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

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Synopsis

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

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

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

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

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Introduction

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

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

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

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

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

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

Part A: Elements of estoppel

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

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

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

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

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

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

Australian law

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

Public law

Kurtovic and Quin

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

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

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

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

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

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

> significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.[21]

Australian public law since Kurtovic and Quin

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

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

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

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

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

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

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

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

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

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

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

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

Lam's case

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

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

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

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

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

Application of private law principles of estoppel

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

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

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

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

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

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

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

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

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

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

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

English law

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

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

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

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

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

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

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

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

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

Part C: Substantive unfairness and abuse of power

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

English law

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

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

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

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

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

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

Australian law

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

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

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

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

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

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

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

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

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

Part D: Comparison of English and Australian positions

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

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

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

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

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

Discussion

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

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

Part E: Values and estoppel in public law

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

The proper scope of judicial review

Separation of powers

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

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

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

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

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

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

Legality / merits

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

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

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

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

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

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

The doctrine of ultra vires

Allars states:

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

Ultra vires representations

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

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

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

> That is not to say that a statutory power or duty might not, in appropriate circumstances, be capable, on general principles, of a construction accommodating obligations from equitable principles.[138]

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

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

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

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

Intra vires representations

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

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

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

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

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

Ethical / political considerations

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

Public v individual interests

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

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

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

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

Accountability

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

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

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

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

Ethics

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

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

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

Remedy

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

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

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

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

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

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

Part F: Estoppel against public authorities – the alternatives

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

No estoppel against public authorities

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

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

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

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

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

Estoppel against public authorities in private law actions

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

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

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

Substantive legitimate expectations and abuse of power

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

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

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

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

Estoppel against public authorities in respect of operational decisions

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

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

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

Judicial balancing

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

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

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

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

Part G: A new doctrine of administrative estoppel?

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

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

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

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

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

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

Conclusion

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

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

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

Endnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

92 *Coughlan,* note 90.

93 *Coughlan,* note 90.

94 *Coughlan,* note 90 at 646.

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

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

97 *Kurtovic,* note 10 at 220.

98 *Kurtovic,* note 10 at 221.

99 *Quin,* note 4 at 23.

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

101 *Barratt v Howard,* note 44.

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

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

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

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

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

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

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

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

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