

**Administrative Law in an Interconnected World:  
Where to from here?**

Address by the Honourable Justice Duncan Kerr  
Federal Court of Australia  
President, Administrative Appeals Tribunal  
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**Synopsis**

Despite drawing upon fundamentally different constitutional underpinnings the functional outcome of administrative review in democratic free market societies is often remarkably similar. There has been a growing international exchange of knowledge and ideas between their administrative bodies.

The Commonwealth and the States have also evolved from different constitutional underpinnings but developed functional similarities. Moreover there has been a recent drift towards greater uniformity of principle in administrative law: a trend that has been reinforced by the decision of the High Court of Australia in *Kirk*.

However, both as between nations and within the Australian federation it is easy to identify instances where history and constitutional structures have generated gaps or anomalies. Some of these gaps and anomalies are examined and consideration given to whether there may be yet further evolution towards greater commonality.

**Introduction**

In a recent speech to public sector lawyers Justice Nye Perram drew a delightful biological analogy between animal evolution and comparative administrative law.<sup>1</sup>

Fish, he noted, swim by moving their tails sideways: dolphins by moving their tails up and down. The reason Justice Perram explained, was that at an earlier stage of their evolutionary history dolphins had left the sea and had become land animals – air breathing mammals. When dolphins later returned to the sea their vestigial legs had, over the millennia, fused to become tails but continued to hinge up and down rather than sideways. Yet despite their fundamentally different evolutionary biology the tails of dolphins and fish perform a functionally equivalent role.

The task of swimming and the environment in which swimming took place, not the original biomechanical differences inherent in their constitutions, had led both to evolve a slightly different but functionally equivalent means of propelling themselves in the oceans.

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<sup>1</sup> 'General Principles of Law in Civilian Legal Systems: What Lessons for Australian Administrative Law?', AGS Administrative Law Symposium, Excellence in Government Decision-Making, Canberra, 21-22 June 2013, available at <http://www.fedcourt.gov.au/publications/judges-speeches/justice-perram/perram-j-201>.

Justice Perram then noted similar environmental factors, including the desirability of constraining arbitrary power, had led to similar functional equivalences to evolve in international administrative law notwithstanding the existence of constitutional differences between nations equally as profound as the biological differences between fish and dolphins.

Thus, the Conseil d'Etat, re-established after the French Revolution by Napoleon exclusively to be a creature of the Executive and constitutionally separate from the French court system (French judges are prohibited, on pain of criminal sanction, from imposing limits on administrative power) acts as an independent body and grants functionally equivalent relief against misuse of administrative power in all of the circumstances in which an Australian Ch III court can grant judicial review.

The position is as was explained by M Patrick Frydman, President, Administrative Court of Appeal of Versailles:

The administrative courts have jurisdiction over all disputes related to decisions or actions of public authorities, from tiny decisions made by any local authority to decrees issued by the President of the Republic, whether the complainant seeks the annulment of an act or financial compensation for damage, and this applies in all fields of public administration. The most common kinds of administrative cases include, for example, those related to the application of economic or social regulations, taxation, town-planning, building permits, public works, public service procurement, environmental projects, hospital liability, immigration permits, civil servants' careers and pensions, European and local government elections, and so on.

The possible conflicts of jurisdiction between civil and administrative courts, which, in practice, are quite exceptional, are arbitrated by a special court, called the "Tribunal des conflits", whose members are chosen, on an equal representation basis, among judges of the Council of State and of the "Cour de cassation".

The order of administrative jurisdictions has, as well as the civil order, three levels of courts: the administrative tribunals, the administrative courts of appeal and, naturally, the Council of State, at the top, that normally acts as a "juge de cassation" (i.e. as a court reviewing only legal and procedural aspects of the judgements, but not the assessment of the merits of the case).

