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ESTOPPEL AGAINST PUBLIC AUTHORITIES: IS AUSTRALIAN PUBLIC LAW READY TO STAND UPON ITS OWN TWO FEET?

*Alexandra O'Mara**

Synopsis

In the House of Lord's decision in *Reprotech* Lord Hoffman, in rejecting the application of estoppel in public law, stated that the time had come for public law to 'stand upon its own two feet'.

The dilemma posed by the question of whether estoppel should lie against public authorities is complex. Central, though, is the issue of whether the exercise of free and unhindered discretion by the executive should be protected at all costs above the interests of an individual who has relied to their detriment on a freely made representation.

The traditional rule is that an estoppel may not be raised against a public authority to prevent the performance of a statutory duty or to hinder the exercise of a statutory discretion. However, the traditional rule has not been applied consistently in either Australian or English law. There are powerful arguments in support of the traditional rule, based largely on fundamental doctrines such as separation of powers and ultra vires. Such doctrines are fundamental to the effective operation of public law and the legal system generally. However, I argue that the current Australian position is unsatisfactory and lacks consistency. In the end we are left with a sense of discomfort, generated by the failure of the traditional rule to render government accountable for its representations, when they are relied upon by members of the public so as to occasion significant detriment. Particularly resonant is Schwartz's statement that to deny the application of estoppel in public law has 'all the beauty of logic and the ugliness of injustice'.

I consider whether what is called for is a new doctrine of administrative estoppel. The framework offered by the concept of equitable estoppel is valuable, particularly in terms of the flexibility of remedy. In some circumstances, minimum equity may allow a public authority to be estopped, but not require it to be held it to its representation. However, I argue that it is not appropriate to apply the private law rules of estoppel in a public law context without modification, because they fail to take account of the public interest, the critical element in public law. I argue that perhaps equity offers a solution, through the equitable concept of unconscionability. The public obligations of a public authority could be considered by a court in deciding whether it would be unconscionable for the authority to resile from a representation.

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Introduction

In *Regina v East Sussex County Council Ex parte Reprotech (Pebsham) Ltd* ('*Reprotech*')[1], Lord Hoffman, in rejecting the application of estoppel in public law, stated that the time had come for public law to 'stand upon its own two feet'.[2]

The traditional rule[3] is that an estoppel may not be raised against a public authority to prevent the performance of a statutory duty or to hinder the exercise of a statutory discretion.[4] However, the traditional rule has not been applied consistently in either Australian or English law. Further, a number of commentators take issue with the ethics of the traditional rule. Pagone, for example, argues:

> If administration of public powers is necessary in our community, then our law should encourage reliance upon it by individuals who have to deal with it.[5]

In this paper I explore the question of whether estoppel should lie against public authorities.[6] I am principally concerned with estoppel by representation.[7] I begin with a comparative analysis of Australian and English case law. In Part A, I briefly set out the elements of estoppel. I explore the development of Australian and English case law on estoppel against public authorities in Part B, and the approaches to substantive (as opposed to procedural) unfairness in Part C. In Part D, I discuss the contrasting positions taken by Australian and English law. Members of the highest courts in both Australia and England have recently dismissed the application of estoppel in public law, but for very different reasons.[8]

In Part E, I consider the values which ground differing approaches to estoppel in public law: the proper scope of judicial review, the doctrine of ultra vires and ethical/political considerations. I also consider the question of remedy. Possible alternatives for the application of estoppel against public authorities are canvassed in Part F.

There is no simple solution to the question of whether estoppel should lie against public authorities, because of the complexity of competing considerations. Central, though, is the issue of whether the exercise of free and unhindered discretion by the executive should be protected at all costs above the interests of an individual who has relied to their detriment on a freely made representation. However, I argue that the current Australian position is unsatisfactory and lacks consistency. In Part G, I consider whether what is called for is a new doctrine of administrative estoppel. The framework offered by the concept of equitable estoppel is valuable, particularly in terms of the flexibility of remedy. In some circumstances, minimum equity may allow a public authority to be estopped, but not require it to be held it to its representation. However, I argue that it is not appropriate to apply the private law rules of estoppel in a public law context without modification.[9] This is because they do not require any consideration of the public interest, the critical element in public law. I argue that perhaps equity offers a solution, through the equitable concept of unconscionability. The public obligations of a public authority could be considered by a court in deciding whether it would be unconscionable for the authority to resile from a representation.

Part A: Elements of estoppel

It is possible to distill, from the Australian cases in which public authorities have been estopped, the following elements of estoppel:

1. there has been an unambiguous representation, express or implied by the administrator as to a state of affairs, legal or factual, present or future;
2. that representation has induced an assumption by the applicant;
3. the applicant has reasonably acted or refrained from acting in reliance on that assumption;

4. the administrator knew or intended that the applicant would rely on that assumption; and
5. the administrator departed from the representation, failing to act to avoid the detriment which would be occasioned to the applicant.[10]

If these elements are established 'the court asks whether, having regard to the detriment the applicant will suffer, it would be unconscionable to permit the administrator to depart from the assumption.'[11]

Estoppel can operate at common law[12] or in equity.[13] Mason CJ in *Verwayen* referred to 'the emergence of one overarching doctrine of estoppel',[14] however, Parkinson states that 'the process of unification' is 'not complete'.[15] In this paper, I am principally concerned with equitable estoppel. In *Waltons Stores v Maher*, the majority held that the purpose of remedy in the context of equitable estoppel was to 'reverse the detriment, not necessarily to fulfil the expectation.'[16]

Part B: Case law on estoppel by representation against public authorities

Australian law

In Australia, claims of estoppel against public authorities have typically been rejected in the context of public law, but allowed in private law actions.

Public law

Kurtovic and Quin

In *Kurtovic*, the Full Federal Court held that no estoppel was grounded by a letter warning Mr Kurtovic that any further conviction rendering him liable to deportation would 'weigh heavily against him' when the Minister reconsidered his case. It did not constitute a representation of fact or promise and did not cause Mr Kurtovic to alter his position to his detriment. Gummow J explained the traditional rule:

> the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding'[17]

Gummow J drew a distinction between 'the planning or policy level of decision-making wherein discretions are exercised' and 'the operational decisions which implement decisions made in exercise of that policy'.[18] The latter class of decision could potentially ground an estoppel, although he recognised that 'it may be difficult, in a given case, to draw a line.'[19]

In *Quin's* case, a majority of the High Court held that the Attorney-General was not obliged to treat an application from Mr Quin (a former stipendiary magistrate) to become a Local Court magistrate without reference to the other applications, or in accordance with a former policy.

Mason CJ was the only judge to consider the issue of public law estoppel. He applied the traditional rule, holding that the Executive could not by representation, disable itself from performing a statutory duty or exercising a statutory discretion to be performed 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 discretion.'[20] However, Mason CJ did not dismiss completely the possibility that estoppel could lie against the Executive:

> What I have just said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not

> significantly hinder the exercise of the relevant discretion in the public interest. And, 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 public interest by causing grave injustice 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.[21]

Australian public law since Kurtovic and Quin

Whilst the judgments of both Gummow J in *Kurtovic,* and Mason CJ in *Quin,* clearly left open the possibility of public law estoppel in certain circumstances, Australian courts have not generally seen fit to depart from the traditional rule in a public law context. Soon after *Quin,* in *Annetts v McCann*, Brennan J stated that 'no doctrine of administrative estoppel' had emerged in Australian public law.[22]

However, Mason CJ's comments in *Quin* were taken up in some cases, including two decisions of Einfeld J of the Federal Court. In *Keenan*, Einfeld J held that the 'basic principle' articulated in *Quin* was subject to 'possible exceptions also required by the public interest'.[23] In *Maiorana*,[24] Einfeld J referred to the traditional rule, but stated that:

> so long as the promisor is not acting contrary to law in making the promise, s/he is bound to the promise where it affects an important human right, where the promisee would be expected to rely on it, and where it would be unfair to the promisee and contrary to the public interest for the promisor to go back on it.[25]

Further, in *Vanden*, Bannon J held that a council was estopped from asserting that a letter, issued under the hand of its town clerk and city manager, purporting to grant development consent and subdivision approval was not a development consent and subdivision approval.[26] He relied on the judgments of Windeyer J in *Brickworks* and Mason CJ in *Quin.*[27]

In *Li Fang (No 2)*, Hill J, relying on Gummow J's distinction in *Kurtovic,* held that an estoppel could be raised as a result of the applicant's reliance on a visa to her detriment, since it was an operational decision and 'no question of policy was involved'.[28] Nevertheless, relying on the traditional rule articulated in *Quin,* he also held that a public authority could not be estopped from doing its duty – here, cancelling a visa.[29]

However, despite attempts to rely on Mason CJ's comments in *Quin,* decisions of the Full Federal Court have generally confirmed the application of the traditional rule in public law, dismissing arguments that estoppel should lie against public authorities.

In *Roberts v Repatriation Commission,*[30] the Full Federal Court held that an estoppel could not be raised to require the Administrative Appeals Tribunal to exercise its discretion on the basis of an assumption which denied the true date on which the application for a disability pension had been lodged. The applicant sought to rely on Mason CJ's comments in *Quin.* [31] However, the court held that

> It is not open to this court to erect..a general principle, of uncertain application based upon a balancing of elements of the public interest, by which the executive could, by being bound to a representation it had itself made, act beyond the power conferred upon it by the parliament.[32]

In *Chand,*[33] the Full Federal Court held that a statement by an officer could serve to waive a directory statutory requirement, but could not confer upon the Minister a power omitted by the statute. In *Polat,*[34] Davies and Branson JJ stated that 'a court may not relieve against non-compliance with a requirement which the statute intends shall be satisfied'.[35] Whitlam J, though, reserved his position on the scope of any application of estoppel 'to a case where the facts as found require it'.[36]

In *Petrovski* too, the applicant attempted to rely on Mason CJ's comments in *Quin.* However, Tamberlin J construed the comments of Mason CJ as concerned with natural justice rather than estoppel. *Petrovski's* case addressed the question of whether a person wrongly issued with an Australian passport, who had come to Australia on the faith of it and married, could claim estoppel against the Australian government in an application for Australian citizenship. Burchett and Tamberlin JJ in the Federal Court rejected the estoppel claim, Burchett J referring to 'a phalanx of cases that cannot be breached' and Tamberlin J to the 'well settled principles' that applied.[37] Despite this, Tamberlin J referred to the 'serious case of detriment' and noted that the facts would have made out 'a powerful case for estoppel' in a private law context.[38] In neither *Polat* nor *Petrovski* was there any reference to the decisions of Einfeld J discussed above.

The Full Federal Court's decisions in cases such as *Roberts, Chand, Polat* and *Petrovski* [39] have been followed in later decisions of single judges of the Federal Court: see *Butler,*[40], *Wang,* [41] *Chan,*[42] *Al Chaar,* [43] and *Salehi.*[44] Hill J in the Federal Court in *Braganza* [45] was prepared to assume that 'in an appropriate case an estoppel could operate',[46] as was Emmett J in *Pillai.* [47] However, in *McDade,* relying on *Kurtovic* and *Quin,* the Full Federal Court held that a substantive estoppel could not lie against the Minister to prevent him from contending that a notice issued under the Migration Act 1958 (Cth) was invalid.[48]

The traditional rule has also been applied to reject the application of estoppel in public law in a number of decisions of State courts, including the NSW Court of Appeal in the *Showground* case,[49] as well as decisions of single judges.[50] It has also been applied in tribunal decisions.[51]

Lam's case

The High Court's recent decision in *Lam* [52] was concerned with procedural fairness and legitimate expectation. However, some of the comments made in obiter are relevant to public law estoppel. Gleeson CJ rejected the claim that unfairness resulted from the failure by the decision-maker to act in accordance with his stated intention because 'no attempt was made to show the applicant held any subjective expectation' on which he relied, or that 'he suffered any detriment.'[53] This analysis seems to blur the boundary between legitimate expectation and estoppel.

McHugh and Gummow JJ confirmed Brennan's statement in *Annetts v McCann* that:

> As the judgments in *Quin* illustrate, in Australia 'no doctrine of administrative estoppel has emerged.[54]

Interestingly, they made no reference to Gummow's policy/operational distinction in *Kurtovic.* They also noted that the Supreme Court of the United States had not recognised a doctrine of administrative estoppel,[55] and commented that:

> in England, any necessary connection between the outcomes of legitimate expectation and notions underlying estoppel in private law recently has been disavowed by the statements of the English Court of Appeal...and by the decision of the House of Lords in ..*Reprotech.*[56]

Application of private law principles of estoppel

Verwayen arose out of a private law action for damages for injuries sustained in a collision involving HMAS *Voyager* in 1964. The Commonwealth had repeatedly stated its intention not to contest liability or to plead the *Statute of Limitations Act* 1958 (Vic). *Verwayen* concerned a decision by the Commonwealth government to change its policy, so as to rely on that defence and the combat defence. By a majority, the High Court held that the Commonwealth could not rely on those defences.[57] However, only Deane and Dawson JJ based their

judgments upon estoppel, holding that it would be unconscionable for the Commonwealth to resile from the assumption it had induced. [58]

In *Metropolitan Transit Authority v Waverley Transit Pty Ltd,* [59] the Full Court of the Supreme Court of Victoria held the authority estopped from changing its policy relating to the award of bus service contracts. In *Clark's* case, which involved similar facts to *Verwayen*,[60] the Full Court of the Supreme Court of Victoria held that the Commonwealth was estopped.[61]

In these cases, the private law principles of estoppel were applied without reference to the traditional rule, despite the fact that they make explicit that the government's change in position in each case resulted from a change in policy.[62] Further, as Allars points out, *Waverley Transit* was a judicial review case, rather than a private law action.[63] Allars argues that *Verwayen* emphasises that the traditional rule will 'have little role to play when an estoppel is argued in a private law action against government.'[64]

Interestingly, in *Marlborough Gold Mines*[65], the High Court rejected an argument, based on *Verwayen*, that the Australian Securities Commission (ASC) was estopped from changing its policy. Allars notes that this was not a judicial review action, but had a 'private law flavour' as 'an application for approval by a court of a scheme of arrangement under the Corporations Law'.[66] However, it concerned a change in policy by the ASC with respect to the conversion of a limited company to a no liability company, in circumstances where the original policy of the ASC had been based on inadequate legal advice. The court relied on early English authority to reject the estoppel argument[67] and did not discuss the application of the traditional rule in either public or private law.[68]

However, in *Baillieu,* Sundberg J in the Federal Court found the Commonwealth estopped from enforcing its copyright. The Liberal Party had arranged for publication of a brochure relating to postal votes on the basis of a representation made by the Australian Electoral Commission, which later changed its policy and argued that the Commonwealth's copyright had been infringed. Sundberg J stated:

> I do not consider the case is to be resolved by resort to this distinction between policy and operational matters. No statutory discretion is involved here. This is not an administrative law case. As the owner of copyright in the gazetted form and the commission's brochure, the Commonwealth asserts its rights in the same way as any other copyright owner. [69]

In *Chanrich Properties,*[70] a private law action, Hodgson CJ in Equity held Baulkham Hills Shire Council estopped from denying that compensation would be payable for land dedicated as a public reserve because of the representations made by council officers and the practice of the council.[71] He rejected the council's argument that the traditional rule should apply to prevent it being estopped.[72]

Gray v National Crime Authority concerned an application for equitable compensation. Austin J in the NSW Supreme Court held that the claim was made out and that the National Crime Authority was estopped from departing from representations by Inspector Small (who had ostensible authority to make them) that Mr and Mrs Gray would not be financially disadvantaged by taking part in a witness protection program.[73] There was no discussion of the traditional rule, the court relying on the two 'seminal decisions' of *Waltons Stores* and *Verwayen.*[74]

Where public authorities have been estopped in private law actions, there has usually been no discussion of the traditional rule.[75] In other cases where estoppel has been held not to lie against public authorities in a private law context, this is often due to the facts of the case, rather than the application of traditional rule.[76] Often in such cases, judges have indicated that they would have found an estoppel had the facts allowed it.[77] In some cases,

unsuccessful attempts have been made to rely on *Verwayen,* to argue estoppel in a public law context.[78]

English law

In *Reprotech,*[79] the House of Lords unanimously rejected the respondent's argument that the council was estopped by representation from denying that electricity could be generated onsite without further planning permission being obtained. Lord Hoffman emphasised that a determination by a planning authority concerned not only the applicant and the authority, but also the public. He indicated that it was 'unhelpful to introduce private law concepts of estoppel' into 'the public law of planning control, which binds everyone'.[80]

Lord Hoffman found that even if the Council had been a private party, the facts did not support an estoppel. However, in relation to public law estoppel, he said:

> There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: *Regina v North and East Devon Health Authority; ex parte Coughlan.* But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority seeks to promote...
>
> It is true that in early cases such as the *Wells* case and *Lever Finance* .. Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful....It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet. [81]

Until the decision in *Reprotech,* estoppel operated in English public law under the two narrow exceptions established by *Western Fish.* [82]

Western Fish represented a return to the 'orthodoxy' of the traditional rule. [83] However, it allowed for two narrow exceptions to the exclusion of estoppel in public law, the first concerning delegation[84] and the second, the waiver of procedural requirements,[85] so as reconcile the traditional rule with earlier cases.

