

# Estoppel and public authorities: examining the case for an equitable remedy

Greg Weeks\*

## Abstract

*Estoppels can be raised against public authorities but cannot be enforced where that would require the public authority to act ultra vires or fetter a statutory discretion. There have been attempts to create a public law doctrine of substantive legitimate expectations to address this remedial gap; indeed, such a doctrine is now well-established in the UK. However, it is not appropriate to the constitutional setting in Australia. This need not mean that no remedy is available where an individual relies to his or her detriment on a misrepresentation made by a public authority. This article argues that equity retains a capacity to provide compensation to remedy an estoppel, even where parties are not in a fiduciary relationship and in the absence of fraud.*

## Introduction

Equity is sometimes viewed as having little to contribute to public law issues, although this is an inaccurate view. As Spigelman CJ has noted, some of the origins of administrative law in England can be traced to Chancery.<sup>1</sup> Current grounds of review, particularly *Wednesbury* unreasonableness<sup>2</sup> and S20 irrational or illogical fact-finding, were developed by analogy to equity<sup>3</sup> and others, such as unauthorised purpose,<sup>4</sup> have more direct equitable origins. There is no difficulty *per se* with equitable remedies being available in litigation against public authorities; the issues are much the same as those involved in liability being imposed upon public authorities in tort. Indeed, the power of the High Court to grant injunctive relief against an officer of the Commonwealth is enshrined in s 75(v) of the Constitution.<sup>5</sup> In both equity and tort, the difficulties arise only as a result of the inapplicability of private law remedies to certain functions of government.

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\* Lecturer, UNSW Faculty of Law. The author would like to thank Mark Aronson, Matthew Groves, Keith Mason, Christopher Rossiter, Theunis Roux and Gareth Tilley for their generous advice and assistance. Any errors or infelicities remain mine alone.

1 See J. J. Spigelman, 'The Equitable Origins of the Improper Purpose Ground' in L Pearson, C Harlow and M Taggart (eds), *Administrative law in a changing state: essays in honour of Mark Aronson* (2008) at 147.

2 *Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002* (2003) 198 ALR 59 at 75 [67]-[69] per McHugh & Gummow JJ; *Re Minister for Immigration and Multicultural Affairs; ex parte Eshetu* (1999) 197 CLR 611 at 649 [124] per Gummow J; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 195 [12] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon & Crennan JJ. The judgment of the court in *SZFDE* took pains to explain that the equitable underpinnings of any public law doctrine must be subject to Chapter III of the *Constitution*, as applied in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 663-664 [28]; 668-669 [46]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513-514 [103]-[104]. See M Groves, 'The Surrogacy Principle and Motherhood Statements in Administrative Law' in L Pearson, C Harlow and M Taggart (eds), *Administrative law in a changing state: essays in honour of Mark Aronson* (2008) 71 at 85 at 96.

3 See G Weeks, 'Superannuation Complaints Tribunal and the public/private distinction in Australian administrative law' (2006) 13(3) *Australian Journal of Administrative Law* 147 at 150.

4 Spigelman, above n1, at 147.

5 Superior courts also have the power to make declarations in judicial review proceedings, although historically declaratory relief is a statutory rather than an equitable remedy: R. P. Meagher, J. D. Heydon and M. J. Leeming, *Meagher, Gummow and Lehane's Equity: doctrines and remedies* (4th ed, 2002) at 641-2. See e.g.

Attempts to enforce estoppels against public authorities encounter problems because public authorities are fundamentally different from private actors: they are not, essentially, self-regarding. Consequently, enforcement of a promise made to an individual necessarily comes at the expense of the other people to whom the public authority must have regard, rather than the public authority itself. The capacity to enforce an estoppel against a public authority in circumstances where it would be raised against a private actor is limited. Nonetheless, the equitable jurisdiction to mould relief leaves open the possibility that justice can be satisfied with some lower form of equity than the substantive enforcement of an estoppel against a public authority.

This article will review the interaction between public law and equity in circumstances where an estoppel is raised against a public authority. In Part I, I will look at the enforcement of estoppels against public authorities in equity. In Part II, I will contrast English developments in substantive enforcement of legitimate expectations in judicial review proceedings with the law as it stands in Australia. Part III proposes that a revised approach to equitable compensation would have the benefit of providing an appropriate remedy to parties who have relied to their detriment on a representation of a public authority without the doctrinal difficulties that have been identified in enforcing estoppels against public authorities, either as a matter of public or private law.

## Part I: Public law estoppel

Estoppel is a doctrine which has the capacity to provide remedies to a party which has relied to its detriment on the representation of another. An estoppel may be raised against a public authority either at common law or in equity. Both varieties of estoppel fall under the heading of estoppel in pais, described by Mason and Deane JJ as follows.<sup>6</sup>

Estoppel in pais includes both the common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement.

An estoppel at common law where the estoppel is raised by acts performed by the party estopped is contrasted with equitable estoppel, which is raised by a representation which induces another party to act. Additionally, the common law doctrine of estoppel by convention requires that parties adopt a mutual assumption as the conventional basis of their relationship,<sup>7</sup> whereas in estoppels by representation “the relevant detriment has not been accepted by the party estopped as the price for binding himself to the representation”.<sup>8</sup> An estoppel in pais can therefore be raised, for example, against a public authority which does not adhere to the terms of a non-statutory instrument which has caused an individual to rely to his or her detriment on such adherence, but the available remedies will depend on whether the instrument is characterised as “the conventional basis of the relationship”

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*Federal Court of Australia Act 1976* (Cth) s 21. For a history of the declaratory order, see M Aronson, B Dyer and M Groves, *Judicial review of administrative action* (4th ed, 2009) at 901-09.

<sup>6</sup> *Legione v Hateley* (1983) 152 CLR 406 at 430. See also: E Campbell, 'Estoppel in Pais and public authorities' (1998) 5(3) *Australian Journal of Administrative Law* 157 at 158; Meagher, Heydon and Leeming, above n5, at 536-537; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (“*Waltons*”) at 413 per Brennan J.

<sup>7</sup> *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244; Meagher, Heydon and Leeming, above n5, at 540.

<sup>8</sup> Meagher, Heydon and Leeming, above n5, at 540.

between the parties or as a representation which encouraged the reliant party to act to his or her detriment.

No specific doctrine of public law estoppel has developed in Australia.<sup>9</sup> The fact that public authorities are not truly the same as private individuals means that substantive enforcement of a government's representations to an individual must take account of the impact of that enforcement on the public at large.<sup>10</sup> Equity is capable of raising an estoppel to create a cause of action where an individual is misled to his or her detriment by a government entity.<sup>11</sup> As with liability in tort, this occurs on the same basis as an estoppel against any other party,<sup>12</sup> subject to some additional considerations peculiar to public authorities.<sup>13</sup>

The capacity of equity to enforce an estoppel against a public authority is limited. Public authorities will generally be amenable to private law doctrines when they are not acting *qua* government. For example, the Commonwealth was able to be held to its representations in *Verwayen*<sup>14</sup> because it was in no different position to any other litigant. The situation is different, however, in relation to public authorities' statutory powers and discretions. Public authorities "cannot fetter the performance of their duties by contract or estoppel, or, without statutory authority, bind themselves to perform them in a particular way".<sup>15</sup> In this respect, the issues surrounding public law estoppel mirror those which limit the availability of liability in tort for the otherwise negligent acts of public authorities.<sup>16</sup>

It is long settled that an estoppel cannot be enforced to prevent the exercise of a statutory duty<sup>17</sup> or a statutory discretion of a public character.<sup>18</sup> The point that an estoppel cannot be raised against a public authority where it would have the effect of compelling the authority to act *ultra vires*<sup>19</sup> is, in fact, no more than an extension of the principle that an estoppel cannot compel an unlawful act either by a public authority or a private actor as a matter of public policy.<sup>20</sup> Therefore, it is uncontroversial that a representation made on behalf of a public authority that it will perform an act that it has neither statutory nor executive power to perform will be substantively unenforceable,<sup>21</sup> particularly since an official cannot even have ostensible authority which is inconsistent with his or her statutory limitations.<sup>22</sup>

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9 *Annetts v McCann* (1990) 170 CLR 596 at 605 per Brennan J.

10 The differences between equity's application to individuals and public entities also arises in other contexts. For example, Mason J, sitting alone in the matter of *Commonwealth v John Fairfax & Sons Ltd*, expressly noted the importance of public interest considerations in applying 'private law' causes of action to public authorities: *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51-52.

11 *Commonwealth v Verwayen* (1990) 170 CLR 394.

12 *Judiciary Act 1903* (Cth) s 64; *Crown Proceedings Act 1993* (Tas); *Crown Proceedings Act 1993* (NT); *Crown Proceedings Act 1992* (ACT); *Crown Proceedings Act 1992* (SA); *Crown Proceedings Act 1988* (NSW); *Crown Proceedings Act 1980* (Qld); *Crown Proceedings Act 1958* (Vic); *Crown Suits Act 1947* (WA).

13 See per Stevens J for the Supreme Court in *Heckler*: "But however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without **at least** demonstrating that the traditional elements of an estoppel are present.": *Heckler v Community Health Services of Crawford County Inc* 467 US 51 (1984) at 60 (emphasis added). The additional consideration may be something such as unconscionable conduct.

14 Either because it was estopped from denying them (per Deane and Dawson JJ) or because it had waived its rights (per Toohey and Gaudron JJ).

15 K. R. Handley, *Estoppel by conduct and election* (2006) at 22 (citation omitted). As to the power of the Executive to enter contracts, see *New South Wales v Bardolph* (1934) 52 CLR 455 at 462-463 (Evatt J).

16 See e.g. *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215. The comparison is not absolute given the greater remedial flexibility possessed by equity.

17 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610; [1937] 1 All ER 748 at 753-754 per Lord Maugham. The Privy Council's decision was cited by Kitto J in *Commissioner of Taxation (Cth) v Wade* (1951) 84 CLR 105 at 117.

18 *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416 at 423 per Lord Parker CJ.

19 See Handley, above n15, 22-23; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 208, 211-216 per Gummow J.

20 Handley, above n15, at 296.

21 Just as an estoppel cannot give a court or a tribunal jurisdiction that is not permitted by statute: Handley, above n15, at 299. Public authorities are, of course, still subject to estoppel where they are exercising powers held in common with natural persons. For example, in *Verwayen*, the Commonwealth Government was able to

## Estoppel and revenue authorities

An example of this point can be observed in attempts to enforce estoppels against revenue authorities. In *Bellinz v Commissioner of Taxation*,<sup>23</sup> the appellants applied to the respondent Commissioner of Taxation for a private ruling in respect of an arrangement whereby they leased plant under a lease agreement with an option to purchase, and immediately sublet the plant under a further equipment lease but without a purchase option. The appellants wanted to know whether they would be entitled to claim depreciation in respect of the plant under s 54(1) of the *Income Tax Assessment Act 1936* (Cth). The Commissioner issued a ruling on this question which was unfavourable to the appellants, who then lodged a notice of objection with the Commissioner. This was disallowed. An appeal to the Federal Court in its original jurisdiction was dismissed. The appellants then appealed to the Full Court and contended, *inter alia*, that the Commissioner was bound by the underlying reasoning of previous rulings issued prior to the introduction of binding public rulings because the Commissioner was required to treat each taxpayer fairly and was not permitted to discriminate between taxpayers. The appellants further contended that they were entitled to rely on binding rulings issued by the Commissioner after the amendment of the *Taxation Administration Act 1953* (Cth) to allow binding rulings from 1 July 1992.

A full bench of the Federal Court, comprising Hill, Sundberg and Goldberg JJ, was able to uphold the decision reached by Merkel J below on the basis that the lessors were not the “owners” of the plant for the purposes of s 54(1) of the *Income Tax Assessment Act 1936* (Cth). On the issue of whether the Commissioner was, in effect, estopped from making a ruling which was inconsistent with other rulings issued by the Australian Taxation Office (ATO), the Full Court held that there could not have been an estoppel<sup>24</sup> in the circumstances because the reliance of the appellants on the rulings issued by the ATO was not reasonable. The terms of the rulings on which the appellants claimed to have relied made it clear that ATO rulings are issued subject to legislation and appellate rulings.<sup>25</sup> This reasoning is similar to that which holds that a disclaimer may prevent reliance on a negligent misrepresentation from being reasonable.<sup>26</sup>

Further, though, their Honours applied the rule in *Maritime Electric*,<sup>27</sup> as encapsulated in the *dictum* of Kitto J in *Commissioner of Taxation v Wade* that “no conduct on the part of the Commissioner could operate as an estoppel against the operation of the [taxation legislation]”.<sup>28</sup> It follows that, regardless of the terms of the rulings, the ATO could not have been estopped from making a decision either required or allowed<sup>29</sup> by the relevant legislation. This limitation upon any enforcement of an estoppel does not

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be estopped from denying its promise to the plaintiff that it would not rely on a statutory limitation defence because this is a representation of a sort that any litigant could have made: *Commonwealth v Verwayen* (1990) 170 CLR 394.

<sup>22</sup> *Attorney-General for Ceylon v De Silva* [1953] AC 461 at 479.

<sup>23</sup> *Bellinz and Others v Commissioner of Taxation* (1998) 84 FCR 154.

