SUPREME COURT OF QUEENSLAND

CITATION:	*Tang v Griffith University* [2003] QCA 571
PARTIES:	**VIVIAN TANG** (applicant/respondent) **v** **GRIFFITH UNIVERSITY** (respondent/appellant)
FILE NO/S:	Appeal No 2308 of 2003 SC No 10477 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2003
JUDGES:	Jerrard JA and Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed on the standard basis**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – JURISDICTION AND GENERALLY – "DECISION" WITHIN ACT'S APPLICATION – "UNDER AN ENACTMENT" – where respondent excluded from her PhD candidature program by the appellant university – where respondent applied for statutory review of this decision – where appellant contends that the decision not to confer a degree was not made "under an enactment" and therefore is not subject to judicial review – whether power of the appellant to confer degrees is a power authorised or permitted by statute – whether this power derives its legal efficacy from statute *Administrative Decisions (Judicial Review) Act* 1977 (Cth) *Australian National University Act* 1946 (Cth), s 23 *Griffith University Act* 1998 (Qld), s 6, s 9, s 11, s 61 *Higher Education (General Provisions) Act* 1993 (Qld) *Judicial Review Act* 1991 (Qld), s 4

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, followed
Australian National University v Burns (1982) 43 ALR 25, considered
Australian National University v Lewins (1996) 138 ALR 1, considered
Blizzard v O'Sullivan [1994] 1 Qd R 112, applied
CEA Technologies Pty Ltd v Civil Aviation Authority (1994) 51 FCR 329, discussed
Concord Data Solutions Pty Ltd v Director General of Education [1994] 1 Qd R 343, referred to
General Newspapers Pty Ltd v Telstra Corporation Limited (1993) 45 FCR 164, discussed
Hutchins v Deputy Commissioner of Taxation (1996) 65 FCR 269, considered
Lamb v Moss (1983) 49 ALR 533, followed
Neat Domestic Trading Pty Ltd v AWB Ltd (2002) 198 ALR 179, discussed
Orr v Bond University (Unreported, QSC, Dowsett J, SC No 2337 of 1996, 3 April 1996), discussed
Whitehead v Griffith University [2003] 1 Qd R, discussed

COUNSEL: J McKenna, with S M Cool, for the appellant
A J Morris QC, with J Murphy, for the respondent

SOLICITORS: Minter Ellison for the appellant
Dibbs Barker Gosling for the respondent

[1] **JERRARD JA:** In this matter Griffith University appeals a judgment of this court delivered 14 February 2003 which held that a decision to exclude Ms Vivian Tang from a PhD candidature program, on the grounds that she had undertaken research without regard to ethical and scientific standards, was an administrative decision made under an enactment[1] (the *Griffith University Act* 1998 (Qld)), and subject to judicial review. Ms Tang had filed an application for a statutory order of review pursuant to Part 3 of the *Judicial Review Act* 1991 (Qld) on 16 December 2002, alleging that various breaches of rules of natural justice had happened in relation to the making of the decision, that procedures required by law to be observed in relation to its making were not observed, that it involved errors of law, that its making was an improper exercise of the power conferred by the *Griffith University Act*, and that there was no evidence or other material to justify it.[2] Particulars of those grounds were provided.

[2] Griffith University applied by application filed 15 January 2003 for orders under s 48(1) of the *Judicial Review Act* dismissing or staying Ms Tang's application, and argued on the hearing that the decision was neither of an administrative character, nor made under an enactment. The learned judge hearing that application dismissed it on both grounds, and Griffith University argues on this appeal that the judge erred in holding it was a decision under an enactment, conceding on the appeal that the decision was one of an administrative character.

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1 See s 4 of the *Judicial Review Act* 1991 (Qld).
2 These grounds reflect s 20(2) of the *Judicial Review Act*.

General Background

[3] It is safe to assume Ms Tang was a PhD candidate at Griffith University. That University was established as a body corporate by the *Griffith University Act*[3] and its functions, listed in s 5 of that Act, include:

> "…
> (ba) to encourage study and research; and
> …
> (e) to confer higher education awards; and
> (f) to disseminate knowledge and promote scholarship
> …"

By that Act [4] that University:

> "(1) … has all the powers of an individual, and may, for example –
> (a) enter into contracts; and
> (b) acquire, hold, dispose of, and deal with property; and
> (c) appoint agents and attorneys; and
> (d) engage consultants; and
> (e) fix charges, and other terms, for services and other facilities it supplies; and
> (f) do anything else necessary or convenient to be done for, or in connection with, its functions.
> …"

[4] By s 7 of that Act a council of the University was established as its governing body[5], and the council was given[6] the power to do anything necessary or convenient to be done for, or in connection with, its functions; including the power to manage and control the University's affairs and property. By s 11 provision was made for the council to delegate its powers under the Act to an appropriately qualified committee.