In *Powergen,* decided a few years before *Reprotech,* Dyson J foreshadowed the move to a public law solution to estoppel. He stated:

> although the principle of legitimate expectation is a public law doctrine, and estoppel belongs to the realm of private law, the principles are very closely analogous.[86]

In *Coghurst,* Richards J stated that the effect of the judgments in *Powergen* and *Reprotech* was to:

> emphasise not just the need to apply public law concepts rather than private law concepts but also the importance attached in public law to a statutory body's powers and duties and to the wider public interest.[87]

Part C: Substantive unfairness and abuse of power

I discuss below the divergence between Australian and English law in this area.

English law

Lord Templeman in *Re Preston* [88] held that a decision that was unfair because the conduct of a public body was 'equivalent to a ..breach of representation' fell 'within the ambit of abuse of power' for which judicial review was an appropriate remedy.[89] Following *Re*

Preston, the English concepts of substantive legitimate expectation and abuse of power were developed in cases such as *Ruddock, MFK Underwriting, Baker, Unilever* and, finally, *Coughlan.*[90]

In a unanimous decision, the English Court of Appeal in *Coughlan* [91] held that the applicant had a legitimate expectation that the health authority would not resile from its promise that Mardon House would be her home for life.[92] In the circumstances, breach of that promise constituted unfairness amounting to an abuse of power:

> Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power....the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.[93]

Lord Woolf MR indicated that most cases of an enforceable expectation of a substantive benefit were likely to be cases 'where the expectation is confined to one person or a few people'.[94]

This was recently confirmed in *Henry Boot Homes.* [95] Keene LJ in the English Court of Appeal noted that legitimate expectation had 'a far greater role to play' in cases where 'the issue is essentially one as between the individual and the public body', as distinct from cases in which third party interests played a greater role, such as planning cases.[96]

Australian law

Gummow J in *Kurtovic* dismissed the concept of unfairness in a substantive, rather than a procedural, sense, to be arrived at by some process of 'judicial balancing between public and private interests'.[97] He concluded that 'the question of where the balance lies' was one of merits, so was for the decision-maker, and that a conclusion that a representation was ultra vires would ordinarily 'preclude its effectiveness.'[98]

In *Quin*, Mason CJ found that legitimate expectations did not attract substantive protection because to do so 'would entail curial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances.' [99] However, as with public law estoppel, he did not entirely rule out the possibility of substantive protection of a legitimate expectation.[100]

In *Barratt v Howard,*[101] the Full Federal Court held that Mr Barratt could not have a legitimate expectation that his position as the Secretary to the Department of Defence would not be terminated, because the doctrine of legitimate expectation had not been extended in Australia to afford substantive protection of the rights the subject of the expectation.[102]

In *Lam*, the applicant did not claim to be entitled to a substantive benefit. [103] His case was put on the basis of a denial of procedural fairness, by reason that he had a legitimate expectation created by a letter from the Minister's representative which was not fulfilled. [104] Both Gleeson CJ and Hayne J found that it was not necessary to decide what was meant by 'abuse of power' or 'substantive unfairness', however, Gleeson CJ noted that:

> It is a subject that may involve large questions as to the relations between the executive and judicial branches of government. [105]

McHugh and Gummow JJ, with whom Callinan agreed, explicitly rejected the idea that substantive benefits could attach to a denial of natural justice.[106] They discussed the English

concept of substantive legitimate expectation,[107] but indicated, on the basis of *Quin* and *Teoh,* that the prevailing view in the High Court was that the 'rules of natural justice are 'in a broad sense a procedural matter:'[108]

> That remains the position in this Court and nothing in this judgment should be taken as encouragement to disturb it by adoption of recent developments in English law with respect to substantive benefits or outcomes.[109]

McHugh and Gummow JJ attempted to draw a distinction between English and Australian law, arguing that an aspect of the rule of the law under the Australian Constitution was the 'observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made'.[110] English law was not so constrained.

Part D: Comparison of English and Australian positions

Recently Justice French, when speaking extrajudicially, noted that 'the possibility that estoppels may apply in public law is not foreclosed by the current state of authority in Australia'.[111]

In Australian public law, the traditional rule has usually been applied to exclude estoppel against public authorities, although it is clear that this has not always been the case. Further, estoppel has been allowed against public authorities in private law actions. Allars notes that 'as a private law action, *Verwayen* has no direct bearing' upon the issue of the scope of the traditional rule in public law.[112] However, she contrasts the approach taken in *Verwayen* to that taken in *Quin*, decided only a few months earlier:

> The fundamental purpose of estoppel is to afford protection against the detriment which would flow from the Commonwealth's change of position. In *Verwayen* the High Court fettered the Executive's discretion to alter policy, but without this relief being challenged as not only disproportionate but also an invasion of the *Southend-on-Sea* principle. By contrast, in the judicial review case of *Quin*, decided just a few months prior to *Verwayen*, the High Court declined to grant relief in a form which would have fettered the NSW government's discretion to change its policy regarding the selection procedure for the appointment of magistrates.[113]

Stewart argues that the balancing approach described by Mason CJ in *Quin* is 'almost indistinguishable' from the English notion of 'substantive unfairness and its balancing of public interest'.[114] Whilst some Australian judges have explored the balancing approach, it has not been broadly accepted. In *Petrovski* , Mason CJ's comments were narrowly construed as concerned with procedural fairness, rather than substantive estoppel.[115]

In *Lam,* McHugh, Gummow and Callinan JJ explicitly rejected the idea that a breach of the rules of natural justice could generate substantive outcomes, whilst Gleeson CJ and Hayne J left open the meaning of concepts such as 'abuse of power' and 'unfairness'. To date, Australian law has rejected arguments that a denial of natural justice could give rise to substantive, as opposed to procedural, benefits. On the other hand, it is well-established in English law that frustration of a legitimate expectation which is so unfair as to amount to an abuse of power can attract substantive benefits.[116] The House of Lords rejection of estoppel in public law in *Reprotech* must be seen in this context. Bradley argues that the practical effect of *Reprotech* is that while 'estoppel disappears into the wings on one side of the Administrative Court, legitimate expectations enter the stage from the other side'.[117] Further, Kinloch argues that it must also be understood in the light of the UK's accession to the (then) EEC and the impact of European law under the European Communities Act 1972, as well as the human rights dimension, since the European Convention on Human Rights was incorporated into English law under the Human Rights Act 2000.[118]

Discussion

A comparative analysis throws up many questions. Is there a justification for the difference in approach to estoppel against public authorities in public, as opposed to private, law actions in Australia? Should Australian public law embrace the English concept of substantive unfairness? Or is it so elastic as to invoke an 'open-ended discretion' on the part of the judge? [119] In considering *Lam*, the important question is whether the judges who discussed English law properly understood and addressed *Coughlan.* Arguably, they took the English cases out of context. Further, their discussion of English common law in this area seemed to add little to their reasoning.

How can Australian public law provide a solution to the dilemma posed by estoppel cases without relying on open-ended judicial discretion? The principles of private law estoppel may offer a useful starting point. It is clear that in many Australian cases where estoppel has been denied, it is on the basis that the facts themselves do not ground an estoppel. As such, the principles of estoppel establish a threshold through which only significant and genuine cases will pass. It is necessary to consider whether the private law principles of estoppel should apply in a public law context and if so, whether they need to be modified so as to accommodate the added complexities that arise in public law.[120]

Part E: Values and estoppel in public law

The question of whether estoppel should operate in public law is characterised by competing considerations, including the proper scope of judicial review, the doctrine of ultra vires, ethical and political considerations and finally, the question of remedy. These are discussed in turn below.

The proper scope of judicial review

Separation of powers

Allars notes that the rationale for the no-fettering rule may be found 'at a deeper level in the doctrine of separation of powers'.[121] In *Quin's* case, Brennan CJ stated that the 'duty and jurisdiction of the court to review administrative action' did not go beyond the 'declaration and enforcing of the law affecting the extent and exercise of power'.[122] As such, the scope of judicial review was not to be defined 'in terms of the protection of individual interests.'[123] However, Allan argues that the principles governing review should 'assume a theory of individual rights, and that the essence of the test of legality consists in their being afforded sufficient respect in the exercise of public power.'[124] Further, Galligan validly asserts that:

> Far from being value free, the justification for review lies in the assertion of certain values as sufficiently important to be constraints on the exercise of discretion.[125]

Recently, in *Lam's* case, McHugh and Gummow JJ stressed that the Australian constitution necessitates the separation of judicial power such that approaches taken in English law are not transferable:

> In Australia, the existence of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from the English and other European systems.... An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of .. the executive function of administration.[126]

However, the contemporary effectiveness of the separation of powers has been effectively criticised by many commentators. McLachlan, for example, asserts that the traditional separation between executive and legislative power no longer exists 'so that that Parliament provides no effective control over the executive'.[127] It is questionable whether the legal

doctrine of separation of powers is so critical as to trump any argument based on the protection of individual rights and associated values.

Legality / merits

The scope of judicial review is also defined by the legality/merits distinction.[128] Brennan J in *Quin's* case argued that:

> If the courts were to assume a jurisdiction to review administrative acts or decisions which are 'unfair' in the opinion of the court – not the product of procedural unfairness but unfair on the merits – the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ.[129]

In *Lam*, McHugh and Gummow JJ argued that the English concept of 'abuse of power' was concerned with 'judicial supervision of administrative decision-making', and 'thus the merits of the outcome', which represented an 'attempted assimilation into the English common law of doctrines derived from European civilian systems'.[130] Again, it is arguable whether such comments accurately reflect the position at English common law.

In any event, Allars argues persuasively that the legality/merits distinction is 'flawed' because the courts have become 'closely concerned with the very assessment of facts which is supposed to be left with an administrator' in applying principles relating to relevant and irrelevant considerations, *Wednesbury* unreasonableness and jurisdictional fact. She argues:

> The legality/merits distinction has little value even as a guide to the proper scope of checking of administrative discretion by the judiciary (and in consequence the proper balance between branches of government) particularly in the context of newly developing, and therefore highly indeterminate, bases for judicial review.[131]

Similarly, Allan describes it as 'largely incoherent since it begs important questions concerning the acceptable limits of judicial scrutiny.'[132] That courts are able to effectively engage in merits review of administrative decisions is illustrated by State courts such as the NSW Land and Environment Court.[133] Arguably, the legality/merits distinction is often no more than a legal construct and, as such, its use as a basis on which to reject estoppel in a public law context must be questioned.

The doctrine of ultra vires

Allars states:

> The ultra vires doctrine is fundamental and no principle of estoppel can excuse an administrator from performing statutory duties or permit the administrator to act ultra vires.[134]

Ultra vires representations

The notion that estoppel could render legally effective an ultra vires representation is one of the most powerful arguments against the application of estoppel in public law.

Gummow J in *Kurtovic*, discussed the possibility of an exception to the doctrine of ultra vires, which relied upon 'principles of ostensible authority and presumptions of regularity drawn from the law of agency in private law and from company law', and which 'would be the first true exception or qualification to the general rejection of estoppel in public law.'[135] Campbell argues that in *Lever, Western Fish* and *Jurkovic* the doctrine of ostensible authority was assumed to apply to statutory authorities which held out persons as their delegates, whilst in *Lever* and *Jurkovic* it was assumed that the indoor management rule applied.[136]

Thompson argues that the effect of estoppel may be to convert an ultra vires representation to one within power, because of the implied modification of a statute by equity.'[137] Justice French, speaking extrajudicially, stated that the traditional rule prevented equity 'amending the statute'. However, he continued:

> 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 from equitable principles.[138]

I would argue that it is this approach which should guide judicial review in this context.

Whilst there is a division of opinion among commentators about whether ultra vires representations should bind,[139] Craig makes the valid point that often, there will be 'balancing within the ultra vires principle itself', in the form of a 'value judgment as to whether to categorise an error as one of law, fact, discretion or no error at all'. Further, he argues that:

> It is not clear why the loss should be borne by the representee. The reason appears to be that there is still an extension of statutory powers and that this outweighs any harm to the representee. A rule of such generality cannot be presumed, without more, to be correct.[140]

Craig argues that, in an English context, the principle of legality (manifested in the ultra vires doctrine) must be balanced against the principle of legal certainty. He argues that the traditional rule leads to a 'flawed outcome' because of the failure to take account of the principle of legal certainty. Whilst his analysis to some extent relies on the European connections of English law, Craig states that the principle of legal certainty has 'self-evident connections with mainstream thinking about the formal conception of the rule of law, its concern for autonomy and the ability to plan one's life'.[141] He refers to Raz's argument for the 'principled faithful application of the law'.[142] Such considerations should also inform Australian law in this context.

Intra vires representations

In *Kurtovic*, the Federal Court applied the traditional rule to reject the application of estoppel even in the context of an intra vires representation.[143] McLachlan argues persuasively that there is no conflict between the non-fettering principle and enforcement of a foreshadowed intra vires exercise of discretion:[144]

> the approach in *Kurtovic* and *Quin* gives to the 'duty to exercise a free and unhindered discretion' a wider operation than the principle against fettering discretion, so that the decision-maker cannot before the time of the actual making of a decision bind ... him or herself to make a particular decision. This is so, even though the particular decision would be lawful (within statutory power) and even though the decision-maker has freely and properly exercised his discretion.[145]

Thompson argues that estoppel should be allowed to operate where it is consistent with the public interest. He promotes 'the consistency approach', arguing that:

> A fetter will be consistent with a future intra vires exercise of discretion where it is reasonably foreseeable that it will not conflict with the exercise of the discretion for the public's benefit.[146]

The approach of Australian law seems to unfairly weight the interests of the decision-maker in maintaining an unfettered discretion against those of an individual who has relied to their detriment on a representation which is within power. Whilst the principle against the fettering of discretion is central to administrative law, in some circumstances it must be balanced with other principles, such as those discussed above in relation to ultra vires representations.

Ethical / political considerations

In considering the application of estoppel against public authorities, it is important to consider the broader perspective in which the law operates.

Public v individual interests

One of the central problems posed by allowing estoppel to lie against a public authority is the question of how to reconcile the public interest with the interests of the individual concerned. Pagone points out that to hold a public authority estopped would 'seem to favour the private interests above that of the public'.[147] Arguably, changing emphasis in the political context influences the development of the common law. Hutchinson's observations are incisive:

> The dialectical tension between individualism and communitarianism generates competing legal principles that march in pairs throughout the law. While the doctrinal manifestations of one vision may temporarily gain the upper hand and the whole areas of doctrine appear uncontroversial, the insoluble quality of the contradiction guarantees that renewed struggle is always close at hand. The alternate vision can be contained, but it can never be obliterated. There is no logical or natural point at which one vision ends and the other begins.[148]

This is illustrated by the recent developments in English public law relating to estoppel. Kinloch argues that:

> The effect of these changes have been increasingly to emphasise the public nature of planning law and for judges to be more willing to understand the wider public-interest implications – as opposed to an older generation of judges holding attitudes more conditioned to a 'private property' approach.[149]

Accountability

The issue of accountability is critical. Whilst the legal principles discussed above are central to the legal system, surely too are principles of fairness. Why should public authorities not be held accountable for the representations they make, particularly where such representations are relied upon to the detriment of an individual? Why should a public authority be less accountable than an individual, who could be held accountable through the mechanism of private law estoppel if they made a representation that was relied upon by another individual to their detriment?

Both Gummow J in *Kurtovic*, and Thompson, refer to the policy reasons articulated in American cases as to why it is not appropriate for estoppel to operate in public law. These include the dangers of 'collusion between administrative bodies and the public to extend the powers of administrative bodies' and 'inadvertent representations'.[150] Rutherford and others note that in cases such as *Brooks* and *Western Fish*, the courts emphasised the need for government officers to feel free to assist members of the public 'without all the time having the shadow of estoppel hanging over them.'[151]

However, there is considerable weight in the argument put forward by Finn and Smith that the 'government above all other bodies in our community should lead by example', as well as Stein's comment that 'the ready availability of a remedy helps keep government authorities on their toes'.[152] Finn and Smith argue persuasively that the notional public interest should not be used as a justification for refusing relief to a person who has relied on a representation from the government to their detriment:

> To allow the public interest to be used in this way is, in our view, to relieve government of its responsibility and accountability for its own actions; is to perpetuate a morally penurious principle. In a democratic society legal doctrine should be designed so as to accentuate, not diminish, public accountability of government for its actions.[153]

Ethics

As a matter of ethics, the traditional rule seems to generate an unsatisfactory result in public law. Whilst the legal principles underpinning the rule are central to the effective operation of our legal system, the end result is itself difficult to justify. Allars states that:

> the clear message of *Kurtovic* and *Quin* is a judicial discomfort with the *Southend-on-Sea* principle, different solutions being presented for confining that principle.[154]

Arguably, the inconsistencies in the common law in this area are the product of such judicial discomfort, although the decision of the High Court in *Lam* seems to indicate that some members of the Court are perhaps more comfortable now than in the past, such inconsistencies raise difficult questions. Is the traditional rule insufficiently sophisticated to address the complexities of public law? There seems to be a need to introduce a level of flexibility to allow public law to deliver an ethically sound and equitable outcome, where general principles will not. Perhaps what is called for is a new doctrine of administrative estoppel, which would introduce the flexibility needed to accommodate the competing values discussed above and avoid the current state of inconsistency.