The order of administrative jurisdictions also includes many specialized administrative courts, such as, for example, the "Cour des comptes" (or Court of Auditors, that audits public expenditure), the National Court of Political Asylum (that decides about granting the political refugee status) and many social or disciplinary tribunals of different kinds. All these specialized courts - which, by the way, are probably closer to the notion of "administrative tribunals" as it is understood in many common law countries - also come under the jurisdiction of the Council of State, acting as "juge de cassation."<sup>2</sup>

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<sup>2</sup> Keynote address, 11<sup>th</sup> AIJA Tribunals Conference, Surfers Paradise, Australia, 5-6 June 2008, available at <http://www.aat.gov.au/Publications/SpeechesAndPapers/Frydman/AdministrativeJusticeInFrance2008.htm>

The text of Justice Perram's paper discusses not only civil law systems based on French jurisprudence, but also the comparative administrative law of the United States, the United Kingdom and the European Union. At considerable risk of trivialising its content it confirms that there has come to be far greater similarity in practice between the administrative law practices of modern democratic nation states than their history and constitutional differences suggest would be the case. Despite their drawing upon fundamentally different constitutional underpinnings the functional outcome of administrative review in democratic free market societies is often remarkably similar.<sup>3</sup>

However, history and constitutional differences are not without their consequences and Justice Perram suggests, those evolutionary differences may have left Australian jurisprudence unable to respond, at least in one specific regard, with remedies for unfair administrative conduct which other comparable legal systems now routinely provide.

That is the consequence of Ch III of the Australian Constitution having been held to mandate a strict separation of powers.

I will return to that difference later in this paper. However, first I should focus upon what has emerged out of the growing awareness of our great commonalities.

### **International Institutions**

Awareness of those commonalities has prompted a growing international exchange of knowledge and ideas between their highest administrative bodies.

Founded in 1983, the Association Internationale des Hautes Jurisdictions Administratives (AIHJA) known in the English language as the International Association of Supreme Administrative Jurisdictions (IASAJ), represents many national bodies that exercise judicial/administrative review. The membership of the AIHJA now extends over 100 countries spread over all continents. Reflecting the wide

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<sup>3</sup> It seems plausible to suggest that, in the aftermath of *Minister for Immigration v SZMDS* (2010) 240 CLR 61, and despite considerable differences in underpinning jurisprudence, Australian law may be currently in the process of edging closer to adopting review standards which may functionally be not greatly different from the standard in many other countries which apply the notion of proportionality. As in Canada (see *Baker v Canada* [1999] 2 SCR 817; 174 DLR (4<sup>th</sup>) 193—where similar jurisprudence, albeit influenced by notions of rights and deference foreign to Australian law, has been considerably developed) that outcome would be arrived at not by the overthrow of prior doctrine but through the mundane and orthodox route of statutory interpretation in the light of presumptions of legality. In *Minister for Immigration and Citizenship v Li* [2013] HCA 18 the plurality, Hayne, Keifel and Bell JJ stated at [63] “The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably”. This appears to be conceptually more flexible than *Wednesbury* unreasonableness and allow a bridge to permit review if a court cannot be satisfied that the decision was properly open, see at [68] “The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified”. Such a standard opens the prospect of Australian courts achieving substantially the same end as the English courts have achieved by applying a doctrine of proportionality”. See also Gageler J at [88]-[92] under the heading “Reasonableness as a statutory implication” and, similarly, but perhaps more cautiously and limited to reasonableness in its *Wednesbury* form, French CJ at [23]-[24].

diversity of juristic forms that functionally similar review can take, its membership is open to the most senior of the courts and tribunals of all States and international organizations that have capacity to resolve disputes arising from the activities of government. Australian membership of the AIHJA is joint: Australia's national membership is shared by the Federal Court of Australia and the Administrative Appeals Tribunal.

To meet its objective, the AIHJA creates, promotes and conducts legal research, helps to diffuse and disseminate to members and, where applicable, to any interested person, useful information on the organization, operation and the jurisprudence of member jurisdictions. It also promotes contacts between the judges of these courts and tribunals.

The Association holds triennial congresses; the most recent being held in Cartagena in 2013. It focussed on the theme *The administrative law judge and the environment*. That congress followed on the heels of the 2010 Tenth Congress in Sydney - *The review of administrative decisions by the courts and administrative tribunals*. A book including a number of the papers produced for the Sydney congress was recently published by the AIHJA.<sup>4</sup> In so doing, the AIHJA helps to open an international perspective on administrative law.