<sup>24</sup> “It was not suggested that the appellants could rely upon estoppel, although the administrative law arguments advanced in reality seek to activate a doctrine of estoppel in a different guise.”: *Bellinz and Others v Commissioner of Taxation* (1998) 84 FCR 154 at 164. Their Honours clearly regarded the relationship between public law estoppel and public law enforcement of legitimate expectations as more than merely “analogous”; cf *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58 at 66.

<sup>25</sup> *Bellinz and Others v Commissioner of Taxation* (1998) 84 FCR 154 at 165. *Bellinz* was not a case where the appellants had relied to their detriment on representations of the Commissioner. Rather, they were sophisticated parties which sought to extract a more favourable assessment from an unwilling ATO. It is open to question whether the appellants could be said to have relied upon the representations contained in the earlier rulings to the requisite degree, particularly since they had sought a ruling from the Commissioner in the first place.

<sup>26</sup> See e.g. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Note, however, the criticisms of the ‘reasonableness test’ as it applies to equitable estoppel made by Lord Neuberger of Abbotsbury MR, ‘Thoughts on the law of equitable estoppel’ (2010) 84(4) *Australian Law Journal* 225 at 233.

<sup>27</sup> *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610; [1937] 1 All ER 748.

<sup>28</sup> *Commissioner of Taxation (Cth) v Wade* (1951) 84 CLR 105 at 117 per Kitto J (emphasis added).

<sup>29</sup> *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416. The Court pointed out, however, that “[i]n the true sense the application of the statute to facts involves no question of administrative discretion” and later stated that “principle may be said to permit judicial review in matters of administration or procedure

rule out the possibility of circumstances in which judicial review's remedies could be available to remedy an invalid exercise of a discretion as a matter of public law.<sup>30</sup> Nor, as I will argue below, does it preclude a court from applying some lesser equity than enforcement of the estoppel, such as an award of equitable compensation, where the justice of the case so demands.

## ***Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 and *Attorney-General (NSW) v Quin* (1990) 170 CLR 1: is the door closed on public law estoppel?**

As the example above confirms, that an estoppel cannot be enforced where to do so would cause a public authority to act *ultra vires* is beyond dispute in Australia.<sup>31</sup> Likewise, an estoppel will not be enforced by an Australian court if to do so would fetter the exercise of a public authority's discretion. In both *Kurtovic* and *Quin*, the plaintiff sought substantive enforcement of a representation made by a public authority. Mr Kurtovic alleged that the Minister's warning that any further criminal conviction would cause the Minister to reassess his decision not to exercise his statutory power to deport Mr Kurtovic "carried the implication that if the respondent gave no further cause to be deported, then he would be free to continue his life here".<sup>32</sup> This proposition was rejected by the Full Federal Court, comprising Neaves, Ryan and Gummow JJ .

The respondent in *Quin* had been a stipendiary magistrate in New South Wales. When the Court of Petty Sessions was abolished by statute and replaced by the Local Court in 1982, it was the policy of the NSW Government that all former stipendiary magistrates would be appointed as magistrates of the new court, unless they were unfit for judicial office. Mr Quin was one of five former stipendiary magistrates who were not reappointed to the new court and who subsequently sought judicial review of that decision.<sup>33</sup> The NSW Court of Appeal held that the five former stipendiary magistrates were owed a duty of procedural fairness, the content of which was to allow them to respond to any allegations about them, before the Attorney-General decided not to appoint them to the Local Court. The Attorney-General subsequently changed his policy, such that the five former stipendiary magistrates would be considered for vacant positions on the Local Court on their merits and in competition with other applicants. Mr Quin sought to hold the Attorney-General to his original policy and therefore to be considered in preference to any applicant who was not a former stipendiary magistrate. By majority, the High Court held that there was an insuperable impediment to any form of relief, on the basis that it would be substantive rather than procedural in form.

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where a decision-maker acts unfairly by discriminating between different categories of persons. But where the question arises as to the inclusion of an amount in assessable income or the allowance of an amount as a deduction, where no question of discretion arises and where the Commissioner is charged to administer the law ..., and one might say bound so to do in accordance with the language used in the statute as passed by Parliament, it is difficult to see how the Commissioner can properly be said to have acted unfairly, even if there is an element of discrimination, where he has acted in accordance with the law itself.": *Bellinz and Others v Commissioner of Taxation* (1998) 84 FCR 154 at 166-7.

<sup>30</sup> *R v Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617 at 637 per Lord Diplock; at 651 per Lord Scarman (*Fleet Street Casuals Case*); *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835; [1985] 2 All ER 327, at AC 863 per Lord Templeman; *Bellinz and Others v Commissioner of Taxation* (1998) 84 FCR 154 at 167.

<sup>31</sup> In *Kurtovic*, Gummow J summarised the position of the law by stating that "the present case is not one where a party asserts that the executive or other public authority is estopped from asserting that a particular action, of which the other party seeks performance, would be *ultra vires* as exceeding the powers given by or pursuant to a law of the Parliament. Any doctrine of estoppel in that context would threaten to undermine the doctrine of *ultra vires* by enabling public authorities to extend their powers both *de facto* and *de jure* by making representations beyond power, which they would then be estopped from denying.": *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 208 per Gummow J.

<sup>32</sup> *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 207 per Gummow J.

<sup>33</sup> *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268.

What should be remembered in treating *Kurtovic* and *Quin* as decisive of the proposition that estoppels cannot be raised against public authorities is that neither case dealt with a factual matrix in which an estoppel could have been raised in private law. The court held that Mr Kurtovic's attempt to raise an estoppel would fail, in the words of Gummow J, "for want of a sufficiently clear and unambiguous representation to the effect contended for"<sup>34</sup> and furthermore, even had there been a representation of the requisite kind, that Mr Kurtovic had not altered his position in reliance on it.<sup>35</sup> In *Quin*, only the majority judges considered the possibility that an estoppel may be raised against the Attorney-General which would have prevented him from adopting a new policy.<sup>36</sup> They rejected this possibility because, in the words of Mason CJ:<sup>37</sup>

I am unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, in relation to the appointment of magistrates, so long as the new policy is one that falls within the ambit of the relevant duty or discretion, as in this case the new policy unquestionably does.

Even without this impediment, it would have been difficult for Mr Quin to establish that he had in any way altered his position to his detriment in reliance on the Attorney-General's initial policy statement. While the position may be otherwise in relation to the substantive enforcement of legitimate expectations in public law, detrimental reliance is an essential element for the creation of any estoppel.

Professor Allars has argued that the "clear message of *Kurtovic* and *Quin* is a judicial discomfort"<sup>38</sup> with the principle that an estoppel can *never* be "raised to prevent the performance of a statutory duty or hinder the exercise of a statutory discretion".<sup>39</sup> She argues that "both Gummow J and Mason CJ sought to preserve the separation of powers", whose protection is inherent in the principle that an estoppel cannot be enforced such as to require the performance of an *ultra vires* act, "but to leave the door open to do individual justice".<sup>40</sup> In the two decades since the decisions in *Kurtovic* and *Quin*, there has not been an Australian case which shuts the door that was left open in those cases.<sup>41</sup> In appropriate circumstances, a court is still able to provide a remedy where an estoppel has been raised against a public authority. The nature of the available remedy will be considered in Part III below.

What is perhaps more interesting is the extent to which, for the last twenty years, Australian courts have so warmly embraced the limitations on raising an estoppel against a public authority expressed in *Kurtovic* and *Quin* rather than attempting to make their way through the door to an equitable remedy. It is difficult to enunciate a definitive reason for this trend. In part, it is possible that an appropriate set of facts comes along but rarely.<sup>42</sup> It may also arise in part by analogy to the high level of protection that

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34 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 207 per Gummow J. His Honour referred to *Legione v Hately* (1983) 152 CLR 406 at 435-7. See also *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 196 per Neaves J.

35 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 196 per Neaves J; at 218 per Gummow J.

36 Deane J, with whom Toohey J agreed in dissent, stated that the Court could mould "relief appropriate to prevent a successful plaintiff from being subjected to the consequences of a wrongful denial of procedural fairness": *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 45.

37 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 17 per Mason CJ.

38 M Allars, 'Tort and Equity Claims Against the State' in P. D. Finn (ed), *Essays on law and government - Volume 2: The citizen and the state in the courts* (1996) vol 2, 49 at 93.

39 Allars, above n38, at 86.

40 Allars, above n38, at 93.

41 "The possibility that estoppels may apply in public law is not foreclosed by the current state of authority in Australia": R. S. French, 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *AIAL Forum* 1 at 11.

42 It is hard to imagine a more unsuitable vehicle for an estoppel to be raised against a public authority than *Attorney-General (NSW) v Quin* (1990) 170 CLR 1. The notion that a government may be compelled to enforce promises about judicial appointments is all but unthinkable. Even the possibility of providing monetary compensation to a disappointed judicial candidate raises immense difficulties. The sheer inappropriateness of *Quin* to a remedy for estoppel may have resulted in public law estoppel being placed in the 'too-hard basket' as a whole.

public authorities now receive from actions in tort, both at common law and more recently under legislation, such as the *Civil Liability Act 2002* (NSW).<sup>43</sup> Regardless of what may be regarded as a general reluctance to attempt to raise estoppels against public authorities, it is important to recognise that the capacity to do so has not decisively been removed in Australia.

In *Minister for Immigration v Kurtovic*, Gummow J confirmed that:<sup>44</sup>

in a case of a discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; 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.

In his judgment in *Quin*, Mason CJ accepted the general statement of the law made by Gummow J in *Kurtovic*, with one caveat. His Honour held that the general statement that an estoppel could not be enforced to require an *ultra vires* act or fetter a statutory discretion did not:<sup>45</sup>

... 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.

This *dictum* appears to leave the door to public law estoppel ajar, if only slightly.<sup>46</sup> The contrary view to that put by Mason CJ may, of course, still be preferred by a full High Court bench. That view argues that any remedy (including equitable compensation) amounts to a restriction on Executive freedom, much as an award of damages for breach of contract can be seen as an enforcement of that contract. Furthermore, the burden of compliance falls entirely on the Executive, rather than on each party to look out for its own interests. It is implicit in the thesis pursued in this article that these objections should not form an insuperable barrier to compensation, given the fact that the Executive government is essentially different from all other parties, in as much as it does not have a wholly self-interested outlook. Nonetheless, it would be idle to deny the resonance of the opposing argument with modern developments in the law of negligence as it applies to public authorities.

In *Kurtovic*, Gummow J also refused to state that an estoppel could never be raised against a public authority, although on a different basis to that of Mason CJ. His Honour suggested in *obiter dicta* that an estoppel may be raised in relation to a public authority's operational decision-making, although never in relation to decisions on policy issues.<sup>47</sup> This adopted the reasoning of Lord Wilberforce in *Anns v Merton LBC*,<sup>48</sup> in relation to the liability in negligence of public authorities. Gummow J expressly

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43 See generally M Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44.

44 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 210 per Gummow J. This passage was approved by Mason CJ in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 17.

45 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 18 per Mason J. cf *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 220-221 per Gummow J.

46 It found no support in the judgment of Brennan J in *Quin*.

47 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 215 per Gummow J.

48 *Anns v Merton Borough Council* [1978] AC 728 at 754.

noted the difficulty in drawing a line between operational and discretionary decision-making,<sup>49</sup> a reality which has always caused the policy / operational distinction to be hard to apply.<sup>50</sup>

While neither approach conclusively rules out the availability of remedies where an estoppel is raised against a public authority, they proceed on essentially different legal approaches. Gummow J had been critical in *Kurtovic*<sup>51</sup> of Lord Templeman's statement in *Preston* that his Lordship saw "no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation."<sup>52</sup> Gummow J objected to Lord Templeman's analogy between performance of contracts and making good of representations on one hand and the exercise of a discretion granted by statute on the other.<sup>53</sup>

Lord Templeman's speech in *Preston* has been seen as part of the development of an English public law ground of review for substantive unfairness.<sup>54</sup> *Preston*<sup>55</sup> was a case in which the taxpayer sought judicial review of the IRC's refusal to adhere to an informal agreement about the amount of the taxpayer's liability. The House of Lords unanimously accepted *dicta* by Lord Templeman that relief could be available where.<sup>56</sup>

the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy.

However, his Lordship's statement needs to be understood as providing a basis for judicial review by analogy to an enforceable contract rather than as providing a remedy as the result of raising an estoppel. In light of the way that English administrative law has developed after the House of Lords' decision in *Preston*, it is in fact better understood as an early case in which substantive effect was given to a legitimate expectation.<sup>57</sup> The opposition of Gummow J to Lord Templeman's *dicta* in *Preston* certainly appears to be on this basis.<sup>58</sup>

In *Quin*, Mason CJ indicated that he was also prepared to entertain the possibility of an exception to the general prohibition on estoppels which hinder the exercise of a statutory discretion on the basis of "justice to the individual", albeit his Honour expressed this as an issue which does not involve weighing a private interest against the public interest.<sup>59</sup> By contrast, the full extent of Gummow J's disapproval of allowing a court to remedy substantive unfairness caused by the holder of a statutory discretion was seen some years later in the joint judgment to which his Honour contributed in *Lam*.<sup>60</sup>

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49 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 215 per Gummow J. Lord Wilberforce had acknowledged that this distinction would usually be "one of degree": *Anns v Merton Borough Council* [1978] AC 728 at 754.

