

## La Trobe Lecture

### "Public & Private Law: The intersection"\*

Chief Justice Robert French

30 October 2009, Melbourne

As this is the inaugural public lecture organised by the La Trobe University Law School, it is appropriate that I say some brief things about La Trobe, the University and the Law School.

From 1839 until 1850, Charles Joseph La Trobe was the Supervisor of the Port Philip District. Victoria was then part of the Colony of New South Wales. In 1851, following separation and the creation of Victoria's Legislative Council, he was appointed Lieutenant Governor, a post he occupied until 1854. When he made his first speech in Melbourne, he said<sup>1</sup>:

It is not by individual aggrandisement, by the possession of numerous flocks or herds, or by costly acres, that the people shall secure for the country enduring prosperity and happiness, but by the acquisition and maintenance of sound religious and moral institutions without which no country can become truly great.

Here there was a vision in which private morality and public good converged.

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<sup>1</sup> \* Elements of this paper are found in French RS, "Administrative law in Australia: Themes and values" in Groves M and Lee HP (eds) *Australian Administrative Law* (Cambridge University Press, 2007), pp 15-33; French RS, "The Equitable Geist in the Machinery of Administrative Justice" (2003) 39 *Australian Institute of Administrative Law Forum* 1-17.

Eastwood J, "La Trobe, Charles Joseph (1801-1875)", *Australian Dictionary of Biography*, Volume 2, (Melbourne University Press, 1967), pp 89-93.

The University, which bears La Trobe's name, was established by *The La Trobe University Act 1964 (Vic)* and was opened in 1967. It was Victoria's third university, after the University of Melbourne and Monash University. It claims, however, superior antiquity based upon the 135 year history of its precursor institutions. Its Act provides an appropriate framing for the topic of this lecture.

Under the Act, the University is a "body politic and corporate".<sup>2</sup> It can sue and be sued and can, among other things, take, purchase, hold and transfer property for the purposes of its Act. It can also do and suffer all the things which bodies corporate may do and suffer. Its objects are public in character. They include:<sup>3</sup>

- (i) to serve the community and in particular the citizens of Victoria;
- (ii) by making knowledge available for the benefit of all.

The University has a law making power. It can make Statutes<sup>4</sup> and the Statutes can make provision for the making of regulations.<sup>5</sup> They are a species of delegated legislation. The University can form corporations.<sup>6</sup> It can create trusts.<sup>7</sup> It can appoint and terminate the appointment of staff.<sup>8</sup>

As appears from its Act there are important respects in which the University has the character of a public or statutory authority serving public goals. It can do things which, on any view, involve the exercise of public power. There are other

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<sup>2</sup> *La Trobe University Act*, s 3(2).

<sup>3</sup> *La Trobe University Act*, s 5.

<sup>4</sup> *La Trobe University Act*, s 30(1).

<sup>5</sup> *La Trobe University Act*, s 30(2).

<sup>6</sup> *La Trobe University Act*, s 37A.

<sup>7</sup> *La Trobe University Act*, s 37.

<sup>8</sup> *La Trobe University Act*, s 22.

things it can do which are governed by the private law of property, contract, equity and tort. If it be sensible to talk of a realm of public law and another of private law, the University might be seen as an example of a body which straddles both.

The ambivalent character of universities in this respect has generated some case law in Australian courts. When a university dismisses a staff member the question is, does it do so under its Act and is it thereby amenable to judicial review, or is it merely exercising contractual rights? That question was posed in the Federal Court more than 25 years ago in *Australian National University v Burns*.<sup>9</sup> Professor Burns' appointment at the Australian National University as Professor of Political Science was terminated by resolution of the University Council. He sought reasons for the decision under the *Administrative Decisions (Judicial Review) Act 1975* (Cth). He was only entitled to do so if the decision to dismiss him could be characterised as "a decision of an administrative character made ... under an enactment".<sup>10</sup> The enactment he relied upon was s 23 of the *Australian National University Act 1946*. It conferred the power upon the university to appoint, and by implication, to dismiss professors. Nevertheless, the Full Federal Court held that the rights and duties of the University and the professor as parties to his contract of engagement were derived from the contract and not from the University Act. That is to say, although the Court did not say it, the University was exercising private law rights rather than public law power. The distinction was, however, fragile and in that case depended upon the accident of particular arrangements. That fragility was pointed up by the hypothetical case discussed in the judgment of the Full Court.<sup>11</sup>

If the Australian Broadcasting Commission entered into a contract of employment with a person which provided for the circumstances in which that person could be promoted simply by restating the relevant provisions of the Broadcasting and Television Act covering the promotion of officers in the service of the Commission, decisions in respect of the promotion of that person may be made not only under the contract but also under the

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<sup>9</sup> (1982) 43 ALR 25.

