to enforce the trust by requiring transfer of the quotas and, in one sense, the source of the right to obtain the order for transfer was the general law respecting trusts. Nevertheless, the subject-matter of the trust owed its existence to federal law so that the litigious proceeding "arose under" that law[56].

"Proximate source of power"?

69 The considerations just mentioned point against acceptance of a construction of the legislation here in question which turns upon the identification of "the immediate or proximate source of power" to make

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53 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16].

54 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154.

55 (1983) 151 CLR 575.

56 (1983) 151 CLR 575 at 581.

the decision in question, rather than an "ultimate source residing in ... legislation". The distinction was drawn in these terms in *Post Office Agents Association Ltd v Australian Postal Commission*[57] and has been applied in subsequent Federal Court decisions[58]. In *Hutchins v Commissioner of Taxation*[59], Black CJ held that the relationship between the generally expressed administration provisions of the *Income Tax Assessment Act* 1936 (Cth) and a decision by a Deputy Commissioner to vote against a motion put at a meeting of creditors under Pt X of the *Bankruptcy Act* 1966 (Cth) was "too remote and non-specific" to qualify the decision as made under the taxation statute.

70 Notions of immediacy and proximity have given rise to much difficulty elsewhere in the law, particularly with questions of attribution of legal responsibility for tortious acts and omissions. Moreover, there is evident from the reasoning of Jerrard JA in the present case[60] uncertainty whether the suggested criterion applies only where there are arguably competing statutory sources of power. The circumstance that a decision could not have been made but for the concurrence of a range of circumstances of fact and law does not deny that in the necessary sense it was "made under" a particular enactment. The search for "immediate" and "proximate" relationships between a statute and a decision deflects attention from the interpretation of the Review Act and the ADJR Act in the light of their subject, scope and purpose.

What anyone in the community could do

71 Reference has been made earlier in these reasons to the acceptance by Dutney J and Philippides J of a criterion which asked of the decision whether it was something anyone in the community could do and was but facilitated by the enactment, or whether it required specific statutory authority. On appeal, this was developed by the respondent into two limbs:

"a) One first determines the true *lawful* source of the power to make the decision.

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57 (1988) 84 ALR 563 at 571.

58 These include *James Richardson Corporation Pty Ltd v Federal Airports Corporation* (1992) 117 ALR 277 at 280; *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 409.

59 (1996) 65 FCR 269 at 273.

60 [2003] QCA 571 at [28].

b) One then asks whether members of the community at large possess that power, either at common law or by statute: if the answer is in the affirmative, the decision was not made under an enactment; if in the negative, then the source of power must be statutory in the relevant sense." (original emphasis)

72 The search for the "true lawful source" has the deficiencies just discussed. For the second limb, reliance was placed on the decision of this Court in *Glasson v Parkes Rural Distributions Pty Ltd*[61]. As will appear later in these reasons, *Glasson* does not support the formulation in the suggested second limb. Nor does the other decision relied upon, *Board of Fire Commissioners (NSW) v Ardouin*[62]. References by Kitto J in *Ardouin*[63] to the lack of any need of a grant of statutory power for the Board to cause its vehicles to be driven on a public street were made in the course of construing a provision protecting the Board from liability for damage caused in the bona fide exercise of its powers. Such exemption provisions are construed narrowly[64] and that is what Kitto J was doing in *Ardouin*. The case provides no analogy of use in construing the phrase "under an enactment" in the Review Act and the ADJR Act.

73 What then is the preferred construction? Before turning to that question, it is convenient to refer to relevant decisions in this Court.

Decisions of the High Court

74 Three decisions of this Court require attention, although none is necessarily determinative of the present appeal. They are *Glasson*[65], *Minister for Immigration and Ethnic Affairs v Mayer*[66] and *NEAT Domestic Trading Pty Ltd v AWB Ltd*[67]. All of the decisions were concerned with the phrase "made … under an enactment" in the definition

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61 (1984) 155 CLR 234.

62 (1961) 109 CLR 105.

63 (1961) 109 CLR 105 at 118.

64 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 578 [4], 588 [34], 613 [113].

65 (1984) 155 CLR 234.

66 (1985) 157 CLR 290.

of "decision to which this Act applies" in s 3(1) of the ADJR Act.

75 *Mayer* is authority for the proposition that a power to make a determination may be discerned as a matter of implication in a particular statute. This follows from what was said by Mason, Deane and Dawson JJ as follows[68]:

"[T]he preferable construction of s 6A(1)(c) [of the *Migration Act* 1958 (Cth)] is that it impliedly confers upon the Minister the function of determining, for the purposes of the paragraph, whether a particular applicant for an entry permit 'has the status of refugee' within the meaning of the [Convention relating to the Status of Refugees] or [the 1967 Protocol relating to the Status of Refugees]. It follows that the Minister's decision was a decision made in the performance of the statutory function which that paragraph impliedly confers upon him. It was, within s 3(1) of the [ADJR Act], a decision made 'under' an 'enactment'."

76 The minority in *Mayer* (Gibbs CJ and Brennan J) was unable to construe s 6A as impliedly conferring any relevant power upon the Minister. As Brennan J put it[69], a determination of refugee status within the meaning of the Convention produces an effect in international law but required no statutory authority or power to make it. It followed that there was in the migration legislation to be found no source of a power to make a determination of refugee status and there was no decision made under that legislation to attract the ADJR Act. A distinction was drawn by Brennan J between "the source of a decision's legal effect" and "the source of a power to make a decision having that effect"[70].

77 The earlier decision in *Glasson* concerned federal legislation and a scheme formulated thereunder by a Minister of the Commonwealth which provided for the making of payments by the Commonwealth to New South Wales and by that State to distributors of certain petroleum products. The scheme provided for a system whereby officers authorised under State legislation certified that amounts were payable to the distributors, but only the State statute authorised the giving of a certificate and its effect. The Court said[71]:

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67 (2003) 77 ALJR 1263; 198 ALR 179.

68 (1985) 157 CLR 290 at 303.

69 (1985) 157 CLR 290 at 307.

70 (1985) 157 CLR 290 at 307.

> "When neither the Commonwealth Act nor the scheme is the source of the power to appoint the decision-maker, or *the source of his power to make the decision, or the source of the decision's legal effect*, it cannot be said that the decision was made under that enactment." (emphasis added)

This was so even though the issue of the certificate might have a significant practical effect leading to the adjustment of accounts between the Commonwealth and the State.

78 In *NEAT*, the written approval of AWB (International) Ltd ("AWB") was a statutory condition which had to be satisfied before the authority established by the *Wheat Marketing Act* 1989 (Cth) might give its consent to the bulk export of wheat. It was held in the joint judgment in *NEAT* that the circumstance that the production of the written approval by AWB was given statutory significance did not provide the basis for an implication of the conferral by the statute of authority upon AWB to give approval and to express its decision in writing; that power derived from the incorporation of AWB under the applicable companies legislation, s 124 of the Corporations Law of Victoria. The determination to give written approval was not a decision under an enactment for the purposes of the ADJR Act; rather, the provision of the approval was a condition precedent to consideration by the authority as to whether it would give its consent to export[72].

The preferred construction

79 There is a line of authority in the Federal Court, beginning with the judgment of Lockhart and Morling JJ in *Chittick v Ackland*[73] and including the judgments of Kiefel J and Lehane J in *Australian National University v Lewins*[74], which assists in fixing the proper construction of the phrase "decision of an administrative character made ... under an enactment". As

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71 (1984) 155 CLR 234 at 241; cf *Salerno v National Crime Authority* (1997) 75 FCR 133 where search warrants were issued under the *Summary Offences Act* 1953 (SA) and supplied the only lawful authority for what otherwise were acts of trespass and conversion by State police officers "attached" to the National Crime Authority.

72 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 77 ALJR 1263 at 1275 [55]; 198 ALR 179 at 193-194.

73 (1984) 1 FCR 254 at 264.

noted earlier in these reasons, the presence in the definition in the ADJR Act of the words "(whether in the exercise of a discretion or not ...)"[75] indicates that the decision be either required or authorised by the enactment. *Mayer*[76] shows that this requirement or authority may appear sufficiently as a matter of necessary implication. However, whilst this requirement or authority is a necessary condition for the operation of the definition, it is not, by itself, sufficient.

80 The decision so required or authorised must be "of an administrative character". This element of the definition casts some light on the force to be given by the phrase "*under* an enactment". What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?

81 The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement[77]? To adapt what was said by Lehane J in *Lewins*[78], does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute[79]?

82 If the decision derives its capacity to bind from contract or some other private law source, then the decision is not "made under" the enactment in question. Thus, in *Lewins*, a decision not to promote to Reader a member of the staff of the Australian National University was not "made under" the *Australian National University Act* 1991 (Cth) ("the ANU Act"). Lehane J explained[80]:

"In this case, the relevant statutory power (in s 6(2)(k) of the ANU Act) is simply one 'to employ staff'. Obviously that, taken together with the

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74 (1996) 68 FCR 87 at 96-97, 101-103.

75 The words in s 4 of the Review Act are "(whether or not in the exercise of a discretion)".

76 (1985) 157 CLR 290.

77 cf *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154.

78 (1996) 68 FCR 87 at 103.

79 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164 at 169.

80 (1996) 68 FCR 87 at 103.

general power to contract, empowers the University to enter into contracts of employment, to make consensual variations of employment contracts and to enter into new contracts with existing employees. But I cannot see how it is possible to construe a mere power to employ staff as enabling the University unilaterally to vary its contracts with its employees or to impose on them, without their consent, conditions which legally bind them – except, of course, to the extent that contracts of employment may themselves empower the University to make determinations which will be binding on the employees concerned[81]."

