WAIVER BY AGENCIES OF GOVERNMENT OF STATUTORY PROCEDURAL REQUIREMENTS

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I. INTRODUCTION

From time to time questions arise about when an agency of government is permitted to waive some statutory requirement. The requirement will usually be one relating to a matter of procedure. It may be one about the time within which, or the form in which applications are to be made, in which case the obligation, if any, to comply with the requirement will normally fall on individuals who wish to make an application to the relevant government agency.

This article is primarily concerned with waiver of statutory requirements of this kind. It begins with a short analysis of the concept of waiver and its relationship with the doctrine of estoppel by representation. It proceeds to a consideration of the somewhat elusive and unsatisfactory distinction which courts have made between mandatory (or imperative) provisions and directory provisions and how that distinction bears on the question of when and when not a procedural requirement may be waived. Attention is then given to a series of cases in which there was an issue about whether some statutory requirement could be waived by a governmental agency or about whether the agency could be estopped, by representation, from insisting on compliance with the requirement.

II. WAIVER, ESTOPPEL AND ELECTION

As a legal concept, the term waiver is notoriously imprecise.[1] It is employed in a variety of legal contexts to express the idea that the holder of some legal right may, by some voluntary act, abandon or extinguish that right.[2] The principles of law which may be invoked to support a conclusion that a right has

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1 Its imprecision was commented upon in *Commonwealth v Verwayen* (1990) 170 CLR 394.

2 *Banning v Wright* [1972] 1 WLR 972 at 978-9.

been waived are not, however, necessarily the same. Waiver of a contractual right may result simply from a variation of the contract. Sometimes a right is said to be waived by operation of the principle of election which, shortly stated, is that a person is bound by a deliberate choice between alternative rights which are inconsistent with one another. Sometimes a conclusion that a right has been waived rests on application of principles of estoppel.[3]

Whether there is an independent doctrine of waiver, separate and distinct from the law of contract and doctrines of estoppel and election, is a matter on which judicial opinions have been divided. In *Commonwealth v Verwayen* two Justices of the High Court of Australia, Mason CJ and Deane J, doubted the existence of a separate doctrine of waiver and accordingly dealt with the respondent's (plaintiff's) plea that the Commonwealth had waived its right to rely on certain defences as if it were the same as the further plea of estoppel by representation.[4] The other five Justices of the Court accepted that there is a doctrine of waiver which is *sui generis*, and each of them dealt with the plea of waiver as one which was separable from that of estoppel.

Unfortunately, the opinions of these five Justices (Brennan, Dawson, Toohey, Gaudron and McHugh JJ) do not disclose a common, coherent view of the elements of this independent doctrine of waiver. The Justices were in agreement only in relation to the following elements:

(a) That which is waived must be a legal right possessed by the party alleged to have waived it, and that right must be one which exists solely for the personal or private benefit of that party. (This limitation, they accepted, has particular relevance where the right in question is conferred by statute).

(b) Rights capable of being waived are not limited to those cases where a person holds alternative rights which are inconsistent with one another.

(c) A party may be held to have waived a right notwithstanding that he or she is not estopped from exercising it. In particular a person may be held to have waived a right possessed by him or her notwithstanding that it is not shown that another party has acted in reliance on the act of waiver and would incur detriment if the first party were allowed to assert the right alleged to have been waived.

In *Commonwealth v Verwayen* the plaintiff, Verwayen, contended that, by reason of certain firm undertakings given on its behalf, the Commonwealth had waived its right to plead two defences to the action (an action for negligence)

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3 See *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326; *Kammins Co v Zenith Investments* [1971] AC 850 at 883. These and other relevant judicial precedents on waiver, estoppel and election are referred to in *Commonwealth v Verwayen* (1990) 170 CLR 394. For comments on this case see M Spence, "Estoppel and Limitation" (1991) 107 *LQR* 221; JW Carter, "Waiver of Contractual Rights Distributed" (1991) 4 *Journal of Contract Law* 59; M Allars, "Tort and Equity Claims against the State" in PD Finn (ed), *Essays on Law and Government, Vol 2: The Citizen and the State in the Courts*, Law Book Company (1996) 49 at 93-9. See also *Commonwealth v Clarke* [1994] 2 VR 33.

4 Note 1 *supra* at 407-9, per Mason CJ; at 448-51, per Deane J. The most recent consideration of estoppel by conduct had been in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

against it, one of these defences being that the action was statute barred under the applicable statute of limitations.[5] By not raising these defences, the Commonwealth effectively admitted liability, leaving the only matter to be determined that of damages. Later the Commonwealth sought and obtained the leave of the trial court to amend its defence to include the two defences.

