

# DOCTORAL DREAMS DESTROYED: DOES *GRIFFITH UNIVERSITY v TANG* SPELL THE END OF JUDICIAL REVIEW OF AUSTRALIAN UNIVERSITY DECISIONS?

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*Vivian Tang was excluded from her doctoral program at Griffith University on the basis of academic misconduct. Her academic dreams in that or in any other university were thus effectively curtailed as were her prospects of following a career in her chosen field. She sought judicial review of the university's decision. Her application and its progress through the courts have recently brought into focus the justiciability of university decisions of an academic nature. The university unsuccessfully sought to have the action dismissed in both the Supreme Court of Queensland and the Court of Appeal. However, the High Court allowed the university's appeal and by a 4-1 majority held that the student was not entitled to judicial review. Has this case effectively shut the gate on court intervention in university decisions affecting individual students? This article considers the nature of the relationship between Australian universities and their students and the desirability of the court's scrutiny in light of the High Court decision and judicial attitudes in comparative jurisdictions.*

## I INTRODUCTION

Litigation between students and universities in Australia is still relatively uncommon. It is therefore necessary to seek guidance as to the public law and private law rights of university students from judicial pronouncements in other common law jurisdictions. When a matter involving a student and an Australian university reaches the High Court of Australia, the court's decision is eagerly awaited by all those with an interest in this area of law.

Vivian Tang said her dreams had been destroyed. Queensland's Griffith University ('the University') had excluded her from her PhD candidature and thus severely limited her prospects of pursuing a career as a scientist in her chosen field. She asked the Supreme Court of Queensland to review the University's decision. That court agreed with Tang that the decision could be judicially reviewed.<sup>1</sup> The Queensland Court of Appeal also agreed with that view.<sup>2</sup> The University then appealed to the High Court. The sole question on appeal was whether the decision to exclude Tang was one to which the *Judicial Review Act 1991* (Qld) ('the Review Act') applied and the majority (Kirby J dissenting) answered in the negative.<sup>3</sup> A leading national newspaper reported that the decision of the highest appellate court in Australia has, 'done universities and other statutory corporations a wonderful service'.<sup>4</sup> Has it?

This article reviews the *Griffith University v Tang* litigation and, in particular, the dissenting judgment of Kirby J in whose view the majority decision 'constitutes an erosion of one of the most important Australian legal reforms of the last century'.<sup>5</sup> Kirby J says further that the greatest defect

in the majority view is that '[i]t destroys the capacity of the Review Act to render the exercise of public power accountable to the law where a breach can be shown'.<sup>6</sup> This view is compatible with the attitude expressed in previous cases elsewhere. Almost universally the attitude has been that it is imperative that students have recourse to the courts where it is demonstrated that irregularities in internal procedures give rise to a high possibility of their having led to an unjust result. The decision in *Griffith University v Tang*, with its sacrifice of accountability of universities to their students, does appear to eschew the prevailing trends in other jurisdictions.<sup>7</sup> Closer analysis suggests that the decision may be of limited application and may not herald the end of rights of judicial review of Australian university students. The decision's importance however may lie in the message which it conveys.

## II TANG V GRIFFITH UNIVERSITY: THE FACTS

The University was established by the *Griffith University Act 1998* (Qld) ('the University Act')<sup>8</sup> with general powers<sup>9</sup> to carry out its functions including the provision of education at university standard and the conferral of higher education awards.<sup>10</sup> The University's governing body is a Council also with general powers including the power of delegation.<sup>11</sup>

The University Act was assented to on 12 March 1998 and replaced the *Griffith University Act 1971* (Qld). All Queensland legislation establishing and providing for the operation of that state's public universities was replaced at or around the same time.<sup>12</sup> When introducing the universities bills into Parliament, the Minister for Education noted that:

Historically, universities in Queensland have been authorized to make statutes for the good governance of the institutions and have done so on a wide range of matters. This practice has given rise to as many as 30 statutes for some institutions. Currently, each statute requires drafting by the Office of Parliamentary Counsel and is subject to approval of the Governor in Council. The need for ongoing review of and frequent amendment to such instruments has been a significant administrative burden on institutions and on the Government. The Bills now provide for the governing bodies of the universities to make statutes only about matters of a legislative character, reducing the number of statutes to approximately 10.<sup>13</sup>

The universities bills made 'no significant changes in the powers and functions of the universities'<sup>14</sup> and were 'based substantially on the provisions of the antecedent legislation'.<sup>15</sup> They were however considered to be 'long overdue'<sup>16</sup> in order to bring 'the administration of the State's universities up to modern legislative principles'<sup>17</sup> and to reduce 'the administrative burden on the university and on the Government, by simplifying the requirements on the university to make subordinate legislation'.<sup>18</sup> As part of the legislative reforms, all university statutes made pursuant to the antecedent university legislation were repealed.<sup>19</sup>

All public universities in Queensland were required to follow the new provisions and procedures when making university statutes. However, the University appears not to have exercised its powers in this regard. Although the Council is empowered to make university statutes<sup>20</sup> on matters set out in the University Act, including the admission, enrolment and disciplining of students and the making and notifying of university rules<sup>21</sup> Gleeson CJ noted that, '[t]here are no such statutes of relevance to this appeal'.<sup>22</sup> Instead of making university statutes or by-laws to expressly govern matters such as the entitlement to degrees and the disciplining of students, the Council, under its power of delegation, established the Academic Committee. This Committee had the power to determine university policy on matters such as academic misconduct and student grievances and

appeals.<sup>23</sup> The Council also appointed sub-committees of the Academic Committee, including the Research and Postgraduate Studies Committee and the Appeals Committee contemplated by such policies.

