PUBLIC TRUSTS, PUBLIC FIDUCIARIES

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In 1995 I wrote a short piece entitled 'The Forgotten "Trust": The People and the State'.[1] Its premise was the simple proposition that the most fundamental of fiduciary relationships in our society is that which exists between the State (and its officers and agencies) and the community (the people). I do not intend here to revisit the justifications for that proposition. My primary concern when I wrote was with two quite different legal manifestations of that proposition. The first was its use in informing and justifying the imposition of legally enforceable standards of conduct on public officers and agencies. The second was how trust and fiduciary ideas have been, and could be, invoked to circumscribe and channel the exercise of public power for the benefit or protection of the public or a section of it. It is the second — and much more problematic — of these that I wish to revisit in this article. I do so not simply to satisfy Leslie Zines that I have reconsidered a 'heresy' into which he believed I was misguidedly lured.

I begin with the commonplace observation that we live in the age of statutes and of government under statutes. It is in this statutory domain — a complex and burgeoning one — that the issues of channelling and controlling the exercise of public power now characteristically arise. It is this which explains the focus upon statutory interpretation and judicial review in what follows.

It needs to be acknowledged at the outset that there clearly are circumstances in which the Crown, or a public agency can be so circumstanced relative to particular property or to particular persons (almost invariably today as a consequence of a relationship created by or under statute)[2] as properly to require that it be characterised as a trustee of that property,[3] or as in a fiduciary relationship with those persons.[4] I will suggest though that at least in statutory settings we should be slow to embrace expansively principles drawn from the law of trusts and from fiduciary law so as to channel and control official decision making. My reasons for taking this view are

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1 Paul Finn, 'The Forgotten "Trust": The People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (1995) ch 5.

2 Cf *Aboriginal Development Commission v Treka Aboriginal Arts and Crafts Ltd* (1984) 3 NSWLR 502 where no trust was found.

3 See, eg, *Registrar of the Accident Compensation Tribunal v Commissioner of Taxation (Cth)* (1993) 178 CLR 145; cf *Authorson v Attorney-General (Canada)* (2002) 215 DLR (4th) 496 which the relationship found was properly characterised as fiduciary only, in the circumstances; see also *Swain v Law Society* [1983] 1 AC 598.

4 See, eg, *Cubillo v Commonwealth* (2001) 112 FCR 455, [460].

threefold. First, I consider that our principles of statutory construction are now sufficiently robust, our principles of judicial review sufficiently adaptable, to render resort to trust and fiduciary law for grounds of review largely unnecessary. Second, those latter grounds of review can in quite obvious ways necessitate judicial usurpation of official decision making in settings where judicial competence and legitimacy to decide is almost certainly lacking. Third, contrary to my intimations in 'The Forgotten Trust', I consider it unlikely that the characterisation of the State as a trustee of its powers of government for the people — a trust founded upon the proposition that 'the powers of government belong to, and are derived from … the people'[5] — will provide workable criteria upon which to found judicial review of official decision making, save perhaps in bleak, almost unthinkable circumstances.[6] It is too abstract for everyday use. This said, I do not resile from the view that that characterisation is fundamental to an understanding of the *contemporary* legitimacy and authority of our constitutional arrangements.[7] It embodies what should now be acknowledged as a 'fundamental [principle] of [our] common law'.[8]

Before enlarging upon this I should, for contextual reasons, begin with a brief comment on the imposition of standards of conduct on public officials.

1 IMPOSING STANDARDS OF CONDUCT

Though this function of the common law has clear medieval antecedents,[9] it is sufficient to commence note of it after the tumultuous constitutional events of 17th century in England. The medieval 'King's officer' had by then become the 'public officer'. Public offices were perceived to be ones of 'public trust and confidence',[10] and in time came to be defined by reference to the 'public's interest' in their exercise, hence the accepted modern definition that '[a] public officer is an officer who discharges any duty in the discharge of which the public are interested'.[11] By the end of the 18th century there was a large and well developed body of primarily common law doctrine

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5 *Nationwide News Pty Ltd v Wells* (1992) 177 CLR 1, 72 (Deane and Toohey JJ). See also Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government* (1995) vol 1, 1; popular sovereignty, a powerful fiction, can be regarded as a vehicle for sustaining the government of the many by the few: see generally Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988); see also Edmund Morgan, *American Heroes: Profiles of Men and Women Who Shaped Early America* (2009) ch 15.

6 Finn, 'The Forgotten "Trust": The People and the State', above n 1, 141.

7 See Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138; Harley Wright, 'Sovereignty of the People — the New Constitutional Grundnorm?' (1998) 26 *Federal Law Review* 165. I am aware that the proposition I have stated is not uncontentious: see George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1.

8 *Saeed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507, [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

9 See, eg, the extortion provisions of the *Statute of Westminster The First 1275*, 3 Edw 1, c 5, which influence the common law to this day; see, eg, James Lindgren, 'The Elusive Distinction between Bribery and Extortion: From the Common Law to the Hobbs Act' (1987–1988) 35 *University of California at Los Angeles Law Review* 815.

10 *R v Bembridge* (1783) 22 State Tr 1, 155–6.

11 *R v Whitaker* [1914] 3 KB 1283, 1296.