It was common ground among the Justices of the High Court who considered the question of waiver that these defences were not available unless pleaded. All but one of them agreed also that the defence available under the statute of limitations could be waived by a defendant.[6] Two of the judges, Toohey and Gaudron JJ, concluded that, despite the fact that the Commonwealth had been given leave to amend its defence, it had, by its conduct, waived its right to rely on the defences contained in the amended pleadings. They decided against the Commonwealth on that ground alone.[7] Brennan and Dawson JJ in contrast concluded that the Commonwealth had not waived its right. This conclusion was based essentially on the notion that a right cannot be waived until an occasion for the exercise of the right occurs. Given that pleadings can be amended, with leave, at any time prior to judgment, a right to rely on a defence which is available only if pleaded cannot be waived until the moment before judgment.[8]

McHugh J also concluded that the Commonwealth had not waived its right to rely on the statutory defence raised in its amended pleadings, but he did so because, in his view, the case fell outside the scope of the doctrine of waiver of statutory rights, a doctrine which he characterised as "outside the categories of election, contract and estoppel".[9] The cases encompassed by this independent doctrine were, he said, limited to:[10]

> cases where a statute has conferred a right on A, subject to the fulfilment of a condition for the benefit of B, and B has waived the condition by taking the next step in the course of procedure without insisting on A fulfilling the condition... [W]here the existence of a statutory right depends upon the fulfilment of a condition precedent, a person entitled to insist on the fulfilment of that condition may dispense with its compliance unless it is enacted for the benefit of the public, and that person will be held to have waived compliance with the condition if he or she knowingly takes or acquiesces in the taking of a subsequent step in the course of procedure laid down by the statute after the time for the other person to fulfil the condition has passed.

While a majority of the Justices in *Commonwealth v Verwayen* accepted the existence of a doctrine of waiver of rights which is separate from doctrines of election and estoppel, the differences of opinion among them on the application of that doctrine in the particular case underscore the imprecision of the concept

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5 The other defence was based on *Groves v Commonwealth* (1982) 150 CLR 113, a case concerning the circumstances in which governments may be held liable for the negligence of members of defence forces, in relation to other members of those forces, during peacetime, but in the course of defence exercises.

6 McHugh J considered that waiver was not open.

7 Note 1 *supra* at 463-88.

8 *Ibid* at 424-8, per Brennan J; at 456-9, per Dawson J.

9 *Ibid* at 497.

10 *Ibid.*

of waiver and also its indistinctness from that of estoppel by conduct, and in particular, conduct indicative of intention.

Toohey and Gaudron JJ, as has already been pointed out, decided the appeal solely on the basis that the Commonwealth had, by its conduct, waived its rights. On their view of the doctrine of waiver, a party alleging waiver of right by a party in opposition who seeks to assert that right need not establish detriment resulting from reliance on the alleged act of waiver if that act is held to be binding.[11] The arguments of these two Justices in support of their conclusions on the waiver issue nevertheless depend to some extent on concepts of estoppel.

The other five Justices of the Court rejected the contention that the Commonwealth had waived its right to rely on the defences raised in its amended pleadings. But they went on to consider whether the Commonwealth was, by virtue of its representations as to defences it would not raise in the plaintiff's action, estopped from raising those defences. They were in agreement that the Commonwealth's representations were of a kind capable of creating an estoppel of the promissory variety. They were also agreed that all of the elements of estoppel of that variety had been satisfied.[12]

They disagreed, however, on the appropriate remedy. Deane and Dawson JJ thought the Commonwealth should be held to its undertaking.[13] Mason CJ and Brennan and McHugh JJ, on the other hand, thought that it would be sufficient for the Commonwealth to be ordered to compensate Verwayen for the expense and inconvenience he had sustained in bringing and continuing his action, in reliance on the Commonwealth's assurance, until the amendment of the Commonwealth's pleadings.[14] That was the price the Commonwealth would have to pay for its later decision to resile from its undertaking. But in result these three judges were in a minority.

The questions the High Court had to decide in *Verwayen*, it needs to be emphasised, did not really depend on the status of one of the parties as a governmental party. The Commonwealth had been sued in the capacity of a defendant to an ordinary action for damages for the tort of negligence. By virtue of s 64 of the *Judiciary Act* 1903 (Cth) its liability for that alleged tort was to be adjudicated, prima facie, according to the substantive and procedural law applicable in like suits between non-governmental parties. There was also no dispute that s 64 of the *Judiciary Act* was effective to make applicable to the action against the Commonwealth, the statute of limitations attracted by the same section and "choice of law" rules. *Verwayen*, in short, was decided as if it had been an ordinary suit between private individuals. Its main significance for present purposes is that it revealed differences of judicial opinion about the relationship between doctrines of waiver and of estoppel by conduct.

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11 *Ibid* at 473, 485.

12 *Ibid* at 413-7, per Mason CJ; at 428-31, per Brennan J; at 446-51, per Deane J; at 461-3, per Dawson J; cf McHugh J at 501-4.

13 *Ibid* at 446-9, per Deane J; at 461-3, per Dawson J.

14 *Ibid* at 416-7, per Mason CJ; at 429-31, per Brennan J; at 504, per McHugh J. The discretion available to a court in shaping an appropriate remedy in cases of equitable estoppel had previously been considered by the High Court in *Waltons Stores* note 4 *supra*.