[5] 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[7] included the apparently delegated one of developing and monitoring the academic policies and procedures of the University and making recommendations to the Council[8] 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 Committee approved a revised Policy on Academic Misconduct, and on 6 September 2001 a revised Policy on Student Grievances and Appeals. There was no

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3 By s 4.
4 Section 6.
5 See s 8.
6 By s 9.
7 As described in its constitution, at AR 14.
8 The constitution of the Academic Committee refers to the "Council".

suggestion made on the appeal that those approvals were not intra vires the Academic Committee.

[6] 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, as the learned judge described, (at [22] of the reasons) those of approving the eligibility of students to receive higher degrees including a PhD, and to develop policy relating to research higher degree courses, which by definition include a PhD. The learned judge found that this function was a direct delegation from the council.

Ms Tang's exclusion

[7] A meeting of the Research and Postgraduate Studies Committee held on 12 March 2002 considered documents relating to allegations of academic misconduct made against Ms Tang, and a subcommittee was constituted to act as an Assessment Board to administer the Policy on Academic Misconduct in relation to those allegations.[9] On 19 July 2002 that assessment board wrote to Ms Tang, advising her that following a reconvened hearing on 10 July 2002 (at which Ms Tang was present for some period) the Board had unanimously found she had engaged in academic misconduct as described in "clause 1.1"[10] of the Policy on Academic Misconduct, in that it was found she had presented falsified or improperly obtained data as if it were the result of laboratory work. On 9 August 2002 the Assessment Board wrote again to Ms Tang, repeating that finding and advising it had determined that she should be excluded from her PhD candidature program on the grounds that she had undertaken research without regard to ethical and scientific standards. She was advised of her right to appeal against the decision, which Ms Tang did, to the University Appeals Committee; that Committee by letter dated 21 October 2002 advised her appeal had been dismissed, describing the grounds of dismissal.

[8] Ms Tang's application for judicial review described it as one to review the "decision notified on 19 July 2002; and the decision notified on 21 October 2002", the latter being described as the decision of Griffith University upholding the decision of 19 July 2002 that Ms Tang was guilty of academic misconduct and was excluded from her PhD candidature. I agree with the learned trial judge that the substantive decisions would seem to have been that of 9 August 2002 and the decision of the Appeals Committee communicated 21 October 2002 upholding the August decision; the critical decision found by the learned judge was the one to exclude Ms Tang from the PhD program on the grounds of the finding of the described academic misconduct. It is that decision to exclude Ms Tang which the learned judge held was subject to judicial review.

Arguments on the appeal

[9] The appellant had no quarrel with the description by the learned judge of the relevant events and procedures involved in that decision, or of the powers and functions of Griffith University, the council, and the relevant committees and

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9 AR 65 affidavit of William Lovegrove.

10 The copy of that document exhibited in the appeal record does not sub-number the paragraphs of Clause 1; it is clear enough which clause is meant.

subcommittees. That description included that the council had power to manage and control what the learned judge described as the very core aspect of the University's functions, of conferring higher educational awards and promoting scholarship. The judge held that necessarily included measures to avoid corruption of the quality of awards by the use of methods antithetical to acceptable standards of scholarship. The judge also described the council having express power to delegate its power to an appropriately qualified committee, which it had done with regard to that particular aspect of its functions, by creating the Academic Committee and its subcommittee the Research & Postgraduate Studies Committee. The judge described the Academic Committee as creating the Policy on Academic Misconduct pursuant to its delegation by the council, including the way in which academic misconduct was to be dealt with, and likewise the Policy on Student Grievances and Appeals. The judge held that in doing those things the Academic Committee acted as the delegate of the council, and the judgment refers to the tightly structured nature of the devolution of authority by delegation in relation to the maintenance of proper standards of scholarship and, consequently, intrinsic work of research higher degrees.