83 For these reasons, a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties.

84 To the extent that the Federal Court decided otherwise in *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd*[82], that case and decisions relying upon it should be regarded as having proceeded on an incorrect interpretation of the ADJR Act. Given the absence in this case of any suggested contractual relationship between the parties, a matter to which attention was drawn earlier in these reasons, what has been said above respecting the contract cases cannot be determinative of the outcome.

85 Reference has been made earlier in these reasons to the significance attached in *Hutchins*[83] to the relationship between the income tax legislation and the decision to vote at the creditors meeting as being "too remote and non-specific". However, Black CJ also based his decision on the sound ground that "the decision was not given statutory effect by the

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81 See, eg, *Thorby v Goldberg* (1964) 112 CLR 597.

82 (1985) 7 FCR 575.

83 (1996) 65 FCR 269 at 273.

sections relied upon"[84]. Lockhart J[85] said that the decision to vote could not have conferred any benefit or imposed any disadvantage when it was made; any affection of legal rights arose from the cumulative effect of the votes later cast against the special resolution at the meeting of creditors.

86 The legal rights and obligations which are affected by the authority of the decision derived from the enactment in question may be those rights and obligations founded in the general or unwritten law. For example, in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*[86], it was the decision to issue the search warrants pursuant to s 10 of the *Crimes Act* 1914 (Cth) which provided the police officers executing them with lawful authority to commit what otherwise were acts of trespass and conversion and attracted the operation of the ADJR Act.

87 However, that which is affected in the fashion required by the statutory definition may also be statutory rights and obligations. An example is that given by Toohey and Gaudron JJ in *Bond*[87] of a requirement, as a condition precedent to the exercise of a substantive statutory power to confer or withdraw rights (eg, a licence), that a particular finding be made. The decision to make or not to make that finding controls the coming into existence or continuation of the statutory licence and itself is a decision under an enactment.

88 In *Mayer*[88], the making of a determination of refugee status (under the power impliedly conferred by the statute) was a necessary condition for the grant of an entry permit. The determination of refugee status was a decision under the migration legislation which controlled the coming into existence of the entry permit to this country. On the other hand, in *Glasson*[89] and *NEAT*[90], the statutory condition precedent was a decision made *dehors* the federal statute, although, once made, it had a critical effect for the operation of the federal statute. In *Mayer*, both the

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84 (1996) 65 FCR 269 at 273.

85 (1996) 65 FCR 269 at 277.

86 (1997) 188 CLR 501 at 565.

87 (1990) 170 CLR 321 at 377.

88 (1985) 157 CLR 290.

89 (1984) 155 CLR 234.

90 (2003) 77 ALJR 1263; 198 ALR 179.

determination of refugee status and the grant of an entry permit were authorised by the *Migration Act* 1958 (Cth).

89 The Review Act recognises such cases and takes them further. It does so in s 6, which states[91]:

> "If provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision."

90 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. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice.

91 The character of the ADJR Act as a law of the Commonwealth which confers federal jurisdiction to hear and determine applications for review supports the construction of the critical phrase "decision ... made ... under an enactment" in these reasons. Reference has been made earlier in these reasons under the heading "The definition" to the importance in construing this phrase of the expression in s 76(ii) of the Constitution "arising under any laws made by the Parliament". There must be a "matter" so arising. The meaning of the constitutional term "matter" requires some immediate right, duty or liability to be established by the court dealing with an application for review under the ADJR Act[92]. A recent example of the

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91 Section 3(3) of the ADJR Act is to similar effect.

92 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 389 [4]-[5], 404-407 [61]-[68], 459 [243].

practical operation of the constitutional requirements of a "matter" is provided by *Re McBain; Ex parte Australian Catholic Bishops Conference*[93]. As a State law, the Review Act does not have the constitutional underpinning which controls the interpretation of the ADJR Act. However, as noted at the beginning of these reasons, s 16(1) of the Review Act explicitly links the text and structure of that statute to the ADJR Act.

The present case

92 Counsel for the University correctly submitted that, given the manner in which the respondent had framed her application for judicial review, there had subsisted between the parties no legal rights and obligations under private law which were susceptible of affection by the decisions in question. There was at best a consensual relationship, the continuation of which was dependent upon the presence of mutuality. That mutual consensus had been brought to an end, but there had been no decision made by the University under the University Act. Nor, indeed, would there have been such a decision had the respondent been allowed to continue in the PhD programme.

93 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 J[94] and Lehane J[95] 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.

94 Nor were there any presently subsisting statutory rights of the respondent, or statutory rights the coming into existence of which would be contingent solely upon her re-admission to the PhD candidature programme. The respondent would still have had to satisfy the requirements for award of the degree. Had she done so, a question (which it is unnecessary to

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93 (2002) 209 CLR 372. See also Zines, *Federal Jurisdiction in Australia*, 3rd ed (2002) at 17-21.

94 (1996) 68 FCR 87 at 96-97.

95 (1996) 68 FCR 87 at 103-104.

96 (2003) 214 CLR 1 at 27-28 [81]-[83], 48 [148].

decide) may have arisen as to whether she had a statutory or other right to the award.

The result

95 It may be accepted that the Higher Education Act required the respondent to obtain the "higher education award", which she sought by her PhD candidature, from an authorised educational institution such as the University. But the circumstance that the University was not doing "what anyone in the community could do" does not render the exclusion of the respondent a decision made under the University Act.

96 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 to decisions later made by the Committees.

97 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.

Orders

98 The appeal should be allowed. The order dismissing the appeal to the Court of Appeal should be set aside and in place thereof the appeal to the Court of Appeal should be allowed. Order 1 made by Mackenzie J should be set aside and the application for a statutory order of review should be dismissed.

99 In accordance with the terms of the grant of special leave, the University is to bear the respondent's costs of the appeal to this Court and the costs order made in the Court below is not to be disturbed. Mackenzie J

reserved the costs of the application to the Supreme Court of Queensland made under s 48 of the Review Act. The question of costs of that application should be remitted to the Supreme Court.

100 KIRBY J. For the second time in less than two years, this Court adopts an unduly narrow approach to the availability of statutory judicial review directed to the deployment of public power. The Court did so earlier in *NEAT Domestic Trading Pty Ltd v AWB Ltd*[97]. Now it does so in the present case.

101 Correctly in my opinion, *NEAT Trading* has been described as a "wrong turn" in the law[98]. Its consistency with past authority of this Court[99] has presented difficulties of explanation[100]. Its outcome has been described, rightly in my opinion, as "alarming", occasioning a serious reduction in accountability for the exercise of governmental power[101]. Now, the error of approach, far from being corrected, is extended. This constitutes an erosion of one of the most important Australian legal reforms of the last century[102]. This Court should call a halt to such erosion.

102 In the Supreme Court of Queensland, Ms Vivian Tang (the respondent)

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97 (2003) 77 ALJR 1263; 198 ALR 179 ("*NEAT Trading*").

98 Mantziaris, "A 'Wrong Turn' On the Public/Private Distinction: NEAT Domestic Trading Pty Ltd v AWB Ltd", (2003) 14 *Public Law Review* 197 at 198. See also *NEAT Trading* (2003) 77 ALJR 1263 at 1276 [68]; 198 ALR 179 at 195-196.

99 *Glasson v Parkes Rural Distributions Pty Ltd* (1984) 155 CLR 234.

100 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. The author concludes that (with a little difficulty) the reconciliation is possible.

101 Arora, "Not So Neat: Non-Statutory Corporations and the Reach of the *Administrative Decisions (Judicial Review) Act 1977*", (2004) 32 *Federal Law Review* 141 at 160. The issue is a transnational one: see Aman, "Privatisation, Prisons, Democracy and Human Rights: The Need to Extend the Province of Administrative Law", in de Feyter and Gomez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation*, (2005) 91.

102 Second Reading Speech by the Attorney-General (Mr R J Ellicott MP) on the Administrative Decisions (Judicial Review) Bill 1977 (Cth): Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 April 1977 at 1394, 1395; Curtis, "A New Constitutional Settlement for Australia", (1981) 12 *Federal Law Review* 1; Aronson and Franklin, *Review of Administrative Action*, (1987) at 241; Australia, Administrative Review Council, *The Scope of Judicial Review*, Discussion Paper, (2003) at 17-21 [1.47]-[1.63].

succeeded both before the primary judge (Mackenzie J)[103] and in a unanimous decision of the Court of Appeal[104]. The attempt by Griffith University to obtain summary dismissal of the respondent's application for a statutory order of review, directed to the University, failed. That order had been sought to challenge (essentially) the procedural fairness of the steps by which the University, provided for in the *Griffith University Act* 1998 (Q) ("the University Act"), excluded the respondent from the candidature upon which she had embarked for the award of the University's degree of Doctor of Philosophy. Such exclusion was explained as being "on the grounds that [the respondent had] undertaken research without regard to ethical and scientific standards"[105].

103 The exclusion of the respondent was affirmed by the University's Appeals Committee, established by the University Council. In the result, the respondent has not only been stopped in the middle of her studies for the higher degree for which she was enrolled, refused the opportunity to graduate in the University with that degree and had findings of "falsified or improperly obtained data … of laboratory work"[106] made against her. She has also been confirmed as guilty of a grave wrong-doing such as would effectively make it difficult, or impossible, for her to pursue academic aspirations in this or another university and to follow the professional career in the employment field (molecular biology and bio-science) which she had chosen.

104 These serious consequences notwithstanding, the respondent is now held by this Court to be disentitled to a statutory order of review on the basis that the "decisions" of the University which she challenges were not made "under" the University Act. This conclusion is reached because, it is said, in order to be made "under" that Act "legal rights and obligations" between the University and the respondent had to be affected[107], but were not[108].