III. MANDATORY AND DIRECTORY PROVISIONS

In the past some judges have taken the view that whether a statutory procedural provision may be waived depends, at least in part, on whether the provision is directory or mandatory (imperative).[15] A directory provision, it has been suggested, can be waived whereas a mandatory provision usually cannot. In *Minister for Immigration and Ethnic Affairs v Kurtovic*,[16] for example, Gummow J referred to "cases where, upon its proper construction, the legislation may permit the decision-maker to waive procedural requirements or observance of those procedural requirements which may be regarded as directory."[17] Similarly in *SS Constructions Pty Ltd v Ventura Motors Pty Ltd*[18] Gillard J stated that:

> waiver of an irregularity can only be admitted where the breach is of a directory provision in a statute and not where it is of a peremptory condition for the exercise of a power. Where the legislative directive is mandatory and the observance of the provisions is in effect a condition precedent to the exercise of a statutory power, then the purported exercise of the statutory power has no validity whatever, where the condition for the exercise of the power has not been fulfilled.[19]

To state that a provision is mandatory rather than directory is to express no more than a conclusion about its legal effect. When a court describes a provision as mandatory, what it usually means is that, in its judgment, failure to comply with it invalidates acts to which the provision applies. This is not to say that when courts have characterised provisions as being merely directory they have regarded non-compliance with them as of no legal consequence whatsoever.

On one view a directory provision is one which requires no more than substantial compliance.[20] There is yet another view which distinguishes between two types of directory provisions: those which can be disregarded entirely without affecting the validity of resulting acts, and those with which substantial compliance is necessary to validate resulting acts.[21]

The concept of substantial compliance has been criticised.[22] Some statutory provisions, it has been pointed out, are of a kind which do not admit degrees of compliance. Only one course of action can constitute compliance. Yet other

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15 On the mandatory/directory distinction generally see M Allars, *Introduction to Australian Administrative Law*, Butterworths (1990) at [5.26]-[5.28]; M Aronson and B Dyer, *Judicial Review of Administrative Action*, LBC Information Services (1996), pp 349-53; DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, Butterworths (4th ed. 1996) Chap 11; J Evans, "Mandatory and Directory Rules" (1981) 1 *Legal Studies* 227.

16 (1990) 92 ALR 93.

17 *Ibid* at 112.

18 [1964] VR 229.

19 *Ibid* at 245-6.

20 See DC Pearce and RS Geddes, note 15 *supra*, at [11.22]-[11.23].

21 See *Victoria v Commonwealth* (1975) 134 CLR 81 at 179 (Stephen J) and cases cited by M Aronson and B Dyer, note 15 *supra*, p 350 note 90.

22 See M Aronson and B Dyer, *ibid*, pp 350-2; J Evans, note 15 *supra*; DC Pearce and RS Geddes, note 15 *supra* at [11.22]-[11.23].

provisions, characterised as mandatory, may be expressed in terms which allow some discretion in the manner of their fulfilment.[23] Another criticism of the concept of substantial compliance is that it confuses the question of whether there has been a breach of a statutory provision with that of the legal consequences of the breach.[24]

In the recent case of *Project Blue Sky v Australian Broadcasting Authority*[25] the High Court of Australia has virtually rejected the distinction between mandatory and directory provisions in statutes on the ground that it is singularly unhelpful in determination of whether acts done in disregard of the statutory provisions can be recognised as valid. This case did not concern provisions of a procedural character. Nevertheless what the Court had to say on the mandatory/directory distinction is clearly relevant when it comes to determining the legal consequence of failure to comply with provisions of that nature. In their joint opinion, McHugh, Gummow, Kirby and Hayne JJ made the following observations:

> The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court determining the validity of an act done in breach of a statutory provision may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory, and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of that an act done in breach of the provision is invalid.[26]

The matter raised on appeal before the High Court in the *Project Blue Sky* case was not one in which the Court was required to consider when and when not statutory procedural requirements may be waived. Nonetheless the approach clearly suggests that the question of the waivability of such requirements should be decided with reference to their perceived purpose. Even before the *Project Blue Sky* case, there had been cases in which courts had recognised that, whilst the mandatory character of a statutory procedural provision was relevant in determining whether that provision was capable of being waived, the question of whether the particular provision could be waived ultimately depended on its purpose. Was it a provision enacted for the personal benefit of individuals, or was it rather a provision enacted to serve some broader public interest? If it was a provision of the former kind, it could be waived by individuals for whose benefit it had been enacted. But if it was a provision of the latter kind it could not be waived.[27]

SS Constructions Pty Ltd v Ventura Motors Pty Ltd[28] was clearly a case in which the mandatory procedure was incapable of waiver.

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23 M Aronson and B Dyer, *ibid*, pp 350-2. See also *JJ Richards and Sons Pty Ltd v Ipswich City Council* (1995) 86 LGERA 417 at 419-20.

24 J Evans, note 15 *supra* at 231.

25 (1998) 153 ALR 40.

26 *Ibid* at para 93. See also at paras 37-41, per Brennan CJ.

27 DC Pearce and RS Geddes, note 15 *supra*, para 11.29.

28 [1964] VR 229.

The procedure there related to the manner in which planning authorities were to deal with applications for planning permits. The legislation, Victoria's *Town and Country Planning Act* 1961, provided that if a planning authority formed the opinion that the proposed land development which was the subject of an application for a planning permit might occasion substantial detriment to others, the authority should direct the applicant to give notice of the application to the persons affected. That notice had to set out "clearly the location of the land and the purpose and effect of the permit sought". Those so notified had a right to object to the grant of the application and have their objections considered by the planning authority. It was held that a planning authority could not disregard the statutory requirements as to the content of a notice it caused an applicant to serve on persons who, by the authority's own determination, were potential objectors. It could not therefore make a valid determination on the application in the absence of compliance with the notice requirement. It could not do so even though a person who received a defective notice, who lodged an objection and then appealed against the planning authority's decision to grant the application, did not, before the appeal, contest the sufficiency of the notice.

