THE EQUITABLE GESIT IN THE MACHINERY OF ADMINISTRATIVE JUSTICE

*Justice R S French**

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Introduction

The empire of equity is substantial in its extent. So too is that of administrative law. Their most visible interaction lies in the crossover into administrative law of the equitable remedies of injunction and declaration as instruments for the announcement and restraint of unlawful official action. Beyond those remedies however the territories of administrative law are receptive to the more subtle normative and doctrinal influences of equity. Their effects are still unfolding. Some of these influences and interactions are explored in this paper.

The Equitable Spirit of Administrative Justice

Administrative law is concerned with the delivery of administrative justice according to law. The core elements of administrative justice are lawfulness, fairness and rationality in the exercise of public power. They are not mutually exclusive. They shade into each other. But they are central to any just process of official decision-making. They are important reflections in administrative justice of the broadest understanding of equity.

Equity is as protean in meaning as it is in application. Its first and second definitions in the Shorter Oxford English Dictionary identify the qualities of being equal or fair, impartial or even-handed. It refers to that which is 'fair and right'.[1] In this wide sense it embraces the long standing aspiration of administrative justice enunciated by Lord Halsbury LC requiring official power to be exercised:

> …according to the rules of reason and justice, not according to private opinion: … according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself….[2]

That standard in turn incorporates the central requirements of natural justice or procedural fairness which are substantive supports of lawfulness and rationality in administrative decision-making. So equity in this wide sense informs basic doctrines of administrative law. In that sense it also finds a place in statute law by implication or judicial imposition and sometimes as an express statutory criterion of behaviour.[3]

There is an important Commonwealth statute, the *Public Service Act 1922,* which has as its objective:

> The efficient, equitable and proper conduct … of the public administration of the Australian government.[4]

That objective underpinned the view of the Full Federal Court in a case involving the termination of the appointment of the Secretary of the Department of Defence that the Act did not intend to exclude procedural fairness in respect of such terminations. The Court said:

> Fairness is not a moral fetter on efficiency. Fairness, expressed in recognition of the right to be heard and want of bias on the part of the decision-maker operates in aid of informed decision-making that has regard to relevant criteria and so advances the statutory purpose. So equity serves efficiency.[5]

This is not regarded by all as a universal truth. Privative clauses and limits placed on the requirements of procedural fairness offer recent testimony to that lack of unanimity.[6] Because it is of importance and not universally accepted, it bears repetition in circles outside those of law professionals.

Equitable conduct, expressed as procedural fairness in official decision-making is not a form of ethical ornamentation inimical to efficiency. Procedural fairness is a necessary element of many aspects of the valid exercise of statutory power. A decision affected by actual bias may also be made in bad faith or for purposes foreign to those for which the relevant power is conferred and in some cases the internal logic of a statutory power requires that processes be followed which reflect procedural fairness.[7] A decision made, without providing the person affected with an opportunity to be heard, may overlook necessary criteria and relevant factors which must be considered if it is to be valid. It may also overlook evidence that would, if taken into account, give rise to a better decision on the merits, albeit the failure to take it into account would not render the decision invalid.

Equity, in its broadest sense, also implies equality of treatment. Equality of treatment is a principle of lawful administration.[8] Discrimination without justification in the purported exercise of a power may vitiate that exercise.[9] Inequality of treatment has been treated as an 'abuse of power' for the purpose of the *Administrative Decisions (Judicial Review) Act 1977.*[10] The equality principle has also been used to strike down delegated legislation.[11]

Equity in its broadest definition may be found at the heart of administrative justice. It is necessary now to turn to narrower meanings of equity and their interaction with administrative law.

Equity – Corrective and Supplement of the Common Law and Statute Law

Beyond the important general considerations outlined above, this paper is concerned with the relationship between administrative law and equity in its narrower senses. The first of these dates back to Aristotle who, as Story said '… defined the very nature of equity to be the correction of the law, wherein it is defective by reason of its universality'.[12] This reflects the first part of the third definition of equity in the Shorter Oxford English Dictionary:

> The recourse to general principles of justice to correct or supplement common and statute law.

Story proposes a purposive approach to statutory construction as an example of the application of equity in the Aristotelian sense:

> So, words of a doubtful import may be used in a law, or words susceptible of a more enlarged, or of a more restricted meaning, or of two meanings equally appropriate. The question, in all such cases, must be, in what sense the words are designed to be used; and it is the part of a judge to look to the objects of the legislature, and to give such a construction to the words, as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of equity, as contradistinguished from a strict adherence to the mere letter of the law.[13]

Equity in a more technical sense stands alongside statutory power under the protection of the proposition that statutes will not lightly be taken to displace equitable principles. That

proposition is a particular case of the general approach to statutory interpretation which in this country dates back to the judgment of O'Connor J in *Potter v Minahan*[14] where, citing the 4th edition of Maxwell on *The Interpretation of Statutes*, he said:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[15]

The presumption against the modification or abolition of fundamental rights or principles was restated in *Bropho v Western Australia*[16] and *Coco v R.*[17] A like interpretive principle affecting the exercise of official power is expressed in the United Kingdom as a 'principle of legality', namely a strong presumption that broadly expressed discretions are subject to the fundamental human rights recognised by the common law.[18] The application of the interpretive principle to equitable doctrines was recognised by the New South Wales Court of Appeal in *Minister for Lands and Forests v McPherson*.[19] The Court held that the Supreme Court, exercising its equitable jurisdiction, could give relief against forfeiture of a Western Districts lease created under the *Western Land Act 1901* (NSW). The Minister had argued that the lease was a creature of statute and that the statute provided for its termination by forfeiture, the means by which it would cease to exist by forfeiture and the means by which relief could be granted. In rejecting that proposition, Kirby P, with whom Meagher JA agreed, acknowledged the long established principle relating to the effect of statute law on common law rights and freedoms.[20] The question was whether a similar principle applied in relation to the doctrines of equity. Kirby P posed the question thus:

> Does a similar principle apply in relation to basic principles of equity, where those principles have been developed over the centuries to safeguard the achievement of justice in particular cases where the assertion of legal rights, according to their letter, would be unconscionable?[21]

The answer was:

> In principle, there would seem to be no reason why a similar approach should not be taken to basic rules of equity. The justice of equity may equally supply the omission of the legislature, filling the silences of the statute.[22]

Common law and equity were part of the legal order with which statute law must harmoniously operate.