50 See Allars, above n38, at 89.

51 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 220 per Gummow J.

52 *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835; [1985] 2 All ER 327, at AC 866-867; at All ER 341.

53 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 210 per Gummow J.

54 Indeed, this was so some years before the decision of the Court of Appeal in *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850. See J McLachlan, 'Recent Cases' (1990) 64 *Australian Law Journal* 670.

55 *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835; [1985] 2 All ER 327.

56 *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835; [1985] 2 All ER 327 at 341.

57 M Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470 at 476-7; A O'Mara, 'Estoppel against public authorities: is Australian public law ready to stand upon its own two feet?' (2004) 42 *AIAL Forum* 1, at 7-8. The development of this public law doctrine will be examined below.

58 It certainly resonates with the later judgment to which his Honour contributed with McHugh J in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1.

59 Allars, above n38, at 92.

60 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1.



As Mason CJ acknowledged,<sup>61</sup> Gummow J was also critical of Lord Denning MR's reasoning in *Laker Airways*.<sup>62</sup> It was, however, approved by Mason CJ in *Quin*. It is easy to understand Gummow J's concerns with abuse of power as an organising principle behind cases in which an estoppel is raised against a public authority: like beauty, it is in the eye of the beholder. As has been observed<sup>63</sup> in relation to *Wednesbury*<sup>64</sup> unreasonableness, abuse of power treads very close to the boundary between legality and merits. It would be necessary to define that concept in such a way that, like *Wednesbury*,<sup>65</sup> there were an objective standard of an abuse of power justifying a judicial remedy. Matthew Groves has argued that:<sup>66</sup>

the phrase 'abuse of power' suggests that there has been a breach of a basic tenet of public law, but it is usually used in a conclusionary [sic.] rather than explanatory manner. This approach enables abuse of power to be used as a motherhood statement that can be invoked as a wider principle or justification in English public law without any clear explanation of what might constitute an abuse of power or whether a new ground of review can be said to fall within the scope of that term.

On this reading, like the *Wednesbury* ground of judicial review, abuse of power is essentially undefined but is 'found' by judges who know it when they see it.<sup>67</sup> Unlike *Wednesbury*, at least on its application in Australia, abuse of power seems to be applied in England by judges as an application of "personal choice" which is not anchored to any underlying theoretical basis.<sup>68</sup>

Behaviour of a public authority could be measured against the equitable standard of unconscionability for the purpose of determining whether an estoppel has been raised. It is certainly a standard which fits with Mason CJ's notion of justice to the individual as a basis for the enforcement of estoppels against public authorities. Alexandra O'Mara has suggested that "the concept of unconscionability is flexible enough to accommodate a consideration of the 'public obligations' of a public authority"<sup>69</sup> and that it could therefore become a requirement of a new doctrine of administrative estoppel. This remark suggests the possibility that unconscionability could provide a means of applying Gummow J's suggestion of a policy / operational distinction in determining when an estoppel will be enforceable against a public authority. To the extent that O'Mara is advocating the creation of a new 'hybrid' doctrine which straddles public and private law, her proposition may not be either necessary or desirable. However, there is no reason why an estoppel ought not to be raised against a public authority if its conduct can be objectively characterised as unconscionable.<sup>70</sup> Like reasonableness, unconscionability is a concept well understood by the law.

An additional point in favour of using unconscionability to determine when an estoppel should be raised against a public authority is that it is an equitable standard. Unlike 'abuse of power', which is used in

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61 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 18.

62 *Laker Airways v Department of Trade* [1977] QB 643.

63 See G Weeks, 'Litigating questions of quality' (2007) 14(2) *Australian Journal of Administrative Law* 76.

64 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

65 Particularly after the High Court indicated that it was a ground of review which should be given a restrained application in *Re Minister for Immigration and Multicultural Affairs; ex parte Eshetu* (1999) 197 CLR 611.

66 Groves, above n2, at 90.

67 "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of 'hard-core pornography']; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.": *Jacobellis v Ohio* 378 US 184 (1964) at 197 (Stewart J). Stuart-Smith LJ in the English Court of Appeal referred to this as "the well known elephant test. It is difficult to describe, but you know it when you see it.": *Cadogan Estates Ltd v Morris* [1998] EWCA Civ 1671 at [17].

68 Groves, above n66, at 92-3.

69 O'Mara, above n57, at 17.

70 Unconscionability may provide the additional element needed to enforce an estoppel against a public authority: see *Heckler v Community Health Services of Crawford County Inc* 467 US 51 at 60 per Stevens J (1984).

England as a public law standard, unconscionability is able legitimately to appeal to concepts of fairness. At a substantive level, fairness has no place in Australian public law. Part of the concern with abuse of power as a guiding principle for raising an estoppel can be met by equity's capacity to mould relief, rather than adhere to the substantive / procedural dichotomy that is the hallmark of judicial review. As much as using unconscionability as a superadded factor may clarify when an estoppel should be raised against a public authority, it does nothing to alter the position that a court cannot provide a remedy which compels an *ultra vires* act or fetters a statutory discretion.<sup>71</sup>

However, there are limitations on the use to which a broad (and arguably conclusory) term such as 'unconscionable' or 'unconscientious'<sup>72</sup> can be put. The High Court has warned that while:<sup>73</sup>

it may be said that breaches of trust and abuses of fiduciary position manifest unconscientious conduct ... whether a particular case amounts to a breach of trust or abuse of fiduciary duty is determined by reference to well developed principles, both specific and flexible in character. It is to those principles that the court has first regard rather than entering into the case at that higher level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large.

Using unconscionable conduct as the guiding star of the suitability of an equitable remedy may be apt to mislead.<sup>74</sup> There are, additionally, significant impediments to Australian courts developing any broad, residual remedy for serious administrative injustice.<sup>75</sup> It follows that unconscionability as a concept at large has little to offer as a determinant of when an estoppel should be raised in public law unless it is linked to some principled base.

## Part II: Substantive enforcement of legitimate expectations

Lord Denning MR first coined the term "legitimate expectation" in *Schmidt v Secretary of State for Home Affairs*,<sup>76</sup> at a time when English courts "were developing the modern law with respect to standing and the range of circumstances which attracted the rules of natural justice."<sup>77</sup> His Lordship's purpose in that case was to extend the coverage of procedural fairness to a deportee with an unexpired visa. At that time, this was not a legal entitlement which amounted to a "right or interest" in respect of which procedural fairness was owed, although Professor Aronson has noted that *Kioa v West*<sup>78</sup> has

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71 An analysis of equity's remedial flexibility and its possible responses to this uncontroversial proposition will be provided in Part III below.

72 See *Commonwealth v Verwayen* (1990) 170 CLR 394 at 444 (Deane J).

73 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 324 [20]. See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 84 ALJR 446 at 462 [74].

74 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 325-326 [24]-[26].

75 M Groves, 'Federal Constitutional Influences on State Judicial Review' (Paper presented at the Australian Association of Constitutional Law, Federal Court, Sydney, 26 August 2010).

76 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170-171. Brennan J subsequently noted, drily, that "this seed ... has grown luxuriantly in the literature of administrative law": *Kioa v West* (1985) 159 CLR 550 at 617.

77 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 16 [47] per McHugh & Gummow JJ. See also A Mason, 'Procedural fairness: its development and continuing role of legitimate expectation' (2005) 12(2) *Australian Journal of Administrative Law* 103 at 106.

78 *Kioa v West* (1985) 159 CLR 550.

long since extended procedural fairness to putative deportees, even if they have expired visas.<sup>79</sup> As a concept which confers procedural rights, 'legitimate expectation' now has little work to do.<sup>80</sup>

Indeed, the term itself has been criticised as a "fiction".<sup>81</sup> Professor Aronson has commented on this topic that:<sup>82</sup>

the 'expectation' was often something that the subject had not entertained in fact. Rather, the subject could more accurately be said to have 'naturally'<sup>83</sup> or 'reasonably' assumed a certain course of conduct on the decision-maker's part or taken it for granted.<sup>84</sup> It is submitted that in such cases, it might be more straightforward to talk of 'reasonable assumptions'.

Where the decision-maker actually created the relevant expectation in the subject's mind (for example, by promising a certain course of conduct), then it is strictly superfluous to refer to a 'legitimate expectation'. Its legitimacy is not relevant. Its existence is indeed relevant, but only because the decision-maker was its cause. The focus should be on whether the decision-maker's conduct in making and then breaching the expectation was fair in the circumstances.<sup>85</sup>

Prior to this, Brennan J had concluded in *Kioa v West* that the term 'legitimate expectation' added nothing to the concepts of rights and interests for the purposes of determining to whom a duty of procedural fairness is owed,<sup>86</sup> noting that the appellant's infant child could scarcely be said to have any 'expectation' of a particular outcome. Perhaps it is this very awkwardness of expression which has seen the public law doctrine in England for enforcing 'legitimate expectations' described more usually as 'substantive unfairness'.

## The English position

Contrary to the genesis of 'legitimate expectation' to define when a duty of procedural fairness is owed, a substantive element to the doctrine of legitimate expectations has developed in the UK, which nonetheless features a substantial conceptual overlap with the private law doctrine of estoppel as it applies to public authorities.<sup>87</sup> In *Reprotech*,<sup>88</sup> Lord Hoffmann made the enigmatic statement that "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".<sup>89</sup> It may therefore

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79 M Aronson, 'Private bodies, public power and soft law in the High Court' (2007) 35 *Federal Law Review* 1 at 5.

80 *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 23 [68] per Kirby J. See also *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 16 [47]; 27-28 [81]-[83] per McHugh & Gummow JJ; at 45-46 [140] per Callinan J. cf Mason, above n77, at 106.

81 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 310-14 per McHugh J. cf *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 22 [67] per Kirby J.

82 Aronson, above n79, at 5. In *Kioa*, Gibbs CJ stated simply that "the expression 'legitimate expectation' means 'reasonable expectation'": *Kioa v West* (1985) 159 CLR 550 at 563.

83 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 30-32 (McHugh & Gummow JJ).

84 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 45-47 (Callinan J).

85 Professor Aronson added that, in Australia, "there will usually be no unfairness if the subject was adequately forewarned of the decision-maker's change of course", as in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

86 *Kioa v West* (1985) 159 CLR 550 at 617-622.

87 The development of this body of law was driven in the UK by migration, revenue and planning cases. In regard to the last of these, this development is contrary to the warning of Lord Scarman that "[i]n the field of property law, equity is a potent protection of private rights, operating on the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone.": *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731, at AC 616; at All ER 752. See A Mason, 'The Place of Estoppel in Public Law' in M Groves (ed), *Law and government in Australia: Essays in honour of Enid Campbell* (2005) 160 at 178.

88 *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58.

89 *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58 at 66 [35].

be considered that, in the UK at least, the two doctrines will henceforth develop along essentially different paths.<sup>90</sup> Sir Anthony Mason has commented that Lord Hoffmann's *dictum*:<sup>91</sup>

suggests that the role of private law estoppel in English public law, to the extent to which a private law estoppel would not be *ultra vires* the statute, is now subsumed in the doctrine of legitimate expectation, notably in the substantive protection of legitimate expectation, a concept which has no counterpart in Australian public law.

That there is common ground between the doctrines of equitable estoppel and substantive legitimate expectations is nonetheless implicit in Lord Hoffmann's approach.<sup>92</sup>

The watershed case for recognition in England that the holder of a legitimate expectation may sometimes be entitled to substantive protection of that expectation was *Coughlan*.<sup>93</sup> The facts of this case are sufficiently well known to be repeated here in brief. Miss Coughlan was a severely disabled patient who, along with other similarly disabled patients, was moved to a purpose-built facility run by the National Health Service called Mardon House. These patients were told that this would be their home for life or as long as they chose. However, within five years, the NHS had made the policy decision that it would close Mardon House and instead transfer the care of Ms Coughlan to the defendant local health authority. Prior to making this decision, the NHS had consulted with the patients and had allowed them to voice their opposition to the proposed change. When the NHS decided to close Mardon House despite the promise made to the patients, Ms Coughlan sought judicial review of the decision and was successful at first instance in obtaining an order of *certiorari* to quash the decision to close Mardon House.

The Court of Appeal unanimously<sup>94</sup> dismissed the appeal brought by the North and East Devon Health Authority. In doing so, it outlined three "categories" of case in which a court exercising a judicial review function is able to provide a remedy for the disappointment of a legitimate expectation:<sup>95</sup>

- (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds.<sup>96</sup> This has been held to be the effect of changes of policy in cases involving the early release of prisoners.<sup>97</sup>

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90 In Australia, where the doctrine of substantive legitimate expectations has been conclusively rejected by the High Court, this question is probably moot since at least one (and perhaps both) of those doctrines is not developing in Australia at all; see *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1. In the UK, by contrast, a doctrine of substantive unfairness "has essentially evolved from the earlier and more procedurally-focused legitimate expectation": Aronson, Dyer and Groves, above n5, at 543. See Groves, above n57; K Stern, 'Substantive fairness in UK and Australian law' (2007) 29 *Australian Bar Review* 266; C Stewart, 'Substantive unfairness: a new species of abuse of power' (2000) 28(3) *Federal Law Review* 617-635; C Stewart, 'The doctrine of substantive unfairness and the review of substantive legitimate expectations' in M Groves and H.P. Lee (ed), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 280.

