

## **Society of Trust and Estate Practitioners**

# **The Interface between Equitable Principles and Public Law**

Chief Justice Robert French

29 October 2010, Sydney

### **Equity and Administrative Justice**

The ordinary English meaning of the word 'equity' defined in terms of equality of treatment, fairness, impartiality or even-handedness, embodies concepts which inform long-established understandings of administrative justice whereby official power is to be exercised, in the words of Lord Halsbury:

... according to the rules of reason and justice, not according to private opinion: ... not arbitrary, vague, and fanciful, but legal and regular.<sup>1</sup>

The application of the concept of trusteeship to the exercise of public power is longstanding and persistent:

The powers of public officials are regarded as being held on trust for the public who granted them. They cannot lawfully be exercised for personal gain or motive or irrationally or for purposes which exceed the reasons for their conferral.<sup>2</sup>

Contemporary notions of administrative justice require that a decision involving the exercise of public power and affecting the subject whether natural person or corporation, will be:

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<sup>1</sup> *Sharp v Wakefield* [1891] AC 173 at 179 per Lord Halsbury LC.

<sup>2</sup> M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) at 94.

1. In accordance with law.
2. Rational, in the minimal sense that the decision is logically open on information properly before the decision-maker having regard to the law which must be applied.
3. Fair, so that the decision-maker is not distracted or hampered in fact finding by bias or prejudice or the absence of relevant information able to be provided by the person affected by the decision being made.
4. Intelligible, by the provision of reasons so that the person affected, and perhaps the wider community, will know why the decision has been made (albeit in the present state of authority in the High Court there is no common law obligation to provide reasons for administrative decisions).<sup>3</sup>

That understanding of administrative justice and the trusteeship analogy is consistent with a characterisation of public power as fiduciary in nature. There is a kind of irrationality that can lead to an exercise of power being vitiated on the basis that it is so unreasonable that no reasonable person could have so exercised it.<sup>4</sup> Paradigm cases of that kind of irrationality have been identified as follows:<sup>5</sup>

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.

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<sup>3</sup> *Osmond v Public Service Board (NSW)* (1986) 159 CLR 656.

<sup>4</sup> *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223.

<sup>5</sup> A classification developed by Margaret Allars, see, M Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 5.54-5.57.

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 Gummow J said:

All of them are consistent with a view of Lord Greene's 'doctrine' as rooted in the law as to misuse of fiduciary powers: see Grubb, *Powers, Trusts and Classes of Objects* [1982] 46 Conv 432 at 438.<sup>6</sup>

Equity in its wide ordinary sense implies equality of treatment which is a principle of lawful administration.<sup>7</sup> Unjustified discrimination may be an abuse which vitiates the exercise of official power.<sup>8</sup> Equity in its ordinary non-technical sense lies at the heart of a contemporary understanding of administrative justice. It also has a long history of use in statutes requiring certain classes of decision to be made according to 'equity and good conscience'.<sup>9</sup>

### **Equitable Interpretation and the Principle of Legality**

Joseph Story, in his *Commentaries on Equity Jurisprudence* in 1884, invoked Aristotle as having 'defined the very nature of equity to be the correction of the law, wherein it is defective by reason of its universality'.<sup>10</sup> Equity in that sense informed a purposive approach to statutory interpretation which Story called 'equitable

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<sup>6</sup> *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation* (1990) 96 ALR 153 at 167.

<sup>7</sup> SA De Smith, *De Smith's Judicial Review* (Sweet & Maxwell, 6th ed, 2007) 11-069.

<sup>8</sup> *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Livestock Corporation* (1990) 96 ALR 153 at 167. *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121; *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 131 ALR 559, Aronson, Dyer and Groves, above n 2, at 383-386.

<sup>9</sup> G Sawyer, 'The Administration of Morals' in AR Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (Butterworths, 1983) at 85-87.

<sup>10</sup> J Story, *Commentaries on Equity Jurisprudence* (Stevens and Haynes, 1884) ch 1 par 3.

interpretation'. Given the dominant role of statutes as the source of official power today the concept of 'equitable interpretation', even though it is not a fashionable term, has considerable significance for public law. Story explained it thus:

So, words of a doubtful import may be used in a law, or words susceptible of a more enlarged or of a more restricted meaning, or of two meanings equally appropriate. The question, in all such cases, must be, in what sense the words are designed to be used; and it is the part of a judge to look to the objects of the legislature, and to give such construction to the words as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of equity as contradistinguished from a strict adherence to the mere letter of the law.<sup>11</sup>

The purposive approach described by Story in this way can be coupled with the well established presumption of legislative purpose that parliament does not intend, by mere implication, to displace fundamental principles of the unwritten law. That coupling supports the principle of legality. That principle, although only relatively recently<sup>12</sup> attracting that name, has a long history. The usual starting point in discussion of that history in Australia is the decision of the High Court in *Potter v Minahan*<sup>13</sup> and O'Connor J's quotation of the familiar passage from the 4th edition of Maxwell on *The Interpretation of Statutes*:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.<sup>14</sup> (footnote omitted)

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<sup>11</sup> Ibid.

