Excluding judicial review from the decisions of non-state actors

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The various roles of non-state actors in regulation place the courts in complex and often uncertain roles. Often this role is explored through considering the effect of judicial review on achievement of the regulatory scheme and the alternative forms of accountability available. However, to the extent the involvement of non-state actors attempts to exclude judicial review, at least where that review might be available were state actors involved, then issues of separation of powers and the appropriate role of the court in filling in any accountability gaps are also directly concerned.

This paper will explore how approaches to delineating judicial involvement in regulation, whether in response to a particular crisis or otherwise, help us in considering the availability of judicial review to actions of non-state actors. It will compare recent judicial decisions in Australia and the UK to the interpretation of privative clauses and other restrictions explicitly attempting to restrict judicial review. It will then attempt to place these approaches in the context of other important developments in the role of judicial review in each jurisdiction, and in particular the diverging role of jurisdictional error and different constitutional frameworks. The differences in approaches to the separation of powers and the role of judicial review that this comparison elicits will then be used in exploring the approach the courts take in intervening in the actions of non-state parties on the grounds on their connection with the state or the achievement of public regulatory objectives.

This paper considers the province of public law, or at least the ‘who’ or ‘what’ the ‘public’ part, usually in contrast to ‘private’, refers to. It is a popular topic.1 We are becoming increasingly aware of the role played by ‘private’ bodies,

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1 There continues to be a considerable number of recent articles, edited collections or books devoted to the subject. The reference to ‘province’ derives from Taggart, M (Ed) Province of Public Law (1997) which initiated my interest in the area. Either the area is critical to our understanding of modern governance or sufficiently uncertain in its scope to suggest that it might be - if only someone could figure out which. I have no pretence this paper provides any such insight, but is merely attempting to show why the issues involved are hard to distinguish from the other perennially evolving discussions in administrative law.
traditionally regarded as distinct from the state, in regulatory regimes. With this awareness has come a concern to ensure accountability of the 'public' functions they carry out. As Peter Cane has suggested, much of the ongoing discussion of the public/private distinction in public law comes about because:

supporters and the opponents of the public/private distinction are talking about different things. In the view of the opponents, the distinction misrepresents the way power is distributed and exercised; while according to its supporters, it embodies an attractive normative theory of the way power ought to be distributed and its exercise controlled.

This paper attempts to draw out and reconcile the implications from this disjunctive. It begins with the observation that the effect of the 'private' label is to insulate the function or agent in question from public law judicial review. More explicit, or at least express, attempts to exclude judicial review give rise to a number of fundamental questions relating to the role of judicial review and the separation of powers. That role is an important element in any reconciliation of the public/private distinction. Comparing different approaches to the role of judicial review then helps to base some of the different approaches that have been taken to delineating between public and private. Recognising the distribution of power as between the courts and other agents in any regulatory scheme, or at least the role of subjecting a body or function to judicial review, can then be used to enhance its effectiveness.

This paper begins with an examination of the approach of UK courts to when a body is subject to judicial review for error of law or for breach of human rights standards. It then compares this to the approach taken by Australian courts at the Commonwealth level to focus on the limits of authority and effect of the decision rather than attempt classification of a body or function as public. The paper then considers whether other limitations on access to judicial review can provide either a basis for minimal standards to be imposed or greater clarity as to the basis for restricting access to judicial review. It concludes by briefly considering the implications of the differences between the nature of the grounds for error of law and human rights for any justification for limiting access to the courts.

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2 I will use this term broadly to encompass systems of control involving (i) norms or rules, (ii) mechanisms for monitoring or feedback, and (iii) incentives or other mechanisms to correct deviating behaviour (see Hood, Rothstein and Baldwin, The Government of Risk, 2001.). In most cases below, however, I will be referring to any such regime intentionally established, recognised or supported by the State.

Public Functions

Since *R v Panel on Take-overs and Mergers; Ex parte Datafin*\(^4\) the courts in the UK have subjected a body to judicial review because of the public nature of the power or function it carries out. However, there is no easy way to distinguish when a function is sufficiently 'public'. As Scott Baker LJ in *R (Tucker)* v *Director General of the National Crime Squad*\(^5\):

> The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met.