91 Mason, above n87, at 179.

92 Most notably, substantive effect can only be given to either an estoppel or a legitimate expectation if to do so would not be *ultra vires* the relevant legislation nor impinge on the scope of a statutory discretion. See Mason, above n77, at 108. Professor Groves has noted that Lord Templeman's speech in *Preston* states that, in special circumstances, it would be open to a court to hold that a tax authority could not collect revenue if it would be unfair or unjust to enforce that duty: *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835; [1985] 2 All ER 327 at 339 per Lord Templeman. See Groves, above n57, at 476.

93 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850.

94 Lord Woolf MR delivered the judgment of the court on behalf of himself and Mummery and Sedley LJ.

95 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850 at 871-2 (emphasis in original). See Groves, above n57, at 478-9.

96 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

97 See *Findlay v Secretary of State for the Home Department* [1985] AC 318; *R v Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 All ER 397.

- (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontroversial that the court itself will require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it,<sup>98</sup> in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.
- (c) 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. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

The first two of these categories are not controversial.<sup>99</sup> The court held, however, that *Coughlan* fell into the third of these categories as an “unjustified breach of a clear promise given by the health authority’s predecessor to [Ms] Coughlan that she should have a home for life at Mardon House, [which] constituted unfairness amounting to an abuse of power by the health authority”.<sup>100</sup> It therefore upheld the order of *certiorari* granted in the court below and thereby remedied the “unfairness” to Ms Coughlan by substantively enforcing her legitimate expectation that Mardon House would be her home for life.

Prior to the Court of Appeal’s decision in *Coughlan*, English cases had been edging towards allowing public law enforcement of legitimate expectations,<sup>101</sup> a process in which Lord Denning was particularly prominent.<sup>102</sup> *Coughlan* represented a leap, with the court recognising an unfair outcome as a ground of judicial review. Professor Stewart has remarked that the facts of *Coughlan* were “perfect” for developing the nascent doctrine of substantive unfairness,<sup>103</sup> an assessment with which this author does not argue. Seen from another angle, however, they also demonstrate the shortcomings of abuse of power as a determinant of when there has been unfairness sufficient for the decision of a public authority to be invalid.<sup>104</sup>

There is no doubt that Ms Coughlan had every reason to feel that she had been treated rather badly by the NHS, which had reneged on its offer of a “home for life” within five short years. In other circumstances, she may have been able to argue successfully that she was entitled to an equitable remedy, although on the facts she would not have been able to demonstrate detrimental reliance on the NHS’ representation, since, like Mr Kurtovic, she had not altered her position on the faith of it.<sup>105</sup> That she sought substantive redress through judicial review for the disappointment of her legitimate expectation meant that her interests were necessarily to be weighed by the court against the public interest more generally. The court held that this could be done by assessing the fairness of the *outcome* to Ms Coughlan against the public interest.<sup>106</sup> Necessarily, however, this pits the immediately

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98 See *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629.

99 Groves, above n57, at 478.

100 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850 at 889.

101 See the account in Stewart, ‘The doctrine of substantive unfairness and the review of substantive legitimate expectations’, above n90, at 283-5.

102 See Aronson, Dyer and Groves, above n5, at 387-8.

103 Stewart, ‘The doctrine of substantive unfairness and the review of substantive legitimate expectations’, above n90, at 286.

104 See Groves, above n2, at 90-7. Professor Groves describes many of the English cases which use the concept of abuse of power as a determinant of validity as “result in search of a principle”: *Ibid.* at 92.

105 cf *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850 at 882 per Lord Woolf MR. With respect, it is not clear from the facts that Ms Coughlan had any genuine alternative to the course of action which she in fact adopted on the faith of the NHS’ representation. See Aronson, Dyer and Groves, above n5, at 388.

106 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850 at 876.

apparent disappointment of a severely disabled woman against the somewhat more abstract interest that the public had in the NHS being run efficiently and cost effectively.<sup>107</sup> It is scarcely surprising that when a comparison of that sort is made, it becomes more difficult to find an “overriding public interest” to justify the breach of the NHS promise.<sup>108</sup> Where there is no clear guidance about the elements which will ground a finding of abuse of power, there is always a chance that such a finding is not made upon only objective considerations.

In the recent case of *R (Grimsby Institute) v Chief Executive of Skills Funding*,<sup>109</sup> the claimant Institute applied to the defendant for funding of £10 million for proposed building works. It received approval in principle (AiP), but was denied final approval and funding for the sole reason that the defendant had run out of funds (a result described by the judge as a “debacle”).<sup>110</sup> The Institute had, however, expended a significant amount of money in preparing its application for the Approval in Detail (AiD) stage of the application process. The Institute’s claim was twofold: first, that once AiP had been granted, the application would be dealt with in accordance with the defendant’s usual and known procedures; and second, that the defendant would be funded and organised in a manner which enabled it to meet commitments given at AiP stage.<sup>111</sup> Judge Langan held that there was “nothing in the nature of a clear and unambiguous statement of the kind required to found a legitimate expectation”,<sup>112</sup> nor was there “anything in the nature of a specific undertaking to colleges that a practice (if it existed) of confining consideration of an application for AiD to the merits of that application would continue”.<sup>113</sup> His Honour further held that there had not been an abuse of power on the part of the defendant authority sufficient to enable the Institute to obtain a remedy for conspicuous unfairness in the absence of a representation. The extent of the Institute’s public law rights was a right to have its claim for reimbursement of its wasted expenditure considered by the defendant, and:<sup>114</sup>

that right has been satisfied: the request was considered and the decision to apply such funds as were available to meeting the expenses incurred by colleges which were facing insolvency cannot be stigmatised as irrational.

In short, *Grimsby Institute* is a cautionary tale for those who would spend money on the expectation of a grant from a public authority.

In the course of his judgment, Judge Langan set out nine propositions in *Grimsby Institute* which were said to represent the current state of the law in the UK on substantive unfairness. By way of summary, I have combined the submissions put by counsel with the comments of the judge in that case as follows:

- (i) save in an exceptional case, a legitimate expectation founded on a representation requires that representation to be clear and unambiguous,<sup>115</sup> subject to how “on a fair reading” a statement

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107 “Where one is dealing with a promise made by an authority a major part of the problem is that it is often not adequate to look at the situation purely from the point of view of the disappointed promisee who comes to the court with a perfectly natural grievance”: *R (on the application of Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at [35].

108 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850 at 883.

109 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin). I am grateful to John Randall QC for bringing this case to my attention.

110 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [139].

111 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [5].

112 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [130].

113 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [135].

114 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [139].

115 *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 at [72]-[73]; *R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd* [1990] 1 All ER 91 at 1569 G-H.

“would reasonably have been understood by those to whom it was directed”,<sup>116</sup> and cases of legitimate expectation not founded on an express representation are themselves highly exceptional;<sup>117</sup>

- (ii) a legitimate expectation founded on a past practice requires there to have been a specific undertaking to an individual or group whereby its continuance is assured;<sup>118</sup>
- (iii) an abuse of power is really the breach of a legitimate expectation of a general kind, namely that a public authority will not act so unfairly that its conduct amounts to an abuse of power;<sup>119</sup>
- (iv) the requirements for legitimate expectation in public law are now sufficiently developed to stand separately from private law doctrines such as estoppel, and should do so, being more sensitive, and tailored to, the particular context of public law;<sup>120</sup>
- (v) legitimate expectation not being the same as estoppel, detrimental reliance is not essential to making it out, though it remains highly relevant;<sup>121</sup>
- (vi) when allotting an alleged legitimate expectation as between the three *Coughlan* categories,<sup>122</sup> the correct approach to resolving cases which fall within the third of those categories is that of the Court of Appeal in *R (on the application of Bibi) v Newham London Borough Council*,<sup>123</sup> which qualifies *Coughlan* in two respects:<sup>124</sup>
  - (a) first, doubt is expressly cast on the approach which suggests that the question for the court in a category (3) case is whether the authority by reneging on its promise was acting so unfairly as to be guilty of an abuse of power. This question provides an uncertain guide, because a major part of the problem in legitimate expectation cases “is that it is often not adequate to look at the situation of the disappointed promisee” apart from the situations of the promisor and (sometimes) of many other persons to whom promises have been made;<sup>125</sup> and
  - (b) secondly, doubt is cast by implication upon what was said in *Coughlan* about the remedy in category (3) cases;<sup>126</sup>
- (vii) there are two sub-propositions:<sup>127</sup>

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116 *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 at [56]. See *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [84].

117 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [89].

118 *R (on the application of Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755 at [40]. See *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [87].

119 *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 at [72]; *R v Inland Revenue Commissioners; ex parte Unilever plc* [1996] STC 681; *Rowland v Environment Agency* [2005] Ch 1 at [68]. See *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [89].

120 *R (on the application of Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755 at [40]; *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58, [2003] 1 WLR 348 at [6] (Lord Mackay of Clashfern); at [33]-[35] (Lord Hoffmann). See *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [90].

121 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [60] (Lord Hoffmann); at [135] (Lord Carswell); *R (on the application of Begbie) v Department Of Education & Employment* [2000] 1 WLR 1115 at 1131G per Laws LJ; *R (on the application of Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at [29]-[31] per Schiemann LJ (for the court). See *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [92].

122 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850 at 871-2.

123 *R (on the application of Bibi) v Newham London Borough Council* [2002] 1 WLR 237.

124 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [93].

125 *R (on the application of Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at [33]-[37].

126 *R (on the application of Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at [40]-[41]; [43].

- (a) it is clear that in non-ECHR/EU cases, the test of proportionality has not been substituted for the *Wednesbury*<sup>128</sup> principle;<sup>129</sup> and
  - (b) that being so, and subject to *Bibi*,<sup>130</sup> many of the comments about balancing the public and private interests in *Coughlan* have to be read with caution;
- (viii) the fact that maladministration has occurred is not a ground for judicial review - the question is only “has the public body acted unlawfully?”;<sup>131</sup> and
- (ix) in deciding what, if any, relief should be granted, the court will take into account:<sup>132</sup>
- (a) whether the decision challenged is in the macro-political field;<sup>133</sup> and / or
  - (b) involves social or political value judgments as to priority of expenditure;<sup>134</sup> and / or
  - (c) the nature and clarity of the promise or prior practice in question.<sup>135</sup>

As this account of the current state of the law in the UK shows, the principles articulated in *Coughlan* have in some respects been wound back, but the basic principle remains that public law remedies will be available where a public authority reneges on a representation such as to breach the legitimate expectation that it will not act so unfairly that its conduct amounts to an abuse of power.<sup>136</sup> What constitutes an abuse of power in any given circumstance is less than clear.<sup>137</sup>

## The Australian position

It seems most unlikely that an Australian court could agree with the proposition that “the requirements for legitimate expectation in public law [should] stand separately from private law doctrines such as estoppel ... being more sensitive, and tailored to, the particular context of public law”.<sup>138</sup> Indeed, for the reasons stated by the High Court in *Lam*, it is impossible for an Australian court to weigh substantive unfairness done to an individual against an “overriding interest” in a public authority being able to disappoint a legitimate expectation as a matter of public law, at least without a “revolution in Australian judicial thinking”.<sup>139</sup> The English courts, by contrast, see issues like those in point (ix) of the list from *Grimsby Institute* as factors shaping the discretion to grant relief, rather than a bar to jurisdiction. Subject to my analysis of the availability of an equitable remedy in Part III of this article, one may well ask whether a public law remedy for disappointment of a legitimate expectation is necessary at all.

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127 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [98].

128 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

129 *R v Secretary of State for the Home Department, Ex parte Brind* [1991] AC 696 at 762-763 per Lord Ackner.

130 While a striking of the balance between the public and the private interest may be required in some cases, *Bibi* provides a reminder that the court should not concentrate on the understandable disappointment of the claimant to the exclusion of wider considerations: *R (on the application of Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at [52].

131 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [101].

132 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [103].

133 *R (on the application of Begbie) v Department Of Education & Employment* [2000] 1 WLR 1115 at 1131 C-D (Sedley LJ); *R (on the application of Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at [23].

134 *R (on the application of Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at [64].

135 *(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [182] (Lord Mance, dissenting as to the result).

136 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [89].

137 See Groves, above n57, at 487-9.

138 *R (Grimsby Institute) v Chief Executive of Skills Funding* [2010] EWHC 2134 (Admin) at [90]. cf Stern, above n90, at 289. Dr Stern appeared as junior counsel for the intervening Royal College of Nursing in *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850.

139 Mason, above n77, at 108.



There is a tension between the doctrine of substantive legitimate expectations and the rule against fettering discretions,<sup>140</sup> which is essentially the same as the tension between an estoppel and a statutory discretion of a public character.<sup>141</sup> The *Southend-on-Sea* principle prevents a court from enforcing an estoppel such as to fetter a statutory discretion. It is difficult to see, as a matter of principle, why the equivalent position in public law should be otherwise. The factor that is conclusive of this issue in Australia is the constitutional entrenchment of the separation of powers doctrine, which defines and confines judicial power in equal measure.<sup>142</sup> The classic modern exposition of the legal principle involved is that of Brennan J in *Quin*.<sup>143</sup>

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

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.