[10] Not only did the appellant not quarrel with any part of that description of the decision making process, but also its submissions included that the appeal should equally succeed if the decision to exclude Ms Tang had actually been taken by the council itself, rather than by the committee to which it had delegated the functions in the exercise of which that decision was made. Senior counsel for the appellant submitted that the learned judge erred in following what counsel submitted was a "core function approach", which approach senior counsel submitted had been rejected in earlier decided cases: and that the learned judge likewise erred in following what counsel described as a "route of authority" analysis of the power exercised when making the decision, which approach was likewise argued to have been rejected.

[11] The appellant conceded that the learned judge had correctly described relevant authorities and tests when determining if a decision was made under an enactment. The judge had referred to the decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and particularly the observations of Mason CJ at 336-7, to *Australian National University v Burns* (1982) 43 ALR 25, to *Blizzard v O'Sullivan* [1994] 1 Qd R 112, to *Australian National University v Lewins* (1996) 138 ALR 1, particularly at 14, to *Hutchins v Deputy Commissioner of Taxation* (1996) 65 FCR 269, and to *Concord Data Solutions Pty Ltd v Director General of Education* [1994] 1 Qd R 343 at 350.

[12] It was those references which led the learned judge to conclude that it was necessary to examine the legislative framework within which the decisions were made, and to provide the description of that repeated in this judgment. The learned judge had been responding to the appellant's submissions at first instance that the decisions sought to be reviewed were not made "under an enactment" but rather were made pursuant to various policies of university, and in any event were not administrative decisions. The judge referred to the remarks of Thomas J (as he then was) in *Concord Data Solutions* at 350:

> "A correct legal analysis of whether a decision is made under an enactment requires a characterisation of the decision that has been made, and an examination of all legislation and statutory instruments applicable to it. It is only then that the Court can say whether in its

> essential respects it was made under an enactment or under some other power or source (*Australian National University v Burns* (1982) 64 FLR 166, 174; 43 ALR 25, 32). One searches for the operative or substantial source of the power rather than incidental sources. (*Glasson v Parkes Rural Distributions Pty Ltd* (1984) 155 CLR 234; *Australian Film Commission v Mabey* (1985) 6 FCR 107, 129)."

[13] The learned trial judge then referred to the judgment in *Hutchins* of Black CJ, with whom Spender J agreed, that where a decision is impliedly required or where the authorisation for a decision is to be implied in a specific context, the enactment can be seen to "make provision" for the making of the decision. The judge observed that Black CJ continued:

> "Where, however, the authorisation is very general it is difficult to see how an enactment may be said 'to make provision' for a decision in the sense in which that expression was used by Mason CJ in *Bond* [*Australian Broadcasting Tribunal v Bond* (1990) CLR 321] (at 337). It seems to me that Mason CJ contemplated that there might be acts, capable of being called decisions, that were authorised in the sense of being within the general scope of powers conferred by an enactment but as to which the enactment could not be said to make provision, and which would therefore not be decisions under the enactment….
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> If a decision is neither expressly nor impliedly required by an enactment and, although authorised, is authorised by an enactment only in a very general way, it is unlikely to have a character of a decision for which provision is made under an enactment. The connection between the text of the enactment and the decision is likely to be too remote for the decision to have the requisite character."

[14] Finally, the learned judge referred to the observations in *Australian National University v Lewins* by Lehane J, with whom Keifel J agreed, that:

> "…..a decision is 'made' under an Act if it is 'a decision which statute requires or authorises' or 'one for which provision is made by or under a statute': *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336, 327; 94 ALR 11 per Mason CJ. In *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 51 FCR 329; 122 ALR 724 Neaves J accepted (at FCR 333, 337) that a decision meets that 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 force or effect. It is clear, I think, that the general power to employ staff does not satisfy either limb of a test so expressed. That conclusion is required equally, I think, by the recent decision of the Full Court in *Hutchins v DCT* (1996) 136 ALR 153."

[15] The appellant described that passage cited by the learned trial judge from the judgment in *Australian National University v Lewins* as correctly expressing the relevant test; and necessarily conceded therefore that the learned trial judge described the correct one. Senior counsel for the respondent agreed that the decision in *Lewins* provided the test relevant in this matter, and that the decision

must be of a kind authorised or permitted by the statute and a decision which derives its legal efficacy from the statute.[11]

What gives the decision legal force and effect?