The former President of the AAT, Justice Garry Downes, became an early advocate of greater Australian engagement with the AIHJA and a member of the AIHJA's Board. He co-hosted the AIHJA's Sydney congress. Former Federal Court judge, the Hon Brian Tamberlin QC, now a Deputy President of the AAT, presented the Association's General Report to that congress.

My then commencing role as President of the AAT required focused attention at home and precluded my attending the AIHJA's Cartagena congress but the growing interconnectedness of our legal world requires our eyes to lift occasionally to engage with developments international administrative law. I plan to attend the 2016 Congress.

In the meantime the AAT's routine engagement with other administrative law bodies will continue. In the past 12 months the AAT has hosted delegations from counterpart institutions from Thailand and Russia. The AAT has also been constructively engaged in the Federal Court's international outreach programs in our near neighbourhood. The AAT's Manager, Learning and Development, Athena Ingall, travelled to Kosrae, Federated States of Micronesia, to participate in the Federal Court's assistance program to the Pacific region. Budget pressures are far too tight for unfocused action. If the AAT is to spend public money on international cooperation it needs to be within a coherent and publicly defensible framework. I am keen to see our working with our closer regional counterparts in the Pacific, if possible with the assistance of AusAid, become a priority for the AAT.

### **Evolution towards common functional outcomes and residual differences**

Returning to Justice Perram's biological theme, the same evolution towards commonality despite deep constitutional differences we can observe at the

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<sup>4</sup> International Association of Supreme Administrative Jurisdictions *The Review of the Administrative Decision by Administrative Courts and Tribunals*: Association Internationale des Hautes Jurisdictions Administratives *Le controle des decisions administratives par les cours et les tribunaux administratifs* (La documentation Francais 2013).

international level has been equally evident within the Australian federation. The Commonwealth and the States evolved from what were substantially different constitutional genetics but have since developed close functional similarities.

Nothing, at least in so far as the Australian Constitution was understood in the first half century and more of its coming into force, required that to be so. The States were not bound to the strict doctrine of separation of powers as was the Commonwealth. State Parliaments were free to constitute courts and administrative structures however they wanted to—and to confer, or withdraw, power from them as they saw fit. Judicial tenure was a convention, not a constitutional imperative.

It was possible for a State to confer judicial power on administrative bodies and vice versa. Not so many years ago, High Court Justice Michael McHugh observed in obiter remarks that it was open to a State to give to an administrative body power to try offences and impose punishments for infringements of the criminal law.<sup>5</sup> It certainly would have been thought possible in the early years of Australia's constitutional development for the State Supreme Courts to be conferred with power to undertake merits review of administrative decisions directly rather than being confined to supervising its exercise.

However none of the more adventurous pathways then open to the States were followed. Since the decisions of the High Court in *Kable v Director of Public Prosecutions (NSW)*<sup>6</sup> and the more recent *Kirk v Industrial Court of New South Wales*<sup>7</sup> some of the most radical of those options have been foreclosed.

But the relatively recent constitutional closing of those pathways does not explain why earlier parallel policy choices were made by the States, for example with respect to the development of merits review. Under both historic and modern State and Commonwealth constitutional doctrine, merits review is exclusively a creature of statute. Nothing compelled the States to follow in the Commonwealth's footsteps when, after the reports of the Kerr and Ellicott Committees,<sup>8</sup> the Australian Parliament enacted the *Administrative Decisions (Judicial Review) Act 1977* and the *Administrative Appeals Tribunal Act 1975*.

However, in large measure they did so.

That was, perhaps, in part because State policies were shaped by the same considerations that had motivated Commonwealth reform. That is, State legislators recognised that the complexity of modern administration had increased such that review of government decisions through the Parliament and the courts by the prerogative writs had become inadequate as to its content and inaccessible to most persons affected, such that the same kind of remedies were needed at the State level.

While the process was far from uniform, over time each of the States adopted mechanisms to facilitate administrative review that borrow heavily from the Commonwealth model.

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<sup>5</sup> *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 600.

<sup>6</sup> (1996) 189 CLR 51.

<sup>7</sup> (2010) 239 CLR 531.

<sup>8</sup> The Commonwealth Administrative Review Committee, chaired by Sir John Kerr, and the Committee of Review of Prerogative Writ Procedures, chaired by RJ Ellicott QC.