Brennan J's reasoning<sup>144</sup> is fundamentally at odds with the proposition of the Court of Appeal in *Coughlan* that a court can weigh "the requirements of fairness against any overriding interest relied upon for [a] change of policy".<sup>145</sup> Rather, on this orthodox view, an Australian court exercising judicial review cannot simply "cure administrative injustice", regardless of whether it outweighs the benefits of valid administrative action, because the merits of a decision fall outside its jurisdiction.<sup>146</sup> This reasoning was not applied directly to the issue of substantive unfairness as a ground of judicial review in *Lam*. Rather, it was held that the constitutional issues did not arise because of the limited scope of 'legitimate expectations'.<sup>147</sup>

I have commented above that the judgments of Gummow J in *Kurtovic* and Mason CJ in *Quin* did not close the door on the possibility of an estoppel being raised against a public authority in regard to the exercise of a statutory power. The door to an equitable remedy remains ajar where an equitable estoppel is raised.<sup>148</sup> The same cannot be said of the substantive enforcement of legitimate expectations in Australian courts as a matter of public law: the High Court in *Lam* slammed that

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140 P Sales and K Steyn, 'Legitimate Expectations in English Public Law: An Analysis' [2004] *Public Law* 564.

141 *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416 at 423 per Lord Parker CJ.

142 Groves, above n57, at 507.

143 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-6.

144 Brennan J further stated that "if an express promise be given or a regular practice be adopted by a public authority, and the promise or practice is the source of a legitimate expectation, the repository is bound to have regard to the promise or practice in exercising the power, and it is unnecessary to enquire whether those factors give rise to a legitimate expectation. But the court **must stop short of compelling fulfilment** of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power.": *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 40 (emphasis added). See *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 16-17 [48] (McHugh & Gummow JJ).

145 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; [2000] 3 All ER 850 at 872.

146 See Groves, above n57, at 507.

147 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 21 [65] (McHugh & Gummow JJ).

148 French, above n41, at 11.

particular door very firmly indeed,<sup>149</sup> despite the fact that Mr Lam had not attempted explicitly to rely on *Coughlan*.<sup>150</sup>

One basis upon which the court rejected Mr Lam's application for *certiorari* quashing the decision to cancel his visa was that he had not been shown procedural unfairness simply because he had a legitimate expectation that the respondent Minister's delegate would contact the carer of Mr Lam's children and this expectation was disappointed. Mr Lam had a right to a fair hearing before the decision to cancel his visa was made.<sup>151</sup> This he received, notwithstanding the disappointment of his expectation that the delegate would contact his children's carer. As Gleeson CJ noted, there was no suggestion that Mr Lam was deprived of the opportunity to put his full case and, therefore, no practical injustice had resulted from the disappointment of his expectation.<sup>152</sup>

Additionally, the joint judgment of McHugh and Gummow JJ noted explicitly the nature of the Australian *Constitution* in comparison to the constitutional arrangements of the UK. Their Honours considered<sup>153</sup> the comment of Laws LJ in *Begbie* that:<sup>154</sup>

Abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law. It may be said to be the rationale of the doctrines enshrined in the *Wednesbury* and *Padfield* [*v Minister of Agriculture, Fisheries and Food* [1968] AC 997] cases, of illegality as a ground of challenge, of the requirement of proportionality, and of the court's insistence on procedural fairness. It informs all three categories of legitimate expectation cases as they have been expounded ... in *Coughlan*.

McHugh and Gummow JJ commented that:<sup>155</sup>

The notion of 'abuse of power' applied in *Coughlan* appears to be concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards now identified by the English common law. These standards fix upon the quality of the decision-making and thus the merits of the outcome.

Their Honours expressly contrasted the English and French public law systems with that which exists under the Australian *Constitution* and held that the "distinction between jurisdictional and non-jurisdictional error which informs s 75(v)"<sup>156</sup> provides a further reason why the role of Australian courts "does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration".<sup>157</sup> By way of contrast, Kirby J had earlier floated the idea of judicial review for "serious administrative injustice" in his dissenting judgment in *Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002*,<sup>158</sup> which would operate as a minimum normative

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149 Since then, Finn J has held in the Federal Court that it was not open to him even to entertain any cause of action based on a claim that a substantive legitimate expectation was not satisfied: *Rush v Commissioner of Police* (2006) 150 FCR 165 at 185 [75].

150 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 9-10 [28] (Gleeson CJ). Mike Taggart commented that the court had "done about as much as judges can by way of *obiter dicta* in a case where the point was not argued to overrule" *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273: M Taggart, "Australian exceptionalism' in judicial review' (2008) 36(1) *Federal Law Review* 1 at 17. However, the precedent value of *Lam* must now be understood in light of the High Court's view that "seriously considered *dicta* of a majority of this Court" ought not to be overruled by intermediate appellate courts: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151.

151 *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 at 636 (Privy Council).

152 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 13-14 [36]-[38] (Gleeson CJ).

153 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 23 [72].

154 *R (on the application of Begbie) v Department Of Education & Employment* [2000] 1 WLR 1115 at 1123 [76].

155 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 23 [73]. This comment, however, should not be taken to express any doubt about the validity of *Wednesbury* unreasonableness or *S20* illogical fact-finding; see Weeks, above n63, at 81.

156 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 25 [77].

157 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 24-25 [76].

158 *Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002* (2003) 198 ALR 59 at 91-3, 98.

standard, in the manner of “abuse of power”. Professor Groves has argued convincingly, however, that this suggestion, although “interesting”, cannot be applied in Australia while the doctrine of jurisdictional error is so firmly embedded in the jurisprudence of the High Court.<sup>159</sup> That is a process which shows no signs of imminent reversal.<sup>160</sup> *Lam*’s reasoning cannot co-exist with a ground of review such as that expressed by Kirby J.

The best understanding of the approach to substantive unfairness expressed by the High Court in *Lam* may therefore be seen as twofold: first, ‘legitimate expectations’ may have a role to play in determining when a duty of procedural fairness is owed but, in that case, the focus of the court will be on the fairness of the procedure and not on the legitimacy of the expectation<sup>161</sup> or the substantive fairness of the outcome; and secondly, the *Constitution* restricts the availability of remedies under s 75(v) to occurrences of jurisdictional error, meaning that courts lack the jurisdiction to grant a remedy in respect of a legally valid exercise of power, even if it results in substantive unfairness. The door to relief in public law for the disappointment of a legitimate expectation is firmly closed in Australia for the foreseeable future.

## Part III: An equitable remedy

One view of government is that it is not a monolith but a broad and disparate collection of agencies and departments providing services to the public. On this view, the notion of a single unified government entity is fractured further by the increased use of private entities to fulfil public functions. However, this does not change the sense that most citizens have of government as a highly integrated, unified entity. This perception, whether right or wrong, is what stands behind arguments that public bodies should be compelled by equity to adhere to a promised course of action where a citizen has relied on that promise to his or her detriment.

The House of Lords in *BAPIO* was divided on the issue of the “indivisibility of the Crown”. Lord Scott stated that:<sup>162</sup>

the constitutional theory of the indivisibility of the Crown is in my opinion no basis upon which an important issue as to the lawfulness of guidance given by a Minister to institutions for which she has statutory responsibility ought to be decided.

His Lordship made this comment in the context of holding that a legitimate expectation ought only to be held against the decision-maker who gave the assurance upon which the legitimate expectation is based.<sup>163</sup> Lord Rodger, by contrast, held that “it would be wrong, not only as a matter of constitutional theory, but as a matter of substance” to separate the powers, duties and responsibilities of one decision-maker from the effects of a legitimate expectation created by another because “both are formulating and implementing the policies of a single entity, Her Majesty’s Government”.<sup>164</sup> Professor Groves has argued that:<sup>165</sup>

The latter approach is surely correct and also consistent with other cases that have acknowledged the complexity of modern government. If governments can rely on that complexity to invite the courts to take a more holistic approach to the valid exercise of official authority in cases such as

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<sup>159</sup> Groves, above n57, at 512.

<sup>160</sup> See *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

<sup>161</sup> *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 36 [111] (Hayne J).

<sup>162</sup> *R (on the application of BAPIO Action Limited) v Secretary of State for the Home Department* [2008] UKHL 27 at [28].

<sup>163</sup> *R (on the application of BAPIO Action Limited) v Secretary of State for the Home Department* [2008] UKHL 27 at [29].

<sup>164</sup> *R (on the application of BAPIO Action Limited) v Secretary of State for the Home Department* [2008] UKHL 27 at [34].

<sup>165</sup> M Groves, ‘Treaties and legitimate expectations: the rise and fall of *Teoh* in Australia’ (2010) *Judicial Review* (forthcoming).

*Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, they can hardly complain when the courts allow the citizens to view government in the same holistic way.

Regardless of one's opinion of the respective arguments of Lords Scott and Rodger, there can be no doubt that there are sound legal reasons (in addition to moral ones) why an erroneous representation of, say, a Centrelink officer or a junior official at the Department of Immigration should not leave a person who has relied on that representation to his or her detriment without a remedy.<sup>166</sup> This is so even if the agency or department respectively cannot be bound to perform the course of action which has been erroneously promised, because to do so would be to act *ultra vires*. Refusal to give substantive effect to an estoppel against a public authority is based on the principle that decision makers are given their discretion by Parliament and it may not be restricted other than by the terms of the statutory grant of power and the procedural requirements of administrative law.

For example, one may consider the case of *Minister for Immigration and Ethnic Affairs v Petrovski*.<sup>167</sup> The respondent in the Full Federal Court, Mr Petrovski, was born in Australia while his father was a consular official from the Republic of Yugoslavia. He returned to Yugoslavia with his family in 1971 at the age of 2 but, in 1984, was issued a passport by the Australian Embassy in Belgrade after having revealed his father's consular status. A second passport was issued to Mr Petrovski in 1990 and he entered Australia in 1991 and 1992 by producing that passport. Prior to his second entry to Australia, he had married a Thai woman in Thailand. Upon seeking to sponsor his wife and her child for permanent resident status in Australia, he was told for the first time that he was not, and had never been, an Australian citizen. Mr Petrovski's application for citizenship was rejected on the basis that he was an illegal entrant. This rejection was affirmed by the Administrative Appeals Tribunal but was subsequently overturned on appeal by Einfeld J.

In the Full Federal Court, Burchett and Tamberlin JJ held that, on the proper construction of the *Migration Act 1958* (Cth), Mr Petrovski was an "illegal entrant" into Australia and was therefore ineligible to be granted citizenship under the terms of the *Australian Citizenship Act 1948* (Cth). This was so notwithstanding the fact that he had entered the country legally as the holder of a validly conferred Australian passport, since the conferral of a passport does not amount to a grant of citizenship.<sup>168</sup> Mr Petrovski's application was therefore doomed to fail, since any order by the court which compelled the Minister to grant Australian citizenship to Mr Petrovski would require the Minister to act *ultra vires* the *Australian Citizenship Act 1948* (Cth).

Burchett J, with the concurrence of O'Loughlin and Tamberlin JJ,<sup>169</sup> commented on the plight of the unsuccessful respondent as follows:<sup>170</sup>

Although an estoppel will not be enforced in these circumstances, there is no doubt about the duty of administrators to take account of the unfairness, and even misery, that serious mistakes in the actions of government may cause. In the present case, some years of Mr Petrovski's life may have been wasted, and he may have contracted a marriage involving grave, possibly even insoluble, problems for the establishment of a marital home. It is accepted that at all times he acted in good faith. It may well be that if he had not been misled at the age of fifteen by what appears to have been nothing less than administrative incompetence on the part of an Australian official, he would long ago have been received as a migrant into Australia in the normal course. In those

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166 The Privy Council has stated that the concept of "good administration" may be the source of a public authority's obligation to adhere to an antecedent promise as to its conduct: *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 at 638 per Lord Fraser of Tullybelton (Privy Council). This statement was conditional on the authority not thereby acting contrary to "its statutory duty".

167 *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303.

168 *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303 at 308C-F per Burchett J; at 321G per Tamberlin J.

169 *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303 at 316D-E per O'Loughlin J; at 329A per Tamberlin J.

170 *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303 at 309A-D.

circumstances, it is to be hoped that it will be found possible to take urgent steps to find a remedy for Mr Petrovski's plight.

In the absence of any public interest consideration adverse to him (and none was suggested at any stage of this case), it is plainly in the public interest that a person who has acted on the faith of an instrument as serious as a passport issued by the Australian Government should not find his faith misplaced: cf *Gowa v Attorney-General* (1985) 1 WLR 1003 at 1011; *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 at 638. The attention of the Minister should be drawn to this matter.

It is clear from *Petrovski* that reliance on the acts and representations of public authorities has the potential to cause significant practical detriment to individuals who rely on them. The incapacity of courts to enforce an estoppel in these circumstances leaves the possibility of serious injustice, as Burchett J noted.<sup>171</sup> I will argue below that equity may be able to provide an alternative remedy in such cases.