[16] The reference in *Lewins* to a decision for which a statute expressly or impliedly provides and to which the statute gives legal force or effect, in the passage from Neaves J in *CEA Technologies v CAA* approved in *Lewins*, derived in the judgment of Neaves J in *CEA Technologies* from observations in the joint judgment of Davies and Einfeld JJ in *General Newspapers Pty Ltd v Telstra Corporation Limited* (1993) 45 FCR 164. In that case the Full Federal Court was examining whether a decision to enter into a contract, made by a statutory body upon which had been conferred all the powers of a natural person including that of entering into contracts, was a decision under an enactment and reviewable. Neaves J dealt with the same issue in *CEA Technologies*. In the joint judgment in *General Newspapers Pty Ltd v Telstra*, the point is made that the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("*ADJR Act*"), (the provisions of which are relevantly copied in the *Judicial Review Act*), provides the structure for judicial review, not of decisions taken under the general law applicable in the community, but of acts which have statutory effect because of the provisions of a federal enactment[12]. The judgment explains that the *ADJR Act* is thus concerned with decisions which, being authorised or required by an enactment, are given force or effect by the enactment or by a principle of law applicable to the enactment.[13] Their Honours continued:[14]

> "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. That empowering statute merely confers capacity to contract, whilst the validity and effect of the contract is determined by the ordinary laws of contract."

[17] The joint judgment in *General Newspapers* went on to hold that the relevant decision sought to be reviewed involved the entry into contracts and conduct leading to the making of those contracts. No statute had made specific provisions for those contracts, merely conferring upon Telecom all the powers of a natural person including that of contracting. That being a mere conferral of a capacity to act, the contracts themselves were not relevantly authorised or required by and were not made under an enactment. Their validity, and of the acts done, was governed entirely by the law of contract, not by the statute.

[18] Neaves J applied that reasoning in *CEA Technologies*, holding that general functions conferred upon the Civil Aviation Authority by s 9 and s 10 of the *Civil Aviation Act* 1988 (Cth), in conjunction with a power conferred by s 13(1) of that Act to enter into contracts, did not result in s 9 and s 10 of that Act being any more than the setting out the functions of the Civil Aviation Authority, nor result in CEA Technologies Pty Ltd being entitled to review the decision of the Civil Aviation Authority not to award it a particular contract and to award that to another tenderer. As Neaves J wrote:

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11 Transcript at page 29.
12 At 45 FCR 169.
13 At 45 FCR 172.
14 At 45 FCR 173.

> "It cannot, in my opinion, properly be said that they required or authorised … the making of the particular decisions in question and gave statutory effect to them ..."

[19] The focus in *General Newspapers Pty Ltd v Telstra Corporation Limited* and in *CEA Technologies v CAA*, and the cases cited in each, upon the source of the law which gives legal effect to a particular decision, follows the approach taken early in the construction of the *ADJR Act* by the Full Federal Court in *Australian National University v Burns*. In that case the court was considering a decision by the Council of the Australian National University in November 1981 to terminate the appointment of a professor. Section 23 of the *Australian National University Act* 1946 (Cth)[15] relevantly provided that the Council of the university (constituted under that Act) might from time to time:

> "….appoint deans, professors, lecturers, examiners and other officers and servants of the University, and shall have the entire control and management of the affairs and concerns of the University, and may act in all matters concerning the University in such manner as appears to it best calculated to promote the interests of the University."

[20] The Council was empowered from time to time to make, alter and repeal statutes with respect to all or any of a large number of matters, which included the "number, type and manner of appointment and dismissal of deans, professors, lecturers, examiners and other officers and examiners and other officers and servants of the University"; but that Council, although it had made a number of statutes, had made none in respect of those matters.

[21] The judgment of Bowen CJ and Lockhart J held that not withstanding that s 23 was the source of the Council's power to appoint and dismiss the professor, it did not follow that the decision to dismiss him was made under the *ANU Act*. That joint judgment pointed out that the *ANU Act* prescribed no essential procedural requirements to be observed before a professor was dismissed and laid down no incidents of a professor's employment. Rather the rights and duties of the parties derived from a contract of engagement between the professor and the University, entered into in December 1966 when he was appointed subject to conditions of appointment which dealt with matters including salary, tenure, duties and leave, and which conditions included that the Council might terminate the appointment of any professor who became permanently incapacitated from performing the duties of that office. That was the ground upon which the Council terminated the professor's appointment, and that joint judgment held that the rights and duties of the parties to the contract of engagement were derived under the contract and not under the *ANU Act*. Those conditions had been signed by the respondent professor when appointed.[16]

[22] That approach, of identifying what in law is the source of the obligation, power, or right to make the decision and thus from which its consequences derive, has been consistently followed as seen in the cases already described. That judgment was relied on by the appellant as establishing the irrelevance of a "core functions" analysis, and likewise a "route of authority" approach. The appellant's senior

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15 Hereafter referred to as *ANU Act*.