<sup>10</sup> (1982) 43 ALR 25 at 26.

<sup>11</sup> (1982) 43 ALR 25 at 33 per Bowen CJ and Lockhart J.

Broadcasting and Television Act itself and therefore answer the description of decisions made under that Act.

Justice Sheppard, in his judgment in *Burns* acknowledged that the decision of a university to dismiss a senior member of its academic staff in the exercise of contractual powers may have both a public and a private perspective. He said:<sup>12</sup>

... the Council may have to consider its obligations to the University itself, to other members of the staff, to the public purse and to the principles which govern its existence.

These factors did not permit characterisation of its decision as a decision under the University Act, rather than under the contract of engagement. A similar point was taken, and effectively upheld, some years later in *Australian National University v Lewins*<sup>13</sup> in respect of a decision by the Australian National University to refuse promotion to one of its academic staff.

More recently, the High Court in *Griffith University v Tang*<sup>14</sup> held that a decision taken by the University to exclude a person from her PhD candidature was not a decision made under the University's Act. It could not therefore be reviewed under the *Judicial Review Act 1991* (Qld) which, in the relevant provisions, was modelled on the *Administrative Decisions (Judicial Review) Act*. In the joint judgment of Gummow, Callinan and Heydon JJ, their Honours said:<sup>15</sup>

If the decision derives its capacity to bind from contract or some other private law source then the decision is not "made under" the enactment in question.

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<sup>12</sup> (1982) 43 ALR 25 at 39.

<sup>13</sup> (1996) 138 ALR 1.

<sup>14</sup> (2005) 221 CLR 99.

<sup>15</sup> (2005) 221 CLR 99 at 128 [81].

Kirby J in dissent, suggested that the Court had adopted "an unduly narrow approach to the availability of statutory judicial review ... of public powers".<sup>16</sup>

Each of the cases to which I have referred required the Court to consider the source of the power to make the decision which was the subject of complaint. Did the decision derive from the University Act or was it made otherwise in the exercise of contractual rights or non-statutory policies.

In a sense, the question in such cases might have been recast more broadly – was the university exercising public power derived from its Act or rights derived from private law? But the question so recast lifts the issue into a more abstract realm of debate. The particular problem in each of the cases mentioned had to do with the interpretation and application of a statute, namely the relevant Judicial Review Act. Was the decision in contest, a decision of an administrative character made under an enactment? There is a need in considering cases of this kind, as in all cases raising larger abstract questions, not to neglect the concrete and particular question before the Court.

No doubt the La Trobe University School of Law is a place in which the answers to difficult questions of this kind are to be found. It dates its commencement back to 1992 when the law program began at the Bundoora Campus. The school now has approximately 1,200 students enrolled in its courses which it describes as having "a strong justice and business law focus ...". I am delighted to have been invited to deliver this first annual lecture. I have begun by, I hope, illustrating the difficulty of the public/private law distinction. That leads me to remark more generally upon the human tendency to label things and, having labelled them, to specialise in talking about one or other of the labels. This is a tendency which can sometimes create and support the illusion of distinction between things which are not in truth distinct.