In *Datafin* the issue was whether a body that developed and interpreted a code for corporate takeovers and mergers, whose only legal status revolved around it being taken into account in any de-listing from the stock exchange, the operations of the exchange in turn being a statutory function provided for under government regulation. The court, as other since then, considered a range of factors in determining whether the body was appropriately subject to judicial review and public law remedies. These included whether the source of the power to exercise the function in question was legislative or executive or merely consensual such as through contract, the historical role of the state in the activity, whether the body relies on public funds, whether its decisions are recognised by statute or parliament or have other public consequences, and whether they are supported by sanction, statute based or otherwise.

The result has been considerable uncertainty and criticism but generally limited application.\(^6\) Subsequent decisions have tended to reduce the list of relevant factors to two principal tests: the but-for test, or whether, in the absence of a non-governmental body to perform the function, the government would almost invariably carry out the function;\(^7\) and whether the body performing the function is underpinned by statutory provisions.\(^8\) The but-for test almost explicitly requires the courts to reference their own conceptions of the appropriate role for government, and there is little evidence that those conceptions have developed

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4 [1987] 1 QB 815  
5 [2003] ICR 599  
7 See, eg., *R. v. Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 W.L.R. 909, 930 per Farquharson L.J. and 932 per Hoffman L.J.  
from a coherent or even apparent, basis. Similarly, the statutory underpinning test looks to both the importance of the statutory underpinning to the effect or impact of the function in question or to the extent statute limits or restricts the activities of the body carrying out the function. The prevalence of statutory regulation and its near ubiquitous effect requires some further distinctions to be drawn but as yet those further distinctions remain unclear.

Some of the difficulty with attempting to draw a clear, coherent line distinguishing public from private functions may be because the need for the distinction developed in *Datafin* and its progeny derive from what was a largely procedural requirement, directing what form of remedy could be sought, the limits on the timing of the application and the admission of evidence. However, this approach has also been influential in determining whether a body is a public authority and hence subject to the *Human Rights Act 1998* (UK) and the rights and freedoms guaranteed under the European Convention on Human Rights.

**Human Rights legislation**

Legislation in many common law jurisdictions extends human rights obligations to private bodies, either through extending the responsibility of government bodies to protect against human rights violations by private bodies sufficiently within its influence or directly due to the public nature of the functions that the private body may be carrying out. What differentiates a public from a private function when carried out by a body has been subject to a number of important decisions, but disagreement behind the principles underlying distinction remain.

Under the *UK Human Rights Act 1998* the courts have referred to the need to provide a wide scope to what constitutes a function of a public nature so as to further the aim of promoting observance of human rights. In *Anston Cantlow Parochial Church Council v. Wallbank* Lord Nicholls suggested that:

> Clearly there is no single test of universal application. There cannot be given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is

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11 [2004] 1 AC 546
taking the place of a central government or local authorities, or is providing a public service.\footnote{Ibid at [12].}

However, in the recent decision of \textit{YL v Birmingham City Council}\footnote{[2008] 1 AC 95} much of the majority placed emphasis on an institutional rather than strictly functional focus. The body in question provided residential care and personal attention to the frail and elderly under contractual arrangements with the local council. It was privately owned, operated for profit, received payment for public residents on a fee for service basis and was only subject to statutory supervision and regulation with respect to both its publicly and privately funded alike. Hence the function of providing residential care, even where funded by the government, was of a private nature.

The minority in \textit{YL} focused more on the public service nature of the function, and in particular the public interest in providing assistance to the frail and elderly. Lord Bingham referenced the ‘role and responsibility of the state’ in providing assistance.\footnote{Ibid at [6] – [11].} Similarly Baroness Hale stated that the rationale underlying the public nature of a function ‘is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest.’\footnote{Ibid at [65].} It was artificial to try to draw a distinction between identifying the public ends to be met and the means of meeting them. This assumption of responsibility was indicated through the extent of state involvement in the activity, such as the closeness of state regulation or supervision or the importance of public funding, and the close connection between the function and the human right values at risk of being violated.\footnote{Similar Human rights legislation has now been provided in two Australian jurisdictions. The \textit{Charter of Human Rights and Responsibilities Act 2006} (Vic) and the \textit{Human Rights Act} (ACT) also applies to a body performing a public function, at least where it is doing so on behalf of the government. The Vic legislation expressly provides that the fact that an entity is public funded to perform a function does not necessarily mean that it is exercising that function on behalf of the state or a public authority, but otherwise leaves the question of on behalf of undefined. For a recent decision indicating an even broader interpretation of public function see \textit{Metro West v Sudi} [2009] VCAT 2025.}