The flexibility of equity in the context of relief against forfeiture was compared with the rigidity of administrative policy. So it was said:

> … administrators may be governed by general rules and their concern for the overall administration of the Act, to the detriment of particular parties whose conduct has led to forfeiture.

Mahoney JA adopted similar reasoning leading to the same conclusion. Noting the existence of the statutory power on the part of the Minister to relieve against forfeiture, his Honour said:

> The fact that the statutory power existed would no doubt mean that the court would not interfere except where the result would otherwise be unconscionable. But such matters go to the exercise rather than the existence of the power.[23]

From equity as an influence in the interpretation of statutes, including statutes involving the use of official power, it is now necessary to pay attention to the lawyer's understanding of the term.

Equity – A Body of Law Historically Defined

Despite the interpretive principle referred to above there was never an unbounded jurisdiction of courts of equity to correct, modify or supersede the positive law.[24] Courts of Equity, like other courts of law, decided new cases as they arose by principles derived from precedent and developed or elaborated upon those principles. But those principles were:

> … as fixed and certain as the principles on which the courts of common law proceed.[25]

For lawyers the traditional definition of equity was historical and institutional in its terms. It was that used in the dictionary as an example or special case of the third definition, namely:

> The part of the English law originally administered by the Lord Chancellor and later by the Court of Chancery.

This was Maitland's definition. He called it supplementary law:

> It is a collection of appendixes between which there is no very close connection. If we suppose all our law put into systematic order, we shall find that some chapters of it have been copiously glossed by equity, while others are quite free from equitable glosses.[26]

As Chancery historically kept clear of public law, crime and much of tort, so too did equity. However it engaged closely with Contract and Property law supplying both with equitable appendices including the law of trusts. So Maitland could say:

> The bond which kept these various appendixes together under the head of Equity was the jurisdictional and procedural bond. All these matters were within the cognizance of Courts of Equity and they were not within the cognizance of the courts of common law.'[27]

The institutional monopoly of that jurisdiction was removed by the *Judicature Acts* leading to the prediction that:

> The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice that it is a well established rule administered by the High Court of Justice.'[28]

In one sense that day has come. Equity is part of the single body of unwritten law administered by most, if not all, Courts of the land, albeit it retains its distinctive character and functions. To say that of course is not to say anything about fusion between the common law and equity, a topic which seems to raise peculiar passions in some quarters.[29]

Equity Entangles with Public Law

Maitland and other equity authors of his time seem to have had little or nothing to say about public law even though equitable injunctions and declarations were already being applied in that area. Indeed this is still the case in some contemporary texts. But in 1934 Hanbury's *Essays in Equity* included a chapter 'Equity in Public Law'. This began by reflecting upon the blurring of the public-private law divide and the extent to which:

> In the law of property, the law of tort, the law of contracts, at every turn we find public interests intruding upon the sphere of the interests of individuals.

Hanbury referred to housing and town planning legislation and even the *Law of Property Act 1925* which enabled persons interested in freehold land affected by restrictive covenants to apply to an arbitrator to modify or discharge such covenants. In the area of tort, private citizens were bringing actions against public officials. He concluded that:

> … the growing importance and unresting penetration of public law is gradually awakening our minds to the fact that it, just like private law, is composed of a medley of common law and equity, cemented by statute. It is true that there is not so much equity in public as in private law, but nevertheless a sketch of either constitutional law or criminal law that did not mention the equitable influences at work in those branches of the law would be a very imperfect and one-sided sketch.

Much common law, equitable and statutory water has passed under the bridge, both in the United Kingdom and in Australia since Hanbury wrote his essays. But even then, the intersections between equity and public law were various:

1 Breaches of trust by the Crown.

2 The question whether a trust was a charitable trust and therefore exempt from income tax.[30]

3 The function of the Attorney-General with respect to charitable trusts.

4 The use of injunctive relief in public law, including relief to restrain a person from applying for a private bill and in the colonies to restrain the introduction of a public bill.[31]

5 The use of injunctive relief to restrain the commission of a crime and the development of the associated doctrine of the standing requirements for a private citizen claiming relief against breach of a public right.[32]

6 Proceedings in equity against the Crown in the Courts of Chancery and Exchequer.

The growth of the relationship between administrative law and equity has been untidily organic in character. That is not an unusual feature of the interaction between disparate areas of law whose territories overlap. Common law and statute law provide a paradigm case.[33] There is no grand unifying principle to bring administrative law and equity into a coherent whole. Their interaction occurs in different ways. Specific levels of interaction involve the use of equitable remedies, the injunction and the declaration, to provide relief against the unlawful exercise of statutory or other power. Even where equivalent statutory remedies are available equity supplies analogues for their application particularly in the identification of considerations relevant to the discretion to grant them.

Some equitable doctrines have potential application to official conduct. Doctrines of estoppel at common law and equity and associated preclusionary rules may apply to certain categories of case although not so as to extend statutory power, contract statutory duties or fetter discretions. A statutory duty in some circumstances may equate to a fiduciary duty. Equitable doctrines governing fiduciary duties and the conduct of fiduciary relations have a place if only by analogy in the exercise of some statutory powers. And where the Crown or public bodies are assimilated to the position of private corporations or persons by the removal of Crown immunity or otherwise then equity will apply to them as it does to private corporations and persons. Statutory bodies engaged in commercial or trading activities will in their private or privatised capacity, absent any statutory immunity or modification of their liabilities, attract to their conduct the general body of the law including equity.