(both criminal and civil) applying to public officials *because they were public officials*. It regulated the use and exercise by officials of their 'several trusts'.[12] The reason and need for it were obvious enough. Put shortly, the powers and authorities possessed by virtue of office were not given for the officer's own benefit. Rather they were held so as to serve public purposes hence the 'public's concern', or 'interest', in the execution of such an office and the corresponding expectation of an official's integrity, diligence and good faith.[13]

The substantive personal liabilities imposed on officials reflected the peculiarity of their position in the governmental order. The common law recognised that official conduct could affect two distinct interests: the one being that of the system of public governance itself, the efficacy and credibility of which depended upon the proper discharge of official functions; the other, that of the individual member(s) of the community, the object(s) of official action or decision. For centuries the law accommodated the demands of both interests in a dual system of accountability — a system which rendered an official responsible, first, to the King for the polity[14] (primarily through the criminal law),[15] and second, to the aggrieved citizen (primarily in tort).[16]

The maturing of the prerogative writ system of judicial review blurred the dualism of this system, the writs within their separate provinces safeguarding the respective interests both of the Crown (and the public) and of the aggrieved citizen. Judicial review was to be one of a complex of factors which contributed to the relegation of both tort and the criminal law to relatively minor roles in checking the actions of officials in the second half of the 19th century. This, in a sense, was unsurprising as hitherto both actions in tort and criminal prosecutions had often to be used, in the absence of any other remedy, to settle disputes concerning the actual powers and duties of particular offices.

What is surprising about the law as I have so far described it is that while its concern was with the conduct of officials in their 'fiduciary',[17] or 'trust'[18] relation with the public, it was the common law, *not equity* which policed that relationship. It was only in the 19th century that equitable doctrine was deployed against such 'trustees'

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12 Cf *Lane v Cotton* (1701) 1 Ld Raym 646, 648.

13 See, eg, *Driscoll v Burlington-Bristol Bridge Co* 86 A 2d 201, 222–3 (1952) which, though a modern case, captures much of the essence of the early law, albeit with a more explicitly republican sentiment than was open to the 18th century English judiciary: see Finn, 'The Forgotten "Trust": The People and the State', above n 1, 133.

14 See *R v Bembridge* (1783) 22 State Tr 1, 155–6.

15 Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307.

16 Paul Finn, *Law and Government in Colonial Australia* (1987) 19–24. The action on the case for, variously, deceit, misfeasance and non-feasance in office was the usual vehicle for imposing tort liability on officials as such: see, eg, the classifications adopted in Sir John Comyns, *A Digest of the Laws of England* (4th ed, 1800) vol 1, 226 ff, 274 ff, 279 ff. Almost all of this law passed from memory in Anglo-Australian law, although an aspect of it was to be unfaithfully recreated in the modern tort of misfeasance in public office: see *Northern Territory v Mengel* (1995) 185 CLR 307, 345 ff. In the US, in contrast, it retained its vitality: see, eg, Floyd R Mechem, *A Treatise on the Law of Public Offices and Officers* (1890) §§ 585–682.

17 Cf *R v Boston* (1923) 33 CLR 386, 412.

18 *Horne v Barber* (1920) 27 CLR 494, 502.

and then, seemingly, only to protect public funds in the hands of public officials from misapplication[19] or misuse for improper gain.[20] With little by way of equity jurisprudence relating to the setting of standards of conduct for public officials, it is unsurprising that English courts in particular in the mid–20th century experienced considerable difficulty in providing a satisfactory explanation for imposing what was, in reality, fiduciary regulation of the conduct of public officials.[21]

Turning to Australian law, it is clear that for much of our history the law I have so far described was forgotten or ignored.[22] Forgotten also was the language of the 'public trustee' or 'fiduciary' — save, surprisingly, in relation to members of parliament[23] and local government councillors.[24] Nonetheless, events in the second half of the 20th century have compelled us to rediscover and expand upon laws designed both to sanction abuse of public office and to promote official probity. It is sufficient to refer to what are known colloquially as the Fitzgerald Inquiry[25] and the WA Inc Royal Commission[26] and to the changes these wrought in the standards to be expected of, and applied to, public officials and employees of all stations.[27] What is notable is that, as has been enduringly the case in the United States since the Revolution,[28] the idea of the public trust — of public fiduciary responsibility — is alive and well in informing and justifying the standards of conduct being set. Simply by way of illustration, the *Independent Commission Against Corruption Act 1988* (NSW) s 8(1)(c) proscribes 'corrupt conduct' which is defined to include 'conduct of a public official … that constitutes or involves a breach of public trust'.[29] Equally standards of conduct

19 See the illuminating article, John Barrat, 'Public Trusts' (2006) 69 *Modern Law Review* 514, 517–25.

20 See, eg, *Attorney-General v Edmunds* (1868) LR 6 Eq 381.

21 As witness the tortured reasoning in *Reading v Attorney-General* [1949] 2 KB 232; affirmed in *Reading v Attorney-General* [1951] AC 507. The contrast in this with US law is marked: see Finn, 'The Forgotten "Trust": The People and the State', above n 1, 148–9.

22 The number of reported public officer/tort cases is few: see, eg, *Fitzgerald v Boyle* (1861) 1 QSCR 19; *Brayser v MacLean* (1875) LR 6 PC 398; *Lemme v Krone* (1890) 16 VLR 613; *Chichester v Marine Board of South Australia* [1910] SALR 22; *Farrington v Thomson and Bridgland* [1959] VR 286. A partial explanation of this may well have been the early enactment in the Australian colonies of Claims against the Government legislation beginning in Queensland in 1866.

23 For example, *R v Boston* (1923) 33 CLR 386. For an extended treatment of the public trustee status of MPs and of the standards of conduct imposed on them, see Gerard Carney, *Members of Parliament: Law and Ethics* (2000) ch 7–12.

24 *Wood v Little* (1921) 29 CLR 564.

25 See Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989).

26 Western Australia, Royal Commission into the Commercial Activities of Government and Other Matters, *Reports Part 1 and 2* (1992).

27 The numerous reports published by Queensland's post-Fitzgerald Electoral and Administrative Review Commission and WA's Commission on Government are eloquent of this.

28 See, eg, *Pennsylvania Declaration of Rights 1776*; *Driscoll v Burlington-Bristol Bridge Co* 86 A 2d 201, 222–3 (1952).

