TAKING THE BRAKES OFF: APPLYING PROCEDURAL FAIRNESS TO ADMINISTRATIVE INVESTIGATIONS

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> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practise fairness; ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."
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> Frankfurter J in *Joint Anti-fascist Refugee Committee v. MacGrath* 341 US 123 at 129 (1950)
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> All power is, in Madison's phrase, 'of an encroaching nature'... Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint.
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> Frankfurter J in *Trop v. Dulles* 356 US 86 at 119 (1958)

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Introduction

In 1963, in the case of *Testro Bros Pty Ltd v. Tait,*[1] a majority of the High Court held that there was no obligation on inspectors to accord a company under investigation for suspected insolvency the benefits of natural justice. In 1990, 27 years of evolution in the principles of natural justice, or procedural fairness as it is now often referred to,[2] led to the case of *Annetts v. McCann,*[3] where a majority of the High Court held that "[i]t is beyond argument that the view of the majority in [*Testro*] would not prevail today".

This evolution in procedural fairness has been associated with an increased judicial activism in protecting the interests of individuals. As a result, the question of whether natural justice applies has focused on the interference with those interests as a justification for judicial interference in the administrative process. In *Kioa v. Minister for Immigration and Ethnic Affairs,*[4] in what has been accepted as an authoritative statement of the law,[5] Mason J held that:

> [t]he law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention.[6]

As this statement illustrates, the obligation of procedural fairness derives from the common law, is subject to a clear manifestation to the contrary, and, most importantly, arises due to the effect of the

decision on an individual.[7] In this way, procedural fairness has been applied to protect individual rights and interests, including personal liberty, status, preservation of livelihood and reputation, proprietary rights and interests and legitimate expectations.[8]

The expansion of the notion of procedural fairness and the range of interests affected can be illustrated by the introduction and exponential development of the notion of legitimate expectations.[9] In *Attorney-General (NSW) v. Quin*[10] Mason CJ held;

> [a] legitimate expectation may be created by the giving of assurances ... the existence of a regular practice ... the consequences of denial of the benefit to which the expectation relates ... or the satisfaction of statutory criteria. ... [It] may consist of an expectation of a procedural right, advantage or opportunity.[11]

The inclusion of legitimate expectations has meant that there is no need for there to be an effect on an existing legally enforceable right, interest, privilege or benefit.[12] Legitimate, in this context, refers only to the need for "positive grounds which are sufficient to render it objectively justifiable"[13] and indeed may be little more than a requirement that the expectation be reasonable.[14] There is no need for the expectation to be held by the individual in their private capacity but rather may be one accruing to the public or class of people in general or based on some official or legitimate action.[15]

However, the obligation of procedural fairness "does not give substantive protection to any right, benefit or privilege that is the subject of the expectation".[16] It is not based on an expectation that procedural fairness should have been complied with.[17] The legitimate expectation derives from a circumstance "which suggests that, in the absence of some special or unusual circumstance, the person will obtain or continue to enjoy a benefit or privilege".[18] In *Breen v. Amalgamated Engineering Union*[19] it was suggested by Lord Denning that a legitimate expectation arose due to a belief that the applicant would benefit unless "there were good reasons against him". Therefore, the concept of legitimate expectations emphasises that the obligation to accord procedural fairness derives from the circumstances in which that right or interest is being denied and not the nature of the right or interest expected. However, it does not suggest the type of bodies on which the obligations may be placed nor the basis on which the obligation is imposed. A legitimate expectation merely describes the circumstances in which procedural fairness has been applied. It cannot be used as the basis on which to impose the obligations of procedural fairness.

The expansion in the range of interests protected by procedural fairness led Mason J to suggest that "[t]he critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?"[20] McHugh J in *Minister for Immigration and Ethnic Affairs v. Teoh*[21] has built on this to suggest that the rational development of this area requires procedural fairness to be applicable to all "administrative and similar decisions made by public tribunals and officials".[22] Similarly, Deane J has stated:

> the law seems to me to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of clear contrary legislative intent, be recognised as applying generally to government executive decision-making.[23]

If these views are accepted, the nature of the interest affected would only be considered in determining the content or extent of the obligation.

However, these broad propositions about the application of judicial review and procedural fairness lack any integrated or

principled basis or justification. In many ways these recent views have merely come to reflect the position of earlier this century. In 1911, Lord Loreburn LC in *Board of Education v. Rice*[24] stated that the obligation of natural justice was a "duty lying upon everyone who decides anything".[25] This statement echoes those in *Wood v. Woad,*[26] where natural justice was "applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals",[27] and in *Fisher v. Keane*[28] where natural justice was applied to "any other body of persons who decide upon the conduct of others".[29] Therefore, the question then as now is: in what circumstances will the brake of procedural fairness *not* be applied to administrative action?

This question arises in two areas: to what bodies or institutions, especially those outside the government or the executive, should the principles of procedural fairness be applied; and at what point in the administrative process should the obligations of procedural fairness arise. These two areas are not distinct. Both require consideration of the changing institutional structures of society, recognition of the influence of these structures and the interests they affect, and of the role of the courts in reacting to and developing this environment.

This paper is concerned with the second of these two areas in attempting to examine the boundaries of the application of procedural fairness. Chapter one considers the influence of the public / private dichotomy on administrative law. This dichotomy is responsible for the emphasis the court places on the individual in defining the ambit of judicial review. Illustrating the inefficacy of this dichotomy suggests that, as a basis at least for procedural fairness, this is inadequate. Chapter two examines an alternative basis for procedural fairness in the assessment of discretionary decisions, based on principles of rationality and participation. It will be argued that use of these principles demonstrates how procedural fairness can be used to enhance the operation of the bodies it is applied to as well as the interests of individuals. Chapter three examines how the emphasis on individuals has led to inconsistencies in the application of procedural fairness to administrative investigations. It applies the theory developed in the previous chapters to consider how the question should be approached in future.

CHAPTER ONE

Judicial Review

Procedural fairness originated from the principle that no one shall be condemned unheard.[30] Today it has developed into perhaps four distinguishable components: a person should know the case against them and have a chance to respond; any hearing should be by an impartial adjudicator; any decision has to be based on logically probative evidence;[31] and the decision-maker has a duty to inquire into matters which are centrally relevant.[32] Procedural fairness forms one of the elements of administrative law whereby courts undertake judicial review of administrative agencies. Administrative law, in turn, constitutes one of the "general principles which govern the exercise of powers and duties by public authorities".[33]

The word 'public' in this context has been used primarily to refer to government-related administration. Many of the remedies available in administrative law are restricted to control of government duties and powers.[34] Procedural fairness is therefore seen as an aspect of 'public law', regulating the relations between individuals and the state.[35] However, procedural fairness has been used to invalidate decisions of purely domestic or non-government bodies,[36] and remedies of injunction and declarations traditionally applicable to disputes between individuals

in their private capacity have been incorporated into administrative law.[37] This raises the question of whether 'public' is in some sense delimiting or determinative, or whether it is merely descriptive of the areas in which judicial review is applicable.

This chapter examines the influence of the distinction between public and private on the development of a theoretical basis for judicial review in general and procedural fairness in particular. Implicit reliance on this distinction has led to emphasis by the courts on the effect on the individual. It will be argued, however, that this reliance should be reconsidered in the same way as the distinction has been blurred by changing social structures and recognition of alternative prescriptive foundations.

The rule of law

The scope of judicial review, especially in relation to procedural fairness, has expanded over the last half of this century.[38] This increase has been seen as a response to the diminution in legislative control over executive power[39] that has accompanied the growth of the welfare state and government regulation. As Galligan suggests:

> the State, in order to achieve a variety of social goals, has taken control of wider spheres of social and economic activity, so the legal framework has become increasingly characterised by the combination of broad statutory provisions and the vesting in officials of wide discretionary powers. ... [The] emphasis has moved from private rights, guaranteed by explicit legal norms and enforceable by legal institutions, to a system in which power is exercised by officials according to a wide sense of the public interest, which includes, but is much wider than the personal interests of individuals.[40]

In response, administrative law has fashioned increasing means of judicial redress for the individual, whilst trying to avoid "the exercise of legal control itself [becoming] discretionary, sectional and subjective in the same way as the institutions that it seeks to control".[41]

Judicial intervention has been justified through a normative view of the rule of law. This concept, popularised through the work of A V Dicey, involves the absolute supremacy of, and the equal subjection of all classes to, the ordinary law of the land as administered by the ordinary law courts.[42] As a result of this ordinary law, the constitution governing the relations between individual and state is not the source but the consequence of the rights of individuals, as defined and enforced by the courts.[43] In this way, Dicey argued that the social, political or economic status of an individual was by itself no answer to legal proceedings,[44] and hence there was no need for anything similar to the then continental conception of 'administrative law'. Public power beyond that of ordinary law was legitimated through parliament, the courts merely supplementing ministerial authority to give effect to parliamentary intent.[45] This is still the foundation of review based on the principles of *ultra vires*, the courts ensuring that "a public ... body that has been granted powers, whether by statute, order in council, or some other instrument, must not exceed the powers so granted".[46] In this way:

> [m]uch of the doctrinal complexity which besets nineteenth and twentieth century administrative law can indeed be explained as the result of the tensions between the policing [of the boundaries of legislative intent] and adherence to a strict requirement of a private right as a pre-condition of natural justice, standing or substantive review.[47]

However, the expansion in the social and economic role undertaken by the state and the increase in broad grants of discretionary power that accompanied it inevitably led to criticism of this basis for judicial intervention.[48] As Craig suggests:

> [t]he idea that there is an interest in securing the efficacious discharge of regulatory legislation was no part of this model, except in so far as it was viewed

> as a natural correlative of the proper maintenance of external judicial supervision delimiting the boundaries of the legislative will.[49]

The courts also reacted to a perceived ineffectiveness of ministerial control of the executive[50] by placing emphasis on the prevention of arbitrary or oppressive uses of discretionary power in order to protect the rights and interests of individuals.[51] The intervention of the courts came to be based on, and seen by them as necessary to protect, the rights and interests of individuals. The 'rule of law' had become a means by which the courts could subject the government to compliance with judicial authority so as to limit the exercise of public power to protect the interests of individuals.[52] Judicial review was seen as a method of independent adjudication of a citizen's rights and "one of the checks and balances indispensable to our democratic constitutional structure."[53] The application of procedural fairness as "a duty upon anyone who decides anything"[54] was implicitly based upon, and hence restricted to, prevention of interference with individual interests.

