Common heads of obligation; an institutional law construction of the duties of public officials*

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1. Introduction

> The task of institutional law is one of controlling the institutions and trying to maximise the likelihood that the institutions will achieve ends that justify their existence, while avoiding the harm that is always possible with the concentration of power involved.[1]

Sampford's opening quote outlines a void that presently exists in Australian jurisprudence, a single law governing institutions and the power that is inherent in societal bureaucracies; whether these bureaucracies are included in the governmental framework or are part of the multi-national corporations that dominate the business landscape. Presently, no single strand of laws for the governance of

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* This article is written in response to Christine Brown's paper 'The Fiduciary Duty of Government: An Alternative Accountability Mechanism or Wishful Thinking?' (1993) 2 *Griffith LR* 161. In her paper, Brown questioned the contribution that new administrative law had made to defining the duties of government officials and their effectiveness. Her conclusion was one of continued inefficiency and ineffectiveness arising out of failure to extrapolate clearly the duties of government. Thus as a follow on from her paper, I have attempted to outline duties for institutional officials, both as they stand at present and in a new paradigm of institutional law. This new paradigm draws on new administrative law as well as corporate law and, in a comparative context, develops several heads of common institutional obligation. In doing so I advocate the notion of an umbrella sphere of institutional law covering the duties of all institutional officials, a concept also noted but dismissed by Brown. I conclude by outlining the similarity of the two spheres by comparing their theoretical underpinnings and suggest that this can and will give rise to a single strand of law governing institutions which has as its hallmarks more clear cut and definite duties of officers of these spheres. Further, I provide some examples of where the spheres are already merging, particularly in reference to corporate law. As such, I submit this fusion must be an improvement as after all, institutional law is the merging of two dynamic legal areas providing a melange of their best and most effective duties. The law is current at January 1995.

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1 Sampford, C.J.G., 'Law, Institutions and the Public Private Divide' (1991) 20 *Federal Law Review* 185 at 214.

institutions exist and as such the question posited by Airo-Farulla[2] 'what are the appropriate decision-making standards which should be imposed on bureaucracies of all sorts?' remains relevant and timely.

Sampford[3] suggests that law has a crucial role in both bureaucracy and corporations. Thus we must question how has the law attempted to govern these sectors? It would seem that as with the overall question of institutional law, an answer is unattainable. In addressing this inconclusive jurisprudence, the aim of this paper is to outline that, while the duties of government officials and company directors can differ, the substantive, applicable duties are largely congruent. This congruency is more evident in the contextual underpinning of the duties and in the governing principles of how they are to exercise their power. I will argue that from this, a single strand is evolving, but it is yet to be officially fused and presented as an institutional law doctrine. However I submit that it does go a long way in clarifying and defining the duties of public officials through the common heads of obligation. In order to demonstrate this, my paper will assume the following structure. Part 2 provides an initial discourse surrounding the theme of institutional law and the debate surrounding the public/private dichotomy that characterises present law. Part 3 compares the administrative and corporate responsibilities under four heads of institutional duties drawn from both spheres. Part 4 outlines the underlying principles and the ideology of both sets of duties while part 5 assesses whether a single strand of institutional duties and law is in fact emerging. It is from this discussion that I shall draw my conclusions.

2. Institutional Law and the Public/Private Divide

We are a society of institutions,[4] be they public or private. The essential difference lies in how we view the actions of the institutions and what duties we expect of them. However, this classification is being questioned. Sampford[5] argues that corporations are seen as private by default because they form an artificial entity when indeed they are vast institutions whose impact on society is demonstrable. However, they remain in the 'private

2 Airo-Farulla, G., 'Public and Private in Australian Administrative Law' (1992) 3 *Public Law Review* 186 at 200.
3 Sampford, fn. 1 at 186.
4 Id at 185.
5 Id at 200.

sphere' and are not required to have any consideration for their effect on the community. Conversely, public law is seen as trying to limit state power and the effect it can have on the society and individuals; it is thus based on a different ethos than corporate governance.[6]

This inconsistency is highlighted in Sampford's[7] discussion of the 'closure rules' applicable to different institutions. Corporations, because of their classification as private have the governing principle that whatever is not prohibited is permitted, while the public law approach is the antithesis, what is not authorised is prohibited. The effect of such rules is a strictly constrained state while corporate activity, whose effect is similar to that of the public sphere, remains relatively unregulated. Thus Sampford's[8] question remains relevant, but unanswered. If the organising principle of constitutional law is the limiting of state power, why do we not say that the organising principle of company law is the limitation of corporate power, particularly when it has been outlined that the power of the corporation is considerable and may impose constraints on individuals?[9]

In answering this question, some suggest that public law principles be applied in the private sphere,[10] a notion that Airo-Farulla[11] advocates as he sees the reliance on public/private divides as an impediment to the decision-making processes in all bureaucratic bodies.[12] However if the role of the law is to force institutions into fulfilling the purposes that justify them[13] it must also ensure equity in the types of duties enforced in both spheres. Thus, the remainder of this paper will outline how this is evolving through the similarity of the duties and the shared contextual underpinning of the theories. This will lay the foundations for assessing whether a theorem of institutional law is developing out of this 'erosion of the public/private divide.'[14]

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6 Id at 201.
7 Ibid. Sampford notes that the term 'closure rules' was first used by Joseph Raz in *The Authority of Law*, 1979, Oxford: Clarendon Press at 61.
8 Id at 202.
9 Id at 205 & 210.
10 See Collins, H. 1982, *Marxism and the Law*, Oxford University Press, New York, 78.
11 Fn. 2 at 192.
12 Id at 187.
13 Id at 218.
14 Id at 200.