29 Relatively similar provisions are to be found in the *Crime and Misconduct Act 2001* (Qld) and the *Corruption and Crime Commission Act 2003* (WA); see generally Peter Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Enquiry – Powers and Procedures* (2004) ch 1 and 2.

which acknowledge, or are consonant with, the ideas that public officers and employees occupy positions of public trust and confidence which exist to serve the interests of the public,[30] albeit in differing ways, permeate the codes of conduct now widely applied to Members of Parliament, Ministers and Public servants, as also Public Service Rules, Regulations, statements of values and the like. Though the vehicles employed to maintain integrity in government have evolved — as witness the demise of centuries of tort law, but the rise of regulatory agencies concerned with policing official probity — the old, animating ideas remain.

2 CONTROLLING THE EXERCISE OF PUBLIC POWER

If the law mentioned in the first part of this article owed — and owes — little to equity jurisprudence, such is not the case in what follows. My concern here is not with the bases of personal liability of public officials *as such*, but rather the extent to which orthodox (or adapted) principles of the law of trusts and of fiduciary obligation can, or should properly be permitted to, contrive the legal efficacy of official decision making be it by the Crown, its officers or agencies, or by some other public body or functionary.[31]

Because what I have to say is of broad compass, it necessarily will be selective and general. My purpose in this brief space can be only to outline the contours of an argument. To set the scene I will refer, first, to the public law use of the 'Fiduciary Metaphor'; second, to modern statutory interpretation; third, to judicial review; and fourth, to 'fiduciary powers'. I will then address the appropriate use, and limits of, trust and fiduciary law.

(i) The 'Fiduciary Metaphor'

The aphorism — 'nothing is so apt to mislead as a metaphor' — comes to life here. I provide the following observations for essentially contextual reasons. They invite misunderstanding. First, Lord Woolf MR in *Equitable Life Assurance Society v Hyman*:

> Parliament confers wide discretionary powers on the government of the day, so that they can be used in the nation's and the public's interests. Local authorities have wide discretionary powers conferred upon them so that they can be used in the interest of the locality and those who reside there. … The recipients of the powers, whether national or local, are in very much the same position as they would be if they had fiduciary powers conferred upon them. The powers are entrusted to them so that they can exercise them on behalf of the public or a section of the public. The public places its trust in the public bodies to exercise their powers for the purposes for which they are conferred.[32]

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30 See, eg, Queensland, Electoral and Administrative Review Commission, *Report on the Review of Codes of Conduct for Public Officials* (1992).

31 This is a subject of quite some interest in recent Canadian legal scholarship, although it must be accepted that fiduciary law in Canada has followed — and is following — quite different courses to that followed in Australia: see, eg, *Breen v Williams* (1996) 186 CLR 71; and most notably in relation to the Crown-aboriginal peoples relationship: see *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Haida Nation v British Columbia* [2004]3 SCR 511. See Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's Law Journal* 259; Lorne Sossin, 'Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law' (2003) 66 *Saskatchewan Law Review* 129.

32 [2002] 1 AC 408, 416.

Second, in a speech entitled 'Judicial Legitimacy', Gleeson CJ observed:

> Judicial power, which involves the capacity to administer criminal justice, and to make binding decisions in civil disputes between citizens, or between a citizen and a government, is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath …[33]

The Chief Justice went on to observe that the High Court exercises its powers 'in a fiduciary capacity'. The burden of both statements is clear and indisputable, but the descriptions themselves are no more than metaphor. Third, in their work, *Administrative Law,* Wade and Forsyth made the well accepted[34] comment:

> Statutory power conferred for public purposes is conferred *as it were* upon trust, not absolutely — that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. [35]

In each instance the function of the metaphor is to signify that legal (or constitutional) constraints and obligations attach to the exercise of the public powers and discretions held.[36] The question, though, is whether the 'trustee' or 'fiduciary' labels positively assist our understanding of those constraints and obligations and, in particular, what if anything they add to the now well understood principles of statutory interpretation and of judicial review?

(ii) Statutory interpretation

Interpretation, statutory and otherwise,[37] is now widely acknowledged to be contextual and purposive in character.[38] Nonetheless, it is girded by increasingly invoked conventions which can contrive the interpretative process — as, for example, that 'all statutes are construed against a background of common law notions of justice and fairness.'[39] A number of these are designed to protect against adverse or otherwise unacceptable consequences, unless those consequences are shown to have been clearly intended;[40] others, to enhance the operation of the beneficial intent of an Act, as for example, the principle that statutes that can be classified as remedial or beneficial should be interpreted liberally.[41] Here I can only refer to one of these. It is the 'important principle that Acts be construed, where constructional choices are open, so

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33 (2000) 20 *Australian Bar Review* 4, 5.

34 See, eg, *Porter v Magill* [2002] 2 AC 357, 463.

35 Sir William Wade and Christopher Forsyth, *Administrative Law* (9th ed, 2004) 354–5 (emphasis added).

36 See also *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, [135] where the purpose of the metaphor is openly acknowledged.

37 The convergence of the principles applied in different areas of law, eg statute and contract, is clearly perceptible: see, eg, *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 223 ALR 560, [79].

38 See, eg, Aharon Barak, *Purposive Interpretation in Law* (2005); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

39 *Saeed v Minister for Immigration and Citizenship* [(2010)]84 ALJR 507, [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

40 Purposive construction itself can be used to this end. For an excellent example, see the dissenting judgment of Kiefel J in *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232.