Public v. Private

The rule of law, as a justification for review by a non-elected judiciary, has been criticised as undemocratic. Even if democracy is redefined to mean that no one person or body should have absolute power in a society,[55] the rule of law has allowed judges to take it upon themselves to demarcate the 'public' from the 'private' sphere to determine what is subject to judicial review. It can be argued that this demarcation has given rise to much of the rhetoric behind protection of the individual against the state.[56] Placing priority on the private rights of individuals has led "towards increasing judicial supervision of public bodies in order to protect the free exercise of personal liberties by those affected by the public power".[57] Restrictions upon the autonomous rights of individuals must then be justified in some way. Public bodies, it is argued, carry with them the inherent capacity to restrict this autonomy and hence must act only when authorised.[58] The balance between private power and the public interest is then achieved through the interaction of liabilities and intervention,[59] between so-called private and public law.

However, this demarcation has also been used in the application of the principles of judicial review to areas outside government. Procedural fairness has been applied to expulsion from a privately owned racecourse due to the public nature of the activities being conducted,[60] and to the conduct of sporting associations which promote public interests.[61] The courts have not, however, extended procedural fairness to the exercise of private rights in respect of property by such bodies [62] or to review of decisions made under contracts validly entered into by government and statutory bodies.[63] In these cases, characterisation as public has therefore depended on the nature of the relationship between the parties and the activities being pursued, rather than on the nature of the parties themselves.[64] Where the relationship between the parties has effects beyond the parties themselves the courts have intervened to preserve the autonomous private sphere of the individuals concerned.

Even in the context of government action, however, the growth in bureaucratic structures and diffusion of decision and policy-making power has led to the distinction between public and private becoming increasingly blurred.[65] Conceptions of the public interest have been reassessed through theories of interest-group pluralism - competition amongst interest groups - and the capture of self-interested bureaucratic officials.[66] Accompanying this has been the "widespread perception that so called private institutions were acquiring coercive power that had formerly been reserved to government".[67] The traditional private-law sense of individual rights has also been

challenged through the distribution of government funds in the form of welfare payments, government contracts, and licences which have come to be regarded as the 'New Property'.[68] These have all influenced the development of administrative law through recognition of the diversity of interests that are now at stake. As Galligan suggests, the courts:

> seem to be coming to realise ... that much administrative decision-making is not of the State v. Individual kind, but is a process for deciding upon courses of action of a continuing and positive nature, which may affect many interests, community, group or individual.[69]

The question then becomes whether administrative law is to remain principally concerned with the protection of the individual against state power or should attempt to ensure the proper representation of interests in the administrative process.[70]

In criticising the public/private dichotomy and the role it plays in administrative law, commentators such as Sampford and Airo-Farulla point out the similarities between public and private institutions in terms of their functions and effects. They suggest that any distinction serves only as a formalistic criterion, obscuring the need for appropriate processes applicable to all institutional structures. As Sampford suggests:

> Anglophone legal theory does not take non-state institutions seriously. It does not address the existence of bureaucratic power of managers and the abuses to which it can give rise. It does not address the purposes for which the institutions are supposed to exist and how they might be structured to fulfil them. Above all it does not address the key questions about how institutions might be best structured to achieve their purpose.[71]

This position recognises that institutions are not merely an encroachment upon an individual's autonomy or a "symptom of despotic power"[72] but serve to benefit both community and individual interests. Using public law as a limitation only upon state power serves to perpetuate the view of government as intrusive in nature whilst ignoring the influence of non-government institutions. Ignoring the positive functions of all such institutions "is like saying that the essence of a motor car is its brakes".[73] Therefore, if administrative law is to move away from the public/private divide it has to recognise that "the point is to have institutions that are capable of achieving certain ends and to give them the power to achieve those ends".[74] It is the interaction between the interests of these institutions, in terms of their provisions of a benefit going beyond that of an individual and the interests of individuals themselves, which should be the basis of public law.

Dangerous supplements

The recognition of the legitimacy and benefit of state power forms the basis of what Loughlin terms a 'functionalist' style of public law.[75] Proponents of this style "view law as part of the apparatus of government" and hence focus "upon law's regulatory and facilitative functions".[76] The rights of individuals are viewed as emanating from the state and liberty is seen in the positive sense as the capacity or ability to do or enjoy something.[77] This is distinguished from the ideology inherent in the rule of law as described above, or what Loughlin terms a Normativist style. This views individuals as prior to and separate from the state and hence liberty as the absence of external constraint, created and preserved through the rule of law.[78]

These idealised views reflect the inadequacies in drawing *a* distinction between public and private. To borrow the terminology of Derrida,[79] conceptions of public and private are *dangerous supplements* to each other, each dependent on yet threatened by the other. Private refers to the sphere of the self, but we can define ourselves only through

relationships with the world in which we live. Humans are social beings who cannot be abstracted from a particular social and historical context.[80] Public is usually associated with ideas of impersonality, of commonness, and the perspective of universality rather than particularity. But any reference to what we share collectively must take account of the individual components that make up the collectivity and must acknowledge the private interests.[81] Therefore, any dichotomy between public and private cannot be successfully delineated. As the functions and operations of the various institutional structures prevalent in society take on divergent and overlapping roles, any distinction becomes increasingly blurred. Any justification of judicial intervention based on a public / private dichotomy is open to criticism.

Conclusion

Sir Gerard Brennan has suggested that:

> [t]he political legitimacy of judicial review depends ... on the assignment to the Courts of that function by the general consent of the community. The efficacy of judicial review depends ... on the confidence of the general community in the way in which the Courts perform the function assigned to them. Judicial review has no support other than public confidence.[82]

However, such a statement is meaningless in any single instance without some ground on which to base, maintain or ascertain that confidence. Even if one accepts a Dworkinian approach[83] which minimises the emphasis on judicial discretion through the application of some coherent and integrated set of principles, the question becomes: on what principles is that application to be made? The Normativist philosophy suggests that judicial review is a means to protect individual autonomy from arbitrary or oppressive exercises of discretionary power but, as outlined above, this has led to reliance on dichotomies of public and private interests. Such a dichotomy can no longer serve as a valid justification. As Oliver concludes, any common law basis for judicial review should facilitate:

> a general theory about the exercise of power: the doctrine[s of judicial review] may apply to power whatever its source, if it affects vital private interests, or is in the 'public domain', whether in public or private hands.[84]

This general theory has to recognise the institutional structure of contemporary society. Judicial intervention should be based on the interaction between the interests of these institutions in terms of their provision of a public benefit and the interests of individuals. Development of the principles upon which to base judicial intervention would then begin with an examination of the function and operation of the various institutional structures in which the bodies under question operate.

CHAPTER TWO

Procedural fairness

Chapter one argued that judicial review cannot be justified purely on the basis of the public nature of the body concerned. Administrative law should go beyond placing a brake on public authorities and recognise the institutional structures in which it operates and of which is part. In this way a body of law governing the nature of the decision-making function and the influence and exercise of power can be developed. This chapter considers the application of procedural fairness in the context of these conclusions. It will look at the exercise of discretionary power and the basis on which it attracts the obligation of procedural fairness. A theory of the application of procedural fairness will then be developed through notions of rationality and participation, which can be used to preserve, without explicit discovery, the institutional structures in which it operates whilst recognising the influence of such structures on the individuals affected.

The nature of discretionary power

In *R v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ltd,*[85] Aitkin J stated:

> [w]herever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the [superior courts].[86]

A similar classification of the nature of the decision-making body can be seen in the way the courts imposed the requirements of natural justice on the basis of a duty to act judicially.[87] However judicial, and later quasi-judicial,[88] in this context[89] effectively referred to "an act done by competent authority, upon consideration of facts and circumstances, imposing liability and affecting the rights of others".[90] The distinction was eventually seen as creating arbitrary limits upon the application of natural justice,[91] and it "is now clear that the obligation to observe the principles of natural justice attaches whether the authority is judicial or administrative."[92]

Subjecting a body to review on the basis of it "having the duty to act judicially" can be criticised in the same way as subjecting a body to review based on its public nature. Relying on the nature or classification of a body ignores its functions and undermines any means to ascertain the legitimacy or otherwise of any exercise of power. As Sir Anthony Mason has suggested, "[t]he availability of judicial review may ultimately depend, not so much on the character of the decision-maker, as on the nature and subject matter of the decision that is made."[93] It is the exercise of discretionary power that attracts judicial review through the application of procedural fairness; the nature of the body is relevant only in determining the extent or content of that application.

