REFLECTIONS ON THE CURRENT OPERATION OF THE ADJR ACT

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1 INTRODUCTION

There are five recent decisions of the High Court of Australia, four of which were given in matters which had arisen under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the Act"), and all of which have a significance for the operation of the Act, as well as for public law generally. They are *Park Oh Ho v Minister for Immigration and Ethnic Affairs*,[1] *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*,[2] *Attorney-General (NSW) v Quin*,[3] *Haoucher v Minister for Immigration and Ethnic Affairs*[4] and *Australian Broadcasting Tribunal v Bond*.[5] The primary concern of this paper is to consider some aspects of their significance for the operation of the Act.

2 THE ACT AND THE GENERAL LAW

I turn first to the relationship between the Act and the general body of "administrative law", including within that term both the relief available under s 75(v) of the Constitution and s 39B of the Judiciary Act 1903 (Cth), and the administrative law of the States which is largely based in common law and equitable remedies.

The Act, particularly in its provisions dealing with conduct relating to the making of decisions, with the provision of written reasons for decisions, and with the range of remedies available to the Court, travelled well beyond the pre-existing general law. And it was, with the Administrative Appeals Tribunal Act 1975 (Cth) ("the AAT Act"), part of a legislative scheme dealing both with judicial review and with administrative review on the merits. This has not always been fully appreciated.

What of *locus standi* for judicial review? The rules as to standing in respect of the prerogative writs and as to equitable relief were by no means uniform, although by 1977 there was discernible a measure of broad agreement as to *locus standi* in public law both for legal and equitable remedies.[6] The terms "persons aggrieved" and "person interested" as they are used in the Act have been

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* A Judge of the Federal Court of Australia. Revised version of an address at the Conference: "Ten Years of the Federal Administrative Decisions (Judicial Review) Act" in September 1990.

1 (1989) 167 CLR 637.

2 (1989) 169 CLR 379.

3 (1990) 170 CLR 1.

4 (1990) 169 CLR 648.

5 (1990) 170 CLR 321.

6 *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124, 131-133 *per* Gummow J.

construed at least as generously as that broad agreement at general law would suggest.[7]

In *Park Oh Ho*,[8] the High Court re-emphasised that both declaratory and injunctive orders, as distinct from an order for damages, are appropriate remedies of judicial review. The power in s 16(1)(c) of the Act for the Court to declare the rights of the parties in respect of any matter to which the decision relates was given a reading which means that it is not to be constricted by undue technicality. A declaration was made which decided as between the appellants and the Minister that their detention during a particular period was unlawful; the declaration did not decide whether the responsibility for that unlawful detention lay with the Minister. The effect of the declaration was of significance for other proceedings the appellants had instituted against the Minister in a State court claiming damages in tort, for false imprisonment. The High Court did not have occasion to consider the limitation (if any) placed upon the jurisdiction of the State court in the tort proceedings, by s 9 of the Act.

The Act has certain limitations when compared with the general law. Certainly the Act, particularly in ss 5 and 6, imports fundamental general law concepts such as the rules of natural justice, want of jurisdiction and error of law (which need not appear on the record of the decision). But the general law, of course, is not static. Is the Act to be read in an ambulatory fashion so as to accommodate decisions which modify the general law from time to time? We know that the reverse process is not favoured in this country, and that one should not readily go beyond the terms of a statute to derive some principle to be applied by way of analogy in fashioning the common law.[9] The reasoning in *Australian Broadcasting Tribunal v Bond*[10] provides strong support for the view that a concept such as "error of law", as used in s 5 of the Act, has the same content as it had in the common law in Australia before 1977 and is not to be treated as shifting its meaning to accommodate post-1977 decisions upon the general law. (But the Court appears to have left open the question whether the ground of review in s 5(1)(j) of the Act "otherwise contrary to law", was to be read with the same limitation.[11])

The result in a given case in which (as happens not infrequently in the Federal Court) reliance is placed on both the Act and s 39B, for what in substance is the same complaint, namely alleged "error of law", may be that the plaintiff fails under the Act but succeeds under s 39B. For it has not been suggested that the remedies referred to in s 39B and s 75(v) of the Constitution are identified solely by the case law in England and the colonies in 1900. May not the result in such a case be that the Act fails in its purpose of providing a convenient and effective means of redress to persons aggrieved by federal administrative decision-making processes?