In *Project Blue Sky Inc v Australian Broadcasting Authority*[29] McHugh, Gummow and Kirby JJ placed this case in the category of one in which "an essential preliminary to the exercise of a statutory power or authority" - here the power to grant a planning permit - had not been fulfilled. In other words, the notice requirement went to the jurisdiction of the planning authority. It was a requirement for the benefit of potential objectors to grant of the planning permit sought. Clearly it was a requirement which neither the planning authority or a single objector should be permitted to waive.

IV. WAIVER BY PUBLIC BODIES

In many cases a plea that a public body has waived a right will fail for the reason that the right in question is statutory and is incapable of being waived by the public body because it rests on public policy or expediency. The waivability of the statutory rights of public bodies has arisen most commonly in relation to statutory provisions governing the manner in which their public powers are to be exercised. Cases of this type, some of which have been decided with reference to estoppel doctrine rather than waiver, fall into the following main categories:

(a) Cases in which the governing legislation prescribes that an applicant for a permit or benefit should make application in writing, or in writing and in a prescribed form.

(b) Cases in which the governing legislation prescribes that the public body should record its decision in writing, or in writing and in a particular form.

29 Note 25 *supra*, para 92.

(c) Cases in which the governing legislation prescribes time limits within which applications or objections have to be made to a public body.

A. Forms of Application

Cases in which a public body is alleged to have waived a statutory requirement that applications to it for an exercise of its authority be in a particular form, in that the body has decided an application which was not in accordance with that form, are probably best regarded as cases of estoppel rather than waiver. This is not, however, to say that the waivability of the statutory requirement is not relevant in determination of whether a plea of estoppel can be sustained.

In *Wells v Minister of Housing and Local Government*[30] a majority of the English Court of Appeal concluded that a statutory requirement of the type here in question could be waived by the public body to whom application had been made, though they did not refer to any of the case law on waiver of statutory rights. The circumstances of the case were these:

Wells had applied in writing for a planning permit. The official reply was that a permit was not needed as the proposed land use described by Wells in his application was already a permitted development. In reliance on that assurance, Wells erected a building on the land. But later the planning authority served an enforcement notice upon him which directed him to remove the building, thereby countermanding the previous 'ruling'. What was in contest in the judicial proceedings was the validity of that notice. That issue fell to be determined with reference to provisions in the governing planning legislation which dealt with forms of application.

There was a provision in the legislation which said that if a person who proposed to carry out any operations on land, or to alter the use of it, wished to obtain an authoritative ruling on whether the proposed course of action would relevantly amount to "development" of the land, and, if so, whether that development had to be authorised by grant of a planning permit, that person could apply to the local planning authority for a determination of that issue. Wells had not made an application under that provision. He had applied for a planning permit under another section in the legislation. Nevertheless a majority of the Court of Appeal concluded that his application for a planning permit could be, and had in fact been, treated as an application under the special provision, and that it had been so determined. The determination of it was, the majority held, irrevocable.

Lord Denning MR, of the majority, justified the majority's conclusion by broad statements such as: "[A] public authority cannot be estopped from doing ... its duty, but ... it can be estopped from relying on technicalities"; and "[A] defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid."[31]

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30 [1967] 1 WLR 1000. See also *Ku-ring-gai Municipal Council v Arthur H Gillott Pty Ltd* (1968) 15 LGRA 116.

31 *Ibid* at 1007.

In dissent, Russell LJ expressed the view that a land planning body, as "the guardian of the planning system", is "not a free agent to waive statutory requirements".[32]

In *Western Fish Products Ltd v Penwith District Council*[33] counsel on both sides submitted that *Wells* was wrongly decided, but the Court of Appeal did not find it necessary to rule on that contention.[34] For the purposes of the case before it, the Court found it sufficient to say that the exception recognised by the majority in *Wells* to the general rules denying estoppels against public bodies had no application in the present case. The Court of Appeal nonetheless admitted that one of the exceptions to those general rules was this: "If a planning authority waives a procedural requirement relating to an application made to it for exercise of its statutory powers, it may be estopped from relying on lack of formality".[35]

There have been decisions of courts in New South Wales which are reflective of the reasoning of the majority in *Wells*. Those decisions have been to the effect that unsuccessful applicants for planning permits are not deprived of their statutory rights to appeal against the refusal of their applications merely because the respondent public body contends that its decision was a nullity in that the application for a permit was not in proper form.[36]

Where a statute requires that applications of a certain type be in writing, there may be an initial question of whether the requirement is even mandatory. That was a question which arose in *Formosa v Secretary of Department of Social Security*[37] and the court's conclusion in relation to it clearly affected its subsequent consideration of the appellant's plea of estoppel by conduct. A Full Court of the Federal Court of Australia held, by a majority, that provisions in the *Social Security Act* 1947 (Cth) which stipulated that a grant or payment of a pension should not be made except on the making of a claim for the pension, and that claims should be made in writing in accordance with an approved form, were mandatory.[38] Their reasons were these:[39]

> The subject matter of the claim is the disbursement of public moneys consequent upon the satisfaction of various criteria laid down in the statute for the payment of particular pensions, benefits and allowances. It would be to attend the administration of the legislation with the greatest uncertainty both for alleged claimants and for those charged with administration of the legislation if oral applications were to be treated as sufficient for the making of a claim. We would not see these difficulties as alleviated by the prospect of proceedings in a court or before an administrative tribunal to establish the making of oral claims in disputed cases.