16 At 43 ALR 27.

counsel pointed to the remarks already quoted from the joint judgment, and to those[17] where their Honours wrote:

> "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 its authority."

Their Honours then went on to observe that plainly s 23 was the source of the Council's power to enter into contracts of engagement with professors and other University staff, and to explain that:[18]

> "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."

[23] Thus was the "route of authority" approach negated, in the appellant's submission. Likewise, the appellant took the court to the passage[19] wherein their Honours wrote:

> "We cannot accept that to determine whether a decision is made 'under an enactment' it is legitimate to distinguish between decisions about matters lying at the very heart of the existence of the appellant or its Council and other matters. The powers vested in the Council by s 23 are in substance to do whatever is necessary to control and manage the activities of the appellant. It is difficult to conceive of wider or more general powers. It is true that deans and professors are mentioned as the first object of the power of appointment conferred by that section; but we attach no importance to that and circumstance. We see no reason for distinguishing between decisions of the Council of the appellant relating to professors and decisions relating to its other servants. A University cannot function without its teaching staff – whether they be deans, professors, readers, lectures or tutors. Nor can it function without its other officers or servants – whether registrars, librarians, groundsmen or security officers."

They went on:[20] (in respect of the respondent's submission) that, if correct -

> "….it follows that a vast array of decisions relating to the employment of the appellant's officers and servants, and any other decisions of the managerial or administrative nature, may be susceptible of review under the Judicial Review Act particularly because the Council's charter (s 23) empowers it, in effect, to do whatever is necessary to run the affairs of the appellant. This serves to illustrate to our mind the correctness of the conclusion on the facts of this case that the Council's decision to dismiss the respondent was made under the contract of engagement of 1966 and not under the powers conferred by s 23 of the University Act."

[24] Examples of cases following and applying that approach include *Blizzard v O'Sullivan*, where this court was dealing with an application by an Assistant Commissioner of Police following the termination of his contract of employment,

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17 At 43 ALR page 31.
18 At 43 ALR 32.
19 43 ALR 35.
20 At ALR 36.

and *Whitehead v Griffith University* [2003] 1 Qd R 220, where this court heard an application under Part 5 of the *Judicial Review Act* for a prerogative order in respect of a decision by the University to censure that applicant. The learned judge hearing that latter application held the University was exercising powers conferred by the contract of employment between the parties, the power to discipline staff members for misconduct was contractual and not statutory, and that that was undoubtedly the reason that particular applicant discontinued an application originally brought under Part 3 of the (*Judicial Review*) Act, which application – unlike the instant one – was abandoned.

[25] *Australian National University v Lewins* was itself a case in which that applicant, appointed as a lecturer to that University, claimed a right under s 13 under the *ADJR Act* to a statement of the reasons for not promoting him to the position of Reader, which right depended upon that decision being one made under an enactment. By the time of that decision there was still no university statute made by the Australian National University concerning the employment or promotion of staff. Lehane J's judgment, that the general power to employ staff taken together with the general power to contract empowered the university to enter into contracts and to make consensual variations of employment contracts and to enter into new contracts with existing employees[21], treated that applicant's rights as deriving from the contract of employment; the decision not to promote him was not one made under an enactment. In similar vein in *Orr v Bond University*[22] this court held that a decision not to permit that applicant to undertake supervised research leading to the degree of Master of Arts, being a decision pursuant to a series of regulations relating to the conduct of the University adopted pursuant to Article 18 of the Articles of Association of Bond University Ltd, was a decision taken pursuant to regulations enforceable as between the members of the corporation and which could be incorporated into contracts entered into between that University and its students and staff. Nevertheless those regulations (and indeed the memorandum and Articles of Association) did not otherwise have the force of law, being primarily contractual and made pursuant to arrangements existing in the context of company law amongst the members of the corporation and between it and its employees and students.