Remedy

Finn and Smith argue that courts have approached the application of estoppel in public law on the basis of a flawed assumption, namely, that to estop a public authority would require it to be held to a representation and thus breach the no-fettering principle. They argue that an important consequence of equitable estoppel is to 'nullify' this objection. The remedy for equitable estoppel is minimum equity,[155] which:

> would allow, as the persisting 'public law' orthodoxy does not, pecuniary relief against a government which induces detrimental reliance. In other words, the government, if still not to be compelled to honour the expectation it has created, would nonetheless be able to be held liable for loss occasioned by reasonable reliance on that expectation... While the public interest may necessitate a refusal to enforce the representation or undertaking, it should not allow government with impunity to occasion loss to a person who has relied upon that representation.[156]

Allars argues that estoppel holds 'the promise of a more powerful form of relief than those familiar in public law':

> The normal relief in judicial review of setting aside a decision or declaring the rights of parties appears inferior by comparison.[157]

Wade and Forsyth argue that, rather than allowing estoppel to operate in public law 'the only acceptable solution...is not to enforce the law but to compensate the person.'[158] However, as Thompson points out, there may be situations in which the minimum equity will be consistent with strict compliance with a statute.[159] Craig argues that funds for compensation are scarce and that:

> If, by balancing the public and private interest, it can be shown that the detriment to the former is outweighed by that of the latter, it is not clear why we should give compensation rather than allow the representation to bind.[160]

Part F: Estoppel against public authorities – the alternatives

Many commentators support the application of estoppel in public law in some form.[161] Alternative options are discussed below.

No estoppel against public authorities

Should the traditional rule apply to exclude estoppel against a public authority in any context, be it public or private? It is clear from the Australian case law that public authorities have often been estopped in private law actions, and sometimes in public law actions as well. What is the justification for the departure from the traditional rule in a private law context? Presumably, the decisions of public authorities that give rise to estoppel in private law may involve the exercise of statutory powers and discretions for the benefit of the public. Allars states:

> it is arguable that the rationale for restricting the scope of estoppel in judicial review should also apply when it is argued that estoppel is raised in tort actions against government. Here too the future exercise of statutory discretion in the public interest may be hindered.[162]

In recent cases such as *Chanrich Properties* and *Gray* public authorities have been estopped.[163] However, no sound basis for the different approach taken to public authorities in public, as opposed to private, law has been articulated in the case law reviewed.

Further, the absence of public law estoppel may simply channel legal action against public authorities into other forms. Pagone discusses the effect of the traditional rule in the context of public law. He refers to private law actions brought by individuals against the government for negligent misstatement and argues that this is 'at odds with the policy ostensibly being served by the preclusion of estoppel':[164]

> The law is allowing the innocent party, in effect, to rely upon a representation which the public body has no power to make. In these cases, private law is being used to supplement the deficiency in public law and to allow a representation which might not sustain a successful plea of estoppel to found a cause of action against the public body resulting in an award of damages as compensation for the negligent exercise of public duties and discretions.[165]

Estoppel against public authorities in private law actions

Can the operation of estoppel against a public authority in a private law context be explained by 'the equality principle', namely, that 'law should apply to the government in the same way that it applies to the governed'?[166] In *DTR Securities*,[167] the court upheld a claim by a public authority that a company with whom they were dealing should be estopped from departing from a representation.[168] Is the rationale that it would be unfair to allow estoppel to apply to one party but not another, namely to the private party but not to the government, when they are involved in a commercial relationship? Is the government like any other party in a private law suit? Sundberg J made statements to this effect in *Baillieu*.[169]

In *Haoucher*, McHugh J stated that 'in cases which do not involve the exercise of statutory discretions or duties, a Minister of the Crown may be estopped from denying a fact or promise.'[170] However, Allars validly argues that 'the difference in the protection of the doctrine of separation of powers' in public law as opposed to private law 'requires justification'.[171] The case law has provided no such justification.

If the difference in approach is essentially a question of fairness, it is difficult to see why unfairness in other contexts cannot provide a justification for departure from the traditional rule.

Substantive legitimate expectations and abuse of power

Perhaps Australian law should adopt English law's solution to this problem, which is to embrace the notion of substantive legitimate expectations and abuse of power. However, there is merit in Craig's argument that:

> The articulation of the concept of legitimate expectation is not..some intellectual panacea which will make the problem of estoppel in public law disappear.[172]

The adoption of the concepts of substantive legitimate expectation and abuse of power would not, of itself, resolve the tensions between competing values that arise in the context of estoppel against public authorities, discussed in Part E above.

The decision of the High Court in *Lam* indicates that it is unlikely that English concepts of substantive legitimate expectations and abuse of power will be taken up in an Australian context. Further, most of the judges were critical of the concept of legitimate expectation.[173] Perhaps there is merit in the argument that the concept of legitimate expectation is nebulous. However, the failure of Australian public law to offer any substantive remedies limits its effectiveness. There is merit in Craig's assertion that 'bare procedural rights' are of limited utility because it is 'open to the public body simply to go through the motions' without delivering any real result.[174]

Estoppel against public authorities in respect of operational decisions

As suggested by Gummow J in *Kurtovic,*[175] estoppel could operate in the context of operational decisions. Cases such as *Gray* could potentially be explained on this basis.[176] However, Allars argues that the policy/operational distinction is problematic:

> That policy-making permeates the administrative decision-making process and may occur in the very process of policy application, is well illustrated by the cases on estoppel and government.[177]

She asserts that cases such as *Verwayen* and *Waverley Transit* illustrate that policy-making and policy-application may be 'intimately connected'.[178] Further, the policy/operational distinction has not been taken up in later cases.[179] Interestingly, McHugh and Gummow JJ make no reference to it in *Lam* when discussing the application of estoppel in Australian public law.[180]

Judicial balancing

Another alternative is to allow estoppel to operate under the judicial balancing approach discussed by Mason CJ in *Quin.*[181]

Thompson argues that the balancing approach would require the courts to make policy judgments that they are 'ill-equipped' to make.[182] However, courts are called upon to balance competing public interests in other contexts, for example, in claims for public interest immunity.[183] Further, cases such as *Petrovski*, illustrate that judges are able to reach a view about what they see to be in the public interest.[184] However, it is possible that there may be insufficient evidence before the court to allow the judge to form a view about how to strike a proper balance.[185]

In private law estoppel cases, the contest is between individual interests. One of the arguments for the traditional rule in public law is that public authorities must consider the public interest when exercising statutory duties or discretions. In *Western Fish,*[186] and *Reprotech,*[187] English courts emphasised the potential injustice to third parties which could result from allowing a public authority to be estopped. However, Craig argues that third parties are 'one of the factors to be taken into account in the balancing process'.[188] Craig argues that it may be appropriate to allow an ultra vires representation to bind if 'harm to the public would be minimal compared to that of the individual'.[189] There are many situations where the public interest carries more weight than the potential harm to the individual, but in each case the balance may be different.[190]

Interestingly, Craig also suggests that balancing could be achieved through legislative intervention, in the form of a general statute creating a 'defence of bona fide reliance upon a rule or opinion' or alternatively, a clause inserted in general statutes.[191] Perhaps this offers a way of addressing the concerns expressed about the doctrines of separation of powers and ultra vires in the context of public law estoppel. However, this relies on the will of the legislature. Also, legislative interference with the substance of common law grounds of review may be problematic, as can be seen with recent amendments to the Migration Act 1958 (Cth).

Part G: A new doctrine of administrative estoppel?

Perhaps what should exist in public law is a new doctrine of administrative estoppel, modelled on that which applies in private law, but modified to take account of the added complexities of public law. The doctrine of estoppel provides a clear framework for the exercise of judicial discretion in the context of administrative injustice. That the elements of estoppel are difficult to establish in the context of public law is illustrated by the number of cases in which judges have found that, notwithstanding the application of the traditional rule, the elements of estoppel were not made out. Perhaps the equitable concept of 'unconscionability' offers public law a means by which to accommodate a consideration of the 'public obligation' or public interest represented by a public authority, in the light of the circumstances of a particular case.[192]

In *Verwayen*, Deane J in holding the Commonwealth estopped, explained the concept of unconscionability in these terms:

> the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted.[193]

It is clear that Deane J's conception of unconscionability requires a case by case approach. Whilst the notion of 'unfairness' can be vague and ill-defined, the concept of unconscionability is useful because it is inherently linked to particular circumstances:

> definition 'is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.' The most that can be said is that 'unconscionable' should be understood in the sense of referring to what one party 'ought not, in conscience, as between [the parties], to be allowed' to do'....That being so, the question whether conduct is or is not unconscionable in the circumstances of a particular case involves a real process of consideration and judgment... in which the ordinary process of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case such as the present.[194]

Similarly, the question of whether estoppel should lie against a public authority is complex, and not resolvable by 'some preconceived formula'. This, too, will depend upon the particular circumstances of the case. Arguably, the concept of unconscionability is flexible enough to accommodate a consideration of the 'public obligations' of a public authority. A court, in deciding whether it would be unconscionable for a public authority to depart from a representation in particular circumstances, could consider the obligations of that authority to the broader public.

Conclusion

The dilemma posed by the question of whether estoppel should lie against public authorities is complex. As Pagone notes, it is difficult to arrive at a single answer.[195] There are powerful arguments in support of the traditional rule, based largely on fundamental doctrines such as

separation of powers and ultra vires. Such doctrines are fundamental to the effective operation of public law and the legal system generally.

However, in the end we are left with a sense of discomfort, generated by the failure of the traditional rule to render government accountable for its representations, when they are relied upon by members of the public so as to occasion significant detriment. The inconsistency which has characterised both Australian and English approaches to estoppel against public authorities is arguably the result. The appropriate balance between the need to allow for the free exercise of discretion by a decision-maker, and the need to protect the rights of an individual disadvantaged by the actions of a public authority, has yet to be struck. Particularly resonant is Schwartz's statement that to deny the application of estoppel in public law has 'all the beauty of logic and the ugliness of injustice'.[196]

Endnotes

1 [2002] 4 All ER 58.
2 At [35].
3 I will use the term 'traditional rule' throughout this paper to refer to the principles established in the cases set out in note 4 below.
4 *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 417 at 423-4 per Lord Parker CJ: see also *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 17 per Mason CJ; Thomson J, 'Estoppel by Representation in Administrative Law', (1998) 26 *Fed L Rev* 83-113 at 83; Allars M, 'Tort and Equity Claims Against the State' in Finn P (ed.), *Essays on Law and Government: Volume 2, The Citizen and the State in the Courts* (Sydney: Law Book Company, 1996), 49 at 86.
5 Pagone GT, 'Estoppel in Public Law: Theory, Fact and Fiction', (1984) 7 *UNSW Law Jo* 267 at 282, 284.
6 By the term 'public authority', I mean all branches of the executive government, including for example, a public or local government authority constituted by an Act, a government department, a statutory body representing the Crown, as well as Minister acting as heads of the executive.
7 I will not consider estoppel per *res judicata* (cause of action estoppel) or issue estoppel.
8 *Reprotech,* note 1 at paragraph 35; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at 518, paragraph 69, per McHugh and Gummow JJ.
9 Allars, note 4, at 52.
10 Halsbury's Laws of Australia, 'Elements of estoppel in administrative law', paragraph [10-2159], Butterworths, Sydney, June 1999, online at www.butterworthsonline.com; see also: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-9 per Brennan J; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 502; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 216-218 per Gummow J; *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181 at 208; *Clark v Commonwealth* (1992) 26 ALR 496 at 498 (affirmed in *Commonwealth v Clark* [1994] 2 VR 333 at 360).
11 Halsbury's, note 10; see also *Commonwealth v Clark*, note 10.
12 Parkinson refers to common law estoppel as a generic term that describes all forms of estoppel in pais recognised at common law. Common law estoppel involves representations of fact the remedy for which is to hold the party to 'the assumption they have induced': *Thompson v Palmer* (1933) 49 CLR 507 at 547. Parkinson argues that the essential element in common law estoppel is that it does not extend to expressions of intention and has a 'preclusionary operation' – it is not a 'cause of action': Parkinson P 'Estoppel' in Parkinson P (ed) *The Principles of Equity*, (Pyrmont: Law Book Co, 2003) 211 at 221-2, 234; see also *Grundt v Great Boulder Pty Hold Mines Ltd* (1937) 59 CLR 641 at 674; *Verwayen*, note 10 at 409.
13 Equitable estoppel is not confined to representations of existing fact. It can be a cause of action, rather than merely a defence to a cause of action: Parkinson, note 12 at 230.
14 *Verwayen*, note 10 at 410 –411, see also Parkinson, note 12 at 211-5.
15 Parkinson argues that it has not yet been authoritatively determined whether estoppel can operate as just one doctrine, or whether it remains necessary to distinguish common law estoppel from equitable estoppel. The sticking point seems to relate to the remedial consequences of estoppel: Parkinson, note 12 at 215, 231-239.
16 Parkinson, note 12 at 230; *Waltons Stores v Maher*, note 10, at 405 per Mason CJ & Wilson J and at 419 per Brennan J.
17 *Kurtovic,* note 10 at 210.
18 *Kurtovic*, note 10 at 215.
19 *Kurtovic*, note 10 at 215. In doing so, Gummow J referred to the distinction drawn in the United States between 'proprietary' and 'governmental' capacities of public bodies.
20 *Quin*, note 4 at 17: Mason CJ relied on a long line of English and Australian cases, and approved of the explanation of the traditional rule offered by Gummow J in *Kurtovic*, note 10.
21 *Quin,* note 4 at 18.

22 *Annetts v McCann* (1990) 170 CLR 596 at 605 per Brennan J.
23 *Keenan v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 30 ALD 918 at 921. Einfeld J held that there was no evidence that some public interest or policy required a wait until the deportation order made under s60 of the Migration Act 1958 (Cth) superseded the promised or indicated deportation procedure under s55. Affirmed by the Full Federal Court on appeal: *Minister for Immigration, Local Government and Ethnic Affairs* v *Keenan* (1993) 47 FCR 244;(1993) 13 ALR 657; (1993) 32 ALD 725.
24 *Maiorana v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 31 ALD 352. This case also concerned a deportation order made under s55 of the Migration Act 1958 (Cth).
25 *Maiorana,* note 24.
26 *Vanden Pty Ltd v Blue Mountains City Council* (1992) 77 LGRA 16; discussed in *Wingecarribee Shire Council v Concrite Quarries Pty Ltd* (2001) 114 LGERA 82 at 89, paragraph 25.
27 *Vanden,* note 26; *Brickworks Ltd v Warringah Shire Council* (1963) 108 CLR 568 at 577; *Quin,* note 4 at 18.
28 *Li Fang v Minister for Immigration, Local Government and Ethnic Affairs (No 2)* (1992) 25 ALD 455.
29 *Li Fang,* note 28, *Quin,* note 4.
30 *Roberts v Repatriation Commission* (1992) 111 ALR 436.
31 *Quin,* note 4 at 18.
32 *Roberts,* note 30 at 442.
33 *Chand v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 30 ALD 777 at 780: the case concerned a mandatory time limit. This was followed in *Brewer v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 31 ALD 716 at 719, which also concerned a mandatory time limit. See also *Glass v Defence Force Retirement and Death Benefits Authority* (1992) 28 ALD 620 at 625 in which a similar statement was made in obiter. The Court also stated that an authority could not, on the basis of a fiction, give itself scope to exercise discretion that it would not otherwise have.
34 *Minister for Immigration and Ethnic Affairs v Polat* (1995) 37 ALD 394. The court rejected the applicant's claim that the Minister was estopped from denying that Mr Polat had lodged his application for a confirmatory entry permit, because the facts did not ground an estoppel: at 399 per Davies and Branson JJ. This case was followed in *Fang v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 583 at 625; see also Carr J at 600.
35 *Polat,* note 34 at 399.
36 *Polat,* note 34 at 394.
37 *Minister for Immigration v Petrovski* (1997) 154 ALR 606 at 610 per Burchett J; 625 per Tamberlin J.
38 *Petrovski,* note 37 at 625; see also 611 per Burchett J.
39 *Roberts,* note 30, *Chand,* note 33, *Polat,* note 34 and *Petrovski,* note 37.
40 *Butler v Fourth Medical Services Review Tribunal and another* (1997) 47 ALD 647 at 663.
41 *Wang v Minister for Immigration and Ethnic Affairs* (1997) 151 ALR 717 at 722.
42 *Chan v Minister for Immigration and Multicultural Affairs*(1998) 88 FCR 404.
43 *Al Chaar v Minister for Immigration and Multicultural Affairs* [2000] FCA 941.
44 *Salehi v Minister for Immigration and Multicultural Affairs* [2001] FCA 995 at paragraph 38. See also *Barratt v Howard* [2000] 170 ALR 529 at 545, paragraph 59 in which the Full Federal Court implicitly rejected the operation of 'substantive administrative estoppel' in Australian law.
45 *Braganza v Deputy Registrar, Migration Review Tribunal* (2000) 61 ALD 475.
46 *Braganza,* note 45 at 481, paragraph 29, 31. On the facts, however, Hill J held that no estoppel arose because there was no evidence of reliance or of a representation. He also indicated that it was difficult to see how an estoppel could arise to alter mandatory time limits imposed by a statute.
47 *Pillai v Minister for Immigration and Multicultural Affairs* [2001] FCA 1756, paragraph 21-26. Interestingly, *Verwayen,* note 10, was discussed in this case at paragraph 26 on the basis that it was authority for the proposition that it would be unconscionable for a government department to depart from an assumption induced in an applicant.
48 *Minister for Immigration and Multicultural Affairs v McDade* (2001) 109 FCR 137. The Court also held that the applicant had not adequately identified the implied representation on which he relied, nor established sufficient detriment.
49 *Save the Showground for Sydney Inc v The Minister for Urban Affairs and Planning* (1997) 95 LGERA 33 at 41 per Gleeson CJ (in the context of legitimate expectation).
50 *Seymour CBD Pty Ltd v Noosa Shire Council* [2002] QPELR 226 at 241, paragraph 36; *Adams v Executive Director, Fisheries WA* [2000] WASC 34; *Pancho Properties v Wingecarribee Shire Council* (1999) 110 LGERA 352 at paras 39-46; *North Cronulla Precinct Committee Incorporated v Sutherland Shire Council* (1998) 98 LGERA 299 at 309-10; *Enoka v Shire of Northhampton* (1996) 15 WAR 483, BC9601266 at 20-28; *Holidays-A-Float Pty Limited v Hornsby Shire Council* (1992) 75 LGRA 127 at 129-131, 132; see also *FN Eckhold Pty Ltd v Auburn Municipal Council* (1987) 34 LGRA 114 at 116-7; *Baulkham Hills Shire Council v Cosmopolitan Homes* (1986) 61 LGRA 200 AT 203; *Coffs Harbour Shire Council v Ben Hall Industries Pty Ltd* (1983) 48 LGRA 391 at 398-9; *Canterbury Municipal Council v Perri* (1982) 47 LGRA 111; *Trimboli v Penrith City Council* (1981) 48 LGRA 323; *Jurkovic v City of Port Adelaide* (1979) 41 LGRA 71 at 78-9; *Rockdale Municipal Council v Duffy Bros Pty Ltd* (1974) 29 LGRA 279 at 286-7; *Brickworks,* note 27 at 577.
51 *Re Peterkin and Others and Secretary, Department of Employment, Education, Training and Youth Affairs* (1997) 44 ALD 689; *Re Bowen Repatriation Commission* (1994) 32 ALD 700, *Re Crompton and Repatriation Commission* (1992) 29 ALD 98.