All of the States now have streamlined processes, based in the main on the criteria adopted under the *Administrative Decisions (Judicial Review) Act 1977*, allowing simplified access to judicial review.<sup>9</sup>

Most have also passed legislation conferring a right of merits review over broad areas of administrative conduct.

Much was copied from Commonwealth merits review precedents, including the widespread adoption of the principles that merits review tribunals should pursue the objectives of providing a mechanism that is fair, just, economical, informal and quick and free of the obligation to be bound by rules of evidence.

But once established the States discovered that they had some particular advantages which allowed them to make adaptations unavailable to the Commonwealth. In *Brandy v Human Rights and Equal Opportunity Commission*<sup>10</sup> the High Court had held that a Commonwealth administrative body could not make enforceable orders against non-government parties as if it was a court. No such restraint applies to the States. They were therefore free to establish institutions such as the Queensland Civil and Administrative Tribunal which exercises both administrative and judicial power and as a result can make orders which are enforceable.<sup>11</sup> This is an inestimable convenience.

Moreover, as the later adopters, the States were able to move more quickly than the Commonwealth to consolidate the administrative machinery for merits review. Most of the States have moved or are moving towards establishing “one-stop shops” bringing together under a single roof the multiplicity of former tribunals which had earlier been established with subject matter jurisdiction.

By contrast the Commonwealth is yet to implement the recommendations of the Administrative Review Council’s “*Better Decisions*” report<sup>12</sup> which recommended an integrated system of review to integrate the AAT with the other stand-alone national merits review tribunals. Public pressure led to the rejection of a compromised version of that proposal by the Howard government. It is an interesting speculation as to whether evolutionary pressures to achieve similar efficiencies and maximisation of

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<sup>9</sup> *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas); *Administrative Decisions (Judicial Review) Act 1989* (ACT). The now little-used *Administrative Law Act 1978* (Vic) differs substantially from the *Administrative Decisions (Judicial Review) Act*. Those states in which judicial review remains governed wholly or partly by the common law have simplified their procedures: see, eg, Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic); and in New South Wales, Practice Note No. SC CL 3, Supreme Court Common Law Division – Administrative Law List, 16 July 2007.

<sup>10</sup> (1995) 183 CLR 245.

<sup>11</sup> Although the Queensland Civil and Administrative Tribunal primarily exercises administrative power it has been held to be a “court of a State” for the purposes of the Constitution: *Owen v Menzies* [2012] QCA 170; (2012) 265 FLR 392, 396-400 (de Jersey CJ), 405-409 (McMurdo P). The Tribunal’s orders can be enforced by filing them with an affidavit in an appropriate court: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 131 and 132. Its status as a ‘court of a State’ also permits it, subject to inconsistency with federal law, conveniently to exercise jurisdiction in matters in which the Commonwealth is a party. Otherwise the limits whereby the Commonwealth is subject to State administrative decisions, have proved prone to give rise to disputes—notwithstanding what was said by the High Court in *Re Residential Tenancies Tribunal (NSW); Ex parte the Defence Housing Authority* (1997) 190 CLR 410 (*Henderson’s Case*)—which affirmed in that particular instance that the Commonwealth was bound.

<sup>12</sup> Report No 39 (1995).

tribunal expertise will now operate so that the States' initiatives in that regard will ultimately lead to the Commonwealth re-visiting the ARC's recommendations.

## Gaps

Despite the parallel developments that have occurred in Commonwealth and State administrative law, one or two odd gaps remain or have opened up. One such gap that more recently has emerged is in respect of the administration of national "model laws". Since *Plaintiff S157/2002 v Commonwealth*<sup>13</sup> and *Kirk* it is clear that the supervisory jurisdiction of the High Court in respect of conduct of "officers of the Commonwealth" and the like jurisdiction of state Supreme Courts in respect of state public officials is constitutionally entrenched. However, some national schemes do not fit that binary conception. For constitutional and political reasons (the desire to establish national regulation without conferring the power to directly legislate upon the Commonwealth) a number of national schemes have been devised and implemented which rely on interlocking State laws rather than Commonwealth legislation.