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7 *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 526-530.

8 *Supra* n 1, 645.

9 *Lamb v Cotogno* (1987) 164 CLR 1, 10-12.

10 *Supra* n 5, 357-358.

11 *Ibid* 355.

Further, the pivotal concept in the Act of a "decision to which this Act applies" is narrower than what may be involved in a "matter" in the sense of the entrenched jurisdiction in s 75(v) of the Constitution. The "decision" must both be of "an administrative character" and made "under an enactment". But s 75(v) applies, for example, to judges of federal courts other than the High Court, to at least some activities of delegated law making by officers of the Commonwealth,[12] and to the exercise of some prerogative powers.[13]

The decision in *Bond*[14] imposes a significant restriction on the reasoning in *Lamb v Moss*.[15] But may declaratory or injunctive relief nevertheless still be available under s 39B even though particular steps taken by a decision maker may not have amounted to a "decision" so as to attract review under s 5 of the Act and relief of an injunctive or declaratory nature under s 16? Declaratory relief is not confined to complaints in respect of ultimate decisions, as the Chief Justice pointed out in *Bond*.[16] A recent example of a declaration being made in such circumstances is provided by the orders made by the High Court in *Balog v Independent Commission Against Corruption*;[17] the High Court declared that the respondent was not entitled to include certain statements in a report it might make upon a particular investigation conducted by it under its State statutory powers.[18]

3 FACT AND LAW

Next, as to mistakes or errors of fact and law. The distinction between questions of fact and law (not to mention so called "mixed fact and law") is difficult, elusive and important. But as the Chief Justice stressed in *Bond*, the terms in which the Act and the AAT Act are expressed draw a sharp distinction between errors of fact and errors of law.[19] In a recent work,[20] Mr Detmold describes as "full of confusion" the received view that where the expression or term under which primary facts are to be subsumed is an expression or term of ordinary language, the subsumption is a matter of fact; he goes on to provide forceful reasoning for his opinion. Of course, as the learned author points out, the conflicting proposition, that where the ultimate fact in issue involves a term used in a statute there is presented a question of law in deciding whether the primary facts establish that ultimate fact, has a tendency greatly to increase the scope of judicial review.

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12 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 633-637 *per* Gummow J.

13 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1986-87) 13 FCR 19, 41 *per* Beaumont J; on appeal (1986-87) 15 FCR 274, 277-278 *per* Bowen J, 280-281 *per* Sheppard J, 302-304 *per* Wilcox J.

14 *Supra* n 5.

15 (1983) 76 FLR 296.

16 *Supra* n 5, 336.

17 (1990) 169 CLR 625, 637.

18 See also *Tam v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 87 ALR 373, 378.

19 *Supra* n 5, 340-341.

20 M J Detmold, *Courts and Administrators: A Study in Jurisprudence* (1989) 66.

In this regard, decisions such as *Edwards v Bairstow*[21] have helped to foster the notion that tribunals and other decision makers are to be seen as first directing themselves on the law, as a judge would a jury, then deciding factual issues, as would a jury. Along with Mr Detmold,[22] one may wonder as to the utility of that analogy as a basis for preserving from curial review the "jury" findings of the decision maker, provided neither constitutional nor jurisdictional facts are in issue.

The point is illustrated in a number of "appeals" to the Federal Court from the Administrative Appeals Tribunal ("the AAT"). The statutory requirement (in s 44 of the AAT Act) limiting the content of the "matter" with which the Federal Court is invested with jurisdiction to "a question of law", produces unsatisfactory disputation in the opening submissions of counsel as to the presence or absence of a question of law, as distinguished from a merely factual dispute. This is particularly so in income tax "appeals".