Discretionary power is used here to describe a capacity or authority, beyond that possessed by an individual,[94] to adjudicate upon matters involving consequences for individuals.[95] As Kitto J in *Testro Bros. Proprietary Limited v. Tait,*[96] after referring to the decision in *Ridge v. Baldwin,* stated;

> [o]f course it is not every statutory power to do an act to the prejudice of another which [gives rise to the obligation of procedural fairness]. ... The reason is that there is no duty to decide anything upon inquiry. It is the *duty of antecedent decision upon some question* that makes the analogy of judicial powers at once appropriate and compelling.[97]

He then concludes that it is the authority to make an inquiry and a judgement or conclusion as a result of that inquiry, a "power to determine and decide",[98] that implies the requirement of procedural fairness.[99] The source of this power, whether prerogative, statutory or contractual, public or private, is not critical. Through exercising the power to affect the interests of others a decision-maker is concerned with applying or considering those interests in some way. To be reviewable the decision or exercise of power under question must have been made at the discretion of the decision-maker in the exercise of some capacity or entitlement to determine the interests of others. To constitute an exercise of discretionary power the act must be definitive[100] or *determinative* of the question being considered.[101]

The exercise of this power is not of itself illegitimate. As argued in chapter one, discretionary power can be seen as an element of the functioning of institutions which seek to enhance a positive conception of the liberty of individuals. Exercising such power in a way that affects an individual does not constitute an encroachment upon the autonomy of individuals in a way inevitably arbitrary or oppressive. However, the capacity or entitlement to affect others carries with it the potential for abuse. Procedural

fairness is an attempt to ensure the accountability of the exercise of discretionary power to prevent this potential.

Sampford suggests that there are four bases on which the exercise of discretionary power can be legitimated - democracy, the market, protection of human rights,[102] and what may be termed altruism.[103] However, questions relating to the market or altruism in its various forms, which may in some way validate any substantive outcome, or the institutional structures giving rise to that outcome, are unlikely to be acceptably determined in a court of law. As Sir Gerard Brennan suggests:

> judicial decision-making is a syllogistic process, involving major and minor premises of law and fact. Application of policy is different, calling for balancing of interests of the individual and the community at large, a process for which the adversary system is ill-equipped.[104]

The limitations of this adversarial process reflect the motivation for the delegation of discretionary decision-making to a body capable of considering and balancing various and often largely undefined interests. Judicial intervention has to recognise its relative unsuitability to take over this function. It is almost axiomatic that judicial review is concerned "not with the decision but with the decision-making process" and unless the court observes that restriction on its power it will "under the guise of preventing abuse of power, be guilty itself of usurping power".[105] Therefore, any limitations imposed by the courts on discretionary decision-makers has to be separated from the ultimate function of that body so as to prevent the undermining of that function. These limitations on the arbitrary or abusive use of discretionary power should be consistent with considerations of democracy and the provision of human rights so as to utilise and complement the adversarial focus of the courts.

Rationality

Galligan responds to the suggestion that there are no fixed principles preventing the arbitrary selection of competing values in the exercise of discretionary power by asserting that "it is an assumption of modern jurisprudence and political theory that a condition of the legitimacy and justifiability of the exercise of any government power is that decisions be rational".[106] By this it is meant that "decisions are based on reasons which explain and justify any exercise of power in terms of some set of wider policies and purposes".[107] Any discretionary decision-making power is therefore limited by a requirement that it not be arbitrary, that there be some reasons for the decision outside the particular decision or decision-maker in question.

Rationality is only one justification on which to base any particular exercise of power. However, having some reasoned basis is inherent in the legitimation of interference with an individual's interests, where that legitimation derives from some justification going beyond the particular parties concerned. Notions of consistency, generality, continuity and proportionality may also be inherent in reasoned decision-making.[108] Having a justification removed from the subjective interests of the decision-maker is implicit in the suitability of review as opposed to the re-making of any decision. Rationality requires that the decision be made on a reasoned rather than personal basis - the obligation of impartiality - on logically probative evidence, and after inquiring into relevant matters.

Rationality in this context[109] also requires participation in the decision-making process in order to ensure that the exercise of discretion is not completely determined through a competition of sectoral interests or through the self interest of the decision-maker. In this way any decision can reflect the values and interests of the community in which the

decision is made. Galligan, in the context of the exercise of government policy, refers to participation as requiring that:

> the decision-maker have before him a full view of the public interests bearing upon the exercise of his power and that the citizen exercise his rights of citizenship in helping to shape the ends of power.[110]

This reasoning can just as easily be extended to the exercise of discretionary power generally. It is where a decision-maker is empowered to make decisions on the basis of the interests of others, that those affected should have some chance to participate in the decision-making process in order to ensure the rationality of that decision.[111] In this way, the concept of participation represents a recognition of the *bounded rationality* of decision-makers.[112] They cannot consider every consequence of their decision but in order to ensure that the consequences they are considering have some relevance, and are correctly founded, decision-makers should allow those people likely to be affected the opportunity to have some bearing on the decision. Procedural fairness should be required to ensure the accuracy of the reasons, and not the reasoning, involved in a decision.

Equality

Galligan tentatively suggests that ideas of equality are inherent in any form of rationality which requires that like cases be treated similarly.[113] He argues that differences in treatment between individuals should be based on reasoned considerations. If a decision is to single out an individual for differential treatment, then any reasoned justification would have to include considerations personal to that individual. However, equality is also implicit in the notions of democracy and human rights that Sampford employs.[114] Hence, if any exercise of discretionary power is to be consistent with these principles, it would have to provide some means by which those individuals being considered could participate in the decision-making process.

The case for participation can, however, be put on a wider basis than this. If Brennan's views are accepted,[115] the legitimacy of judicial review ultimately rests on the general consent of the community. Analogously, any exercise of discretionary power should ultimately stand for legitimation before the community of interests it is meant to serve. Participation can then be seen as a means of securing access for the community of interests to the decision-maker. The competing interests of many sectors of society must be capable of equal representation in the ultimate decision and hence in the decision-making process if they are to be resolved in a continuing and positive manner.[116]

Participation in the application of government policy or function itself can also be seen as an aspect of the democratic process, ensuring that citizens are able to influence and review government decisions and that their views are represented. Furthermore, participation in this sense may also be seen as an aspect of an individual's right to citizenship.[117] This may be extended beyond the institutions of government and, as Sampford accepts, it suggests that

> participation in institutions is essential for the fulfilment of human personality and hence a very important individual right ... [which] means that human rights laws should seek to ensure that institutions serve those purposes by providing participation rights.[118]

Participation can therefore be seen as enabling a process of self-realisation[119] through involvement in the institutional structures of society. As argued in chapter one, this interaction between individual and institutional interests, should be reflected in any justification for judicial review. Rationality and the resultant requirements of participation provide that

justification for the imposition of procedural fairness.

Therefore, any obligation of procedural fairness which requires the participation of the person affected in the decision under review should be based on the reasons being considered in that decision-making process. Establishing that an individual should be heard requires establishing that the decision-making process involves a consideration of the interests of that individual. In other words, the decision must be made, at least in part, on the basis of reasons personal to that individual. It is only when the decision-maker has to make a determination, based on or reflecting considerations personal to the individual affected, that the obligation of procedural fairness arises.[120] Participation ensures that considerations personal to an individual are sourced in some way from that individual.

Judicial application

This conclusion is at least consistent with the approach of the courts to the application of procedural fairness. In *Kioa*[121] Mason J held that providing the applicant with notice of the intention to make a deportation order might serve "only to facilitate evasion and frustrate the objects of the statute"[122] and hence, where deportation is based solely on the fact that the person has been declared a prohibited immigrant, natural justice does not require such advance notice. However, he then states:

> it may be otherwise where the reasons for the making of the order travel beyond the fact that the person concerned is a prohibited immigrant and *those reasons are personal to him*, as, for example, where they relate to his conduct, health or associations.[123]

Brennan J, in the same case, after inferring procedural fairness from the manner in which the individual's interests are apt to be affected by the decision, goes on:

> It does not follow that the principles of natural justice require the repository of a power to give a hearing to an individual whose interests are likely to be affected by the contemplated exercise of the power in cases where the repository is *not bound and does not propose to have regard to those interests* in exercising the power.[124]

As these statements suggest, it is only where the decision under question has been based on, or reflects considerations personal to, an individual that the obligations of natural justice are imposed. They should not be imposed merely because an individual is affected.

There has been little need for explicit recognition of such a limit in the decisions natural justice has traditionally been concerned with. Taking into account adverse information about an applicant in deportation cases,[125] denying the renewal of a licence,[126] terminating employment,[127] or depriving someone of property[128] or liberty[129] are all situations which have given rise to requirements of procedural fairness when the decision-maker has singled out an individual on considerations personal to them. Even if it is accepted that legitimate expectations extend the range of interests attracting procedural fairness, this involves objectively ascertainable criteria which are overridden or applied on the basis of the particular applicant in question.[130] It has only been where the reasons for the decision relate to the person affected that the courts have extended the principles of natural justice to ensure that the person is able to participate in the decision.

