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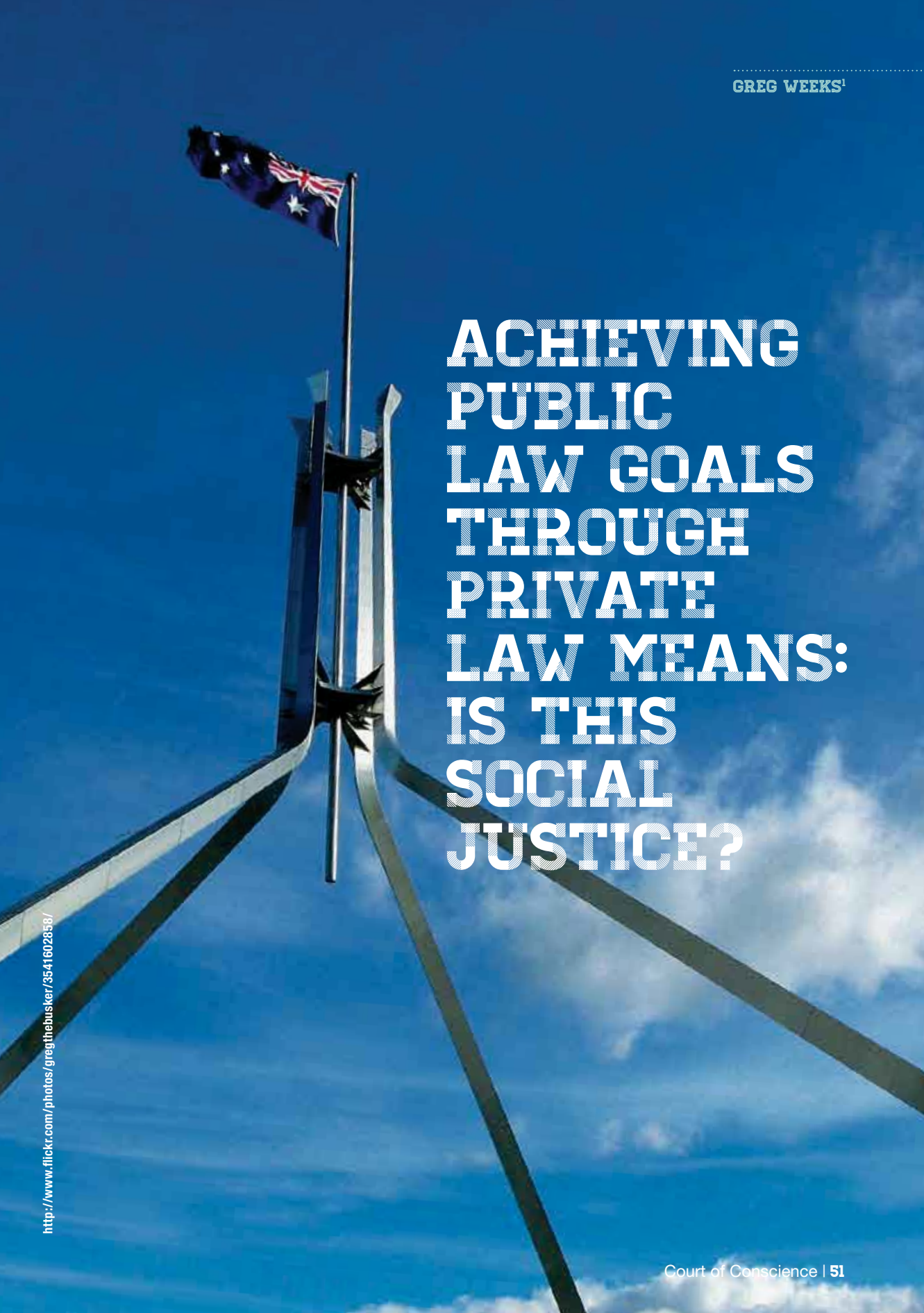
ACHIEVING PUBLIC LAW GOALS THROUGH PRIVATE LAW MEANS: IS THIS SOCIAL JUSTICE?