However, the very fact that the AAT can provide a review on the merits under the AAT Act was a significant element in the reasoning in *Bond*.[23] The High Court declined to follow recent English judgments which indicated a readiness to find "error of law" where fact finding by administrative tribunals had apparently gone awry. Although the position in the United States was not discussed in the judgments, it would appear that the reasoning in the High Court may well also be adverse to the "substantial evidence" doctrine as understood since *Consolidated Edison Co v National Labor Relations Board*.[24] The statute establishing the National Labor Relations Board provided that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive". The Supreme Court held that this required substantial evidence, more than a mere scintilla or mere uncorroborated hearsay or rumour, and that what the legislation stipulated was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".[25]

The Act provides review of decisions on grounds, separately expressed, of "error of law" and "no evidence". *Bond* is particularly significant for the method of statutory interpretation adopted, whereby each of the particular heads of review in s 5(1) is to be construed by reference to the others and not as being free-standing.[26] The result was that "error of law" in s 5(1)(f) embraced the "no evidence" ground as understood in Australia before 1977, and the "no evidence" ground in s 5(1)(h) expands that concept, but only to the limited extent of cases covered by s 5(3)(a) and (b). But, in any event, if the particular

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21 [1956] AC 14.

22 *Supra* n 19, 71.

23 *Supra* n 5, 328, 340-341 *per* Mason CJ.

24 305 US 197, 229-230 (1938).

25 The English and United States decisions are usefully discussed in J Beatson, "The Scope of Judicial Review for Error of Law" (1984) 4 Oxf J Leg Stud 22, 39-45, and in J Beatson and M H Matthews, *Administrative Law: Cases and Materials*, (2nd ed 1989) 125; see also C T Emery and B Smythe, "Error of Law in Administrative Law" (1984) 100 LQR 612, 617-636; R J Pierce, S A Shapiro and P R Verkuil, *Administrative Law and Process* (1985) §7.3. New Zealand has followed the English developments: *Daganayasi v Minister for Immigration* [1980] 2 NZLR 130, 145-149 *per* Cooke J, and in *Auckland City Council v Minister for Transport* [1990] 1 NZLR 264, 293 *per* Cooke J.

26 *Supra* n 5, 357-358 *per* Mason CJ.

fact finding does not amount to a "decision" in the statutory sense, it is beyond independent review under the Act; the result is that ordinarily a finding of fact will not be susceptible to review under the Act independently of the ultimate decision. But, as Deane J emphasises in his concurring judgment in *Bond*,[27] the requirements of procedural fairness may in a given case have a significant impact upon the fact finding process in which the decision maker is engaged. As the topics dealt with at this Conference illustrate, the range of decision making is enormous. It is not unusual to encounter statutory tribunals charged with fact finding in respect of complex questions as to very valuable rights or serious liabilities. And in considering the significance for such cases of requirements of procedural fairness one also has to bear in mind, as Dixon J pointed out in *King Gee Clothing Company Pty Ltd v Commonwealth*, that our Constitution contains no due process clause.[28] Action by an administrative agency in the United States may affect interests protected by that clause, so that it is for the federal courts to determine the minimum procedural safeguards the agency must supply.[29]

4 WEDNESBURY UNREASONABLENESS

As I have mentioned, alleged factual error may be relied upon in support of at least two grounds of review in s 5(1) of the Act, those dealing with "error of law" and "no evidence". In *Bond*, Mason CJ said that "a finding of fact will then be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts, which amounts to the same thing".[30] In *Nuchapohn Detsongjarus v Minister for Immigration, Local Government and Ethnic Affairs*, Pincus J treated the phrase "not reasonably open" as equivalent to "unreasonable" in the *Wednesbury* sense.[31] His Honour also analysed the reasoning of McHugh J in *Chan*,[32] as involving the application of the *Wednesbury* test not to the ultimate decision as a whole, but to a factual element in the reasoning of the decision maker.

Thus there is now coming before the courts the question of the relationship between decisions in which apparently flawed fact finding does not warrant review for error of law, but the result nevertheless is said to be bad for *Wednesbury* unreasonableness. It should first be said that the so called *Wednesbury* doctrine is in some respects obscure and, in Australia, has only received scholarly analysis by Allars.[33]

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27 *Ibid* 366-368. Deane J had spoken to similar effect in the Federal Court in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 689-690.