The relationship between the reasons for the decision and the individual concerned has, however, been explicitly considered by the courts through the concepts of standing and justiciability. These concepts relate to the appropriateness of any particular application for judicial review: standing concerning why *this* individual should be before them and seeking redress;[131] justiciability concerning whether *any* applicant should be entitled

to relief.[132] The similarity of the tests adopted has meant that the relationship between these concepts and the application of natural justice has become confused,[133] the courts struggling to reconcile ensuring the legitimacy of administrative action with the suitability of the judicial process for review.

The relationship between standing and procedural fairness can be seen through appreciating that each is concerned with participation in the decision-making process.[134] Procedural fairness provides access to the administrative process; standing enables access to the judicial review of that process.[135] As Brennan J suggests:

> [i]f a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large, the repository of power will ordinarily be bound or entitled to have regard to the interests of the individual before he exercises the power.[136]

In this way Brennan J equates the interests which attract natural justice to those that provide standing.[137] However, recent developments in the rules of standing have concerned particular individuals or groups representing the interests of others or indeed the community at large.[138] In these cases the courts have examined how the body seeking review represents the interests which are the subject of the decision in question, so as to ensure that the applicant is in some way distinct from the community generally[139] and has more then a "mere intellectual belief or concern".[140] Questions of efficiency may dictate that the applicant be the one *best* able to represent the interests being considered, but ultimately the question comes down to the proximity of the applicant to the reasons for the decision under review.[141]

Similarly, justiciability, or reviewability, is a concept used by the courts where the decision involves considerations beyond that of the effect on a single individual, usually of a policy or polycentric nature.[142] It questions "whether the nature of a decision or decision-maker makes the judicial review inappropriate".[143] Just as the courts have rejected any classification of judicial or administrative in the applicability of procedural fairness, the question of justiciability is not dependant on a classification of the decision in question.[144] The emphasis has instead been placed on whether there are "factors personal to the applicant"[145] being considered. As Wilson J states in *FAI Insurance Ltd v. Winneke*:[146]

> if it were the fact that a decision affecting an individual is dictated by the application of a principle of government policy, with the result that *considerations personal to the individual* do not and could not influence the outcome, then there is no applicable principle of fairness which requires more than that the individual in question be informed of that overriding policy consideration. ... Of course, in a democracy there are ways and means of challenging government policy but the processes of judicial review cannot be harnessed to that end.[147]

The question is whether the decision was to be made "principally, if not exclusively, by reference to considerations relating to the applicant".[148]

For example, in *R v. Collins*[149] Stephen J, although not deciding the matter, would have distinguished the case where a licence may be granted on the basis of a report from the case where a decision is made to increase the total number of licences available and hence reduce the value of those remaining. He suggested that simply having an adverse effect on individual interests was not enough when the characteristics of the person who held the licences were not a consideration in the decision. In *Minister for the Arts, Heritage and Environment v. Peko-Wallsend Ltd*[150] it was held by Wilcox J that justiciability overlapped with the circumstances which attract natural

justice.[151] Therefore, as the question in that case of whether a decision to seek world heritage listing "did not relate essentially to the personal circumstances of any individual",[152] it was held that no obligation of natural justice was implied. Similarly in *Nashua Australia v. Channon,*[153] it was held that natural justice did not apply to a decision to revoke a tariff concession as it depended "on matters appertaining to the goods themselves in relation to tariff policies and considerations applied by the Department" rather than on factors "personal to the applicant".[154]

The courts have therefore recognised that the obligations of natural justice will not accrue to every decision which disadvantages or affects individuals.[155] The presence of factors personal to the applicant removes the impediments of standing and justiciability in the same way it suggests the obligation of procedural fairness, demonstrating that the individual or interest is being singled out for consideration in some way and so should be able to participate in the decision-making process, including review by the courts.

Conclusion

This chapter has argued that the obligations of procedural fairness may apply to the exercise of any power to determine or decide, whatever the source of that power or the classification of the body exercising it. Requirements of impartiality, probative evidence and possibly even the duty to inquire into relevant considerations can be derived from principles of rationality and equality whenever this power is exercised on some principled basis beyond that of the subjective values of the decision-maker. If a decision involves or is made on the basis of some reason or factor personal to the individual affected, then that individual should have an opportunity to know and respond in some way to those reasons, and hence participate in the decision-making process. The singling out of an individual should be based on considerations personal to, and sourced directly from, that individual.

In this way, concepts of procedural fairness, standing and justiciability condition the entitlement or capacity of the decision-maker to affect the interests of the individual. When this entitlement is exercised in a manner which reflects considerations specific or personal to an individual, it gives rise to a correlative right to have the requirements of procedural fairness met. The appropriateness of the courts as a means of redress is then inherent in the application of procedural fairness and further restrictions in terms of standing or justiciability are not required. Where the decision involves considerations going beyond those of an individual or a particular interest, then there is little principled justification for the participation of that individual or representative in the decision-making process.

CHAPTER THREE

Investigations

The first two chapters have suggested that, despite the expanding ambit of procedural fairness, there should remain limitations on its application. This chapter applies the conclusions reached previously to the application of procedural fairness in investigations, which in this context refers to any process involving an inquiry, examination or search to gather information. This area highlights the difficulty of using the effect on the individual to reconcile the protection of individual interests with the functioning of administrative agencies. However, if procedural fairness is imposed on the basis of the justifications outlined above, then a more principled and consistent approach can be adopted.

Prejudicial effect

Administrative decisions, especially those made by government agencies, are rarely made by one individual but are increasingly institutional in nature, involving formal and informal tiered decision-making and integrated appeal structures.[156] It is partly in recognition of the potential of natural justice to impose undue burdens on this administrative process,[157] that the courts have applied natural justice only to the decision-making process "in its entirety".[158] However, the question then becomes: what is to be considered a 'decision' for the purposes of procedural fairness?[159] In other words, at what stage in the decision-making process should procedural fairness be accorded? This question is especially relevant to the application of procedural fairness to investigations which are often an intermediate step in any administrative process.

The emphasis on the rights and interests of individuals has led various judges to state that, in order for natural justice to be required, the effect on the individual needs to be "direct and immediate".[160] The expansion of the range of interests to which the courts have applied procedural fairness has meant that any direct effect includes harming a person's reputation.[161] As Brennan J states:

> natural justice is required to be observed whenever a statutory authority contemplates a publication which would affect reputation by diminishing the estimation in which the bearer of the reputation stands in the opinion of others.[162]

Similarly, where the instigation of the investigation is based on some previous finding or upon accusatory criteria, and hence may affect the person's reputation, it may be subject to procedural fairness.

However, the courts have also suggested that such a direct effect is not required. It was held in *Koppen v. Commissioner for Community Relations*[163] that "[t]he question remains whether the dictates of procedural fairness apply to the exercise of statutory powers which do not culminate in a decision which affects rights, interests or legitimate expectations".[164] In this way the courts have looked at the prejudicial effect of the decision in question.[165] In *Testro Bros v. Tait*,[166] in dissenting on a different interpretation of the legislation, Kitto J held that:

> [t]he general conclusion seems justified that an inquiry may be of the character that implies a necessity to allow a person affected a fair opportunity to be heard, notwithstanding that an adverse report will do no more than expose him to a possibility not previously existing of a deprivation of rights by the exercise of a discretionary power by another authority. The reason is that the report itself prejudices the rights by placing them in a new jeopardy.[167]

This statement was cited with approval by Mason J in *FAI Insurances v. Winneke*.[168]

The possibility of a new jeopardy was applied in *R v. Criminal Injuries Compensation Board; Ex parte Lain*[169] where the court held that natural justice was available "even though the decision is merely a step as a result of which legally enforceable rights may be affected",[170] and even though there may be "some subsequent condition to be satisfied before the determination can have any effect upon such legal rights or liabilities".[171] That subsequent condition included a later determination by another tribunal.[172] Similarly, in *Brettingham-Moore v. St Leonards Municipality*,[173] it was held that the obligations of natural justice accrued to the making of a report which was a condition precedent before any further action could be taken. Therefore, procedural fairness may apply to any "step in the process"[174] which could prejudice the individual affected.