The result of finding there was an assumption of responsibility by the state was to impose the state’s human rights obligations directly on the provider of the service in question. The direct application of European Community Directives has a similar result. In \textit{Foster v British Gas}\footnote{Case C-188/99 [1990] E.C.R. 1-3313} the European Court of Justice held that directives may have direct effect against a body that (i) has been made responsible
for providing a public service under the control of the State (ii) as a result of a measure adopted by the State and (iii) has for that purpose special powers beyond those which result from the normal rules applicable in relationship between individuals.\textsuperscript{18} However, applying this test has involved difficulties in determining which cases are of the same general type so as to be subject to the test, what is included within each of the elements, and even whether all three elements are required by direct application will be found.\textsuperscript{19} Underlying the test is the need to determine which bodies are entities of the State subject to the directive in question, and as such may be seen as generally narrower in its operation than the identification of functions that are subject to human rights obligations.

\textbf{Public Authority}

In Australia, \textit{Datafin} and its progeny has been tentatively adopted in some States, but in only a handful of decisions.\textsuperscript{20} At the Commonwealth level only Kirby J has preferred the \textit{Datafin} approach in dissent \textit{Neat Domestic v AWB}\textsuperscript{21} and \textit{Griffith University v Tang}.\textsuperscript{22} The majority judgements, however, have expressly declined to generally consider when public law remedies may be granted against private bodies or when public bodies perform a private function. In the specific cases they have considered, however, they have rejected reliance on public functions as the basis of judicial review. Instead they have considered questions of the source of public authority for the decisions and the effect that exercise of authority may have.

The decision of the High Court in \textit{Neat Domestic v AWB}\textsuperscript{23} concerned an application by Neat Domestic Trading Pty Ltd for the consent of the Wheat Export Authority to export wheat, as required under the \textit{Wheat Marketing Act 1989} (Cth). However, under s 57 of that Act, no consent could be given unless AWBI had approved the export. In this way AWBI, and hence AWB, was able to maintain monopoly control, or a ‘single desk’ policy, over the export of Australian Wheat. The issue before the Court was whether the decision by AWBI to withhold consent was reviewable by the court for breach of public law standards, namely a failure by AWBI to consider the merits of Neat’s application.

\textit{Neat} is an example of how the decisions of private bodies can play a role in a regulatory scheme, in that case through acting as a veto for any subsequent export

\textsuperscript{18} See Campbell, above n.9 at 112.

\textsuperscript{19} Ibid,113–115.

\textsuperscript{20} For a discussion of some of these cases see see, for eg, Mark Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’ (2007) 35 Federal Law Review 1

\textsuperscript{21} (2003) 216 CLR 277

\textsuperscript{22} (2005) 221 CLR 99

\textsuperscript{23} \textit{NEAT Domestic Trading Pty Ltd v AWB Ltd} (2003) 216 CLR 277 (‘Neat’).
approval by a statutory authority. It is an example relevantly similar to Datafin of mandated self-regulation where a private industry body establishes, interprets or enforces policies or codes of conduct but breach of which leads to disqualification or sanction under relevant legislation.\textsuperscript{24}

The majority in Neat\textsuperscript{25} rejected the application of public law standards to AWBI. They relied on three related considerations to hold that public law remedies did not lie in this situation:

First, there is the structure of s 57 and the roles which the 1989 Act gives to the two principal actors - the Authority and AWBI. Secondly, there is the ‘private’ character of AWBI as a company incorporated under companies’ legislation for the pursuit of the objectives stated in its constituent document: here, maximising returns to those who sold wheat through the pool arrangements. Thirdly, it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.\textsuperscript{26}

The private character of AWBI was therefore only one factor in determining that it was not relevantly authorised to make the veto decisions by legislation or any other source of public authority. As a matter of statutory interpretation, the legislation merely gave effect to AWBI’s decision\textsuperscript{27} – as it was described in a later case, the decision was dehors the legislation.\textsuperscript{28} An examination of the legislation and extrinsic materials suggested that the legislation intended AWBI to act in its own self interest, as any other private actor, and relied on the exercise of that self-interest to achieve the regulatory objective of providing for the participation of the wheat growing owners of AWB in the regulation of wheat exports.