At a more general level equity influences the development of principles of administrative law and the bases of judicial review.

Both the specific and the general interactions are reflected in the often quoted observation by Sir Anthony Mason that:

> Equitable doctrines and relief have extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint. In the field of public law, equitable relief in the form of

> the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.[34]

It is helpful in this context to recall Maitland's prophecy, cited earlier, that the day would come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law. It has a resonance with the further observation by Sir Anthony Mason in his paper that:

> There is no reason why the courts in shaping principles, whether their origins lie in the common law or in equity, should not have regard to both common law and equitable concepts and doctrines, borrowing from either as may be appropriate, just as courts have regard to the way in which the law has been developed by statute and has developed in other jurisdictions and, for that matter, in other systems of law.

Relevantly for the present topic, he noted the comment of Justice Somers of New Zealand that over the years words such as 'unconscionable' and 'inequitable' had drawn closer to more objective concepts such as fair, reasonable and just.[35]

This is not to say that the operation of equitable principles in administrative law today is in any sense comprehensive or complete. As Dal Pont and Chalmers have observed, while there is a well developed equitable jurisdiction regulating the relationships of trust between private individuals, Courts of Equity have shunned a parallel jurisdiction between government and the governed:

> The relationship between government and the people has attracted the jurisprudence of equity, but in a less developed fashion. The breadth of equitable remedies are, with limited exceptions, available to plaintiffs who establish the relevant cause of action against the government. Similarly, public sector organisations and agencies are generally subject to equitable doctrines. There is no reason for equity not to apply in public law, as otherwise there would be inconsistency with the accepted social and legal policy of equality before the law, with all having access to the same rights and remedies. Equity and public law is a subject of only rudimentary perusal by commentators, and remains largely unexplored by the courts.[36]

Equitable Remedies and Public Law – An Historical Perspective from the High Court

An account of the historical development of equitable doctrines and remedies in public law is given in the judgments in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*.[37] The case concerned the standing requirements for persons other than the Attorney-General seeking the grant of equitable remedies by way of declaration and injunction to restrain the excess of statutory power. The relief was claimed by the respondents against apprehended conduct by the appellant Land Council. The Land Council proposed to establish a funeral benefit for Aboriginal people in New South Wales, a service already provided by the first respondent.

The Court held that the respondents had standing to seek declaratory and injunctive relief on the basis that if not restrained the appellants could cause severe detriment to the respondents' business and that the respondents therefore had a sufficient special interest to seek the relief they did. The Court rejected the 'special damage' criterion of standing enunciated in *Boyce v Paddington Council*.[38] It adopted instead a sufficient criterion of standing, the existence of a special interest in the subject matter of the proceedings. This reflected the reformulation of the *Boyce* 'special damage' test in *Australian Conservation Foundation Inc v The Commonwealth* [39] and *Onus v Alcoa of Australia Ltd* [40] and more recently *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA).* [41]

In a joint judgment, Gaudron, Gummow and Kirby JJ discussed the relationship between equity and public law. Equity, they said, provided remedies to vindicate the public interest in the maintenance of due administration where other remedies and in particular the prerogative remedies, were inadequate. The application of equitable doctrine to the grant of relief in these circumstances was expressed thus:

> There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction. The position is expressed in traditional form by asking of the plaintiff whether there is an 'equity' which founds the invocation of equitable jurisdiction.[42]

The public interest in due administration was evidenced historically by the Crown's power of visitation of municipal and other chartered corporations and enforced primarily by mandamus, quo warranto and scire facias. Chancery already had broad jurisdiction in respect of charitable trusts but it intervened more generally on two bases:

1 The right of the Attorney-General to come to Chancery even for a legal demand.

2 The inadequacy of legal remedies.

The three justices noted that in the public law arena equitable intervention had not been limited to the protection of particular proprietary rights. The administration of charitable trusts was a matter of public concern and, analogously with the enforcement of that interest, the English Attorney-General would move for equitable relief to restrain municipal corporations misapplying funds which they held upon charitable or statutory trusts. The remedies were then extended to prevent statutory bodies from unauthorised application of their funds. The role of the Attorney-General was further generalised to protect the public interest against conduct by statutory authorities exceeding their power in a way which would interfere with public rights and so injure the public.[43] This historical background, which informed an important judgment about the standing of private persons to seek equitable relief, leads into a wider consideration of equitable remedies in this area.

Equitable Remedies

A substantial part of the contribution of equity to administrative law has come from the use of the equitable remedies of injunction and declaration. The injunction is available to restrain threatened official conduct which is beyond power or otherwise unlawful. Interlocutory injunctions are an indispensable tool by which the status quo is maintained in judicial review applications pending their final hearing and determination.

The place of the injunction in administrative law in Australia is secured by s 75(v) of the Constitution. That provision was inserted at the suggestion of Andrew Inglis Clark to avoid the possible application in Australia of the decision in *Marbury v Madison*.[44] Although the case is famous for the assertion by the Supreme Court of the United States of authority to review the constitutional validity of legislation it also held that the Court could not validly be given original jurisdiction under the Constitution to issue writs of mandamus to non-judicial officers of the United States. Edmund Barton accepted Inglis Clark's concerns and formally moved the insertion of the provision in March 1898 observing as he did that absent that specific provision in the Constitution it might be held 'that the court should not exercise this power, and that even a statute giving them the power would not be of any effect….'. The power thus conferred on the High Court he said could not do any harm and might 'protect us from a great evil'. In the event, s 75(v) has become a bulwark of the rule of law in Australia, proof against privative clauses which might otherwise have had the effect of depriving the High Court of the jurisdiction to review and restrain unlawful official action. So the injunction

stands as a constitutional remedy against unlawful executive action along with the constitutional writs of mandamus and prohibition.