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32 *Ibid* at 1015.

33 [1981] 2 All ER 204.

34 *Ibid* at 221.

35 *Ibid.*

36 *Randwick Municipal Council v Broten* [1964-5] NSWR 1445; *Hornsby Shire Council v Devery* [1965] NSWLR 939.

37 (1988) 81 ALR 687. See also *Schweiker v Hansen* (1981) 450 US 785.

38 Justice Burchett dissented.

39 Note 37 *supra* at 694. See also the judgment at 693.

The majority went on to hold that no estoppel could operate to remove the statutory prohibition on grant of a pension except upon a formal application for it. So although an applicant might have been misled by advice of a departmental officer and, on the basis of that advice, did not lodge a written application for a pension at the time he or she became qualified to be granted the pension, no pension could be granted until a formal application was made. Even when a formal application was made, payment of pension in respect of a period prior to the claim could not be made. Such payment "would conflict with the ... principle that estoppel does not operate so as to sanction the appropriation of public money without the authority of the parliament".[40]

When legislation prescribes something like a form of application it may include in a schedule the requisite form. Even though a decision-maker may not have power to decide an application unless it has been presented in the prescribed form, an application made in substantial compliance with the prescribed form may be sufficient. Most cases of this kind will be covered by a provision like s 25C of the *Acts Interpretation Act* 1901 (Cth). This provides that:

> Where an Act prescribes a form, then unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient.

Similar provisions appear in the Acts interpretation statutes of the other Australian legislatures, except Tasmania's.[41] They probably do no more than restate a principle of common law.[42]

There can, of course, be room for dispute about whether in a particular case there has been substantial compliance with the prescribed form. In *JJ Richards and Sons Pty Ltd v Ipswich City Council*[43] the Queensland Supreme Court held that the application made for the required Council consent to the work of removal of refuse was not in substantial compliance with the form of application prescribed by regulations. The material which had been supplied by the applicant was altogether insufficient to enable the Council to consider the application properly. The statutory requirement that an application be in the prescribed form was said to be mandatory, but even if it were assumed that an application in that form was not a prerequisite for the grant of consent, an application still had to be in substantial compliance with that form.[44] The Court also held that since the requirement that an application be in a prescribed form had been imposed for the benefit of the public, it was not one the Council could waive.[45] The Council had therefore properly refused the application.

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40 *Ibid* at 696.

41 *Interpretation Act* 1967 (ACT), s 13; *Interpretation Act* 1987 (NSW), s 80; *Interpretation Act* (NT), s 68; *Acts Interpretation Act* 1954 (Qld), s 49; *Acts Interpretation Act* 1915 (SA), s 25; *Interpretation of Legislation Act* 1984 (Vic), s 53; *Interpretation Act* 1984 (WA), s 74.

42 See *Hamilton v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 35 ALD 205 at 210 (FC).

43 (1995) 86 LGERA 417 (Thomas J).

44 *Ibid* at 419-20.

45 *Ibid* at 420. *Commonwealth v Verwayen*, note 1 *supra* at 420, per McHugh J, was cited.

B. Form of Decisions

When a public body is invested with a power to grant licences and the empowering statute requires licences to be in writing, that requirement is invariably regarded as mandatory and one which can neither be waived nor overridden by any estoppel against the licensing body.[46] Where there is such a requirement it is certainly unsafe for an applicant for a licence to act in reliance on an oral communication that a licence has been granted.

The reasons for treating such requirements as mandatory and ones which cannot be waived were explained by the House of Lords in *Epping Forest District Council v Essex Rendering Ltd.*[47]

The legislation under consideration in that case prohibited the establishment of offensive trades without the written consent of a local authority. The company and its predecessor in title had been unaware of this prohibition, and for a period of 23 years had carried out an offensive trade on their premises, with the knowledge of the local authority. The company was eventually prosecuted and convicted of violating the statutory prohibition. Its appeal against conviction was dismissed first by the Divisional Court and then by the House of Lords. The latter appeal was limited to the question of whether the requirement that the local authority's consent be in writing was mandatory or directory only - directory in the sense that consent could be given or implied by a course of conduct over a period of years.

Lord Templeman, with whom the other Lords of Appeal agreed, began by stating that:

> When Parliament enacts that a consent shall be in writing any other form of consent is usually ineffective. But a consideration of the objects sought to be achieved by the legislation and of the consequences of denying the efficacy of any other form of consent may lead to the conclusion that Parliament was more concerned with the substance than the form of the consent.[48]

There were several reasons for regarding the present requirement that consent be in writing as mandatory. First "[f]rom the point of view of the local authority and the public it ... [was] important that the grant of consent ... [should] not be accidental or informal". Secondly, the activity which was prohibited without written consent was a criminal offence. "Prosecution, defence and magistracy must be able to determine whether an offence has been committed without recourse to vague or disputed recollections regarding events or conversations which might or might not constitute consent binding on the local authority."[49] Lord Templeman considered the argument on behalf of the company that hardship would result if the requirement were held to be mandatory and dealt with it as follows:

> Where an offensive trade is established and carried on, money is expended and goodwill is acquired in reliance on the knowledge, consent and approval of the local authority and their qualified representatives. But hardship is a matter for the local

46 *Howell v Falmouth Boat Construction Co Ltd* [1951] AC 837.
47 [1983] 1 WLR 158.
48 *Ibid* at 161-2.
49 *Ibid* at 162.