The majority reasoned that AWBI, as a private company, did not need to rely on any public source of authority to enable it to consider an application to export wheat and to express its approval. Whether AWBI would approve of any exports depended upon its view of its own self-interest, or more particularly the interests of its shareholders who had contributed to the wheat pool administered by AWB. The relevant legislation ‘neither modified nor supplanted the obligations which


\textsuperscript{25} McHugh, Hayne and Callinan JJ. Gleason CJ also agreed with the orders of the court as there was no failure to consider the merits of Neat’s application in this case, but would have held that Neat was in general subject to Public Law standards. Kirby J dissented (see further the discussion of Kirby J’s discussion below).

\textsuperscript{26} Neat (2003) 216 CLR 277, 297 [51] (McHugh, Hayne and Callinan JJ).


\textsuperscript{28} Griffith University v Tang (2005) 221 CLR 99 (‘Tang’), 130 (Gummow, Callinan and Heydon JJ).
AWBI and its organs had under its constituent documents and applicable corporations law principles. 29 There was therefore no obligation placed on AWBI to consider more ‘public’ considerations that derived not from its self interest but from the ‘subject matter, scope or purpose of the [relevant legislation] which are identified as bearing upon the decision.’ 30

Whether legislation ‘authorises’ the act or function in question is just one aspect of showing that it is underpinned by legislation as applied by UK courts in subjecting decisions of private bodies to judicial review. However, the majority in Neat don’t look to the statutory underpinning of the impact or effect of the decision, but only to the source of any limitations or restraints on the exercise of authority. The court in Neat doesn’t have to look at the role of the impact or effect of the decision or spell out what aspect of the decision requires underpinning – that came with the subsequent decision of Griffith University v Tang. 31

Rights and obligations

Neat concerned one aspect of the public / private divide in the application of public law standards: when is a private actor subject to those standards. The other aspect – when a public body can make a ‘private’ decision not subject to those standards – was considered in Griffith University v Tang. 32 The majority in Tang drew on the decision in Neat in discussing the extent to which a decision by a university established under state legislation to expel a student is made ‘under an enactment’ so as to be subject to public law standards through operation of the Administrative Decisions (Judicial Review) Act 1977 (Cth). 33 Although the application of the decision to a broader context is uncertain, it can be argued 34 that as a result of the decision in Tang the application of public law standards generally, at least where the exercise of Commonwealth legislative authority is concerned, essentially involves two elements:

[F]irst, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. 35

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30 Ibid 299 [60]
31 Tang, above n.28.
33 Tang actually concerned the Qld version of that legislation but this was accepted by the judges as relevantly subject to the same interpretation.
The decision of AWBI to refuse approval in *Neat* acted as a condition precedent to the consent needed from the Wheat Export Authority before wheat could be exported from Australia. It therefore affected the legal rights and obligations of both exporters and the Authority.\(^{36}\) The decision in *Tang*, however, had no such effect, as the majority of the High Court\(^{37}\) characterised the relationship between a university and a student as consensual or private in character. Even though the University was public, in the sense of being established and relying upon legislation for its authority to make the decision in question, that authority didn’t provide the source for any effect on rights and obligations.

In an equivalent UK case of *Clark v University of Lincolnshire and Humberside* the court held, reflecting the procedural aspect of the public function test:

> If it is not possible to resolve the dispute internally, and there is no visitor, 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.\(^{ii}\)

The statutory basis of Griffith University’s authority to confer the degree, the regulation of recognition of doctoral qualifications, the effect on a student’s ability to engage in their intended profession, the wider public interest in the awarding of qualifications, and no alternative means of redress in the absence of contractual remedies would therefore suggest that the University was carrying out a public function.

The majority in *Tang*, however, held that it was the consensual nature of the relationship that was the relevant source of any effect on rights and obligations of the university and the student. Any limitations on the capacity of the University to exclude Ms Tang came from that relationship rather than the legislation which established the University. In that sense, using the criteria in *Foster* described above,\(^{38}\) the university was not exercising special powers beyond those which result from the normal rules applicable in relationship between individuals.