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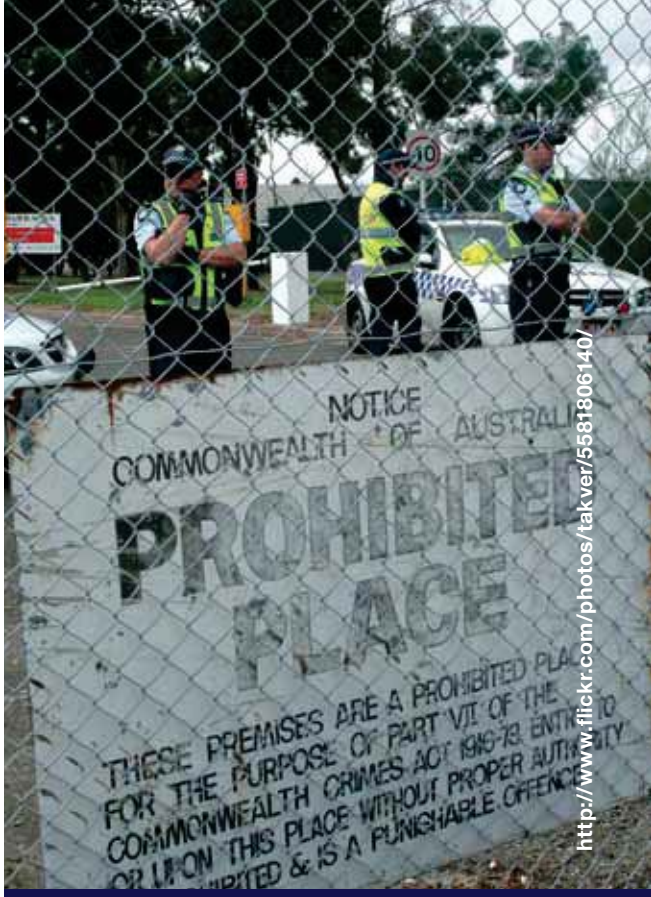
I INTRODUCTION

Australian administrative lawyers aren't frequently called upon to address their minds to the issue of social justice. With the partial exception of the two jurisdictions which have statutory human rights protections,[2] and to the extent that administrative tribunals are able to reach the 'correct or preferable decision' on the merits within the constraints of legislation, the concept of justice has an almost entirely procedural meaning in administrative law. Furthermore, it is rarely thought of as having an overtly social component. In one of the most frequently quoted statements about the nature and limitations of judicial review, Brennan J said:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. *If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.* The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[3]

In some ways, to hold this view as being entire of itself is simplistic:[4] there is, for example, doubtless a social justice aspect to challenges run on behalf of asylum seekers, who have limited opportunities to challenge administrative action for themselves.[5] However, in broad terms, this is a restriction under which judicial review in Australia necessarily labours, due to the separation of powers and the procedural nature of the judicial remedies which are each entrenched in our Constitution.[6]

It is implicit in Brennan J's remarks in *Quin* that a court applying judicial review remedies must do no more than 'to say what the law is'.[7] Axiomatically, the remedies do not give a substantive result[8] to a successful applicant,



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... THERE IS, FOR EXAMPLE, DOUBTLESS A SOCIAL JUSTICE ASPECT TO CHALLENGES RUN ON BEHALF OF ASYLUM SEEKERS, WHO HAVE LIMITED OPPORTUNITIES TO CHALLENGE ADMINISTRATIVE ACTION FOR THEMSELVES.[5]

but in general merely a remedy which removes or prevents invalidity and clears the way for another decision to be made according to law. It is not possible under the current orthodoxy for a party to obtain a monetary remedy in public law litigation;[9] public law remedies are restricted to compelling the performance of an unperformed public duty (*mandamus*), quashing an invalid decision (*certiorari*), declaring the law (declaration) and preventing the commencement or continuation of an invalid (prohibition) or unlawful (injunction) action.

The ways in which an applicant is able to work around these public law limitations through private law mechanisms are few. I propose to examine three which can work and one which can't.