[26] A like approach may be discerned in the majority judgment in *Neat Domestic Trading Pty Ltd v AWB Ltd* (2002) 198 ALR 179, in which the High Court considered the "reviewability" of a decision by a company limited by shares (AWB International Ltd) and incorporated under the Corporations Law of Victoria, not to give approval in writing to the Wheat Export Authority for an export of durum wheat in bulk. Section 57(3B) of the *Wheat Marketing Act* 1989 (Cth) provided that the Wheat Export Authority must not give any bulk export consent without the prior approval in writing of that company; s 57(1) of that Act prohibited the export of wheat unless that Authority had given its written consent to the export.

[27] The majority decision (of McHugh, Hayne, and Callinan JJ) held the decision non reviewable, because the company needed no statutory power to give it capacity to provide an approval in writing.

> "As a company, AWBI had power to create such a document. No doubt the production of such a document was given statutory significance by s 57(3B) but that subsection did not, by implication,

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21 At 138 ALR 16.

22 Unreported, Supreme Court of Queensland No 2337 of 1996, Dowsett J, 3 April 1996.

> confer statutory authority on AWBI to make the decision to give its approval or to express that decision in writing. Power, both to make the decision, and to express it in writing, derived from AWBI's incorporation and the applicable companies legislation. Unlike a statutory corporation, or an office holder such as a minister, it was neither necessary nor appropriate to read s 57(3B) as impliedly conferring those powers on AWBI."[23]

[28] This stream of clear authority requires courts hearing applications for judicial review to determine whether the relevant decision was an exercise of rights pursuant to a contract, or of a right or power derived from a source other than the enactment under which the application is sought to be made. In cases where the effect of the decision to which the applicant for review objects derives from contractual rights and powers, or the right to enter into those contracts, or from some other and independent statutory source, there is a strong body of authority supporting the appellant's submission rejecting a core or central functions approach; and likewise the source of authority approach. However, the force of that argument is considerably dissipated where there is no contractual relationship between the applicant for review and the decision maker, and no other statutory source than the enactment the applicant relies on for the power, right or obligation to make the relevant decision.

[29] In the instant appeal the appellant contended and the respondent accepted that there was no contractual relationship between these parties, and the appeal record discloses no evidence of any. For example, there is no evidence of any payment made by Ms Tang to the respondent 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.

[30] Even in cases such as this where it is common ground that there is no other source than the enactment for the decision making power or for its effect upon the relevant applicant, regard must still be had to the observations of Black CJ in *Hutchins v Commissioner of Taxation*[24], that a decision authorised by an enactment only in a very general way is unlikely to have the character of a decision for which provision is made under that enactment, because the connection between the text of the enactment and decision is likely to be too remote. Nevertheless, regard must also be had to the context in which that was written. In that case the relevant decision was that of the Deputy Commissioner of Taxation to vote against a motion put to a meeting of creditors convened under Part X of the *Bankruptcy Act* 1966 (Cth). The Deputy Commissioner was there exercising rights or powers provided by the *Bankruptcy Act* and the Full Federal Court by majority rejected the argument that that decision was made "under" s 8, 208 and 209 of the *Income Tax Assessment Act* 1936 (Cth).

[31] I respectfully consider that keeping the remarks of Black CJ in mind, where the *Griffith University Act* is the source of the power to make the relevant decision, then even when that power is granted in the most general terms to enable acts necessary or convenient in connection with its broadly described functions, it is relevant to consider how central the decision is to the role of the decision maker, and to trace

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23 At 198 ALR 193 at [54].

24 At 65 FCR 272.

the statutory source of authority for any decision. That is what the learned trial judge did. When a decision made is as to a central or core function of the University, as it was here, where the decision is substantive and final, and where the decision is made in the exercise of the statutory power and responsibility vested in the University to execute its functions of encouraging study and research and conferring higher education awards, then the decision is likely to answer the description given by Thomas J in *Blizzard v O'Sullivan* (at Qd R 119), where His Honour, having described cases where a contract became the charter of the rights of the relevant parties, compared those with:

> "Unilateral exercises of power that derive from a statutory source, and not from the contract, on the other hand, [which] are plainly exercises of administrative power and are the very kind of actions which are intended to be reviewable under the Judicial Review legislation."

I respectfully consider that that description is apposite in this matter and that subject to the appellant's further arguments, the learned trial judge was correct in holding the decision reviewable.