**The relationship with judicial power**

The court is *Tang* was strictly interpreting the meaning of ‘decision of administrative character under an enactment’ which restricts access to the ADJR

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\(^{37}\) Gummow, Callinan and Heydon JJ, Gleason CJ agreeing with the orders on generally similar reasoning, Kirby J dissenting.

\(^{38}\) See text around n.17.
Act. However, in describing what it was that arises out of a decision that gives it sufficient significance to warrant judicial review the majority drew on the meaning of ‘matters arising under’ the Constitution or Commonwealth legislation for the purposes of s.76 of the Constitution. It was this reference to ‘matter’ that required, for the majority, the need for a decision to affect rights and obligations before it can be made ‘under an enactment and hence subject to judicial review.

As Christos Mantziaris and Leighton McDonald have suggested, there seems to be some disagreement among both the Australian High Court and among commentators about the meaning of ‘matter’. However, it is increasingly being used by the High Court as a crucial element in ascribing the range of justiciable controversies that can form the basis of jurisdiction of federal courts, including the limits of judicial review and the exercise of judicial power.

In *Minister for Immigration v Bhardwaj* Gauldron and Gummow JJ stated:

> In the context of administrative decisions, the expression ‘judicial review’ tends to obscure the fact that the reviewing court is not simply examining the decision in question to see whether it is affected with error of the kind that requires it to be set aside or varied. Judicial review is an exercise of judicial power. As such, it is an exercise directed to the making of final and binding decisions as to the legal rights and duties of the parties to the review proceedings.

McHugh J, in that case, suggests that as a statement of principle this needs to be expanded to make it clear that the decision under review doesn’t itself have to determine rights and obligations as opposed to interests such as the grant of a licence. However, he continues to use the rights and obligations language.

More recently, in *Minister for Immigration and Multicultural and Indigenous Affairs v B* Gleeson CJ and McHugh J held that ‘matter’ requires the identification of:

> some right that may be determined or privilege that may be granted by a court, or some duty or liability that is enforceable against a person by another person. Most ‘matters’ involve the determination of a duty or liability in one party and a correlative right or standing in another to enforce the duty or liability.

When issuing a constitutional writ for breach of jurisdictional error the court is determining the duty on the decision maker, if making a decision, to comply with the jurisdictional limits and a right of the party affected to enforce those limits. The court is also able to determine the consequence of a breach of jurisdiction, and

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39 (2002) 209 CLR 597 at 617

the legal effect that has on rights and obligations of any person to take or abstain from action in reliance on the validity of the decision in question.41

A matter requires more than just the identification of an applicable remedy. As Gleeson CJ and McHugh J, this time in Abebe v Commonwealth42, suggest:

A legally enforceable remedy is as essential to the existence of a ‘matter’ as the right, duty or liability which gives rise to the remedy.

Any right, duty or liability therefore doesn’t arise as a result of the issue of the remedy, but either arises from the making of the decision, or, of present relevance, from some condition or limitation on the ability to make the decision.43

In the context of judicial review therefore, just because the prerogative writs or equitable remedies may be available against bodies performing a public function is not in itself enough to constitute a matter. There must be a condition on the exercise of authority that, if breached, would enable the court to conclusively determine the consequences of that breach. Given the limited jurisdiction of federal courts, including the High Court, the issue generally becomes whether Commonwealth legislation44 or the limits on the exercise of executive power under the Constitution conditions the grant or exercise of authority.

For example, where, as in Tang, the substantial ground was likely to be a breach of natural justice, if the relationship between the university and Ms Tang was categorised as contractual then the issue would be whether there was any obligation of natural justice implied in the contract beyond that already provided. There may also have been limits imposed on the extent of any property right, and obligations on its enforcement imposed through equity, restraints of trade, etc. Being consensual rather than contractual meant there was no means to judicially enforce any interests or expectations Ms Tang may have had on the maintenance of that relationship. But in either event the lack of public law remedies amounts to a finding by the court that the capacity to enter into a consensual relationship was not conditioned by the legislation establishing the University. I have speculated elsewhere about how the element of choice of institution and other

41 See Gauldron J in Abebe v Commonwealth (1999) 197 CLR 510 at 555: ‘The right put in issue when an administrative decision is challenged is not a right to have the decision set aside. That is the relief granted in the event a challenge is successful. The right put in issue is the right of an officer of the Commonwealth to act upon or give effect to that decision.’