105 This outcome has, in my respectful view, only to be stated to demonstrate

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103 [2003] QSC 22.

104 [2003] QCA 571, per Jerrard JA, Dutney and Philippides JJ.

105 Communication by Griffith University to the respondent of the decision of the Assessment Board of the University, dated 9 August 2002.

106 Communication by Griffith University to the respondent of the decision of the Assessment Board of the University, dated 9 August 2002.

107 Reasons of Gummow, Callinan and Heydon JJ ("joint reasons") at [80].

108 Joint reasons at [91].

its flaws. There is nothing in the *Judicial Review Act* 1991 (Q) ("the Review Act") to warrant such a gloss upon its beneficial and facultative terms. It is a gloss that defeats the attainment of important reformatory purposes of that Act. It destroys the capacity of the Review Act to render the exercise of public power accountable to the law where a breach can be shown. Moreover, it is incompatible with the express provision of the Review Act affording remedies to those whose "interests" are adversely affected by the challenged decision[109]. There was never a dispute that the respondent's "interests" were so affected. Nor was it contested that she was, within the Review Act, a "person aggrieved"[110]. The gloss favoured by the majority is contrary to the text and the purposes of the Review Act. Properly construed, that Act is applicable to this case. The University's appeal should be dismissed.

The facts, procedures and legislation

106 *The background facts*: Most of the facts necessary to an understanding of these reasons appear in the description of the case set out in the reasons of Gummow, Callinan and Heydon JJ ("the joint reasons")[111]. However, because of the University's proceedings (effectively for the summary judgment now entered by this Court)[112], the respondent's claim for relief, and her contentions on the merits, have never been tried. Now, they will not be, at least in this case. It is useful, therefore, in considering the construction now imposed on the Review Act, to examine the type of case that it will now keep out of the courts.

107 Universities in Australia have special characteristics that distinguish most of them from universities in other lands. Even the oldest Australian universities (those at Melbourne and Sydney) were established by statute in colonial times[113]. Until recently, all Australian universities have been "public institutions, heavily dependent on government funds"[114], governed in accordance with statute by a council or senate with power to make

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109 Review Act, s 7(1).

110 Review Act, s 7(1).

111 Joint reasons at [33]-[39].

112 Joint reasons at [97].

113 The University of Sydney was established by an Act made by the Legislative Council of New South Wales in 1850 (14 Vict No 31), and the University of Melbourne by the Legislative Council of Victoria in 1853 (16 Vict No 34). See also *University and University Colleges Act* 1900 (NSW); *University Act* 1890 (Vic); *The Australian Encyclopaedia*, 6th ed (1996), vol 8 at 2979-2984.

subordinate legislation and to establish policies consistent with the legislation, to carry into effect the public purposes of the law creating them[115].

108 The first university in Queensland was established by statute in 1909[116]. The appellant University was first created in 1971 as one of five new Australian universities formed at that time. The Act of 1998, affording the present statutory basis of the University, was enacted as a public law by the Queensland Parliament. In this respect, the University can be distinguished from universities created by private benefactions and trusts or royal charter[117]. Most Australian universities are in the same class as the appellant and so are those of New Zealand[118]. In this country, even private universities not publicly established are subject to statutory regulation, essential for their recognition as such and for permission lawfully to use the title of "university" and to confer university degrees and awards[119]. The maintenance of high standards of teaching and research, and the furtherance of the export of university services by Australian universities, make it essential that public regulation of universities be scrupulously maintained, in accordance with the law enacted to achieve that objective. It also makes the defence of academic standards and of the integrity of degrees or awards and university research a vital part of the functions of such statutory bodies. The University did not contest any of these propositions.

109 *Universities, public funding and judicial review*: The foregoing features of universities, and specifically of the appellant, require adjustment in Australia to any notion that, because of their functions, universities are somehow exempt from the provisions for judicial review applicable to government authorities, as under the Review Act. Although provision is made under that Act for exclusion of specified enactments[120] or exemption

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114 *The Australian Encyclopaedia*, 4th ed (1983), vol 10 at 130.

115 See *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

116 *University of Queensland Act* 1909 (Q).

117 *Thomas v University of Bradford* [1987] AC 795 at 810-811. See joint reasons at [40].

118 *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129 at 135-136, 140. See joint reasons at [40].

119 For example the *Higher Education (General Provisions) Act* 1993 (Q) ("the Higher Education Act"), ss 7, 8.

120 Review Act, s 18, Sched 1.

of identified corporations[121], no such exclusion or exemption applied to the present case. The Review Act therefore governed the University to the full extent of its provisions.

110 This conclusion should cause no surprise because, as a body established as a statutory corporation, the University enjoyed (as Callinan J remarked during argument)[122] monopoly powers, notably that of conferring university degrees, including the degree of Doctor of Philosophy[123]. Moreover, as such a university, the appellant receives very substantial funds for capital and recurrent expenditures under the *Higher Education Funding Act* 1988 (Cth). It is now a "higher education provider" under the *Higher Education Support Act* 2003 (Cth)[124]. By virtue of s 19-35(1) of the lastmentioned federal statute, the University, receiving such federal assistance in respect of a student or a class of students, "must ensure that the benefits of, and the opportunities created by, the assistance are made equally available to all such students … in respect of whom that assistance is payable".

111 By federal and State legislation, then, universities in Australia are not wholly private bodies, entitled to govern themselves or enter private arrangements as they please. With their establishment by public law and with large subventions of public funds, they are rendered part of the network of public authorities which, to the extent provided, must conform to the law – relevantly, to the legal requirements of procedural fairness and administrative justice.

112 Similar principles about the susceptibility of the administrative decisions of universities to judicial review have been acknowledged by superior courts throughout the common law world, including in New Zealand[125],

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121 Review Act, s 18, Sched 6.

122 [2004] HCATrans 227 at 1315.

123 By a combination of the University Act, ss 5 and 6 and the Higher Education Act, ss 5, 6, 7 and 8. Strictly speaking, the University enjoyed oligopoly powers with the limited number of institutions in Queensland entitled, or recognised by State law as entitled, to describe themselves as universities.

124 ss 16-1, 16-15.

125 *Norrie* [1984] 1 NZLR 129 at 135.

> Canada[126] and the United Kingdom[127]. In *Norrie v Senate of the University of Auckland*, Woodhouse P in the Court of Appeal of New Zealand explained[128]:
>
> "Like other statutory corporations here [universities] have been established by Act of Parliament as public institutions to promote public purposes, in this case higher education, and largely with public funds. And for that important reason alone I would agree ... that they 'should be subject to public scrutiny in the courts'."

Academic commentators have expressed the same conclusion about the legitimacy (as well as the social and legal desirability) of judicial review of the administrative decisions of universities[129].

113 Such basic postulates were not denied by the University in this case. It could scarcely be otherwise, given that, in the "Policy on Student Grievances and Appeals", adopted by the University's Council, within powers conferred by the University Act[130], there appears the following paragraph[131]:

> "6.0 Finality of appeal
>
> The decisions of the University Appeals Committee are final and there is no further recourse to appeal *within the University*. Before pursuing any *avenues of judicial review*, the appeals process within the University should be exhausted."

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126 *Re Paine and University of Toronto* (1981) 131 DLR (3d) 325 at 329-330 (Court of Appeal of Ontario; leave to appeal refused by the Supreme Court of Canada: (1982) 42 NR 270); see *Re Polten and Governing Council of the University of Toronto* (1975) 59 DLR (3d) 197 at 212.

127 *Ceylon University v Fernando* [1960] 1 WLR 223 at 231-233, 236 per Lord Jenkins (PC); [1960] 1 All ER 631 at 637-639, 642.

128 [1984] 1 NZLR 129 at 135.

129 See for example Fridman, "Judicial Intervention Into University Affairs", (1973) 21 *Chitty's Law Journal* 181 at 181-182, cited in *Re Polten* (1975) 59 DLR (3d) 197 at 209-211; Nelson, "Judicial Review in the Community of Scholars: A Short History of Kulchyski v Trent University", (2004) 13 *Education and Law Journal* 367 at 381-382; Caldwell, "Judicial Review of Universities – The Visitor and the Visited", (1982) *Canterbury Law Review* 307 at 311.

130 University Act, ss 5, 6, 8 and 9.

131 Griffith University, "Policy on Student Grievances and Appeals", (2001), Nos 01/0268; 01/0030 (revised) at [6.0] (emphasis added).

114 It was not suggested, or found, that this paragraph precluded the respondent's access to the remedy under the Review Act that she sought in the courts. The existence of the paragraph indicates that the facility of judicial review was contemplated as a possibility. Given the foregoing features of the law affecting the University, the contrary would not have been arguable.

115 *The student's complaints*: In the way in which the proceedings developed, the respondent's complaint of procedural unfairness and administrative injustice has not been examined by a court. The University sought to forestall such examination by seeking relief against the proceedings on legal grounds. Nevertheless, it is useful to be aware of the kind of case which the respondent alleged and that is now put out of court. That case should be measured against the language and purposes of the Review Act, in its application to a statutory authority such as the University[132]. Because, necessarily, the principle upheld in this case has an application far beyond universities and affects other statutory authorities, likewise not excluded from the Review Act, it is proper to test the majority's conclusion against the case which it expels from consideration under the Review Act.

116 The respondent's complaint, as stated in her application for a statutory order for review, was that the University officer who chaired the Assessment Board[133] was a person who would not bring an impartial mind to the resolution of the issue before the Board. This was claimed to be so because that person had initially investigated the complaint against the respondent, satisfied himself that a case existed against her in relation to it and then participated in the substantive decision of the Assessment Board.