The way such schemes have been enacted is for a particular state law to be selected as a model and every other state then to legislate to apply mirror legislation in identical substantive terms within its jurisdiction. Each State thus confers its own jurisdiction to administer the scheme on the same body which, in the result, in practical terms acts as a national regulator. But in strict legal terms it remains the regulator of six separate state and two separate territory schemes.

In *Pardo v Australian Health Practitioners Regulation Authority* [2013] FCA 91 I followed Greenwood J in *Broadbent v Medical Board of Queensland* [2011] FCA 980 to conclude that the Federal Court of Australia lacked jurisdiction to consider complaints under the national scheme relating to Australian health practitioners. That was despite Dr Pardo's complaint having involved not only the refusal of the Psychology Board of Australia to register Dr Pardo as a psychologist in Tasmania but also its prior (and, on her case, related) conduct when it had failed to register her in West Australia and, in that context, had allegedly defamed her.

Thus despite the conduct Dr Pardo complained of arising under an interlocking national scheme of mirror legislation the Federal Court was held to lack jurisdiction. The Tasmanian and West Australian State Parliaments had both enacted legislation giving the power to register psychologists in their respective states to the Psychology Board of Australia but any exercise of that power could involve only the application of State law.

I do not resile from my conclusion in *Pardo* but it may be thought unfortunate that judicial review of such national "model law" schemes can be sought only in state courts which would appear to lack jurisdiction to consider the conduct of the national regulator coherently as a whole.

That registration scheme, of course, is simply one example of where jurisdictional blind alleys have been generated because Australian federal administrative law has yet to fully mesh as between state and federal systems. In a recent submission to the Review of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) the AAT suggested that consideration might be given to cross-vesting of jurisdiction in cases where an employee's condition may have been contributed to by two or more employers, one of which is bound by the SRC Act and the other by state or Territory

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<sup>13</sup> (2003) 211 CLR 476.

workers compensation legislation.<sup>14</sup> The Tribunal suggested that the jurisdictional difficulties involved could be overcome if the Commonwealth, State and Territories passed legislation providing for concurrent appointments allowing a member of a corresponding tribunal, with the consent of relevant Ministers, to be appointed to simultaneously exercise power derived from multiple appointments. The submission pointed out that reciprocal legislation having that effect has been in place for many years to overcome similar problems under industrial legislation.<sup>15</sup>

That such gaps still exist should be hardly surprising. Despite the Australian Constitution's autochthonous expedient of permitting State courts to exercise Federal jurisdiction from the earliest days of our Federation, it took over a century for our robust system of cross-vesting of judicial power to evolve. Given the development of comprehensive systems of merits review in the Commonwealth and the various States and Territories, it remains an ongoing project to ensure similar coherence emerges across those newer institutions.

### **More profound differences: administrative estoppel**

Thus far this paper has focused upon the similarities that have evolved in both national and international administrative law notwithstanding their profoundly different constitutional structures.

However, those constitutional differences still sometimes generate substantively different outcomes.

One key difference which Justice Perram identified is the absence in Australia of any doctrine allowing for the application of what he termed "administrative estoppel" – 'the proposition that an official might be bound to exercise a power in a particular way because of antecedent conduct which has led the person affected to act to their detriment'.<sup>16</sup> Conventional legal theory posits that Australian courts cannot grant relief to a citizen who has been disappointed in their reliance upon an undertaking by government if the law authorises, even retrospectively, the government to take action in breach of that undertaking.

That is because in Australian legal theory judicial review exists exclusively to police the boundaries of power and to correct legal errors.<sup>17</sup> In *Attorney General (NSW) v Quin*<sup>18</sup> Brennan J stated:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.

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<sup>14</sup> A similar issue might arise where an employee's condition has been contributed to by injuries arising out of employment with the same employer, but occurring at different times, initially when the employer was bound by State or Territory legislation and later when the employer was licenced under the SRC Act. For the full terms of the submission see AAT *Submission to the Review of the Safety, Rehabilitation and Compensation Act 1988* [2.4].

<sup>15</sup> See for example ss 631 and 632 of the *Fair Work Act 2009* and ss 37 and 38 of the *Fair Work Act 1994* (SA).