42 (1999) 197 CLR 510 at 527

43 See also R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett (1945) 70 CLR 141 at 155

44 leaving aside the issue of whether state legislation alone can confer limits on the exercise of authority on a cwth officer.
forms of accountability such as competition, reputation and availability of funding, can play a role in reaching that legislative intention.45

**Minimal Standards**

*Neat* and *Tang* therefore involve a process of discerning legislative intention and the conclusion that, in effect, the legislation was intending that AWB and Griffith University have an unfettered discretion, with no enforceable restrictions other than those implied through private law. The question therefore arises as to whether it is constitutionally possible to confer an unfettered discretion on a decision-maker, or at least to protect the exercise of that discretion from judicial review. That issue was considered in Australia in *Plaintiff S157 v Commonwealth*.46

*S157* concerned the effect of a privative or ouster clause inserted in the migration legislation in attempt to limit recourse to judicial review. It was held that the privative clause in question was interpreted to not limit judicial review of jurisdictional errors, because to do otherwise would be invalid due to the operation of s.75(v) of the Constitution, conferring original jurisdiction on the High Court to issue writs of prohibition and mandamus and an injunction against an officer of the Commonwealth.

The concept of jurisdictional error implies that there are some restrictions or conditions inherent in the conferral of authority on the officer in question. The majority suggest that injunctive relief may be available on grounds that are wider than jurisdictional error which can give rise to prohibition or mandamus, being clearly available for fraud, bribery, dishonesty or other improper purpose. Thus even if within jurisdiction these elements of bona fides are perhaps irreducible where an officer of the Commonwealth is concerned. The court did, however, discuss three other bases for imputing minimal conditions on the legislative conferral of authority: the so-called *Hickman* conditions, the exclusive exercise of judicial power, and the exercise of legislative power.

In *R v Hickman; Ex parte Fox and Clinton*47 Dixon J stated that the effect of a privative clause attempting to oust access to judicial review is to be interpreted as:

> meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation,

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45 See

46 (2003) 211 CLR 476

47 (1945) 70 CLR 598 at 614-15
and that it is reasonably capable of reference to the power given to the body.

However, in S157 the majority made it clear that these three minima were merely an interpretation of the meaning or protection given by the privative clause itself, and still required a reconciliation of this meaning with the more specific limitations on power that are essential to validity of the decisions in question. It therefore goes to the limitations on the application of the privative clause rather than direct expansion of the jurisdiction of the decision-maker.

S157 also confirmed that Commonwealth legislation cannot confer on a non-judicial body the judicial power of conclusively determining the limits of its own jurisdiction. Cases such as Attorney-General (Cwth) v Breckler48 confirm that this involves whether the body is able to conclusively determine the existence of rights and obligations that may flow from its decisions. In other words, as was suggested in B, judicial power involves conclusive determination of ‘matters’ that come before the body in question.49 The reservation of judicial power to Courts with jurisdiction conferred by ChIII of the Constitution requires that it be left to such courts, in the exercise of judicial power, to enforce limits on the capacity of other bodies to affect the rights and obligations of others.

Finally, the majority in S157 suggested that limits on the exercise of legislative power may prevent legislation delegating an open-ended discretion. They suggested that such a provision:

would appear to lack that hallmark of the exercise of legislative power identified by Latham J in The Commonwealth v Grunseit50, namely, the determination of ‘the content of a law as a rule of conduct or a declaration as to power, right or duty’. Moreover, there would be delineated by parliament no factual requirements to connect any given state of affairs with the constitutional head of power.51

It is not clear when a conferral of discretion will be too broad so as to fail to constitute ‘a rule of conduct or declaration as to power, right or duty.’ The connection with a Constitutional head of power depends upon the nature of the power, and the existence of alternative forms of accountability which seek to limit the scope of the decision in question without implying any direct conditions on the decision making power may be sufficient in establishing that constitutional connection. Therefore there is no clear basis on which you can limit legislative power through a requirement that legislation must establish limits or conditions