<sup>12</sup> *R v Lord Chancellor; Ex parte Witham* [1998] QB 575; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; D Dyzenhaus, M Hunt and M Taggett, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5-34; J Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769.

<sup>13</sup> (1908) 7 CLR 277.

<sup>14</sup> (1908) 7 CLR 277 at 304.

The oft-quoted passage has a larger history. It was taken from the judgment of Marshall CJ in a case about priorities in bankruptcy decided in 1805.<sup>15</sup> The principle of legality has been applied on many occasions in Australia.<sup>16</sup> In *Electrolux Home Products Pty Ltd v Australian Workers' Union*, Gleeson CJ described it as:

... not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.<sup>17</sup>

It is not entirely a play on words to observe that the principle of legality, which may be seen as an application of Story's equitable interpretation, has been applied to interpret a statute so as not to displace equitable principles. In *Minister for Lands and Forests v McPherson*<sup>18</sup> the Court of Appeal of New South Wales held that the Supreme Court could grant relief against forfeiture of a statutory lease created under the *Western Land Act 1901* (NSW). Kirby P, with whom Meagher J agreed, acknowledged the long-established principle relating to the effect of statute law on common law rights and freedoms. Kirby P posed the question whether a similar principle applied to the doctrines of equity. In the event he concluded:

In principle, there would seem to be no reason why a similar approach should not be taken to basic rules of equity. The justice of equity may equally supply the omission of the legislature, filling the silences of the statute.<sup>19</sup>

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<sup>15</sup> *United States v Fisher* (1805) 2 Cranch 358 at 390.

<sup>16</sup> See eg, *Bropho v Western Australia* (1990) 171 CLR 1 at 18, and *Coco v The Queen* (1994) 179 CLR 427 at 437.

<sup>17</sup> (2004) 221 CLR 309 at 329 [21].

<sup>18</sup> (1991) 22 NSWLR 687.

<sup>19</sup> (1991) 22 NSWLR 687 at 700.

The decision left open the possibility that other equitable doctrines might fill statutory silences in relation to the exercise of official power.<sup>20</sup>

### **Equity – A Body of Law Historically Defined**

The traditional definition of equity for lawyers was historical and institutional in its terms. It was as the dictionary says:

... the part of English law originally administered by the Lord Chancellor and later by the Court of Chancery.<sup>21</sup>

Courts of Equity did not enjoy a general jurisdiction to correct, modify or supersede positive law.<sup>22</sup> Like the courts of common law, they decided new cases as they arose by principles derived from precedent and developed or elaborated upon them. Those principles were said to be:

... as fixed and certain as the principles on which the courts of common law proceed.<sup>23</sup>

Maitland called equity 'supplementary law':

If we suppose all our law put into systematic order, we shall find that some chapters of it have been copiously glossed by equity, while others are quite free from equitable glosses.<sup>24</sup>

Equity engaged closely with Contract and Property law supplying both with 'equitable appendices' including the law of trusts. As Maitland said:

The bond which kept these various appendixes together under the head of Equity was the jurisdictional and procedural bond. All these matters were

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<sup>20</sup> See eg, *Bridgewater v Leahy* (1998) 194 CLR 457, referring to the possibility that a statute relating to perpetual leases permitted the operation of the equitable doctrine of vendor's lien.

<sup>21</sup> *The Shorter Oxford English Dictionary* (5th ed, 2002) vol 1 at 851.

<sup>22</sup> Story, above n 10, ch 1 par 19.

<sup>23</sup> *Bond v Hopkins* 1 Sch & Lefr 428 at 429 cited by Story, above n 10, ch 1 par 20.

<sup>24</sup> FW Maitland, *Equity a Course of Lectures* (Cambridge University Press, 2nd ed, 1936) at 19.

within the cognizance of Courts of Equity and they were not within the cognizance of the courts of common law.<sup>25</sup>

In light of the *Judicature Acts*, however, he predicted that:

The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice that it is a well established rule administered by the High Court of Justice.<sup>26</sup>

Equity today is a distinctive part of the unwritten law of Australia administered by most, if not all, Courts of the land albeit it retains its distinctive character and functions shaped by its historical roots. Its general aim is the prevention and remediation of unconscientious or unconscionable conduct. Professor Hardingham put it succinctly in 1985 when he said that the overriding aim of all equitable principle is the prevention of unconscionable conduct.<sup>27</sup> Gummow and Hayne JJ in *Australian Competition and Consumer Commission v CG Berbatis Pty Ltd* wrote:

It will be unconscientious for a party to refuse to accept the position which is required by the doctrines of equity.<sup>28</sup>

It is proper to acknowledge, as their Honours did, that observations of such generality have little practical utility for they may mask rather than illustrate underlying principles.<sup>29</sup> The aim of equity, however, should be kept in mind in conjunction with its specific doctrines when considering their possible intersections with public or administrative law. Such intersections have existed as a matter of history and continue to exist to some extent in the application of equitable doctrines to aspects of

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<sup>25</sup> Ibid at 20.