117 The law requires the actuality and appearance of impartiality on the part of those who exercise power under a law made by Parliament[134]. Depending

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132 Stated in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J; cf Brennan, "The Purpose and Scope of Judicial Review", (1986) 2 *Australian Bar Review* 93 at 104-105.

133 The Assessment Board, provisions for its "Chair" and for the conduct of a "Formal Hearing Concerning Alleged Academic Misconduct" are described in the "Policy on Academic Misconduct" approved by the University's Academic Committee Resolution 2/2001 of 1 March 2001 (No 01/0035) exhibited by the University in the proceedings.

134 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 33-34; *Kioa v West* (1985) 159 CLR 550 at 584-585; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652; *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342 per Deane J.

upon the evidence, the claim by the respondent was not unarguable. The respondent complained that she had been denied adequate time to evaluate and respond to expert witnesses relied on by the University before the Board; that she had been denied legal representation, notwithstanding the very serious nature and consequences of the allegations; and that the University had breached its own Policy as promulgated under authority from the Council. The respondent also claimed that the Policy had been misinterpreted by the Board and the Committee as *requiring* the prohibition of legal counsel, as distinct from *permitting* the Board to deny legal representation. The University's decision-makers were also charged with acting on irrelevant material and without evidence.

118 At the hearing of an application for a statutory order to review, the respondent might have been incapable of making good any of the foregoing complaints. However, the present appeal must be approached on the footing that the respondent could establish each and every one of the matters complained of. Notwithstanding this, it is now held that the Review Act affords her no legal remedy.

119 Given her enrolment in the University for the degree of Doctor of Philosophy, the nature of the complaints that the respondent wished to ventilate, the public character of the University as a statutory authority substantially supported by public funds, the devastating consequences of the University "decision" on the immediate and long-term career and reputation of the respondent and the language and purposes of the Review Act, such a result would be surprising.

120 Unusual outcomes sometimes happen in the law. The answer to this appeal does not lie in impressions derived at the foregoing level of generality. Nevertheless, impression is often a useful check for judges to apply when their reasoning and verbal analysis lead to an outcome that appears counter-intuitive. When many less serious "decisions", made within statutory authorities, are subjected to judicial review, the conclusion that the Review Act is inapplicable on a case such as the present demands thorough justification, anchored clearly in the text and purposes of that Act. Repeatedly, in recent years, this Court has insisted upon the duty of others to approach problems such as the present with the closest of attention to the statutory language in question, read in its context and so as to achieve its purposes[135]. We must be no less strict in the application of this rule to ourselves.

121 *A procedural restraint*: There is another consideration of a general kind that must be mentioned at this point[136]. The University sought peremptory relief against the respondent's claim. By the authority of this Court, such

135 *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 10 [24] and cases there cited.

relief "must be sparingly exercised"[137], at least in a case such as the present.

122 Where the law is uncertain and where it is in a "state of transition"[138], it is undesirable for courts to "decid[e] questions of legal principle without knowing the full facts"[139]. This is because it is the experience of the law that the interpretation of a statute is more likely to be accurately performed when the issue is approached not as one of disembodied verbal analysis but as one proceeding on a thorough appreciation of the law applied to clearly identified evidentiary findings. In a sense, this is an aspect of the resistance which this Court has shown from its earliest days[140] to the formulation of "legal rules against a background of hypothetical facts"[141].

123 *Application to the present case*: The slightest familiarity with the meandering course of decisions in the Federal Court of Australia, concerning the provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), and the informed criticisms of the inconsistencies that had emerged in those decisions[142], should have suggested to the Supreme Court the desirability of postponing the provision of the interlocutory relief sought by the University until after the substantive hearing of the application under the Review Act. In my view, that is the course which, at the least, this Court also should require before

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136 See for example *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056 at 1073 [92]; 208 ALR 271 at 293.

137 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 271.

138 *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694; see also *Lonrho Plc v Fayed* [1992] 1 AC 448 at 469-470; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 78 ALJR 628 at 654 [138]; 205 ALR 522 at 558.

139 *E (A Minor)* [1995] 2 AC 633 at 693 per Sir Thomas Bingham MR. See *Behrooz* (2004) 78 ALJR 1056 at 1073 [92]; 208 ALR 271 at 293.

140 For example *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

141 *E (A Minor)* [1995] 2 AC 633 at 693.

142 Creyke and Hill, "A Wavy Line in the Sand: *Bond* and Jurisdictional Issues in Judicial and Administrative Review", (1998) 26 *Federal Law Review* 15 ("Creyke and Hill"); and O'Donovan, "Statutory Authorities, General Newspapers and Decisions under an Enactment", (1998) 5 *Australian Journal of Administrative Law* 69 ("O'Donovan").

now deciding a most important question in advance of evidentiary findings.

124 It cannot be doubted that evidence can throw light on the application of statutes to particular facts. Now, without evidence (or a full demonstration of the "rights" and "interests" asserted by the respondent and provable by her) her claim to relief under the Review Act is refused because she is said to have no "legal rights or obligations" affected by the University's "decisions". Given that it is common ground that the meaning of the critical expression in the Review Act is to be derived from the language of that Act read in the light of its subject, scope and purpose[143], it is highly undesirable that the present outcome should be reached in the procedure that was initiated by the University. At a minimum, those inclined towards such relief should send the matter to trial where derived principles could better be applied to the facts as those facts are finally found.

The legislation and common ground

125 *The legislation*: The joint reasons set out, or describe, the provisions of the Review Act, the University Act and the Higher Education Act of Queensland, applicable in this case[144]. There is no need for me to repeat these provisions or to explain the provisions of the ADJR Act, comparable to those of the Review Act, and the way in which the Queensland Parliament has commanded an interpretation of its law in a way consistent with the interpretation of the ADJR Act[145]. It is this command that makes it essential in this appeal to have regard to the history of the judicial attempts to elaborate the critical words "under an enactment" appearing both in the federal and Queensland statutes. As will appear, that history is confused. It remains unsettled.

126 The link between the "decisions" made successively by the University's Assessment Board and Appeals Committee, pursuant to the Policy on Academic Misconduct adopted by the Council of the University, is easily traced. The University Act creates the University as a body corporate[146]. Unsurprisingly, the powers of the University are widely stated. They include "all the powers of an individual"[147] and the power to "do anything

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143 Joint reasons at [65].

144 Joint reasons at [26]-[35], [41]-[51].

145 Review Act, s 16(1). See joint reasons at [26].

146 University Act, s 4(2)(a).

147 University Act, s 6(1).

… necessary or convenient to be done for, or in connection with, its functions"[148]. Those functions include the provision of education at university standard[149]; the provision of courses of study or instruction to meet the needs of the community[150]; and the dissemination of knowledge and promotion of scholarship[151]. Notably, the functions include "to confer higher education awards"[152]. It was common ground that the conferral of the degree of Doctor of Philosophy was such an "award".

127 Necessarily, both by the operation of the *Acts Interpretation Act* 1954 (Q)[153] and by the common law[154], the conferral of such powers on a statutory body, such as the University, extended to the provision of all powers necessary to carry the enumerated functions and expressly stated powers into effect including, where appropriate, the power *not* to confer a higher education award on a candidate or to exclude a candidate, who is otherwise being provided with education at university standard, from a course that might, save for such exclusion, lead to such an award. The capacity and power of the University to exclude a candidate such as the respondent was not in dispute.

128 The University Act establishes a council[155]. That council ("the Council") is designated the "governing body" of the University[156]. It is empowered to do anything necessary or convenient to be done for, or in connection with, its functions[157]. Those functions include the management and control of the University's affairs[158]. Specifically, the Council is empowered to delegate its powers to an appropriately qualified committee[159]. By s 61 of the University Act, the Council is empowered to make university "statutes" (elsewhere frequently called by-laws) dealing with various matters, including the entitlement to degrees and other

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148 University Act, s 6(1)(f).

149 University Act, s 5(a).

150 University Act, s 5(d).

151 University Act, s 5(f).

152 University Act, s 5(e).

153 s 23(1); see also s 24AA and Review Act, s 5.

154 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

155 s 7.

156 s 8.

157 s 9(1).

158 s 9(2).

159 s 11.

awards and the disciplining of students and other persons undertaking courses at the University.

129 No such "statute" was made by the Council to govern either of the foregoing matters by express terms. Instead, the Council, under its power of delegation, established the Academic Committee, relevantly with powers to determine the University's academic policy, including in respect of "student … assessment, progress [and] credit"[160]. In March 2001, the Academic Committee approved a revised Policy on Academic Misconduct. In September 2001, the same Committee approved a revised Policy on Student Grievances and Appeals. The Council appointed subcommittees of the Academic Committee. These included the Research and Postgraduate Studies Committee (of which the Assessment Board was itself a subcommittee) and the Appeals Committee contemplated by the foregoing Policies[161].

130 It follows from this series of steps, made in pursuance of the University Act, that the proceedings taken against the respondent, and the Policies purportedly applied in her case, were neither expressly stated in the University Act nor even expressly provided for there. However, this does not prevent the "decisions", so made, from being made "under" an enactment, namely the University Act[162]. It remains in each case to characterise the undoubted "decisions" by reference to that statutory expression.

131 *Common ground*: A number of features of the case may be accepted as being uncontested. Thus, it was agreed (although detailed evidence might have shaken this) that there was no contractual arrangement between the respondent and the University pursuant to which, within the University Act, the University "provide[d] education at university standard" to the respondent[163]. In the nature of the peremptory challenge to the respondent's proceedings, the exact basis upon which the respondent came to be enrolled or registered or accepted as a postgraduate candidate, submitted to supervision and permitted to use facilities (including laboratory facilities) towards a degree of Doctor of Philosophy, was not spelt out or elaborated[164].