41 See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [9.2]–[9.4]; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 (Kirby J).

as not to encroach upon common law rights and freedoms.'[42] The classic formulation of this principle, drawn from Maxwell's *On the Interpretation of Statutes*, is that:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[43]

A like qualification has been adopted in the United States and has demonstrated 'remarkable staying power'.[44] One of the modern justifications advanced for this rule is to ensure democratic accountability for the explicit deprivation of basic rights.[45] This 'principle of legality'[46] requires Parliament to confront squarely 'what it is doing and accept the political cost.'[47]

I will refer to this principle as the principle in *Potter v Minahan* (an early Australian application of it). Because of what I have to say later of the State-indigenous people relationship, I will illustrate its use in a native title setting. Where it is alleged that legislation has effected the total or partial extinguishment of native title, the principle is applied because rights recognised by the common law are said to have been extinguished: if extinguishment is to be procured, a 'clear and plain intent' to do so must be manifest.[48] As Brennan J commented in *Mabo v Queensland [No 2]*:

> This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian bands in North America. … [R]eference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so. That approach has been followed in New Zealand. It is patently the right rule.[49]

(iii) Judicial Review

It was both predictable and prudential that there would be marked similarities, at least at the core, between the grounds of judicial review both of the exercise of fiduciary powers[50] and of statutory powers given for public purposes.[51] Not having the default

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42 *Evans v New South Wales* (2008) 168 FCR 576, 593.

43 Sir Peter Maxwell, *On the Interpretation of Statutes* (4th ed, 1905) 122. See *Potter v Minahan* (1908) 7 CLR 277, 304; *Bropho v Western Australia* (1990) 171 CLR 1, 18; *Coco v The Queen* (1994) 179 CLR 427, 437.

44 Sutherland, *Statutes and Statutory Construction* (5th ed, 1992) vol 3, § 61.04.

45 See *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, [106]–[108], [152] (Kirby J); *Gould v Greylock Reservation Commission* 215 NE 2d 114 (1966); *Kootenai Environmental Alliance Inc v Panhandle Yacht Club Inc* 671 P 2d 1085 (1983); and see Joseph L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1969–1970) 68 *Michigan Law Review* 471, 491 ff, 559–60.

46 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

47 Ibid.

48 *Western Australia v Commonwealth* (1995) 183 CLR 373, 423 ('*Native Title Act Case*').

49 (1992) 175 CLR 1, 64. For a recent application of this see, eg, *Akiba v State of Queensland (No 2)* [2010] FCA 643, [768].

50 Discussed below.

function of actually exercising such powers, the court's task in either case was to set the ring to permissible decision making by the respective donees. That courts followed largely similar paths in so doing (at least from the 19th century) was to be expected.[52] Have the terms of the power been exceeded? Has the power been exercised in good faith for a proper purpose? Was the manner of its exercise unreasonable? Were irrelevant considerations taken into account? Has its exercise been fettered? Etc.[53] Such preoccupations, though, do not require resort to fiduciary principles for their explanation.

Where the two sets of grounds differ is that a trustee and a fiduciary have, distinctly, a duty to act 'in the interests (or best interests)' of their respective beneficiaries.[54] The scope, even the independent existence of,[55] this duty are matters of contest in private law.[56] Nonetheless, it is a duty that has attracted significant legislative recognition or acknowledgement in trustee and corporations legislation in some number of common law countries.[57] This duty marks a crevasse between the two contexts of judicial review ordinarily, but not only, because of a marked judicial reluctance to countenance that a group or class of persons are properly to be characterised as the 'beneficiaries' of a statutory fiduciary or trust regime absent a manifest legislative intent to that effect. I will later illustrate the working out of this, as also the occasional unnecessary attempts made to cross the divide.

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51 One could now add to this, though with some qualification, the review of contractual powers and discretions: see Jeannie Paterson, 'Implied Fetters on the Exercise of Discretionary Contractual Powers' (2009) 35 *Monash University Law Review* 45.

52 The extent of this commonality in many of the grounds of judicial review has been often noted and explanations proffered for the phenomenon: see, eg, James 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* (2008) 147; Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 238; Geraint Thomas, *Powers* (1998), vii; Paul Finn, *Fiduciary Obligations* (1977) [26]; see also *Edge v Pensions Ombudsman* [2000] Ch 602, 627–30; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 416–17.

53 On the review of fiduciary and powers see generally Richard C Nolan, 'Controlling Fiduciary Power' (2009) 68 *Cambridge Law Journal* 293; Thomas, above n 52, ch 6. It is fair to say that the equitable grounds are, today, less developed than their administrative law counterparts: see, eg, the comments of Park J in *Breadner v Granville-Grossman* [2001] Ch 523, [58].

54 In the case of fiduciaries this duty only applies insofar as they have powers conferred on them in their fiduciary capacity: see Thomas, above n 52, 25; see also Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (14th ed, 2010) [8.070] ff.

55 See John Lehane, 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7 *Bond Law Review* 36, 36–8.

56 See Geraint Thomas, 'The Duty of Trustees to Act in the "Best Interests" of their Beneficiaries' (2008) 2 *Journal of Equity* 177 and the cases and literature there discussed.

57 See, eg, *Trustee Act 1925* (NSW) s 14B(2)(a) which is replicated in all Australian jurisdictions; *Corporations Act 2001* (Cth) s 181(1)(a); cf *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(c) for a variant; and see *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, [101]; contrast *Companies Act 2006* (UK) s 172; see Andrew Stafford and Stuart Ritchie, *Fiduciary Duties: Directors and Employees* (2008) [2.118]–[2.120].

(iv) 'Fiduciary Powers'

To begin with the problem of language, there is no uniformly agreed and accepted understanding of what the description 'fiduciary powers' signifies in private law.[58] Here it refers to a *power*[59] conferred upon a person in his or her fiduciary capacity.[60] As such it imports at least two limiting ideas. The first is that the holder of such a power is, as a fiduciary, entrusted with it to be exercised for the benefit of the persons (the beneficiaries) to whom the fiduciary duty is owed — in whose interests he or she is expected to act. This characteristic is ordinarily wanting in the case of possessors of statutory powers. Their functions, as a rule, are to further public purposes, not the interests of persons as such. Second, such powers characteristically will be specified expressly or impliedly in the instrument under which the fiduciary acts, and can only be exercised for the purposes for which they have been conferred. This characteristic, ordinarily, is shared with the possessors of statutory powers. The private law exemplars of donees of fiduciary powers are trustees, company directors, court appointed receivers and liquidators.[61]

(v) The Use and Limits of Trust and Fiduciary Law

To turn now to the fundamental question: When, as a matter of strict law, will (should) the Crown, or other public body or person be a trustee or a fiduciary and thus be amenable to judicial review on grounds of trust or fiduciary law?