Taxonomy, the practice of classifying things, is such an entrenched behaviour of the human species that it suggests there may be an associated

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<sup>16</sup> (2005) 221 CLR 99 at 133 [99].

evolutionary benefit. That fairly trite speculation and a brief internet search disclosed the existence of some literature on the topic including a paper published in the *Journal of Social and Evolutionary Systems* in 1995 entitled "Human Evolution and the Capacity to Categorise"<sup>17</sup>. The abstract of the paper informs the prospective reader that "the capacity to categorise ... avoids unnecessary costs by not having to resort to experience". This is perhaps why categories are so popular, particularly with lawyers. They lead to economies of intellectual effort. They are often associated with the location of elements of the profession on small islands of expertise. There are powerful rewards for a degree of intellectual insularity. On an island you can be the ruler of all you survey. Expertise commands respect. It may attract accreditation or certification of some kind. For routine problems within a specialisation it no doubt increases efficiency by expediting resolution and reducing costs. All these things are benefits to some degree. The problem is that despite the best efforts of the categorisers, the law is not an archipelago. It is more in the nature of a continent. The fact is that for any specialist subject area in the law the expertise necessary to practise in that area is likely to require a basic knowledge, if not mastery, of a number of intersecting areas. A dangerous distinction in aid of specialisation is that between public and private law.

In February I addressed a national conference of superannuation lawyers. The initial impression created by the term "superannuation lawyer" is of someone operating within a narrow field of legal expertise. However, nothing could be further from the truth. Superannuation arrangements attract the application of equitable doctrines particularly the law relating to trusts and fiducial obligations. As they frequently involve relations between employer and employee the law of contract and workplace relations law may apply. They are affected by the powers of the Family Court under the *Family Law Act* 1975. Overlapping regulatory arrangements affect their administration. Constitutional questions have arisen from time to time in this field.

The example of superannuation makes the point that the word "intersection" in the title of this talk may be misleading. It suggests a rather limited overlap where

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<sup>17</sup> Castro L & Toro MA, "Human Evolution and the Capacity to Characterise" (1995) 18 *Journal of Social and Evolutionary Systems* 65-66.

two lines cross each other. Public law provides a framework within which private law exists. Private law, as the university cases show, can suffuse public law.

As a general proposition there are few aspects of economic activity in our society which are not the subject of supervision by some kind of regulator with powers to grant, withhold, suspend or cancel licences to engage in the activity, or to approve or withhold approval for particular classes of transactions. At the national level, examples include the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Takeovers Panel, the Australian Prudential Regulatory Authority and similar bodies. The Commissioner of Patents and the Registrar of Designs and Trade Marks make important administrative decisions affecting valuable intellectual property rights. These officials describe themselves as "an administrative tribunal". There are many ministers, officials and tribunals whose decisions, in a variety of ways, can affect the economic interests and property rights of individuals and organisations. They are all subject to the rule of law which we tend to associate with the field of public law. Public law in its administrative law aspect sets out the proper scope of government executive power. It is in a sense the ether in which private law moves in a regulated society.

Consideration of the relationship between public law and private law must involve some workable definition of each. One pair of definitions in *Jowitts Dictionary of English Law* divides the legal universe into two categories. Law it says "is either public or private". On its definition, public law deals with the State either by itself or in its relations with individuals. As constitutional law it regulates the relations between the various divisions of the sovereign power. As administrative law, it regulates the business which the State has to do. That dictionary speaks of private law as dealing with those relations between individuals with which the State is not directly concerned. Examples include relations between husband and wife, parent and child and property, contract, tort, trust and succession law inter alia. We can perhaps treat the definition with a little scepticism when regard is had to the extent that statute law has come to affect private relations in a way that not uncommonly engages the intervention of public authorities.

No doubt, the scope of the terms public and private law could be further unpacked and their intricacies and even inherent contradictions exposed. But it is wise not to tarry too long on preliminaries. The definitions will do for the moment. They are to a degree ambulatory. In Australia their scope and relationship must be understood in the context of the rule of law which importantly informs the public law.

It is an important aspect of the rule of law that it controls and limits the exercise of public power. The rule of law itself is a legacy of English constitutional thought. It was expressed by Dicey in the French statement:

La ley est le plus haute inheritance, que le roy ad; car par la ley il meme et toutes ses sujets sont rules, et si la ley ne fuit, nul roi, et nul inheritance sera.

For non-French speakers:

The law is the greatest heritage that the King has for by the law he and all his subjects are governed, and if the law did not exist, there would be no King and no heritage.

In the British context the rule of law has been described by Jeffrey Jowell in the following terms:<sup>18</sup>

It is a principle which requires feasible limits on official powers so as to constrain abuses which occur even in the most well-intentioned and compassionate of governments. It contains both procedural and substantive content, the scope of which exceeds by far Dicey's principal attributes of certainty and formal rationality.