> authority. Where an offensive trade has been carried on for a long period with the knowledge, approval and consent of the local authority and no change has occurred or is threatened in the matter or extent of carrying on the trade in the future, the applicant for consent in writing will have strong grounds for urging and expecting a grant which will legitimise his activities for the future.[50]

The mischief of holding the statutory requirement to be directory outweighed "the possibilities of individual hardship".[51]

It should be noted that while Lord Templeman did not go so far as to suggest that, by reason of its conduct, the local authority was obliged to grant the company its written application for consent (which application had been refused but which was the subject of a pending appeal to the Crown Court), his remarks suggest that in dealing with that application, the local authority was at least bound to take its prior conduct into consideration.

C. Time Limits

Statutory provisions which impose time limits affecting the exercise of the rights and powers of public bodies are of two broad types. Provisions in the first category are typically those which limit the time within which persons seeking a determination in relation to their case have to make application or else lodge an objection or a defence to an application made by another. Provisions of this type include those contained in statutes of limitations and those limiting the time for lodging appeals or making applications for judicial review. Provisions in the second category include those which limit the time within which a public body may exercise a power of its own motion, and those which limit the time within which a public body must take specified action in order to effectuate a valid determination made by it.

Here we are concerned only with the waivability of time limitations within the first category.

Time limitations within this category are considered to be incapable of waiver by anyone if their fulfilment is a condition precedent to the exercise of jurisdiction.[52] Most statutes of limitation are regarded as not imposing limits on the jurisdiction of courts to entertain actions which are brought outside the prescribed limitation period. They are regarded simply as a bar to remedy. The right of a defendant to rely on such a statute as a defence is also regarded as a right for the defendant's personal benefit and therefore capable of being waived by him or her.[53]

There is no general rule about whether limitations regarding the time for lodging appeals go to the jurisdiction of the appellate body. In *Park Gate Iron Co v Coates*[54] the Court of Common Pleas characterised a provision which allowed an appeal from the County Court, and which obliged an appellant to

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50 *Ibid.*

51 The House of Lords alleviated the hardship to the company by discharging the lower court's order for costs against it and making no costs award against it on the appeal.

52 *Commonwealth v Verwayen*, note 1 *supra* at 404, per Mason CJ; at 425, per Brennan J.

53 *Ibid.*

54 (1870) LR 5 CP 634.

give the respondent written notice of appeal and security for costs within ten days, as a mere matter of practice and procedure, which, being entirely for the benefit of respondents, could be waived by them. Wade and Forsyth suggest that there are some statutory conditions for the exercise of jurisdiction which are jurisdictional only in the sense that non-compliance with them will result in loss of jurisdiction if the person entitled to protest against the exercise of jurisdiction on the ground of non-compliance takes objection at the right time.[55]

When a statute confers a right of appeal against decisions of a public body and limits the time within which appeals must be lodged, without allowing the appellate tribunal any discretion to extend time, the time limit may be held to be a limit on the tribunal's jurisdiction or else as a mandatory provision incapable of waiver by the respondent. Whichever view is taken the result is the same. The tendency has been to treat time limitations of this variety as incapable of waiver on the ground that they serve a public purpose and are not for the personal or private benefit of the body whose decisions are subject to appeal.

In *Reckitt & Coleman (New Zealand) Ltd v Taxation Board of Review*,[56] for example, the New Zealand Court of Appeal held that it was not open to the Commissioner for Inland Revenue to waive a limitation on the time within which taxpayers were required to lodge their appeals since the 'right' in question concerned "a matter in which every citizen has an interest".[57] The Court's underlying concern seems to have been that, if the Commissioner was allowed to waive the time limit, the power of waiver might be exercised arbitrarily and contrary to the public interest in the "due and impartial administration of a revenue statute".[58]

Considerations of public interest were also paramount in *Ross v Australian Postal Commission*.[59] The appellant in that case was a postman who had been suspended by the Commission. He sought to exercise his right to appeal to a Disciplinary Appeal Board. His notice of appeal had been posted outside the period prescribed by regulations. The Appeal Board dismissed the appeal on the ground that the provision regarding the time for lodging appeals was mandatory and that non-compliance with it deprived it of jurisdiction. On an application for judicial review of the Board's decision, Lockhart J held the time limit to be mandatory and also one which was probably incapable of being waived. He characterised it as mandatory having regard to the purpose of imposing it, which was "to ensure that the Commission knows with certainty whether an appeal has been brought from its decision".[60] In his opinion "[i]t would create uncertainty, inconvenience and injustice in the service of the Commission if the limitation as to time ... was merely directory". On the facts of the case, Lockhart J concluded that the conduct of the Commission was not such as to constitute an act of

55 HWR Wade and CF Forsyth, *Administrative Law*, Clarendon Press (7th ed 1994), pp 273-4.
56 [1966] NZLR 1032.
57 *Ibid* at 1042, per Turner J.
58 *Ibid*.
59 (1983) 69 FLR 376.
60 *Ibid* at 382.

