

PROCEDURAL FAIRNESS – ITS SCOPE AND PRACTICAL APPLICATION

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Introduction

The requirements of procedural fairness, or natural justice (in this paper I use the terms interchangeably), have recently been likened to a last meal before the hanging (Prof John McMillan - *Natural Justice – Too Much, Too Little or Just Right?* delivered at the AIAL 2007 Forum. They do not affect the substance of a decision, but they can have a significant impact on matters of substance and policy in requiring time consuming, expensive, and sometimes simply impracticable, steps to be taken prior to the taking of (sometimes only preliminary) administrative decisions. There is little point, for example, in introducing summary procedures for resolving certain matters, if such procedures will, to be lawful, have to incorporate elaborate procedural mechanisms for disclosure, hearings, and the giving of reasons.

Australian courts have in recent years increasingly granted relief in judicial review claims based upon a breach of the requirements of procedural fairness. This development stands in stark contrast to the repeated reiterations of the limits of the scope of judicial review of administrative action, and of the reluctance of Australian courts to usurp the role of the executive, thereby expanding the rule of law. Indeed, unusually, one sees repeated criticisms of the expanding notion of procedural fairness in academic commentaries, on the basis that courts have become too formulaic and rigid in their adherence to precepts of procedural fairness (see, for example, David Bennett AO QC, *Is Natural Justice becoming more rigid than Traditional Justice AIAL, 3rd National Lecture Series 2006*), rather than focussing upon the justice of the individual case, set against the background of the relevant statutory, administrative, or governmental framework.

In large measure the increasing focus upon procedural fairness can be explained by reference to the constraints preventing Australian courts from trespassing in any way upon the merits of administrative decision-making. Where, in such circumstances, the court feels a concern about a particular decision, there is some attraction in instead granting relief based upon a ground which, by definition, does not trespass upon the merits of a particular decision. For this reason, no case should ever be relied upon as establishing a 'principle' of procedural fairness without ensuring that this reliance is accompanied by proper recognition of the precise factual and legislative context in which it arose. Many procedural fairness cases are properly understood only with a recognition that the court clearly felt that something really had gone wrong which required judicial intervention.

Further, whilst to some extent constrained in the bases upon which relief can be granted by reference to more substantive bases for seeking judicial review,¹ courts have no similar constraint as regards the ground of procedural fairness. It therefore permits of a flexibility of interpretation denied in other administrative law contexts.

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These two matters probably explain the main thesis of this paper, that there is relatively little principled analysis available of the nature, scope or function of the rules of procedural fairness. Advocates and courts are required in many cases simply to fall back on an intuitive assessment that something was, or was not, fair. This, however, leads to the danger of claims succeeding where, on a true construction, the complaint is one of substantive and not procedural fairness, and to the further danger of impermissibly broadening the scope of the principle, leaving it somewhat amorphous and undefined. The conclusion 'it was not fair' becomes also the process of reasoning.

For this reason, in order properly to understand the practical application of the requirements of procedural fairness it is necessary to go back to the cases which establish the fundamental principles upon which this ground for seeking relief is based, and to understand the proper scope and purposes of those principles. Such analysis reveals the fallacy of treating procedural fairness as giving rise to a blanket entitlement to all persons to make representations in advance of all decisions which they regard as adverse. Rather, the entitlement to be heard properly understood is a very focussed and specific entitlement, which relates to particular aspects of particular decisions and only in particular circumstances.

Further, it is vital to guard against an unquestioning assumption that there is a right to be heard as to every adverse decision and that that includes a right to make submissions or present evidence or an account of events prior to the decision being made. Any such assumption ignores the many subtleties which appear from a careful reading of the primary cases from which the principles of natural justice, as currently applied, derive. It also ignores:

- (a) the many layers of decision-making which may arise before a final administrative decision is taken;
- (b) the variety of factors which may be at play in any particular administrative decision; and
- (c) the focus upon actual, practical, unfairness.

In seeking to address this topic I propose first to consider how procedural fairness has been defined, then consider the leading cases on the topic, I identify the guiding principles in the application of the principle, and then consider some examples in a variety of different contexts.

Definition of procedural fairness

The fundamental requirements of procedural fairness are that there should be a fair hearing, and it the decision- maker should be free from bias. I consider only the former in this paper. Fleshing out these requirements somewhat, *Professor S A de Smith, Judicial Review of Administrative Action, 2nd ed.*, 180-181 has stated

Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position: (a) to make representations on their own behalf; or (b) to appear at a hearing or inquiry (if one is to be held); and (c) effectively to prepare their own case and to answer the case (if any) they have to meet.

This definition identifies:

- (a) that natural justice only applies to persons who are directly affected by proposed administrative acts – that, obviously begs the question of what is meant by direct or affected, and what is an administrative act;

- (b) such persons must be given adequate notice of what is proposed – but it is not clear what amounts to adequate notice, and whether or not this also comprehends the reasons why something is proposed; and
- (c) the purpose of the imposition of any rules of natural justice is to enable someone to attend, represent, prepare and present their case.

Leading cases

The leading cases on procedural fairness establish a basic framework against which individual claims can be tested. Indeed, between a number of leading cases, it is possible to identify a blueprint against which the later cases can be explained.