52 *Lam*, note 8.
53 *Lam*, note 8 at 511, paragraphs 36-7, per Gleeson CJ.
54 *Lam*, note 8; *Quin*, note 4; *Annetts v McCann*, note 22.
55 Pierce, *Administrative Law Treatise*, 4th ed., (2002), vol 2, 13.1, cited in *Lam*, note 8.
56 *Lam*, note 8 at 518, paragraph 70, per McHugh and Gummow JJ.
57 *Verwayen*, note 10.
58 Mason CJ's dissent was based on the proposition that to hold the Commonwealth to its representation would be a disproportionate response. The judgments of the other majority judges, Toohey and Gaudron JJ, were based on waiver: *Verwayen*, note 10. See also Allars M, note 4, at 94. *Verwayen* has also been applied by the High Court of New Zealand in circumstances in which the Crown offered to sell land back to the original owner following compulsory acquisition: *Deane v Attorney-General* [1997] 2 NZLR 180 at 197-8.
59 *Metropolitan Transit Authority v Waverley Transit Pty Ltd* , note 10, affirming the decision in *Waverley Transit Pty Ltd v Metropolitan Transit Authority* (1988) 16 ALD 253.
60 *Commonwealth of Australia v Clark*, note 10. The Commonwealth did not admit liability when initially filing its defence. Instead a default judgment was entered for damages to be assessed, following which the Commonwealth had the judgment set aside and pleaded the two defences in its original defence: see Ormiston J at 344. Also, unlike *Verwayen*, note 10, significant evidence relating to the extent of detriment was led: see Ormiston J at 344.
61 *Commonwealth of Australia v Clark*, note 10, per Ormiston J at 381-2; see also Marks J at 341-3.
62 *Verwayen*, note 10; *Metropolitan Transit Authority v Waverley Transit Pty Ltd*, note 10; *Commonwealth of Australia v Clark*, note 10 per Marks J at 340; Ormiston J at 344, 364; see also *Clark v Commonwealth*, note 10, per Coldrey J at 500; Allars, note 4 at 97.
63 Allars, note 4 at 97.
64 Allars, note 4 at 98.
65 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; Allars, note 4 at 90.
66 Allars, note 4 at 90.
67 Specifically *Maritime Electric Co v General Dairies Ltd* [1937] AC 610 at 620.
68 *Marlborough Gold Mines*, note 65 at 506-7. This is surprising given that, as Allars states, 'the possible fettering of the discretion of the ASC to make policy in the nature of legal interpretations was squarely in issue': Allars, note 4 at 90.
69 *Baillieu v Australian Electoral Commission & Commonwealth of Australia* (1996) 33 IPR 494 at 508-9 per Sundberg J.
70 *Chanrich Properties Pty Ltd v Baulkham Hills Shire Council* [2001] NSWSC 229. The council granted development consent, subject to a condition, imposed under section 94 of the Environmental Planning and Assessment Act 1979, which required a cash contribution to be paid to the council and that specified land be dedicated as a public reserve.
71 Hodgson CJ found that to require the Council to pay full compensation at market value for the lots would be doing more than necessary to avoid injustice, so discounted that market value by 25%: at paragraph 111.
72 *Chanrich Properties* , note 70 at paragraph 107.
73 *Gray v National Crime Authority* [2003] NSWSC 111 at paragraphs 4, 5, 154-159, 196, 224, 226, 231-235, 237, 238-9, 245, 251; see also Young J 'Equitable estoppel and the National Crime Authority' in 'Recent Cases' (2003) 77 *ALJ* 221 at 223. Austin J held that by agreeing to take part in the witness protection program, the plaintiffs were severed from their lawful means of livelihood and so were highly vulnerable. He found that 'it would be outrageously unfair' to permit the National Crime Authority to resile from its representations and that by terminating the witness protection arrangements without meeting the plaintiff's encouraged assumptions, the authority had acted unconscionably. The equitable compensation awarded was substantially less than that sought by the plaintiffs.
74 *Gray*, note 73 at paragraphs 154-159, *Verwayen*, note 10; *Waltons v Maher* , note 10.
75 See, for example, *Baillieu*, note 69, *Chanrich Properties*, note 70, *Gray*, note 73, *Byron Shire Council v Vaughan* (No 2) (2000) 110 LGERA 424 at 431-440.
76 See, for example, the recent case of the NSW Court of Appeal in *State of New South Wales v RT & YE Falls Investments Pty Ltd* [2003] NSWCA 54 at paragraph 17 per Gleeson CJ, at paragraph 51 per Sheller JA and at paragraph 122-3 per Hodgson JA; see also *Easts Van Villages Pty Ltd v Minister Administering the National Parks and Wildlife Act* [2001] NSWSC 559 at paragraph 95; *Adams v Executive Director, Fisheries WA*, note 50 at paragraph 63.
77 *Paino v Woollahra Municipal Council* (1990) 71 LGRA 62 at 66 per Hemmings J; *Nelson v Ballina Shire Council* (1993) 80 LGERA 271 at 282 per Bignold J, discussed in *Wingecarribee Shire Council v Concrite Quarries Pty Ltd* note 26 at 89, paragraph 27; *DTR Securities Pty Ltd v Sutherland Shire Council* (1993) 79 LGERA 88; see also *Dunn, Harris & Eddy v Commonwealth*, Supreme Court of NSW, unreported, Durnford J, 15 December 1994, BC 9403492 at 21-25.
78 See, for example, *Crofton (deceased) (by his Trustees Nuttal and Nash) v Workcover Corp of South Australia*, unreported, Supreme Court of South Australia, Full Court, Prior, Nyland and Gray JJ, 16 April 2002 at paragraphs 21-22; *Anderson v Commonwealth* (1998) 51 ALD 72 at 79.
79 *Reprotech*, note 1.
80 *Reprotech*, note 1 at paragraph 33.
81 *Reprotech*, note 1 at paragraphs 34-35; see also Lord Mackay, paragraph 6.

82 *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204; see, for example, *Downderry Construction Limited v The Secretary of State for Transport, Local Government and the Regions* [2002] EWHC Admin 2.

83 In applying the traditional rule, the Court of Appeal reaffirmed the 'orthodoxy' established in the *Southend-on-Sea* case: *Western Fish,* note 82; *Southend-on-Sea,* note 4; see also Craig PP, *Administrative Law,* (London: Sweet & Maxwell, 4th ed., 1999) at 639.

84 The first exception was that estoppel would operate to bind an authority where it had statutory power to delegate functions to its officers and there was some evidence justifying reliance. It arose out of Lord Denning's decision in *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222.

85 The second exception was that estoppel would lie against a planning authority which waived a procedural requirement relating to any application made to it for the exercise of its statutory powers: *Western Fish,* note 82. The exception arose out of the decision in *Wells v Minister of Housing and Local Government* [1967] 2 All ER 1041 at 1044-5 per Lord Denning MR.

86 *R v Leicester City Council Ex p. Powergen UK Ltd* [2000] JPL 629 at 639. In that case, Dyson J (at first instance) noted that the applicant did not specifically raise the issue of estoppel, but relied on having a legitimate expectation that one of the conditions of a planning permission would allow the development of a food store. On the facts, Dyson J held that the representations relied on were not sufficient to found a legitimate expectation and that the applicant had failed to demonstrate detrimental reliance. Dyson J's decision was affirmed by the English Court of Appeal. Schiemann LJ held that on the facts of the case, it was not possible to show that the doctrine of legitimate expectation operated to allow Powergen to proceed to build a food store on the basis of implied representations from the Council: *R v Leicester City Council Ex p. Powergen UK Ltd* [2000] JPL 1037 at paragraph 23; see also Kinloch I, 'Representations, Estoppel and Legitimate Expectation', [2003] *JPL* 288 at 292-3; Jones G & Chapman H, 'The end of public law estoppel?' (28 June 2002) *Solicitor's Journal* 580 at 581.

87 *Coghurst Wood Leisure Park Limited v The Secretary of State for Transport, Local Government and the Regions and Rother District Council* [2003] LPL 206 at paragraph 56; see also Kinloch, note 86 at 295-6; Jones G & Chapman H, note 86.

88 *Preston v Inland Revenue Commissioners* [1985] 2 All ER 327.

89 *Preston,* note 88 at 341. In *Ex parte Unilever,* Simon Brown LJ proposed the following reconciliation of strands of public law: 'Unfairness amounting to an abuse of power .. is unlawful not because it involves conduct such as would offend some equivalent private law principles, .. but rather because it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power...The test in public law is fairness, not an adaptation of the law of contract or estoppel': *Ex parte Unilever Plc.* [1996] STC 681 at 695-6. Interestingly, Allars states that *Re Preston* was limited by the House of Lords to the facts of that case: Allars M, *Introduction to Australian Administrative Law,* (Sydney: Butterworths, 1990) at 255, paragraph 6.44.

90 See *R v Home Secretary, ex parte Ruddock* [1987] 2 All ER 518 at 531; *R v Board of Inland Revenue; ex parte MFK Underwriting Agencies Ltd* [1990] 1 All ER 91 at 110-111, 115; *R v Devon County Council; ex p Baker* [1995] 1 All ER 73 at 88; *Ex parte Unilever Plc.,* note 89; *Regina v North and East Devon Health Authority; ex parte Coughlan* [2000] 2 WLR 622 at 645; see also McLachlan J, 'Substantive Unfairness: Elephantine Review or a Guiding Concept? Part II', (1991) 2 *PLR* 109 at 111-112 and Stewart C, 'Substantive Unfairness: A New Species of Abuse of Power' (2000) 28 *Fed L Rev* 617 at 625.

91 *Coughlan,* note 90 at 650-1, paragraph 73. The Court also referred to Simon Brown LJ's comment in *Baker* that one of the categories of substantive legitimate expectation recognised by modern authority is 'when there is a clear and unambiguous representation upon which it was reasonable' for a person to rely. In such a case, the administrator will be held bound in fairness to the representation made. Brown LJ noted that the doctrine employed in this sense was akin to an estoppel: *Baker,* note 90.

92 *Coughlan,* note 90.

93 *Coughlan,* note 90.

94 *Coughlan,* note 90 at 646.

95 *Henry Boot Homes v Bassetlaw District Council* [2002] EWCA Civ 983.

96 *Henry Boot,* note 95 at paragraph 55; see also *Coghurst,* note 87 at paragraph 58, 63; Kinloch I, note 86 at 298.

97 *Kurtovic,* note 10 at 220.

98 *Kurtovic,* note 10 at 221.

99 *Quin,* note 4 at 23.

100 *Quin,* note 4 at 23; see also McLachlan J, note 90 at 119-120.

101 *Barratt v Howard,* note 44.

102 *Barratt v Howard* note 44 at 546, paragraph 66.

103 *Lam,* note 8 at 530, paragraph 119, per Hayne J.

104 *Lam,* note 8 at 507, paragraph 23, per Gleeson CJ.

105 *Lam,* note 8 at 508, paragraph 28, per Gleeson CJ and at 530, paragraph 119, per Hayne J.

106 *Lam,* note 8 at 517-8, paragraph 67 per McHugh and Gummow J; Callinan J stated that 'on no view' could a legitimate expectation 'give rise to substantive rights rather than to procedural rights': at 539 paragraph 148, per Callinan J.

107 *Lam,* note 8 at 517, paragraph 66, per McHugh and Gummow JJ.

108 *Lam,* note 8 at 517-8, paragraph 67, per McHugh and Gummow JJ: *Quin,* note 4 at 22; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 310-311.
109 *Lam,* note 8 at 517-8, paragraph 67, per McHugh and Gummow JJ.
110 *Lam,* note 8 at 519, paragraph 72, per McHugh and Gummow JJ.
111 French Justice RS, 'The Equitable Geist in the Machinery of Administrative Justice', (2003) 39 *AIAL Forum* 1.
112 Allars, note 4 at 94.
113 Allars, note 4 at 95.
114 Stewart C, note 90 at 630.
115 *Petrovski,* note 37 at 626, Thomson, note 4 at 98; see also *Roberts,* note 30 at 442.
116 *Re Preston,* note 88 at 341; *Ruddock* , note 90; *MFK Underwriting,* note 90 at 110-111, 115; *Baker,* note 90; *Unilever,* note 89 at 695-6; *Coughlan,* note 90; see also McLachlan J, note 90. For the Australian position, see *Kurtovic,* note 10 at 220-1, *Quin,* note 4 at 23, *Barratt v Howard,* note 44 at 546, paragraph 66, *Lam,* note 8, at 508, paragraph 28, per Gleeson CJ, at 517-8, paragraph 67 per McHugh and Gummow JJ, at 530, paragraph 119, per Hayne J, and at 539 paragraph 148, per Callinan J.
117 Bradley AW, 'Estoppel: the need for public law to stand 'on its own two feet' '[2002] *P.L. Winter* 597 at 600.
118 Kinloch I, note 86 at 298; see also Bradley, note 17 at 597; Jones & Chapman, note 86.
119 McLachlan J, 'Substantive Unfairness: Elephantine Review or a Guiding Concept? Part I', (1991) 2 *PLR* 12 at 22.
120 Allars, note 4 at 52.
121 Allars, note 4 at 100. The pure doctrine of separation of powers encapsulates the idea that each of the three branches of government, namely the legislature, the executive and the judiciary, 'will be a check to the others': Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), cited in Allars M, *Administrative Law: Cases and Commentary,* (Sydney: Butterworths. 1997) at 73.
122 *Quin,* note 4 at 35.
123 *Quin,* note 4 at 36. This statement was affirmed by the High Court in *Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey J, McHugh J and Gummow J in discussing the proper role of a reviewing court.
124 Allan TRS, 'Pragmatism and Theory in Public Law' (July 1988) 104 *LQR* 422 at 423.
125 Galligan DJ, *Discretionary Powers,* (Oxford: Clarendon Press, 1996) at 233.
126 *Lam,* note 8 at 520, paragraph 76, per McHugh and Gummow JJ.
127 McLachlan J, note 119 at 15; see also *R v Toohey; ex p North Land Council* (1981) 154 CLR 170 at 222 per Mason J, cited in Allan, note 124 at 433.
128 Allars, note 89 at 163 at paragraph 5.4.
129 *Quin* , note 4 at 37.
130 *Lam,* note 8 at 519, paragraph 73, per McHugh and Gummow JJ. They point out that the French system of administrative law depends on the close connection between the administrative and judicial functions: at paragraph 74.
131 Allars M, note 89 at 163 at paragraph 5.6.
132 Allan, note 124.
133 In Class 1 of the Land and Environment Court's jurisdiction: section 17, Land and Environment Court Act 1979 (NSW). note: The jurisdiction of State courts is not constrained by Chapter III of the Commonwealth Constitution.
134 Allars, note 4 at 86.
135 *Kurtovic,* note 10 at 213.
136 Campbell E, 'Ostensible Authority in Public Law', (1999) 27 *Fed L Rev* 1 at 5-7, 17; *Lever Finance,* note 84; *Western Fish,* note 82; *Jurkovic,* note 50; see also *Robertson v Minister of Pensions* [1949] 1 KB 227; *Howell v Falmouth Boat Construction Co* [1951] AC 837.
137 Thomson, note 4 at 102 Thomson refers to Kirby P's comment in *McPherson* that 'the justice of equity may... supply the omission of the legislature, filling the silences of the statute': *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 700.
138 French, note 111 at 19.
139 See, for example, Pagone, note 5 at 281; Thomson J, note 4 at 102; Campbell E, note 136 at 17.
140 Craig, note 83 at 646, 642.
141 Craig, note 83, p 615.
142 Raz, *Ethics in the Public Domain,* (1997) at 373, cited in Craig, note 83 at 616. See also Stewart, who refers to the 'principle of legal certainty' as 'one of the three main constituent elements of the rule of law: Stewart, note 90 at 623.
143 *Kurtovic,* note 10 at 210.
144 McLachlan, note 90 at 117.
145 McLachlan, note 90 at 117.
146 Thomson, note 4 at 101.
147 Pagone, note 5 at 274-5.
148 Hutchinson AC 'The Rise and Ruse of Administrative Law and Scholarship' in Hutchinson AC, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought,* (Carswell: Toronto, 1998), cited in Allars, note 121 at 103.
149 Kinloch, note 86 at 298; see also Bradley, note 117 at 597 Jones & Chapman, note 86.