3. Duties of Institutional Officials: A Comparison of Administrators' Duties and those of Corporate Directors

Peris[15] quotes Lord Diplock as stating that the development of a comprehensive system of administrative law is the greatest achievement of the English Courts in his lifetime. It is true, there are now well defined rules and procedures for administrative action laid down by statute and these procedures are constantly being expanded and refined by the courts.[16] In contrast, corporate duties have been consistently stated in statute and thus do not have to be discerned from reviewable actions as in public law. However, the applicability of corporate duties is narrow. Generally, duties are only owed to 'the company', that is the shareholders; they are not individually enforceable and there are no duties owed to the wider community.[17]

In outlining these duties, I shall restrict my comparative exposition to four main heads of institutional obligation that I have derived from both spheres. Although other duties exist,[18] I feel these to be paramount in institutional governance. They include the duty to act in good faith; to act for proper purposes; to observe procedural fairness and avoid conflicts of interest and finally to act reasonably as compared to acting with due skill, care and diligence. All of these duties are subsidiary duties of the main principle of institutional governance, the requirement to act intra vires. In administrative law, this is seen as following a mandatory procedure or directive.[19] While in corporate law, this refers to the duty to act

15 Peris, G.L., 'The Doctrine of Locus Standi in Commonwealth Administrative Law' [1983] *Public Law* 52 at 52.

16 See for example *Bond v. The Australian Broadcasting Tribunal* (1990) 170 CLR 321.

17 Corporate duties also exist to individual shareholders, however this is usually only in a small family company—*Coleman v. Myers* [1977] 2 NZLR 225 and also to creditors when the firm is near liquidation— *Kinsela v. Russel Kinsela Nominees (In Liq)* (1986) 10 ACLR 395.

18 In regard to administrative duties see Allars, M. 1990, *Introduction to Australian Administrative Law*, Butterworths, Sydney and Harding, A.J. 1989, *Public Duties and Public Law*, Clarendon Press Oxford, United Kingdom. Harding's analysis centres on broad principles and thus, while useful as an overview, is not applicable to a paper of this nature. In regard to corporate duties see Gooley, J. 1992, *Corporations and Associations Law: Principles and Practice*, Magna Carta Press, Sydney. He outlines numerous duties including topics such as allocation of shares, making of secret profits, and use of information among others.

19 Allars, id at 173. See also *Our Town FM Pty Ltd v. Australian Broadcasting Tribunal (No 1)* (1987) 77 ALR 577 at 592, per Wilcox J for a common law affirmation.

within the guidelines of the articles of association. Thus even on this general level one can already discern a convergence of the respective duties and principles into a single model. As such, I shall now outline the four main heads of institutional duties and note any congruency between their application in the administrative sphere and in the corporate domain.

Duty to Act in Good Faith

In the administrative arena, a duty to act in good faith is expressly provided for in the *Guidelines on Official Conduct of Commonwealth Public Servants.*[20] The duty connotes the highest degree of integrity and also prescribes honesty in the exercise of an administrative power.[21] This was also asserted in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation.*[22] Lord Greene MR, stated[23] that acting in bad faith or dishonestly stood alone as valid reasons for review of a decision. This establishes that in the administrative sphere, the government official has a clear duty to act in good faith, or in other terms, honestly and with integrity, otherwise the decision made is one that may be subject to judicial review.

In commercial law, a duty of good faith escapes easy definition and thus I have adopted the statement of Justice Dixon, as he then was, in *Mills v. Mills* when he outlined that 'a person having power, must exercise it bona fide for the end design, otherwise it is corrupt and void.'[24] Or in the terms of Gooley,[25] the directors must 'exercise their discretion bona fide in what they consider to be in the best interests of the company.' Also included in this area of law is the statutory duty of honesty in directorial actions (section 232 (2) *Corporations Law*). Therefore, this duty indicates that any action of the directors must evocate integrity, proper business etiquette and practices, and honesty.