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160 [2003] QSC 22 at [9].

161 [2003] QSC 22 at [11]-[12].

162 cf *Australian National University v Lewins* (1996) 68 FCR 87 at 104.

163 University Act, s 5(a).

164 Joint reasons at [57].

132 There was no suggestion in this case that the respondent had failed to exhaust the remedies made available to her within the University, as by a final appeal to the Council as the governing body. The revised "Policy on Student Grievances and Appeals" contained a provision[165] specifically stating that the decision of the Appeals Committee was "final". In the case of the University, no provision was made by the University Act for a Visitor to whom an ultimate appeal might be addressed[166]. Within the University, therefore, the respondent was at the end of the line.

133 It was not suggested that the omission of the University to make "statutes" for the discipline of students (as it might have done)[167] invalidated or affected in any way the Policies and subcommittees created by the Council under its general powers[168]. On the other hand, the respondent relied upon the fact that such subordinate lawmaking was specifically contemplated by the Act. She suggested that the University could not put itself in a better position by proceeding indirectly in the way that it had.

134 It was agreed that the power of the University to confer higher awards[169] included the power to confer the higher degree of Doctor of Philosophy[170]. The respondent contended that the "decision" to exclude her from candidature for that degree was equivalent to a "decision" *not* thereafter "to provide education at university standard" and *not* to confer a higher degree on her, in which she had evidenced an "interest" by her earlier pursuit of candidature for her chosen degree.

135 No submission in the Supreme Court was addressed to a suggestion that the "decisions" of the Assessment Board or Appeals Committee were not "decisions" as referred to in the Review Act, if otherwise it was established that they were made "under" the University Act. Clearly, within the line of authority that developed in the Federal Court in relation to the meaning of "decision" in the equivalent provisions of the ADJR Act, the determination of the allegation made against the respondent, and the sanction imposed in consequence, represented a "substantive" determination[171]. It was clearly justiciable in character[172]. The

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165 Par 6.0. See above at [112].

166 Joint reasons at [40].

167 Under the University Act, s 61(1). See also s 62.

168 Joint reasons at [95].

169 University Act, s 5(e).

170 Joint reasons at [33].

171 *Australian Wool Testing Authority Ltd v Commissioner of Taxation* (1990) 26 FCR 171 at 178.

172 cf *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at

subcommittees' determinations, certainly that of the Appeals Committee, were "decisions" within the language used by this Court in *Australian Broadcasting Tribunal v Bond*[173] and had a real and immediate impact on the respondent's interests. The determinations did not constitute merely preliminary actions or recommendations, although even these can sometimes amount to a "decision" within the ADJR Act[174]. Whatever debates have circled around characterisation of a "decision"[175] in this statutory context, they can be put aside in this case. It is clear beyond doubt that the "decisions" complained of had an immediate operative effect on the respondent's interests[176]. In litigation in which so much else was contested, this was not.

136 As noted in the joint reasons, the University did not argue that the respondent was not a "person who is aggrieved" within the Review Act[177]. Neither did it suggest any other basis upon which relief should be denied to the respondent for lack of relevant standing to engage the Act[178]. In the general law, by the authority of this Court, standing is now ordinarily determined by reference not solely to the affection of legal *rights* and *duties* belonging to parties but to the effect of the impugned conduct on the parties' *interests*[179]. Given this established and unchallenged approach, and the terms of the Review Act, the conclusion stated in the joint reasons in this appeal becomes all the more remarkable.

137 It was common ground that the Review Act does not purport to cover the entire field of judicial review applicable to government officials and public authorities in Queensland. The Supreme Court of Queensland continues to enjoy power, pursuant to Pt 5 of the Review Act, to grant

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173 (1990) 170 CLR 321 at 335-338 per Mason CJ.

174 s 3(3). See *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

175 Creyke and Hill at 28-31.

176 Creyke and Hill at 41. See also *Lamb v Moss* (1983) 49 ALR 533 at 546-551, 556.

177 Joint reasons at [46] by reference to the Review Act, s 20(1).

178 cf *Kelson v Forward* (1995) 60 FCR 39.

179 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492; cf Mack, "Standing to Sue Under Federal Administrative Law", (1986) 16 *Federal Law Review* 319.

prerogative orders, as well as declarations and injunctions[180]. The statutory orders of review provided by the Review Act[181] represent a non-exhaustive but simplified remedy, supported by modernised procedures and enhanced by rights to reasons for challenged decisions[182] which rights, in turn, facilitate the new statutory remedy.

138 So much was also uncontested. However, the respondent urged that it would be wrong, in the light of the purposes of the Review Act, and its provisions, for an interpretation to be favoured that significantly reduced the availability of the statutory orders of review when compared to remedies still available to persons with an interest to obtain the older remedies of the prerogative writs, declarations and injunctions. There is merit in this argument. The Review Act was meant to enhance and supplement the remedies available under the general law, not to cut them back.

139 Finally, although there was at first instance a dispute on the part of the University, challenging the respondent's characterisation of the "decisions" impugned in these proceedings as of "an administrative character", by the time the matter reached the Court of Appeal, this argument had been abandoned. It was specifically conceded on the appeal that the decision was one of "an administrative character"[183]. This fully justified concession, therefore, confines the matter in contention (all other issues being resolved by decision or concession in favour of the respondent) to the sole remaining question. This was, and is, whether the "decisions" affecting the "interests" of the respondent were, or were not, "made … under an enactment"[184].

140 One final point should be mentioned in reviewing the statutory landscape. In the definition in the Review Act of "decision to which this Act applies"[185], there is an alternative definition that goes beyond the simple formulation of "a decision of an administrative character made … under an enactment". It is provided that decisions enlivening the Review Act extend to decisions of the same character made by a "State authority" under a "non-statutory scheme or program involving funds that are

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180 Review Act, ss 41, 47(1).

181 Review Act, s 20(1).

182 Review Act, s 33. See also Review Act, Pt 4.

183 [2003] QCA 571 at [2] per Jerrard JA.

184 Review Act, s 4, definition of "decision to which this Act applies".

185 s 4(b).

provided … out of amounts appropriated by Parliament" or "from a tax, charge, fee or levy authorised by or under an enactment". Although in the Supreme Court, the respondent presented her argument as being founded solely upon the principal definition of an applicable "decision", attracting the application of the Review Act, in this Court, her counsel reserved her entitlement, in any later possible proceedings, to rely on the alternative definition of the "decision" engaging the Review Act. By that Act, a "State authority" means "an authority or body (whether or not incorporated) that is established by or under an enactment"[186]. The appellant University is certainly such a body.

141 In the nature of these proceedings, the evidentiary foundation for attracting the application of the alternative definition of a "decision to which this Act applies" was not laid in the Supreme Court. No notice of contention was filed for the respondent in this Court. Accordingly, the alternative definition does not arise for consideration in this appeal. Nonetheless, the existence of an alternative, and even wider, ambit for the operation of the Review Act – extending as is there contemplated into decisions made "under a non-statutory scheme or program" – represents a further argument against the adoption of a narrow interpretation of the phrase "under an enactment", as it appears in the primary definition[187]. In the Review Act it is clear that the Queensland Parliament was marking out a large ambit for the application of these beneficial provisions. That fact should guide the approach taken by this Court to the ambit of the expression "made ... under an enactment".

The competing meanings of "under an enactment"

142 *The context of the new federal laws*: It would have been possible, when the ADJR Act was adopted, for the Federal Parliament to have specified the "decisions" that it would subject to the new law on judicial review, in a way different from that ultimately chosen. Thus, it would have been feasible to enumerate the decisions of specific decision-makers or to identify particular decisions by name or description.

143 Various possibilities were debated in the report and parliamentary discussions that preceded the adoption of the ADJR Act[188]. For instance, it would have been possible (as was done in relation to the case of a failure to make a decision) to limit the occasion for relief under the Act to those "decisions" in which a person had a duty to make a decision, whether by

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186 Review Act, s 3, definition of "State authority".

187 Review Act, s 4.

188 See generally Explanatory Memorandum, Administrative Decisions (Judicial Review) Bill 1977 (Cth) ("Explanatory Memorandum").

or under an Act or by the unwritten law[189]. There were many methods by which a different key could have been fashioned that would unlock access to the simplified system of judicial review afforded by the ADJR Act (and hence its later Queensland derivative) in different ways[190].

144 Instead, under the ADJR Act, the formula adopted was to apply that Act to *all* defined "decisions"[191]. Relevantly, these were defined by reference to whether they had, or had not, been "made, proposed to be made, or required to be made … under an enactment"[192]. Provision was made in the ADJR Act for the express exception of "a decision by the Governor-General"[193].

145 In this approach, the ADJR Act adopted a course different from that followed when provision had been made by the Federal Parliament two years earlier, for merits review of specified federal administrative "decisions" by the new Administrative Appeals Tribunal[194]. In the case of that Tribunal, the same wide definition was adopted for those persons who might apply to the Tribunal for relief. In such a case, it was enacted that application might be made "by or on behalf of any person or persons … whose interests are affected by the decision"[195]. Indeed, standing was extended to organisations whose objects or purposes included such "interests"[196].

146 However, these large prescriptions in the new federal administrative law concerning the "interests" of those who might enliven the new remedies stand in marked contrast to the narrow view which the majority reasoning in this appeal now seeks to stamp on the Review Act under the guise of a requirement, inherent in the necessity to show that the "decision" impugned was made "under" an enactment. The parallel language of the Review Act, and its express command to adopt an approach to the Queensland statute similar to that taken to the ADJR Act[197], deny the validity of this approach. It represents a departure from a fundamental feature of the ADJR Act which the Queensland Parliament had copied in

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189 Explanatory Memorandum at [28]. See ADJR Act, s 7.