## The need for an equitable remedy

Individuals are apt to act to their own detriment on the faith of representations made on behalf of government and, in the absence of an estoppel being raised, they are usually left without a substantive remedy unless they can establish that there has been a negligent misrepresentation in circumstances where they are owed a duty of care.<sup>172</sup> The fact that a request, demand or instruction comes from an official source will frequently result in compliance from a private actor, regardless of that person's subjective opinion. An instruction from a police officer to drive the wrong way up a one way street will inevitably be obeyed because we are used to accepting the authority of the police, particularly in circumstances where there is no practical means of challenging their authority to give a certain instruction.

There is little difference in effect between this example and instructions from many other types of public entities. It is unlikely that an instruction from a revenue authority to a small business owner would be challenged,<sup>173</sup> although it would have the potential if incorrect to cause substantial loss. Such an instruction may amount to a negligent misrepresentation compensable in tort. The necessity for an equitable remedy is to cover situations where the elements of negligence are not made out.

For example, consider hypothetical legislation which states that the responsible Minister may make a grant to assist the studies of University students of indigenous background. Mary has an indigenous grandmother, since deceased, and applies for the grant. She is told by the Minister's delegate that, on this basis, she meets all criteria for the grant and she should receive her first payment within a fortnight. On the faith of this representation, Mary rents an apartment she would not otherwise have been able to afford. The Minister's delegate subsequently decides not to accept that Mary is "of indigenous background" and refuses to make the grant to Mary on this basis. Mary therefore suffers detriment as a result of having relied on the delegate's original representation by having entered a lease she would not otherwise have entered.

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<sup>171</sup> Although his Honour's *dicta* should be understood as a plea for mercy rather than as an argument that decision-maker's bear a duty to take account of 'unfairness'.

<sup>172</sup> See e.g. *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225.

<sup>173</sup> cf *Neil Martin Ltd v Revenue and Customs Commissioners* [2007] EWCA 1041 at [67]. The reasoning of Chadwick LJ in this regard is doubted by T Cornford, *Towards a Public Law of Tort* (2008) at 214.

In regard to raising a common law estoppel against a public authority, Professor Enid Campbell noted that:<sup>174</sup>

To hold a public body estopped from denying the existence of a certain state of affairs will not always be to sanction *ultra vires* action on the part of that body or breach of its statutory obligations. A body which is empowered to grant pensions to former defence personnel who suffer disabilities attributable to war service cannot really be said to have exceeded its powers if it is estopped, by representation, from denying that X's disability is attributable to such service.

The result in the example used by Professor Campbell is open to doubt. If a power to grant a pension is only activated in relation to persons disabled as a result of war service, the power does not accrue to the decision-maker in question *unless* he or she forms the opinion that the recipient of the pension has in fact been disabled as a result of war service. To grant a pension on any other basis is to act *ultra vires*.<sup>175</sup>

Likewise, in Mary's example, the Minister's power to make a grant to Mary is dependent on her being (or the Minister forming the opinion that she is) "of indigenous background". Establishing this fact is the threshold to the Minister having power to make the grant. Suppose further, however, that Mary's application has been approved and she has received payments under the grant scheme when the Minister comes to believe that she is not in fact "of indigenous background". In the absence of statutory authority in the Minister to make a grant of money, there is long-standing authority that Mary would not succeed in estopping the Minister from recovering the monies paid other than in accordance with statute.<sup>176</sup> Professor Campbell argued that an estoppel should be raised where the benefit in question was paid as the result of a mistake of fact by the public authority and "in the absence of fraud or misrepresentation on the part of the recipient".<sup>177</sup> However, while it is desirable that a remedy should be available to the innocent recipient of a grant under these circumstances, that does not in itself get around the fact that such a payment has been made in the absence of the statutory power to make it.

The result remains the same regardless of whether the representation relied upon is phrased as an existing state of affairs (i.e. Mary was told that the grant had already been approved) or as a promise of future conduct (i.e. that Mary's grant would be approved at some future time). In either case, the representation would be ineffective because it was *ultra vires*.

The fact that a public authority is unable to have an estoppel raised against it which would require it to fetter the future exercise of a statutory discretion may be seen as a matter of public policy<sup>178</sup> but, in public law terms, is also *ultra vires* since it effectively prevents the authority from exercising the power granted to it by Parliament at its own discretion. The result of this is that a private actor mistakenly charged only 10% of the statutorily fixed monthly charge for electricity cannot rely on an estoppel to overcome the price regime set by statute<sup>179</sup> regardless of his change of position in reliance on the amount charged.<sup>180</sup> In contrast, a teacher mistakenly over-paid by his employer, a local government

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174 Campbell, above n6, at 166.

175 On the other hand, one of the key constitutional assumptions of Australian administrative law is that executive agencies and their officials, in essence, have the authority to make a mistake of fact as part of their constitutional province over factual issues. Professor Campbell's argument can be taken to mean that an estoppel can be raised where a decision maker finds (perhaps wrongly) that a person meets certain criteria because such a finding is within the decision-maker's jurisdiction. The result of a justiciable controversy on these facts would, of course, be highly dependent on the statutory definition of the relevant terms.

176 *Auckland Harbour Board v R* [1924] AC 318. Recovery of overpayments would be subject to Chapter 5 of the *Social Security Act 1991* (Cth). Note that most such decisions are now subject to review by the Administrative Appeals Tribunal, which has a general power to vary (and perhaps waive entirely) the amount owed as a matter of discretion: *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1)(b) & (c).

177 Campbell, above n6, at 165.

178 Handley, above n15, at 301.

179 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610.

180 See Handley, above n15, at 301-02.

body, who then spent part of the amount overpaid was able to prevent the employer from recovering the overpayment as moneys had and received by raising an estoppel by representation.<sup>181</sup> The estoppel raised in such a situation will not always entitle an individual to the entirety of the amount overpaid,<sup>182</sup> nor will it prevent a payment from Consolidated Revenue from being *ultra vires* if made without statutory authority.<sup>183</sup> Nonetheless, this demonstrates that the Crown<sup>184</sup> is capable of being estopped from denying the veracity of its representation provided that it is not in conflict with the public law doctrines to which a public authority is subject.<sup>185</sup>

In *Verwayen*, Mason CJ and Deane J proposed the view that there is now a unified “general doctrine of estoppel by conduct”<sup>186</sup> in Australian law which encompasses both common law and equitable doctrines so as “to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted”.<sup>187</sup> However, this was specifically denied by Dawson and McHugh JJ, whereas Brennan J stated, in contrast to the statement of Mason CJ extracted above, only that “equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise”.<sup>188</sup> Since then, the High Court has left the question open<sup>189</sup> and the proposition has never commanded the support of a High Court majority.<sup>190</sup>

Professor Campbell has pointed out that, while the objects of estoppel in pais<sup>191</sup> and equitable estoppel<sup>192</sup> are the same, the remedies available in equity are significantly more flexible than at common law, which offers only the “all or nothing”<sup>193</sup> remedy of holding the party estopped to his or her representation.<sup>194</sup> McHugh J summarised the authorities on this issue in *Verwayen* as follows:<sup>195</sup>

What will be required to satisfy the equity which arises against the party estopped depends on the circumstances.<sup>196</sup> Often the only way to prevent the promisee suffering detriment will be to enforce the promise. But the enforcement of promises is not the object of the doctrine of equitable estoppel. The enforcement of promises is the province of contract. Equitable estoppel is aimed at preventing unconscionable conduct and seeks to prevent detriment to the promisee. As Brennan J pointed out in *Waltons*, “in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct”.<sup>197</sup> Consequently, a court of equity will only require the promise or assumption to be fulfilled if that is the only way in which the equity can be fulfilled.<sup>198</sup> In *Silovi Pty Ltd v Barbaro*,<sup>199</sup> Priestley JA, writing for an unanimous Court of Appeal,

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181 *Avon County Council v Howlett* [1983] 1 All ER 1073.

182 Meagher, Heydon and Leeming, above n5, at 538-9.

183 *Auckland Harbour Board v R* [1924] AC 318. See Handley, above n15, at 302.

184 Although query whether the principle from *Auckland Harbour* covers public authorities with separate legal personality.

185 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 208-11 per Gummow J.

186 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 431 per Deane J.

187 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 410 per Mason CJ.

188 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 428-429 per Brennan J (emphasis added).

189 *Giumelli v Giumelli* (1999) 196 CLR 101 at 112-13. See Meagher, Heydon and Leeming, above n5, at 535.

190 Campbell, above n6, at 159 (fn 14).

191 “The object of an estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption is adhered to, would operate to that other's detriment.”: *Thompson v Palmer* (1933) 49 CLR 507 at 547 per Dixon J.

192 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 427 per Brennan J.

193 “The result of an estoppel at common law was, viewed as a separate and distinct doctrine from equitable estoppel, to preclude the party estopped from denying the assumption upon which the other party acted to his detriment. It followed that the party who acted to his detriment was, in effect, given the benefit of the assumption. It was all or nothing.”: *Commonwealth v Verwayen* (1990) 170 CLR 394 at 454 per Dawson J.

194 Campbell, above n6, at 167.

195 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 501 per McHugh J.

196 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 404 per Mason CJ and Wilson J.

197 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419.

198 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 416 per Brennan J.

said: “The remedy granted to satisfy the equity ... will be what is necessary to prevent detriment resulting from the unconscionable conduct.”

The capacity of courts with equitable jurisdiction to “mould” a decree to satisfy the minimum equity required to do justice between the parties means that courts may be able to provide a remedy, even where it is impossible to hold the relevant public authority to its initial representation. Such a remedy would likely be an order for equitable compensation.<sup>200</sup>

## Equitable compensation

The reasoning behind the rejection of attempts to extend private law estoppel to the public exercise of statutory powers and discretions is that private actors are capable of being estopped because they are self-regarding, whereas the “public law ... binds everyone”.<sup>201</sup> There is no *prima facie* reason why, where a plaintiff has made out that an estoppel could be raised if the defendant were a private actor,<sup>202</sup> courts should be prevented from providing an alternative remedy in circumstances where it is inappropriate to estop the defendant public authority from exercising a statutory power or discretion.

There are, of course, reasons why public authorities and private actors cannot be treated in the same way. This, however, has not operated as a blanket rule to prevent individuals from obtaining remedies against public authorities in tort. Fears that estoppel in public law will result in courts enforcing the substance of promises made to individuals are overstated, provided always that the scope of public law estoppel is appropriately restricted. A better solution would be for equity to exercise its capacity to construct a remedy which is not at odds with the doctrine of *ultra vires*. As Spigelman CJ has noted, “remedial flexibility is a characteristic of equity jurisprudence”.<sup>203</sup>

If the only reason that courts do not currently award compensation in such circumstances were purely for reasons of public policy, this obstacle would not be insuperable. After all, strong objections to the extension of equitable estoppel on policy grounds have been overcome. Prior to the decision of the High Court of Australia in *Waltons v Maher*,<sup>204</sup> there were grave concerns that the extension of the doctrine of estoppel to enforce promises as to future conduct outside the realm of contract would have a severely deleterious effect on the contractual doctrine of consideration.<sup>205</sup> More than 20 years after that landmark decision, the law relating to consideration remains recognisable. It has survived the capacity of equity to intervene and enforce<sup>206</sup> a promise upon which another party has relied to his or her detriment.

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199 *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 at 472.

200 Campbell, above n6, at 167.

201 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731 at 752. Lord Scarman denied “that ‘the general principle’ of equitable estoppel is applicable to planning cases”, contrary to the statement of Lord Denning MR in the Court of Appeal below that “the general principle of equity considered in *Crabb v Arun District Council* ([1975] 3 All ER 865 at 871-872, [1976] Ch 179 at 187-188) ... is, in my view, particularly applicable in planning cases. At any rate in those cases where the grant of planning permission opens a new chapter in the planning history of the site.”: *Newbury District Council v Secretary of State for the Environment* [1979] 1 All ER 243 at 250.

202 NB: this was held not to be so in several of the key cases on this issue. See e.g. *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 217-18 per Gummow J; *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58 at 66 [32] per Lord Hoffmann.

203 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 304 [4] (NSW Court of Appeal).

204 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

205 Mason, above n87, at 162.

206 NB: In *Waltons*, substantial damages were ordered in lieu of an order for specific performance, which was held to be inappropriate in the circumstances.