On comparison, the corporate duties make a fitting compliment to their administrative law equivalent. This comes about from the high importance placed on the integrity and honesty of both groups of officials in their dealings with those associated with the particular institution. The only difference being to whom the duty is

20 *Guidelines on Official Conduct of Commonwealth Public Servants*, 1987, AGPS, Canberra. See page 59, section 19.7(d).
21 Allars, fn. 18 at 175.
22 [1948] 1 KB 223.
23 Id at 228.
24 (1938) 60 CLR 150 at 185, per Dixon J. See also Lord Greene MR in *In Re Smith and Fawcett Ltd* (1942) Ch 304 at 306.
25 Fn.18 at 183 (footnotes omitted).

owed; administrative bodies owe this duty to all, while corporations, under current law, only owe a duty of good faith to those financially connected to the company through their shareholdings.

Duty to Act for Proper Purposes

Allars[26] outlines that the exercising of power for an improper purpose is *ultra vires* and is reviewable under sections 5(2)(c) and 6(2)(c) of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth). In *Municipal Council of Sydney v. Campbell*[27] it was held that an exercise of power for an improper purpose arises where power is used for purposes other than that for which it was conferred. Allars[28] combines this with the notions of unfairness[29] and proportionality and reasonableness[30] to form guidelines for acting improperly. Such an approach was adopted in the case of *R v. Toohey (Aboriginal Land Commissioner; Ex Parte Northern Land Council)*[31] where it was found that the rezoning of 40 times the required amount of land as town land to prevent traditional aboriginal land claims was an exercise of power for an improper purpose. Thus this establishes a clear duty for government officials to exercise their power for proper purposes and to try to achieve the goals for which the power was conferred; otherwise its use will be found to be ultra vires.

The powers conferred on directors by the articles of association must be exercised only for those purposes which will benefit the company in some way. They are not to be used for under-handed approaches to management or to confer any inappropriate benefit on one or all of the directors. This was outlined in *Australian Metropolitan Life Assurance Co. Ltd v. Ure*[32] and *Whitehouse v. Carlton Hotels Pty Ltd.*[33] In these judgments, it was held that cases on this duty should be decided on individual factors, incorporating the nature of the company, its articles and its scheme of regulation. Thus, the exercising of power with an ulterior or impermissible purpose is invalid, even if it is substantially altruistic. As such, Tomasic *et al* outlined that this duty evocates the notion that:

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26 Allars, fn.18 at 176.
27 [1925] AC 338.
28 Fn.18 at 177.
29 *Laker Airways v. Department of Trade* [1977] 1 QB 643.
30 *Wednesbury*, fn.22.
31 (1981) 151 CLR 170.
32 (1923) 33 CLR 199 at 220 - 222, per Isaacs J.
33 (1986) 70 ALR 251 at 256, per the majority.

> It is not sufficient for directors to act in what they believe is in the best interests of the company, unless they can also demonstrate that such actions are within the powers granted.[34]

In comparing the approaches in reference to this duty, one again gets the impression of an equivalent duty owed by each group of officials. Both have to act within the guidelines of their position, whether they be the articles of association or a governing statute. One main difference does lie in the inapplicability of the ethic of proportionality to the corporate sector, though this may be changing in that action taken to remedy a commercial problem is to be proportionate to that problem. However, in regard to the duty to exercise powers for a proper purpose, the duties are essentially congruent and allude to a single strand of institutional obligation, albeit on different wavelengths.

Duty to Accord Procedural Fairness / Duty to Avoid a Conflict of Interest

Procedural fairness requirements in administration are sometimes viewed, as Yardley[35] suggests, as a prime test for proper administrative procedure based on two rules; the right to be heard and the unbiased decision rule.[36]

As the name denotes, the hearing rule provides for the right of a person to be heard when formulating a decision that may have adverse effects on an individuals interest.[37] Mason J (as he then was) outlined this in *Kioa v. Minister for Immigration and Ethnic Affairs.*[38] He stated that:

> It is a fundamental rule of common law ... that when an order is to be made that could deprive a person of some right or interest or the legitimate expectation of a benefit he (sic) is entitled to know the case sought to be made against him and to have an opportunity to reply to it ... there is now a common law duty to accord procedural fairness in making decisions

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34 Tomasic, R., Jackson, J. and Woellner, R. 1992, *Corporations Law: Principles, Policy and Process*, Butterworths, Sydney, 419.

35 Yardley, D. C. M. 1986, *Principles of Administrative Law*, Butterworths, London, 101.

36 See also Yardley, id at 93; Allars, fn.18 at 236; Business Law Education Centre (BLEC) 1991, *Review of Administrative Actions*, Longman Cheshire, South Melbourne, 15.

37 See *Houcher v. Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653, per Deane J where he outlines that this applies generally to all government decisions.

38 (1985) 62 ALR 321 at 345 - 346.

> which effect rights ... subject to the clear manifestation of a contrary intention.