Tang was a PhD candidate at the University. In July 2002, the University's Assessment Board ('the Board'), a sub-committee of the University's Research and Postgraduate Studies Committee, made a decision that Tang had engaged in academic misconduct (as defined by university policy). The Board made this decision on the ground that it had found that she had presented falsified or improperly obtained data as if it were the results of laboratory work. After receiving further submissions from her, the Board determined that she should be excluded from the PhD program because she had 'undertaken research without regard to ethical and scientific standards'. The letter notifying Tang of the Board's decision also notified her that she had a right to appeal against the decision and enclosed a copy of the University's *Policy on Student Grievances and Appeals*.

She exercised this right of appeal and in October 2002 was notified that the University Appeals Committee ('the Committee') had determined that her appeal be dismissed. The Committee said it was satisfied 'on a strong balance of probabilities, that an ongoing fabrication of experimental data ... did occur over an extended period for a significant number of experimental results, as alleged in the initial complaint ... and as found by the Assessment Board'.<sup>24</sup> The Committee upheld the decision that she was guilty of academic misconduct and that she had been rightly excluded from her PhD candidature as this 'was appropriate in the context of [her] responsibility as a professional scientist to adhere to ethical and scientific standards at all times'.<sup>25</sup>

The possibility of judicial review of this decision was clearly contemplated by the University as the *Policy on Student Grievances and Appeals* included the following paragraph:<sup>26</sup>

#### 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.

In December 2002, having exhausted the available in-house remedies, Tang filed an application in the Supreme Court of Queensland for a statutory order of review, under the Review Act, of the decisions made by the Board and the Committee of the University. She alleged various breaches of the rules of natural justice in relation to the making of the decisions including failures to observe proper procedures required by the policy, improper exercises of power and lack of evidence or other material to justify the decisions. She claimed she was 'a person aggrieved'<sup>27</sup> because her interests were adversely affected by the decision as her prospects of a career in molecular biology and bioscience had been destroyed.

Her application for relief and her contentions on the merits were never tried because the University almost immediately, in January 2003, applied to dismiss or stay her application. The University did not argue that Tang was not a person 'aggrieved' but that the question could not arise unless it could be shown that this was 'a decision to which this Act applies'.<sup>28</sup> The University's argument was that the Review Act did not apply to the decisions because they were not made under the University Act but were made pursuant to various policies and thus they were neither of 'an administrative character' nor made 'under an enactment' as required by the Review Act.<sup>29</sup>

### III TANG V GRIFFITH UNIVERSITY: IN THE SUPREME COURT OF QUEENSLAND

The University's application was dismissed, at first instance, on both grounds. In the view of Mackenzie J:

... the 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 Ms Tang from the PhD program is an administrative decision made under an enactment for the purposes of the ... Act. I do not accept that because the processes immediately used for the purpose of making the decisions were provided for in documents described as 'policy' precludes this conclusion.<sup>30</sup>

The University appealed on the ground that the trial judge had erred in holding the decision was made 'under an enactment' though it did concede on appeal that the decision was one of an administrative character.<sup>31</sup>

The Court of Appeal dismissed the University's application finding also that the decision to exclude Tang was 'made under an enactment' for the purposes of the Review Act and was therefore subject to judicial review.<sup>32</sup> Separate reasons were given for judgment by each member of the Court but each concurred as to the orders made dismissing the University's appeal. In the view of Jerrard JA, it was 'relevant to consider how central the decision is to the role of the decisions maker and to trace the statutory source of authority for any decision'.<sup>33</sup> Dutney J agreed but added that:

In determining whether or not the decision derives its efficacy from the statute the question which must be answered is ... '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?'<sup>34</sup>

His Honour noted that the University has power to confer degrees by virtue of its status as a university conferred on it by the University Act and said:

The power to confer degrees is thus a power 'under an enactment' ... it is a power authorised or permitted by statute and it derives its legal efficacy from statute. 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'.<sup>35</sup>

Four judges of the Queensland Supreme Court accordingly held that the critical decision to exclude Tang from the PhD program on the grounds of the finding of academic misconduct was subject to judicial review under the Review Act.

But the Tang litigation did not end in Queensland. The University applied for and was granted special leave to appeal to the High Court. The sole issue to be decided was the very narrow one, namely, whether the decision to exclude Tang was 'a decision of an administrative character made ... under an enactment' as required by section 4 of the Review Act.

#### IV GRIFFITH UNIVERSITY V TANG: THE MAJORITY DECISION IN THE HIGH COURT OF AUSTRALIA

The High Court, by a 4 to 1 majority,<sup>36</sup> allowed the University's appeal and dismissed Tang's application. It held that Tang was not entitled to review under the Review Act because the relevant decision was not made under nor did it take legal force or effect from the University Act. The majority noted that nothing in the University Act dealt specifically with admission to or exclusion from a research program or academic misconduct nor did it prescribe procedures for dealing with such matters. These powers flowed from a general description in the University Act regarding the university's functions and general powers, and the powers of the Council, including its powers of delegation.<sup>37</sup> Consequently, the power to affect Tang's rights and obligations derived, in the view of the court, not from the enactment but under the general law and from such agreement as has been made between the parties.<sup>38</sup> In the judges' view, the decision to exclude Tang occurred under the general law and under the terms and conditions on which the University had been willing to enter into a relationship with her.