The injunction and declaration are species of equitable relief available in all manner of litigation coming before both Federal and State courts. It is not necessary that claims for such relief be conjoined with other prerogative or statutory remedies. In *Corporation of the City of Enfield v Development Assessment Commission*[45] the council of the City of Enfield contended that a development plan consent granted by the Development Assessment Commission was invalid by reason of the misclassification of the proposed development as other than a 'special industry'. It claimed injunctive and declaratory relief in the Supreme Court.

The Council's action invoked a jurisdiction of the Supreme Court which was characterised in the joint judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ as:

> … its jurisdiction as a court of equity to grant equitable relief to restrain apprehended breaches of the law and to declare rights and obligations in respect thereto.[46]

Their Honours pointed to the differences between the availability in public law of equitable remedies on the one hand and judicial review by mandamus, prohibition and certiorari on the other.[47] An applicant with standing to apply for prohibition or certiorari could fail to obtain an order absolute for reasons which would not have precluded the availability of a declaration. So although in *FAI Insurances Ltd v Winneke*[48] certiorari and mandamus were not available against the Governor in Council, a declaration could be made against the Attorney-General of Victoria as representative of the Crown.[49]

Gaudron J who agreed with the joint judgment added some observations about the inadequacies of the prerogative writs as general remedies to compel executive government and administrative bodies to operate within the limits of their powers.[50] She said:

> Equitable remedies are available in the field of public law precisely because of the inadequacies of the prerogative writs. Thus… it is not incongruous that equitable relief should be available although prerogative relief is not. What is incongruous is the notion that equitable remedies should be subject to the same or similar limitations which beset the prerogative writs. In the field of public law, equitable remedies are subject to the same considerations, including discretionary considerations, as apply in any other field. There is no need for the importation of other limitations.[51]

The application of the equitable injunction and declaration in public law may also be influenced by the modern availability of statutory remedies which, because they are seen as serving the public interest, may not impose any particular standing requirement. Section 80 of the *Trade Practices Act 1976* (Cth) which provides that injunctive relief to restrain contraventions of the Act can be sought by any person is the leading case in point. Its constitutional validity was considered in the recent decision of the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*.[52] In his reasons for judgment in support of validity, Gummow J returned to the role of equity in public law which he had considered in the *Bateman's Bay* case. He pointed out that in Chancery a plaintiff would seek to lay out facts and circumstances demonstrating the equity to the relief claimed. That equity might arise from the violation or apprehended violation of rights secured in equity's exclusive jurisdiction or because of the inadequacy of legal remedies to vindicate legal rights or as a defensive equity to resist legal claims. The legal rights, interests and remedies in question might come from common law or from statute. Equity could intervene to protect statutory rights. Alternatively, where statute conferred obligations upon administrators or particular sections of the community it might provide no means or inadequate means for enforcement of the obligation or the restraint of ultra vires activity. His Honour said:

> This led to the engagement of the equity jurisdiction in matters of public law.[53]

In the context of questions about the competency of parties, other than the Attorney-General or absent an Attorney-General's fiat, to seek enforcement of statutory regimes the modern concept of 'standing' was born. His Honour said:

> The litigious activity did not involve the exercise by a plaintiff of personal rights bestowed upon the plaintiff by statute. Rather, it involved the use of the auxiliary jurisdiction in equity to fill what otherwise were inadequate provisions to secure the compliance by others with particular statutory regimes or obligations of a public nature.[54]

In the context of the challenge to validity raised in relation to s 80, this historical background counselled caution in extrapolating to Ch III of the Constitution narrow rules of standing from the fields of public law involving the intervention of equity (as at 1900) and the field of judicial review for constitutional validity.

In an interesting article, focusing on the *Truth About Motorways'* case, in the March 2001 edition of the Public Law Review, David Wright has referred to the indirect effect of analogical reasoning or what might more loosely be called 'cross fertilisation of ideas' between equitable and like statutory remedies. In this respect he concluded:

> … the role of equitable remedies is being reinvigorated particularly with regard to cases understood as public law matters. These cases frequently involve the *Trade Practices Act*. *Truth About Motorways* is simply part of this larger pattern. Finally, also with reference to the *Trade Practices Act* (and the New Zealand *Fair Trading Act*) the private law has been altered and most particularly the law of remedies has been fundamentally altered. The combination of all three effects means that there is an emerging decline in the importance of the strict divide between public and private law. This movement is accompanied by the rise of the unifying force of equitable remedies, particularly injunctions, as modified by the *Trade Practices Act*. These changes outside the narrow scope of the relevant legislation will have an impact around the common law legal world. The role of equitable remedies is changing. They are now a potent force for the unification of private and public law.

Equitable Estoppel

The application of estoppel at common law and equity to the exercise of statutory power is a topic itself deserving of a substantial paper.[55]

A number of species of estoppel were identified by Gummow J in *Minister for Immigration and Ethnic Affairs v Kurtovic*[56] as having a conceivable application to administrative law. These included estoppel by representation which comprises common law estoppel, relating to present facts, and equitable or promissory estoppel relating to the future. He also referred to issue estoppel and proprietary estoppel.

It is well established that a public authority cannot be required, by the application of doctrines of estoppel, to exceed its statutory powers or breach its statutory duties. That would involve equity amending the statute. That is not to say that a statutory power or duty might not, in appropriate circumstances, be capable, on general principles, of a construction accommodating obligations arising from equitable principles. But such a construction would by definition allow the performance of the obligation intra vires or in accordance with the relevant statutory duty. For example, in *Kurtovic* Gummow J recognised that there are cases where upon its proper construction the legislation may permit a decision-maker to waive procedural requirements. This does not involve an exception to the principles of ultra vires in favour of an estoppel doctrine but a process of construction.