The second requirement is the no-bias rule. The test for the no-bias rule was established in *R v. Watson; Ex Parte Armstrong*[39] where it was held that if a reasonable person could apprehend or suspect that a tribunal has pre-judged a case then this rule is infringed. Thus, there is a clear duty to make decisions giving consideration only to the facts and not be swayed by any socialisation or personal mores. Inherent to this is the duty not to allow a conflict of interest and this is provided for in both Commonwealth and Queensland Public Service Codes of Conduct.[40]

Whilst directors do not have an express duty of procedural fairness, they are under similar obligations. Section 232 (1) of the *Corporations Law* outlines that there is a duty to disclose conflicts of interest and failing such disclosure the company will have the right to rescind the agreement, regardless of whether that agreement was fair or otherwise.[41] This was affirmed in *Hely-Hutchinson v. Brayhead Ltd*[42] where Lord Denning stated that non-disclosure of a conflict of interest 'does not render a contract void or a nullity, but renders it void at the instance of the company and makes the director accountable for any secret profit that he (sic) has made.' Secondly, directors must not misuse their position as directors for individual gain.[43] In *Aberdeen Railway*[44] the broad application of this duty was summarised by Lord Cranworth when he stated:

> ... it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he (sic) has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect.[45]

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39 (1976) 136 CLR 248 at 262 - 263.

40 See for example fn.20 at 29 (Cwlth) and *Code of Conduct of the Officers of the Queensland Public Service*, 1987, Goprint, Brisbane, 4 (Qld).

41 See *Aberdeen Railway v. Blakie Bros* [1843 - 1860] All ER 250 at 252, per Lord Cranworth.

42 [1968] 1 QB 548 at 585, per Lord Denning.

43 Such gain can be seen in the use of privileged information, property, opportunity. For cases on these topics see *Mordecai v. Mordecai* (1988) 12 ACLR 751 for property; *Cook v. Deeks* [1916] 1 AC 554 or *Regal (Hastings) v. Gulliver* [1967] 2 AC 134 or *Chan v. Zacharia* (1984) 154 CLR 179 for opportunity; and *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* [1963] 3 All ER 413 for information.

44 Fn.41 at 252, per Lord Cranworth. See *also Alexander v. Automatic Telephone Co.* [1900] 2 Ch 56 at 67 per Lindley MR.

45 A similar approach to determining the proper use of information by directors is to be found in *Boardman v. Phipps* [1967] AC 46 at 117, per Lord Guest;

This duty is clear in its effort to ensure probity and correct conduct in the affairs and dealings of the directors. As such it is at the core of the fiduciary relationship between directors and members of a company.

Due to the corporate sector having no promulgated equivalent of procedural fairness, comparison is difficult. However similarities do exist. Section 260 of the *Corporations Law* provides protection for a minority group of shareholders from oppressive conduct. This accords a sense of procedural fairness as a minority has some redress if its interests are adversely effected and there is no consultation or recompense. As both duties serve to protect the individual from the awesome power and impact of these institutions, one may view the corporate duty to disclose any conflict of interest as imparting procedural fairness if one views this conflict as inclusive of situations where the director influences company decisions in favour of one direction because of a bias against another. In regard to the disclosure rules, both duties are unequivocal in their demand for honesty and integrity in official business through the compulsory disclosure of conflicts of interests. Therefore, although the actual duties are different in this comparison, it is clear that the thrust and reason for their existence share a common foundation, namely, to ensure honesty and integrity in business affairs, to encourage fair decision-making and to protect individuals or minorities from the power of the institutions and as such, they are compatible across the domains.

Duty to Act Reasonably / Duty to Exercise Due Skill, Care and Diligence

In determining whether an administrator has acted reasonably, the court applies Killowen CJ's test in *Kruse v. Johnson.*[46] He stated that an act is unreasonable where:

> ...it is partial or unequal in operation between classes; if it is manifestly unjust; if it disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men (sic)...

The quality of this judgment can be discerned when one considers the support it has retained in cases on similar matters over the years.[47] Another feature of this judgment is its inclusion of a degree

Regal (Hastings) v. Gulliver fn. 43 at 137 per Viscount Sankey.

46 [1898] 2 QB 91 at 99.

47 See for example *CCSU v. Minister for the Civil Service* [1985] 1 AC 374 at 410, per Lord Diplock.

of proportionality[48] into administrative decision-making. This was extended in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.*[49] Mason J (as he then was) outlined that in making a decision, an administrator should make reference to the subject matter, scope and purpose of the statute, as well as broad policy considerations,[50] and that decisions are to be made on the basis of the most current material available to the decision-maker.[51] Thus this would evoke a duty of ensuring that the decisions made were of a nature that was reasonable, applicable, beneficial to the public and proportionate in nature.

A corresponding duty in commercial law is that of the duty to exercise due skill, care and diligence. Section 232 (4) of the *Corporations Law* outlines that 'in the exercise of his or her powers and the discharge of his or her duties, an officer of the corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporations circumstances.' However, there are problems; not only does it fail to include skill as a statutory obligation but Trebilcock[52] notes that this approach results in a situation where:

> ... the fewer a director's qualifications for office, the less time and attention he devotes to his office, and the greater the reliance he places on others, legally the less responsible he is.