28 (1945) 71 CLR 184, 195. The relationship between "due process", as understood in the United States, and the rules of natural justice, as understood in Australia, was emphasised by Deane J in *Pochi, supra* n 27, 687-688.

29 Pierce *et al, supra* n 25, 6.3.

30 *Supra* n 5, 359-360.

31 Supreme Court of the Australian Capital Territory, 19 September 1990, unreported decision of Pincus J.

32 *Supra* n 2.

33 M Allars, *Introduction to Australian Administrative Law* (1990) [5.50]-[5.60].

In truth, as the High Court cases beginning with *Widgee Shire Council v Bonney*[34] indicate, there was much authority, from a time before Lord Greene MR spoke in 1948, on the question of whether delegated legislation was so oppressive or capricious in its operation that no reasonable mind could justify it, in which case there was said to have been no real exercise of the delegated law making power.[35] More recently, in *South Australia v Tanner*, the parties accepted as a test of validity the criterion of whether the regulation is capable of being considered as reasonably proportionate to the pursuit of the enabling purpose.[36] This has an affinity to what has been said in dealing with the external affairs power.[37] English law does not include such a distinct principle.[38] It may be but a particular manifestation of *Wednesbury* unreasonableness.[39]

However, before *Chan* the *Wednesbury* doctrine was properly seen as concerned with the exercise of discretionary powers where there was, under the law in question, a range of reasonable decisions available to the decision maker in a given set of circumstances.[40] Had there been an abuse of power in the exercise of the discretion? That was the issue.

It may be that this is how *Wednesbury* is still to be understood.[41] Yet *Chan* was concerned not with the exercise of discretion, but with the question of whether there had been satisfied a condition (as to whether the appellant was a "refugee" within a statutory meaning) upon which depended the exercise of a discretion. That suggests a question of law or of "mixed law and fact". But on its face the case was decided in the appellant's favour on *Wednesbury* grounds, and both before the Federal Court and the High Court the appellant appears not to have relied on alleged error of law. (Nevertheless, the ground of review in *Chan* was described by Mason CJ in *Bond* as error of law.[42]) If a decision of this character, with such a heavily factual content, is to be classified as unreasonable, is there a disharmony with the treatment of fact finding in relation to review for error of law in *Bond*? That is a question for the future.[43]

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34 (1907) 4 CLR 977.

35 *Carter v The Egg and Egg Pulp Marketing Board for the State of Victoria* (1942) 66 CLR 557, 576-577 *per* Latham CJ, 584-585 *per* Starke J, 591-593 *per* McTiernan J and 599-600 *per* Williams J; *Foley v Padley* (1984) 154 CLR 349, 353 *per* Gibbs CJ and 375 *per* Dawson J.

36 (1989) 166 CLR 161, 165.

37 *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1, 260 *per* Deane J.

38 *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720.

39 *R v Secretary of State for Transport; ex parte Pegasus Holidays (London) Ltd* [1989] 2 All ER 481, 490 *per* Schiemann J.

40 See *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, 249 *per* Lord Scarman, 252 *per* Lord Bridge; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1064 *per* Lord Diplock; *Note* (1990) 64 ALJ 95; and compare *R v Governor of Pentonville Prison; ex parte Osman* [1989] 3 All ER 701, 722-723 *per* Lloyd LJ.

41 *Quin, supra* n 3, 36-37 *per* Brennan J.

42 *Supra* n 5, 343.

43 C T Emery and B Smythe adumbrated it to some extent in their article, *supra* n 25, 638.

There is a line of authority in the New South Wales Court of Appeal, dealing with decisions of tribunals and inferior courts, in which it has been held that perverse or unreasonable findings of fact do not attract certiorari and do not give rise to any "point of law" within the meaning of State statutory provisions for judicial review, unless the findings relate to the application of a statutory description and are thus "ultimate" findings of fact.[44] It remains to be seen how far the public law of the States, exemplified by these decisions, will develop in response to recent authorities upon federal administrative law.