150 *Kurtovic,* note 10 at 209; see also Thomson, note 4 at 108.
151 Rutherford LA, Peart JD & Pickard RD, 'Estoppel and Development Control Counter Service', (Dec 1986) *Journal of Planning and Environmental Law* 891 at 896; *Brooks and Burton v Secretary of State for the Environment* (1976) 35 P & CR 27 at 40; see also *Western Fish*, note 82.
152 Finn P & Smith KJ, 'The Citizen, the Government and 'Reasonable Expectations' ' (March 1992), 66 *ALJ* 139 at 146; Stein, Paul, 'Can Review Bodies Lead to Better Decision-Making' (October 1991) 66 *CBPA* 118 at 122.
153 Finn & Smith, note 152 at 147.
154 Allars, note 4 at 93. Note: the *Southend-on-Sea* principle referred to by Allars is the traditional rule: see notes 3 and 4 above.
155 Finn & Smith, note 152 at 147; *Verwayen*, note 10 at 411 per Mason CJ; see also Campbell E, 'Estoppel in Pais and Public Authorities' (May 1998) 5 *Aust Jo of Adm Law* 157 at 166-7.
156 Finn & Smith, note 152 at 147.
157 Allars, note 4 at 87.
158 Wade & Forsyth, *Administrative Law*, (Oxford: Clarendon Press, 7th ed, 1994) at 376.
159 Thomson, note 4 at 112.
160 Craig, note 83 at 650.
161 Pagone argues that estoppel should operate in public law, subject to two exceptions. Firstly, in some circumstances, the ultra vires doctrine must exclude estoppel in circumstances 'which invoke such fundamental countervailing doctrines, such as the constitutional doctrine that moneys cannot be withdrawn from consolidated revenue without parliamentary authority', and secondly, cases where the public interest is best served by excluding estoppel: Pagone, note 5 at 28. McLachlan argues that the principle of consistency, akin to a form of public law estoppel, should apply in Australia: McLachlan, note 90 at 123. Thomson argues that 'nothing inherent in the nature of private law estoppel prevents it from being transposed into public law' and on this basis, that estoppel should apply to representations about the performance of statutory functions, unless 'legislative intention to exclude estoppel can be deduced from the statute': Thomson, note 4 at 93.
162 Allars, note 4 at 95.
163 *Chanrich Properties* , note 70; *Gray,* note 73.
164 Pagone, note 5 at 279.
165 Pagone, note 5 at 279; see also *Shaddock v Parramatta City Council* (1981) 36 ALR 385. The *Civil Liability Act* 2002 (NSW) may affect this in NSW to some extent, although this question is beyond the scope of the paper.
166 Allars, note 4 at 49.
167 In *DTR Securities,* note 77, Talbot J held that a developer was estopped from denying that a certain condition of consent had been validly imposed, since that condition had been the subject of agreement.
168 *DTR Securities,* note 77; see also *Wingecarribee Shire Council v Concrite,* note 26 at 90, paragraph 30, in which Lloyd J found that as the necessary elements of estoppel were not made out on the facts, it was unnecessary to decide whether he could uphold the council's claim that the respondent was estopped from denying the council's entitlement to have declarations made limiting the operation of the consent.
169 *Baillieu,* note 69 at 509.
170 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 678.
171 Allars, note 4 at 49.
172 Craig, note 83 at 669-70.
173 *Lam,* note 8 at 508, paragraph 28, at 509, paragraphs 32-3 per Gleeson CJ; at 516-7, paragraphs 61-3, at 522, paragraphs 81-83, per McHugh and Gummow JJ; at 531, paragraph 121 per Hayne J; at 536, paragraph 140, at 538, paragraph 145 per Callinan J.
174 Craig, note 83 at 628.
175 *Kurtovic,* note 10 at 215.
176 *Gray v National Crime Authority* , note 73.
177 Allars, note 4 at 99.
178 Allars, note 4 at 96-7.
179 See, for example, *Baillieu,* note 69 at 508-9 per Sundberg J.
180 *Lam,* note 8 at 518, paragraph 69, per McHugh and Gummow JJ. note, however, that their comments relating to estoppel were obiter.
181 *Quin*, note 4 at 18.
182 Thomson, note 4 at 97-8; see also McLachlan, note 119 at 16-7.
183 In *Sankey v Whitlam*, Gibbs ACJ said 'In a particular case, the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice': *Sankey v Whitlam* (1978) 142 CLR 1 at 43; see also 63-4 per Stephen J and 98-9 per Mason J; cited with approval in *Commonwealth of Australia v Northern Land Council & Anor* (1993) 176 CLR 604 at 616-7, see also 614-5.
184 *Petrovski*, note 37 at 611.
185 *Enoka,* note 50 at 497 per Steytler J.
186 *Western Fish*, note 82; see also Wade & Forsyth, note 158 at 374-5.
187 *Reprotech*, note 1, paragraph 33.
188 Craig, note 83 at 648.

189 Craig, note 83 at 644.
190 In support of this argument, he cites the decision of Lord Denning in *Laker Airways*, as well as US cases: Craig, note 83 at 645, *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 707; *City of Long Beach v Mansell* 476 P.2d 423 (1970) 448. The balancing approach Craig advocates is similar to that explored by Mason CJ in *Quin*, note 4 at 18.
191 Craig, note 83 at 648.
192 Pagone, note 5 at 274-5.
193 *Verwayen,* note 10 at 445 per Deane J; cited with approval in *Giumelli v Giumelli* (1999) 196 CLR 101 at 123 per Gleeson CJ, McHugh, Gummow and Callinan JJ.
194 *Verwayen,* note 10 at 440-1 per Deane J; see also Parkinson , note 12 at 35, 42-4.
195 Pagone, note 5 at 280.
196 Schwartz, *Administrative Law* (1976) at 134, cited in Craig, note 83 at 637.

PROVIDING INFORMATION TO THE PARLIAMENT

*Stephen Argument**

Introduction

The issues that arise in relation to providing information to the Australian Federal Parliament (**'Parliament'**) involve little or no law. In the large part, they are not particularly difficult, once you understand the underlying principles and the way that the Parliament applies them. It also helps to have a working knowledge of the relevant reference material.[1]

This article addresses the relevant issues under 3 broad headings:

- the ways in which information is provided to the Parliament;
- the bases on which requests by the Parliament for information can be resisted; and
- the consequences of providing information to the Parliament.

The ways in which information is provided to the parliament

Information can be provided to the Parliament voluntarily, say in response to an invitation to make submissions to a parliamentary committee or in the course of providing evidence to a Senate Estimates Committee, or on request. Providing information voluntarily is uncontroversial, except that a few things should be remembered. In the case of information that is requested, requests can be pressed (and the following part of the paper deals with resisting such requests).

Making submissions to Parliamentary committees

The starting point for submissions on behalf of government agencies is the Department of Prime Minister and Cabinet's *Guidelines for Presentation of Government Documents, Ministerial Statements and Government Responses to the Parliament.*[2] This is a general reference point for the preparation of all government documents that are intended for the Parliament.

Beyond these guidelines, the first thing to bear in mind in relation to providing information voluntarily to a Parliamentary committee is that there should be no expectation that a person making a submission will be in any way recompensed for the time and expense incurred in making such a submission. While a committee may pay for a witness to travel in order to give evidence, the general rule is that submissions are made at the expense of the person or organisation making them.

As an interesting side issue, it is important to note that the Senate requires that its committees be advised if a department or other body pays the expenses of a witness not

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attached to that department or other body, 'so that the committees are not misled as to the position of the witnesses and the status of their evidence'.[3]

The second thing to remember is that making a submission to a committee does not automatically mean that parliamentary privilege (which is discussed further below) attaches to that submission. The Senate has published a document entitled *How to make a submission to a Senate Committee inquiry*,[4] which indicates that parliamentary privilege only applies after the relevant committee has formally accepted the submission. The equivalent House of Representatives document, *Preparing a submission to a Parliamentary Committee Inquiry*,[5] does not explicitly make this point, though it does indicate that a committee has a discretion to decide whether or not to accept a submission. The point of this mechanism is to allow a committee to decline to clothe with parliamentary privilege a submission that contains, for example, scurrilous or defamatory material, or because it contains material that is not relevant to the particular inquiry.

While various committees apparently have procedures that allow for automatic acceptance of submissions (ie without a formal motion of the committee), the more prudent approach for persons and bodies making submissions is *not* to assume that a submission to a parliamentary committee has been formally accepted but to await confirmation that this is the case.

The third thing to remember is that, once a submission has been made to a parliamentary committee, it is for the committee to decide whether or not the submission is to be made public. That is, it is not possible to make a submission to a parliamentary committee and for the person or body making the submission then to publish it. Rather, the person or body must wait until the relevant committee has authorised the publication of the submission.[6]

Of course, the combination of the second and third issues above involves the most danger. A person or body should *never* publish a submission made to a parliamentary committee on the assumption that anything contained in the submission would automatically be protected by parliamentary privilege.

This raises the wider issue of the privilege (if any) that attaches to correspondence and information sent to members of the Parliament. Section 16 of the *Parliamentary Privileges Act 1987* (**'Parliamentary Privileges Act'**) provides certain protections in relation to 'proceedings in Parliament', as defined in subsection 16(2) of the Parliamentary Privileges Act, namely:

> all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
> (a) the giving of evidence before a House or a committee, and evidence so given;
> (b) the presentation or submission of a document to a House or a committee;
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

This is a very wide definition and its limits have been tested in various court cases. In *O'Chee v Rowley*,[7] the Queensland Court of Appeal considered the application of parliamentary privilege to certain documents that had been provided to Senator O'Chee by a constituent and also letters exchanged between the Senator and another Member of Parliament (**'MP'**). The documents were sought in relation to a defamation action by a Cairns fisherman, following statements that Senator O'Chee had made in a radio interview relating to the issue of long-line fishing. Senator O'Chee had addressed this issue in 2 speeches in the Senate and he claimed he had used the documents in making his remarks. However, he

did not table them. Senator O'Chee claimed that the documents were 'proceedings in Parliament' and, as a result, were covered by parliamentary privilege (and, in particular, could not be used in the defamation proceedings).

The Court of Appeal held that if documents came into the possession of an MP who retained them with a view to using them, or the information contained in them, for questions or debate in a House of Parliament, then the procuring, obtaining or retaining of possession were acts done for the purpose of, or incidental to the transacting of the business of that House, as required by subsection 16(2) of the Privileges Act. This means that if correspondence or information is in the possession of an MP to be used for the purpose of transacting the business of a House or a committee, parliamentary privilege would attach. The key issue, however, is making that connection to the business of a House. That being so, it should never be assumed that such correspondence, etc. automatically attracts any sort of privilege.

Information provided to Estimates committees

The general propositions set out above in relation to submissions to parliamentary committees also apply to submissions made to Senate Legislation Committees when those committees are considering Estimates (**'Estimates committees'**). There are some important differences, however. The most significant in this context is the proposition that 'all documents officially received as evidence by [Estimates committees] become public documents accessible to all'.[8] In practice, Estimates committees generally do not decline to accept material or information submitted to it but, rather, publish all material received. Another key difference is that Estimates committees have no power to take evidence *in camera* (discussed further below).[9]

As a side issue, it is interesting to note that, prior to the introduction of the 'Legislation Committee' and 'Reference Committee' structure, in 1994, Estimates committees had no power to 'send for persons and documents'. Only the Legislative and General Purpose Standing Committees had this power. The 1994 reforms therefore significantly increased the power of Estimates committees.

Providing information on request: The power to send for persons and documents

Various parliamentary committees have the power to call for witnesses and documents (in effect, a power of summons or *subpoena*). In the House of Representatives, the power is set out in Standing and Sessional Order 340, which provides:

> **Power to call for witnesses and documents**
>
> **340** (a) A committee or any subcommittee shall have the power to call witnesses and require that documents be produced.
>
> (b) The chair of a committee or subcommittee shall direct the secretary of the committee or subcommittee to invite or summon witnesses and request or require the production of documents, as determined by the committee or subcommittee.

A similar power is provided by Senate Standing Order 25(15), which provides:

> A committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.

Senate Standing Order 176 sets out the power to summon witnesses:

Summoning of witnesses

176(1) Witnesses, other than senators, may be ordered to attend before the Senate by summons signed by the Clerk, or before a committee by summons signed by the secretary of the committee.

(2) If a witness fails or refuses to attend or give evidence, the matter shall be reported to the Senate.

The Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for the Scrutiny of Bills also have the power to send for persons and documents.[10]

For statutory committees, the power to call for witnesses and documents may be set out in the relevant statute. For the Joint Committee of Public Accounts and Audit, for example, the power to summons witnesses is set out in section 13 of the *Public Accounts and Audit Committee Act 1951*.

Failure to comply with a requirement to appear or to produce documents could, ultimately, result in a person being found in contempt.

It is important to bear in mind that individual Members and Senators have no power to require Government agencies or individual Australian Public Service (**'APS'**) employees to provide information. Any requests must come from a parliamentary committee or from a House of the Parliament to have the capacity to compel the production of information.

Orders for return

Senate Standing Order 164 provides:

Order for the production of documents

164(1) Documents may be ordered to be laid on the table, and the Clerk shall communicate to the Leader of the Government in the Senate all orders for documents made by the Senate.

(2) When returned the documents shall be laid on the table by the Clerk.

A request for documents made under Senate Standing Order 164 is called an 'order for return'. When the order is complied with, the result is called a 'return to order'.

House of Representatives Standing and Sessional Order 316 provides:

Papers ordered

316 Papers may be ordered to be laid before the House, and the Clerk shall communicate to the Minister concerned all orders for papers made by the House; and such papers when received shall be laid on the Table by the Clerk.

Orders for return are used in the Senate to require the Government to produce documents. *Odgers' Australian Senate Practice* (10th edition) (**'Odgers'**) states:

> Orders for the return of documents are relatively common (In the Parliament of 1993-96, for example, 53 such orders were made, all but 4 being complied with). In the Parliament of 1996-98, 48 orders were made and 5 were not complied with. They are used by the Senate as a means of obtaining information about matters of concern to the Senate. They usually relate to documents in the control of a minister, but may refer to documents controlled by other persons. Documents called for are usually the subject of some political controversy, although there have been several examples of orders made for the production of answers to questions on notice.[11]

The current Supplement to Odgers states:

> In the Parliament of 1998-2001, there were 56 orders, and 15 not complied with, the latter figure reflecting increasing resistance by the then government to the orders .....

The issue of resisting requests for information is discussed further below.

Other requirements to provide information - Departmental and agency contracts: The 'Murray motion'

On 20 June 2001, the Senate passed a motion in relation to departmental and agency contracts. The key requirements of the motion (often referred to as the 'Murray motion', as it was moved by Australian Democrats Senator Andrew Murray) are:

- at 6-monthly intervals, there be tabled in the Senate, by Ministers, a list of contracts entered into by agencies governed by the *Financial Management and Accountability Act 1997* for which the Minister is responsible (or that the Minister represents in the Senate) during the previous 12 months and involving consideration in excess of $100,000;
- the list is to contain, in relation to each contract:
  - the contractor and the subject matter of the contract;
  - whether the contract contains confidentiality provisions;
  - whether the contract contains provisions regarded by the parties as confidential;
- if there are confidentiality issues, a statement of the reasons for confidentiality.[12]

Indexed files lists

Originally passed by the Senate on 30 May 1996, a similar requirement applies in relation to indexed lists of departmental and agency files. Twice a year, Ministers must table, on behalf of departments and agencies, a letter advising that an indexed list of all 'relevant' files created in the 6 months prior to 1 January and 1 July has been placed on the Internet.[13]

Agency advertising and public information projects

Similar requirements also apply as a result of a motion passed on 29 October 2003, in relation to advertising and public information projects undertaken on behalf of agencies. A statement must be tabled by the Minister responsible for an agency in respect of each advertising or public information project undertaken by each agency where the cost of the project is estimated or contracted to be $100,000 or more. Within 5 sitting days of the Senate after the relevant project has been approved, a statement must be tabled indicating:

- the purpose and nature of the project;
- the intended recipients of the information to be communicated by the project;
- who authorised the project;
- the manner in which the project is to be carried out;
- who is to carry out the project;
- whether the project is to be carried out under a contract;

- whether such contract was let by tender;
- the estimated or contracted cost of the project;
- whether every part of the project conforms with the Audit and Joint Committee of Public Accounts and Audit guidelines;[14] and
- if the project in any part does not conform with those guidelines, the extent of, and reasons for, the nonconformity.[15]

Resisting requests for information

The Guidelines for Official Witnesses

The starting point for APS employees when considering whether or not there is any basis for resisting a request by a House of the Parliament or by a parliamentary committee that they attend to give evidence is the document published by the Department of the Prime Minister and Cabinet entitled *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters - November 1989* (**'Guidelines for Official Witnesses'**).[16] That document sets out a useful framework for dealing with such requests.

According to the Guidelines for Official Witnesses, there are 3 main areas in relation to which there may be restrictions on the information that they can provide to a parliamentary committee, namely:

- matters of policy;
- matters in relation to which public interest immunity may apply; and
- matters involving confidential material, in relation to which it may be desirable to provide evidence *in camera.*

As a matter of practicality, the issue of resisting a request for information is unlikely to come other than from the Senate or from a Senate committee. This reflects the fact that the Government invariably has the numbers in the House of Representatives. For that reason, the discussion in this part of the paper concentrates on the relevant Senate powers and requirements.