The Supreme Court in each Australian jurisdiction has the power, granted by statute in terms derived from *Lord Cairns' Act*,<sup>207</sup> to award equitable damages. The purpose of *Lord Cairns' Act*, passed in 1858, was stated by Lindley LJ to be “to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act”.<sup>208</sup> Additionally, there is an inherent<sup>209</sup> power in the Supreme Courts of each Australian jurisdiction to award equitable compensation, for the breach of a fiduciary duty<sup>210</sup> or other breach of an equitable duty. The difference in nomenclature between damages and equitable compensation has recently been described by Owen J, in the course of his Honour’s extensive judgment in *Bell Group v Westpac*, as “notoriously difficult”.<sup>211</sup> In summary, equitable damages are able to be awarded due to a statutory grant of power to courts with equitable jurisdiction whereas equitable compensation can be granted in the inherent jurisdiction of such courts; equitable compensation is to breaches of equitable duty what damages are to breaches of common law duties.<sup>212</sup> Generally, therefore, equitable damages will not lie as a remedy to fulfil the equity in circumstances where the conditions to raise an estoppel would be raised but for the public status of the party to be estopped because neither a statutory nor a common law right will have been breached. Furthermore, the court would lack jurisdiction to award equitable damages, since neither injunctive relief nor an order for specific performance would be available against the public authority, as required by the statute.<sup>213</sup>

The compensatory function of equitable compensation may be understood broadly<sup>214</sup> and it goes beyond the well-understood circumstances where “property held in a fiduciary capacity is misapplied”.<sup>215</sup> In his celebrated speech in *Nocton v Lord Ashburton*,<sup>216</sup> Lord Haldane stated that damages are available at common law where loss is consequent on an honest but reckless statement falling short of fraud,<sup>217</sup> in the context of a “special relationship” which is not of a fiduciary character.<sup>218</sup>

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207 *Lord Cairns' Act* (21 & 22 Vict c 27) s 2. See Meagher, Heydon and Leeming, above n5, at 842-3. The current scope of this statutory power of the Supreme Court is stated as follows by *Supreme Court Act 1970* (NSW) s 68.

“Where the Court has power:

- (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or
- (b) to order the specific performance of any covenant, contract or agreement,

the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.”

See also: *Supreme Court Act 1986* (Vic) s 38; *Equity Act 1867* (Qld) s 62.

208 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 316.

209 See L Aitken, ‘Developments in equitable compensation: opportunity or danger?’ (1993) 67(8) *Australian Law Journal* 596 at 596 (fn 3). Note that the learned authors of *Meagher, Gummow & Lehane* use the term damages to refer to both the statutory remedy and the remedy available to a court in its exclusive equitable jurisdiction. They state that “there was no need to provide in legislation such as *Lord Cairns' Act* ... for ‘damages’ for breach of purely equitable obligations; there was an inherent power to order restitution in respect of violation of equitable rights.”: Meagher, Heydon and Leeming, above n5, at 833. See also Charles E.F. Rickett and Tim Gardner, ‘Compensating for Loss in Equity: The Evolution of a Remedy’ (1994) 24 *Victoria University of Wellington Law Review* 19, at 20-5.

210 See *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 426-7 per McHugh J. See also the cases noted in R.I. Barrett, ‘Equitable compensation’ (2000) 74(4) *Australian Law Journal* 228. Additionally, Vann points out that “literature in the field has differentiated between equitable compensation that is *reparation for loss* and equitable compensation that is in *substitution of performance*”: V.J. Vann, ‘Equity and proportionate liability’ (2007) 1 *Journal of Equity* 199 at 212 (original emphasis). The principles involved when a court awards compensation for the breach of a fiduciary duty causing loss are well known but will not be addressed here.

211 *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 225 FLR 1 at 835 [9698].

212 *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457 at 478 per Jules Sher QC.

213 See e.g. *Supreme Court Act 1970* (NSW) s 68.

214 “In my view it is quite fallacious to seek to build an argument upon the premise that equitable compensation is compensatory. That blinding glimpse of the obvious tells you nothing about areas where equity goes further, for example, by granting an injunction, specific performance or account of profits.”: *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 323 [120] per Mason P (NSW Court of Appeal). The authors of *Meagher, Gummow & Lehane* agree that “there is much to be said for the view that the primary purpose of equitable damages [sic.] is compensatory”: Meagher, Heydon and Leeming, above n5, at 837.

215 I. E. Davidson, ‘The Equitable Remedy of Compensation’ (1982) 13 *Melbourne University Law Review* 349 at 349. Note also the comment of Mason P that it is “fallacious to move from a premise such as ‘equitable compensation is compensatory’ as if that told you something about the limits of the monetary relief capable of being awarded in equity.”: *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 324 (NSW Court of Appeal).

216 *Nocton v Lord Ashburton* [1914] AC 932; [1914-15] All ER Rep 45.

217 cf *Derry v Peek* (1889) 14 App. Cas. 337. See F Pollock, ‘Nocton v Lord Ashburton’ (1915) 31 *Law Quarterly Review* 93.

His Lordship's statement was subsequently used as authority for the recognition of liability for negligent misstatement in *Hedley Byrne*.<sup>219</sup> On the facts of *Nocton's Case* itself, the appellant solicitor was held by the House of Lords not to have been liable to his client, the respondent, in the tort of deceit and therefore damages were not payable at common law. The appellant was, however, liable for breach of a fiduciary duty; this was a matter falling within the exclusive jurisdiction of equity.<sup>220</sup> The learned authors of the 4<sup>th</sup> edition of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* cite the judgment of Dixon AJ (as his Honour then was) in *McKenzie v McDonald*<sup>221</sup> as stating that *Nocton v Lord Ashburton* stood for the proposition that the equitable jurisdiction to remedy breaches of fiduciary duty extended to making an order for compensation in favour of the party whose confidence had been abused.<sup>222</sup> Such an order would also be available in respect of a "special relationship" which is not fiduciary in nature. In short, "equitable compensation can be awarded for a wide variety of infractions of fiduciary and other 'equitable' duties".<sup>223</sup>

There is a distinction which must be drawn between the equity which is raised where the conditions giving rise to an equitable estoppel are satisfied and the relief which a court will grant to fulfil the equity thus created. The mere fact that relief by way of enforcing an estoppel is inapt to be granted against a public authority where to do so would cause the authority to act *ultra vires* or would require the future exercise of a statutory discretion to be fettered does not prevent a court from fulfilling the equity with an award of monetary compensation.

The frequent generalisation that "common law estoppel operates where [an] assumption is one of existing fact, whereas equitable estoppel operates where the assumption relates to the future conduct of the representor or the legal rights of the representee"<sup>224</sup> is not universally accepted as being comprehensive.<sup>225</sup> However, for current purposes, it is sufficient to acknowledge that estoppel by representation as to a future state of affairs is an equitable doctrine and creates an equity in the party which relies to its detriment upon such a representation. The equity thus created need not be fulfilled by holding the representor to the substance of his or her representation. Dawson J described the legal principle as follows:<sup>226</sup>

The result of an estoppel at common law was, viewed as a separate and distinct doctrine from equitable estoppel, to preclude the party estopped from denying the assumption upon which the other party acted to his detriment. It followed that the party who acted to his detriment was, in effect, given the benefit of the assumption. It was all or nothing. By contrast, ... an estoppel in equity may not entitle the party raising it to the full benefit of the assumption upon which he relied. The equity is said "not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon" ...<sup>227</sup> To avoid the detriment

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218 *Nocton v Lord Ashburton* [1914] AC 932; [1914-15] All ER Rep 45 at 53.

219 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 484-485 per Lord Reid; at 500-502 per Lord Morris of Borth-y-Gest; at 508-509 per Lord Hodson; at 519 per Lord Devlin; at 533 per Lord Pearce. Note the criticism of this reasoning at Meagher, Heydon and Leeming, above n5, at 58-9.

220 Meagher, Heydon and Leeming, above n5, at 831-2. Mason P commented on this issue that "Viscount Haldane's speech in *Nocton v Lord Ashburton* exposed the error of thinking that equity lacked power to award compensation for infringement of a right which was recognised exclusively in Chancery in the pre-*Judicature Act* era.": *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 323 (NSW Court of Appeal).

221 *McKenzie v McDonald* [1927] VLR 134 at 146 (Dixon AJ).

222 Meagher, Heydon and Leeming, above n5, at 833.

223 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 323 [124] per Mason P (NSW Court of Appeal).

224 A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805 at 807. As to common law estoppel, see generally Meagher, Heydon and Leeming, above n5, at 536-42.

225 See per Mason CJ in *Foran v Wight*: "[W]e should now recognise that a common law estoppel as well as an equitable estoppel may arise out of a representation or mistaken assumption as to future conduct.": *Foran v Wight* (1989) 168 CLR 385 at 411. See also Meagher, Heydon and Leeming, above n5, at 570.

226 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 454 per Dawson J (citations omitted).

227 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 423 per Brennan J.

may, however, require that the party estopped make good the assumption ... But, depending upon the circumstances of the case, the relief required may be considerably less.

While the decision of the High Court in *Verwayen* is often criticised for its lack of a *ratio decidendi*, each member of the Court noted the flexibility with which the equity created by an equitable estoppel was able to be fulfilled as a result of the wide discretion<sup>228</sup> possessed by courts of equitable jurisdiction as to the grant of remedies.<sup>229</sup> Of the available equitable remedies, Deane J noted specifically that in some circumstances “the appropriate order may be an order for compensatory damages”.<sup>230</sup> I submit that one set of circumstances in which compensation will be an appropriate remedy is where the representor is a public authority and it is inappropriate as a matter of public law to give substantive effect to the representation in question.

In *Crabb v Arun District Council*, Scarman LJ stated<sup>231</sup> that courts “have to determine not only the extent of the equity, but also the conditions necessary to satisfy it”.<sup>232</sup> This ‘minimum equity’ approach to relief was applied by some members of the High Court in *Waltons* but received detailed consideration only from Brennan J.<sup>233</sup> His Honour articulated a reliance-based approach to remedying the breach of a legal obligation owed to the representee in circumstances where the conditions for an equitable estoppel are met,<sup>234</sup> although Robertson noted that, following *Verwayen*, courts almost universally satisfied equitable estoppels by granting expectation-based relief.<sup>235</sup> However, the quantification of relief is, for current purposes, considerably less significant than to recognise that the statement of principle articulated by Brennan J in *Waltons* is consistent with equitable compensation being available as a remedy to a person who has relied to his or her detriment on a representation of a public authority. In such circumstances, the remedy of giving effect to the representation, reliance on which has created the equitable estoppel, will generally be unavailable against the public authority for the reasons surveyed above. However, the minimum equity required to do justice to the reliant individual need not be the substantive fulfilment of the representation.

Vann summarises the issue in the following terms:<sup>236</sup>

[T]he vast majority of plaintiffs who allege estoppel are seeking to have the defendant’s representation to them fulfilled. Frequently, the order finally made reflects this. Sometimes though, it is not possible for the estopped party to perform the promise. This might be because the subject matter of the promise has disappeared, or because the court has taken into account interests of third parties who might be affected by an order specifically performing the promise. In these cases, the court has little alternative but to order the payment of a monetary sum, in order to relieve the detriment suffered by the plaintiff.

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228 Robertson, above n224, at 807.

229 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 411-412 per Mason CJ; at 429-430 per Brennan J; at 439, 442 per Deane J; at 454 per Dawson J; at 475-476 per Toohey J; at 487 per Gaudron J; at 501 per McHugh J.

230 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 442 per Deane J.

231 The reasoning of Scarman LJ was subsequently approved by a majority of the High Court in *Waltons* at 404 per Mason CJ & Wilson J; at 425 per Brennan J; at 460 per Gaudron J. See also Robertson, above n224, at 820.

232 *Crabb v Arun District Council* [1976] Ch 179; [1975] 3 All ER 865 at 880.

233 Robertson, above n224, at 821.

234 “Equitable estoppel ... does not operate by establishing an assumed state of affairs. Unlike an estoppel *in pais*, an equitable estoppel is a source of legal obligation. It is not enforceable against the party estopped because a cause of action or ground of defence would arise on an assumed state of affairs; it is the **source of a legal obligation arising on an actual state of affairs**. An equitable estoppel is binding in conscience on the party estopped, and it is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the assumption or expectation which he has been induced to adopt. Perhaps equitable estoppel is more accurately described as an equity created by estoppel.”: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 416 per Brennan J (emphasis added).

235 Robertson, above n224, at 829.

236 Vann, above n210, at 218 (citations omitted). NB: this quotation does not refer specifically to the situation in which the representor is a public authority.

I submit that there is no logical difference between a representation which cannot be fulfilled for the reasons suggested by Vann in the quotation above and a representation which cannot be fulfilled because to do so would require an *ultra vires* act or fetter on the future exercise of a discretion. The equitable estoppel which has been created by the representation remains. The public identity of the representor does not provide any *prima facie* basis for the denial of compensation to fulfil the 'minimum equity'.<sup>237</sup> Providing compensation as a remedy poses no issue of *vires*, because the right to relief arises from the conduct of the defendant public authority. There is no statutory immunity from liability which arises from that conduct.

## Is equity the appropriate source of a compensatory remedy?

There is a large degree of overlap between equitable estoppel<sup>238</sup> and negligent misstatement. Both doctrines attach liability to a party which has made a representation upon which another has reasonably relied to his or her detriment. In equity, liability accrues as a result of the representor's refusal or inability to adhere to the representation. In negligence, liability is the consequence of the representor breaching a duty of care not to make a representation if reliance upon it will cause loss to the representee. This doctrine covers both inaccurate statements of current fact<sup>239</sup> and the negligent provision of advice.<sup>240</sup> The reasoning of Lord Haldane in *Nocton*<sup>241</sup> reads as a precursor to cases later in the 20<sup>th</sup> century<sup>242</sup> in which the relationship between parties, being neither contractual nor fiduciary, was able to form the basis of either a remedy in tort (for negligent misrepresentation) or an estoppel. Neither requires any fraud, in the sense of moral obloquy, on the part of the party which has made the representation relied upon.<sup>243</sup>

The doctrine of negligent misstatement remains of particular importance for obtaining relief for loss consequent on a negligently made representation of a public authority, because such representations will generally not be covered by s 52 of the *Trade Practices Act 1974* (Cth). However, there is an argument that, given the scope to obtain damages for government misrepresentations in tort, there is no need to stretch equity to provide a monetary remedy.<sup>244</sup> I disagree with this line of thinking for the reasons which follow.