The unacceptability of this situation is obvious, but this is more concerning as the statute and the common law 'coincide and coexist'.[53] This coexistence is shown in *Re City Equitable Fire Insurance Co.*[54] Three main principles were identified; (1) there is a requirement to take the care expected of a reasonable man acting on his own behalf, though he is not expected to exhibit a greater degree of skill than is attributable to him; (2) a director is not required to give continuous attention to the affairs of the company and (3) the director is entitled to, in the absence of grounds of suspicion, rely on the other officials to perform their duties honestly and provide the correct information to the directors. Such an

48 This is an issue I intend to discuss in greater depth in part 5 of the paper, proposing it as a theory which should govern both public and corporate law.

49 (1985-86) 162 CLR 24.

50 Id at 39/40, per Mason J.

51 Id at 45, per Mason J.

52 Trebilcock, R., 'The Liability of Company Directors for Negligence' (1969) 32 *Modern Law Review* 499 at 508 - 509.

53 Smith, D. 1991, *Directors Rights and Responsibilities*, Information Australia, Melbourne, 69. See also Malcolm, D.K., *Handbook on the National Companies Legislation*, 181.

54 (1925) Ch 407 at 428 / 429, per Romer J.

approach was applied in Australia for many years, with the High Court adopting the view that if the decision was made in good faith and for relevant purposes then it is not open to review by the court.[55] This area is changing with the development of objective ability tests for executive directors[56] and the recommendation that abilities of directors be fully outlined and a standard duty of care developed.[57]

In comparison, one notes that the aims of the duties are the same; to produce solid, reasonable decisions. However, the process of achieving this is vastly different. While the administrative sector is likely to succeed, until there is a requisite level of skill, care and diligence in the corporate model, I do not believe that we will achieve the desired results. The corporate sphere has not the procedures or structure in place to develop decisions that are reasonable, applicable, beneficial to the shareholders and proportionate in nature because the measure of corporate responsibility is in constant flux. Thus, while the purpose of the duty is congruent on both sides, the application of acting reasonably or with due skill, care and diligence remains inconsistent. However, this is changing and these developments may be one of the strongest indications of an emergence of a single strand of institutional duties.

Thus, to summarise the institutional duties of administrators and directors and their congruency, one could employ this passage from a recent judgment[58] in the Federal Court:

> ... decisions can be set aside if they are insufficiently supported by reason, they appear to be an improper exercise of the power conferred; they are arbitrary; because there was no evidence to justify the making of the decision or the decision was so unreasonable that no reasonable person could have exercised that power.

These principles easily equate between institutions and thus, whilst the application and enforceability of the duties may differ,

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55 See *Harlowe's Nominees Pty Ltd v. Woodside (Lakes Entrance) Oil Co. NL* (1968) 121 CLR 483.

56 See *AWA v. Daniels* (1992) 7 ACSR 759 per Rogers CJ, cited by Baxt, R. and Rubenstein, P., in Campbell, D. and Campbell, C. (eds), 1993, *International Liability of Corporate Directors*, Lloyds of London Press, London, 41.

57 See recommendations 1, 16, 17 and 18 of the Senate Standing Committee on Legal and Constitutional Affairs, 1989, Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors, AGPS, Canberra at xi to xiv.

58 *Minister of Immigration, Local Government and Ethnic Affairs v. Pashmforoosh* (Unrept., FC, Davies, Burchett & Lee JJ, 28/6/89).

particularly in terms of standing requirements, the underlying theme and the principles of conduct are the same. This results in a fading of the public / private distinction and an increased focus on joint institutional duties which are clear and able to be enforced. Therefore, in determining whether a single strand of duties is emerging as a generic code for bureaucratic action, the answer can only be in the affirmative, as a doctrine of officials holding peoples' interests on trust permeates the entire scope of both public and private institutional obligation.

4. Theoretical foundation of administrative and corporate duties

Within any compilation of institutional duties there is always a philosophy or underlying reason for their nature and direction and this case is no exception. Below is a comparison of the two theories. I believe this to be a most important comparison because of the permeation and directional effect these theories have on the specific duties owed by officials. These theories provide the underlying thematic structure of the institution and accordingly, their importance to determining whether a single strand is emerging can not be understated.

Administrative Law Theory

In this sphere the thematic undercurrent of the duties lies in the public trust doctrine; holding the officials as fiduciaries for the preservation of the public interest. This concept was considered in the *Mabo* case by Justice Toohey.[59] He found that a fiduciary relationship arose out of the government's possession of the power to effect the interests of the people. As it holds this power on trust the government has to exercise its power in the best interests of the people.[60] Whilst this has been the central judicial discussion of this relationship in case law,[61] in academic writings the theory has evolved to a far greater extent.

An advocate of the public trust doctrine, Finn[62] states that:

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59 *Mabo and Ors v. The State of Queensland (No 2)* 107 ALR 1 at 156 - 160.

60 Id at 158, per Toohey J. For a legislative affirmation of this principle see Macpherson, C.B. 1980, *Burke*, OUP, Oxford, 32: 'all political power ...[is] ... in the strictest sense a trust; and it is of the very essence of every trust to be rendered accountable'.