I begin with the apparently exceptional case, that of the Crown and trusts. There is long-standing authority stemming from *Kinloch v Secretary of State for India in Council*[62] to the effect that clear words are required before an obligation of the Crown (or of a Crown servant or agent) in relation to property will be treated as a trust according to ordinary principles, even if described as such in the instrument concerned. Rather, absent clear words, the obligation will be characterised as a governmental or political one — or, as it was put in *Kinloch*, a trust 'in the higher sense'.[63] It needs to be emphasised, though, as did the joint judgment in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation,* that '*Kinloch* does no more than state a rule of construction'.[64]

Why this distinctive 'rule of construction' — or presumptive bias — should continue to be applied in this country, at least in cases where the trust issue involves the construction of a statute or a contract is no longer self evident given (a) our

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58 See Thomas, above n 52, 25–6.

59 That is, a prescribed capacity to do a specified act or to make a specified decision, that capacity being conferred expressly or impliedly by the instrument under which the authority so to act is conferred.

60 That is, the person is a fiduciary in the strict legal sense.

61 See generally Finn, above n 52, ch 2; Thomas, above n 52.

62 (1882) 7 App Cas 619.

63 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145, 162-3. The usefulness of the 'higher/lower sense' dichotomy has been doubted in Canada, see *Guerin v The Queen* (1984) 13 DLR (4th) 321, 357, though the distinction is still honoured in Canadian law: see Donovan W M Waters, *Waters' Law of Trusts in Canada* (3rd ed, 2005) 30–31; Peter W Hogg and Patrick J Monahan, *Liability of the Crown* (3rd ed, 2000) 258-9 which describes a trust in the higher sense as 'a nothing'; in Australia see Peter Young, Clyde Croft and Megan Smith, *On Equity* (2009) [7.530].

64 Ibid 163.

contemporary rules of statutory interpretation and contract construction;[65] (b) the use of the 'as nearly as possible … the same' formula in Claims Against the Government legislation in describing the rights of parties in any suit to which the Commonwealth or a State is a party;[66] and (c) our acceptance of statutory, non-charitable, public purpose trusts.[67] Because of the significance context and purpose now have both in the modern rules of statutory interpretation and in applying the so-called '*Kinloch* principle', it obviously is appropriate to have regard to the governmental setting in which a trust (statutory or otherwise) is alleged to have arisen and, in so doing, to have particular regard to whether what might be described as a 'trust' reflects in substance no more than a description of purely infra-governmental, administrative arrangements for the effectuation of a governmental purpose — be it for the benefit of a designated class of persons or for the public (or some public purpose) generally. Nonetheless, the conclusion that such was the case should, I suggest, now be one reached as a matter of orthodox construction and not in consequence of a privileging presumption favouring the Crown.

Beyond the Crown, and save for the development of the statutory trust for public purposes,[68] the courts in this country have shown no propensity to find a public body or functionary to be a trustee on other than strictly orthodox grounds. I would note in particular that despite some local advocacy and notwithstanding its reception in other common law jurisdictions,[69] no consideration has been given to adapting to our own purposes that evolving species of 'public' (or 'sovereign') trust of natural resources which has been used in the United States[70] to circumscribe governmental decision making affecting resources in which the public has rights.[71] A topic in its own right, I mention this trust briefly. It has an enormous and expanding literature.[72]

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65 Our principles of contract construction track that of statutory interpretation: see, eg, *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407, [239] – [305].

66 See *Judiciary Act 1903* (Cth) s 64.

67 See *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 ('*Bathurst City Council*'); as to this last species of 'trust' — which is not a trust in the strict sense of the term — the High Court has accepted that a public body may be so restricted in the statutorily permitted use it can make of public property vested in it as to be required to hold it on trust for the statutorily permitted purposes. So in *Bathurst City Council* (1998) 195 CLR 566 land used for a car park and vested in the Council as 'community land' under the provisions of the *Local Government Act 1993* (NSW) was held to be trust property in its hands subject to the limitations on permissible use and disposition of such land prescribed in the Act.

68 Itself a beneficial and, with respect, an orthodox development. It does open up potentially issues of standing if the Attorney-General of the jurisdiction in question abjures his or her supervisory responsibility: cf *Bathurst City Council* (1998) 195 CLR 566, [67].

69 See Brian Preston, 'The role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9 *Asia Pacific Journal of Environmental Law* 109, 203–10.

70 See, eg, *Illinois Central Railroad Co v People of the State of Illinois*, 146 US 387 (1892) — the landmark case.

71 See Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 12 *Environmental and Planning Law Journal* 329.

72 The modern progenitor of it was Joseph L Sax's highly influential article 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471.