II TORT LIABILITY OF PUBLIC AUTHORITIES SOUNDING IN DAMAGES

Public authorities can be held liable in tort; this is an obvious statement, but misleadingly so. Traditionally, the English monarch was immune from suit but was able to consent to a suit being brought personally against the Crown.[10] Indeed, the monarch's consent was determined as a matter of law and not subject to regal whim and this was the origin of the maxim 'the King can do no wrong'. Over time, however, the original meaning was lost and a series of judgments through the 19th century[11] came to interpret the maxim as conferring immunity from suit on the monarch.[12]

The misapplication of the common law doctrine of Crown immunity was not redressed until well into the 20th century.[13] Australia had, however, removed the Crown's specially protected position by statute under a series of Australian *Crown Proceedings Acts*[14] from the 1850s.[15] The legislation required that suits between a private individual and the Crown be conducted on the 'same' basis as in suits between private individuals. Following Federation, this language was replicated at Commonwealth level with the result that the Commonwealth was 'in the same position as the colonies had been prior to Federation'.[16] The relevant provision of the *Judiciary Act* reads: 'in any suit to which the Commonwealth or a State is a party, the rights of parties shall *as nearly as possible* be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.'[17]

Most current Australian iterations of Crown proceedings legislation continue to qualify the proposition that governments are to be liable to subjects in tort in the same way as in any action between two subjects by stating that suits between individuals and government are to be conducted *'as nearly as possible'* on the same basis as between two individuals.[18] This qualification recognises implicitly that governments cannot be dealt with on *exactly* the 'same' basis as private individuals and that their responsibilities do make them different to individuals in some important senses. As Gleeson CJ noted in *Graham Barclay Oysters Pty Ltd v Ryan*, the qualification 'as nearly as possible' is an 'aspiration' that cannot be realised completely.[19]

The equality principle has generally been considered orthodox since it was expressed by AV Dicey, but is nonetheless subject to the reality described by Gleeson CJ, which affects the extent of governments' liability in tort.[20] As a result, where public authorities are held to a lesser standard than private individuals, it is now usually a matter dealt with legislatively in Australia.[21]

The real difficulties lie where there is an argument that public authorities should be held to some *greater* standard. Over the course of the last forty years,[22] courts have held that public authorities may in some circumstances have a common law duty to perform a positive act in order to prevent loss or damage to an individual. This is because public authorities, by their very nature, have a greater level of responsibility than a private actor in the same circumstances and *ought* sometimes to take

THERE IS NO PRIMA FACIE REASON WHY EQUITABLE REMEDIES SHOULD NOT BE AVAILABLE AGAINST PUBLIC AUTHORITIES BUT DIFFICULTIES ARISE BECAUSE PRIVATE LAW REMEDIES ARE INAPT TO CERTAIN FUNCTIONS OF GOVERNMENT.

positive action to exercise that responsibility. Mark Aronson has noted that:[23]

> the starting point in most cases involving government defendants is to ask why their status should entitle them to any special dispensation. In other words, the government's civil liability should be judged by the same standards that govern private sector defendants. It is commonplace, however, that people expect positive action from government that they would not demand of a private person or firm,[24] and some of the leading negligence cases have tried to turn that expectation into a common law duty.

In other words, there is more than one sense in which public authorities and private actors are not 'the same'. The legislative qualification that public and private actors shall be treated 'as nearly as possible … the same' is generally seen as recognising that the liability of public authorities may properly be less than that of private actors in some circumstances, due to the greater demands under which they operate. Crennan and Kiefel JJ commenced their analysis in *Stuart* with the converse proposition, that *more* might sometimes be expected of public authorities where they have a capacity to prevent harm which is not possessed by individuals.[25] This is, however, not a position that has yet found majority support in the High Court.

III EQUITABLE LIABILITY OF PUBLIC AUTHORITIES SOUNDING IN COMPENSATION

There is an interesting interaction between equity and administrative law, which is often overlooked.[26] In regard to equity's application to decision-making by public authorities, the issues are much the same as in regard to tort liability. There is no *prima facie* reason why equitable remedies should not be available against public authorities but difficulties arise because private law remedies are inapt to certain functions of government.