[32] The appellant also argued that Ms Tang, having no contract with it, had no enforceable right to go onto the University land and indeed no statutory right to the conferral of a degree, even if she complied with the relevant polices and satisfied the relevant requirements of the University for a higher degree. It was then submitted that a decision to confer a degree upon her, if made, would derive no legal effect from the *Griffith University Act*; that statute merely enabled the University to confer one. It was submitted that all the more so, a decision to exclude her from conferral of a degree had no legal effect. Those last submissions were founded upon the submission that a degree if conferred was simply an acknowledgement of the completion of the requisite course of study and no more.

[33] Allied to that submission was the further one, made central by the appellant, that a decision even if administrative has no legal effect unless it affects, by for example subtracting from, other rights of the person the subject of the decision, such as statutory rights otherwise given by the same enactment.[25] Since a decision to confer a degree had no particular legal effect pursuant to the *Griffith University Act*, *a fortiori* a decision not to confer a degree did not subtract from any rights and had no obvious legal effect.

[34] A decision by the respondent to confer a higher education award upon the applicant would necessarily constitute a representation that the applicant has satisfied the relevant requirements for that award and exhibited the required intellectual ability. That representation could be expected to have commercial value to Ms Tang, for example if and when seeking academic or non-academic employment. Excluding her from all opportunity to attain that benefit has an effect on her. It does not take away a right she previously had, but it does take away, and apparently irrevocably, a potentially valuable opportunity.

[35] The *Higher Education (General Provision) Act* 1993 (Qld) prohibits a non University provider from holding out that that provider is competent to confer a

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[25] The facts in *McLean v Queensland Principal Club* [1996] QSC 109; SC No 899 of 1995, 3 July 1996, were suggested as an example.

higher education award,[26] the right to do so being restricted to Universities established under an Act such as Griffith University, or ones recognised as such. Likewise, a person is prohibited by that *Higher Education Act* from inducing or attempting to induce the belief that the person has a higher education award unless the award was conferred on the person by a University, where that belief is induced or attempted to be induced with a view to obtaining an advantage or benefit for the person. One obvious advantage or benefit is that automatically denied to Ms Tang by her exclusion from her PhD candidature, namely the potential employment benefit of the right to represent that Griffith University duly awarded her a PhD.

[36] The appellant did not refer the court to any particular authority for the proposition that a decision can have no legal effect unless it affects, in the sense of subtracting from, rights otherwise given and often by the same enactment. That proposition has not emerged as a principle upon which the decisions turned to which this court was referred on the appeal. The appellant in its reply limited the submission to the particular context of the *Griffith University Act*, but adhered to the submission that a relevant right derived from that statute needed to be found, from which the decision detracted or which it affected.[27]

[37] I consider it wrong in principle to determine whether a decision is made under an enactment by ascertaining if it detracts from rights otherwise given by that enactment. Firstly, this requires an applicant for review to show the existence of a statutory right adversely affected by the decision, which is not a requirement appearing in the definition of "decision to which this Act applies" in s 4 of the *Judicial Review Act*, or the corresponding provision of the *ADJR Act*. Secondly, if such a statutory right were given, its existence would not be determinative in any event of whether the relevant decision was made under an enactment. For example, the *Griffith University Act* might have specifically provided that a candidate for a higher degree award who satisfied the relevant University policies and requirements was entitled to be awarded a higher education award; but the university might nevertheless have contracted, with PhD candidates paying money to be allowed to undertake candidacy, in terms and on conditions which specified when the University could withhold the award or exclude a candidate. In those circumstances a disappointed candidate seeking review of a decision to exclude would face the hurdle of the decisions in *Australian University v Burns* and other cases, that is of a finding that the relevant decision derived from the contract and not the enactment, irrespective of the existence of that statutory "right".

[38] Next, the proposition that a decision to be reviewable must affect a right otherwise given by the statute appears inconsistent with the decision in *Lamb v Moss* (1983) 49 ALR 533, upheld in *Australian Broadcasting Tribunal v Bond*, that a Magistrate's opinion formed in a committal proceeding that a prima facie case had been established, and a determination made by the Magistrate to proceed with the committal proceedings, constituted a decision of an administrative character made under the *Judiciary Act* 1903 (Cth). The Full Federal Court held in *Lamb* v *Moss* that that decision was relevantly made under that Act because it picked the relevant New South Wales state law (s 41 of the *Justices Act* 1902 (NSW)), made applicable by either s 68(1) or 68(2) of the *Judiciary Act*. Although a decision that a prima facie case exists against a person charged with an indictable offence, or a decision to

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[26] By s 8(1) of that Act.