<sup>26</sup> Ibid.

<sup>27</sup> IJ Hardingham, 'Unconscionable Dealing' in PD Finn (ed), *Essays in Equity* (Lawbook, 1985) at 1.

<sup>28</sup> (2003) 214 CLR 51 at 73 [43].

<sup>29</sup> *Australian Competition and Consumer Commission v CG Berbatis Pty Ltd* (2003) 214 CLR 51 at 73 [43] citing J McGhee (ed), *Snell's Equity* (Sweet & Maxwell, 30th ed, 2000), Preface.

the exercise of public power. Equity also informs, at least by analogy, the definition of limits upon the exercise of statutory powers which might be said to place their repository in a relationship of fiduciary nature with those affected by the exercise of those powers.

### **The Public Trust in History**

There is a long history which attaches the characterisation of a public trusteeship to the holders of public office. Professor Paul Finn, now a Judge of the Federal Court, wrote of the body of civil and criminal law which applied to public officers in the eighteenth and nineteenth centuries because of their capacity as public officials. In the language of the eighteenth-century case *R v Bembridge*<sup>30</sup> they were regarded as holding offices of 'trust and confidence concerning the public'.<sup>31</sup> This reflected what his Honour called the 'circuitous route by which English judges brought public officials into a fiduciary relationship with the public'. The idea that public officers occupy a trust-like or fiduciary obligation was applied to Members of Parliament in the 1920s by the High Court in *Horner v Barber*<sup>32</sup> and in *R v Boston*.<sup>33</sup> In the latter case, Isaacs and Rich JJ held Members of Parliament to be 'public officers' and invoked the definition of 'office' in the Oxford Dictionary of the day which included 'a position of trust, authority, or service under constituted authority'. Higgins J made a comparison with private trusteeship when he said of cases concerning bribery of members of parliament and the criminal liability attaching thereto:

All the relevant cases rest on the violation of a public trust. 'The nature of the office is immaterial as long as it is for the public good' [*R v Lancaster*

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<sup>30</sup> [1783] 22 State Trials 1 at 155-156.

<sup>31</sup> PD Finn, 'The Forgotten "Trust": The People and the State' in M Cope (ed), *Equity: Issues and Trends* (Federation Press, 1995) at 133.

<sup>32</sup> (1920) 26 CLR 494.

<sup>33</sup> (1923) 33 CLR 386.

(1890) 16 Cox CC, 737, at p 739]. An agreement between a trustee and an estate agent to share commission on a sale is void and the trustee has to account to the beneficiaries for his share. But it is not an indictable matter, as it is not a public trust – a trust 'concerning the public' [*R v Bembridge* (1783) 3 Doug (KB), at p 332].<sup>34</sup>

And further:

He is a member of Parliament, holding a fiduciary relation towards the public, and that is enough.<sup>35</sup>

The importance of the public trust idea was diminished with the rise of mechanisms for oversight and accountability such as responsible cabinet government, statutory regulation of the public service, parliamentary scrutiny of official action, the political accountability of ministers and the employment arrangements of officials. However, a loss of faith in these mechanisms in the late-twentieth century was, as Justice Finn has observed, 'one of the principal stimuli to renewed interest in the 'public trust' and in its implications both for officials and for our system of government itself.' He gave as examples provisions of the *Independent Commission Against Corruption Act 1988* (NSW) and the *Criminal Justice Act 1989* (Qld) which referred to 'breaches of public trust'. He also pointed to the central role that the trust or fiduciary concept was given in codes of conduct for public officials at all levels.

The 'public trust' concept does not attach to property rights and interests. Public property is generally not regarded as held in trust for the people. Such a proposition would no doubt depend upon a considerable development of constitutional concepts of popular sovereignty underpinning legislative and executive authority. Nevertheless, public officials or authorities dealing with public funds, in particular cases, may be trustees according to ordinary principles and have obligations

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<sup>34</sup> (1923) 33 CLR 386 at 410-411.

<sup>35</sup> (1923) 33 CLR 386 at 412.

enforceable in equity. There is a history of such cases dating back to the early nineteenth century.

An example of the application of trust law to official acts affecting public funds arose in *Attorney-General v Dublin Corporation*.<sup>36</sup> The question before the House of Lords was whether the Chancery Court had jurisdiction to require the Dublin Corporation to account for alleged misapplication of funds for the supply of water works and for replacement of misapplied funds. The Corporation denied that it was a trustee of the money which was raised by rates. Lord Redesdale asked the question whether the jurisdiction that protected charities was applicable to public institutions. He said:

It is expedient, in such cases, that there should be a remedy and, highly important that persons in the receipt of public money should know that they are liable to account, in a Court of Equity, as well for the misapplication of, as for withholding the funds.<sup>37</sup>

In an article in the *Modern Law Review* in 2006, which comprehensively discussed the history of enforceable public trusts, John Barratt characterised the imposition of or recognition of enforceable 'public trusts' in this way as a separate application of a permanent equitable jurisdiction which had long been applied to protect charitable funds.<sup>38</sup>

The foreshadowing of wider administrative justice concepts in this context may be discerned in Lord Cottenham LC's statement in *Frewin v Lewis*<sup>39</sup> that if public functionaries exceeded their powers the court would treat them merely as persons dealing with property without legal authority, whether they be corporation or

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<sup>36</sup> (1827) 1 Bligh NS 312.