I have already referred to the judgment of Deane J in *Bond*. In framing incidents of the obligation to extend procedural fairness, his Honour included the *Wednesbury* principles.[45] This is a matter of some importance. Looked at in this way, *Wednesbury* is taken beyond the exercise of discretion, but in a manner which avoids difficulties that to some minds follow from reviewing unreasonable fact finding processes as errors of law. In that passage, Deane J also said that a duty to act in accordance with the requirements of procedural fairness arguably requires a minimum degree of "proportionality".

5 THE CONSTITUTION AND JUDICIAL REVIEW

The judgment of Deane J is important also for its emphasis[46] on the potential confusion between an obligation to act judicially, in accordance with the well worn judgment of Atkin LJ in *The King v Electricity Commissioners*[47] and, for Australians, the well understood notion of the exercise of the judicial power of the Commonwealth.

It is important to appreciate, though I fear it has not been sufficiently stressed in the past in the teaching of public law, that our federal administrative law exists in a setting fundamentally different from that in the United Kingdom. Speaking of the complexities involved in the *Anisminic* case,[48] Sir William Wade has said:

> At a time when the [English] courts are mobilising all their resources for controlling governmental power it is unlikely that they will discard the principles which have served them well for centuries. Their addiction to the technicalities of jurisdictional review is not a mere aberration. It is the consequence of their constitutional position *vis à vis* a sovereign legislature: only by showing that they are obeying its commands can they justify their interventions. By one means or another, therefore, the doctrine of ultra vires must be stretched to cover the case. The courts of the United States, with their entrenched constitutional status, can afford to dispense with these subtleties. The position of British judges is fundamentally different.[49]

Thus (as is particularly illustrated in Australia by the number of cases dealing with prohibition in respect of conciliation and arbitration tribunals) jurisdictional facts may also be constitutional facts, so that the constitutional

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44 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139; *Mahony v Industrial Registrar of New South Wales* (1986) 8 NSWLR 1; *Haines v Leves* (1987) 8 NSWLR 442.

45 *Supra* n 5, 367.

46 *Ibid* at 365-366.

47 [1924] 1 KB 171, 205.

48 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

49 W Wade, *Administrative Law* (6th ed 1988) 298-299.

doctrine of judicial review will override the operation of privative clauses. Further, the original jurisdiction of the High Court in respect of prohibition and injunction against officers of the Commonwealth, entrenched by s 75(v) of the Constitution, cannot be ousted by privative clauses.

Australian authority indicates that in some circumstances a law may effectively operate to validate a decision of a tribunal up to the boundary of constitutionally permissible decisions. A question then arises as to the relationship between those principles and the *Anisminic* principles laid down by the House of Lords in relation to the legislation of, as Sir William Wade points out, an absolutely sovereign Parliament. (However, that last proposition now itself requires re-examination in the light of the impact in Britain of European Community law.) These matters divided the Full Court of the Federal Court in *O'Toole v Charles David Pty Ltd*.[50]

In *In re Rees* Lord Mackay of Clashfern used the expression "abuse of process" in relation to the initiation by the executive of new proceedings under extradition legislation, after the release of the fugitive in question.[51] Where the proceedings are under Commonwealth law but do not involve the exercise of the judicial power of the Commonwealth and are administrative in character, it may be an inapt use of language and of legal concepts to characterise them as an abuse of process.[52] This is not to deny that in a given case, repetitious administrative procedures purportedly engaged in pursuant to a discretion reposed in the administrator by Commonwealth law may attract judicial review under another head.[53]

Finally, in relation to the different constitutional setting of Australian administrative law, it is trite but important to appreciate (i) that the entrenched jurisdiction of the High Court in respect of mandamus, prohibition and injunction does not extend to certiorari, a circumstance which has given rise to considerable difficulty in a number of decisions, and (ii) that the judges of federal courts, other than the High Court, are "officers of the Commonwealth" for the purposes of s 75(v) of the Constitution, even though the federal court in question may have been created by the Parliament as a superior court of record. That circumstance also has given rise to various difficulties.[54]

Thus, there is a dimension to federal administrative law which is lacking in England. This further emphasises the need in the future to consider with caution developments in the English case law.