Determine and decide

However, the courts have held that "not every inquiry or investigation has to be conducted in a manner that ensures procedural fairness."[175] In *Mahon v. Air New Zealand Ltd,*[176] it was held that natural justice was required by a Royal Commission only before reporting on an investigation. In *National Companies and Securities Commission v. News Corporation Ltd,*[177] Gibbs CJ held that *Mahon* was not applicable to a body which makes no findings or report, on which point Brennan J agreed.[178] *Mahon* and *News Corp* were referred to in *Annetts v. McCann,*[179] where Mason CJ, Deane and McHugh JJ made it clear that the rules of natural justice "apply to public inquiries whose findings of their own force could not affect a person's legal rights or obligations".[180] Brennan J held that obligations of procedural fairness applied generally, subject to any contrary intention, to "statutory inquiries in which the inquisitor is authorised to publish findings that might reflect unfavourably on a person's conduct".[181]

Therefore, a decision to conduct an investigation or the conduct of the investigation itself short of a point where unfavourable findings may be made against a particular person, has been held by the courts to not require procedural fairness.[182] Where there is no direct effect there must be a finding of some sort which exposes the individual to the potential of such an effect. The decision-maker in question must have contributed in some positive way to prejudicing or affecting the individual. The difficulty of distinguishing direct effect has, however, confused the matter. In drawing the "fine line between making a finding and merely reporting the results of an investigation",[183] the courts have resorted to balancing the prejudice to the individual against the investigatory function of the body.[184] As Spender J states, "[t]he fact that certain investigators are not required to accord natural justice may be justified because the efficient conduct of public affairs requires that these bodies not be unduly burdened or delayed".[185] However the expansion of the ambit of the interests protected has meant that "[a] court today should be slow to exclude any statutory tribunal from a duty to observe natural justice fully, in the absence of plain words in the statute necessarily having that effect".[186] This approach is consistent with the recognition that acting on a reasoned basis, and allowing the participation of individuals considered in the decisions of administrative bodies, is as much a part of their function as having to act efficiently or quickly.[187]

The requirement for a finding is, however, merely a need for there to be some antecedent decision or determination as a necessary condition for the application of procedural fairness. Investigations are often used to discover evidence or find the reasons for or against a particular decision. It is only where the product of the investigation is applied in some way or used in reaching a conclusion or determination that the need for some reasoned basis accrues and the application of procedural fairness becomes appropriate. As Davies J suggests, "procedural fairness ... is a precondition of decision-making, not of conduct which does not decide anything, even on a provisional basis."[188] Merely collecting or collating evidence to be used in a decision, although prejudicial to a person, would not be an exercise of discretionary power.[189] It is the input or reasons employed by the decision-maker in reaching a conclusion which is definitive of the issue before it, and not the act of investigation, which gives rise to a possible application of procedural fairness.

Considerations personal

The difficulty associated with applying procedural fairness to investigations or inquiries comes about because they are only an intermediate step before there is

any direct effect on the person's interests. Applying procedural fairness on this basis requires breaking up the decision-making process to determine at what stage any effect occurs. This difficulty is compounded where there may be an opportunity for the person affected to participate at a later stage or when the investigation or report comes to be acted upon. Whether there has been a finding or determination may not be known to the individual until a further step is taken, or the process is challenged on suspicion that such a finding is possible. The investigation may only relate to whether some act *may* have been committed,[190] or may determine the probity of evidence or reasons to be used in a later decision, yet still prejudice an individual in some way. How then do you determine how 'unfavourable' a finding must be?

The courts have held that the decision-maker may be obliged to give the party an opportunity to participate at each stage where the ultimate decision-maker takes account of a new matter or considers aspects of the report which the party affected has not had the opportunity to deal with,[191] where there is an immediate and irreparable effect on the interests of the party, where the functions of the bodies differ and do not form part of the same decision-making process,[192] or where any subsequent decision does not supersede or put aside the earlier one. Therefore, whilst stating that the obligation of procedural fairness accrues to the decision-making process "in its entirety",[193] the courts have distinguished what constitutes a 'decision', on the basis of the effect on the person involved.

A different approach has been taken with appeals. Where there is available a full statutory right of appeal, the courts regard it as an indication of the intention of parliament that the appeal provide the only means of redress.[194] To do this, the right of appeal must in effect supersede the original decision, involving no additional financial or other burden or prejudice, a need for speedy resolution of the matter, and no irrevocable effects of the immediate decision.[195] Therefore, integrated decision-making processes have been recognised only to the extent set out by legislation and only 'cures' the obligation of procedural fairness where there is no irremediable detriment, burden or prejudice to the individual affected prior to some subsequent opportunity to participate.[196]

However, the courts have gone beyond the possible or direct effect on the individual and examined the reasons for the decisions at later stages of the process. For example, in *South Australia v. O'Shea*,[197] it was held that the decision not to release a prisoner against the recommendation of the parole board did not require procedural fairness.[198] Despite its direct effect, it was held that the decision was based on considerations of the public interest and not anything personal to the individual. Similarly, in *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs*,[199] the Minister was required to afford procedural fairness before rejecting the recommendation of the AAT and deporting the applicant on the ground of exceptional circumstances, where those circumstances were in part personal to the applicant, namely his risk of recidivism and ability to return to his country of origin. In this way the courts have looked to the particular determination rather than the stage at which it is made. Where the later stages in the decision-making process are removed from making determinations reached on the basis of considerations personal to the applicant, there is no need for the obligations of procedural fairness to be accorded to those later stages.

If procedural fairness is not required in later stages in the decision-making process, where factors personal to the individual are not being considered, then it should not be applied to intermediate stages on the same basis. It is this

examination of the reasons for the decision and their relation to the individual involved that formed the conclusions in the previous chapter. These conclusions are applicable independently of the stage at which they are applied. Where a determination is made about an individual or a conclusion is reached on the basis of reasons personal to an individual, procedural fairness would require that the individual be allowed to participate in the decision-making process. In this way there is no need for the courts to attempt to dissect the decision process to determine the independent effect of each interdependent stage.

For example, in *Edelsten v. Health Insurance Commission,*[200] the question arose of whether there was any obligation to provide procedural fairness prior to recommending that the Commission investigate possible over-servicing by Dr Edelsten. These recommendations were authorised to be made given the appearance of possible over-servicing in the information before the decision-makers. The Commission in turn was empowered to determine whether there was actually over-servicing through a process including participation by Dr Edelsten. Therefore, the earlier recommendation and previous investigation by those bodies did not involve determining any question personal to Dr Edelsten, but merely examined the possibility of such a determination being made. They were not definitive of any question which related to Dr Edelsten. In these circumstances, there was no requirement of procedural fairness until that determination commences. The court however, though primarily concerned with the operation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth),[201] felt that the recommendations were only preliminary and therefore there was no effect on Dr Edelsten's interests. This was despite the fact that the recommendations exposed Dr Edelsten to the Commission and having to defend himself against the subsequent chance of penalty, an effect that other cases have considered warrants procedural fairness.

Edelsten illustrates both the subtlety of the investigations process and the difficulty of determining when an individual has been adversely affected. Clearly, Dr Edelsten had an interest in not being the subject of a Commission investigating his activities. However, imposing the burden of procedural fairness on the recommendations may have undermined the function of the administrative structure in place.[202] Imposing procedural fairness on the basis of the reasons for the decision would allow the participation of individuals at a stage in which factors personal to them are being considered, giving individuals the chance to defend their interests whilst enhancing the functioning of the decision-making process.

Conclusion

The traditional judicial emphasis on using procedural fairness to protect the interests of individuals against administrative action has been extended to investigations. This has meant that procedural fairness has been imposed at any stage in the decision-making process that has an immediate effect on recognised interests or prejudices those interests by exposure to an effect that was not previously possible. The courts have recognised the institutional processes that are involved in administrative bureaucracy, but how far the courts are willing to intrude into this process, given the effect that any one step may have in the outcome for the individual, is a question that still remains.

However, if the nature and function of procedural fairness as represented in the preceding chapters is accepted, this intrusion of the courts would be conditioned upon the particular determination or conclusion rather than the proximity of the effect on the individual. Ultimately, any identifiable stage in a decision-making process may

involve some prejudice to an individual by its role in leading to the final outcome. Requiring the participation of individuals possibly affected by that final outcome at every stage may undermine both the efficiency and purpose of that process. Decisions based on the appearance of objectively determined criteria, considerations of a wider public interest,[203] or preliminary reports or collations of information from other sources should be left to the agencies concerned. It is only where a determination or finding is made, based on or reflecting considerations involving matters personal to an individual, that procedural fairness should be implied.

CHAPTER FOUR

Conclusion

This paper has examined the conditions which determine whether natural justice will be applied, or rather not applied, to administrative action. When used in this way, what is meant by administrative action has not been defined by the courts but merely illustrated through the context in which it is used. The difficulties of deriving a principled basis on which to apply the requirements of natural justice results from this inability to define the terminology being used without reference to any explicit and particular context. The object of this paper may therefore be described as examining what actions should be subject to procedural fairness. Given the suggestion that procedural fairness is a "duty lying upon everyone who decides anything",[204] this amounts to describing what can be considered a 'decision', on the basis that procedural fairness is then universally applied to it.

Attempting to classify a decision on the basis of the public nature of the decision-maker neither determines nor justifies the application of procedural fairness. Conceptions of what is 'public' derive from conceptions of what is 'private', which in turn is a view of which interests of individuals should not be interfered with. Such a dichotomy requires without explanation that the legitimacy of the decision-maker's function or existence depends on its subjection to judicial review. Any objective justification of such a dichotomy is also undermined by the increasing interaction and overlap of the institutions of society.

Similarly, imposing procedural fairness on the basis of the presence of discretionary power to affect individuals fails to recognise that such power is not of itself arbitrary or oppressive. The institutions that exercise this power fulfil a positive function, the legitimacy of which cannot be determined by the courts solely on the basis of interference with the autonomy of an individual which may accompany it. It is the interaction between the interests of these institutions, in terms of their provisions of a benefit going beyond that of an individual and the interests of individuals themselves, which should be the basis of administrative law.