Not only is estoppel unable to authorise ultra vires action, it cannot prevent or hinder the performance of a positive statutory duty or the exercise of a discretion intended to be performed or exercised for the benefit of the public or a section of the public.[57]

There may be put to one side the classes of case in which officials or public authorities enter the realm of private law by making contracts, acquiring or disposing of property or engaging in tortious conduct. There the private law, including equity, applies to them. This was well exemplified in *Verwayen v The Commonwealth* [58] where the Commonwealth was held estopped in negligence litigation from invoking a limitation period which it had previously indicated it would not invoke. It is increasingly a feature of modern life that statutory authorities engage in trade and commerce. The Full Court of the Federal Court has recently held, for the purposes of the application of the *Workplace Relations Act,* that the University of Western Australia is a trading corporation and also a financial corporation within the meaning of those terms in s 51(xx) of the Constitution – *Quickenden v O'Connor*.[59] Many other universities and public bodies with significant commercial operations would attract a similar characterisation.

In *Kurtovic* Gummow J referred to a number of cases where the dealings of public bodies with outsiders have attracted the operation of principles of estoppel and proprietary estoppel.[60] He noted the distinction drawn in the United States between proprietary and governmental capacities of public bodies. Where a public body acts in its proprietary capacity then an equitable estoppel may arise. Here his Honour drew an important distinction between the planning or policy level of decision-making by public authorities, in which statutory discretions are exercised, and operational decisions implementing such policy. He said:

> Where the public authority makes representations in the course of implementation of a decision arrived at by the exercise of its discretion, then usually there will not be an objection to the application of a private law doctrine of promissory estoppel. It must, however, be recognised that it may be difficult, in a given case, to draw a line between that which involves discretion and that which is merely 'operational'.[61]

The distinction applied also to the operation of doctrines of promissory estoppel. It is a distinction which, as his Honour recognised, may be difficult of application. Indeed in one sense it is paradoxically too easy resembling one of Julius Stone's categories of indeterminate reference and offering a mask for judicial choice.

His Honour also expressed the view that, before an estoppel can be raised against a donee of a statutory discretion it is necessary for the party seeking to raise the estoppel to have suffered detriment by his reliance on the expectations generated by the representor.

Some important observations concerning the availability of estoppel against the Executive were made subsequently by Mason CJ in *Attorney-General v Quin*[62] where his Honour said:

> The Executive cannot by representation or promise disable itself from or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power.

He cited with approval the observation of Gummow J in *Kurtovic* that in the case of a discretion there is a duty under the statute to exercise a free and unhindered discretion and that an estoppel cannot be raised to prevent or hinder its exercise. This is on the basis that the legislature intends the discretion to be exercised on a proper understanding of the statutory requirements. The repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding. Nevertheless Mason CJ did not deny the availability of estoppel against the Executive arising from conduct amounting to a representation if holding the Executive to its representation would not significantly hinder the exercise of the discretion in the public interest. He said:

> … as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.[63]

The possibility that estoppels may apply in public law is not foreclosed by the current state of authority in Australia.

The doctrine of legitimate expectations which attract particular requirements of procedural fairness in some cases[64] bears some resemblance to estoppel but is not itself an equitable doctrine. Nor is it a species of estoppel. In particular, in Australia, it does not afford substantive protection to the rights the subject of the claimed expectation. As with the application of estoppel to the exercise of statutory discretions it would entail curial interference with administrative decisions on their merits by precluding the decision-maker from ultimately making the decision which he or she considered most appropriate in the circumstances. In *Quin* Brennan J said of the concept of substantive protection:

> That theory would effectively transfer to the judicature power which is vested in the repository, for the judicature would either compel an exercise of the power to fulfil the expectation or would strike down any exercise of the power which did not.[65]

A submission in support of the use of a legitimate expectation to support endorsement of substantive rights was made in *Barratt v Howard*.[66] It was submitted that Mr Barratt had been led to believe that his office would not be terminated on the basis of his conduct at the time when it was terminated. It was argued that in the circumstances he had the legitimate expectation that 'prevented his termination in the manner adopted and on the grounds relied on.' That submission was rejected on the basis that, in Australia, there is no doctrine which recognises substantive rights by reason of a legitimate expectation, induced by official representations, that they will be afforded.

Fiduciary Obligations in Administrative Law

Fiduciary obligations are creatures of equity. The Latin word '*fiducia*' means trust. Originally applied to trust relationships in English law it has evolved a wider application covering a range of rules and principles of which it has been said:

> These rules are everything. The description 'fiduciary', nothing. It has gone much the same way as did the general descriptive term 'trust' one hundred and fifty years ago.[67]

The private law of fiduciary obligations requires persons entrusted with powers for another's benefit to observe a general equitable obligation, when exercising such powers, to act honestly in what they consider to be the interests of the other. In this category we will find company directors, trustees, liquidators, executors, trustees in bankruptcy and others. The repositories of such powers are subjected, by reason of their equitable obligations, to judicial review of their actions. And as Paul Finn has said:

> Perhaps not surprisingly, given the close resemblance which the fiduciary officer bears to the public official, this system of review reflects in a very large measure that described by the late Professor De Smith in Judicial Review of Administrative Action.

A distinction has been drawn between the concept of a trust enforceable in equity and that of a non-justiciable public or 'political' trust. The idea of a 'political' trust has been applied to the discharge by public officers of duties or functions belonging to the prerogative and authority of the Crown.[68] This has been said not to be a conventional but a 'higher sense' of the word.[69] The distinction was relied upon by the Privy Council in 1902 in a case involving the

allotment to a Maori Chief in 1870 of certain land over which native title had been extinguished. The land was to be held in trust by the Chief '… in the manner provided or hereinafter to be provided by the General Assembly for Native Lands held under trust'. Notwithstanding the use of the term 'trust' it was held that the allottee had taken absolutely and beneficially and that there was no trust in favour of the traditional owners of the land.[70]

There is no presumption or general rule that the imposition or assumption of a statutory duty to perform certain functions gives rise to fiduciary obligations notwithstanding that the word 'trust' may be used.[71] In *Bathurst City Council v PWC Properties Pty* Ltd[72] Gaudron, McHugh, Gummow, Hayne and Callinan JJ referred to the notion developed in decisions such as *Kinloch v Secretary of State for India*[73] that:

> … an obligation assumed by the Crown even if it be described as a trust obligation, may be characterised as a governmental or political obligation rather than a 'true trust'.