Its foundations were discerned in long standing common law,[73] and before that Roman law, doctrine which recognised there were certain natural resources — navigable rivers, the sea, the foreshore — in which the public had collective or common rights as, for example, rights of passage, of navigation and to fish. In the late nineteenth century United States courts drew upon these rights and the State's ownership of the foreshore and of the land over which navigable waters flowed to establish a State trusteeship of such land for the benefit and use of the people so that they might enjoy their rights on the waters thereon, whether for purposes of navigation, fishing or passage. That trust required the State to protect and to maintain, and to keep, the common resource in a manner that was in the interests of the public, though this did not totally preclude its re-allocation to some new *public* need.[74]

Interestingly for present purposes, the Supreme Court of India has conceived of this trust in Indian law in these terms:

> The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.[75]

Though the case law in the United States is discordant,[76] the public trust has been extended to lands held for other public uses (eg public parks).[77] It is not unfair to say that this doctrine now carries the hopes of advocates of environmental protection.[78] The matter to be emphasised about the United States doctrine is that a principle of statutory interpretation similar to that protecting fundamental rights which was enunciated in *Potter v Minahan*, is applied to legislation which appears to authorise diversion of trust lands to some other inconsistent use.[79] The only additional comment I would make of this trust is that if it is to have any real place in Australian law protective of public rights, a reconceptualisation of the importance of such rights in our jurisprudence will be necessary. Such rights, unlike native title rights, seemingly are not 'fundamental' ones for *Potter v Minahan* purposes. As Brennan J said in *Harper v Minister for Sea Fisheries*[80] of the right of fishing in the sea and in tidal rivers: 'being a public not a proprietary right, [it] is freely amenable to abrogation or regulation by a

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73 Though by no means uncontroversial: see generally, Tim Bonyhady, *The Law of the Countryside* (1987).

74 See *Illinois Central Railroad Co v People of the State of Illinois*, 146 US 387 (1892).

75 *M.C. Mehta v Kamal Nath* (1997) 1 SCC 388, [34].

76 See Donovan W M Waters, 'The Role of the Trust in Environmental Protection Law' in Donovan W M Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 383, 385–6.

77 See *Gould v Greylock Reservation Commission*, 215 NE 2d 114 (1966).

78 See, eg, Mary Wood, 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift' (2009) 39 *Environmental Law* 43; Mary Wood, 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance' (2009) 39 *Environmental Law* 91.

79 See *Gould v Greylock Reservation Commission*, 215 NE 2d 114 (1966); but see also, for a lesser but nonetheless heightened standard of review: *Kootenai Environmental Alliance Inc v Panhandle Yacht Club Inc*, 671 P 2d 1085 (1983).

80 (1989) 168 CLR 314, 330.

competent legislature.'[81] Beyond trusts, the position with respect to fiduciary relationships is distinctly more complex, the more so when judged by reference to other common law jurisdictions. To begin with two examples to give focus to the issues. First, in *Habib v Commonwealth (No 2)*[82] the applicant, who had been held in Pakistan, Egypt and Guantanamo Bay, alleged he was illegally detained and tortured by overseas authorities and that the Commonwealth knew of this but did little or nothing to stop it from taking place. Amongst the various claims asserted was that the Commonwealth breached its fiduciary duty to him by not acting on his behalf and in his interests in exercising its power under s 61 of the *Constitution* when conducting its foreign relations with Pakistan, Egypt and the United States. Secondly, in *Franklin Savings Corporation v United States*[83] a defunct savings and loans company sued the United States for damages for breach of fiduciary duty in not maintaining the profits of the company when the United States ordered write downs of its capital and then appointed a "conservator" under the provisions of the *Financial Institutions Reform, Recovery and Enforcement Act 1989* (FIRREA). The basis of the fiduciary claim was that, on appointment of the conservator, the government exercised such an extent of daily supervision over the company's assets as to become its fiduciary yet it failed to conserve the business. To anticipate matters, the claims made in both of these cases were rejected: there was no fiduciary relationship.

This is not the place to enter generally on the questions what is a fiduciary relationship and when can it arise.[84] Suffice it to say for present purposes that a public body will ordinarily be characterised as being in a fiduciary relationship with a person (or group or section of the public) if it is so circumstanced in discharging some statutory[85] function, power or purpose capable of affecting the interests of that person[86] as entitles that person, etc reasonably to expect that the public body (i) will act in his or her interests in discharging that function[87] or, exceptionally, (ii) will act fairly to him or her, if the public body is to act in the interests of groups of persons having different rights and interests *inter se* in the particular matter.[88]

Such a relationship can arise because a statutory regime itself creates a relationship having the above characteristics as, for example, in *Cubillo v The Commonwealth*[89] where it was held that the Director of Native Affairs in the Northern Territory owed fiduciary obligations to the applicants by virtue of his statutory role as their legal guardian, they

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81 See also *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24; but cf Bonyhady, above n 73, 251–53; see also *Akiba v Queensland (No 2)* [2010] FCA 643 at [777]–[846].

82 (2009) 175 FCR 350.

83 56 Fed Cl 720 (2003).

84 My own view is outlined in 'The Fiduciary Principle' in Timothy G Youdan (ed), *Equity, Fiduciaries and Trusts* (1989).

85 I again emphasise I leave out of account those cases where for reasons of contract or voluntarily assumed responsibility a public body enters into a relationship which is in fact a fiduciary one: see *Northern Land Council v Commonwealth of Australia* (1987) 75 ALR 210, 214–5.

86 *Wik Peoples v Queensland* (1996) 187 CLR 1, 96.

87 See Young, Croft and Smith, above n 63, [7.30].

88 Cf *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768, 815.

89 (2001) 112 FCR 455, 576; see also *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 426–7.

having been removed from their Aboriginal families and detained by the Director until their mid-to-late teens under a series of Ordinances applying to Aboriginal people. Or it may arise given the nature of actions taken under, and in implementation of, a statutory scheme as in *Guerin v The Queen*[90] where, upon an Indian band's surrender to the Crown under the provisions of the *Indian Act 1952*, of Indian title to part of its reservation (the land to be dealt with on their behalf in a particular way), the Crown was found to have a fiduciary duty to act for their benefit which it breached by dealing with the land contrary to the understanding on which the surrender was made.