In seeking to avoid the "judicialisation of administrative procedure"[205] and strike a balance between the needs of practical administration and the procedures of judicial review, the courts have looked to the nature of the body in question. However, locating the point of balance in an ability to affect the interests of individuals merely returns to the public / private dichotomy and ignores the accepted role of the institutions in question. It is the adjudicative nature of any action of a body empowered, beyond that of an individual, to determine and decide that gives rise to the analogy with judicial processes that procedural fairness represents. It is the drawing of a conclusion on the basis of reasons beyond those of the decision-maker that requires impartiality in the making of that conclusion. And it is the recognition of the bounded rationality of the decision-maker and the need to make a reasoned rather than a subjective decision that requires the participation of the interests being

determined which procedural fairness provides.

Requiring participation in the decision-making process recognises the interaction of individual and institutional interests. It ensures that the singling out of an individual or any inequality of treatment is based on reasons personal to that individual whilst placing before the decision-maker the community of interests being considered and determined by them. It is only when discretionary power is exercised on a basis that reflects matters specific to an individual that the correlative right of procedural fairness arises to ensure participation in the exercise of that power. Once this is determined, there is no need for the concepts of standing and justiciability. The fact that the exercise of power is based on factors personal to the applicant indicates both the suitability of that applicant and the appropriateness of judicial intervention through the application of procedural fairness.

On this basis, there is no need for the courts to attempt to define the interests which should be protected, or to classify the nature of the bodies which should be subject to the obligations of procedural fairness. These are instead relevant only to the question of the content of the obligation, or the extent of the participation in the decision-making process, where they can be flexibly considered in the context of the functions of the body in question once procedural fairness is applied.[206] Similarly, there is no need for the proximity of the decision to the final outcome of the decision-making process to be determined. Procedural fairness applies at any stage at which there is a determination which reflects or is made on the basis of matters personal to an individual. Merely collecting evidence is not determinative of the issues involved. Investigations are not reviewable unless they are instigated on the basis of, draw conclusions from, or are determinative of some question or finding relating specifically to the personal circumstances of the individual.

Participation in the decision-making process, as reflected in the principles of procedural fairness, follows from the proximity of the individual's personal interests to the decision-making process. Considerations of policy or the public nature of the decision, or indeed the frustration of the legislative intent, indicate that the decision is not to be based on considerations personal to an individual, and hence participation by that individual would not enhance or facilitate the decision-making process. The implication of procedural fairness in these circumstances, merely because of the effect the decision has or may have on the individual, operates only as a brake on the institutional structures within which the decision is made and on which the decision is based. Procedural fairness is a common law duty to allow the participation of individuals in the decision-making process. It should be used by the courts to enhance rather than undermine the administrative action it seeks to regulate. It's time to take the brakes off.

Endnotes

1 (1963) 109 CLR 353, hereafter referred to as *Testro*.

2 See eg. *Kioa v. Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550; 62 ALR 321 at 346 per Mason J (hereafter referred to as *Kioa*).

3 (1990) 65 ALJR 167; 170 CLR 596; 97 ALR 177 (hereafter *Annetts*).

4 Above n.2.

5 See *Koppen v. Commissioner for Community Relations* (1986) 67 ALR 215 at 220 (hereafter *Koppen*); *South Australia v. O'Shea* (1987) 73 ALR 1 at 5 (hereafter *O'Shea*); *Annetts* above n.3 at 168.

6 *Kioa* above n.2 at ALR 346.

7 The courts have referred to 'individual' as including "artificial persons or entities" with little discussion (see *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs* below n.12 at ALD 578 per Deane J). However, note that in *Bond Corp Holdings v. Sulan* (1990) 8 ACLC 562 it was held that the presumption that Parliament has intended not

to interfere with the common law rights of individuals had limited application to corporations. The privilege against self-incrimination has also recently been removed from corporations (see *Environmental Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 CLR 477 and *Trade Practices Commission v. Abbco ice Works* (1994) 123 ALR 503). Whether similar considerations may apply to procedural fairness is not explicitly considered here. For an analysis of the distinction between the legal treatment of organisations see Dan-Cohen, M. *Rights, Persons and Organisations*, University of California Press, Berkeley, 1986.

8 *Kioa* above n.2 at CLR 584, ALR 345 per Mason J. Note that Brennan J rejected the concept of legitimate expectation, suggesting "it is not the kind of individual interest but the manner in which it is apt to be affected that is important for determining whether the presumption is attracted" (*Kioa* at ALR 323).

9 See generally Churches, S. "Justice and Executive Discretion in Australia" [1980] PL 397. The concept of legitimate expectations was introduced by Denning J in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170.

10 (1990) 170 CLR 1; 93 ALR 1 (hereafter *Quin*).

11 *Ibid* at ALR 13, citations have been removed.

12 *Kioa* above n.2 at ALR 345 per Mason J; *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs* (1990) 169 CLR 648; 19 ALD 577 at 597 per McHugh J (hereafter *Haoucher*). See generally Allars, M. *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990 at 238.

13 Tate, "The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice" (1988) 14 *Mon Uni Law Rev* 15 at 48-49, quoted with approval in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 69 ALR 423 at 437 per Toohey J, and at 445 per McHugh J (hereafter *Teoh*).

14 See *Teoh* above n.13 at 432 per Mason CJ and Deane J; *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 WLR 735; *Cole v. Cunningham* (1983) 49 ALR 123 and see generally Flick, G. *Natural Justice, Principles and Practical Application* (2nd ed) Butterworths, Sydney, 1984 at 35-36.

15 Churches, S. above n.9 at 409-411.

16 *Teoh* above n.14 at 450 per McHugh J, see eg. *Quin* above n.10 at CLR 21-22 per Mason CJ, at 39-41 per Brennan J; *Haoucher* above n.12 at CLR 651-652 per Deane J.

17 See *Quin* above n.10 at ALR 40 per Dawson J, citing *Durayappah v. Fernando* [1967] 2 AC 337 at 349; see also *Teoh* above n.16 at 433.

18 *Haoucher* above n.12 at CLR 682; ALR 598; See also *Teoh* above n.13 at 445; *Kioa* above n.2 at CLR 583.

19 [1971] 2 QB 175, cited with approval in *Haoucher* above n.12 at 596-7 per McHugh J.

20 *Kioa* above n.2 at ALR 347.

21 Above n.13.

22 *Ibid* at 444-5.

23 *Haoucher* above n.12 at 578-9, as cited in *Annetts* above n.3 at 168.

24 [1911] AC 179.

25 *Ibid* at 182.

26 (1874) LR 9 Ex 190.

27 *Ibid* at 196.

28 (1878) 11 Ch D 363.

29 *Ibid* at 363.

30 Flick, G. above n.14 at 26.

31 *Minister for Immigration and Ethnic Affairs v. Pochi* (1980) 31 ALR 666. See eg. *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 321 at 356 per Mason J; *Mahon v. Air New Zealand* [1984] AC 808 at 821 (Hereafter *Mahon*).

32 See *Secretary, Dept of Social Security v. O'Connell & Sevell* (1992) 38 FCR 540; *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45-46; *Village Roadshow Corporation Ltd v. Sheehan* (1987) 75 ALR 539; *Century Metals and Mining N L v. Yeomans* (1989) 100 ALR 383. The classification of any such duty as an aspect of procedural fairness was questioned in *Teoh* above n.13 by Mason CJ and Deane J (at 432). Gaudron (at 440) and Toohey (at 437) JJ supported the requirement.

33 Wade, H.W.R. *Administrative Law* (5th Ed) Clarendon Press, Oxford, London, 1982 at 5.

34 *Ibid* at 548.

35 See Airo-Farulla, G. "'Public' and 'Private' in Australian Administrative Law" (1992) 3 PLR 186 at 187.

36 See discussion below at text accompanying n.60.

37 See Allars, M. above n.12 at 34.

38 See eg. *Annetts* above n.3 at ALJR 168.

39 Sir Gerard Brennan, "The Purpose and Scope of Judicial Review" in Taggert, M. (Ed) *Judicial Review of Administrative Action in the 1980's*, Oxford University Press, London, 1986 at 19.

40 D.J. Galligan "Judicial Review and the Textbook Writers" (1982) 2 OJLS 257, at 257.

41 *Id.*

42 Dicey, A.V. *The Law of the Constitution* (10th Ed), MacMillan, London, 1959 at 198-199. Note that it is not suggested here that this is the only conception of 'the rule of law' but is merely presented as representative of the Australian approach. See eg. Lev, D. "Judicial Authority and the Struggle for an Indonesian Rechstaat" (1978) 13 Law & Society 1.

43 *Ibid* at 198-199.

44 Heuston, R.V. *Essays in Constitutional Law* (2nd Ed), Stevens, London, 1964 at 32-34.

45 See Craig, P. "Dicey, Unitary, Self-Correcting Democracy and Public Law" (1990) 106 LQR

105 at 119; McMillan, J. "Conflicting Values in Administrative Law and Public Administration", paper presented to the 1993 AIAL/IPAA National Conference, at 5-6.

46 Oliver, D. "Is the Ultra Vires Rule the Basis of Judicial Review?" 1987 PL 543 at 544.

47 Craig, P. above n.45 at 120.

48 See eg. Galligan, D. above at text preceding n.40 and Craig, P. above n.45 at 138-140.

49 Craig, P. above n.45 at 119.

50 See eg. Mason, A. "Administrative Review: The Experience of the First Twelve Years" (1989) 18 FLR 122; Brennan, G. above n.39.