6 ENGLISH AND AUSTRALIAN AUTHORITY

Some divergence between the English and Australian case law is apparent with regard to the meaning of "legitimate expectation" and the operation of the

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50 (1989) 90 ALR 112. The subject was not dealt with in the High Court's consideration of the case (1991) 171 CLR 232.

51 [1986] AC 937, 962.

52 *Wiest v Director of Public Prosecutions* (1988) 86 ALR 464, 466-467 *per* Sheppard J, 469-470 *per* Burchett J, 510-511 *per* Gummow J.

53 *Zoeller v Attorney-General for the Commonwealth* (1987) 16 FCR 153, 161-162 *per* Beaumont J.

54 *Eg The Queen v The Judges of the Federal Court of Australia; ex parte Pilkington ACI (Operations) Pty Limited* (1978) 142 CLR 113.

principles of estoppel in administrative law. The point is made by a consideration of the High Court decisions in *Haoucher*[55] and *Quin*.[56] It had been suggested in England that legitimate expectations were entitled to substantive protection.[57] This would mean that when the expectation created was not that a proper hearing would be given but that the decision maker would decide the case favourably or grant a benefit sought by the applicant, the courts would ensure that the expectation was fulfilled by the decision maker. Some support for that argument was provided by *The Queen v Secretary of State for the Home Department; ex parte Khan*,[58] and by *The Queen v Secretary of State for the Home Department; ex parte Ruddock*.[59] That English view was received with disfavour by the High Court in *Quin*[60] and in *Haoucher*.[61]

The traditional view in the United States has been that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit".[62] In a particular case, a decision maker may be disabled from making a second decision by which he resiles from the first decision, not because he is estopped, but because the power in question is spent by the making of the first decision. Further, in other cases, the legislation may permit the decision maker to waive procedural requirements or observance of requirements which are directory rather than mandatory, with the result that, if strict observance is later insisted upon, there is then no call for the application of principles of estoppel. However, in an oft repeated passage in *Robertson v Minister of Pensions*, Denning J (as he was then) said that:

> The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded.[63]

Nevertheless, in *Quin*, Mason CJ referred to a body of authority for the proposition that the executive cannot by representation or promise disable itself from or hinder itself in performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power. His Honour added that one could not exclude the possibility that the Court might in some situations grant relief, on the basis that a refusal to hold the executive to a representation by means of estoppel would occasion greater harm to the public interest (by causing injustice to the individual) than any detriment

55 *Supra* n 4.

56 *Supra* n 3.

57 Forsyth "The Provenance and Protection of Legitimate Expectations" (1988) 47 CLJ 238; J Beatson and M H Matthews, *supra* n 25, 235.

58 [1984] 1 WLR 1337.

59 [1987] 1 WLR 1482.

60 *Supra* n 3, 22-23 *per* Mason CJ, 39-40 *per* Brennan J, 53-54 *per* Dawson J and 66-67 *per* Toohey J.

61 *Supra* n 4, 652 *per* Deane J, 659 *per* Dawson J, 669-670 *per* Toohey J and 681-682 per McHugh J.

62 *Utah Power & Light Company v United States* 243 US 389, 409 (1917) *cf Heckler v Community Health Services of Crawford County Inc* 467 US 51, 60 (1984).

63 [1949] 1 KB 227, 231.

to that interest that would arise from holding the executive to its representation and thus narrowing the exercise of its discretion.[64]

However, in *Haoucher*, McHugh J said that whilst in cases which do not involve the exercise of statutory discretions or duties, a Minister may be estopped from denying a fact or promise, he cannot impair the exercise of a discretion by a representation as to the exercise of it in a particular way or at a particular time, any more than a Minister may bind the Crown by contract not to exercise a discretion in a particular way.[65]

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64 *Supra* n 3, 17.
65 *Supra* n 4, 678.