There is a long-established jurisdiction in equity to provide compensation as a remedy for a misrepresentation which causes the breach of an equitable right.<sup>245</sup> Although Rickett has suggested that it is the very expansion of civil liability in tort which has driven 'modernist' approaches to equity which embrace equitable compensation<sup>246</sup> (and I do not doubt that there is at least some truth to this statement), it is worth noting that it explains only the *expansion* of that remedy. Prior to *Derry v Peek*,<sup>247</sup> equitable compensation was widely used to remedy loss consequent on misrepresentations.<sup>248</sup>

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237 There are other issues in relation to making out that equitable compensation is payable, notably the requirements of establishing causation and remoteness; see M O'Meara, 'Causation, remoteness and equitable compensation' (2005) 26(1) *Australian Bar Review* 51. These issues will not be addressed in this article.

238 At least as regards promissory estoppel and estoppel by representation.

239 *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225.

240 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

241 *Nocton v Lord Ashburton* [1914] AC 932; [1914-15] All ER Rep 45.

242 Notably, it was applied by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. See Meagher, Heydon and Leeming, above n5, at 58-9.

243 In regard to fraud in public law, see *R v Toohy; ex parte Northern Land Council* (1981) 151 CLR 170 at 232-3 per Aickin J; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 194-5 [11]-[13].

244 "Common law developments in negligence have substantially replaced the need for a revival of [equitable] compensation ...": Davidson, above n215, at 350.

245 Indeed, Davidson notes that, until 1789, fraudulent misrepresentations were remediable in equity but not at common law: Davidson, above n215, at 356.

246 C Rickett, 'Equitable compensation: towards a blueprint?' (2003) 25(1) *Sydney Law Review* 31 at 31.

247 *Derry v Peek* (1889) 14 App. Cas. 337.

*Derry v Peek* resolved uncertainty about liability in the tort of deceit at common law,<sup>249</sup> by holding that it required dishonesty on the part of the representor to be made out, rather than an honest but careless representation. The case was subsequently applied as authority for requiring fraud as a prerequisite for compensation to be payable in equity, although this conclusion need not have been reached in applying its *ratio*.<sup>250</sup> Rather, *Derry v Peek* has been misunderstood as restricting equitable compensation to *dishonest* rather than merely negligent misstatements; that is to say, representations falling within the equitable definition of 'fraud'.

*Burrowes v Lock*<sup>251</sup> was an early case which determined that fraud was unnecessary to ground an equitable estoppel. In that case, the plaintiff had taken assignment of a share of a fund over which the defendant was trustee. The *cestui que trust* had already, to the knowledge of the defendant, assigned his interest to another party. Nonetheless, the defendant represented to the plaintiff that the trust was unencumbered. This was done in error but was not fraudulent. Sir William Grant MR held that the defendant was obliged to compensate the plaintiff to the extent of the prejudice he suffered as a result of the defendant's misrepresentation.

The authors of *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* have noted that *Burrowes* was treated as being good law by Lord Haldane in *Nocton*, but that "*Derry v Peek*<sup>252</sup> and *Low v Bouverie*<sup>253</sup> seem to have been taken together as denying any remedy outside contract in cases of honest representations of the kind considered in *Burrowes v Lock*".<sup>254</sup> There is no need for that mistaken conclusion to persist. The facts of *Low v Bouverie* were that the defendant trustee mentioned certain encumbrances on the trust fund, but not all, since he had forgotten some of them. There was clearly no fraud on the facts. The decision of the Court of Appeal went no further than to state that the trustee bore no duty to provide an accurate answer to the inquiries which were made of him. It therefore applied *Derry v Peek* to hold that the trustee was not liable for carelessness falling short of fraud.

This result was approved by Lord Haldane in *Nocton v Lord Ashburton*.<sup>255</sup> His Lordship, however, noted expressly that this result did not require the conclusion that *Derry v Peek* had overturned *Burrowes v Lock*, which:<sup>256</sup>

could be supported on the quite different ground of estoppel, that is to say, on the ground that the trustee in that case was precluded from denying that the share in question was unincumbered [sic.], as he had asserted this in unambiguous words on the faith of which the plaintiff in the suit had changed his position.

The principle from *Burrowes v Lock* as expressed by Lord Haldane in this *dictum* is still good law.

Writing in 1982, Ian Davidson remarked:<sup>257</sup>

While it has been argued that equitable compensation should be regarded as available (where there is a misrepresentation of fact), at least in the special circumstances occurring in *Burrowes* and

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248 Davidson, above n215, at 356-362. See e.g. *Burrowes v Lock* (1805) 10 Ves. 470; 32 ER 927; *Slim v Croucher* (1860) 1 De G.F.&J. 518; 45 ER 462.

249 Davidson, above n215, at 362.

250 Davidson, above n215, at 368.

251 *Burrowes v Lock* (1805) 10 Ves 470; 32 ER 927.

252 *Derry v Peek* (1889) 14 App. Cas. 337.

253 *Low v Bouverie* [1891] 3 Ch 82; [1891-4] All ER Rep 348.

254 Meagher, Heydon and Leeming, above n5, at 559.

255 *Nocton v Lord Ashburton* [1914] AC 932; [1914-15] All ER Rep 45 at 51.

256 *Nocton v Lord Ashburton* [1914] AC 932; [1914-15] All ER Rep 45 at 51.

257 Davidson, above n215, at 370. See also C Rickett and T Gardner, 'Compensating for Loss in Equity: The Evolution of a Remedy' (1994) 24 *Victoria University of Wellington Law Review* 19 at 27.

*Slim* a resurrection of the remedy here is most unlikely. This is due to the well known recent imposition of common law duties of care in making representations where special relationships, outside of contractual or fiduciary ones, exist.

Davidson considered that the remedy of equitable compensation was of greatest value as a guide to the development of the common law.<sup>258</sup> I disagree with this conclusion. There is no basis in principle why remedies should be reduced in equity simply because the coverage of the common law has expanded elsewhere.<sup>259</sup> The development of the equitable doctrine of estoppel in Australia over the past three decades<sup>260</sup> has broadened the scope of equity to provide a remedy in circumstances where damages in negligence would not necessarily lie. The increased coverage of equity means that, in relation to representations made by public authorities, equitable compensation may be available to complement<sup>261</sup> the common law, or to supplement it in circumstances where a duty of care is not owed.

For example, one can imagine facts, similar to those of *Waltons*,<sup>262</sup> but involving a public authority. Suppose that a local planning authority has been in discussions with Sally about a housing development which she proposes to build. Officers of the authority know that Sally believes that her proposed development has been approved. She is in fact incorrect about this but she has not been unreasonable in arriving at her state of understanding, having relied on various assurances of the authority's officers. Although the development has not in fact been approved, the officers fail to disabuse Sally of her misunderstanding. Sally invests a substantial amount of money and time in obtaining materials and hiring contractors before she learns that her proposed development has not and will not be approved. In these circumstances, it is not certain that the authority has breached any duty of care to Sally. However, the unconscionable conduct of the authority's officers will have raised an equity for Sally's benefit. Even if a court will not require the authority to fulfil the substance of Sally's mistaken belief, it should be able to provide a monetary remedy to compensate Sally for her pecuniary losses consequent on the unconscionable conduct of the authority's officers.

The availability of equitable compensation for breaches of equitable duties other than those of a fiduciary nature has for some time been orthodox in New Zealand.<sup>263</sup> In *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*,<sup>264</sup> the majority comprising Cooke P, Richardson, Bisson and Hardie Boys JJ stated that:

There is now a line of judgments in this Court accepting that monetary compensation (which can be labelled damages) may be awarded for breach of a duty of confidence **or other duty deriving historically from equity...**

However, the judgment of the majority in *Aquaculture* has never been applied in Australia. In *Harris v Digital Pulse*, Heydon JA (as his Honour then was) dismissed it with the withering comment that "[i]t is difficult to imagine an 'authority' offered for adoption in New South Wales which could be less satisfactory."<sup>265</sup> Prior to that, the most recent authors of *Meagher, Gummow & Lehane's Equity:*

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258 Davidson, above n215, at 372.

259 See Meagher, Heydon and Leeming, above n5, at 559-60.

260 See *Legione v Harteley* (1983) 152 CLR 406, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, *Foran v Wight* (1989) 168 CLR 385, *Commonwealth v Verwayen* (1990) 170 CLR 394. See also Handley, above n15.

261 Meagher, Heydon and Leeming, above n5, at 560.

262 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

263 Rickett and Gardner, above n257, at 28.

264 *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299; (1990) 19 IPR 527 at 528 (emphasis added).

265 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 393 (NSW Court of Appeal).

*Doctrines and Remedies* (of whom Heydon J was one) had already referred to the *dictum* of the New Zealand Court of Appeal in *Aquaculture* quoted above as an “astonishing proposition”.<sup>266</sup>

The basis of these impassioned criticisms of *Aquaculture* is that the reasoning of the majority is alleged to display evidence of a “fusion fallacy”.<sup>267</sup> However, there need be no question of either “the administration of a remedy ... not previously available either at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign”<sup>268</sup> where a court provides equitable compensation. As I have noted above, this is a remedy which has been available to courts with equitable jurisdiction for centuries.

Following the decision in *Derry v Peek*, the jurisdiction to provide equitable compensation was mistakenly limited to circumstances where a fiduciary duty had been breached.<sup>269</sup> This interpretation of *Derry v Peek* is wrong. *Burrowes v Lock* still stands for the principle that an estoppel will be raised against a party which had made a careless misrepresentation upon which another has relied to his or her detriment.<sup>270</sup> It is therefore open to Australian courts to decline to follow the mistaken understanding of *Derry v Peek* in circumstances where it is appropriate to award of equitable compensation. This obstacle involves no “fusion fallacy” and can therefore be dealt with in the absence of the high doctrinal passion which has attached itself to that subject. It requires nothing more than that a superior court, confronted with the appropriate matter, take the opportunity to articulate the circumstances in which equitable compensation can be awarded in Australia.

Even if there is nothing preventing courts from awarding compensation in equity for the breach of equitable duties other than of a fiduciary character, some may argue that there is no need for equity to move to cover any gap between its remedies and those available in tort. In *Harris v Digital Pulse*, Heydon JA specifically denied the proposition that an anomaly results from different remedies being available in equity and at law.<sup>271</sup>

It is not irrational to maintain the existence of different remedies for different causes of action having different threshold requirements and different purposes. The resulting differences are not necessarily ‘anomalous’.

His Honour was referring to the finding that equity, in the Australian jurisprudence at least, does not have the jurisdiction to award exemplary damages. Spigelman CJ concurred in this view, although Mason P dissented. There is, however, a difference between *extending* equity to provide a remedy hitherto unavailable and recognising a remedy known to equity but fallen into disuse. In those circumstances, the fact that such disuse has created an anomaly because remedies of similar (but not identical) scope have become, relatively recently, available at law should be significantly more persuasive. Additionally, the purpose of the ‘damages’ remedy is compensatory in both equity and tort and the threshold requirements for each are broadly similar. I respectfully submit that recognition of equity’s capacity to award compensation for breach of an equitable duty would be a significant improvement to the state of the law.

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266 Meagher, Heydon and Leeming, above n5, at 1140. See also *Ibid.* at 78-83; 1128.

267 See Meagher, Heydon and Leeming, above n5, Ch2. cf A Burrows, ‘We Do This At Common Law But That In Equity’ (2002) 22(1) *Oxford Journal of Legal Studies* 1; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 325-9 per Mason P (NSW Court of Appeal).

268 Meagher, Heydon and Leeming, above n5, at 54.

269 The members of the Judicial Committee which handed down the decision in *Derry v Peek* were all common lawyers. See Davidson, above n215, at 362; *Nocton v Lord Ashburton* [1914] AC 932; [1914-15] All ER Rep 45 at 51 (Viscount Haldane LC).

270 *Nocton v Lord Ashburton* [1914] AC 932; [1914-15] All ER Rep 45 at 51 (Viscount Haldane LC).

271 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 404 per Heydon JA (NSW Court of Appeal).

## Conclusion

There is no need for estoppel to be entirely withheld from the field of public law. This result would be based on a mistaken assumption that the only way in which equity can provide a remedy when an estoppel is raised is to enforce it. However, equitable compensation will frequently provide an adequate remedy in situations where an individual has relied on a representation from a public authority to his or her detriment in circumstances where that representation cannot be fulfilled. It is my submission that equity provides a more appropriate remedy in these circumstances than public law. A doctrine of substantive legitimate expectations would require a “revolution”<sup>272</sup> in Australian judicial thinking. There is no need for such a revolution in cases where compensation would suffice, since equity is already able to provide a remedy.

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<sup>272</sup> Mason, above n77, at 108.