In this country the primary requirement of the rule of law is that the exercise of public power, whether legislative, executive or judicial, be supported by constitutional authority or a law made under such authority. A secondary principle

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<sup>18</sup> Jowell J, "The Rule of Law Today" in Jowell J and Oliver D (eds), *The Changing Constitution* (5th ed, Oxford University Press, 2004), p 24.

is that disputes about the limits of official power in particular cases can only finally be determined in a binding manner by a court.

The significance of s 75(v) of the Commonwealth Constitution cannot be understated in this context. It confers upon the High Court jurisdiction in "all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". That is a jurisdiction which cannot be removed by anything less than an amendment to the Constitution. Chief Justice Gleeson in his Boyer Lectures in 2000 described s 75(v) as providing in the Constitution "a basic guarantee of the rule of law".<sup>19</sup> Sir Owen Dixon in the *Australian Communist Party case* spoke of the Commonwealth Constitution as framed in accordance with many traditional concepts and assumptions. He said "among them I think that it may fairly be said that the rule of law forms an assumption".<sup>20</sup>

It is fundamental to the rule of law that in the exercise of official power there is no such thing as an unfettered discretion. Any Commonwealth law conferring a discretionary power is limited by the requirement that it must be a law with respect to one of the heads of legislative power conferred by the Constitution. A statute conferring unlimited power on an official would be unconstitutional because an unfettered power would not know constitutional limits. While the laws of the States and Territories are not confined to specific heads of power, as are those made by the Commonwealth Parliament, they are subject to such limits as are imposed by the Commonwealth Constitution on the legislative competency of the States and also by the legislative supremacy of Commonwealth laws imposed by s 109 of the Constitution. Both Commonwealth and State laws are affected by interpretive principles which prevent, as a matter of internal logic, the creation of unfettered discretions.

Every statutory power is also confined by its own logic. Its exercise must relate to the subject matter, scope and purpose of the legislation which gives rise to

<sup>19</sup> Gleeson M, *The Rule of Law and the Constitution* (Boyer Lectures, ABC Books, 2000), p 67.

<sup>20</sup> (1951) 83 CLR 1 at 193.

it. This has a constitutional dimension for the subject matter, scope and purpose of a statute are the attributes by which its constitutional legitimacy can be assessed. As Kirby J has rightly said, "No Parliament of Australia could confer absolute power on anyone".<sup>21</sup>

The framework of constitutional and administrative law requires that public statutory power be exercised:

1. lawfully – meaning that official decisions are authorised by statute, prerogative or by the Constitution.
2. Good faith – which requires that official decisions be made honestly and conscientiously.
3. Rationality – which requires that official decisions comply with the logical framework of the grant of power under which they are made.
4. Fairness – which requires that official decisions are made fairly, that is impartially in fact and appearance and with a proper opportunity to persons affected to be heard.

These are, in a sense, common law principles which order the exercise of public power.

When statutory power affects private rights to property or common law freedoms such as freedom of speech or, movement, the common law will provide some interpretive protection against undue incursions to the extent that the words of the statute allow. These considerations have found their way into many decisions of the High Court and recently in relation to property rights. In *Wurridjal v The Commonwealth*<sup>22</sup> one of the questions for decision was whether the just terms guarantee in s 51(xxxi) in relation to the acquisition of property applied to the

<sup>21</sup> *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 503-504 [69]-[70]. See also *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 171.

<sup>22</sup> (2009) 237 CLR 309.

Territories as well as to the States. A relevant consideration in holding that it did apply and in overruling the 1969 decision of the Court in *Teori Tau* was the existence of a common law principle predating federation by a very long time that private property should be immune from interference other than on just terms. In the decision of the Court in *R & R Fazzolari Pty Ltd v Parramatta City Council*<sup>23</sup> it was helpful to refer to the same presumption in the interpretation of a statute authorising a compulsory acquisition of land for urban redevelopment. The presumption dates back to Blackstone and was stated early in the history of the High Court by Griffith CJ in *Clissold v Perry (Minister for Public Instruction)*<sup>24</sup>. He referred to:<sup>25</sup>

... a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest.