A prominent example is that there is no specific doctrine of public law estoppel,[27] and the development of any such doctrine in Australia is unlikely,[28] even if not wholly excluded.[29] While equity is capable of raising an estoppel to create a cause of action where an individual is misled to his or her detriment by a government entity,[30] the fact that public authorities are not truly the same as private individuals means that consideration must be given to the impact of enforcing a promise to an individual on the public at large. Public authorities 'cannot fetter the performance of their duties by contract or estoppel or, without statutory authority, bind themselves to perform them in a particular way'.[31] In this respect, the issues mirror those which limit the availability of liability in tort for the otherwise negligent acts of public authorities.

I have argued elsewhere there is need for an equitable remedy where an individual reasonably relies to his or her detriment on a representation (such as a soft law instrument) made by a public authority.[32] The fact that an estoppel raised in such circumstances cannot be enforced if the public authority would thereby be compelled to act *ultra vires* does not contradict this argument.[33] There is scope for equitable compensation to be paid even in circumstances where an estoppel has been raised but cannot be enforced, such as where the estoppel is raised by a public authority.

Others have argued that, given the scope to obtain damages for government misrepresentations in tort, there is no need to stretch equity to provide a monetary remedy.[34] There is, however, a difference between *extending* equity to provide a remedy hitherto unavailable and recognising a remedy known to equity but fallen into disuse, such as equitable compensation. Different remedies being available in equity and at law does not necessarily result in an anomaly requiring remedial action by the courts or legislature.[35] The facts that equitable compensation has fallen into disuse and has thereby created an anomaly because remedies of similar (but not identical) scope have become, relatively recently, available at law does not alter the desirability of that remedy to fill a legal lacuna. Renewing the recognition that equity has the capacity to award compensation for breach of an equitable duty would be a significant improvement to the state of the law.

IV RESTITUTION FROM PUBLIC AUTHORITIES FOR UNJUST ENRICHMENT

In the ground-breaking *Woolwich* litigation,[36] the House of Lords was asked to consider a situation in which the tax liabilities of building societies, in as much as they were affected by tax deductions and interest paid to members, were not covered by the applicable tax legislation but were rather the subject of non-statutory arrangements between the Revenue authority and individual building societies. The Revenue had power under legislation to change the mechanism by which it collected income tax on deposits into building societies, but this power was explicitly not to be used for the purpose of raising additional tax revenue. The Revenue issued soft law guidelines designed to indicate how it would exercise its powers. When implemented, these guidelines had the effect of collecting an amount of taxation in excess of that payable under the usual arrangements in order to prevent the building societies from receiving a windfall. The Woolwich Equitable Building Society concluded that the Revenue's proposed collection of tax would be *ultra vires* but that it would pay anyway, in order to dispel any belief in the marketplace that it could not, and would later attempt to recover from the Revenue both the sum paid[37] and interest on that sum.

Woolwich decided for the first time that 'an *ultra vires* exaction or demand by a public authority was itself a ground for restitution'.[38] The House of Lords, by a bare majority, adopted reasoning[39] that held in essence, because *ultra vires* demands are inconsistent with Article 4 of the *Bill of Rights 1688*,[40] they are therefore sufficient to create a public law ground for restitution, in a special category of its own. The extent to which the *Woolwich* principle applies in Australia is, however, yet to be resolved.[41]

As Williams has noted, the issue which arose in *Woolwich* had features which properly inhabited opposite sides of the 'Diceyan orthodoxy',[42] namely that the validity of the tax was a public law question[43] but the recovery of money paid to the Revenue as a result of an invalid tax was an issue for private law.[44] This ought not to be of undue concern in deciding whether to adopt Woolwich in Australia; after all, recovering tort damages from public authorities is commonplace. Furthermore, as Lord Goff pointed out in Woolwich, 'it is well established that, if the Crown pays money out of the consolidated fund without authority, such money is *ipso facto* recoverable',[45] under the *Auckland Harbour principle*.[46] Why then should the reverse not be true, allowing individuals to recover payments