48 See Attorney-General (Cwth) v Breckler (1999) 197 CLR 83

49 Above n.40

50 (1943) 67 CLR 58 at 82

51 cf Australian Communist Party v The Commonwealth (1951) 83 CLR 1 at 262, per Fullagar J.
on the exercise of any power or function, and even if rights and obligations are affected there is little guidance on the nature of those limits and the scope of their application. Any constitutional foundation would appear to go no further than the concepts of matter I have outlined above, or requires minimal conditions only on the decisions of officers of the Commonwealth to give effect to s.75(v).

Civil Rights and Obligations

The requirement that judicial review be available to conclusively determine rights and obligations is similar to the requirements under article 6(1) of the European Convention of Human Rights, which has been incorporated into the UK through the Human Rights Act 1998 (UK). Art 6(1) relevantly states:

In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

What constitutes a civil right or obligation is a matter for the courts and not subject to legislative or executive definition. The phrase has been interpreted broadly by the European Court of Human Rights and by UK courts but there remains considerable uncertainty about its outer limits.\textsuperscript{52} It was held in \textit{R (Wright) v Secretary of State for Health},\textsuperscript{53} that:

[i]t is a well known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which exercises “full jurisdiction”. … What amounts to “full jurisdiction” varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends on the subject matter of the decision and the quality of the initial decision-making process. If there is a “classic exercise of administrative discretion”, even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case.\textsuperscript{54}

This reflects the recognition in \textit{Runa Begum v Tower Hamlets LBC},\textsuperscript{55} that the meaning of ‘civil rights’ is intimately connected with the nature of the hearing required. Civil rights are therefore only implicated where there is some basis to imply an obligation for an independent and impartial tribunal, even if that

\textsuperscript{52} See Craig, Administrative Law, 2008, 386.

\textsuperscript{53} [2009] UKHL 3 at [23].

\textsuperscript{54} Citations omitted.

\textsuperscript{55} [2003] 2 A.C. 430
tribunal is limited to a court exercising judicial review for errors of law. The
Strasbourg and UK courts have accepted that a wide range of administrative
decision–making may be affected by art.6, but limited that to a recognition that
grounds of review are properly limited by regard to ‘democratic accountability,
efficient administration and the sovereignty of Parliament’.\(^{56}\) Thus, where there is
provision in legislation for a duty to be imposed on a decision maker which
restricts the exercise of discretion inhering in the grant of authority under
legislation, then that has been tentatively accepted as providing a civil right for
the purposes of art 6.\(^{57}\)

**Nature of the grounds of review**

Formally, the judgement that a function is public and subject to judicial review
precedes consideration of whether a ground of review has been breached. Thus to
find that a body has failed to take into account the merits of the case before it in
exercising some function,\(^{58}\) or act impartially in the interest of others or take into
account particular relevant considerations, requires justifying why those
obligations are imposed at all.

The nature of the grounds of review is relevant to the question of whether judicial
review should be available. As Michael Taggart has suggested,\(^{59}\) there are
important differences in the nature of review of human rights standards and for
legality or error of law. Subjecting a body or function to human rights obligations
involves comparing the action taken against the objectives of the human right in
question. Determining whether the effect on the human right is proportional to
the objective sought to be achieved through the function in question allows for
questions of justification to be considered in a (reasonably) determinate way,
allowing judicial development of both an understanding of the right in question
and the qualifications it is properly subject to. Error of law, or legality, needs to
derive the basis for comparison from elsewhere. With the exception of natural
justice obligations perhaps, the content and justification of the grounds of review
generally derive from the source of authority in question.

Therefore, we might subject a body to human rights obligations on the basis that
otherwise those obligations will be breached. Hence the resort by the courts,
albeit not always majorities, to considerations of assumption of responsibility and
the impact on human rights that delegation to private bodies might involve. But
to subject a body to judicial review requires some justification beyond the
possibility that judicial review standards might be breached. Any such

\(^{56}\) Ibid at 447, per Hoffmann LJ.

\(^{57}\) See Craig, above n.52 at 387.

\(^{58}\) As was argued in Neat.