61 Save for Justice McHugh's judgment in *Attorney-General (UK) v. Hinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 191 where he stated that 'governments are constitutionally required to act in the public interest.'

62 His extensive writings include: 'The Abuse of Public Power in Australia:

> To the extent that the power of the people is devolved upon institutions and officials under our constitutional arrangements, those officials and institutions become the trustees, the fiduciaries, of that power for the people ... The institutions of government and our public officials exist to serve our benefit and to serve our interests.[63]

These ideas were also brought to the fore in the recent *Report of the Royal Commission into Commercial Activities of Government and Other Matters in Western Australia.*[64] In the report, the commissioners found that a main problem in the Government was that 'some ministers elevated personal or party advantage over their constitutional obligation to act in the public interest.'[65] Citing Chief Justice Mason's comments from *Australian Capital Television Ltd v. The Commonwealth (No.2)*[66], they expressly identified the trust principle as a fundamental principle of government.[67] Consequently, this principle can no longer be ignored in the exercise of administrative power.

A further underlying theory of administrative duties is the doctrine of proportionality. Given foundation in the cases of *Nationwide News v. Wills*[68] *(Nationwide)* and *Australian Capital Television Ltd v. The Commonwealth (No.2)*[69] *(ACTV)* the ethic of proportionality, as an extension of the public trust concept, has brought about an awareness that the power of government rests with the people,[70] is dependant on participation of the people[71] but most importantly ensures that government is administered in the best interests of the people.[72] As Fitzgerald states,[73] proportionality is:

Making our Governors Our Servants' (1994) 5 *Public Law Review* 43; 'Integrity in Government' (1992) 3 *Public Law Review* 243; 'Public Trust and Public Accountability' (1993) 65(2) *Australian Quarterly* 50; with Smith, K., 'The Citizen, The Government and "Reasonable Expectations"' (1992) 66 *Australian Law Journal* 139.

63 Finn, P., 'The Abuse of Public Power in Australia', id at 45 & 51.

64 *Report of the Royal Commission into Commercial Activities of Government and Other Matters in Western Australia,* 1992, Western Australian Government Printing Service, Perth. This is more commonly known as the WA Inc. Report.

65 Id at 1.2, s. 1.1.2.

66 (1992) 177 CLR 106.

67 Fn. 64 at 1.9, s. 1.2.5

68 (1992) 177 CLR 1.

69 Fn. 66.

70 Id at 703, per Mason CJ.

71 Ibid and *Nationwide,* fn. 67 at 680, per Deane & Toohey JJ.

72 *ACTV,* ibid and *Nationwide,* ibid.

73 Fitzgerald, B., 'Proportionality and Australian Constitutionalism' 12 *University*

> ... ingrained with the notion of governing in the interests of the people ... [it] is itself an ethic generated from the touchstone of the interests of the people. It is an ethic which says that good government is government that is to the point, clear, precise and necessary and, in the context of constitutional guarantees, respectful of those guarantees ... in doing so [it will] instil an ethic of efficiency, responsibility and accountability in government action.

This evolution of proportionality as an ideology of administrative action may represent one of the most important and meaningful developments in the public sphere because of its protection of the individual from the at times excessive actions that are inherent in institutions of 'concentrated power.'[74] However, this remains an ethic which private law has failed to adopt.

Corporate Law Theory

The theoretical foundation that governs the relationship between the directors and the members of the company is the concept of the fiduciary relationship. Directors are viewed as trustees of company property as well as the interests of the members. This concept of directors acting as fiduciaries for the shareholders was outlined in *Furguson v. Wilson*[75] when it was stated that as the company can only act through its directors, and as such, a relationship of principle and agent is inherent. This was further explained by Pam[76] as he moulded the stereotypical company into the basic model of a trust. In doing so, he portrayed the directors as the trustee, the company and its assets as the trust fund and the members of the company as the beneficiaries. Therefore, if we are to accept the basic premise of trust law, that the trustee acts in the best interests of the beneficiary, then so too in company law the directors are bound to act in the best interests of the shareholders, thus re-enforcing the fiduciary principle as the basis for directors' duties.

Such an approach to the director/member relationship has been supported in case law, giving further rise to the extension and application of the aforementioned duties. In addition to the cases previously cited, there are several express statements, particularly in United States authorities[77] giving recognition to this principle.

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of Tasmania Law Review 263 at 268 - 269 (footnote omitted).

74 Sampford, fn.1 at 214.

75 (1866) LR 2 Ch 77 at 89, per Sir H M Cairns LJ.

76 Pam, M., 'Interlocking Directorates: The Problem and its Solution' (1913) 26 *Harvard Law Review* 467 at 471.

77 See for example *Essex Universal Corp v. Yates* 305 F.2d 572, (2d Cir. 1962) at

Upon the consideration of all of these factors and evidence that the office of the director is one of a fiduciary nature, it becomes clear that the philosophy behind the enforcement and application of directors' duties is one based on the premise that directors act in the best interests of the shareholders and consequently this can be cited as the 'Philosophy of Corporate Control'[78] in Australia. It may indeed resemble a quasi public interest doctrine as the obligations are due only to those who are members of the company.