51 See Galligan, D. *Discretionary Powers*, Oxford University Press, England, 1986 at 199-206 and see generally Craig, P. above n.45.

52 See McMillan, J. above n.45 at 1.

53 Mason, A. above n.50 at 130.

54 See text at n.24 above.

55 Cranston, R. *Law, Government and Public Policy*, Oxford University Press, Melbourne, 1984 at 85.

56 For a criticism of the judicial reliance on protection from public bodies in terms of the anomalies in the cases see Oliver, D. above n.46.

57 Sampford, C. "Law, Institutions and the Public/Private Divide" (1990) 20 FLR 185 at 187.

58 See Raz, J. *The Authority of Law* Clarendon, Oxford, 1979 at 61, 72, 75-77.

59 See Stone, C. "Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?" (1982) 130 UPLR 1441 at 1453.

60 See *Forbes v. New South Wales Trotting* (1979) 143 CLR 242.

61 See *McInnes v. Onslow-Fane* [1978] 1 WLR 1520.

62 *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 511 (hereafter *Heatley*).

63 See *Post Office Agents Assoc Ltd v. Australian Postal Commission* (1988) 84 ALR 563; *General Newspapers Pty Ltd v. Telstra Corporation* (1993) 117 ALR 629; and see generally Airo-Farulla, G. above n.35 at 190-191; O'Brien, D. "Judicial Review in the Commonwealth - Proposals for reform" (1989) 63 *Law Institute Journal* 718; Allars, M. "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 PLR 44.

64 Airo Farulla, G. above n.35 at 188.

65 *Ibid* at 187.

66 See eg. Peltzman, S. "Toward a More General Theory of Regulation" (1976) 2 *Journal of Law and Economics* 211.

67 Horowitz, M. "The History of the Public/Private Distinction" (1982) 130 *Uni of Penn LR* 1423 at 1423.

68 Craig, P. *Administrative Law*, Sweet & Maxwell, London, 1983 at 34-35. The term 'New Property' was introduced by Reich, C.A. "The New Property" (1964) 73 *Yale L.J.* 733.

69 Galligan, D.J. above n.40 at 274.

70 Cane, P. "The Function of Standing Rules in Administrative Law" [1980] PL 303 at 327.

71 Sampford, C. above n.57 at 206.

72 Loughlin, M. *Public Law and Political Theory*, Oxford University Press, New York, 1992 at 168-169.

73 Sampford, C. above n.57 at 203.

74 *Id.*

75 Loughlin, M. above n.72.

76 *Ibid* at 60.

77 *Ibid* at 61. See also Galligan, D. above n.51 at 205-6.

78 See eg. Hayek, *The Road of Serfdom*, George Routledge & Sons Ltd, London, 1944 at 54.

79 Derrida, J. *Of Grammatology* (Translated by Spivak, G.) Johns Hopkins University Press, Baltimore, 1976 at 141-164. For a general discussion on this terminology see Culler, J. *On Deconstruction*, Cornell University Press, Ithaca NY, 1982 at 85-98.

80 Loughlin, M. above n.72 at 96; See also Note "Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats" (1994) 107 *Harv Law Rev* 1401 at 1402-1403.

81 For a similar analysis in terms of objectivity and subjectivity see Frug, G. "The Ideology of Bureaucracy in American Law" (1984) 97 *Harv Law Rev* 1277 at 1289-1292.

82 Brennan, G. above n.39 at 18.

83 This refers to the general approach outlined in the work of Ronald Dworkin. See in general *Taking Rights Seriously*, Harvard University Press, Cambridge, 1978 and *Laws Empire*, Belknap Press, Cambridge, Mass, 1986.

84 Oliver, D. above n.46 at 576 and see generally Bayne, P. "The Common Law Basis of Judicial Review" (1993) 67 ALJ 781 at 784.

85 [1924] 1 KB 171.

86 *Ibid* at 205.

87 See *Cooper v. The Board of Works for the Wandsworth District* (1883) 14 CB (NS) 180, 143 ER 414.

88 See Wade, H.W.R. above n.33 at 450.

89 As opposed to the terminology relevant to separation of judicial powers of the Chapter III Courts required by the Constitution. See *R v. Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, on appeal (1957) 95 CLR 529. For a recent discussion on the interpretation of 'judicial' powers for the purpose of Chapter III of the Constitution see *Brandy v. Human Rights and Equal Opportunity Commissioner* (1995) 69 ALJR 191; 127 ALR 1.

90 *R v. Dubin Cpn* (1878) 2 L.R. Ir. 371 at p.376 per May CJ, approved by the Privy Council in *Everett v. Griffiths* [1921] 1 AC 631 at 683.

See generally Wade, H.W.R. above n.33 at 447-450.

91 *Ridge v. Baldwin* [1964] AC 40.

92 *Bread Manufacturers of NSW v. Evans* (1981) 38 ALR 93 at 103 per Gibbs CJ, citing *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 112-113 and *Heatley* above n.62 at 498-9. See also *Kioa* at CLR 620 per Brennan J.

93 Sir Anthony Mason, above n.50 at 124.

94 Oliver, D. above n.46 at 549.

95 *Cooper v. Wansdworth Board of Works* above n.87; *Wood v. Woad* above n.26 at 196, and see generally Flick, G. above n.14 at 26, 32.

96 Above n.1.

97 *Ibid* at 369, emphasis added.

98 *R v. Legislative Committee of the Church Assembly; Ex parte Haynes*-Smith [1928] 1 K.B. 411 at 419 per Salter J, cited with approval in *Ridge v. Baldwin* above n.91 at 948 per Lord Reid; *Testro* above n.1 at 369 per Kitto J. See also *Board of Education v. Rice* above n.24 at 182.

99 *Testro* above n.1 at 370, quoting Lord Lyndhurst in *Capel v. Child* (1832) 149 ER 235 at 242 as quoted in *Smith v. The Queen* (1878) 3 App Cas 614 at 624, and citing *Cooper v. Wandsworth District Board of Works*, above n. 87; *Sydney Corporation v. Harris* (1912) 14 CLR 1 ; *Delta Properties Pty Ltd v. Brisbane City Council* (1955) 95 CLR 11 and *The Commissioner of Police v. Tanos* (1958) 98 CLR 383.

100 See Wade, H.W.R. above n. 33 at 506.

101 See Mason, A. above n.50 at 124.

102 This refers to the indefeasible rights of autonomy necessitated by human dignity or respect. See generally the view of Immanuel Kant, eg. Kant, I. *Foundations of the Metaphysics of Morals*, Beck, L. (ed), Bobbs-Merrill, Indianapolis, 1959.

103 Eg. charity, fraternity, affection or caring. See Sampford, C. above n.57 at 219-221.

104 Brennan, G. above n. 39 at 20.

105 *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155 at 1173 per Lord Brightman.

106 Galligan, D. above n.40 at 271.

107 *Id.*

108 *Ibid* at 272; Jowell, J. and Lester, A. "Beyond *Wednesbury*: Substantive principles of Administrative Law" 1987 PL 368 at 375-376.

109 Note that this is distinct from the 'rationality' doctrine as used in the US, which refers to the deference of the courts in determining whether an administrative agency is acting within its authority. See *Chevron, U.S.A. Inc. v. NRDC* (1984) 467 US 837 and generally Scalia, A. "Judicial Deference to Administrative Interpretation in the Law" [1989] Duke LJ 511 at 511. For a suggested application of this doctrine in Australia see Bayne, P. "Who is in Charge? Do we need a Rationality Test for Questions of Law?" (1991) 66 CBPA 77.

110 Galligan, D.J. above n.40 at 271.

111 See *John v. Rees* [1969] 2 All ER 274 at 309.

112 For the use of this term in relation to review on the grounds of failing to consider relevant considerations and considering irrelevant considerations see Beatson, J. "'Public' and 'Private' in English Administrative Law" (1987) 103 *Law Quart Rev* 34 at 37.

113 Galligan, D.J. above n.40 at 272-273.

114 See above at text accompanying n.103.

115 See above at text accompanying n.82.

116 See Galligan, D.J. above n.40 at 274; Allars, M. "Standing: The Role and Evolution of the Test" (1991) 20 FLR 83 at 110.

117 Galligan, D. above n.40 at 270-271.

118 Sampford, C. above n.57 at 221.

119 See Note "Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats" above n.80 at 1404.

120 See Churches, S. above n.9 at 413-416.

121 Above n.2.

122 *Ibid* at ALR 348.

123 *Id*, emphasis added.

124 *Ibid* at ALR 374, emphasis added.

125 Eg. *Kioa* above n.2.

126 Eg. *FAI Insurance Ltd. v. Winneke* (1982) 41 ALR 1.

127 Eg. *Ridge v. Baldwin* above n.91.

128 Eg. *Cooper v. The Board of Works for the Wandsworth District* above n.87.

129 Eg. *Johns v. Release on Licence Board* (1987) 72 ALR 469.

130 See discussion above at text accompanying n.9.

131 Cane, P. above n.70 at 310.

132 *Id.*

133 See Allars, M. above n.12 at 308. For the confusion between standing and justiciability see *Australian Conservation Foundation Inc. v. Commonwealth* (1980) 146 CLR 493 at 554 per Murphy J; *Right to Life Association (NSW) Inc v. Secretary, Department of Human Services and Health* (1995) 128 ALR 238 at 269. See also the discussion below.