<sup>37</sup> (1827) 1 Bligh NS 312 at 340-341.

<sup>38</sup> J Barratt, 'Public Trusts' (2006) 69 *Modern Law Review* 514.

<sup>39</sup> (1838) 4 My & Cr 249 at 254-255.

individuals.<sup>40</sup> What Lord Cottenham said in 1843 was referred to by Jessell MR in *Attorney-General v Wandsworth District Board of Works*.<sup>41</sup> That case involved a contention that the Board had wrongly charged highway costs to local ratepayers. The Master of the Rolls said:

This case only shews that new cases require, not the application of new law, but the application of old principles of law in a new way; ... The Board of Works ... holds the funds really as a trustee for the ratepayers of the district, and to be laid out in accordance with the terms of the Act of Parliament.<sup>42</sup>

The development of local authority audit surcharges and the availability of legal and equitable remedies pursuant to the Judicature Acts lessened the need for a public trust doctrine. Equitable remedies could be applied for in the Queen's Bench Division without the need to base them explicitly on public trust status.<sup>43</sup> The enforceable public trust has been invoked in the twentieth century from time to time although perhaps more in the United Kingdom than in Australia.

The public trust concept can be seen as continuing in the so-called 'local authority fiduciary duty to ratepayers' referred to in cases such as *Roberts v Hopwood*<sup>44</sup>, *Prescott v Birmingham Corporation*<sup>45</sup> and *Bromley LBC v GLC*.

A relatively recent revisitation of the notion in relation to the exercise of statutory powers occurred in the decision of the House of Lords in *Porter v Magill*.<sup>46</sup> The Conservative Party had retained control of a city council with a reduced majority

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<sup>40</sup> Cited in Barratt, above n 38, at 523.

<sup>41</sup> [1877] 6 Ch D 539.

<sup>42</sup> [1877] 6 Ch D 539 at 541-543.

<sup>43</sup> Barratt, above n 38, at 525.

<sup>44</sup> [1925] AC 578.

<sup>45</sup> [1955] 1 Ch 210.

<sup>46</sup> [2002] 2 AC 357.

in local government elections in May 1986. The leader and deputy leader of the council, believing that homeowners were more likely than council tenants to vote Conservative, established a policy under which the council would sell, in the exercise of its statutory powers, 250 council properties a year in eight marginal wards. After legal advice that targeted sales would be unlawful, the policy was revised to extend the sales to 500 across the city while maintaining the target of 250 sales in marginal wards. The council approved the relevant policy in July 1987. Opposition councillors gave notice of objection to the council auditor under the *Local Government Finance Act 1982*. He found that the council had adopted the policy with a view to achieving electoral advantage for the majority party and that the leader and deputy leader were party to its adoption and implementation in the knowledge that it was unlawful and that the policy so promoted and implemented had caused financial loss to the council. The auditor certified that those responsible for the policy, including the leader and deputy leader, had caused the council to lose approximately £31 million. The certification was upheld subject to a variation in the amount of the loss by the Divisional Court, but overturned by the Court of Appeal on the basis that the leader and deputy leader had acted on legal advice. In the event, the decision of the Court of Appeal was reversed on appeal by the House of Lords.

Lord Bingham set out the underlying legal principles. He relied upon a statement by Lord Bridge reproduced in the eighth edition of Wade and Forsyth's *Administrative Law* in terms which Lord Bingham described as 'a general principle of public law':

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.<sup>47</sup>

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<sup>47</sup> *Potter v Magill* [2002] 2 AC 357 at 463.

Importantly he added:

It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle.<sup>48</sup>

I refer to this case not to comment on the merits of the propositions contained in the judgment to which I have referred, but to illustrate the potential for the analogical application of equitable doctrine to the exercise of official power.

That having been said, explicit recognition of equitable principles in the context of public law in the twentieth century seems to have been slow in coming.

### **Equity's Cautious Entry into Public Law**

Maitland and other equity authors of his time had little or nothing to say about public law even though equitable injunctions and declarations were already being applied in that area. In 1934 Hanbury's *Essays in Equity* included a chapter 'Equity in Public Law'. The author reflected upon the blurring of the public-private law divide and concluded that:

... the growing importance and unrelenting 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.<sup>49</sup>

The intersections between equity and public law identified by Hanbury in 1934 arose in connection with:

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<sup>48</sup> [2002] 2 AC 357 at 463.