Thus, in comparing these fundamental principles a single model is emerging in the joint use of the principle of officials holding on trust the interests of those they represent and govern and the associated responsibility to act in their best interests. This concept lies at the very foundation of the emerging model of institutional law.

5. Is there a single model of delegation developing?

Having noted the 'erosion of the public/private divide'[79] and compared the specific duties of officials and the contextual and theoretical foundations of these duties, one can evaluate whether a single model of duties and ideology is developing out of that decay, thus creating a true sense of institutional law.

The evidence suggests an emergence of an all encompassing institutional law doctrine for a number of reasons. Initially, the congruency of the specific duties of directors and administrators, while differing in application and enforcement, ultimately aim to achieve the same goals. More importantly however, a single strand is seen to be evolving in the theory and ideology behind these duties. In administrative law the foundation ideology is the public trust doctrine while in company law, the framework is based in the fiduciary relationship between directors and shareholders. Therefore, the congruency lies in both being centred on those in power acting in the best interest of those they represent or govern. Thus, at this theoretical level it is shown that both areas work from this same guiding principle.

575; *Ellis v. Ward* 25 N.E. 530 (Illinois 1980) at 533 and particularly *Schemmel v. Hill* 169 N.E. 678 (Ind. App. 1930) at 682 - 683.

78 With thanks to Cowan-Bayne, D. 1986, *The Philosophy of Corporate Control*, Loyola University Press, Illinois. Cowan-Bayne's first several chapters deal with the nature of the relationship between the directors and the members of a company and his findings indicate that the dominate theme of this relationship is that the directors are appointed to act in the best interests of the shareholders.

79 Airo-Farulla, fn. 2 at 200.

This is apparent in the director / shareholder relationship. If it is accepted that in company law the duty to act in the best interests of a shareholder arises out of the fact that one has a holding in the company, we can equate this to every citizen as having a share in government and are thus owed the same duty of care and quality of action by administrators.[80] Similarly, if we accept Zellick's assertion[81] that as the government power continues to grow, we need to ensure that it remains subject to sufficient controls, we would also accept that as the power and influence of corporations increases in society the controls they are subject to should also be extended outside their present responsibility base - their shareholders. Acceptance of these principles would certainly indicate the development of a single strand of duties and a theory of institutional law based on officials acting on trust.

As an extension of the last point, a second reason for the emergence of a single doctrine of institutional law is the increasing pressure on corporations to accept that they not only have duties to their shareholders, but also shoulder a wider social responsibility because of their size and influence within the community, thus mirroring the thematic foundations of administrative duties. For example, Corkery,[82] reflecting the stance taken by Bearle and Means in the 1930's, writes that many now view corporate giants as large private governments and they should be run in a manner that take account of a wider public interest. Tolmie[83] concurs, advocating corporate social responsibility because a 'corporation's' power and control over societal resources demand social corporate governance and secondly because of the increased corporate activity in the economic policy of the society. Clearly they should be held accountable for any adverse impact that they may induce.[84]

On recognising this problem, there have been many suggestions. Futter[85] proposes a corporate ombudsperson with duties akin to the

80 See also Uhr, J., 'Redesigning Accountability' (1993) 65(2) *Australian Quarterly* 1 at 2.

81 Zellick, G., 'Government Beyond Law' (1985) *Public Law Review* 283 at 298.

82 Corkery, J.F. 1987, *Directors Powers and Duties*, Longman Cheshire, Melbourne, 61.

83 Tolmie, J., 'Corporate Social Responsibility' (1992) 15 *University of New South Wales Law Journal* 268 at 289.

84 See for example Herman when he states that although corporations have created wealth, 'they have broken traditional community links and brought forth new problems whose solutions require protective and controlling mechanisms that do not exist': Lord Wedderburn of Charlton, 'The Social Responsibility of Companies' (1985) 15 *Melbourne University Law Review* 4 at 29.

85 Futter, V., 'An Answer to the Public Perception of Corporations: A Corporate

governmental model. However, I believe the answer lies in the recommendations of the Cooney Report.[86] The committee recommended that 'matters such as the interests of consumers, or environmental protection, be dealt with, not in the companies legislation but in legislation aimed specifically at those matters.'[87] Any such developments would indicate a true fusion of the present systems and thus establish a single strand of duties under the umbrella of institutional law. Even if this fails to eventuate, the questioning of unrestrained corporate power represents a strong indication of a single strand of duties developing and gaining momentum, as people continue to assign the same wider societal duties to the corporate sector as are shouldered by the administrative framework and, in doing so, widen the interests held on trust by corporate officials to include those of the community.