Later, their Honours observed, *Tito v Waddell* emphasised that, although not a trustee, the Crown might 'nevertheless [be] administering property in the exercise of the Crown's governmental functions…'. A trust for public purposes could fail because 'purposes of a public character would not necessarily qualify as charitable purposes'.[74] The existence of an unenforceable political trust is not inconsistent with the existence of particular duties imposed on public authorities which have a fiduciary character and are enforceable at law. The duty of local authorities in England to their ratepayers was said, as early as 1925, to be similar to that of the trustees or managers of the property of others.[75] It was designated as 'fiduciary' in *Bromley London Borough Council v Greater London Council.*[76] The duty may operate as a mandatory relevant consideration which informs the exercise of discretionary powers involving expenditure or levying of charges and is an element to which the Court will have regard in deciding whether a decision is unreasonable in the *Wednesbury* sense.[77]

In *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation* [78] Gummow J discussed with evident approval the approach taken by Dr Margaret Allars[79] to the taxonomy of *Wednesbury* unreasonableness and its classification into three paradigm cases. These were characterised by his Honour as follows:

1 The capricious selection of one of a number of powers open to an administrator in a given situation to achieve a desired objective, the choice being capricious or inappropriate in that the exercise of the power chosen involves an invasion of the common law rights of the citizen, whereas the other powers would not.

2 Discrimination without justification, a benefit or detriment being distributed unequally among the class of persons who are the objects of the power.

3 An exercise of power out of proportion in relation to the scope of the power.

Of these his Honour said:

> All of them are consistent with a view of Lord Greene's 'doctrine' as rooted in the law as to misuse of fiduciary powers: see Grubb, Powers, Trusts and Classes of Objects [1982] 46 Conv 432 at 438.[80]

The 'duty' identified in many of these cases arises out of particular statutory regimes. The use of the word 'duty' may be misleading. It may be no more than descriptive of a rule of construction which imports a requirement to act fairly in the sense of paying due regard to the interests of those who may be affected by the exercise of a power or discretion. So used, the idea of a fiduciary duty, in the statutory context, may be analogous to procedural fairness and able to be viewed either as an implication to be drawn from the statute or a judicially imposed gloss to be displaced only by clear words.

There is longstanding and continuing controversy about whether the common law of judicial review of administrative action rests on imputed legislative intention or judicially invented rules or some hybrid.[81] Whether or not a fiduciary relationship properly so called may be said to exist between the repositories of public power and those affected by its exercise, it is right to say that the classical fiduciary relationship between trustee and beneficiary '… is one particularly apt to illuminate the relationship between the government and the people'.[82]

Fiduciary Duties and Indigenous People

In the United States, Canada and New Zealand as well as in Australia the question whether governments owe fiduciary duties to indigenous people has been considered. The relationship between the Indian peoples and the United States government was described in fiduciary language in *Cherokee Nation v State of Georgia*.[83] Marshall CJ described Indian peoples as domestic dependent nations saying:

> Their relation to the United States resembles that of a ward to his guardian.[84]

The Supreme Courts of the United States in *US v Mitchell*[85] found the United States government to be liable in damages for mismanagement of forest resources on Indian Reservation lands. In that case a fiduciary duty arose from Federal Timber Management Statutes and other legislation under which the government had 'elaborate control over forests and properties belonging to Indians'. Reference was made to 'the undisputed existence of a general trust relationship between the United States and the Indian people' and the 'distinctive obligation of trusts encumbered upon the governments in its dealings with these dependent and sometimes exploited people'.[86]

In *Guerin v R*[87] the Supreme Court of Canada found the Crown in a fiduciary relationship to Indians whose lands had been surrendered to it for lease to a golf club. The lease was granted on terms which had not been discussed with and which were disadvantageous to the Indians. The grant was held to be a breach of the Crown's fiduciary duty. The nature of the Indian title and the statutory scheme for disposing of Indian land placed upon the Crown an equitable obligation enforceable by the Court to deal with the land for the benefit of the Indians. Dickson J (with whom Beetz, Chouinard and Lamer JJ concurred) said:

> This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

While it might be thought the judgment of Dickson CJC based the fiduciary duty upon the surrender of Indian lands to the Crown a broader interpretation of his judgment was open. In *R v Sparrow*[88] the relevant duty was founded upon a fiduciary obligation derived from the nature of Indian interests in the land.

New Zealand jurisprudence establishes the existence of the fiduciary relationship between the Crown and Maori people. These cases support the proposition that the Treaty of Waitangi created an enduring relationship akin to a partnership between the Crown and Maori, each accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.[89]

In Australia in *Mabo (No 2)*[90] it was submitted that Queensland was under a fiduciary duty or affected by a trust of which the Meriam people were beneficiaries in connection with their rights and interests in land. It was not contended that the trust or fiduciary obligation fettered legislative power. It was argued however that it limited the way in which power otherwise granted, for example, under Crown lands legislation, could be exercised. The claim for relief

in *Mabo (No 2)* included a claim for a declaration that Queensland was under a fiduciary duty or alternatively bound as a trustee to the Meriam people to recognise or protect their rights and interests in the Murray Islands.