<sup>49</sup> HG Hanbury, *Essays in Equity* (Clarendon Press, 1934) at 83.

1. Breaches of trust by the Crown.
2. The question whether a trust was a charitable trust and therefore exempt from income tax.<sup>50</sup>
3. The function of the Attorney-General with respect to charitable trusts.
4. The use of injunctive relief in public law.<sup>51</sup>
5. The use of injunctive relief to restrain the commission of a crime and the development of the associated doctrine of the standing requirements for a private citizen claiming relief against breach of a public right.<sup>52</sup>
6. Proceedings in equity against the Crown in the Courts of Chancery and Exchequer.

The development of the intersections at both the general analogical level and in the application of equitable doctrines and remedies has continued.

Principles of estoppel at common law and equity and associated preclusionary rules have been held to apply to certain categories of case although not so as to extend statutory power, contract statutory duties or fetter discretions. A statutory duty in some circumstances may equate to a fiduciary duty. Where the Crown or public bodies are assimilated to the position of private corporations or persons by the removal of Crown immunity or otherwise then equity will apply to them as it does to private corporations and persons. Statutory bodies engaged in commercial or trading activities will in their private or privatised capacity, absent any statutory immunity or modification of their liabilities, attract to their conduct the general body of the law

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<sup>50</sup> *Income Tax Commissioners v Pemsel* [1891] AC 531.

<sup>51</sup> *Attorney General for New South Wales v Trethowan* [1932] AC 526.

<sup>52</sup> *Boyce v Paddington Borough Council* [1906] AC 1.

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

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

Equitable doctrines and relief have extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint. In the field of public law, equitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.<sup>53</sup>

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

There is no reason why the courts in shaping principles, whether their origins lie in the common law or in equity, should not have regard to both common law and equitable concepts and doctrines, borrowing from either as may be appropriate, just as courts have regard to the way in which the law has been developed by statute and has developed in other jurisdictions and, for that matter, in other systems of law.<sup>54</sup>

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

The relationship between government and the people has attracted the jurisprudence of equity, but in a less developed fashion. The breadth of

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<sup>53</sup> A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238 at 238.

<sup>54</sup> *Ibid* at 242.

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.<sup>55</sup>

### **Equitable Remedies and Public Law – The *Bateman's Bay* Case**

Equity can provide remedies to vindicate the public interest in the maintenance of due administration where other remedies, and in particular the prerogative remedies, are inadequate. The application of equitable doctrine to the grant of relief in these circumstances was discussed by Gaudron, Gummow and Kirby JJ in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*:

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.<sup>56</sup> (footnotes omitted)

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. This application of trust doctrine has been referred to

<sup>55</sup> GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia and New Zealand* (LBC Information Services, 1996) at 116.

<sup>56</sup> (1998) 194 CLR 247 at 257 [25]; see also J Enderbury, 'Equity and Public Law in the Law of Standing: *Bateman's Bay Local Aboriginal Land Council v the Aboriginal Community Benefit Fund Pty Ltd*' (1999) 21 *Sydney Law Review* 129.

earlier. 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>57</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. That provision has become a bulwark of the rule of law. The injunction for which it provides stands as a constitutional remedy against unlawful executive action along with the constitutional writs of mandamus and prohibition.

The injunction and declaration are species of equitable relief available in all manner of litigation coming before both federal and State courts. It is not necessary that claims for such relief be conjoined with other prerogative or statutory remedies. In *Corporation of the City of Enfield v Development Assessment Commission*<sup>58</sup> the

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<sup>57</sup> (1998) 194 CLR 247 at 259.

<sup>58</sup> (2000) 199 CLR 135.

Council of the City of Enfield contended that a development plan consent granted by the Development Assessment Commission was invalid by reason of the misclassification of the proposed development as other than a 'special industry'. It claimed injunctive and declaratory relief in the Supreme Court.

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

... its jurisdiction as a court of equity to grant equitable relief to restrain apprehended breaches of the law and to declare rights and obligations in respect thereto.<sup>59</sup> (footnote omitted)

Their Honours pointed to the differences between the availability in public law of equitable remedies on the one hand and judicial review by mandamus, prohibition and certiorari on the other.<sup>60</sup> An applicant with standing to apply for prohibition or certiorari could fail to obtain an order absolute for reasons which would not have precluded the availability of a declaration. So although in *FAI Insurances Ltd v Winneke*<sup>61</sup> certiorari and mandamus were not available against the Governor in Council, a declaration could be made against the Attorney-General of Victoria as representative of the Crown.<sup>62</sup>

Gaudron J, who agreed with the joint judgment, added some observations about the inadequacies of the prerogative writs as general remedies to compel executive government and administrative bodies to operate within the limits of their powers.<sup>63</sup> She said:

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<sup>59</sup> (2000) 199 CLR 135 at 144 [18].

<sup>60</sup> (2000) 199 CLR 135 at 145 [22].

<sup>61</sup> (1982) 151 CLR 342.