The majority view was that there were two criteria which were essential to a determination as to whether a decision is made 'under an enactment' for the purposes of the Review Act. 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 existing or new legal rights or obligations, and in that sense the decision must derive from the enactment.<sup>39</sup>

The University Act provided the legal context in which the relationship between Tang and the University existed. The decisions of which she complained were authorised by the University Act but to be reviewable under the Review Act, legal rights and obligations between the University and Tang had to be affected and they were not. The decisions did not derive any capacity to affect legal relations by virtue of the University Act but took legal effect from the general law and so were not reviewable under the Review Act.

Why did the High Court take such a narrow view when courts in other common law jurisdictions have recognised the student's right to judicial review of university decisions in similar circumstances? Perhaps the court's approach was to some extent fashioned by the manner in which Tang framed her application for judicial review, namely that there were no legal rights and obligations under private law affected by the University's decisions.<sup>40</sup> The court noted that:

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.<sup>41</sup>

It was a 'catch 22' situation. Had Tang pleaded a contractual relationship with the university, an application for judicial review under the Review Act would have likely failed on the same grounds as the failed applications of university employees in *Australian National University v Burns*<sup>42</sup> and *Australian National University v Lewins*.<sup>43</sup> There it was made clear that decisions made pursuant to contracts are not reviewable under the Review Act. Although a plea in contract may have been fatal to the application for judicial review, it would have given the court the opportunity to look at the nature of the student/university relationship and consider whether private law (contract) would have provided appropriate relief in these circumstances.<sup>44</sup>

## V GRIFFITH UNIVERSITY V TANG: KIRBY J'S DISSENT

Kirby J delivered a very strong dissenting judgment in which he rejected the majority approach and dismissed the University's appeal. In his view, the majority opinion was 'only to be stated to demonstrate its flaws' as there was

... nothing in 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.<sup>45</sup>

He rejected the notion that because of their functions universities were somehow exempt from the provisions for judicial review applicable to public authorities. He noted that the Review Act provided for exclusion of specified enactments or exemption of identified corporations but no such exclusion or exemption applied in this case.<sup>46</sup> Furthermore, in his view, as universities are statutory corporations enjoying monopoly powers in conferring degrees and receiving substantial government funding for capital and recurrent expenditure, they 'are rendered part of the network of public authorities which ... must conform to ... the legal requirements of procedural fairness and administrative justice'.<sup>47</sup>

Kirby J was particularly concerned that because of the way the proceedings had developed, no court had had the opportunity to examine Tang's complaint in substance.<sup>48</sup> He pointed out that despite the matter proceeding all the way to the High Court of Australia over a number of years Tang's claims and any arguments on the merits had never been nor would they be tried.<sup>49</sup> It is notable that Kirby J is the only judge who seemed bothered by this omission and the only one to attempt to outline her concerns. He set them out as: the Chair of the Board was not impartial as he was the person who had initially investigated the complaint against her; she had been denied legal representation and adequate time to evaluate and respond to expert witnesses relied on by the university; the university had breached its own policy and the decisions were not based on relevant material and evidence.<sup>50</sup> She may or may not have been able to establish each of the complaints but the majority had cut dead any chance of her doing so by holding that the Review Act did not apply. In Kirby J's view:

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 purpose of the Review Act, such a result would be surprising.<sup>51</sup>

### A '*Of Academic Independence and Other Concerns*'<sup>52</sup>

Kirby J considered the University's concern about an 'opening of floodgates' to be 'unwarranted' and 'unpersuasive'.<sup>53</sup> Indeed, he recognised 'that universities are in many ways peculiar public institutions'<sup>54</sup> and he noted that '[t]he law, in common law countries, has consistently respected them and fashioned its remedies accordingly'.<sup>55</sup> Courts have been careful to distinguish 'purely academic' decisions from academic disciplinary decisions. The former are those decisions which he said are: 'pertaining to the intimate life of every independent academic institution that, sensibly, courts decline to review'.<sup>56</sup> Kirby J lists as examples of these: the marking of exam papers, the academic merit of a thesis, the viability of a research project, the contents of courses, timetables and styles of teaching. Universally courts have shown a reluctance

to revisit such decisions. This is understandable. The difficulty is in deciding when that reluctance may properly be overcome and when the decision is justifiably subject to the court's scrutiny. The view has generally been that academic judgment should only attract judicial interference when it can be clearly shown that there was a breach of the rules of natural justice or when the person or body responsible did not actually exercise professional judgment.<sup>57</sup> The point on which all the cases turn is not whether the academic decision was fair but rather whether the process by which the decision was reached was fair.