190 See for example *Administrative Law Act* 1978 (Vic), s 2; Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 21-23.

191 ADJR Act, s 3(1), definition of "decision to which this Act applies".

192 ADJR Act, s 3(1), definition of "decision to which this Act applies".

193 ADJR Act, s 3(1), definition of "decision to which this Act applies".

194 *Administrative Appeals Tribunal Act* 1975 (Cth) ("AAT Act"), s 25(1).

195 AAT Act, s 27(1).

196 AAT Act, s 27(2); cf ADJR Act, ss 3(4), 12.

197 Review Act, s 16(1).

this respect.

147 *Encompassing all decisions*: Nonetheless, the words "under an enactment", appearing in the ADJR Act and in the Review Act, remain to be interpreted. In *Australian National University v Burns*[198] Bowen CJ and Lockhart J, writing of the same phrase in the ADJR Act, observed[199]:

> "The difficulty in the present case does not lie in the definition of the expression 'under an enactment'. … [T]he word 'under', in the context of the [ADJR Act], connotes 'in pursuance of' or 'under the authority of' … The difficulty lies in the application of the expression to particular circumstances. The present case poses the problem in an acute form.
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> ...
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> In one sense every decision of the [university] Council may be said to be made 'under' the University Act namely, in the sense of in pursuance of or under its authority. … If the Council makes statutes with respect to the 'manner of appointment and dismissal' of professors … those statutes arguably may also constitute a source of the Council's authority to engage and dismiss professors; but as no such by-laws have yet been made we need not pause to consider that provision further on this point."

148 Although "in one sense" every "decision" of the governing body of a statutory authority such as the University (and every decision made "under" such decisions) might be seen as being made "under" the University Act, this has not been the approach that courts have taken, virtually from the start of the operation of the ADJR Act, and hence of the Review Act. The reason is simple. And it is grounded in the language of each statute.

149 If it had been the purpose of the two Acts to cast the net of their application so widely, there would have been no reason to include in the definition of a "decision to which this Act applies" the phrase "under an enactment". It would have been sufficient simply to require "a decision" and that it was one "of an administrative character" and perhaps one made by an identified authority or officer of the polity concerned. Instead, the precondition was added, applicable to every case that enlivened the reforming legislation. The "decision" in question had to be one "made … under an enactment". Plainly, therefore, the phrase was intended to impose an additional requirement. It is one that, to the extent of its language and purpose, cuts back the availability of the new law to provide simplified judicial review. Accordingly, although "in one sense" every decision made by or under the governing body of the University might be

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198 (1982) 43 ALR 25.
199 (1982) 43 ALR 25 at 31-32.

said to be made "under" the University Act, this was not the sense in which the phrase is used either in the ADJR Act or in the Review Act. The respondent did not argue otherwise.

150 *Attempted limitations on the ambit*: The appreciation in the courts that this was so has led to successive attempts, principally in the Federal Court, which long enjoyed exclusive jurisdiction under the ADJR Act[200], to explain the meaning of the requirement that the administrative decision in question was one "made … under an enactment". The Federal Court has sought to do so by using alternative words, or description of appropriate approaches. The attempted explanations include the following:

(1) *The core functions test*: This was the view that the phrase was intended to refer to a decision in pursuance of a "core function" of the public official or authority concerned. It represented an approach expounded at first instance in *Burns* by Ellicott J[201], whose part as one of the federal law officers instrumental in designing and piloting the ADJR Act into law made his opinion one of special significance. It was this approach that led Ellicott J in *Burns* to his conclusion that the ADJR Act applied in that case which concerned the termination by a university council of a professor's appointment. Such an action was found to lie "at the very heart of its existence and [was] essential to the fulfilment of the basic function for which the University was set up by Parliament"[202]. There are resonances of this approach in the earlier opinion of Kitto J in this Court in *Board of Fire Commissioners (NSW) v Ardouin*[203]. There, in construing a statutory provision exempting a statutory authority from liability, Kitto J asked whether the negligence on which the plaintiff sued "would have been the very thing, or an integral part of or step in the very thing, which the provisions of the Act other than [the exemption] ... gave power in the circumstances to do"[204]. In his reasoning in the Court of Appeal in this case, Jerrard JA[205] came close to a similar exposition. He described the decision made affecting the respondent as one "as to a central or core function of the University". However, on appeal in *Burns*, that approach was criticised as incorrectly focussed. The Full Court in *Burns* found that it was impossible to distinguish between decisions affecting professors and decisions relating to other employees including "registrars, librarians,

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200 ADJR Act, s 9.

201 (1982) 40 ALR 707.
202 (1982) 40 ALR 707 at 717.
203 (1961) 109 CLR 105.
204 (1961) 109 CLR 105 at 117.

205 [2003] QCA 571 at [31].

groundsmen or security officers". By hypothesis, the latter decisions[206] were thought not to have been made "under an enactment" by reason only of the general powers under the statute belonging to the university council. Therefore, some other and different connection was required. The orders of Ellicott J were set aside.

(2) *The proximate source test*: In place of the test suggested by Ellicott J, the Full Court in *Burns* propounded no principle better than that the outcome of the statutory criterion depends on "the circumstances of each case"[207]. However, whilst this approach was undoubtedly correct, it scarcely gave much guidance. It was in this context (and perhaps reflecting developments happening at the same time in the law of tort) that judges began to suggest that whether a "decision" was made "under an enactment" depended upon whether the propounded enactment was the "immediate" or "proximate" source of the power deployed in the given case. This was the way in which a number of decisions were reasoned in the Federal Court including *Australian Film Commission v Mabey*[208]; *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd*[209]; and *James Richardson Corporation Pty Ltd v Federal Airports Corporation*[210]. In such cases, the Federal Court was at pains to draw a distinction between the enactment which afforded the *capacity* for the public decision-maker to make the "decision" in question and the subordinate source (usually a contract made under general powers) which was the *proximate* foundation or justification of the "decision". Where such a distinction could be made, the impugned decision was held not to have been made "under" the enactment but "under" the more proximate source of power[211]. However, the difficulty with the supposed distinction between "proximate" and "remote" sources of "decisions" is obvious. Essentially, the distinction is self-fulfilling. Debates over "remote" and "proximate" sources are unhelpful because the words are descriptive of the outcome. They are not prescriptive of the way in which that outcome is to be reached.

(3) *The "authorised or required" test*: A realisation that this was so led, in turn, to renewed attempts to find a *discrimen* that would mark out an applicable statutory conferral of power from that which was inapplicable when applying the test required by the statute. This resulted in the

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206 *Burns* (1982) 43 ALR 25 at 35 per Bowen CJ and Lockhart J.

207 (1982) 43 ALR 25 at 34.

208 (1985) 6 FCR 107.

209 (1985) 7 FCR 575.

210 (1992) 117 ALR 277 at 280.

211 See joint reasons at [68].

suggestion in *General Newspapers Pty Ltd v Telstra Corporation*[212] that it was necessary to ask whether the impugned decision amounted to an "ultimate or operative determination which an enactment authorises or requires, and thereby gives it statutory effect" or otherwise[213]. This new test came as something of a surprise because the facts in *General Newspapers* were substantially indistinguishable from those in *James Richardson*, decided shortly before by reference to the concept of "proximate" and "remote" decisions. Moreover, as particular members of the Federal Court were quick to point out, if the Federal Parliament, in the ADJR Act, had meant to confine judicial review to "decisions" expressly identified for that purpose in the legislation, it would have proceeded in the ADJR Act in the manner that it had adopted in the AAT Act; yet it did not. In *Chapmans Ltd v Australian Stock Exchange Ltd*[214], Lockhart and Hill JJ remarked with telling effect:

> "The question of characterisation must be determined as one of substance and it would seem not to be determinative that the statute did not spell out precisely the power to make the decision".

This view conformed to the opinion that had been stated by the Full Court in *Burns*, at the beginning of this series of cases, that "[t]he [ADJR] Act should not be confined to cases where the particular power is precisely stated"[215]. Notwithstanding these conflicting signals, the Federal Court continued to favour an approach restricting the ambit of the phrase "made … under an enactment". It became generally disinclined to characterise a decision in that way if the only source of the legislative power relied upon was stated in *general* terms in the enactment and if a different, more *specific* source could be identified, usually a contract, to explain and justify the "decision" made.

(4) *The rights and duties test*: Now, on the proposal of the University in the present appeal, a majority of this Court has endorsed a new and different test altogether. It requires consideration of whether, in the given case, the enactment "under" which the applicant for review says that the impugned "decision" was made, was one affecting the applicant's "legal rights and obligations"[216]. The test as thus stated is "do legal rights or duties owe in an immediate sense their existence to the decision or depend upon the presence of the decision for their enforcement?" I shall turn shortly to

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212 (1993) 45 FCR 164.

213 (1993) 45 FCR 164 at 170.

214 (1996) 67 FCR 402 at 409.

215 (1982) 43 ALR 25 at 31.

216 Joint reasons at [80], [89].

criticise this test. However, let me at once state what, in my view, is the correct test:

(5) *The need for statutory authority test*: According to the correct test, the question whether a decision challenged in the Review Act[217] proceedings was "made … under an enactment" is answered by first determining whether the lawful source of the power to make the "decision" lies in the enactment propounded and, secondly, deciding whether an individual would, apart from that source, have the power outside of the enactment (either under the common law or by some other statute) to make the "decision" concerned. If the answer to that question is in the affirmative, the "decision" was not made "under" the propounded enactment. If it is in the negative, the source of power in the statute is established as governing the case. The "decision" is therefore made "under" the statute or it is made without power.