<sup>62</sup> *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 146 [22].

<sup>63</sup> (2000) 199 CLR 135 at 156.

Equitable remedies are available in the field of public law precisely because of the inadequacies of the prerogative writs. Thus... it is not incongruous that equitable relief should be available although prerogative relief is not.<sup>64</sup> (footnote omitted)

The application of the equitable injunction and declaration in public law may also be influenced by the modern availability of statutory remedies which, because they are seen as serving the public interest, may not impose any particular standing requirement. Section 80 of the *Trade Practices Act 1974* (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>65</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:

This led to the engagement of the equity jurisdiction in matters of public law.<sup>66</sup>

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<sup>64</sup> (2000) 199 CLR 135 at 157-158 [58].

<sup>65</sup> (1999) 200 CLR 591.

<sup>66</sup> (1999) 200 CLR 591 at 628 [97].

David Wright, writing in the March 2001 edition of the *Public Law Review*, referred to the indirect effect of analogical reasoning between equitable and like statutory remedies. In this respect he concluded:

... the role of equitable remedies is being reinvigorated particularly with regard to cases understood as public law matters.<sup>67</sup>

He described equitable remedies as now a potent force for the unification of private and public law.

### **Equitable Estoppel**

The application of estoppel at common law and equity to the exercise of statutory power is a topic itself deserving of a substantial paper.<sup>68</sup>

A number of species of estoppel have been identified as having an application in public law. These include estoppel by representation which comprises common law estoppel, relating to present facts, and equitable or promissory estoppel relating to the future. Issue of estoppel and proprietary estoppel also have potential application.<sup>69</sup>

It is well established that a public authority cannot be required, by the application of doctrines of estoppel, to exceed its statutory powers or breach its statutory duties. That would involve equity amending the statute. That is not to say that a statutory power or duty might not, in appropriate circumstances, be capable, on general principles, of a construction accommodating obligations arising from equitable principles. But such a construction would by definition allow the

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<sup>67</sup> D Wright, 'The Role of Equitable Remedies in the Merging of Private and Public Law' (2001) 12 *Public Law Review* 40 at 50.

<sup>68</sup> For a comprehensive treatment see J Thomson, 'Estoppel by Representation in Administrative Law' (1998) 26 *Federal Law Review* 83; E Campbell, 'Estoppel in Pais and Public Authorities' (1998) 5 *Australian Journal of Administrative Law* 157; and EJ Morzone, 'Estoppel and Other Private Law Preclusionary Doctrines in Public Law' (1999) *Queensland Lawyer* 135.

<sup>69</sup> *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 per Gummow J.

performance of the obligation *intra vires* or in accordance with the relevant statutory duty.

There may be put to one side the classes of case in which officials or public authorities enter the realm of private law by making contracts, acquiring or disposing of property or engaging in tortious conduct. There the private law, including equity, applies to them. This was well exemplified in *Verwayen v The Commonwealth*<sup>70</sup> where the Commonwealth was held estopped in negligence litigation from invoking a limitation period which it had previously indicated it would not invoke. It is increasingly a feature of modern life that statutory authorities engage in trade and commerce.

Gummow J in *Minister for Immigration and Ethnic Affairs v Kurtovic*<sup>71</sup> noted the distinction drawn in the United States between proprietary and governmental capacities of public bodies. Where a public body acts in its proprietary capacity then an equitable estoppel may arise. His Honour drew an important distinction between the planning or policy level of decision-making by public authorities, in which statutory discretions are exercised, and operational decisions implementing such policy. He said:

Where the public authority makes representations in the course of implementation of a decision arrived at by the exercise of its discretion, then usually there will not be an objection to the application of a private law doctrine of promissory estoppel. It must, however, be recognised that it may be difficult, in a given case, to draw a line between that which involves discretion and that which is merely 'operational'.<sup>72</sup>

It is a distinction which makes sense but which may be difficult of application.

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<sup>70</sup> (1990) 170 CLR 394.

<sup>71</sup> (1990) 21 FCR 193.

<sup>72</sup> (1990) 21 FCR 193 at 215.

In the same year as *Kurtovic* was decided, some important observations concerning the availability of estoppel against the Executive were made by Mason CJ in *Attorney-General (NSW) v Quin*, where his Honour said:

The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power.<sup>73</sup>

Nevertheless, Mason CJ did not deny the availability of estoppel against the Executive arising from conduct amounting to a representation if holding the Executive to its representation would not significantly hinder the exercise of the discretion in the public interest. He said:

... as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the 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.<sup>74</sup>

The application of estoppels in public law is not foreclosed by the current state of authority in Australia.

The doctrine of legitimate expectations which attract particular requirements of procedural fairness in some cases bears some resemblance to estoppel but is not itself an equitable doctrine. Nor is it a species of estoppel. In particular, in Australia, it does not afford substantive protection to the rights the subject of the claimed expectation. As with the application of estoppel to the exercise of statutory

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<sup>73</sup> (1990) 170 CLR 1 at 17.