<sup>16</sup> Justice Perram, 'General Principles of Law in Civilian Legal Systems' p 12.

<sup>17</sup> Even conceding that in practice the distinction between correcting legal error and examining the merits of a decision may sometimes be blurred 'there is in Australian legal theory a bright line between judicial review and merits review,' see Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 279.

<sup>18</sup> (1990) 170 CLR 1, at 35-36.



It would breach the strict separation of powers in Ch III for an Australian court to both hold an enactment to be within power and limit its enforcement. It is not open to an Australian court, even if it were shown that a citizen had suffered detriment by incurring expenditure in reliance of undertakings that the law would not be altered, to make orders, premised on a doctrine akin to estoppel, on the basis that it would be unfair to the citizen for the state to enforce the new law without compensation.

Yet, as Perram J points out, the administrative law systems of many comparable free market economies routinely provide relief to citizens adversely affected in such circumstances.

Is it possible that despite our constitutional differences, Australian law may find some mechanism to permit evolution towards the recognition of a similar entitlement?

This paper has referred earlier to the response of the States following the passage of Commonwealth legislation to streamline administrative review. It suggested State legislators had recognised that the complexity of modern administration had increased such that review of government decisions through the Parliament and the courts by the prerogative writs had become inadequate as to its content and inaccessible to most persons affected.

But abstract commitment to good administration may not have been their only motive. It is likely that those legislators also had to respond to pressures from their business communities and electorates to make available to them the same kind of avenues for the vindication of their rights as they knew had been made available to them by the Commonwealth.

Justice Perram observes that the protection afforded by the *droit administratif* to those who act on the basis of a regulatory regime that is then changed to their detriment, as well as being far stronger protection than that available under Australian administrative law, is 'much closer to our private law concept of estoppel than to the concept of legitimate expectation as it had been developed in this country before its demise in the High Court's decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1'.<sup>19</sup>

In our ever increasingly interconnected world Australian travellers, academics and business men and women are likely to have significant dealings in jurisdictions where such rights as "administrative estoppel" have evolved. That process may generate pressure for legislative reform to match—although nothing of that kind appears in immediate prospect.

Australian law some years ago rejected the notion of substantive legitimate expectations, in contrast to developments in the UK.<sup>20</sup> In *Kaur v Minister for Immigration and Citizenship* [2012] HCA 31 Gummow, Hayne, Crennan and Bell JJ observed that 'the phrase "legitimate expectation" when used in the field of public law either adds nothing or poses more questions than it answers and is an unfortunate expression which should be disregarded.'<sup>21</sup>

Substantive 'legitimate expectation' therefore would seem an improbable candidate as a foundation for doctrinal developments.

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<sup>19</sup> Justice Perram, 'General Principles of Law in Civilian Legal Systems' p 8.

<sup>20</sup> Ibid; *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.

<sup>21</sup> [2012] HCA 31 at [61].

However, while there are some similar issues raised by the concept of estoppel and legitimate expectation, the two are distinct. Lord Hoffman in *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58 at 66 [34] observed:

There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation...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 exists to promote...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.

To date Australian public law, with its heavy focus on jurisdictional error and ultra vires appears to have absorbed little or nothing of the values that underpin private law estoppel. Matthew Groves has observed that 'estoppel is very much directed to a relatively narrow consideration of the issues raised between two parties within which it is often difficult to raise the wider issues of public interest that are present in many public law proceedings'.<sup>22</sup> Australian academic thinking has been very much alive to the problem that estoppel, as a concept ordinarily applied to bipolar legal relationships, may be difficult to adapt to the kinds of polycentric problems often found in the administrative law context.<sup>23</sup>

But the problem is more than pragmatic: such complexities arguably could be addressed through recourse to the normal discretionary considerations that apply to all equitable remedies.

In Australian law the option appears foreclosed for the more fundamental reasons Gummow J stated in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 210:

in a case of discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding.

Justice Perram observed of *Kurtovic* that 'it is difficult to see how, in light of the ultra vires theory which underpins our administrative law, any different result could possibly have been arrived at. It is in effect a corollary of Parliamentary supremacy.'<sup>24</sup>

He concluded:

that doctrine requires condonation of governmental behaviour which if done by private persons would be actionable. Although one may admire the impeccable logic that brings about that situation as a deduction from the ultra vires theory, it is to be doubted, in my opinion, whether it is conducive to wholesome administration.