[27] Transcript 38, 39.

commit that person for trial, clearly affects that person and imposes obligations on the person where none existed before, it is difficult to describe it as one which affects previously existing rights. The relevant criminal laws of the States and Territories of this Commonwealth do not give any person a right not to be committed for trial for an indictable offence, or a right not to have a finding made that a prima facie case exists against them.

[39] The appellant also submitted an adverse decision would leave available for review decisions about lecture times, course content, and the like. The observations in *Lamb v Moss* are relevant here, namely that fears that the floodgates will open, should not cause the court to overlook that there is a wide discretion to grant or refuse relief in a particular case.[28] In any particular case the importance of the decision in the execution of the statutory functions will be significant, and whether it is a sufficiently substantive decision having the character or quality of finality, as described by Mason CJ in *Bond* at CLR 336 and 337.

[40] The appellant also pointed to its capacity granted by s 61 of the *Griffith University Act* to make University statutes, including on the entitlements to degrees and other awards and the disciplining of students and other persons undertaking courses at the University.[29] The appellant pointed out that no such statute had been enacted by it. It submitted it followed that while decisions about the entitlement of students to degrees and other awards, or about disciplining students, might have been made under such a University statute and thus arguably under an enactment, they had not been. The argument obtains support from the remarks of Lehane J in *ANU v Lewins*, in which a similar absence of statutes which the Australian National University had power to make but had not was regarded by Lehane J as a strong statutory indication that, since a means was expressly provided for the making of rules having binding force, the *ANU Act* should not be construed as enabling rules having legally binding force to be made by other less formal means. With great respect, I consider that the absence of enactment of any relevant University statute simply has the result that the court has to determine whether a decision, made in the exercise of the widely and generally expressed powers granted by s 6 of the *Griffith University Act* for doing what is necessary in respect of the functions granted by s 5, answers the oft-cited descriptions given by Mason CJ in *Australian Broadcasting Tribunal v Bond*, (of a substantive decision having the character of finality which the statute requires or authorises, or for which it makes provision) and the further helpful decision given by Thomas J in *Blizzard v O'Sullivan*, namely of a unilateral exercise of power deriving from a statutory source and which does affect the applicant. In my judgment those requirements are satisfied here.

[41] Accordingly, I would order that the appeal be dismissed with costs to be assessed on the standard basis.

[42] **DUTNEY J:** I agree with the orders proposed by Jerrard JA and with his reasons. I would only add the following.

[43] In this case the decision which the respondent seeks to review is a decision "under an enactment" within the meaning of s 4 of the *Judicial Review Act* 1991 (Qld) if it satisfies two criteria. First, it must be a decision of a kind authorised or permitted

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28 At 49 ALR 557.

29 Section 51(2)(b) and (c).

by the statute. Second, it must be a decision which derives its legal efficacy from the statute.

[44] This is not the only kind of decision "under an enactment" but it is the only one relevant here.

[45] In determining whether or not the decision derives its efficacy from the statute the question which must be answered is that posed by Mr Morris QC for the respondent during the course of the argument namely. "Is 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?"[30]

[46] Griffith University has power to confer degrees by virtue of its status as a university conferred on it by the *Griffith University Act* 1998 (Qld). The effect of the *Higher Education (General Provisions) Act* 1993 (Qld) is that the conferral of a degree, status, title or description of bachelor, master or doctor can only be made by a university except in limited circumstances provided for in the Act. To qualify as a university the institution, if domestically based, must be established or recognised by an Act.

[47] The power of Griffith University to confer degrees is thus a power "under an enactment" because it meets the two criteria I have identified. It is a power authorised or permitted by statute and it derives its legal efficacy from statute.

[48] The decision in this case is not a decision to confer a degree but a decision not to confer a degree. Since the choice whether to confer the degree or not only exists by virtue of the *Griffith University Act* it must in my view follow that the decision either to confer or not to confer must equally be a decision "under an enactment".

[49] **PHILIPPIDES J:** I agree for the reasons set out by Jerrard JA and Dutney J that the appeal ought to be dismissed with costs.

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30 See *Australian National University v Lewins* (1996) 138 ALR 1 at 14 (per Lehane J); *Salerno v National Crime Authority* (1997) 75 FCR 133 at 143.