\(^{59}\) See Taggart, M. ‘Proportionality, Deference, Wednesbury’ [2008] NZLR 423
justification must include the rationale for those standards and their application, either generally or in a particular context.

It is in this context that the limitations of judicial review on the basis of error of law become important. In the absence of human rights or other legitimately ascertainable standards, error of law review may not necessarily operate to hold the executive government to account. By refusing to subject a function to judicial review the courts avoid sanctioning the function in question when it is largely free of legal constraints. As Timothy Endicott suggests, ‘politicians should not be able to disclaim responsibility for such decisions on the ground that they are approved by or in the control of judges’. Finding a function to be non-public, therefore, means that the burden of justification for the function remains.

The approach of the Australian courts in cases such as Neat attempts to anchor any claim to legitimacy on the source of authority for the decision under review. The court is able to focus on the role that judicial review will play in modifying the effect of any regulatory scheme. It recognises that the Courts are not the only form of accountability that may be available and indeed subjecting a body to judicial review may undermine those other forms. Thus in Neat the court was able to look to the history of the regulatory scheme in question and recognise the role for the incentives faced by a private body that were now being utilised. Similarly in Tang the Court was able to recognise the implications of subjecting a university to obligations beyond fulfilling its public role of providing educational opportunities. Provided the body in question was fulfilling minimal standards consistent with that regulatory role, judicial intervention would involve reconfiguring the accountability matrix put in place.

This approach also provides some basis for the courts to continue to encourage justification by the government or standard setting body in question. Even though the result may be to limit the need to justify a particular decision, the recourse to the possible role for judicial review in fulfilling the objectives of a regulatory scheme requires justification of the intended operation of the scheme itself and what other measures are intended to fulfil the role that may otherwise be provided by the courts.

**Conclusion**

This paper has tied to suggest that the distinction between public and private functions is unclear. The jurisprudence in the UK is based on attempting to identify functions that are sufficiently governmental so as to have the obligations of judicial review imposed on them. The Australian jurisprudence, however, remains fixed on formalist approaches of defining and enforcing limits on authority bestowed through legislation or, although this is yet to be fully tested, through Executive power under the Constitution. This paper has suggested,
however, that the formalist approach permits the connection to be drawn between the basis of the public/private distinction and the circumstances in which access to judicial review can be limited. By focusing on the role and nature of judicial review, this formalist approach restricts judicial review to the enforcement of restrictions or limits on the exercise of public authority, restrictions imposed because of the affect of the function on rights and obligations rather than through imposition of the grounds of review themselves.

In *Attorney General (NSW) v Quin*61 Brennan J stated:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

As this paper has attempted to argue, judicial review is a search for limits imposed by some source other than the courts themselves. The Australian High Court is beginning to develop a jurisprudence that doesn’t depend on identifying the public nature of the body, or the functions that it carries out. Instead, at least at the Commonwealth level, it is a question of whether legislation or the constitutional limits on the exercise of executive power conditions the decision in question so as to enable the court to determine the consequences of a breach of that condition.

It may be that the limited original jurisdiction of Australian courts requires this outcome. But the approach also reflects the considerations reflected in Brennan J’s statement in *Quin*. By focusing on the limits which govern the exercise of a decision-making power, the courts avoid interfering with the merits of the decision. The choice of organisational form, the appropriateness of alternative forms of accountability to satisfactorily achieve the intended policy outcomes, and whether there should be restrictions placed on capacity of a private decision to have legal consequences are all issues of policy outside the ambit of judicial review.

It may be inevitable that this search for external limits involves a normative assessment of the appropriateness of such limits, irrespective of the rhetoric of the courts. This paper touches on one possible justification for the different approach through recourse to one possible view of the role of the separation of powers in our system of responsible government. By refusing to buy into the public/private divide the courts are effectively placing responsibility for the operation of such mixed regulatory schemes, and importantly the consequences of actions within

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61 (1990) 170 CLR 1 at 35-36
such a scheme, with the Executive. The availability of judicial review can be as simple as express provision for limits on the role of private decisions and the consequences for breach of those limits. To modify those consequences on the basis of the judicial perception of the public interest and the need to protect against the allegedly unforseen affects of the scheme is to provide for accountability not at the ballot box but through argument of counsel.