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<sup>22</sup> Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 490.

<sup>23</sup> See Enid Campbell and Matthew Groves, 'Polycentricity in Administrative Decision-Making', in Matthew Groves (ed), *Law and Government in Australia* (2005) 213.

<sup>24</sup> Justice Perram, 'General Principles of Law in Civilian Legal Systems' p 15.

But are things that black and white? Is it possible that the doctrine of ultra vires need not require such an ‘unwholesome’ outcome at least in egregious and non-polycentric cases?<sup>25</sup>

Or, returning again to Perram J’s analogy and putting the question in those terms, are the constitutional bio-mechanical differences between European civilian legal fish and Australian jurisprudential dolphins so pronounced as to prohibit absolutely any further parallel administrative law evolution or might it be possible to revive interest in the place of estoppel in Australian public law?

### **Possible pathways to parallel evolution?**

Finn and Smith have commented that:

if government in its rights and liabilities is to be treated more leniently or more stringently than an ordinary individual, a principled justification should be given for that different treatment. In particular it should only be for compelling reasons that the government, as servant of the community, should be given privileges which “no private individual in the community possesses”... the government above all other bodies in our community should lead by example; it should act, and be seen to act, fairly and in good faith with all members of the community with whom it deals in individual cases.<sup>26</sup>

In *Quin*, while acknowledging the criticisms that Gummow J had directed to the reasoning of Lord Denning in *Laker Airways v Department of Trade*<sup>27</sup> Mason CJ declined to rule out the possibility of:

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’.<sup>28</sup>

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<sup>25</sup> Nicholas Seddon, citing *Commonwealth v Newcrest Mining (WA) Ltd* (1995) 58 FCR 167, suggests there may be a basis to distinguish particular from general reliance: “It is generally not sensible or reasonable to make large investment decisions or other commitments on the basis of a government announcement or other policy statements. On the other hand, an operational statement or assurance (that is, one about day-to-day matters as opposed to policy) may generate a legitimate claim, either through a negligence claim, through estoppel or by invoking an Ombudsman’s ability to make a recommendation for an ex gratia or act-of-grace payment”. Nicholas Seddon, *Government Contracts: Federal, State and Local* (5<sup>th</sup> ed, 2013) 287.

<sup>26</sup> Paul Finn and Kathryn Jane Smith, ‘The citizen, the government and reasonable expectations’ (1992) 66 *Australian Law Journal* 139, 146.

<sup>27</sup> [1977] Q.B. 643 at p. 707

<sup>28</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 18.

Since his retirement from the High Court Sir Anthony has observed that ‘the recognition and development of the role of legitimate expectations in public law [has] obscured the place of estoppel in public law’.<sup>29</sup>

Justice French (as his Honour then was) writing extra-curially in 2003, and after reviewing the authorities including *Quin* and *Kurtovic*, concluded that ‘the possibility that estoppels may apply in public law is not foreclosed by the current state of authority in Australia.’<sup>30</sup>

As Perram J tactfully remarked in his paper, ‘some might think’ it unjust that the law allows an administrative decision-maker to say one thing and do another even if that administrator’s earlier pronouncement had induced a citizen to change his or her position to their detriment.<sup>31</sup> As he noted such conduct would not be permitted in the private sphere because everyone recognises how unfair it is. In France or the European Union similar public action would almost certainly be invalid or require compensation.

Yet the prospect that Australian law will evolve to accept, as civil law systems do, that the existence of a new administrative regime is insufficient to justify a departure from the expectations engendered by, and relied upon in consequence of, an earlier one, is still only a theoretical possibility. As Weeks has remarked,

...for the last 20 years, Australian courts have...warmly embraced the limitations on raising an estoppel against a public authority expressed in *Kurtovic* and *Quin* rather than attempting to make their way through the door to an equitable remedy. It is difficult to enunciate a definitive reason for this trend. In part, it is possible that an appropriate set of facts comes along but rarely.<sup>32</sup>

However, if such a set of facts did come along it might present an interesting test of Perram J’s observation that, notwithstanding deep differences in history and constitutional taxonomy, different liberal western democracies, responding to shared problems, can, and often do, reach a similar substantive outcome.