The applicable test and inapplicable attempts

151 *The proper approach*: Obviously, none of the Federal Court decisions, nor the several approaches they have successively favoured, bind this Court. Whilst assistance may be derived from reading them, the foregoing digest and lengthier analyses elsewhere of their reasoning[218] show, with all respect, the confusion into which this corner of the law has fallen. It is not sufficient to resolve the present case simply by reference to "the circumstances of each case" as was suggested in *Burns*[219]. Clearly, this Court should adopt an approach that will help resolve not only this case but other cases in other courts in the future. It must be an approach that is consistent with the language, structure and purposes of the Review Act (and, in similar cases to which it applies, the ADJR Act). As I previously stated in *Mulholland v Australian Electoral Commission*[220], "between clearly *valid* and clearly *invalid* [applications] of an Act may be other

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217 Or under the ADJR Act or like enactment.

218 Especially Creyke, "Current and Future Challenges in Judicial Review Jurisdiction: A Comment", (2003) 37 *AIAL Forum* 42. See also Creyke and Hill at 22ff; Dixon, "Local Government, Contracts and Judicial Review", (1996) 12 *Queensland University of Technology Law Journal* 60; Jolly, "Government Owned Corporations: Public Ownership, Accountability and the Courts", (2000) 24 *AIAL Forum* 15.

219 (1982) 43 ALR 25 at 34; cf *Concord Data Solutions Pty Ltd v Director-General of Education* [1994] 1 Qd R 343 at 350.

220 (2004) 78 ALJR 1279 at 1327 [239]; 209 ALR 582 at 646-647 (original emphasis).

[applications] that require characterisation". To give meaning to the contested phrase, it is necessary to look beyond the words in question to other provisions of the Review Act, its context and its purpose.

152 The other provisions of the Review Act that are relevant include the broad connotation of "decision"; the large ambit of "enactment" as defined; and the very large scope afforded to persons to establish standing so as to invoke the remedies provided by that Act. These considerations help to identify the serious flaw in the new test propounded in the joint reasons.

153 No view could be taken of the phrase "made … under an enactment" that is inconsistent with the clear parliamentary purpose that "persons aggrieved" by an administrative decision are entitled by law to enliven the Review Act if they can show no more than that their "interests" are "adversely affected by the decision". To provide such a wide definition of "person aggrieved"[221] and then, by a judicial gloss, to narrow severely the parliamentary purpose in so providing (by obliging demonstrations of the "affecting of legal rights and obligations"[222] as a precondition to relief) is unacceptable as a simple matter of statutory construction. The text is not then internally harmonious and consistent as it should be assumed the Parliament intended. Judges must not impose interpretations on parliamentary law that contradict express provisions of such law or deny, or frustrate, its application. There is no textual foundation for glossing the Review Act in this way. To the contrary, there are clear textual provisions that forbid it.

154 *Reducing the review ambit*: From the start of the operation of the ADJR Act, as relevantly followed in the Review Act, courts have tried, in the ways that I have summarised, to reduce the apprehended over-reach of judicial review. The phrase "made … under an enactment" is but one of the statutory provisions invoked for this purpose. Others have sometimes proved fruitful in confining the ambit of the legislation. These include determinations that the person concerned is not "a person aggrieved"[223]; rejection of the claim that the determination is a "decision"[224]; and suggestions that any "decision" is not "of an administrative character"

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221 Under the Review Act, s 7(1); cf ADJR Act, s 3(4).

222 Joint reasons at [80].

223 See *Rayjan Properties Pty Ltd v Chief Executive, Queensland Department of Housing, Local Government and Planning* unreported, Supreme Court of Queensland, December 1994, noted in O'Donovan at 77.

224 Creyke and Hill at 23-43.

because it does not involve the *governmental* action for which the Review Act and its federal predecessor were designed[225]. None of these controls was available to, or was ultimately relied upon by, the University in this appeal. In elaborating the phrase "made … under an enactment", courts should not strain themselves to adopt artificial interpretations in order to confine the text. The text itself provides for its own restrictions. Unnecessary restraints, without the clearest foundation in the statute, should not be introduced by judges to undermine beneficial legislation of this kind.

155 *Remedial purpose of the law*: Least of all should artificial restrictions be read into the statutory phrase which are inconsistent with the express provisions governing the initiating party's standing rights. This is especially so because the Review Act is one that has been adopted to enlarge, and not to restrict, judicial remedies[226]. The provision of remedies against legally flawed decisions by public authorities (some of which, on legal analysis, may be no "decision" at all) is, after all, simply the application to such authorities of the requirement fundamental to our system of government, namely accountability to the rule of law[227]. It renders the recipients of public power and public funds answerable, through the courts, to the people from whom the power is ultimately derived and the funds ordinarily raised by taxation, and for whose interests such recipients are, in a sense, public fiduciaries.

156 Moreover, relief by way of judicial review is ordinarily discretionary. A court is not, as such, concerned with the factual merits but with observance of legality[228]. Sometimes, the complainant will have remedies otherwise. In the federal sphere, this may include access to the constitutional writs[229]. In the case of the Review Act, it will include entitlements to seek prerogative relief or declaratory or injunctive orders. These are still further reasons why it is inappropriate for this Court to struggle to confine the operation of the remedial provisions of the Review Act in a way that is not fully sustained by that Act's language, structure and purposes. In my respectful opinion, the conclusion reached in the

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225 O'Donovan at 77.

226 *Vietnam Veterans' Affairs Association of Australia New South Wales Branch Inc v Cohen* (1996) 70 FCR 419.

227 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [55].

228 Australia, Administrative Review Council, *The Scope of Judicial Review*, Discussion Paper, (2003) at 50-51 [4.4]-[4.8].

229 Constitution, ss 75(v), 76(ii). Note that in s 75(i) and s 76(i), (ii) and (iv), the preposition "under" is used in identifying the constitutional link essential to jurisdiction. No narrow view has been taken of these provisions.

joint reasons offends all of these requirements. The Review Act is not concerned only with affection of a complaining party's "legal rights and obligations". It is concerned as well with affection of that party's "interests" – a much broader notion, and deliberately so.

157 *Rights of corporations/individuals*: If, therefore, the phrase "made … under an enactment" is approached by reference to the test that I favour, in order to identify the competing possibilities of the legal source of the "decision" concerning the respondent, those possibilities in the present case are (1) the University Act; or (2) legal powers that the University has derived outside the University Act.

158 The possible alternative "sources" of the University's powers outside the University Act could only derive from the fact that that Act created the University as a "corporation" with "all the powers of an individual". The University may therefore enter into contracts. However, it was common ground that there was no right, express or implied under a contract, that could be invoked to sustain the lawfulness of what the University had done in the respondent's case (assuming the contractual distinction to be a correct one). Accordingly, it remains to consider what other sources the University could rely upon to act as it did in the respondent's case. The University Act afforded the University the legal status of a corporation and the powers of an individual. Yet, under the law applicable in Queensland, there was something that no corporation and no individual might do but only a university established or recognised under an Act[230], such as the appellant. This was, relevantly, to "provide education at university standard" and to "confer higher education awards". Apart from such a university, no corporation or individual in the State of Queensland could lawfully do this because of the specific prohibition in the Higher Education Act[231].

159 It follows that, whereas the University, as a corporation with "all the powers of an individual"[232], could enter contracts[233] and do any other thing an individual could do, its power to provide university education and confer higher degrees derived, and derived only, from a source in the University Act. Necessarily, the power of the University to withdraw the provision of education at university standard to an admitted candidate and to deny access by such a candidate to a higher education award, had

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230 See Higher Education Act, ss 6, 7 and 8.

231 ss 6, 7 and 8.

232 University Act, s 6(1).

233 University Act, s 6(1)(a).

likewise to find a source in the University Act. The power to withhold is included in the power to grant. As it happened, the University itself recognised this. By its Council, within relevant powers, it established or authorised the relevant subcommittees and made appointments to them. It adopted the applicable Policies. All of this the University did under the University Act.

160 Thus, whatever might be the case where a "decision" is made under a contract or, as in *NEAT Trading*[234] (as found by the majority of this Court), under the applicable provisions of another statute (the Corporations Law), the position in this case was quite different. The source of the University's power to make the "decision" that it did in relation to the respondent was, and was only, the University Act. The "decisions" affecting the "interests" of the respondent were not made "under" some other legal source of power. They were made "under" the Act or they were unlawful.

161 *No other source of power*: As noted by the Court of Appeal and by this Court, it was common ground between the parties that there was no contract in existence between the respondent and the University, and thus no contractual source of power (as in *Burns*[235]) by which the University could have purported to act so as to permit the action taken against the respondent to be characterised as taken under a contract (assuming that to be a valid distinction) and not under the enactment. In the Court of Appeal it was held, correctly in my opinion, that in the absence of contract in this case the only possible source of power for the decision to exclude the respondent from the programme was the University Act. No competing statutory or other source of a relevant power existed.

162 The majority in this Court now holds that the University was acting only in its capacity under "general law" as a private entity, terminating a private "relationship" or "arrangement" with another entity (the respondent), as any person may do, without recourse to a statutory power[236]. Such a characterisation conceals the reality that the relevant "arrangement" between the University and the respondent consisted *solely* in the exercise by the University of its statutory powers under the Higher Education and University Acts with respect to the respondent, namely the powers to "provide education at university standard" and ultimately to "confer higher education awards" upon valid enrolment and undertaking of the relevant course.

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234 (2003) 77 ALJR 1263 at 1274 [47]-[51], 1275 [54]; 198 ALR 179 at 192-193.