Here it may be said the common law applies to minimise so far as the words of parliament allow, the effect of public power on private rights and freedoms.

The exercise of public power is also affected by private law principles such as the common law duty of care in relation to authorities exercising statutory functions. The conferring of discretionary powers on a statutory body may give rise in particular circumstances to a duty of care on the part of that body. In *Crimmins v Stevedoring Industry Finance Committee*<sup>26</sup> the Court held that the Australian Stevedoring Industry Authority owed a common law duty to a waterside worker to take reasonable care to protect him from reasonably foreseeable risk of injury arising from his employment by regulated stevedores. That was a case in which a private law principle applied to the discharge of a public law function.

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<sup>23</sup> (2009) 254 ALR 1.

<sup>24</sup> (1904) 1 CLR 363.

<sup>25</sup> (1904) 1 CLR 363 at 363.

<sup>26</sup> (1999) 200 CLR 1.

There are other examples of the infiltration of private law principles and remedies into public law. Equity provides a particularly interesting case and I would like to spend a little time on it.

### **Equity entangles with public law**

In 1934 Hanbury's *Essays in Equity* included a chapter "Equity in Public Law". This began by reflecting upon the blurring of the public-private law divide and the extent to which.<sup>27</sup>

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

Hanbury referred to housing and town planning legislation and even the *Law of Property Act 1925* which enabled persons interested in freehold land affected by restrictive covenants to apply to an arbitrator to modify or discharge such covenants. In the area of tort, private citizens were bringing actions against public officials. He concluded that.<sup>28</sup>

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

At a general level equity influences the development of principles of administrative law and the bases of judicial review. Both specific and general interactions are reflected in the often quoted observation by Sir Anthony Mason that:<sup>29</sup>

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<sup>27</sup> Hanbury HG, *Essays in Equity* (Clarendon Press, Oxford, 1934), p 80.

<sup>28</sup> Hanbury HG, *Essays in Equity*, (Clarendon Press, Oxford, 1934), p 83.

<sup>29</sup> Mason A, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238 at 238.

Equitable doctrines and relief have extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint. In the field of public law, equitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.

The operation of equitable principles in administrative law today is not in any sense comprehensive or complete. As Dal Pont and Chalmers have observed, while there is a well developed equitable jurisdiction regulating the relationships of trust between private individuals, Courts of Equity have shunned a parallel jurisdiction between government and the governed:<sup>30</sup>

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

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

An account of the historical development of equitable doctrines and remedies in public law is given in the judgments in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*<sup>31</sup>. The case concerned the standing requirements for persons other than the Attorney-General seeking the grant of equitable remedies by way of declaration and injunction to restrain the excess of statutory power. The relief was claimed by the respondents against

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<sup>30</sup> Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* LBC Information Services 1996, p 116.

<sup>31</sup> (1998) 194 CLR 247.

apprehended conduct by the appellant Land Council. The Land Council proposed to establish a funeral benefit for Aboriginal people in New South Wales, a service already provided by the first respondent.

The Court held that the respondents had standing to seek declaratory and injunctive relief on the basis that if not restrained the appellants could cause severe detriment to the respondents' business and that the respondents therefore had a sufficient special interest to seek the relief they did.

In a joint judgment, Gaudron, Gummow and Kirby JJ discussed the relationship between equity and public law. Equity, they said, provided remedies to vindicate the public interest in the maintenance of due administration where other remedies and in particular the prerogative remedies, were inadequate. The application of equitable doctrine to the grant of relief in these circumstances was expressed thus:<sup>32</sup>

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

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

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

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<sup>32</sup> *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257.

The three justices noted that in the public law arena equitable intervention had not been limited to the protection of particular proprietary rights. The administration of charitable trusts was a matter of public concern and, analogously with the enforcement of that interest, the English Attorney-General would move for equitable relief to restrain municipal corporations misapplying funds which they held upon charitable or statutory trusts. The remedies were then extended to prevent statutory bodies from unauthorised application of their funds. The role of the Attorney-General was further generalised to protect the public interest against conduct by statutory authorities exceeding their power in a way which would interfere with public rights and so injure the public.<sup>33</sup> This historical background, which informed an important judgment about the standing of private persons to seek equitable relief, leads into a wider consideration of equitable remedies in this area.