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SOCIAL JUSTICE IS NOT WELL SERVED BY ADMINISTRATIVE LAW WHERE IT IS FOCUSED ON PROCEDURE RATHER THAN SUBSTANCE.

made to government pursuant to ultra vires demands?[47] His Lordship was compelled to conclude that the comparison between the position of the Crown and the position of the citizen 'on the law as it stands at present is most unattractive'.[48]

Even a passing familiarity with public law is enough to allow a person to conclude that the mere fact of an 'unattractively' disparate position of individuals *vis-à-vis* the Crown has never of itself been sufficient to cause the law to be changed;[49] and there are plenty of situations in which the government is treated preferentially to members of the public. Nonetheless, consider again the situation where money is paid to a revenue collection authority, which is acting *bona fide*, and where the payer does not believe that the money is payable but nonetheless pays it in order that others do not think it incapable of paying. This is not a situation which is caused by the Revenue's *misuse* of its power *per se* but by the very *fact* of that power. This reasoning has been adopted at the highest levels of the judiciary in a number of countries since *Woolwich*;[50] but it is yet to be examined by the High Court of Australia.[51]

V WHY THERE CAN BE NO CONTRACTUAL DAMAGES IN PUBLIC LAW

A contract is perhaps the quintessential private law arrangement,[52] and for that reason decisions made under contract are generally

unreviewable as a matter of administrative law.[53] When public authorities enter into contracts, they are not doing anything that a private party could not do.[54] Consequently, both at common law[55] and under statutory judicial review schemes,[56] a public authority's contractual dealings are considered to be entirely of a private law nature. While there is limited[57] scope for public law supervision of contractual relationships, they are generally beyond the reach of judicial review and are likely to remain so in the absence of statutory reforms.[58]

This is, of course, an imperfect approach to the issue of government contracting,[59] which presumes a bright line distinguishing 'public law' from 'private law'.[60] There is increasingly a recognition that the power held by public authorities as if on trust for the public cannot be wholly indifferent to the public interest even when contracting.[61] Private parties to contracts are, by contrast, able in general[62] to act with utter self-interest in exercising powers under the contract.[63] The suitability of that approach by public authorities must be open to question, just as it is not the case that public authorities are wholly absolved from going to the rescue of another party in need as private individuals are.

The reason why there will be resistance until the very end to judicial supervision of government contracting is that contracts are still seen as being entirely private. Compare this to the acceptance that public authorities and private individuals cannot be treated absolutely 'the same' in regard to tort liability, equitable liability or restitution for unjust enrichment.

VI CONCLUSION

Social justice is not well served by administrative law where it is focused on procedure rather than substance. Equally, private law provides limited and generally unsatisfying 'work arounds' where judicial review will not go. To the extent that merits review does not reach, social justice will only truly be served once there is extensive legislative or, less likely, judicial reform.

REFERENCES

1 * Faculty of Law, UNSW.

2 *Charter of Human Rights and Resposibilities Act* 2006 (Vic); Human Rights Act 2004 (ACT).

3 Attorney-General (NSW) v Quin (1990) 170 CLR 1,35–6 (Brennan J) (emphasis added) ('Quin').

4 Professor Aronson has politely doubted Brennan J's sincerity in this regard, noting that 'it was abundantly clear to every observer that his Honour was profoundly concerned to avoid 'administrative injustice'. Whilst he said that its avoidance was a mere by-product of the implementation of legislative will, it was nevertheless a by-product that his Honour's judgments happily produced with remarkable consistency': Mark Aronson, *'Process, Quality, and Variable Standards: Responding to an Agent Provocateur'* in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart, 2009) 5, 21 (original emphasis). See, eg, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*'The Malaysia Solution Case'*).

5 Cf Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1.

6 Marbury v Madison, (1803) 5 US 87, 111 (Marshall CJ).

7 While this remains true in Australia, the law in the UK has moved past this limitation in recent years; see, eg, *E v Secretary of State for the Home Department* [2004] 2 WLR 1351; *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330; *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] 3 QB 213.