What then of decisions involving discipline for academic misconduct? Until the majority decision in *Griffith University v Tang*, it seemed that the courts were not concerned with whether they had jurisdiction to consider a student's application in public law for judicial review. It was clear that judicial willingness to overturn academic decisions was solely dependent upon whether the student's claims of lack of process and unfairness had been proven on the facts.<sup>58</sup> Kirby J adhered to this view in saying:

... 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. They should likewise be so in Australia. An 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.<sup>59</sup>

He noted that the majority's narrow construction of the Review Act effectively left Australian university students without the means of judicial review — a right which they would normally have in other common law countries and did have in Australia until this decision. In his view, the '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'.<sup>60</sup>

## VI THE END OF THE PROTECTION OF THE LAW FOR AUSTRALIAN UNIVERSITY STUDENTS?

But has the High Court abandoned university students in Australia? Its view of the Queensland judicial review legislation may have been conclusive for *Tang* but may have only a very limited application in future cases involving students aggrieved by university decisions. Undoubtedly the decision has set an important precedent but its potential scope may be as narrow as the narrow view taken by the majority.

### *A Statutory Judicial Review*

The judgments make it very clear that the sole question before the High Court was whether the decision to exclude *Tang* was 'a decision to which this Act applies'.<sup>61</sup> It is this phrase 'which provides the battleground for this litigation'.<sup>62</sup> The answer depended on the meaning of that expression in the relevant section of the Review Act, namely section 4 which provides as follows:

In this Act —

***decision to which this Act applies*** means —

- (a) 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); or
- (b) 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 enactment.

The court noted, ‘the focus in debate has been para (a)’<sup>63</sup> because the University’s application was based on the argument that the provisions in the Review Act did not apply to the relevant university decisions since they were not decisions made ‘under an enactment’ but rather were made pursuant to various policies.

The wording in paragraph (a) of section 4 of the Review Act was borrowed from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (‘the ADJR Act’) and it was common ground that ‘the considerations bearing on the meaning of the Commonwealth Act also apply to the state Act’.<sup>64</sup> In reaching its decision, the majority was effectively only delivering a binding judgment on the meaning of this paragraph in the ADJR Act, in the Review Act in Queensland and in any other state judicial review legislation that may have also borrowed the wording from the Commonwealth Act. The *Administrative Law Act 1978* (Vic) provides statutory remedies of judicial review but does not define a reviewable ‘decision’ in the same way.<sup>65</sup> Only Tasmania<sup>66</sup> and the Australian Capital Territory<sup>67</sup> have judicial review legislation that borrows the exact same wording. The finding that a student is not entitled to judicial review of university decisions under judicial review legislation, would therefore seem only to apply to students seeking redress against universities in Queensland, Tasmania and the Australian Capital Territory pursuant to local judicial review statutes. Beyond those borders, *Tang* is simply not applicable and students still have recourse to their state’s statutory judicial review processes and/or the common law.

The scope of *Tang* may be even more limited. Although, as noted previously, all subordinate university legislation was repealed in Queensland, it is not clear whether all Queensland universities have followed the path of Griffith University and proceeded by way of policy rather than university statutes. Although subordinate lawmaking is specifically contemplated by the University Act, the University has effectively put itself in a better position by proceeding indirectly. Dealing with matters such as admission and enrolment, entitlement to degrees and disciplining of students by way of internal university policies rather than by regulation or statute means, since the High Court decision in *Tang*, that those types of university decisions appear to be immune from judicial review. Even though judicial review of decisions made pursuant to university policies was clearly contemplated,<sup>68</sup> the University denied the application of the Review Act in this case and the High Court agreed. This consequence of not re-enacting university statutes repealed by the University in 1999<sup>69</sup> may have been unintended but it comes at a high cost to students and others in Queensland. Indeed, there is nothing in *Tang* to suggest that it is only university decisions affecting students that are not subject to statutory orders of review in that state. It is not beyond the realm of possibility that in the future, a dispute between, for example, a member of staff and a public university in Queensland will be met with the same response from the university and the courts.

Universities in those jurisdictions with the same statutory definition of a decision to which the state judicial review legislation applies, may, nonetheless, lose immunity in certain

circumstances. For example, under the *University of Tasmania 1992 (Tas)*<sup>70</sup>, the Council of the University of Tasmania also has the power to make ordinances or statutes. However, unlike its counterpart at Griffith University, the Council of the University of Tasmania has exercised this power and has made a number of university statutes dealing with, *inter alia*, student complaints and student misconduct.<sup>71</sup> Should a student at the University of Tasmania be excluded from his or her candidature in circumstances similar to those in *Tang*, it would be very difficult for the University of Tasmania to argue that the decision was not made under an enactment.<sup>72</sup> Even though the relevant provisions in the judicial review legislation in Queensland and Tasmania are identical, what is distinguishable is the way the universities have decided to exercise their powers. Decisions of the University of Tasmania are arguably still amenable to review under the *Judicial Review Act 2000 (Tas)* as decisions under university statutes and ordinances.