The extra-judicial writings of Sir Anthony Mason and (now) Chief Justice French could, perhaps, be drawn on to forge the jurisprudential sword to cut the Gordian knot ‘between strict fidelity to the ultra vires principle, unpalatable particularly where injured people are concerned, and coherence between private and public law’.<sup>33</sup>

Given that estoppel is an equitable remedy, such a case might perhaps also become the vehicle for the High Court to draw on whatever is the extent of its constitutionally entrenched original jurisdiction pursuant to section 75(v) in matters where an injunction is sought against an officer of the Commonwealth. The High Court has yet to authoritatively determine the breadth of the power so conferred. It has left that question open, while indicating that injunctive relief, as an equitable remedy, may be

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<sup>29</sup> Sir Anthony Mason, ‘The Place of Estoppel in Public Law’ in Matthew Groves (ed), *Law and Government in Australia* (2005) 160, 175.

<sup>30</sup> RS French, ‘The Equitable Geist in the Machinery of Administrative Justice’ (2003) No. 39 *AIAL Forum* 1, 11; see also Alexandra O’Mara, ‘Estoppel against public authorities: is Australian public law ready to stand upon its own two feet?’ No. 42 *AIAL Forum* 1.

<sup>31</sup> Justice Perram, ‘General Principles of Law in Civilian Legal Systems’, 16.

<sup>32</sup> Greg Weeks, ‘Estoppel and public authorities: examining the case for an equitable remedy’ (2010) 4 *Journal of Equity* 247, 254.

<sup>33</sup> Justice Perram, ‘General Principles of Law in Civilian Legal Systems’, 18.

available on grounds that are wider than those which would entitle an applicant to relief under the constitutional writs.<sup>34</sup>

Perhaps too, this need not be seen as a violation of the separation of powers or the overthrow of the doctrine of *ultra vires*.

Perram J's paper usefully reminds us that that more than a century and half ago in *Royal British Bank v Turquand*<sup>35</sup> the Chancery Courts put a stop to companies being allowed to avail of the *ultra vires* doctrine to deny the constitutional authority of their officers notwithstanding that the ultimate source of a company's power to act under its memorandum and articles of association was entirely statutory in origin. It may not be fanciful to imagine that this kind of issue could arise in the Australian constitutional setting given the outcome in *Williams v Commonwealth of Australia* [2012] HCA 23 were the Commonwealth ever to deny its own constitutional authority. It seems unthinkable that such a defence would be permitted. It is but a short step from that premise to the wider public law notion of administrative estoppel.

The jurisprudential difficulties standing in the way of Australian courts reaching a similar functional conclusion as their civilian counterparts are, of course, formidable. They may ultimately be shown to forever preclude that course being taken but I am sceptical of the more pessimistic view that that possibility has already been ruled out.<sup>36</sup> As Justice Frankfurter of the Supreme Court of the United States of America observed, in a remark equally apposite to all highest courts obliged to respond to the challenges of the growth and increasing complexity of government systems: 'in administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions'.<sup>37</sup>

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<sup>34</sup> See for example *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ [82].

<sup>35</sup> (1856) 6 E & B 327.

<sup>36</sup> Australia is not the only nation with a common-law inheritance and constitutional structure that have led to hesitancy twinned with a reluctance to rule out the prospect of change. In the United States, the Supreme Court 'has come close to saying that the government can never be equitably estopped based on a false or misleading statement of one of its agents no matter how much an individual has relied on that statement to her detriment or how reasonable her reliance. Each time it seems tempted to take this step, however, the Court stops just short of saying "never."' see Pierce, *Administrative Law Treatise* (4<sup>th</sup> ed, 2002) quoted in *Lam* (2003) 214 CLR 1, 22 (McHugh and Gummow JJ).

<sup>37</sup> Felix Frankfurter, 'The Task of Administrative Law (1926) 75 *University of Pennsylvania Law Review* 614, 619, quoted in Dame Sian Elias, 'Administrative Law for "Living People"' (2009) 68 *Cambridge Law Journal* 47, 47.