134 Participation in the original decision has been held to give rise to an interest sufficient to grant standing; *US Tobacco Co. v. Minister for Consumer Affairs and Others* (1988) 83 ALR 79; *Australian Institute of Marine and Power Engineers v. Secretary, Department of Transport* (1988) 71 ALR 73; *Telecasters North Queensland Limited v. Australian Broadcasting* Tribunal (1988) 82 ALR 90; *Sinclair v. Mining Warden at Maryborough* (1975) 132 CLR 473 and see generally Electoral and Administrative Review Commission (Qld) report on *Judicial Review of Administrative Decisions and Actions*, December 1990 at 75-76.

135 Allars, M. "Standing: The Role and Evolution of the Test" (1991) 20 FLR 83 at 98.
136 *Kioa* above n.2 at CLR 621; ALR 373.
137 See also *Ainsworth v. Criminal Justice Commission* (1992) 106 ALR 11 at 30; *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27 at 75-76; Allars, M. above n.135 at 98-99.
138 See eg. *Australian Conservation Foundation v. Minister for Resources* (1989) 19 ALD 70; *Right to Life Association* above n.133; *Shop Distributive & Allied Employees Association v. Minister for Industrial Affairs* (1995) 69 ALJR 558; *Tasmanian Conservation Trust Inc. v. Minister for Resources* (1995) 37 ALD 73, 127 ALR 580; *North Coast Environment Council Inc. v. Minister for Resources* (1994) 36 ALD 533, 127 ALR 617; 85 LGERA 270; *Alphapharm Pty Ltd v. Smithkline Beecham (Aust) Pty Ltd* (1994) 49 FCR 250; 32 ALD 71; 121 ALR 373.
139 See *Australian Conservation Foundation v. The Commonwealth* (1980) 146 CLR 493 at 526, 547; *Onus v. Alcoa of Australia Ltd* (191) 147 CLR 27
140 *Australian Conservation Foundation v. The Commonwealth* above n.139 at 530 per Gibbs J.
141 See eg. *Onus v. Alcoa of Australia Ltd* above n.139 at 42 per Stephen J.
142 See eg. *Minister for the Arts, Heritage and Environment v. Peko-Wallsend Ltd* (1987) 75 ALR 218 at 224-226 per Bowen CJ and at 250-254 per Wilcox J (hereafter *Peko*); *O'Shea* above n.5 at 5-7; *Bread Manufacturers of NSW v. Evans* above n.92(1981) 38 ALR 93 at 103; *Nashua Australia Pty Ltd v. Channon* (1981) 36 ALR 215 at 227 and *Salemi v. Mackellar (No.2)* (1977) 14 ALR 1 at 20. See in general Cane, P. *An Introduction to Administrative Law*, Oxford University Press, England, 1986 at 100-102.
143 Allars, M. "Standing: The Role and Evolution of the Test" (1991) 20 FLR 83 at 96.
144 See above n.92.
145 *Nashua Australia v. Channon* (1981) 36 ALR 215 at 227.
146(1982) 41 ALR 1.
147 *Ibid* at 44. Cited in *Peko* above n.142 at 253, emphasis added.
148 *South Australia v. O'Shea* (1987) 73 ALR 1 at 6 per Mason CJ.
149 (1976) 8 ALR 691 at 698-699.
150 Above n.142.
151 *Ibid* at 250.
152 *Ibid* at 253.
153 Above n.145.
154 *Ibid* at 227.
155 See *Peko* above n.142 per Wilcox J at 251.
156 McMillan, J. above n.45 at 11-12.
157 See eg. *O'Shea* above n.5 at 24 per Brennan J; and see generally J Disney, "Access, Equity and the Dominant Paradigm" in J McMillan (ed), *Administrative Law: Does the Public Benefit?*, The Australian Institute of Administrative Law, Canberra, 1992 at 7.
158 *O'Shea* above n.5 at 8 per Mason J, as cited in *Johns v. Australian Securities Commission* (1993) 178 CLR 408 at 473; *Ainsworth v. Criminal Justice Commission* (1992) 106 ALR 11 at 19; *Haoucher* above n.12 at 593.
159 Note that this is a distinct question to that in *Bond v. Australian Broadcasting* Tribunal (1990) 170 CLR 321, where it was determined that a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) had to be final and operative. Mason J (at 336) indicated that common law remedies were not so limited. See generally McMillan, J. "Developments Under the ADJR Act: the Grounds of Review" (1991) 20 FLR 50 at 69.
160 See *Kioa* above n.2 at ALR 346; *Salemi* above n.142 at 45; *Peko* above n.142 at 249.
161 *Annetts* above n.3 at 168, 170 CLR at 608, 97 ALR 177 at 186; *Ainsworth* above n.158 at 19, 30; *Heatley* above n.62 at 495, 512; *Kioa* above n.2 at CLR 582, 618-619; *Fisher v. Keane* [1879] 11 Ch D 353 at 362-363.
162 *Ibid* at 30; citing *Kioa* above n.2 at CLR 621-2.
163 Above n.5.
164 *Ibid* at 221 per Spender J.
165 See *Johns* above n.150 at 471 per McHugh J; *Annetts* above n.3 at 167, ALR 179; *Romeo v. Asher* 100 ALR 515 at 531; *Balog v. Independent Commission against Corruption* (1990) 169 CLR 625 at 636; *In re Pergamon Press Ltd* (1971) Ch 388 at 399; *R v. Collins* (1976) 8 ALR 691 at 695.
166 Above n.1.
167 *Ibid* at 368.
168 Above n. 126 at 371.
169 [1967] 2 QB 864, cited by Stephen J in *R v. Collins* above n.165 at 696.
170 *Ibid* at 881 per Lord Parker CJ.
171 *Ibid* at 884 per Diplock LJ.
172 *Id.*
173 (1969) 121 CLR 509; [1971] ALR 3, cited by Stephen J in *R v. Collins* above n.165 at 696.
174 *R v. Collins* above n.165 at 697, quoting *R v. Criminal Injuries Compensation Board; Ex parte Lain* above n.169 at QB 884.
175 *Ainsworth* above n.158 at 17.
176 Above n.31.
177 (1984) 52 ALR 417 at 430; 156 CLR 296 at 315-316 (hereafter *News Corp*).
178 *Ibid* at CLR 325-326
179 Above n. 3.
180 *Ibid* at ALJR 179.
181 *Ibid* at ALJR 172.
182 *Bond Corporation Holdings Ltd v. Sulan* (1990) 8 ACLC 562 at 570, and see generally O'Brien, D. "Administrative Review under the Corporations Law and the Australian

Securities Commission Law" [1991] C&SLJ 235 at 245 and Barnes, J. "Administrative Law and the Commercial Litigator" [1991] ABLR 450 at 453-454.

183 *Balog v. Independent Commission Against Corruption* above n.165 at 635.

184 *Ibid* at 636.

185 *Koppen* above n.5 at 223-224. See also *Marine Hull & Liability Insurance Co Ltd v. Hurford* (1985) 62 ALR 253 at 259; de Smith, S.A. *Judicial Review of Administrative Action* (4th Ed by J.M. Evans) Stephens and Sons Ltd, London, 1980 at 190-191; Flick, G. above n.14 at 40-41.

186 *Romeo v. Asher* above n.165 at 533 per Burchett J.

187 See eg. *Johns v. ASC* above n.158.

188 *Edelsten v. Health Insurance Commission* (1990) 96 ALR 673 at 687 (hereafter *Edelsten*).

189 See text above preceding n.100.

190 Eg. *Edelsten* above n.188.

191 *O'Shea* above n.5 at 8, citing *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* above n.32.

192 *Ainsworth* above n.158 at 20; *Johns* above n.150 at 473-474.

193 *O'Shea* above n.5 at 8 per Mason J. See above n.158.

194 See *R v. Marks; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1981) 147 CLR 471 at 484-6; *Marine Hull & Liability Insurance Co Ltd v. Hurford* above n.185 at 264-266.

195 See *Marine Hull & Liability Insurance Co Ltd v. Hurford* above n.185 at 264-265 where Wilcox J cites de Smith, S.A. *Judicial Review of Administrative Action* above n.185 at 193 and Katz, L. 12 *Uni of WA Law Rev* 535 at 542.

196 As well as the references listed in n.185 above see also *Twist v. Ranwick Municipal Council* above n.92.

197 Above n.5.

198 *Ibid* at 17.

199 Above n.12.

200 Above n.188.

201 See n.159 above.

202 See *O'Shea* above n.5 at 24

203 See *O'Shea* above n.5 at 17.

204 *Board of Education v. Rice* above n.24 at 182. See above at text accompanying n.25.

205 Wade, H.W.R. above n.33 at 453 citing *Local Government v. Arlidge* [1915] AC 120.

206 For an illustration of the balancing approach undertaken by the courts in determining the content of procedural fairness, see generally *Mobil Oil Australia Pty Ltd v. Federal Commissioner of Taxation* (1963) 113 CLR 475; *Johns v. Release on Licence Board* (1987) 9 NSWLR 103.