waiver of the time limit,[61] but he was inclined to the view that the Commission could not in any event waive the limitation. His reasons were that:

> The Commission is not a private citizen. It is a statutory body concerned to ensure the existence of an efficient service. The dismissal of one of its officers will frequently be followed by the appointment of someone in his place. The efficiency and the contentment of the service, the making of appointments and the terms on which they are made require certainty. It would perhaps be strange if a Disciplinary Appeal Board had jurisdiction to hear an appeal at any time after the Commission's decision to dismiss the employee was communicated to him.[62]

The waivability of time limits by public bodies has arisen not only in relation to their position as defendants to civil actions and respondents to appeals. It has arisen also in relation to provisions prescribing the time within which applications must be made to them for grant of some benefit under a statutory scheme. The scheme will usually be one the administration of which involves a choice by the public body between a number of qualified applicants, having regard perhaps to the limited resources available to meet the claims of those applicants, or which also involves consideration of objections to the grant of a particular application. The waivability of time limitations of this variety also entails determination of whether the limitations are mandatory, but if they are so characterised, it is likely that they will also be regarded as incapable of being waived by the public body whose task it is to make decisions in relation to the applications.

Re Cotel Pty Ltd and Australian Trade Commission,[63] a case before the Australian Administrative Appeals Tribunal, is illustrative of cases of this variety. The company, Cotel Pty Ltd, appealed to the Tribunal against the Commission's decision to refuse its application for an export grant for the year 1984-5 under the *Export Market Development Grants Act* 1974 (Cth). A delegate of the Commission had refused the company's application on the ground that the application had been received after the closing date for applications fixed by the Act. At one time the Act had given the Commission a discretion to deal with late applications and to grant them. But in 1985 the Act had been amended to remove that discretion. Despite that amendment, the Commission continued to supply to prospective applicants the same form of application which had been supplied to them prior to the amendment. The form stated that applications had "to be submitted" by a specified date.

The company had posted its application on 29 November 1985, a date prior to the closing date announced in the application form supplied to it. The Commission's delegate had rejected the application on the ground that it had not been received until 3 December 1985, a day after the announced closing date. On the appeal to the Tribunal, the company contended that the form supplied to it in respect of its application for the period 1984-5, taken in conjunction with representations made to it by officers of the Commission in 1984, created an

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61 *Ibid* at 383-5.

62 *Ibid* at 383. See also *Matkevich v New South Wales Technical and Further Education Commission* (1995) 36 NSWLR 718 (CA); *Jones v Motor Accidents (Compensation) Appeal Tribunal* (1988) 17 ALD 287 (SCNT); *Re Roberts and Repatriation Commission* (1992) 27 ALD 611 (AAT).

63 (1987) 13 ALD 54.

estoppel *in pais* against the Commission such that it could not refuse the company's application simply on the ground that it was out of time. In support of its case, the company argued that the use in the application form of the phrase, "to be submitted to" the Commission by the given date, could reasonably be interpreted as meaning that posting on or before that date would be sufficient. The form had not, it was argued, used the less ambiguous words "to be received by" the specified date.

The Tribunal dismissed the company's appeal. It did so on two bases. First, it held that a plea of estoppel could not be accepted in the face of a clear statutory provision such as that applicable in the present case. The amendment to the Act in 1985 had made it clear that applications which were submitted out of time could not be entertained. The Tribunal went on to hold that even if a plea of estoppel was open, the form of application supplied to the company involved no misrepresentation on the part of the Commission as to the applicable law. In using the expression "submitted by" a given date the Commission had employed the precise wording of the statute. Furthermore, in the Tribunal's opinion, the use of that phrase would not "in normal usage or parlance include the method used for transportation, be it by post, courier service or other process of delivery". Rather, "[i]n its usual context the word 'submitted' would be interpreted as giving or placing before or in the hands of the body named."[64]

The Tribunal also held that the statements which had been made to the company by officers of the Commission were not inaccurate, or else ones only in relation to the statutory regime applicable prior to the amendment of the Act in 1985.

In *Helman v Byron Shire Council*[65] the New South Wales Court of Appeal held that a planning authority had no power under the State's *Environment Planning and Assessment Act* 1978 to consent to a proposed development of land if the applicant had not lodged the requisite fauna impact statement within the prescribed time. The reason was, the Court explained, that:

> late lodgement of the fauna impact statement by-passed the statutory requirement that such a document be available for inspection and consideration by the public. Compliance would have enabled relevant and better informed objections to be lodged. While the decision-maker had the benefit of an appropriate fauna impact statement, the objectors had no opportunity to consider and make submissions upon it.[66]

It is implicit in this statement that the planning authority had no power to waive the time limit or extend it.

Where legislation permits objections to be made to the grant of applications for licences, but stipulates that objections must be submitted to the licensing agency within a certain time of the notification of the application, the time limits are more likely than not to be characterised as mandatory and also incapable of being waived. Such time limits will not have been imposed for the personal benefit of applicants, or of the licensing agency, but rather to serve a public

64 *Ibid* at 63.
65 (1995) 87 LGRA 349.
66 *Ibid* at 358-9.

interest, that being that there should be certainty as to when the licensing agency may proceed to decide an application and certainty as to what objections, if any, it is obliged to consider. Were the licensing agency to take account of objections received out of time, it might well be held to have exceeded its authority. It is unlikely therefore that it would be estopped by any representation that late objections would be received and considered by it.