And even in Queensland, *Tang* may not have universal application to all universities or to all circumstances in which students challenge university decisions. Another application for judicial review of a decision made at Griffith University had recently come before the Supreme Court but surprisingly was not referred to in the *Tang* litigation. In *Ivins v Griffith University*<sup>73</sup>, the court dismissed a first year nursing student's application for judicial review of teaching decisions, including the use of group work in assessment, which allegedly resulted in her failure of two subjects, because no basis for judicial intervention had been established. Philippides J, found no improper exercise of power as 'the rules of natural justice were adequately met by the procedure set out in the University's policy and did not require that, in addition to the written submissions of the applicant, the applicant should have been afforded an opportunity to be present and to have been heard orally'.<sup>74</sup> In dismissing the student's appeal, the Court of Appeal agreed that a student had no legal right to be present at a re-mark when the question was one only of academic assessment. In the view of Williams JA:

Clearly when it is purely a question of academic assessment or academic judgment the student has no right to be present on the marking of examination papers. It may well be different if the evaluation of the student's progress or the question of exclusion of a student from the university involves questions other than mere academic judgment.<sup>75</sup>

Douglas J agreed that the appeal should be dismissed but added the following remark:

I want to say that this application is one which relies upon a failure by the appellant to accept that she did in fact fail two subjects in her course, one of which was a prerequisite to her continuing in that course. That, without more, is not sufficient to mount a successful application for relief under ... the ... Review Act.<sup>76</sup>

Even though the result for the student was the same, *Ivins* is clearly distinguishable from *Tang* as decisions about academic assessment are clearly not decisions 'made under an enactment' and so are rightly not reviewable under the Review Act.<sup>77</sup>

In *Orr v Bond University*<sup>78</sup> a Queensland student applied to undertake supervised research leading to the degree of Master of Arts in his chosen field of communications, specialising in film and television. He received notice from the Dean to the effect that he could not undertake research in that field because the school did not have permanent staff to supervise him. In the view of Dowsett J, the Review Act and its provisions relating to the giving of reasons<sup>79</sup> did not apply to a privately owned university that made decisions pursuant to regulations enforceable as between the members of a corporation. He said that the source of such regulations and the relationship between the university and its students were mainly contractual and it was not possible to construe the regulations as being made under an enactment. The circumstances in *Orr*

are also clearly distinguishable from the circumstances in *Tang* and decision illustrates that the issue of whether university decisions may be subject to public law judicial remedies only arises in respect of public universities.

It is important to note that section 4 of the Review Act is wider than the ADJR Act in that, a ‘decision to which this Act applies’ also includes, by virtue of paragraph (b), decisions made under non-statutory programs involving funds appropriated by Parliament or raised under the authority of an enactment. This alternative definition ‘finds no counterpart in the ADJR Act’.<sup>80</sup> The meaning and scope of this alternative was not an issue before the High Court in *Tang* but Kirby J noted:

Nonetheless, the existence of an alternative, and even wider, ambit for the operation of the Review Act ... represents a further argument against the adoption of a narrow interpretation of the phrase ‘under an enactment’, as it appears in the primary definition’.<sup>81</sup>

Although in the Supreme Court *Tang* did not seek to rely on this paragraph, there was reference to it in the course of argument in the High Court and a suggestion she ‘reserved her entitlement, in any later possible proceedings, to rely on the alternative definition of the ‘decision’ engaging the Review Act’.<sup>82</sup> Senior Counsel for *Tang* noted that:

At no stage has Griffith University sought to have proceedings dismissed on the basis that the respondent does not fall within paragraph (b). In other words, if Griffith University wins the appeal, the worst possible outcome, in our submission, is that the matter has to go back to the Supreme Court at first instance for such amendments as are necessary.<sup>83</sup>

It is curious why *Tang* proceeded on the basis on which she did and it is unknown whether, having lost the appeal in the High Court she did return to the Queensland Supreme Court to provide the evidentiary basis of an application for judicial review based on paragraph (b) of section 4 of the Review Act. Perhaps too much time had passed for her to realistically want to go back to the drawing board and start over.

## B *Common Law Judicial Review*

Although the majority of the High Court in *Tang* chose to take a narrow view of the relevant sections in the judicial review legislation, the decision is not nor does it purport to be a comprehensive statement of the law as it applies to universities and their students. Kirby J also noted:

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 Part 5 of the Review Act, to grant prerogative orders, as well as declarations and injunctions. The statutory orders of review provided by the Review Act represent a non-exhaustive but simplified remedy, supported by modernised procedures and enhanced rights to reasons for challenged decisions which rights, in turn, facilitate the new statutory remedy.<sup>84</sup>

The High Court has simply confirmed ‘that the statutory reform of administrative law in Australia has not necessarily introduced statutory administrative remedies to universities’.<sup>85</sup> As Gleeson CJ noted, ‘the statutory scheme, in some circumstances, provides a more restricted form of judicial review than is otherwise available’.<sup>86</sup> Furthermore he said:

[w]hether, 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 s41 of the Judicial Review Act, or otherwise, is not a question that arises.<sup>87</sup>

These questions did not arise because Tang relied solely on the statutory procedures and sought only the statutory remedies provided by the Review Act. Again it is curious that she did not seek orders under the common law given that the statutory scheme and the common law forms of review ‘operate in a complementary fashion so that review sought under either scheme is able to be sought in the one proceeding’.<sup>88</sup> The High Court’s decision therefore says nothing about common law judicial review and should not be read as limiting common law rights in any way. In the past, students may have been unsuccessful in seeking judicial review of university decisions, but these cases were decided on the facts.<sup>89</sup> In the future, Australian students will continue to have the common law right to seek judicial review whenever there is sufficient indication of a failure on the part of a university to adhere to its published processes or a lack of fairness and will be successful if they can prove unfairness or breach of process.