Brennan J did not deal directly with the claim in his judgment. He did say, however, that:

> If native title were surrendered to the Crown in expectation of a grant of a tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation, but it is unnecessary to consider the existence or extent of such a fiduciary duty in this case.[91]

His reasoning about the existence and nature of native title and the extinguishment of native title did not involve any consideration of a fiduciary relationship between government and native title holders or indigenous people generally. Nor did Deane and Gaudron JJ afford any comfort to those who would argue for the existence of a fiduciary duty as an invalidating principle in respect of executive action extinguishing native title. They did say however:

> Notwithstanding their personal nature and their special vulnerability to wrongful extinguishment by the Crown, the rights of occupation or use under common law native title can themselves constitute valuable property. Actual or threatened interference with their enjoyment can, in appropriate circumstances, attract the protection of equitable remedies. Indeed, the circumstances of a case may be such that, in a modern context, the appropriate form of relief is the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title. The principle of the common law that pre-existing native rights are respected and protected will, in a case where the imposition of such a constructive trust is warranted, prevail over other equitable principles or rules to the extent that they would preclude the appropriate protection of the native title in the same way as that principle prevailed over legal rules which would otherwise have prevented the preservation of the title under the common law.[92]

Dawson J, having formed the view that traditional rights had been extinguished upon annexation of the Murray Islands, concluded that there was no fiduciary duty imposed on the Crown. Toohey J, alone among the judges, accepted the existence of such a duty arising directly from or by close analogy to equitable principle. It arose 'out of the power of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power'. The obligation was of the character imposed on a constructive trustee. The content of the obligation was to ensure the traditional title was not impaired or destroyed without the consent of, or otherwise having regard to, the interests of the title holders. It could not limit legislative power but the enactment of legislation could amount to a breach of the obligation.

Mason CJ in *Coe v Commonwealth*[93], a pleadings case, considered a claim for breach of fiduciary duty arising out of the enactment of a statutory power of alienation. He said:

> The existence of a fiduciary duty cannot render the legislation inoperative, though according to Toohey J it could generate a right to equitable compensation if the legislation constituted a breach of duty.[94]

The state of authority to this date is unpromising in relation to the identification of any fiduciary duty owed to indigenous people by reason of their status as such or as native title holders. If it does it would not appear to condition the validity of either legislative or executive acts, albeit its breach could give rise to a claim for equitable compensation. That is not to say that in this case, as generally, principles analogous to those governing fiduciary relationships may not inform the exercise of statutory power as mandatory relevant elements for consideration. Nor is it to exclude the possibility of an interpretive principle under which laws impacting on the rights of indigenous people should be construed by reference to fiduciary considerations where such a construction is open. There is at present no specific authority for such a proposition.

Conclusion

As may be seen from the foregoing review, administrative law and equity interact in a variety of ways from the level of general equitable principles informing the construction of statutes and the exercise of discretions to the specific applications of equitable remedies. The substantive application of equitable doctrines particularly relating to fiduciary duties and estoppels is problematic but open to future development. That openness holds the promise of a fruitful union between the two areas of law in the years to come.

Endnotes

1 Shorter Oxford English Dictionary.
2 *Sharp v Wakefield* [1891] AC 173 at 179 (Halsbury LC); See also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 (Kitto J) and *R v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1980) 144 CLR 45 at 49.
3 An interesting historical discussion of 'Equity and Good Conscience' Clauses in English Courts of Requests and Small Claims Tribunals is found in Geoffrey Sawer, The Administration of Morals in AR Blackshield (ed) *Legal Change – Essays in Honour of Julius Stone* Butterworths (1983) at 88-97.
4 *Public Service Act 1922* s 6.
5 *Barratt v Howard* (2000) 170 ALR 529 at 544.
6 Section 476 of the *Migration Act 1958* (Cth) prior to 2 October 2001 excluded judicial review in the Federal Court on the grounds of procedural fairness (other than actual bias). Section 474, introduced post-Tampa by the *Migration Legislation Amendment (Judicial Review) Act 2001*, purported in terms to exclude all judicial review albeit the Second Reading Speech recognised that it would be construed according to the principles in *Re Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. Its construction was considered by the High Court in *Plaintiff S157 v Commonwealth* (2003) 195 ALR 24. Recently there has been limitation by codification of the natural justice hearing rule effected by the *Migration Legislation Amendment (Procedural Fairness) Act 2002*.
7 See the discussion in *NAAV v Minister for Immigration, Multicultural and Indigenous Affairs* (2002) 193 ALR 449 at 585-586.
8 De Smith, Woolf and Jewell, *Judicial Review of Administrative Action* 5th Edition, Sweet & Maxwell (1995) 13-040-13-046.
9 See *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation* (1990) 96 ALR 153 at 167. In this context also the common law equality principle or anti-discrimination principle so called is of interest – Michael Taggart, 'The Province of Administrative Law Determined?' in Michael Taggart (ed) *The Province of Administrative Law* Hart (1997) 6-17.
10 *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121; *Aboriginal Land Council (NSW) v Aboriginal and Torres Strait Islander Commission* (1995) 131 ALR 559 and see Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action*, LBC (1996) at 379-381.
11 *Kruse v Johnson* [1989] 2 QB 291; *R v Immigration Tribunal; Ex parte Manshoon Bugum* [1986] Imm AR 385.
12 Joseph Story, Commentaries on Equity Jurisprudence (1884) Ch 1 par 3. Story traced this concept of equity through Justinian to Grotius and Puffendorf, Blackstone and Bracton.
13 Ibid at par 7.
14 (1908) 7 CLR 277.
15 Ibid at 304.
16 (1990) 171 CLR 1 at 18.
17 (1994) 179 CLR 427 at 437.
18 *R v Lord Chancellor; Ex parte Witham* [1998] QB 575; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; Dyzenhaus, Hunt and Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford Uni Commonwealth L Jo* 5-34.
19 (1991) 22 NSWLR 687.
20 Ibid at 698.
21 Ibid at 700.
22 Ibid at 700.
23 Ibid at 715.
24 Story, Ch 1 par 19.
25 *Bond v Hopkins* 1 Sch & Lefr 428 at 429 cited by Story at Ch 1 par 20.
26 FW Maitland, *Equity a Course of Lectures* 2nd Ed, Cambridge Uni Press (1936) at 19.
27 Ibid at 20.
28 Ibid at 20.
29 See Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* 4th Ed, Butterworths (2002) by R Meagher, D Heydon and M Leeming at 2-310 and 23-020 where the discussion of this question and of the

decision of Palmer J in *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487 is a touch overwrought; see also a useful discussion of this case and the judgment of the Court of Appeal in *Harris v Digital Pulse Pty Ltd* (2003) 197 ALR 626 in J Edelman, 'A "Fusion Fallacy" Fallacy?' (2003) 119 *LQR* 375 – 380.