In relation to matters of policy, the Guidelines for Official Witnesses refer to paragraph 16 of Resolution 1 of *Resolutions Agreed to by the Senate on 25 February 1988* (**'Privileges Resolutions'**).[17] That Resolution is entitled 'Procedures to be observed by Senate committees for the protection of witnesses'. Paragraph 16 provides:

> An officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.

The Guidelines for Official Witnesses provide practical information about how to deal with this issue, when it arises. This paper does not deal with it in any further detail, other than to note that (as with many things relating to the Senate) what will and will not be accepted as being a 'matter of policy' is something for the Senate to determine and not something to which any precise (or predictable) methodology applies.

Public interest immunity

Following on from the proposition set out immediately above, it must be said that the Senate is grudging in its recognition of the concept of public interest immunity. Odgers states:

> [I]t is acknowledged that there is some information held by government which ought not to be disclosed. Such immunity from disclosure was formerly known as crown privilege or executive privilege and is now usually known as public interest immunity. While the Senate has not conceded that claims of public interest immunity by the executive are anything more than claims, and not established prerogatives, it has usually not sought to enforce demands for evidence or documents against a ministerial refusal to provide them.[18]

There is lengthy discussion in Odgers[19] of circumstances in which the Senate has *not* been prepared to concede that public interest immunity operates to prevent information being provided to it or to one of its committees. This paper does not deal with the detail of those arguments. The bottom line is that it is a matter in relation to which the Senate reserves the final say. The Guidelines for Official Witnesses do, however, provide some useful information about how to approach this issue. Particular points that should be borne in mind are:

- claims of public interest immunity should be made by the responsible Minister (after consultation with the Attorney-General and the Prime Minister);
- the Attorney-General's Department (and the Office of Legal Services Coordination) has a special role (as a result of paragraph 7 of the *Legal Services Directions*) in relation to claims for public interest immunity and must be consulted; and
- various of the grounds under which documents are exempt from release under the *Freedom of Information Act 1982* (**'FOI Act'**) are of assistance in establishing a case for withholding information from the Parliament on public interest immunity grounds (but bear in mind that the Senate no more recognises the grounds of exemption contained in the FOI Act than it does public interest immunity).

Statutory secrecy provisions

The Guidelines for Official Witnesses also identify statutory secrecy provisions as a possible basis for withholding information from the Parliament. There are many statutory provisions that prohibit the disclosure of information, usually also creating criminal offences for the disclosure of information obtained under the relevant statute by officers who have access to that information in the course of duties performed in accordance with the statute. In the early 1990s, it was a point of contention between the Senate and the (then) Government as to whether statutory provisions of this type prevented the disclosure of information covered by the provisions to a House of the Parliament or to a parliamentary committee in the course of a parliamentary inquiry.

Not surprisingly, the position maintained by the Senate and its advisers was that statutory secrecy provisions had no effect on the powers of the Houses and their committees to conduct inquiries, with the effect that general secrecy provisions did not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees. The basis of that view was that the law of parliamentary privilege provided absolute immunity to the giving of evidence before a House or a committee (meaning that there could be no punishment for giving such evidence).

The Government's position was set out in a series of opinions from the Solicitor-General, to which the Clerk of the Senate responded and (in general) disagreed with. The detail of the disagreement (or at least the Senate's perspective of it) is set out in Odgers.[20]

In essence, the Senate's position was that the submission of a document or the giving of evidence to a House or a committee is part of 'proceedings in Parliament' and, as a result, attracts the wide immunity from all impeachment and question. To punish someone, under a statutory secrecy provision, for providing information would be an interference with parliamentary privilege. The Senate argued that it is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words. In support of this, the Clerk of the Senate argued that section 49 of the *Constitution* provides that the law of parliamentary privilege can be altered only by a statutory declaration by the Parliament. He then argued that general secrecy provisions did not amount to express words ousting the privilege.

The Government argument in response was that if the Parliament, cognisant of the existence of the privilege, passed a law containing a secrecy provision, with sanctions for its breach, that was 'express words' altering the application of Parliamentary privilege. If it was not, it was alteration by a 'necessary implication' drawn from the statute. The Clerk of the Senate rejected this view, essentially on the basis of the threat that the interpretation posed to the power of the Houses and their committees.

The final position is that there has been significant back-tracking in the government legal advice, providing the Clerk of the Senate with yet another victory over the lawyers. Suffice to say that you should be cautious about denying information to a Senate committee on the basis that it would offend against a statutory secrecy provision, certainly one that is framed in general terms.

Sub judice *convention*

The concept of '*sub judice*' is generally raised in the context of a matter not being able to be dealt with or discussed because it involves a matter that is before the courts. The source of the concern is that such dealing might prejudice the matter that is before the court. It is a term that should be invoked with *extreme* caution. It should certainly not be invoked as 'the *sub judice* **rule**', as the Senate will be quick to point out that there is only a *sub judice* **convention**. Odgers states:

> The *sub judice* convention is a restriction on debate which the Senate imposes upon itself, whereby debate is avoided which could involve a substantial danger of prejudice to proceedings before a court, unless the Senate considers that there is an overriding requirement for the Senate to discuss a matter of public interest.
>
> The convention is not contained in the standing orders, but is interpreted and applied by the chair and by the Senate according to circumstances.
>
> The concept of prejudice to legal proceedings involves an hypothesis that a debate on a matter before a court could influence the court and cause it to make a decision other than on the evidence and submissions before the court. A danger of prejudice would not arise from mere reference to such a matter, but from a canvassing of the issues before the court or a prejudgment of those issues.[21]

Leaving aside the Senate's position for a moment, the basis of the *sub judice* convention is best summed up in the following quote:

> Parliament should be the supreme inquest of the State, whilst not poisoning the wells of justice before they have begun to flow.[22]

That is the real point. The role of the Parliament as the 'supreme inquisitor' is not denied. What is important, however, is that the Parliament does not carry out that role in such a way as to divert (or thwart) the 'normal' course of justice.

The Senate does, however, routinely question any notion that its activities should be resisted or delayed on the basis that court proceedings are on foot in relation to the same issues. Again, this paper will not canvass those issues in any detail[23] but some basic points should be borne in mind. Apart from the proposition that it is a convention rather than a rule, it is important to note that the Senate requires the matter to be actually before a court and not that proceedings merely be likely or contemplated.

Second, the Senate does not regard the convention as operating if a matter is before a judge, rather than a magistrate or a jury. The basis of this proposition is that, because of his or her background and training, a judge is unlikely to be influenced by anything occurring outside of the court. In a similar vein, the Senate tends not to accept *sub judice* as applying to coronial inquiries, on the basis that a coroner is conducting an 'administrative' rather than a judicial function.[24]

Third, it is not enough to demonstrate simply that a matter is before the courts. It must also be demonstrated that there is a real danger that the matter will be prejudiced by the Senate dealing with it *and* that the public interest in the Senate continuing to do so is outweighed by that prejudice.

While these seem like fairly tough hurdles to overcome, it is comforting to note that the Senate has, in fact, exercised a significant degree of restraint in relation to matters before the courts.

Other matters:* In camera *evidence

Paragraph (7) of the Senate's Privileges Resolution No 1 provides for evidence to be given *in camera*. It provides:

> A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for that decision.

Paragraph (8) then places an important caveat on that proposition:

> Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.

In other words, what the Senate giveth, the Senate can taketh away. It is interesting to note that, in the House of Representatives, Standing and Sessional Order 339 provides for evidence to be taken *in camera*. However, in addition to that provision, the House has made the following resolution in relation to the taking of *in camera* evidence:

> Where a committee has agreed to take evidence in camera, and has given an undertaking to a witness that his or her evidence will not be disclosed, such evidence will not be disclosed by the committee or any other person, including the witness. With the written agreement of the witness, the committee may release such evidence in whole or in part.[25]

The resolution also provides for Members of the House to be referred to the Committee of Privileges, and penalised, for disclosing *in camera* evidence.

It is also important to note that, as indicated above, Senate Estimates committees cannot receive evidence *in camera*. The authority for this proposition is Senate Standing Order 26(2) which provides that Estimates committees shall hear evidence in public session. In the

absence of a formal power to hear evidence *in camera*, the Senate regards this as a requirement that Estimates committees can only take evidence in public session.

Commercial confidentiality

It may also be of interest to note that, on 30 October 2003, the Senate passed the following resolution in relation to confidentiality:

> The Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information.[26]

This is also something to be borne in mind.

Privacy Act implications

Another interesting side issue is that the Office of the Privacy Commissioner regards a requirement to provide information to the Parliament as being a requirement to provide information 'by law' for the purposes of the exceptions to the limitations on use and disclosure of personal information, under paragraphs 10.1(c) and 11.1(d) of the Information Privacy Principles.[27]

What are the consequences of providing information to the Parliament?

It has already been noted that making a submission to a parliamentary committee carries with it a limitation on what then can be done with the submission. That is, a person or body that makes a submission cannot publish the submission to anyone else without the permission of the relevant committee (or without the relevant committee publishing it first). The more significant ramifications of providing information to the Parliament are, of course, the operation of parliamentary privilege.

Parliamentary privilege

The principal objective of Parliamentary privilege is to ensure that the provision of information to the Parliament and its committees is unfettered. It operates to ensure that no-one should ever not provide information because he or she was afraid of the consequences (legal or otherwise) of doing so. The fundamental proposition is that **a person cannot be subject to legal or other sanctions for supplying information to the Parliament or one of its committees.**

This means that a person cannot be physically threatened, or sued for defamation or sacked from his or her job because he or she has given evidence to the Parliament or to a parliamentary committee. That proposition is relatively uncontroversial. The more problematic issue is the potential for section 16 of the Parliamentary Privileges Act to limit the use that can subsequently be made in courts and tribunals of information provided to the Parliament.

As indicated above, section 16 of the Parliamentary Privileges Act operates to limit the use of 'proceedings in Parliament' in a court or tribunal. It provides (in part):

> **Parliamentary privilege in court proceedings**
>
> **16(1)** For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying,

are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

The effect of subsection 16(3) was considered in some detail in the House of Representatives Standing Committee of Privileges' 2000 *Report of the inquiry into the status of the records and correspondence of Members*. In that Report, the House of Representatives Privileges Committee stated:

> The effect of subsection 16(3) is not that parliamentary proceedings may not be disclosed or produced in courts or other tribunals (they can be used in limited circumstances, for example to establish matters of fact). However, they may not be used to question the truth or motive of any part of the proceedings, or the persons involved in the proceedings, nor to draw inferences or conclusions from the proceedings.[28]

Practical relevance of the operation of section 16

The practical relevance of the operation of section 16 of the Parliamentary Privileges Act is in situations where a Parliamentary committee may seek to inquire into a matter that is likely to end up before the courts. The issue is that the presentation of evidence to the committee that would also be relevant to the court proceedings will almost certainly operate to limit the use that can be made of that evidence in the curial proceedings. In particular, those seeking to refer to or rely on the evidence must not do so in such a way as to cast doubt on what was put to the committee.

This issue has arisen in the context of inquests and also in the context of the Senate Select Committee on Superannuation and Financial Services' inquiry into Solicitors' Mortgage Schemes in Tasmania.[29] It is also discussed in some detail in Chapter 6 of Emeritus Professor Enid Campbell's new text *Parliamentary Privilege*.[30]

Conclusion

The principles discussed in this article are hardly rocket science. Little (if any) law is involved. That said, there are some traps that need to be avoided and some mistakes that

are often made. It is important that persons dealing with the Parliament familiarise themselves with the relevant reference material (and particularly the various sources referred to above), in order to avoid the traps and the mistakes.

Endnotes

1 Particularly *Odgers' Australian Senate Practice.*
2 Available at http://www.pmc.gov.au/pdfs/guidelines.rtf.
3 *Procedural Order of Continuing Effect*, No 5, made on 29 April 1999. These Orders can be found at the rear of *Senate Standing Orders*, available at http://www.aph.gov.au/Senate/pubs/standingorders.pdf.
4 Available at http://www.aph.gov.au/Senate/committee/index.htm.
5 Available at http://www.aph.gov.au/house/committee/documnts/howsub.htm.
6 See House of Representatives Standing and Sessional Order 346 and Senate Standing Order 37.
7 (1997) 150 ALR 199.
8 See *Senate Brief No 5 - Consideration of Estimates* (February 2001), available at http://www.aph.gov.au/senate/pubs/briefs/brief5.htm.
9 Ibid.
10 See Senate Standing Orders 23(5) and 24(7), respectively.
11 At 453.
12 The motion appears at the rear of Senate Standing Orders as *Procedural Order of Continuing Effect* No 8.
13 The relevant motion appears at the rear of Senate Standing Orders as *Procedural Order of Continuing Effect* No 7.
14 Being the guidelines set out in Report No 12 of 1998-99 of the Auditor-General, entitled *Taxation Reform: community education and information programme*, and Report No 377 of the Joint Committee of Public Accounts and Audit, entitled *Guidelines for Government Advertising*, respectively.
15 The relevant motion appears at the rear of Senate Standing Orders as *Procedural Order of Continuing Effect* No 9.
16 Available at http://www.pmc.gov.au/pdfs/OfficialWitness.pdf.
17 The Privileges Resolutions are reproduced at the end of the Senate Standing Orders, available at http://www.aph.gov.au/Senate/pubs/standingorders.pdf.
18 At 456.
19 See especially at 456-60 and 481-500.
20 At 48-51.
21 At 224.
22 Quoted in Mullen, V, 'The Parliamentary *sub judice* convention and the media (or 'The Wells of Justice, Parliamentary Poison and the Wicked Witch of the Press')', (1996) 19(2) *UNSW L Jo* 303.
23 See Odgers at 224-9.
24 See Senate Rural and Regional Affairs and Transport Legislation Committee, *Hansard* (Estimates), 31 May 2001, p 478.
25 Resolution of 3 December 1998. See, generally, Harris, I (ed), *House of Representatives Practice* (4th edition), at 659-61 (available at http://www.aph.gov.au/house/pubs/PRACTICE/4Pr01.pdf).
26 Senate, *Hansard*, 30 October 2003, p 17220.
27 See *Plain English Guidelines to Information Privacy Principles 8 – 11*, pp 40-1. Available at http://www.privacy.gov.au/publications/ipp8_11.pdf.
28 At 10.
29 See, generally, http://www.aph.gov.au/senate/committee/superfinan_ctte/index.htm).
30 2003, The Federation Press, Sydney.

JUDICIAL REVIEW OF DECISIONS BY PRIVATE BODIES

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Introduction

It has been said that '(t)he primary purpose of administrative law ... is to keep the powers of government within their legal bounds'.[1] In engaging in judicial review, the courts have historically viewed their role in terms of the declaration and enforcement of the law which determines the limits and governs the exercise of public power.[2] Accordingly, judicial review has traditionally been concerned with the 'enforcement of the rule of law over executive action'.[3]

However, as government functions are increasingly outsourced to private bodies, a question arises as to whether, and on what basis, 'private'[4] bodies can be subject to judicial review. The Australian courts have not yet given a definitive answer to this question. In the recent High Court decision of *NEAT Domestic Trading Pty Ltd v AWB Ltd*[5] (*NEAT*), three members of the Court (McHugh, Hayne and Callinan JJ) indicated that the private nature of a body is a factor counting against its being subject to judicial review,[6] but refrained from answering the general question of when public law remedies may be granted against private bodies.

Anglo-Australian courts have traditionally focussed on the *source* of a body's power to determine whether the exercise of that power is subject to judicial review: power sourced from statute will be subject to public law constraints enforceable by way of judicial review, whereas contractual power is not so limited. Each of the judges in *NEAT* largely followed this approach, with the Court dividing on the question of whether the relevant private body was exercising 'statutory power' or, in the language of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), whether it made a 'decision of an administrative character ... under an enactment'.

In cases where the source of the relevant power is neither statutory nor contractual, the English courts have looked to the *nature* of the power in order to determine whether private bodies are subject to judicial review. Where the power can properly be characterised as 'public' in nature, judicial review may be available.

Apart from a few early exceptions,[7] Australian courts are yet to embrace this 'public power' test. *NEAT* recently presented the High Court with the opportunity to give some indication as to whether Australian courts would follow the English lead in this area, but that opportunity was passed up by all members of the Court except Kirby J, who gave limited consideration to the issue.

This paper presents an overview of these two bases on which the courts have found that judicial review of private bodies may be available - namely, where there has been an exercise of *statutory power* on the one hand (see **Part B**), and where there has been an

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exercise of *public power* on the other (**Part C**), and discusses the extent to which Australian courts have been willing to use 'public power' as a criterion for determining whether a body is subject to judicial review.

Although the High Court in *NEAT* did not indicate when (if ever) the exercise of non-statutory powers by private bodies will be subject to judicial review, there are some indications in *NEAT*, as well as in the English case law, as to when the exercise of such powers will *not* be subject to review. These factors are considered in **Part D**.

Finally, we consider a third basis, often overlooked, on which the exercise of power by private bodies can be limited by public law constraints. Although Anglo-Australian courts have typically held that the exercise of contractual power is not subject to judicial review, there is an existing body of law under which contractual power exercised by 'domestic tribunals' and certain other bodies may be reviewed in private law actions on grounds that are, in many respects, analogous to the common law grounds of judicial review. **Part E** presents a brief overview of this body of law.

When does a private body exercise statutory power?