<sup>74</sup> (1990) 170 CLR 1 at 18.

discretions it would entail curial interference with administrative decisions on their merits by precluding the decision-maker from ultimately making the decision which he or she considered most appropriate in the circumstances. In *Quin*, Brennan J said of the concept of substantive protection:

That theory would effectively transfer to the judicature power which is vested in the repository, for the judicature would either compel an exercise of the power to fulfil the expectation or would strike down any exercise of the power which did not.<sup>75</sup>

### **Fiduciary Obligations in Administrative Law**

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

And as Paul Finn has said:

Perhaps not surprisingly, given the close resemblance which the fiduciary officer bears to the public official, this system of review reflects in a very large measure that described by the late Professor De Smith in *Judicial Review of Administrative Action*.<sup>76</sup>

A distinction has been drawn between the concept of a trust enforceable in equity and the public trust applicable to the discharge by public officers of duties or functions belonging to the prerogative and authority of the Crown.<sup>77</sup> This has been

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<sup>75</sup> (1990) 170 CLR 1 at 39.

<sup>76</sup> Finn, above n 31, at 3.

<sup>77</sup> This does not raise the question whether the exercise of prerogative or executive powers are non-justiciable. That the limits of such powers may be tested in judicial review is clear – see the discussion in *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 368-369 per Gummow J, and its application in *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 242.

said not to be a conventional but a 'higher' sense of the word.<sup>78</sup> The distinction was relied upon by the Privy Council in 1902 in a case involving the allotment to a Maori Chief in 1870 of certain land over which native title had been extinguished. The land was to be held in trust by the Chief '... in the manner provided or hereafter to be provided by the General Assembly for native lands held under trust'. Notwithstanding the use of the term 'trust' it was held that the allottee had taken absolutely and beneficially and that there was no trust in favour of the traditional owners of the land.<sup>79</sup>

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>80</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 has already been referred to as bearing similarities to that of the trustees or managers of the property of others.<sup>81</sup> It was designated as 'fiduciary' in *Bromley London Borough Council v Greater London Council*.<sup>82</sup> The analogy was supported in Gummow J's comparison between *Wednesbury* unreasonableness and abuse of fiduciary powers. 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

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<sup>78</sup> *Kinloch v Secretary of State for India in Counsel* (1887) 7 App Cas 619 at 625-626.

<sup>79</sup> *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56 at 72 per Lord Lindley.

<sup>80</sup> *Te Toh v Waddell (No 2)* [1977] Ch 106; *Swain v Law Society* [1983] 1 AC 598. See also PW Hogg, *Liability of the Crown* (Sydney, Lawbook Co, 2nd ed, 1989) at 186-188.

<sup>81</sup> *Roberts v Hopwood* [1925] AC 578 at 596 per Lord Atkinson and 603-604 per Lord Sumner.

<sup>82</sup> [1983] 1 AC 768 at 815 per Lord Wilberforce and 838 per Lord Scarman.

Wednesbury sense.<sup>83</sup> It may simply be an analogy which helps to identify limits on power defined by the proper purposes of its exercise.

Whether or not the term fiduciary is properly applied to the relationship 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>84</sup>

### **Fiduciary Duties and Indigenous People**

In the United States, Canada and New Zealand as well as in Australia the question whether governments owe fiduciary duties to indigenous people has been considered. The relationship between the Indian peoples and the United States government was described in fiduciary language in *Cherokee Nation v State of Georgia*<sup>85</sup>. Marshall CJ described Indian peoples as domestic dependent nations saying:

Their relation to the United States resembles that of a ward to his guardian.<sup>86</sup>

The Supreme Courts of the United States in *US v Mitchell*<sup>87</sup> found the United States government to be liable in damages for mismanagement of forest resources on Indian Reservation lands. In that case a fiduciary duty arose from Federal Timber Management Statutes and other legislation under which the government had 'elaborate

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<sup>83</sup> M Supperstone and J Goudie, *Judicial Review* (Butterworths, 1992) at 266-267.

<sup>84</sup> Dal Pont and Chalmers, above n 55, at 117.

<sup>85</sup> 5 Pte 1 (1831).

<sup>86</sup> See also *Worcester v State of Georgia* 6 Pte 515 (1832); *United States v Kagama* 118 US 375 (1886) at 383-384.

<sup>87</sup> 463 US 206 (1983).

control over forests and property belonging to Indians'. Reference was made to 'the undisputed existence of a general trust relationship between the United States and the Indian people' and the 'distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people'.<sup>88</sup>

In *Guerin v R*<sup>89</sup> the Supreme Court of Canada found the Crown in a fiduciary relationship to Indians whose lands had been surrendered to it for lease to a golf club. The lease was granted on terms which had not been discussed with and which were disadvantageous to the Indians. The grant was held to be a breach of the Crown's fiduciary duty. The nature of the Indian title and the statutory scheme for disposing of Indian land placed upon the Crown an equitable obligation enforceable by the Court to deal with the land for the benefit of the Indians. Dickson J (with whom Beetz, Chouinard and Lamer JJ concurred) said:

This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.<sup>90</sup>

While it might be thought the judgment of Dickson J based the fiduciary duty upon the surrender of Indian lands to the Crown a broader interpretation of his judgment was open. In *R v Sparrow*<sup>91</sup> the relevant duty was founded upon a fiduciary obligation derived from the nature of Indian interests in the land.