8 See *Aerolineas Argentinas v Federal Airports Corporation* (1995) 63 FCR 100,112 (Beazley J); *Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637 ('Park v MIEA').

9 The procedural requirement for suing the Crown by name was therefore to bring a petition of right. If the Chancellor, having made inquiries as to the facts of the case, concluded that the plaintiff had a 'right' against the Crown in fact, the petition would be endorsed with the King's fiat, 'let right be done'. This process was ultimately simplified by the passage of the *Petitions of Right Act* 1860, 23 & 24 Vict, c 34. See *Mulcahy v Ministry of Defence* [1996] QB 732, 740 (Neill LJ).

10 See, eg, *Tobin v The Queen* (1864) 16 CB (NS) 310. Ultimately, petitions of right were used to enforce rights against the Crown for breach of contract: *Thomas v The Queen* (1874) LR 10 QB 31. However, while the procedural expedient of a petition of right allowed an individual to seek legal redress against the Crown, it was

held not to do so for torts committed by Crown servants: *Feather v The Queen* (1865) 6 B&S 257.

11 Louis L Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77 *Harvard Law Review* 1, 3–4 (footnotes omitted). See also Stephen Gageler, 'Administrative Law Judicial Remedies' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 368, 369.

12 In Australia, several respected sources had concurred with earlier authority that the understanding that the sovereign had a common law 'immunity' from suit is misconceived; see, eg, *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358, 365 (Griffith CJ) ('SHTC v Ryan'). The issue was ultimately settled in Mewett, where it was held that the immunity was procedural rather than substantive: *Commonwealth v Mewett* (1997) 191 CLR 471, 502 (Dawson J); 513 (Toohey J); 532 (McHugh J); 550–1 (Gummow & Kirby JJ).

13 The current state and territory legislation is: *Crown Proceedings Act* 1993 (NT); *Crown Proceedings Act* 1993 (Tas); Crown Proceedings Act 1992 (SA); Crown Proceedings Act 1992 (ACT); *Crown Proceedings Act* 1988 (NSW); *Crown Proceedings Act* 1980 (Qld); *Crown Proceedings Act 1958* (Vic); Crown Suits Act 1947 (WA).

14 The first *Crown Proceedings Act* was passed in South Australia in 1853, followed by New South Wales and Queensland. For a brief overview of this early legislation, see Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 44; Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Australian Bar Review* 215, 217–19; Nick Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245, 257.

15 *Baume v Commonwealth* (1906) 4 CLR 97; Leeming, above n 14, 221.

16 *Judiciary Act 1903* (Cth) s 64 (emphasis added).

17 This form of words is not precisely consistent across every Australian jurisdiction; the New South Wales, Queensland and Victorian legislation each uses the words 'as nearly as possible', as does s 64 of the *Judiciary Act* 1903 (Cth), but these qualifying words are not found in the relevant sections of the legislation in the other Australian jurisdictions. However, the effect of the respective sections is the same in each jurisdiction regardless of whether the same formulation of words is used because the 'qualification flows not from statute but from substantive principles of the common law': Aronson, above n 14, 45.

18 (2002) 211 CLR 540, 556 (*'Graham Barclay Oysters'*). His Honour was discussing the New South Wales legislation: *Crown Proceedings Act* 1988 (NSW) s 5.

19 Ibid 556 (Gleeson CJ).

20 See, eg, *Civil Liability Act* 2002 (NSW) Pt 5.

21 Since *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 and, particularly, *Anns v Merton Borough Council* [1978] AC 728 (*'Anns'*).

22 Aronson, above n 14, 68 (original footnote). See also *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 259 [129] (Crennan & Kiefel JJ).

23 See, eg, *Graham Barclay Oysters* (2002) 211 CLR 540, 553 (Gleeson CJ).

24 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 257 [123] (Crennan & Kiefel JJ).

25 See JJ Spigelman, 'The Equitable Origins of the Improper Purpose Ground' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, 2008) 147.

26 *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J).