The almost invariable issue which arises in these cases is one of construction and characterisation of the statutory powers or duties which are alleged to attract a fiduciary responsibility. It is at this point that most such fiduciary claims are lost. While a person may be benefited or protected by a particular exercise of a statutory power — or for that matter from its non-exercise — the public body having that power will characteristically be able to exercise it in a way which adversely affects or denies that person's interests and will be able lawfully to do so because of the range of interests the body is entitled to consider, protect or promote consistently with the purpose of the power in its legislative setting. As Brennan CJ observed in *Wik Peoples v Queensland,*[91] in such a case it is impossible for the person who could be so benefited or burdened reasonably to expect the public body to exercise the power in his or her interests.

So in *Habib v Commonwealth (No 2)* Perram J, in rejecting the Commonwealth's alleged duty to exercise in Mr Habib's interests its constitutional power to conduct foreign relations, held:

> To accede to the duty alleged would require this Court to conclude that, in the conduct of Australia's alliance with the US (and in its affairs with Pakistan and Egypt), the Commonwealth was bound to disregard its own interests and, instead, act only in Mr Habib's interests. This proposition is impossible to accept.[92]

In *Franklin Savings Corporation v United States*[93] the claimed fiduciary duty was rejected on the basis that '[it] should not be imposed on the government where it would be inconsistent with the principal purpose of the statute', the FIRREA having been promulgated to protect depositors and ultimately taxpayers from fallout of the Savings and Loans crisis of the late 1970s and early 1980s. The public, not Franklin, was the intended beneficiary of the legislation.

I should add that where a public body discharges a number of public statutory functions in the discharge of one of which it is in a fiduciary relationship with particular persons or groups, it is not obliged to act in the interests of those persons or groups when discharging any other of its statutory functions which might affect the persons' or groups' interests, unless the body, as a matter of statutory construction of that other function, is also required so to act. This issue has arisen commonly in the United States because of the fiduciary duty the Executive owes to Indian nations.[94]

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90 (1984) 13 DLR (4th) 321.
91 (1996) 187 CLR 1, 96.
92 (2009) 175 FCR 350, [53].
93 56 Fed Cl 720, 753 (2003).
94 See, eg, *Morongo Band of Mission Indians v Federal Aviation Administration*, 161 F 3d 569, 573–74 (1998); *Northwest Sea Farms Inc v United States Army Corps of Engineers*, 931 F Supp 1515

Trust cases apart, the cases are few indeed in which it has been held that a public body has had discretionary power conferred on it to be exercised on behalf of, for the benefit of identifiable others.[95] Notwithstanding the many regulatory schemes that have been enacted for purposes protective of the public or sections of it, notwithstanding the ameliorative statutes that have been enacted to provide benefits (pecuniary or otherwise) to disadvantaged and vulnerable groups in the community, our courts, understandably, have shown no inclination or need to extrapolate from such legislation, fiduciary relationships between the repositories charged with administering such legislation and the groups who benefit from, or are burdened by, their exercise. Nor should they. Rarely are the provisions in such statutes ones as would give a member or section of the public a fiduciary entitlement in their exercise — hence Lord Brightman's comment in *Swain v Law Society*: 'The duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because there is no beneficiary in the equitable sense.'[96]

Yet three members of the House of Lords in *Bromley London Borough Council v Greater London Council*[97] held in judicial review proceedings that while owing a duty to transport users to promote the provision of 'integrated, efficient and economic transport facilities and services', and having the power to make grants to London Transport for any purpose, the GLC also owed 'a duty of a fiduciary character to its ratepayers who have to provide the money' to meet a special rate levied so as to make a grant to London Transport to reduce bus and tube fares by 25 per cent. As Lord Wilberforce said, '[t]hese duties must be fairly balanced one against the other'.[98] This the GLC failed to do by casting an inordinate burden on the ratepayers.

This fiduciary duty to ratepayers provided brief fascination for New Zealand courts[99] before being treated with considerable circumspection prompting a retreat to conventional grounds of judicial review, notably the *Wednesbury* principles.[100] It has not as yet been determined whether it should be accepted in Australia.[101] There are, in my view, good reasons for reticence in so doing. Despite confident assertions to the contrary, the provenance of this fiduciary duty is open to question.[102] It is not now self-evident why 'any group such as the ratepayers can be singled out as the beneficiary of local government powers'.[103] And it has been properly criticised in *De Smith's Judicial Review*[104] on grounds germane to the themes of this paper: if the 'fiduciary duty' to the ratepayers is merely an oblique way of referring to the

(1996); *Skokomish Indian Tribe v Federal Energy Regulatory Commission*, 121 F 3d 1303, 1308–9 (1977).

95 I earlier gave negative illustrations of this in the context of United States Indian cases.

96 [1983] 1 AC 508, 618.

97 [1983] 1 AC 768.

98 Ibid 815.

99 *Mackenzie District Council v ECNZ* [1992] 3 NZLR 41.

100 See *Wellington City Council v Woolworths NZ Ltd (No 2)* [1996] 2 NZLR 537; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (pace Thomas J); see generally Andrew Butler (ed), *Equity and Trusts in New Zealand* (1st ed, 2003) 1106-12.

101 *IW v City of Perth* (1997) 191 CLR 1, 49.

102 See generally Barratt, above n 19.

103 *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 416.