### C *What About a Student’s Rights in Contract?*

When Professor Wade suggested that the legal relationship of a university with its members was much more suitably governed by the ordinary law of contract and by ordinary contractual remedies much of the academic community was dumbfounded.<sup>90</sup> Now, this proposition seems beyond argument.<sup>91</sup> The courts in New Zealand have accepted the possibility of a breach of contract action by a student against a university.<sup>92</sup> Ellis J of the New Zealand High Court put the existence of a university/student contract beyond doubt when he said:

I think it is beyond argument that the relationship between the student (who is a member of the university: s163) and the University is partly based on contract and partly based on the [Education] Act itself ... it is therefore on the basis of contract, tort or judicial review that a student may seek redress against the University ... The Court will not adjudicate on matters which impinge on academic freedom and independence, but they will entertain an action brought by a student based on tort or his or her contract with the University which does not so impinge.<sup>93</sup>

It is curious therefore that in *Griffith University v Tang* it was accepted as common ground that the enrolment of the PhD student concerned did not give rise to a contractual relationship. Kirby J queried counsel for the University about this in the following terms:

Can I just ask a question? It was common ground when we were told of this at the special leave hearing that there is no contractual relationship. I am curious about that. Would not the respondent have paid fees? I accept that this has been common ground and maybe it ought not and cannot be revived now, but would you just illuminate why that was common ground? I just have to put it out of my brain even though it will not seem to go away.<sup>94</sup>

No evidence of a contractual relationship between the University and Tang was adduced because, as noted above, a plea in contract may have been fatal to the application for judicial review. However, it is not entirely clear as to why Tang did not, as an alternative to the application for a statutory order of review under the Review Act, plead a contract and a breach of its terms. She could have argued for example, that all disputes should be resolved in accordance with published policies and procedures and the overarching rules of natural justice and that this had not been done in her case.<sup>95</sup>

This strategy is even harder to understand in view of the recent decision in the United Kingdom, which supports the idea that public law and private law rights are co-existent and not exclusive of each other.<sup>96</sup> In *Clark v The University of Lincolnshire & Humberside*<sup>97</sup> the Court of Appeal held that where a student had a claim in contract, even though the action could more appropriately be brought by judicial review proceedings, the court would not strike out the claim merely because of the procedure which had been adopted. Importantly, in view of the decision in *Tang*, the judges in *Clark* accepted without question the availability of judicial review in respect of university decisions. Sedley LJ, delivering the opinion of the court saw the position as follows:

This is a matter of considerable importance in relation to litigation by dissatisfied students against universities. Grievances against universities are preferably resolved within the grievance procedure which universities have today. If they cannot be resolved in that way, where there is a visitor, they then have (except in exceptional circumstances) to be resolved by the visitor. The courts will not usually intervene. While the courts will intervene where there is no visitor normally this should happen after the student has made use of the domestic procedures for resolving the dispute. If it is not possible to resolve the dispute, then the courts may have no alternative but to become involved. If they do so, the preferable procedure would usually be by way of judicial review. If, on the other hand, the proceedings are based on the contract between the student and the university then they do not have to be brought by way of judicial review. The courts today will be flexible in their approach.<sup>98</sup>

Interestingly, *Clark's* case has an Australian equivalent, *Ogawa v The University of Melbourne*,<sup>99</sup> which raises some important legal issues about the nature of the relationship between a student and a public university. Although there have been numerous interlocutory applications, this matter has yet to be finally determined by the courts. Unlike *Tang*, *Ogawa* is an international PhD student, who has not limited her claim to judicial review of the university's decisions regarding her candidature. Rather she also alleges breach of contract, negligence and misleading and deceptive conduct on the part of the university regarding the manner in which her studies would be supervised and resourced. Given that the High Court in *Tang* decided that the university's decision was not subject to judicial review, the *Ogawa* litigation raises the possibility that a student in Queensland may nonetheless have an alternative private law basis on which to proceed against an Australian university in similar circumstances.

## VII CONCLUSION

Not surprisingly, disputes between students and universities seldom make their way to the High Court of Australia. In *Griffith University v Tang*, the court had the opportunity to resolve many of the legal issues in this developing area of the law. Sadly, it focussed on an extremely narrow question. This question involved the interpretation of one phrase in the ADJR Act which has been copied by some states in their own judicial review legislation. The end result of the majority's narrow interpretation of the key phrase was that a decision by Griffith University to exclude a PhD student was not subject to review by the courts. This was notwithstanding the fact that four judges of the Supreme Court of Queensland held that decisions of Queensland's public universities were reviewable under the state judicial review legislation. The court's approach may have been fashioned by the way the proceedings were framed. The student applicant had relied solely on one provision in the Review Act. Had she also relied on alternative provisions in the Review Act, on the common law of judicial review or on private law rights in contract,

the discussion of the law and the outcome of the case would have been very different. Although a precedent has now been set by the High Court it is important to note that it may have only a narrow application to future disputes between students and universities. We therefore wait for another day for the High Court to clarify the scope of public law and private law rights of Australian university students.