### **Equitable Remedies**

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

The place of the injunction in administrative law in Australia is secured by s 75(v) of the Constitution mentioned earlier. That provision was inserted at the suggestion of Andrew Inglis Clarke to avoid the possible application in Australia of the decision in *Marbury v Madison*.<sup>34</sup> Although the case is famous for the assertion by the Supreme Court of the United States of authority to review the constitutional validity of legislation it also held that the Court could not validly be given original jurisdiction under the Constitution to issue writs of mandamus to non-judicial officers of the United States. Edmund Barton accepted Inglis Clarke's concerns and formally moved the insertion of the provision in March 1898 observing as he did

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<sup>33</sup> Ibid at 259.

<sup>34</sup> (1803) 5 US 137.

that absent that specific provision in the Constitution it might be held "that the court should not exercise this power, and that even a statute giving them the power would not be of any effect....". The power thus conferred on the High Court he said could not do any harm and might "protect us from a great evil". In the event s 75(v) has become a bulwark of the rule of law in Australia, proof against privative clauses which might otherwise have had the effect of depriving the High Court of the jurisdiction to review and restrain unlawful official action. So the injunction stands as a constitutional remedy against unlawful executive action along with the constitutional writs of mandamus and prohibition.

The application of the equitable injunction and declaration in public law may be influenced by the modern availability of statutory remedies which, because they are seen as serving the public interest, may not impose any particular standing requirement. Section 80 of the *Trade Practices Act 1976* (Cth) which provides that injunctive relief to restrain contraventions of the Act can be sought by any person is the leading case in point. Its constitutional validity was considered in the decision of the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*.<sup>35</sup> In his reasons for judgment in support of validity, Gummow J returned to the role of equity in public law which he had considered in the *Bateman's Bay case*. He pointed out that in Chancery a plaintiff would seek to lay out facts and circumstances demonstrating the equity to the relief claimed. That equity might arise from the violation or apprehended violation of rights secured in equity's exclusive jurisdiction or because of the inadequacy of legal remedies to vindicate legal rights or as a defensive equity to resist legal claims. The legal rights, interests and remedies in question might come from common law or from statute. Equity could intervene to protect statutory rights. Alternatively, where statute conferred obligations upon administrators or particular sections of the community it might provide no means or inadequate means for enforcement of the obligation or the restraint of ultra vires activity. His Honour said:<sup>36</sup>

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<sup>35</sup> (1999) 200 CLR 591.

<sup>36</sup> (1999) 200 CLR 591 at 628.

This led to the engagement of the equity jurisdiction in matters of public law.

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

In an interesting article, focusing on the *Truth About Motorways*' case, in the March 2001 edition of the *Public Law Review*, David Wright referred to the indirect effect of analogical reasoning or what might more loosely be called "cross fertilisation of ideas" between equitable and like statutory remedies. In this respect he concluded:<sup>37</sup>

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

### **Fiduciary obligations in administrative law**

Fiduciary obligations are creatures of equity. The Latin word "fiducia" means trust. Originally applied to trust relationships in English law it has evolved a wider application covering a range of rules and principles of which it has been said:<sup>38</sup>

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<sup>37</sup> Wright D, "The Role of Equitable Remedies in the Merging of Private and Public Law" (2001) 12(1) *Public Law Review* 40 at 50.

<sup>38</sup> Finn P, *Fiduciary Obligations*, (Law Book Co, 1977), p 1.

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

The private law of fiduciary obligations requires persons entrusted with powers for another's benefit to observe a general equitable obligation, when exercising such powers, to act honestly in what they consider to be the interests of the other. In this category we will find company directors, trustees, liquidators, executors, trustees in bankruptcy and others. The repositories of such powers are subjected, by reason of their equitable obligations, to judicial review of their actions. And as Paul Finn has said:<sup>39</sup>