30 *Income Tax Commissioners v Pemsel* [1891] AC 531.
31 *Attorney General for New South Wales v Trethowan* [1932] AC 526.
32 *Boyce v Paddington Borough Council* [1903] 1 CH 109.
33 WMC Gummow, *Statutes Equity and Federalism*, Cambridge Uni Press; and R French, 'Statutory Modelling of Torts' in Nicholas J Mullany (ed) *Torts in the Nineties* LBC (1997) Ch 7.
34 Mason A, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238 at 238.
35 *Elders Pastoral Ltd v Bank of New Zealand* (1989) 2 NZLR 180 at 193.
36 GE Dal Pont and DRL Chalmers, *Equity and Trusts in Australia and New Zealand* LBC Information Services (1996) at 116.
37 (1998) 194 CLR 247.
38 [1903] 1Ch 109.
39 (1980) 146 CLR 493.
40 (1981) 149 CLR 27.
41 (1995) 183 CLR 552.
42 *Bateman's Bay v Aboriginal Fund* above n 37 at 257.
43 Ibid at 259.
44 (1803) 5 US 137.
45 (2000) 199 CLR 135.
46 Ibid at 144.
47 Ibid at 145.
48 (1982) 151 CLR 342.
49 (2000) 199 CLR 135 at 146.
50 Ibid at 156.
51 Ibid at 157-158.
52 (1999) 200 CLR 591.
53 Ibid at 628.
54 Ibid at 628-629.
55 For an excellent and comprehensive treatment see J Thomson, 'Estoppel by Representation in Administrative Law' (1998) 26 *Fed L Rev* 83-113; E Campbell, 'Estoppel in Pais and Public Authorities' (1998) 5 *AJAL* 157-167; and EJ Morzone, 'Estoppel and Other Private Law Preclusionary Doctrines in Public Law' [1999] *Queensland Lawyer*, 135-138.
56 (1990) 21 FCR 193.
57 See fn 51 at 208 citing Halsburys Laws of England (4th Ed) Vol 44, 'Statutes' par 949.
58 (1990) 170 CLR 394.
59 (2001) 194 ALR 260.
60 (1990) 21 FCR 193 at 215.
61 Ibid at 215.
62 (1990) 170 CLR 1 at 17.
63 (1990) 170 CLR 1 at 18.
64 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 which may foreshadow a revisiting of *Teoh.*
65 Ibid at 39.
66 66 (2000) 170 ALR 529.
67 PD Finn, *Fiduciary Obligations,* Law Book Co (1977) 1.
68 This does not raise the question whether the exercise of prerogative or executive powers are non-justiciable. That the limits of such powers may be tested in judicial review is clear – see the discussion in *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 368-369 (Gummow J) and its application in *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 242.
69 *Kinloch v Secretary of State for India in Counsel* (1887) 7 App Cas 619 at 625-6.
70 *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56 at 72 per Lord Lindley.
71 *Tito v Waddell (No 2)* [1977] Ch 106; *Swain v Law Society* [1983] 1 AC 598. See also Hogg, *Liability of the Crown*, 2nd Edition, Caswell (1989) at 186-188.
72 (1998) 195 CLR 366 at 591.
73 (1887) 7 AppCas 619.
74 At 591-592 citing *Blair v Duncan* [1902] AC 37.
75 *Roberts v Hopwood* [1925] AC 578 at 596 (Lord Atkinson) and 603-4 (Lord Sumner).
76 [1983] 1 AC 768 at 815 (Lord Wilberforce) and 838 (Lord Scarman).
77 Michael Supperstone and James Goudie (ed)*, Judicial Review,* Butterworths (1992) at 266-7.
78 (1990) 96 ALR 153.
79 Margaret Allars, *Introduction to Australian Administrative Law,* Butterworths (1990) at par 5.54-5.57.
80 (1990) 96 ALR 153 at 167.

81 For contending views see Wade and Forsyth, *Administrative Law* 8th Edition, Oxford University Press, New York, (2000) at 36; Forsyth 'Of Fig Leaves and Fairytales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) *Cambridge L Jo* at 122-40; Laws, 'Law and Democracy' [1995] *Public Law* 72 at 79; M Elliott, *The Constitutional Foundations of Judicial Review* Oxford, Hart, (2001) at 109-10; Paul Craig 'Competing Models of Judicial Review' [1999] *Public Law* 428 at 446; TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?' (2002) *Cambridge L Jo* 87.
82 GE Dal Pont and DRL Chalmers, *Equity and Trusts in Australia and New Zealand* LBC Information Services (1996) at 117.
83 5 Pte 1 (1831).
84 See also *Worcester v State of Georgia* 6 Pte 515 (1832); *United States v Kagama* 118 US 375 (1886) at 383-4.
85 463 US 206 (1983).
86 At 225.
87 (1984) 13 DLR 4th 321.
88 (1990) 70 DLR (4th) 385.
89 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.
90 (1992) 175 CLR 1.
91 Ibid at 60.
92 Ibid at 113.
93 (1993) 118 ALR 193.
94 At 204.