New Zealand jurisprudence establishes the existence of the fiduciary relationship between the Crown and Maori people. These cases support the proposition that the Treaty of Waitangi created an enduring relationship akin to a

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<sup>88</sup> *US v Mitchell* 463 US 206 (1983) at 225.

<sup>89</sup> (1984) 13 DLR (4th) 321.

<sup>90</sup> (1984) 13 DLR (4th) 321 at 334.

<sup>91</sup> (1990) 70 DLR (4th) 385.

partnership between the Crown and Maori, each accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.<sup>92</sup>

In Australia in *Mabo (No 2)*<sup>93</sup> it was submitted that Queensland was under a fiduciary duty or affected by a trust of which the Meriam people were beneficiaries in connection with their rights and interests in land. It was not contended that the trust or fiduciary obligation fettered legislative power. It was argued however that it limited the way in which power otherwise granted, for example, under Crown lands legislation, could be exercised. The claim for relief in *Mabo (No 2)* included a claim for a declaration that Queensland was under a fiduciary duty or alternatively bound as a trustee to the Meriam people to recognise or protect their rights and interests in the Murray Islands.

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

If native title were surrendered to the Crown in expectation of a grant of a tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation, but it is unnecessary to consider the existence or extent of such a fiduciary duty in this case.<sup>94</sup> (footnotes omitted)

His reasoning about the existence and nature of native title and the extinguishment of native title did not involve any consideration of a fiduciary relationship between government and native title holders or indigenous people generally. Nor did Deane and Gaudron JJ afford any comfort to those who would argue for the existence of a

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<sup>92</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

<sup>93</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>94</sup> (1992) 175 CLR 1 at 60.

fiduciary duty as an invalidating principle in respect of executive action extinguishing native title. They did say however:

Notwithstanding their personal nature and their special vulnerability to wrongful extinguishment by the Crown, the rights of occupation or use under common law native title can themselves constitute valuable property. Actual or threatened interference with their enjoyment can, in appropriate circumstances, attract the protection of equitable remedies. Indeed, the circumstances of a case may be such that, in a modern context, the appropriate form of relief is the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title. The principle of the common law that pre-existing native rights are respected and protected will, in a case where the imposition of such a constructive trust is warranted, prevail over other equitable principles or rules to the extent that they would preclude the appropriate protection of the native title in the same way as that principle prevailed over legal rules which would otherwise have prevented the preservation of the title under the common law.<sup>95</sup>

Dawson J, having formed the view that traditional rights had been extinguished upon annexation of the Murray Islands, concluded that there was no fiduciary duty imposed on the Crown. Toohy J, alone among the judges, accepted the existence of such a duty arising directly from or by close analogy to equitable principle. It arose 'out of the *power* of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power'.<sup>96</sup> The obligation was of the character imposed on a constructive trustee. The content of the obligation was to ensure the traditional title was not impaired or destroyed without the consent, or otherwise having regard to, the interests of the title holders. It could not limit legislative power but the enactment of legislation could amount to a breach of the obligation.

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<sup>95</sup> (1992) 175 CLR 1 at 113.

<sup>96</sup> (1992) 175 CLR 1 at 203.

Mason CJ in *Coe v Commonwealth*<sup>97</sup>, a pleadings case, considered a claim for breach of fiduciary duty arising out of the enactment of a statutory power of alienation. He said:

The existence of a fiduciary duty cannot render the legislation inoperative, though according to Toohey J, it could generate a right to equitable compensation if the legislation constituted a breach of duty.<sup>98</sup>

The state of authority to date is unencouraging in relation to the identification of a fiduciary duty owed to indigenous people by reason of their status as such or as native title holders. Of course, principles analogous to those governing fiduciary relationships may inform the exercise of statutory power as mandatory relevant elements for consideration and as implied limits derived from implied legislative purpose. Nor does it exclude the possibility of an interpretive principle under which laws impacting on the rights of indigenous people should be construed by reference to fiduciary considerations where such a construction is open.

## **Conclusion**

As can be seen from the foregoing review, administrative law and equity intersect in a variety of ways by analogical application of equitable principles, direct application of such principles, and by the application of equitable remedies in relation to exercises of public power. A broader concept of equity informs the construction of statutes and the contemporary understanding of administrative justice. The substantive application of equitable principles in relation to fiduciary obligations and preclusionary doctrines is open to future development.

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<sup>97</sup> (1993) 118 ALR 193.

<sup>98</sup> (1993) 118 ALR 193 at 204.