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#### ENDNOTES

1. *Tang v Griffith University* [2003] QSC 22.
2. *Tang v Griffith University* [2003] QCA 571.
3. *Griffith University v Tang* (2005) 213 ALR 724.
4. G. Moodie, ‘Little Room for Review’, *The Australian* (Sydney), 9 March 2005, 28.
5. *Griffith University v Tang* (2005) 213 ALR 724, 748.
6. *Ibid* 749.
7. See, P. Kamvounias and S. Varnham, ‘Damning Decisions on Doctoral Dreams: Judicial Review of University Academic Decisions’ (Proceedings of the 14<sup>th</sup> Annual Australia and New Zealand Education Law Association (ANZELA) Conference, Fremantle, Western Australia, 28-30 September 2005, 389).
8. *Griffith University Act 1998* (Qld) s 4(1).
9. *Griffith University Act 1998* (Qld) s 6.
10. *Griffith University Act 1998* (Qld) s 5.
11. *Griffith University Act 1998* (Qld) ss 7- 11.
12. eg *Central Queensland University Act 1998* (Qld) replaced *Central Queensland University Act 1989* (Qld) and *University of Queensland Act 1998* (Qld) replaced *University of Queensland Act 1965* (Qld).
13. Queensland, Parliamentary Debates, Legislative Assembly, 8 October 1997, 3698 (R.J.Quinn, Minister for Education).
14. *Ibid*.
15. *Ibid*.
16. Queensland, Parliamentary Debates, Legislative Assembly, 3 March 1998, 80 (Mr Bredhauer).
17. *Ibid*.
18. Queensland, Parliamentary Debates, Legislative Assembly, 9 July 1997, 2462 (R.J.Quinn, Minister for Education).
19. eg, *Central Queensland University (Statute Repeal) Statute 1998* (Qld) and *Griffith University (Statutes Repeal) Statute 1999* (Qld).
20. *Griffith University Act 1998* (Qld) s61(1).
21. *Griffith University Act 1998* (Qld) s61(2).
22. *Griffith University v Tang* (2005) 213 ALR 724, 726.
23. *Ibid* 755.
24. *Ibid* 733.
25. *Ibid*.
26. Griffith University, ‘Policy on Student Grievances and Appeals’, (2001), Nos 01/0268; 01/0030(revised) at [6.0] (emphasis added) referred to in *Griffith University v Tang* (2005) 213 ALR 724, 751.
27. *Judicial Review Act 1991* (Qld) s 7.
28. *Judicial Review Act 1991* (Qld) s 20.
29. *Judicial Review Act 1991* (Qld) s 4 (a).

30. *Tang v Griffith University* [2003] QSC 22 [25].
31. *Tang v Griffith University* [2003] QCA 571[2].
32. *Ibid.*
33. *Ibid* [31].
34. *Ibid* [45].
35. *Ibid* [47-48].
36. Gleeson CJ, Gummow, Callinan and Heydon JJ (Kirby J dissenting).
37. *Griffith University Act 1998* (Qld) ss 5-11.
38. *Griffith University v Tang* (2005) 213 ALR 724, 744 (Gummow, Callinan and Heydon JJ.).
39. *Ibid* 745.
40. *Ibid* 746.
41. *Ibid.*
42. (1982) 43 ALR 25.
43. (1996) 68 FCR 87.
44. Although refer *Clark v University of Lincolnshire & Humberside* [2000] EWCA Civ 129 below which held the rights in private law and public law may be coexistent.
45. *Griffith University v Tang* (2005) 213 ALR 724, 749 (Kirby J).
46. *Judicial Review Act 1991* (Qld) s 18, Schedules 1 and 6.
47. *Griffith University v Tang* (2005) 213 ALR 724, 750-751 (Kirby J).
48. There is no mystery in the litigation strategy of the University. By seeking an order to dismiss Tang's application for a statutory order of review, it forestalled any examination by the courts of her complaints.
49. *Griffith University v Tang* (2005) 213 ALR 724, 749 (Kirby J).
50. Although Kirby J outlines Tang's complaints about the decisions, it is still unclear exactly why and how the Board came to hear the allegations of academic misconduct made against her. Who were the academics who made the initial complaint? To whom had she presented the allegedly false or improperly obtained data? Had she submitted her PhD thesis for examination? Had she presented her work in progress at a research seminar? Had she submitted her work to her PhD supervisor? Had her supervisor instructed her of the appropriate ethical and scientific standards required for laboratory work? Many questions remain unanswered even after lengthy litigation.
51. *Griffith University v Tang* (2005) 213 ALR 724, 752.
52. *Ibid* 767.
53. *Ibid* 768 and 769.
54. *Ibid* 767.
55. *Ibid.*
56. *Ibid.*
57. See, eg, in New Zealand: *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129 and *Lamb v Massey University* Unreported, High Court of New Zealand, Palmerston North Registry, Wild J, 19 October 2004, CIV 2003 454 336 & 337; in the United Kingdom: *R v Lord President of the Privy Council, ex parte Page* [1992] 3 WLR 1112 and *R v Cambridge University ex parte Persaud Persaud v Cambridge University* [2001] EWCA Civ 534; in Canada, *Houston v University of Saskatchewan* (1994) 117 Sask. R. 291; *Mikkelsen v University of Saskatchewan* [2000] S.J. No. 115 (Sask. Q.B.); *Kane v University of British Columbia* (1980)110 D.L.R. (3d) 311 (S.C.C.); *Al-Bakkal v de Vries* (2003) MBQB 198, 176 Man.R. (2d) 127; in the United States of America, *The Board of Curators of the University of Missouri v Horowitz* 435 U.S. 78, 98 S.Ct.948, 55 Ed. 2d 124 (1978); *The Regents of the University of Michigan v Ewing* 474 U.S. 214, 106 S.Ct 507, 88 L.Ed.2d (1985) and *Susan M v New York Law School* 76 N.Y. 2d 241, 556 N.E. 2d 1104, 557 N.Y.S. 2d 297 (1990). For further discussion of the US view see Ford, D.L. & Strobe, J.L.Jr (1996) 'Judicial Responses to Adverse Academic Decisions Affecting Postsecondary Students since "Horowitz" and "Ewing"', 110 *Ed.Law Rep.* 517, at p 531, and Schweitzer, T.A. "'Academic Challenge" cases: should judicial review extend to academic evaluations of students?' *The American University Law Review*,41:267.
58. See, eg, in Australia: *Simjanoski & Ors v La Trobe University & Ors* [2004] VSC 180 and [2004]