A final reason for the development of a single strand of institutional law is identified by Frug.[88] He predicts a single model of obligation, as presently both spheres 'involve the same attempt to legitimate and justify bureaucratic social organisation in the face of concerns that bureaucratic structures of any type... pose a threat to the interests they are created to serve.'[89] Thus, in institutional governance we have already begun to see the emergence of this single theory not only in this sociological jurisprudence, but indeed in case law as well.[90]

6. Conclusion

I set out at the beginning of this paper to show that while the duties of government officials and company directors can differ, the substantive, applicable duties are largely congruent. This congruency is more evident in the contextual underpinning of the

Ombudsperson?' (1990) 46 *The Business Lawyer* 29.

86 Fn. 57.

87 Id, recommendation no. 9, p xii. Does this mean we may see the enactment of a *Corporate Decisions (Judicial Review) Act* or perhaps a *Freedom of Information Act* applicable to corporations and the information they hold?

88 Frug, G., 'The Ideology and Bureaucracy in American Law' (1984) 97 *Harvard Law Review* 1276.

89 Airo-Farulla, fn. 2 at 199. Here Airo-Farulla was discussing the same article and argument by Frug and his summation was as eloquent as one could devise.

90 See for example *R v. Panel on Takeovers and Mergers; Ex Parte Datafin Plc* [1987] 2 WLR 699. Here it was found that a private body (the panel on takeovers and mergers) was exercising public law duties and administrative actions such that it had a considerable effect on the public. This public responsibility can also be seen in cases such as *Donoghue v. Stevenson* [1932] AC 562 and *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447.

duties and in the governing principles of how they are to exercise their power. I argued that from this, a single strand is evolving, but is yet to be officially fused and presented as a single institutional law doctrine. However, it remains successful in clarifying the duties of officials and setting a standard applicable to any large and powerful bureaucracy, be it public or private.

I have attempted to support this argument by outlining in detail the legal duties of both government administrators and company directors alongside an exposition of the underlying ideological reasoning for these duties and their enforcement and, to borrow Airo-Farulla's words, 'the similarities identified from both sides of the dichotomy are compelling.'[91] I further outlined the moves to promote a single strand of institutional directors' duties centring on the developing theory of corporate social responsibility and the increasing irrelevance of the public/private divide. From this, a single model of institutional obligations were seen to be clearly emerging based on institutional officials holding the interests of those they represent or govern on trust and acting in their best interest. However, this doctrine awaits formal ratification and fusion in either legislation or case law.

Importantly, such a paradigm achieves the removal of uncertainty over the duties of public officials through the detailed adoption of the different duties into a single system which, because of its revolutionary and novel nature will encompass the best from these systems and reject their shortcomings. Only a completely new paradigm of law can achieve such a feat of both legal and procedural excellence. In doing as such, and in taking the best from both arenas, the duties of officials will be better defined and honed and consequently it can be argued that they will be more efficient and effective in their operation, thus overcoming a criticism presently levelled at corporate and public law.[92] Indeed this clarity is noticeable upon reflection of this paper. From a comparison of particular duties and ideological underpinnings, several heads of obligation were identified. Further it was shown that where each sphere is deficient, it can be amended by its compliment in the other sphere of law. The result being a single strand of institutional law which establishes, enunciates and enforces duties on those officials whose actions have an effect on wider society by virtue of the societal power encompassed within the institutions from which they

91 Airo-Farulla, fn.2 at 200.

92 See for example Brown, C., 'The Fiduciary Duty of Government: An Alternate Accountability Mechanism or Wishful Thinking?' (1993) 2 *Griffith Law Review* 161.

operate. Thus institutional law provides clear and effective duties, but also protection for the public from organised and established community power bases.

I suggest that when ratified, the framework should resemble a reformed administrative law model with relaxed standing laws. I propose this on the basis of the individual rights stance the High Court has adopted[93] and from Kirby P's argument that the value of fairness is not to be sacrificed due to cost, particularly when individual liberty is at stake.[94] This model would preserve individual justice in the face of economic rationalism and managerialist notions.

In closing, it seems that a single strand of institutional law is destined to replace the present dichotomy as it continues to fall into insignificance. I submit that a hallmark of this new system will be a better defined set of duties and obligations and this will, in part, overcome the problems historically and presently faced by these mammoth institutions. This will have particular applicability to government and the public sector. What then should we expect form the new doctrine? I believe Teubner (cited in Jabbari[95]) summed up the predominant aim of any new legal field. In essence, institutional law should try to be a:

> conceptual system oriented towards social policy which would permit one to compare the consequences of different solutions to problems to accumulate critical experience, to compare different experiences from different fields, in short to learn.

93 See fns 68 and 69.

94 See *Bromby v. Offenders Review Board* (unrept., CA (NSW), Kirby P (diss), Clarke and Handley JJ., 13/11/90). See also Allars, M., 'Managerialism and Administrative Law' (1991) 66 *Canberra Bulletin of Public Administration* 50.

95 Jabbari, D., 'Critical Theory in Administrative Law' (1994) 14 *Oxford Journal of Legal Studies* 189 at 202.