Where a time limited right of objection is conferred by statute, but the right relates to action already taken by a public body, different considerations may operate, depending in part on what consequences follow from the lodging of an objection. A consequence may be that the public body may be required to reconsider its decision or that the decision must be reviewed, or a fresh determination must be made by another body. *Re L (AC) an Infant*[67] was a case of this kind and raised an issue of whether the public body was estopped by its conduct from denying that an objection to a determination made by it had been lodged out of time.

The circumstances of the case were as follows. On 19 June 1968 a subcommittee of a local authority made a determination that parental rights in relation to a child be transferred to the authority on the ground that the child's mother suffered from a personal disability which rendered her incapable of looking after the child. The mother exercised her statutory right to object to this determination, within the prescribed period, in order to secure a review of the determination by a juvenile court. Doubts having arisen within the local authority about whether the subcommittee had power to make the determination, the case was referred to the authority's Children's Committee. This Committee decided, as the subcommittee had done, and the mother was again informed of her right to lodge an objection within 14 days. By this time the mother had engaged a solicitor to act for her, a fact which was known to the relevant officers within the authority. They led the solicitor to believe that, as the decision of the Children's Committee had been a mere formality, the mother's objection to the subcommittee's decision would be treated as an objection to the Committee's decision also. The solicitor did in fact lodge an objection to the Committee's determination, but out of time, and on that ground the local authority refused to accept it. As a result the local authority did not forward the case to the juvenile court for review.

The mother then invoked another provision in the governing legislation in order to obtain review of the Committee's decision. But this provision was less favourable to her in relation to the burden of proof than the provision which would have been applicable had her objection been accepted. On the review the Committee's decision was affirmed. Subsequently the mother obtained an order, under other legislation, whereby her child became a ward of the court. That order was contested by the local authority which maintained that the High Court's jurisdiction had been ousted by the legislation under which it had acted in securing parental rights over the child. Cumming-Bruce J agreed that the Court's wardship jurisdiction would have been ousted had the determination of

67 [1971] 3 All ER 743.

the Children's Committee been operative. But the determination could not operate if the person against whom it was made lodged an objection to it within the prescribed period. For the mother it was argued that, because of the representations made to the mother's solicitor, the local authority was estopped from alleging that notice of objection had not been lodged within the prescribed period.

Cumming-Bruce J accepted that argument. While acknowledging the limitations on the application of principles of estoppel to public bodies whose powers and duties are defined by statute, he regarded himself as "at liberty to follow the approach" of Lord Denning MR in *Wells v Minister of Housing and Local Government*,[68] namely that although "a public authority cannot be estopped from doing its ... duty ... it can be estopped from relying on technicalities". Accordingly, he concluded that there was no determination of the local authority which was effective to give it parental rights over the child, and thereby to oust the High Court's wardship jurisdiction.

V. CONCLUSIONS

The cases considered in this article indicate a want of clarity in the relationship between principles of waiver and principles of estoppel by conduct (including representations). When courts have had to decide whether a governmental party is disabled, by reason of its conduct, from insisting upon compliance with some statutory procedural provision, they have sometimes dealt with the issue by reference to principles of waiver. But on other occasions they have dealt with the same kind of issue with reference to principles of estoppel by conduct. In many instances the outcome is likely to be the same, regardless of the body of doctrine applied. The reason is that both bodies of doctrine require attention to be given to the fundamental question of whether the statutory requirement is capable of being waived, or, alternatively, whether it is one which may be overridden by an estoppel. That fundamental question cannot be answered, satisfactorily, without consideration of the purpose of the statutory requirement and the interests it is meant to serve.

There is, perhaps, one important difference between the doctrine of waiver and that of estoppel by conduct. The latter doctrine insists that the party pleading estoppel be able to show that he/she has acted in reliance on the conduct of the party against whom estoppel is pleaded and in such a way that it would be unconscionable for that party to be allowed to resile from the assurance which was given or made. In *Verwayen's* case, however, it was suggested that a party who pleads that a right has been waived need not show detrimental reliance on the alleged act of waiver. On the other hand it was stated that the only rights which may be waived are those which exist for the personal or private benefit of those who possess those rights.

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68 Note 30 *supra* at 1007.

The statutory procedural requirements which have been considered in this article can hardly be regarded as creative of rights, let alone rights for the personal or private benefit of individuals. Rather, the requirements have been imposed to serve some public interest and their fulfilment is usually a precondition for the exercise of some statutory power. The circumstances in which anyone will be estopped from insisting on fulfilment of such requirements are likely to be few. The party pleading estoppel will seldom be able to show the requisite element of detrimental reliance, for in many cases the power to which the statutory requirement relates will be a discretionary power, for example, a discretionary power to grant or refuse an application for a benefit or a licence. A person who has been assured that a late application for a discretionary benefit will be considered is unlikely to sustain much detriment if the assurance is not honoured. Certainly there would be no guarantee that had the application been lodged in time it would have been granted.

The principles of estoppel by representation, it needs be remembered, have been developed primarily with reference to legal relationships governed by private law. There is little, if any, scope for their application in cases where a plea of estoppel, if sustained, would violate a statutory requirement.