27 The public law equivalent, the doctrine of substantive legitimate expectations, has been forcefully rejected by the High Court in Re *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

28 *Quin* (1990) 170 CLR 1 (Mason CJ); *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 (Gummow J) ('Kurtovic').

29 *Commonwealth v Verwayen* (1990) 170 CLR 394. As with liability in tort, this occurs on the same basis as an estoppel against any other party, subject to some additional considerations peculiar to public authorities: Kurtovic (1990) 21 FCR 193, 208 (Gummow J).

30 KR Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2006) 22 (citation omitted).

31 See Greg Weeks, 'Estoppel and Public Authorities: Examining the Case for an Equitable Remedy' (2010) 4 *Journal of Equity* 247.

32 Handley, above n 29, 22–3; *Kurtovic* (1990) 21 FCR 193, 211–16.

33 'Common law developments in negligence have substantially replaced the need for a revival of [equitable] compensation': Ian E Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 349, 350.

34 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 404 (Heydon JA).

35 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 ('Woolwich').

36 In *Woolwich*, this was almost £57 million.

37 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 498.

38 Developed in Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, revised ed, 1989) 294–9; Peter Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' in PD Finn (ed), *Essays on Restitution* (Law Book, 1990) 164, 165.

39 'That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is Illegal': *Bill of Rights* 1688 (UK) Art 4. This was described as a 'fundamental principle of public law' in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 69 (Mason CJ).

40 See Keith Mason, JW Carter and Greg Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis, 2nd ed, 2008) Ch 20; Tania Voon, 'Restitution from Government in Australia: Woolwich and its Necessary Boundaries' (1998) 9 Public Law Review 15; Derek Wong, 'The High Court and the Woolwich Principle: Adoption or Another Bullet that Cannot be Bitten?' (2011) 85 *Australian Law Journal* 597. Cf the pessimism in Burrows, above n 36, 35–43.

41 Rebecca Williams, *Unjust Enrichment and Public Law: a Comparative Study of England, France and the EU* (Hart, 2010) 21. The die-hard Diceyan may respond that *Woolwich* treated the government party equally by aligning the law with *Auckland Harbour Board v The Queen* [1924] AC 318, (*'Auckland Harbour'*). Cf Burrows' claim (articulated prior to Woolwich) that 'the ultra vires theory contradicts … the whole Diceyan tradition of English law whereby the law of obligations is basically applied equally to all defendants': Andrew Burrows, 'Public Authorities, Ultra Vires and Restitution' in AS Burrows (ed), *Essays on the Law of Restitution* (1991) 39, 62.

42 Decided ultimately in *R v Inland Revenue Commissioners; Ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400.

43 Williams, above n 40, 16.

44 *Woolwich* [1993] AC 70, 177 (Lord Goff of Chieveley).

45 *Auckland Harbour* [1924] AC 318. See Williams, above n 40, 56 ff.

46 See Voon, above n 39, 18.

47 *Woolwich* [1993] AC 70, 177 (Lord Goff of Chieveley).

48 Indeed, even within private law, there is nothing iniquitous about an imbalance of power unless it is taken advantage of in an unconscientious fashion. See, eg, *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. Cf Burrows, above n 36, 306–7.

49 See, eg, *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3.

50 Cf *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

51 Compare this to the recent misstatement I made (provoking some hilarity) to a class of administrative law students that 'a contract is the most private arrangement that two parties can have'. It seems that they were able to think of at least one arrangement more private.

52 See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) 146; *Griffith University v Tang* (2005) 221 CLR 99 ('Tang').

53 *New South Wales v Bardolph* (1934) 52 CLR 455.

54 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164 (*'General Newspapers'*).

55 *Tang* (2005) 221 CLR 99.

56 See, eg, *Ombudsman Act* 1976 (Cth) ss 3(4B), 3BA.

57 Matthew Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 *Public Law Review* 3.

58 See Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) Ch 8.

59 Cf Carol Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 *Modern Law Review* 241.

60 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 290 [27] (Gleeson CJ).

61 Cf *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

62 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64 [11] (Gleeson CJ).

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