The conferral of a specific power by statute on a public body carries with it public law limitations as required by the Constitution[8] and as implied as a matter of common law or statutory interpretation. The same should be true of statutory power conferred on private bodies.[9] However, following *NEAT*, it seems that a different standard applies in determining whether a statute confers power on a private body as opposed to a public body.[10]

Accordingly, there may be some difficulty in identifying when a power exercised by a private body is statutory. This difficulty is highlighted by the decision in *NEAT* itself, where the High Court split 3:2 as to whether review, either at common law or under the ADJR Act, was available against AWB (International) Ltd (AWBI), a private company that was given a role under a statutory scheme regulating the export of wheat.[11] The Court delivered three separate judgments, each of which took a different approach to the question of review based largely on the statutory context in which AWBI operated. It is helpful to briefly run through that context before considering the judgments.

The decision in* NEAT - *what did AWBI do?

The *Wheat Marketing Act 1989* (Cth) (the Wheat Act) prohibited the export of wheat without the consent of the Wheat Export Authority, a statutory authority established by the Wheat Act. In turn, the Wheat Authority could not give its consent without the prior approval of AWBI.

AWBI was a wheat grower-owned company limited by shares and incorporated under the Corporations Law of Victoria. Under its constitution, the business of AWBI was to be conducted in the interests of maximising returns to growers.

The Wheat Act did not lay down any procedure to be followed by AWBI in giving or refusing its approval, or any considerations that AWBI was required to take into account. Furthermore, the *Trade Practices Act 1974* did not apply to 'anything done' by AWBI under the relevant sections of the Wheat Act. AWBI was not required to obtain the Wheat Authority's consent in order to export wheat.

NEAT Domestic Trading Pty Ltd (NEAT Domestic) had applied to the Wheat Authority for its consent to the export of a bulk shipment of wheat. The Authority refused the application because AWBI did not give its approval. NEAT Domestic sought review of AWBI's withholding of approval on the basis that AWBI was acting in accordance with a rule or policy

without regard to the merits of the particular application. This required first establishing that AWBI was subject to judicial review either on the basis that it made a 'decision of an administrative character ... under an enactment' for the purposes of the ADJR Act, or because it was subject to common law judicial review. The Federal Court dismissed the application by NEAT Domestic at both first instance and on appeal.

On appeal, the High Court split as follows:

- A majority of the Court (McHugh, Hayne and Callinan JJ) in a joint judgment held that public law remedies did not lie against AWBI, either pursuant to the ADJR Act or, it seems, at common law.

- Gleeson CJ held that, if the decision was reviewable under the ADJR Act (which he thought it was), AWBI had not breached the relevant ground of review. Gleeson CJ did not consider common law judicial review.

- Kirby J held both that the decision was reviewable under the ADJR Act and that the ground of review invoked by NEAT Domestic was made out. Like Gleeson CJ, Kirby J did not consider the availability of judicial review at common law, except to note that different, although related, questions may arise in that context.

Why did the joint judges find that public law remedies were not available?

The joint judges gave three reasons why AWBI was not subject to judicial review in performing the role it did under the Act. The first was the statutory context, which was sufficient for their Honours to conclude that the Wheat Act did not confer statutory authority on AWBI and that AWBI did not make a 'decision under an enactment' for the purposes of the ADJR Act. The other two reasons were the private nature of AWBI and the incompatibility of any public law obligations with AWBI's existing private obligations. These two considerations are discussed further in Part C below.

In relation to the first reason, three factors appeared to be relevant to the joint judges' conclusion that AWBI was not exercising a statutory power and did not make a decision under an enactment.[12]

First, the legislation already conferred statutory power on the Wheat Authority to consent to the export of wheat.

Second, the Wheat Authority derived its functions and powers entirely from the Wheat Act. The power to consent to the export of wheat was conditional on approval from AWBI. Thus AWBI's determination was characterised as only a condition precedent to the lawful exercise of power by the Wheat Authority (the latter being the relevant 'operative and determinative' decision[13]).

Third, unlike the Wheat Authority, AWBI did not need a specific statutory power to give it capacity to provide an approval in writing - as a company it already had power to make a decision and to express that decision in writing.

This analysis arguably proceeded on the assumption that only one exercise of power could be subject to review. In this the joint judges were clearly influenced by the line of ADJR Act cases that distinguish between a preliminary decision (which will usually not be subject to review) and an operative and determinative decision (which will usually be subject to review). The joint judges did not, however, expressly address whether this was a case where the statute specifically authorised an interim decision, which is a recognised exception to the general rule that only 'final' decisions are reviewable under the ADJR Act.[14]

On the joint judges' approach, it was 'neither necessary *nor appropriate*'[15] to read the Act as impliedly conferring statutory power on AWBI. It was not necessary because, unlike the Wheat Authority, AWBI was not a creature of statute and already had power to create written documents; it was not appropriate because the majority had already concluded that the Wheat Authority made the relevant 'operative decision' for the purposes of the ADJR Act.

In this way, the joint judges both decided that AWBI was not subject to review under the ADJR Act because it did not make the operative and determinative decision, and eliminated one of the bases on which AWBI could be subject to judicial review at common law, namely, that AWBI was exercising statutory power.[16] In doing so, the joint judges drew a sharp line between the Wheat Authority, a statutory body that exercised statutory power, and AWBI, a private body that exercised private power.

This distinction would also seem to indicate that few statutes will ever be construed as conferring statutory power on a private body. This is because private bodies such as companies and natural persons normally already have the capacity to do things (such as make decisions) which, if done by public bodies for the purposes of a statutory scheme, would require statutory authority. It may be, however, that in the absence of a public body such as the Wheat Authority from the statutory scheme, the Court would have been more willing to find that the Wheat Act did confer power on AWBI.

What did Gleeson CJ and Kirby J say?

In contrast to the majority, both Gleeson CJ and Kirby J looked more broadly at the effect given to AWBI's actions by the Wheat Act, and did not draw such a sharp distinction between AWBI and the Wheat Authority. So, for example, Gleeson CJ noted that what AWBI did was:

> ... in substance, the exercise of a statutory power to deprive the Wheat Export Authority of the capacity to consent to the bulk export of wheat in a given case.[17]

Similarly, Kirby J concluded that AWBI had made a decision of an administrative character under an enactment. In doing so, Kirby J focussed less on whether AWBI's power derived from the Wheat Act, and more on whether there was an appropriate nexus between that power and the Wheat Act. He concluded there was such a nexus, including because:

> ... AWBI had conferred upon it the power to exercise a key influence on the regulatory process and the conduct of a public authority. ... It follows that it is the [Wheat] Act that provides for, requires, and gives legal force to, AWBI's "decisions" relevant to NEAT's applications.[18]

Will it be sufficient if the powers are exercised in a statutory context?

Even though the majority in *NEAT* concluded that AWBI did not exercise statutory power, it is clear that AWBI was exercising power in a statutory context. Whether this provided a sufficient basis on which to subject AWBI to common law judicial review was not explicitly considered by the joint judges.

There are, however, several decisions of State Supreme Courts that have subjected private bodies to judicial review on the basis of the legislative context in which they operate. In particular, there is a line of cases where the internal decisions of registered political parties have been subjected to judicial review, on the basis that such parties are recognised by, and registered under, the *Commonwealth Electoral Act 1918*.[19] Review has usually been sought on the basis that the particular party has acted *ultra vires* in breach of party rules. The effect of these decisions has thus been to give substantive legal effect to those party rules, even though the rules are neither legislative nor contractual. This is a consequence the courts have not explicitly recognised.

The basis on which courts have reviewed these decisions has not been persuasively articulated. It may be that the fact that the relevant power is exercised in a statutory context indicates that a private body is exercising 'public power', and that the exercise of public power is subject to judicial review. This is discussed in the following section.

Is the exercise of 'public power' subject to judicial review?

The Datafin principle - is the body exercising 'public power'?

The English courts similarly accept that judicial review will be available against a private body where the source of the relevant power is statutory. However, they have also recognised an alternative basis on which private bodies may be subject to judicial review, namely, where the body is exercising 'public power'. The key authority in this area is the decision of the Court of Appeal in *R v Panel on Take-Overs and Mergers; Ex parte Datafin*[20] (*Datafin*).

In *Datafin*, review was sought of a decision of the Panel on Take-overs and Mergers. The Panel was a non-statutory, unincorporated association with some government representation within its membership. It had no statutory, prerogative or common law powers and was not in a contractual relationship with the financial market or with those who deal in that market.

One of the key functions of the Panel was to administer the City Code on Take-overs and Mergers. Although the Panel had no power to enforce the Code, a decision by the Panel that there had been a material breach of the Code could result in the imposition of various statutory sanctions and penalties, including the exclusion or suspension of a listed company from the stock exchange.

In considering whether decisions of the Panel were amenable to judicial review, the Court rejected the submission that the source of a body's power is the sole test for determining amenability to judicial review. In this respect, Lloyd LJ noted as follows:[21]

> Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review ... But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr. Lever submitted, be sufficient to bring the body within the reach of judicial review.

The Court noted that there were a number of features of the Panel and its decisions that indicated that it was effectively exercising 'public power'. In particular, it was clear that the Panel performed an integral role in the government's regulation of the financial markets[22] and made decisions that had a significant effect on a number of persons, many of whom had not consented to its exercise of power.[23] Accordingly, the Panel operated as 'an integral part of a system which has a public law character', was 'supported by public law in that public law sanctions are applied if its edicts are ignored' and performed 'public law functions'.[24]

Has Datafin been applied in Australia?

Typing Centre of New South Wales v Toose

While Australian courts have on occasion referred to *Datafin* with apparent approval,[25] the decision appears to have only been directly applied once, in *Typing Centre of New South Wales v Toose*[26] (*Toose*).

In *Toose*, review was sought of a decision of the Advertising Standards Council (the ASC). The ASC played a key role in the system of self-regulation adopted by the advertising industry. One of its main functions was to receive and determine complaints of breaches of advertising standards promulgated by the Media Council. Most of the proprietors of commercial media in Australia were members of the Media Council, which was in turn a party to the charter that established the ASC. The Media Council could impose sanctions upon the relevant advertising agency where the ASC had found that an advertiser had breached the advertising standards. In addition, no media proprietor would accept an advertisement for publication following such a finding by the ASC.

The relevant decision under challenge in *Toose* was a finding by the ASC that an advertisement published by the plaintiff was incorrect and misleading in contravention of the Advertising Code of Ethics. The plaintiff sought review of the ASC's decision on the basis that the ASC had failed to observe the requirements of natural justice.

In considering whether the ASC was subject to judicial review, Mathews J referred to the reasoning in *Datafin*, noting that 'the real issue is whether it is exercising public functions, or functions which have public law consequences, or, as Lord Donaldson would have it, whether there is a public element in its functions'.[27] Mathews J concluded that the ASC was exercising a 'public function', and could therefore be subject to judicial review in appropriate circumstances.[28] In this respect, her Honour noted that the ASC had power to interpret the various advertising codes in precisely the same way as the courts can interpret Acts of Parliament. Similarly, it provided an alternative forum for dealing with matters which might otherwise need to be litigated in the courts. In addition, its jurisdiction was attracted simply by means of the publication of a single media advertisement.

The decision in *Toose* was referred to with approval in *Dorf Industries Pty Ltd v Toose*.[29] In an *obiter* statement in that case, Ryan J expressly agreed with Mathews J that decisions of the ASC were amenable to judicial review.[30]

What has the High Court said about public power?

NEAT presented the High Court with the opportunity to expressly adopt or reject 'public power' as a criterion for determining the availability of judicial review. This issue was not, however, explicitly addressed by the majority, and rated only a brief mention by Kirby J.[31]

Long before *NEAT*, and even before *Datafin*, Murphy J had employed the language of 'public power' in *Forbes v New South Wales Trotting Club Ltd*.[32] That case concerned the obligations of a private trotting club to accord procedural fairness before exercising the power to warn off persons from courses under its control. The club had conceded that it was obliged to provide procedural fairness prior to making such a decision.[33] In finding that the applicant in that case was entitled to the relief sought, Murphy J made the following observation:[34]

> There is a difference between public and private power but ... one may shade into the other. When rights are exercised directly by the government or by some agency or body vested with statutory authority, public power is obviously being exercised, but it may be exercised in ways which are not so obvious ... [A] body ... which conducts a public racecourse at which betting is permitted under statutory authority, to which it admits members of the public on a payment of a fee, is exercising public power.

This passage was cited with apparent approval by Kirby J in *NEAT*.[35] However, his Honour made it clear that he was not expressing any view as to 'whether or not the criterion of the exercise of "public power" is sufficiently precise to be accepted as the basis for review of decisions under the common law',[36] notwithstanding his conclusion that 'the observations

about the nature of public power identified in cases such as *Forbes* and *Datafin* are helpful in analysing whether particular decisions are of an "administrative character"'.[37]

While the majority in *NEAT* did not consider whether AWBI was exercising 'public power', the joint judges considered that the 'private' character of AWBI as a company incorporated under companies legislation for the pursuit of maximising returns to wheat growers, and the difficulty in reconciling the pursuit of these 'private interests' with public law obligations, were key reasons why judicial review was not available against AWBI. We outline these considerations, as well as two other factors that may be relevant to determining when judicial review will be available against a private body, in the following Part.

When will judicial review not be available?

Although in *NEAT* the High Court did not expressly consider any basis on which a private body exercising non-statutory powers *will* be subject to judicial review, it is possible to derive from the various judgments certain factors that may indicate when judicial review will *not* be available. These factors are:

- compatibility with public law obligations;
- whether alternative bodies are subject to review; and
- whether there are alternative avenues of review.

The third factor has also been considered by the English courts.

Are public law obligations incompatible with a body's private obligations?

One of the reasons for the joint judges' finding in *NEAT* that AWBI was not subject to judicial review at common law was that the public law obligations sought to be imposed on AWBI were incompatible with AWBI's private interests. This was because:

- the 'private' considerations AWBI could take into account included seeking to maximise returns by remaining the sole bulk exporter of wheat; and

- this consideration (according to the joint judges) outweighed any countervailing public considerations that could be derived from the legislation.

It followed for the joint judges that no sensible accommodation could be made between AWBI's private considerations and any public considerations, and thus that AWBI could apply a blanket policy without regard to the merits of an individual application. Interestingly, the joint judges did not explain why AWBI's private considerations would necessarily outweigh any countervailing public consideration; indeed there was no express consideration of what those countervailing considerations might be.

In our view, the majority went too far in excluding *all* judicial review on this basis. Even accepting the majority's conclusion that AWBI could not be required to consider the merits of a particular application, it would have been possible to confine the more general conclusion that judicial review was not available to the particular ground of review sought to be invoked in that case. This is analogous to the question of the justiciability of non-statutory executive action in judicial review proceedings, which is ordinarily answered by reference to the grounds of review on which the application relies.[38]

In this regard, it is worth noting that English courts have often found it difficult to subject private bodies to any ground of review other than breach of procedural fairness. This has not stopped the courts from subjecting private bodies to judicial review and, in recognition of

this, Lord Donaldson has suggested fashioning an 'innominate' ground of review for such bodies.[39]

Are there alternative bodies to review?

Although not necessarily forming an explicit part of the courts' reasoning in decisions regarding judicial review of private bodies, it appears that the availability of other means of challenging an exercise of power has influenced the courts' consideration of whether judicial review is available. Two alternatives are considered below.

First, it may be that the decisions of other bodies in the relevant scheme can be challenged. So, for example, in *NEAT* the decision-making process involved two bodies - AWBI and the Wheat Authority. Although not explicitly relied upon by the joint judges as a separate factor, the existence of the Wheat Authority, its role in the scheme and its amenability to judicial review appear to have been factors that shaped the conclusion of the joint judges that AWBI was not subject to judicial review.[40] This is in contrast to Kirby J, who appeared to consider that the fact that the decisions of the Wheat Authority were 'administrative' for ADJR Act purposes only strengthened the conclusion that the decisions of AWBI should be similarly characterised.[41]

Are there alternative avenues of review?

Second, there may be other avenues by which the particular exercise of power can be challenged. The availability of other avenues has on occasion led English courts to refuse judicial review of decisions of private bodies; conversely the absence of alternative avenues of redress has been a factor in subjecting bodies to judicial review.[42] So, for example, in *R v Jockey Club Disciplinary Committee; Ex parte Aga Khan*,[43] the Court of Appeal found that a decision of the Jockey Club was not subject to judicial review on the application of a member with whom it had a contractual arrangement. However, the Court left open the question of whether judicial review could be sought by a person with no contractual relationship to the Club.[44]

In *NEAT*, the decisions of AWBI were immune from challenge under the *Trade Practices Act 1974*. This may have been a factor influencing Kirby J's conclusion that AWBI was subject to ADJR Act review.[45] This was not, however, a factor explicitly considered by the majority in *NEAT*.

Accordingly, the fact that the person seeking review is in a contractual relationship with the relevant body may indicate that judicial review will not be available. However, while judicial review may not be available, the courts have recognised that private bodies may nevertheless be subject to public law-like obligations enforceable in a private law action. We briefly consider this form of review in the following Part.

Are contractual powers ever subject tO public law constraints? (the 'club' cases)

At the outset we noted the description of administrative law as being concerned with the powers of government. Accordingly, it has been said that the common law of judicial review focuses on the control of government power and that, where the source of the power being exercised is purely consensual or contractual, judicial review will not be available. The discussion so far has thus considered when the exercise of power by private bodies may be subject to *public law* judicial review. However, it is relevant to note that the activities of private bodies may also be reviewed in a *private law* action on grounds that are, in many respects, analogous to the common law grounds of review.[46]

In this final section we briefly consider this form of private law review with reference to the 'club cases'. These cases deal with private dispute resolution bodies often found within clubs or associations, which are sometimes referred to as 'domestic tribunals'.