- VSCA 125; in the United Kingdom: *R v Manchester Metropolitan University ex parte Nolan* [1994] ELR 380; *R v Cambridge University ex parte Beg* [1999] ELR 404.
59. *Griffith University v Tang* (2005) 213 ALR 724, 767-768.
  60. *Ibid.*
  61. *Judicial Review Act 1991* (Qld) s 20.
  62. *Griffith University v Tang* (2005) 213 ALR 724, 736 (Gummow, Callinan and Heydon JJ).
  63. *Ibid.*
  64. *Griffith University v Tang* (2005) 213 ALR 724, 725 (Gleeson CJ).
  65. *The Administrative Law Act 1978* (Vic) section 2 – ‘decision’ means a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and included a refusal or failure to perform a duty or to exercise a power to make such a decision.
  66. *Judicial Review Act 2000* (Tas) s 4.
  67. *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 3.
  68. See above n 26 and accompanying text.
  69. See above n 19.
  70. *University of Tasmania Act 1992* (Tas) s18 and s19.
  71. University of Tasmania Ordinance No 8 Student Complaints, 21 May 2005; Ordinance No 9 Student Discipline, 1 March 2003. See <http://www.utas.edu.au/universitycouncil/legislation/index.html> at 17 October 2005 for a full list of University of Tasmania Council Legislation and Policies.
  72. Although not a case of a student suing a university, *Evans v Friemann* (1981) 35 ALR 428 is relevant here. In that case, Fox ACJ of the Federal Court of Australia held that a decision of the Board of Examiners of Patent Attorneys that a candidate had failed certain examinations was ‘a decision of an administrative character’ and there was no doubt it was made ‘under an enactment’ namely the Patent Attorney Regulations under the *Patents Act 1952* (Cth) and so reviewable under the *ADJR Act*.
  73. [2001] QSC 086.
  74. *Ibid* [42].
  75. [2001] QCA 393.
  76. *Ibid.*
  77. This view is consistent with the view in the cases that purely academic decisions should be distinguished and only reluctantly revisited by the courts in limited circumstances. See above n 57 and accompanying text.
  78. Unreported, Supreme Court of Queensland No 2337 of 1996, Dowsett J, 3 April 1996.
  79. *Judicial Review Act 1991* (Qld) Part 4.
  80. *Griffith University v Tang* (2005) 213 ALR 724, 730.
  81. *Ibid* 758.
  82. *Ibid.*
  83. Transcript of Proceedings, *Griffith University v Tang* [2004] HCA Transcripts 227 (21 June 2004).
  84. *Griffith University v Tang* (2005) 213 ALR 724, 757.
  85. F. Rochford, ‘Claims against a university: the role of administrative review in Australia and the United Kingdom’ (2005) 17 (1-2) *Education and the Law* 23, 31.
  86. *Griffith University v Tang* (2005) 213 ALR 724, 725.
  87. *Ibid.*
  88. Queensland, Parliamentary Debates, Legislative Assembly, 26 November 1991, 3137 (Hon. D.M.Wells, Attorney-General).
  89. See above n 58 and accompanying text.
  90. H.W. R. Wade, ‘Judicial Control of Universities’ (1969) 85 *Law Quarterly Review* 468.
  91. *Moran v University College Salford (No.2)* [1994] ELR 187, CA; *Sammy v Birkbeck College, The*

*Times*, 3 November 1964.

92. See *Lamb v Massey University* Unreported, High Court of New Zealand, Palmerston North Registry, Wild J, 19 October 2004 where a contractual relationship between the student and the university was accepted but the finding was against the student on the facts.
93. *Grant, Woolley, Staines & Grant v Victoria University*, Unreported, High Court of New Zealand, Wellington Registry, Ellis J, 13 November 1997.
94. Transcript of Proceedings, *Griffith University v Tang* [2004] HCA Transcripts 227 (21 June 2004).
95. In a breach of contract action, the usual remedy is damages. Whether this is an appropriate remedy for a student that has been excluded from a university is debatable but it is important to note that 'disappointment' damages for breach of the student/university contract have been recognised and awarded in the United Kingdom. See *Buckingham and anor v Rycotewood College* Oxford County Court, 26<sup>th</sup> March 2002, OX004741/OX 004342, and Palfreyman, D. 'Phelps ... Clark ... and now Rycotewood? Disappointment damages for breach of the contract to educate' (2003) 15(4) *Education and the Law* 237.
96. *Clark v The University of Lincolnshire & Humberside* [2000] EWCA Civ 129.
97. *Ibid.*
98. *Ibid* paras 31-33.
99. [2004] FCA 491