104 Jeffrey L Jowell, Andrew Le Sueur and Harry Woolf, *De Smith's Judicial Review* (6th ed, 2007) 289–90.

ratepayers' interests being a relevant consideration in the exercise of local government's powers of rating or spending, it is unexceptionable; if, in contrast, it requires the Courts 'to balance fairly' the ratepayer's interest with other affected interests (ie the duty is truly fiduciary), it asks for a decision to be made which the courts, in the litigation process, are not equipped to make.[105]

Distinctly, it is implicit in Australian law and explicit in the United States.[106] that the courts will not accept the concept of a general, free-standing fiduciary obligation being imposed on a public body authoring duties to provide assistance, services or benefits for, and in the interests of, a segment (or class) of the community — and, in particular, indigenous peoples — in the absence of such a requirement (express or implied) in treaty (in the United States), statute, common law duty, or agreement.[107] In 'The Forgotten "Trust"' I suggested that, absent a treaty[108] or entrenched constitutional provisions,[109] advocacy for a distinct fiduciary law regulation of the State/indigenous people relationship[110] was 'likely to founder'.[111] The case law since then provides no reason to revise this view.[112]

What is starkly apparent in Australian judicial decision in contrast with that of Canada and New Zealand is that, in general and save for applying the *Potter v Minahan* principle to native title, it betrays little operative recognition either of the distinctive historical and present circumstances of our Aboriginal people vis-à-vis the State[113] and of the need, after *Mabo [No 2]*, to accommodate those circumstances in appropriate legal principles — principles which may well require departures from old and inapt

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105 Understandably, though, the "fiduciary duty" has been accepted by subordinate courts in the English judicial hierarchy — though less so the Scottish (see *Commission for Local Authority Accounts in Scotland v Stirling DC* (1984) SLT 442) — to have been incorporated into English law: see *R (on the application of Western Riverside Waste Authority) v Wandsworth LBC* [2005] EnvLR 41.

106 See, eg, *Miccosukee Tribe of Indians of Florida v United States* (1997) 980 F Supp 448, 461.

107 See *Wik Peoples v Queensland* (1996) 187 CLR 1, 96; see also *Bennett v Commonwealth of Australia* (2007) 231 CLR 91, [113]–[117]; for the position in New Zealand in relation to Maori see Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd ed, 2009) ch 43; see also *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318.

108 As in New Zealand and, for the most part, in Canada.

109 As in Canada: see *Constitution Act 1982* s 35(1); see also *R v Sparrow* (1990) 70 DLR (4th) 385, [59]:

> the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

110 Founded on their historical relationship, and the inalienability of their native title except by surrender to the Crown, its vulnerability to extinction by State action: cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 202–3 (Toohey J).

111 This is not to say that in particular circumstances a fiduciary relationship may not be found between the State and particular aboriginal people on orthodox grounds: see *Cubillo v Commonwealth* (2001) 112 FCR 455; *Northern Land Council v Commonwealth of Australia (No 2)* (1987) 75 ALR 210; *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, [4].

112 *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178; *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 271-2, [142]; see also *Thorpe v Commonwealth [No 3]* (1997) 71 ALJR 767, 775–6.

113 But cf Kirby J in *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232.

orthodoxies. Principles of fiduciary law probably will in the end prove unsuited to regulating issues arising in the State-indigenous peoples relationship.[114] The Canadian and New Zealand courts have nonetheless acknowledged, albeit in differing ways, the need to deal fairly and in good faith with their respective indigenous people in that relationship. This finds expression in the evolving concept of 'the honour of the Crown' in Canadian jurisprudence — a 'duty of honour [which] derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation'[115] and, in New Zealand, in its not altogether different duty of 'good faith, reasonableness, trust, openness and consultation'.[116] While Australian law accepts that there is an 'old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects',[117] this is seen as little more than one to be honoured by the Crown in conducting litigation.[118] It has not been recognised as privileging our Aboriginal peoples in any way in their relationship with the State. The majority decision in *Griffiths v Minister for Lands, Planning and Environment*[119] upheld the use of power of compulsory acquisition as a means of clearing land of native title interests in order to effect leases and grants of that land for private purposes. All I wish to say of it is that it is emblematic of the difference I have noted.

CONCLUSION

Pulling together the disparate strands in what I have considered, there are I think four conclusions to be drawn.

The first is that the 'public trust'/'public fiduciary' idea still serves a vital function in informing and shaping the standards of conduct properly to be expected of public officers and agencies. Secondly, more controversially, the characterisation of the State as a trustee for the people of its powers of government is fundamental to an understanding of the contemporary legitimacy and authority of our constitutional arrangements. Thirdly, save where a public trust or public fiduciary relationship arises on orthodox grounds, the use of the 'public trust' or 'fiduciary power' concept to describe how public functions should be exercised for the purposes of judicial review proceedings, while explicable, tends to be an unnecessary distraction — and made the more so by my fourth conclusion. It is that we should recognise, much more than we do, that we now live in an age of statutes and not of the common law. If we are properly to regulate the discharge of public functions in light of interests and values that the common law considers should be acknowledged and protected, the appropriate modern vehicles for this are through our rules of statutory interpretation and our grounds of judicial review of statutory powers and discretions. The courts

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114 See the critical discussion in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd ed, 2009) 1265–6.

115 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* (2004) 245 DLR (4th) 193, [24]. This duty is too complex to unpackage here but see *Mitchell v Minister of National Revenue* [2001] 1 SCR 911, [9]; *Haida Nation v British Columbia (Minister of Forests)* (2004) 245 DLR (4th) 33, [25], [27], [29], [32]; *Mikisew Cree First Nation v Canada (Minister for Canadian Heritage)* (2005) 259 DLR (4th) 610, [51].

116 See *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318, 337.

117 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

118 But see *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 196–7.

119 (2008) 235 CLR 232.

have available to them the means through which they can compel the legislature and the Executive respectively to accept responsibility for actions which affect interests, and to take account explicitly of interests, which the common law considers should be respected. The *Potter v Minahan*[120] rule of statutory interpretation which protects fundamental rights and interests from statutory abridgement unless Parliament makes plain such is its intent is emblematic of this. If, in particular statutory contexts, it is considered appropriate to privilege or to protect particular interests — be they those of Aborigines, the environment, public rights holders, etc — this is more likely to be secured sensitively and conformably with the proper exercise of the judicial function, by the use of such means than by the invocation, or adaptation of principles of fiduciary law.

120 (1908) 7 CLR 277.