There are several differences, both procedural and remedial, between this form of review and public law judicial review:

- The relevant cause of action is different to traditional judicial review, usually being framed as an action for breach of contract or breach of trust, or potentially for unlawful restraint of trade, rather than an application for orders in the nature of prerogative relief, or relief under judicial review legislation. [47]

- It follows that the remedies available also differ: prerogative relief is unavailable and, instead, the usual relief is a declaration, often coupled with an injunction. Damages may also be available.

- The standing of a person to bring an action may also vary. So, for example, where the action is based on breach of contract, it is necessary for the person bringing the action to establish a contractual relationship with the domestic tribunal, or perhaps a beneficial interest in the contractual right sought to be enforced.[48]

However, whilst the form of action differs, the grounds on which such 'review' is conducted largely mirror the public law grounds on which judicial review is conducted. Furthermore, the reasoning in such cases often mirrors, either explicitly or implicitly, that adopted in judicial review cases.[49]

Defining judicial review purely in terms of governmental power or prerogative relief thus risks ignoring this particular area of law concerning public law-type constraints on the exercise of power. Indeed, it may be, as Spigelman CJ has suggested, that:

> what the future holds is the emergence of general principles of "institutional law", rather than parallel principles in each of administrative law, corporations law, trade union law and the law of associations.[50]

Conclusion

As the discussion above demonstrates, the extent to which decisions of private bodies may be subject to judicial review is an issue that has not yet been settled in Australia. The recent High Court decision in *NEAT* leaves a number of unresolved questions. For example, when will a private body be taken to be exercising statutory power? To what extent will the statutory context in which a body operates be a relevant consideration in determining the availability of judicial review? Is the 'private character' of the body a relevant consideration? To what extent, if at all, will the 'public power' test developed by the English courts be accepted as the basis for review of decisions under the common law? As governments continue to adopt alternative means of delivering services traditionally performed by the executive, it is likely that the Court will again be called upon to consider these issues at some stage in the future.

Endnotes

1 HWR Wade and CF Forsyth, *Administrative Law* (7th ed, 1994), p 5.
2 See, for example, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 - 36 per Brennan J.
3 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70 per Brennan J.
4 We use 'private' here to mean bodies that are not generally considered to be part of government, for example, bodies that are not the Commonwealth or an officer of the Commonwealth for constitutional purposes, and similarly not a State or an officer of a State.

5 (2003) 198 ALR 179.
6 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [51], [57]-[63].
7 Most notably *Typing Centre of New South Wales v Toose* (unreported, NSW Supreme Court, 15/12/1988), discussed further below.
8 See, for example, *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [102] per Gaudron, McHugh Gummow, Kirby and Hayne JJ (legislation purporting to confer a totally open-ended discretion 'would appear to lack the hallmark of the exercise of legislative power'). See also *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at [70] per Kirby and Callinan JJ (cited in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [66] per Kirby J). But compare the approach of Gleeson CJ in *NEAT*, where his Honour appears to assume that there may be some powers conferred by statute that can be exercised without regard to any particular considerations (see *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [11]).
9 See, for example, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [66]-[68], [133] per Kirby J; cf Gleeson CJ at [11].
10 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [54] per McHugh, Hayne and Callinan JJ.
11 In contrast to the outcome in *NEAT*, there are several examples of State courts judicially reviewing the power exercised by private bodies on the basis that the power is statutory. These include decisions of officials in privately run prisons (eg *Stewart v Crowley* [2002] VSCA 201; *Henderson v Beltracchi* [1999] VSC 135 - no issue appears to have been taken in these cases regarding the private nature of the decision-makers); and the exercise of disciplinary power by the Queensland Turf Club (*R v Wadley, Ex parte Burton* [1976] Qd R 286). For an early High Court case in relation to the exercise of legislative-type power in relation to church property by the NSW Synod of the Church of England see *Fielding v Houison* (1909) 8 CLR 673 at 439 per Isaacs J.
12 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [52]-[55].
13 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-7 per Mason CJ.
14 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 per Mason CJ.
15 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [54], emphasis added.
16 The approach of the joint judges in *NEAT* illustrates the potential for overlap between jurisdictional considerations and the scope of judicial review. At the very least, it is often the case that questions as to a court's jurisdiction and the limits (if any) on the exercise of a particular power will overlap. For example, where a body's power is alleged to be constrained because the power is conferred by statute, the question as to the existence of any such constraint will usually be answered in the same way, and having regard to the same factors, as the question whether the Federal Court (for example) has jurisdiction pursuant to the ADJR Act or s.39B(1A)(c) of the *Judiciary Act 1903* (ie whether there is a decision under an enactment or the matter arises under a law made by the Parliament). The joint judges in *NEAT* went even further. In particular, the joint judges referred to ADJR Act case law in holding that the exercise of power by AWBI was not subject to public law remedies either pursuant to the ADJR Act or at common law.
17 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [29].
18 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [119] and [121] -[123].
19 The line of cases begins with the decision of the Supreme Court (Dowsett J) in *Baldwin v Everingham* [1993] 1 QdR 10 regarding the Queensland Division of the Liberal Party. It has been followed on numerous occasions: *Galt v Flegg* [2003] QSC 290; *Tucker v Macdonald* [2001] QSC 296 (both cases dealing with the preselection of Liberal Party candidate); *Clarke v Australian Labour Party (SA Branch)* (1999) 74 SASR 109 ('stacking' of ALP branches); *Thornley v Heffernan* (unreported, NSW Supreme Court, Brownie J, 25 July 1995) (cancellation of endorsement as Liberal Party candidate). See also *Sharples v O'Shea* (unreported, Qld Supreme Court, Atkinson J, 18 August 1999) and *Liddle v Central Australian Aboriginal Legal Aid Service Inc* (1999) 150 FLR 142. These cases have all sought to distinguish the earlier decision of the High Court in *Cameron v Hogan* (1934) 51 CLR 358. See also, in relation to judicial review of Church decisions, *Scandrett v Dowling* (1992) 27 NSWLR 485 per Priestley JA (Hope AJA agreeing); cf *Macqueen v Frackelton* (1909) 8 CLR 673. These authorities are considered in S Gorman, 'Legislative Recognition of Churches and the Implications for Judicial Review' (2002) 9 *Aust Jo of Admin Law* 84.
20 [1987] 1 QB 815.
21 *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 847.
22 *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 838 per Lord Donaldson.
23 *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 838 per Lord Donaldson.
24 *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 836 per Lord Donaldson.
25 See, for example, *Victoria v The Master Builders' Association of Victoria* [1995] 2 VR 121 at 137 per Tadgell J and 154, 160 - 161 and 163 per Eames J; *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 385 per Spigelman CJ; *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470 at [81] per Campbell J.
26 Unreported, NSW Supreme Court, 15/12/1988.
27 *Typing Centre of New South Wales v Toose* (unreported, NSW Supreme Court, 15/12/1988 at 19).
28 *Typing Centre of New South Wales v Toose* (unreported, NSW Supreme Court, 15/12/1988 at 20).
29 (1994) 127 ALR 654.
30 *Dorf Industries Pty Ltd v Toose* (1994) 127 ALR 654 at 667.
31 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [111] - [115].

32 (1979) 143 CLR 242.
33 Gibbs J noted that this concession was 'correctly made': *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 264.
34 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 275.
35 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [111].
36 In this respect, Kirby J referred to P Craig 'Public Law and Control over Private Power' in M Taggart (ed) *The Province of Administrative Law* (1997) 196 at 198 - 9. Other commentators have questioned the usefulness of a test based on an amorphous concept of 'public power': see, for example, M Aronson and B Dyer *Judicial Review of Administrative Action* (2nd ed, 2000) at 100; A Mason 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (2001) 31 *AIAL Forum* 45 at 59; see also the commentaries referred to by Chief Justice Spigelman in 'Foundations of Administrative Law'(1999) 4 *The Judicial Review* 69 at 75.
37 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [115].
38 See, for example, *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164. But compare Kirby J in *NEAT*, where his Honour rejected the suggestion by Gyles J in the Federal Court that AWBI decisions could be taken 'under an enactment' in some circumstances but not others (see *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [128]).
39 *R v Panel on Takeovers and Mergers; Ex parte Guinness Plc* [1990] 1 QB 146, at 159-160; see also Woolf LJ at 193-4.
40 See, for example, the joint judgement in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [52] ('It is the authority's decision to give its consent which is the operative and determinative decision which the 1989 Act requires or authorises'), [55] (AWB's decision was a condition precedent to exercise of power by Authority) [59] (the Wheat Act should not be read as 'shifting' to AWB the obligation to take account of matters of the kind which the Authority should take account of).
41 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [107], [108].
42 See for example *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 838 per Donaldson LJ.
43 [1993] 1 WLR 909.
44 See *R v Jockey Club Disciplinary Committee; Ex parte Aga Khan* [1993] 1 WLR 909 at 924 per Bingham MR and 930 per Farquharson LJ. See also *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470 at [113] per Campbell J.
45 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [105]; see also at [124]-[125]. Gleeson CJ also referred to the exclusion of the TPA at [27].
46 For an early example see *Dickason v Edwards* (1910) 10 CLR 243.
47 There have been some suggestions that an independent cause of action may exist in relation to domestic tribunals, although these suggestions have been made in a context where it was unnecessary to decide the point, there being a cause of action for breach of contract clearly available. See, for example, *Dixon v Australian Society of Accountants* (1989) 95 FLR 231 at 236 (Miles CJ); see also *Australian Football League v Carlton Football Club* [1998] 2 VR 546 at 550 per Tadgell JA ('I believe that there is no decision of a private or domestic tribunal with which the courts will refuse to interfere if interference be considered necessary for the attainment of justice.').
48 For example, by analogy with the reasoning in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.
49 For example, as with the debate in relation to the jurisprudential basis of judicial review, there is some divergence in the club cases as to whether the existence of the relevant limitations on power (ie, the grounds of review) derive from ordinary principles relating to the implication of terms into contracts or, alternatively, from the common law - see, for example, the cases cited by Campbell J in *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470 at [96]-[97]. Compare also the suggestion by Hayne JA in *Australian Football League v Carlton Football Club* [1998] 2 VR 546 at 552 that '[i]t may be that a decision of the AFL Tribunal which no reasonable person could reach is simply not a "decision" ... within the meaning of the rules and regulations of the AFL' with the reasoning of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 and *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24.
50 JJ Spigelman 'Foundations of Administrative Law' (1999) 4 *The Judicial Review* 69 at 85.

CASE NOTE
LEE v MASKELL-KNIGHT

Lex Holcombe and Sally Nelson*

This Full Federal Court case of *Lee v Maskell-Knight*[1] dealt with a decision of a statutory office holder under the *Health Insurance Act 1973* (Cth) (the Act) that certain action should be taken in relation to a medical practitioner. The decision would be largely unremarkable if it were not for Finkelstein J's dissenting judgement.

The decision was the final process under the Professional Services Review Scheme in Part VAA of the Act. Following an investigation, the Professional Services Review Committee made a finding that Dr Lee had engaged in 'inappropriate practice' as defined in section 82 of the Act. That finding and supporting reasons were then passed to the statutory office holder, the Determining Officer, appointed under then section 106Q of the Act to decide whether certain action should be taken in relation to Dr Lee.

The Act envisaged a two stage process for the determination of the decision by the Determining Officer. Firstly, the Determining Officer would form a preliminary view of the decision that he/she would make, and secondly that office holder would make a final decision after considering any submission received from the practitioner – a very common statutory and administrative process.

In this case, the forming of a preliminary view, and the final decision, were made by two separate individuals. At the time of the making of the final Determination, the officer who normally occupied the position of Determining Officer was away and another officer was acting in that position.

The medical practitioner applied for review of the decision on the ground that, inter alia, the final determination made was invalid because the Act required that the final determination be made by the same person who made the draft determination.

Decision

In holding the decision to be valid, the majority (Hill and Marshall JJ) stated that the question of whether the Act requires both the power to make a draft determination and the power to make a final determination to be exercised by the same person depends upon the nature of the power and all the circumstances of the case. In considering the circumstances of the case regard may properly be had to the practicalities of administration[2].

The majority conceded there was some support for the view that the legislation envisaged the whole process would be performed by only one person. The legislation could be said to provide for a process beginning at the draft determination and proceeding through a decision where the Determining Officer reconsiders the draft determination in light of any submissions made by the medical practitioner. However, the majority emphasised the administrative impracticalities of such an approach. In particular, the majority found the specific time limits specified in the legislation in relation to the decision-making process appear to have been

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calculated on the premise that there would be no break in the process, such as for a change in the office of Determining Officer[3].

The majority also found that the Act contemplated that the instrument of appointment of a Determining Officer might refer not to a person by name, but to a person as the holder 'for the time being of a particular office or appointment'[4]. The majority were of the opinion that this suggested there would be likely to be changes in the identity of the Determining Officer.

In dissent, Finkelstein J found that the decision was invalid because the nature of the discretion required the same decision-maker to make both the preliminary and final determination.

In reaching this conclusion, Finkelstein J stated that the second Determining Officer, in making the final determination, would either have to reach a preliminary decision of his own (taking into account the initial Determining Officer's report), or step in the shoes of the initial Determining Officer and treat the preliminary decision as his own. In either case, Finkelstein J stated there would be the risk that the second Determining Officer would take a different view of the facts from the initial Determining Officer, or would be in a situation where he or she cannot identify and give precisely the same weight to the same factors which were on the mind of the first Determining Officer, or form the same judgment as that which led the initial Determining Officer to make his or her preliminary determination.

Finkelstein J stated that in his opinion the Parliament did not intend to establish two different regimes for making the determination depending on whether there is one or two Determining Officers. As a consequence, Finkelstein J was of the opinion that in the rare cases where the same Determining Officer cannot be involved in the whole process, the process must begin afresh[5].

Commentary

The arguments put forward by Finkelstein J do carry some force. The draft determination would have been formulated by the then Determining Officer based on his or her reading of the findings of the Committee and consideration of the reasons. The view that he or she formed at that time would be predicated on a response to the information then provided. The second Determining Officer would have referred to the same material but would also have available the practitioner's response to the draft determination.

As Finklestein J noted, reasonable people may form different views on exactly the same information. He cited the High Court case of *Norbis v Norbis*[6] in which the Court undertook an analysis of the discretion afforded to an appeal Court in effectively reviewing the decision of an inferior Court. In discussing the assessment of the evidence by a Judge, Mason and Deane JJ said '[B]ecause these assessments call for value judgements in respect of which there is room for reasonable differences of opinion, no opinion being uniquely right, the making of the order involves the exercise of a judicial discretion.'[7]

What if the second Determining Officer did not agree with the sanctions set out in the draft determination by the first Determining Officer? The draft determination sets out the very basis on which the practitioner is to respond and therefore may impermissibly circumscribe the role of the second Determining Officer. The draft determination and the response by the practitioner to that draft predetermine the scope of the final Determination. What if the second Determining Officer, given free licence, would have set out different sanctions in the draft determination? Does the fact that he or she did not have that opportunity by itself give rise to concerns about natural justice and a practitioner's opportunity to meet the real case they are to be assessed upon. That is, the particular view or opinion in the mind of the person who will be actually making the decision which will impact adversely on their rights.

The reasoning of Hill and Marshall JJ leads to a pragmatic result in this case. However, they leave the question open, noting that whether an Act requires the same person to perform both steps of a process will 'depend on the nature of the power and all the circumstances of the case'.[8] One of the considerations in determining whether the Act requires the same person is the 'practicalities of administration'.[9]

Where a two step process is not prescribed in legislation but the decision-maker is affording a person a right to respond to an adverse view prior to making a decision under legislation, the situation may be slightly different. In this circumstance, there is no statutory timeframe or statutory recognition of the entity that is to form the initial view. Public policy, administrative convenience, significance and consequences of the decision, impact on third parties, type of review rights, whether the legislation is protective, and policies and practices of the agency may all be factors which are relevant in the consideration of whether the same person should be involved in both steps of the process.

The considerations may be slightly different if the decision-making entity was a committee and the membership of the committee changed during the process.

Practical implications

Where legislation provides for a decision which involves several stages, *Lee v Maskell-Knight* supports the stages to be undertaken by different people in cases where it is not administratively practical to have the same individual undertake the whole process.

An example of where it would not be administratively practical to have one individual involved in every stage of the decision-making process might include situations where legislation prescribes time limits for the decision. In such a case, the compliance with the time periods may be essential and the implication arises that if the same person is not available to make the final decision then either the process has to start again or the final decision must be made by a new decision-maker. Considerations on whether the process should start again may be, once again, overall statutory time limits, public policy issues or practical matters.

Although Finklestein J was in the minority, there is logic in his position, and even the majority emphasised that whether or not there can be a change in persons making preliminary and final decisions will depend on the nature of the power and the circumstances

To avoid risk, agencies should try to ensure that the same individual is involved in all parts of the decision-making process. Where a decision-maker must be substituted, agencies should consider beginning the process afresh if it is practical and time and resources allow. If it is impractical to begin the process afresh, agencies should fully document the reason why the same person cannot make the decision and also why it is impractical to start the process afresh.

Endnotes

1 [2004] FCAFC 2 (7 April 2004).
2 At 38.
3 At 36.
4 At 31.
5 At 122.
6 (1986) 161 CLR 513.
7 At 518.
8 At 38.
9 Id.