235 (1982) 43 ALR 25.

236 Reasons of Gleeson CJ at [19]-[20], [23]; joint reasons at [91].

163 The "arrangement" and "relationship" in question were co-extensive with the University's powers and obligations under the University Act. Here, they involved nothing else. The termination of that "arrangement" or "relationship" was nothing less than the refusal by the University to exercise its powers in the respondent's case. Put affirmatively, it was the withdrawal from an already accepted student of the University's facilities of education and the conferral of its degree. Describing the events as the termination of an "arrangement" or "relationship" at general law cannot alter the basic character of the University's actions: the termination was, and remains, indistinguishable from the University's refusal to exercise the relevant statutory powers[237].

164 The University could have entered into, or withdrawn from, various "arrangements" or "relationships" with students as it wished. But what gave this withdrawal its "bite", and its impact on the respondent, was the denial, inflicted on a person with an interest, of access to a tertiary education and eventually to a degree, which relevantly only the University could award, pursuant to the Higher Education Act.

165 *Summary and conclusion*: The foregoing approach, which I favour, is wholly consistent with this Court's decision in *NEAT Trading*[238], much as I disagree with that decision. It is firmly anchored in an analysis of the statutory provisions relevant to this case. Unlike the approach in the joint reasons, it does not contradict, but fulfils, the remedial language, structure and purpose of the Review Act. It avoids glossing the phrase "under an enactment" with an additional vague and opaque requirement that is not in the Act and that contradicts the standing and interest provisions that are there. It follows that the University's appeal to this Court should be dismissed.

Of academic independence and other concerns

166 *The special position of universities*: I recognise that universities are in many ways peculiar public institutions[239]. They have special responsibilities, as the University Act envisages in this case, to uphold high academic standards about which members of the academic staff will often be more cognisant than judges. There are issues pertaining to the

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237 Under the Review Act, as under the ADJR Act, "making ... a decision" is defined to include refusing to make a decision: s 5(a). See also ADJR Act, s 3(2).

238 (2003) 77 ALJR 1263; 198 ALR 179.

239 Nelson, "Judicial Review in the Community of Scholars: A Short History of Kulchyski v Trent University", (2004) 13 *Education and Law Journal* 367 at 375.

intimate life of every independent academic institution that, sensibly, courts decline to review: the marking of an examination paper[240]; the academic merit of a thesis[241]; the viability of a research project[242]; the award of academic tenure[243]; and internal budgets[244]. Others might be added: the contents of a course; particular styles of teaching; and the organisation of course timetables. As Sedley LJ noted in *Clark v University of Lincolnshire and Humberside*[245], such matters are "unsuitable for adjudication in the courts ... because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate". Judges are well aware of such peculiarities. The law, in common law countries, has consistently respected them and fashioned its remedies accordingly.

167 However, as Maurice Kay J explained in *R v University of Cambridge; Ex parte Persaud*[246] (a recent English case similar to the present appeal), it is entirely "correct" of courts "to distinguish between the disciplinary type of case and the situation where what is in issue is pure academic judgment". In the present appeal, the respondent's claim fell squarely within the former class. Academic judgment is one thing. But where an individual who has the requisite interest is affected by disciplinary decisions of an administrative nature made by a university body acting according to its powers under a statute, outside the few categories peculiar to "pure academic judgment", such decisions are susceptible to judicial review. They are so elsewhere[247]. They should likewise be so in Australia. An

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240 *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at 1992; [2000] 3 All ER 752 at 756; *Hines v Birkbeck College* [1986] Ch 524 at 542 per Hoffmann J. See also, for example, *Thorne v University of London* [1966] 2 QB 237.

241 *Re Polten* (1975) 59 DLR (3d) 197 at 206.

242 *R v University of Cambridge; Ex parte Persaud* [2001] ELR 64 at 74 [21] (QBD).

243 *Re Paine* (1981) 131 DLR (3d) 325 at 331-333.

244 *Kulchyski v Trent University* (2001) 204 DLR (4th) 364 at 375 [26]-[27], 377 [32], 379-380 [40].

245 [2000] 1 WLR 1988 at 1992; [2000] 3 All ER 752 at 756.

246 [2001] ELR 64 at 72-74 [20]-[21] (QBD).

247 For example *Ceylon University* [1960] 1 WLR 223 (PC); [1960] 1 All ER 631; *R v Aston University Senate; Ex parte Roffey* [1969] 2 QB 538; *R v Chelsea*

> appeal to "academic judgment" does not smother the duties of a university, like any other statutory body, to exhibit, in such cases, the basic requirements of procedural fairness implicit in their creation by public statute and receipt of public funds from the pockets of the people.

168 Where the personal interests of an individual are affected by an institution funded by public monies, there is, to use Woodhouse P's expression, a "double consideration"[248]:

> "On the one hand a final year ... student should be entitled on personal grounds to know that an end to his potential career has been decided upon by the University for reasons that are entirely justified and by methods that are demonstrably fair and appropriate. As well there is the very distinct public interest in seeing that the very large investment of public money in taking him so far will not be thrown away except for good and substantial reasons."

His Honour's elaboration is apposite to the situation of the respondent in this appeal. This Court, by narrowly construing the Review Act and adopting an untextual gloss, effectively puts such persons outside the Act and leaves them without the means of judicial review which would normally be afforded them in other common law countries and hitherto in Australia. This withdrawal of the protection of the law is justified neither by the statutory text nor by past authority or consideration of legal principle and policy.

169 If a university asserts that, globally, by its very nature and by the character of its "decisions", it should be completely exempted from an enactment such as the Review Act, it has the right to seek such an exemption from Parliament[249]. None was granted here. The party seeking a statutory order of review must always establish that it is a "person aggrieved", that the decision in question is "administrative" in character, that it is "made ... under an enactment" and that relief should be granted in the exercise of the court's discretion. Without embracing notions of "deference" that find no footing in the Review Act (or the ADJR Act), it remains true that, in exercising a discretion in relation to a complaint concerning a "decision" of a university, if the decision was made fairly by the appropriate body in accordance with the applicable university policy, the risks of judicial

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College of Art and Design; Ex parte Nash [2000] ELR 686; *R v University of Saskatchewan; Ex parte King* (1968) 1 DLR (3d) 721. See also, for review on contractual grounds, *Olar v Laurentian University* (2002) 165 OAC 1.

248 *Norrie* [1984] 1 NZLR 129 at 135.

249 For example under the Review Act, s 18, Sched 1.

interference would be slight indeed[250].

170 *Unwarranted fears of floodgates*: The University's arguments propounded various sources of anxiety about the outcome that I favour. It is appropriate for me to address those concerns for I do not doubt that they were sincerely held. The ultimate answer to them is one of abiding legal, indeed constitutional, importance.

171 Where bodies, such as Australian universities, specifically the appellant, are recipients of large amounts of public funds, they cannot complain when, like other statutory authorities and public decision-makers, they are rendered accountable in the courts for the lawfulness of decisions they make "under" public enactments. It is not unreasonable that such bodies should be answerable for their conformity to the law. Relevantly, the law includes the law of procedural fairness ("natural justice"). Universities, in formal and important decisions about disciplinary matters affecting students and others, should be places of procedural fairness. So far as the law provides, they should be held to account in the courts in response to complaints – certainly those of a serious nature – that the ordinary legal entitlements have been denied to a person with the requisite interest[251].

172 I have demonstrated that there are many protections in the language of the Review Act against needless interference by the courts in decisions such as those to admit students to candidature for higher degrees or to exclude them once they are admitted. Both in terms of general principle governing the limited role of judicial review[252], and by reason of the provisions of the applicable legislation, the fear of an undue opening of "floodgates" in connection with university "decisions" is, as authority determining the scope of similar legislation demonstrates[253], unpersuasive.

173 *Avoiding untextual limitations*: The foregoing shows how unnecessary it is, in the case of the decisions of a university, to adopt the untextual approach, favoured in the joint reasons, that to be made "under" the University Act the complainant must show affection of his or her legal

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250 For much the same reasons as were mentioned, in another legal context, by Sedley LJ in *Clark* [2000] 1 WLR 1988 at 1992; [2000] 3 All ER 752 at 756. See joint reasons at [58].

251 See *Kioa v West* (1985) 159 CLR 550 at 633; *Ridge v Baldwin* [1964] AC 40; *Calvin v Carr* [1980] AC 574 at 592-593 (PC).

252 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, 291-293.

253 *Berkeley Cleaning* (1985) 7 FCR 575 at 578. See also *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64 at 79.

rights and obligations.

174 The suggestion that a candidate part-way through the University's procedures for admission to the higher degree of Doctor of Philosophy has had no "interests" affected by a finding of academic misconduct, exclusion from the University, removal from the prospect of a degree and with a permanent or long-term blight on any chances of academic advancement elsewhere and termination of career progression is, self-evidently, unrealistic. To analyse the respondent's situation in terms of her entitlement to enter the University's land by legal licence is also unconvincing. It seriously misstates her relationship with the University. Her complaint is not a spatial one but one of procedural unfairness and the non-compliance by the University with its own lawful procedures and Policies established by its Council under the University Act.

175 The respondent had clear "interests" that were affected by the University's decisions. Those "decisions" were "made … under an enactment", namely the University Act. They were directly traceable to the University Act. They were of a character, and with consequences, that only a university operating under the Higher Education Act could lawfully perform. The Review Act applied. The judges of the Supreme Court of Queensland were correct to so hold. Not only for the erroneous outcome in this case, but also because of the uncertain consequences that the distinction now drawn may bring to the beneficial accountability of public decision-makers to the law in Australia, I respectfully dissent.

Order

176 The University's appeal should be dismissed with costs.