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

There is no presumption or general rule that the imposition or assumption of a statutory duty to perform certain functions gives rise to fiduciary obligations notwithstanding that the word "trust" may be used.<sup>40</sup> Nevertheless the existence of an unenforceable political trust is not inconsistent with the existence of particular duties imposed on public authorities which have a fiduciary character and are enforceable at law. The duty of local authorities in England to their ratepayers was said, as early as 1925, to be similar to that of the trustees or managers of the property of others.<sup>41</sup> It was designated as "fiduciary" in *Bromley London Borough Council v Greater London Council*.<sup>42</sup> The duty may operate as a mandatory relevant consideration which informs the exercise of discretionary powers involving expenditure or levying of charges and is an element to which the Court will have regard in deciding whether a decision is unreasonable in the *Wednesbury* sense.<sup>43</sup>

<sup>39</sup> Finn P, *Fiduciary Obligations* (Law Book Co, 1977), p 3.

<sup>40</sup> *Te Toh v Waddell (No 2)* [1977] Ch 106; *Swain v Law Society* [1983] 1 AC 598. See also Hogg P, *Liability of the Crown*, (2<sup>nd</sup> Ed), (Law Book Co, 1989), pp 186-188.

<sup>41</sup> *Roberts v Hopwood* [1925] AC 578 at 596 per Lord Atkinson and 603-604 per Lord Sumner.

<sup>42</sup> [1983] 1 AC 768 at 815 per Lord Wilberforce and 838 per Lord Scarman.

In *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Livestock Corporation*<sup>44</sup> Gummow J discussed the approach taken by Dr Margaret Allars<sup>45</sup> to the taxonomy of Wednesbury unreasonableness and its classification into three paradigm cases. These were characterised by his Honour as follows:

1. The capricious selection of one of a number of powers open to an administrator in a given situation to achieve a desired objective, the choice being capricious or inappropriate in that the exercise of the power chosen involves an invasion of the common law rights of the citizen, whereas the other powers would not.
2. Discrimination without justification, a benefit or detriment being distributed unequally among the class of persons who are the objects of the power.
3. An exercise of power out of proportion in relation to the scope of the power.

Of these his Honour said:<sup>46</sup>

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

The "duty" identified in many of these cases arises out of particular statutory regimes. The use of the word "duty" may be misleading. It may be no more than descriptive of a rule of construction which imports a requirement to act fairly in the sense of paying due regard to the interests of those who may be affected by the exercise of a power or discretion. So used, the idea of a fiduciary duty, in the statutory context, may be analogous to procedural fairness and able to be viewed

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<sup>43</sup> Supperstone and Goudie, *Judicial Review* (Butterworths, 1992), pp 266-267.

<sup>44</sup> (1990) 96 ALR 153.

<sup>45</sup> Allars M, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990), [5.54]-[5.57].

<sup>46</sup> (1990) 96 ALR 153 at 167.

either as an implication to be drawn from the statute or a judicially imposed gloss to be displaced only by clear words.

There is longstanding and continuing controversy about whether the common law of judicial review of administrative action rests on imputed legislative intention or judicially invented rules or some hybrid.<sup>47</sup> Whether or not a fiduciary relationship properly so called may be said to exist between the repositories of public power and those affected by its exercise, it is right to say that the classical fiduciary relationship between trustee and beneficiary "... is one particularly apt to illuminate the relationship between the government and the people".<sup>48</sup>

## Conclusion

I have tried in this talk to indicate some of the complexities of the intersection between public and private law and to warn against the drawing of facile distinctions. Particular cases involving the interface between public power and private rights require close attention to the sources and nature of the power and the rights and the way in which they interact. If one generalisation can be made, it is that we are on a large and not yet fully explored continent, rather than on an archipelago

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<sup>47</sup> For contending views see Wade and Forsyth, *Administrative Law* (8<sup>th</sup> Ed), (Oxford University Press, New York, 2000), p 36; Forsyth CF "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) *Cambridge Law Journal* 122-40; Sir John Laws, "Law and Democracy" [1995] *Public Law* 72 at 79; Elliott M, *The Constitutional Foundations of Judicial Review* (Oxford, Hart Publishing, 2001), 109-10; Craig P, "Competing Models of Judicial Review" (1999) *Public Law* 428 at 446; Allan TRS, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?" (2002) *Cambridge Law Journal* 87.

<sup>48</sup> Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* LBC Information Services (1996), p 117