Leading UK cases

The birth of the modern notion of procedural fairness/natural justice can probably be traced to the speeches of the House of Lords in *Ridge v Baldwin*². Their Lordships held that the rules of natural justice applied to the dismissal of a police constable for misconduct by a watch committee. In that case and the following principles emerge from it:

- (a) Attention must be given to the great difference between the various kinds of case in which it is sought to apply the principles of natural justice (Lord Reid at p 64).
- (b) It is very doubtful whether the argument that ‘it could have made no difference’ could be used as an excuse for not complying with the rules of natural justice (Lord Reid at p 68).
- (c) The rules of natural justice may apply differently to ministerial or departmental decisions because in respect of some ministerial decisions the primary focus of the Minister will be with the public interest and not with the damage to an individual’s interest, and because a Minister has to rely upon departmental information gathering and ‘no individual can complain if the ordinary accepted methods of carrying on public business do not give him as good protection as would be given by the principles of natural justice in a different kind of case ‘ (Lord Reid at p 72).

In three further seminal English cases the requirements of natural justice have been further considered.

In *Wiseman v. Borneman*³ in which it was held that compliance with the statutory procedure of enabling the taxpayer to put material before the Commissioner but not to see material provided to the Commissioner in response was fair where the determination was of a prima facie case. Their Lordships held:

- (a) It is not possible to reduce natural justice to a series of rules, rather, the question was whether in the particular circumstances of this case the tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded (Lord Morris at p 309).
- (b) An important consideration in this question was the limited nature of the task of the tribunal, namely to decide whether or not a prima facie case existed, although it must also be recognised that even that decision had practical adverse consequences (Lord Morris at p 309).
- (c) Whilst legislation should not be read as absolving the tribunal from the obligations of fairness, ‘ it is, I think, a positive consideration that Parliament has indicated what it is

that the tribunal must do and has set out' a prescribed procedure to that end (Lord Morris at p 310).

- (d) Before additional power are to be implied it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the purpose of the legislation (Lord Reid at p 308).

In *Re Pergamon Press Ltd*⁴, the Court of Appeal considered the application of principles of procedural fairness to inspectors operating under the Companies Act seeking evidence from company directors. The background to the concern of Pergamon Press was that they were concerned that any interim report by the inspectors may be used against it in American litigation arising out of the same matter. The directors of Pergamon Press sought assurances that before any report would be written they would be given the opportunity to read the transcripts of evidence, meet any allegations by oral evidence and make written submissions. The inspectors agreed that they would be told the substance of any allegations against them and be able to make submissions, but would not agree that they could read the transcript. Lord Denning MR held that the rules of natural justice applied to the work of the inspectors because:

They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up: see *In re S.B.A. Properties Ltd*. [1967] 1 W.L.R. 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed: see section 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the board may, in their discretion, publish it, if they think fit, to the public at large.

- (e) However, there was no breach on the facts as it was sufficient to give the directors an outline of the charge for comment.

In *R v Panel on Take-Overs and Mergers, ex parte Guinness PLC*⁵ the English Court of Appeal held that there was no unfairness in a refusal of an adjournment in the context of an inquiry by the Panel on Take-Overs and Mergers. Lord Donaldson confirmed that natural justice was not to be tested by reference to a *Wednesbury* test, but rather by the Court's view of the general situation, and that the test for intervention was whether or not something had gone wrong of a nature and degree which required the intervention of the Court (at p178). The context included the nature of the powers of the Panel and the conduct of Guinness leading up to the hearing.

Australian leading cases

One of the earlier cases to consider the application of the rules of natural justice is *FAI v Winneke*⁶ which concerned a decision whether or not to renew an approval of an insurer for the purposes of the *Workers Compensation Act 1958* (Vic). The High Court held that company that would be affected by a refusal to grant a renewal of an approval should be given an opportunity to be heard before a decision is made unless that rule is excluded by statute (at p 348). Elaborating upon why that was so, Mason J held as follows:

- (a) The fundamental rule is that a statutory authority having power to affect the rights, interests or privileges, or legitimate expectations of a person is bound to hear him before exercising a power (at p 360).

- (b) This would cover the revocation of a licence where this affects the right to carry on a financially rewarding activity, although it may not apply in the circumstances of an initial grant of a licence as in such circumstances, the issues are not clearly defined, they often involve policy issues, and they do not often generate allegations of past misconduct (at pp 360-361). Aickin J similarly held that it required most unusual circumstances to warrant the view that upon an initial application for a licence which is not one which the relevant authority must issue as of course there is a duty to provide a hearing (at p 377).
- (c) An applicant for renewal generally has a legitimate expectation that his licence will be renewed when the statutory power is entrusted to a statutory authority (at p 362).
- (d) His finding that in this case there was a right to be heard was based upon his assessment of what had been the central questions in the decision not to renew, ie whether the applicant was a fit and proper person (at p 369).

The judgment of Gibbs J also supports a qualified principle, which has regard to the circumstances of the case. Thus, at p 349, he states that it was not necessary for him to decide whether, if a refusal of a renewal was based purely on grounds of policy, fairness would require that the company affected be given an opportunity to be heard.

Aickin J gave more substance to the nature of the distinction to be drawn between an initial application and a renewal. For him it was the presence of the legitimate expectation of the applicant that the licence would be renewed absent any disqualifying circumstance.

The Court was clear that if the rules of natural justice applied, the nature of the hearing to which a person affected is entitled must always depend upon the circumstances of the case (at p 359). Aickin J listed relevant factors as the nature of the activity for which a licence was required, the nature of the authority, the nature of the applicant's conduct, and the nature of any complaints relied upon (at p 378).

Brennan J's description of the rules of natural justice is indicative of his particular view that they arise from statutory implication, based upon an inference of legislative intention that the principles of natural justice should apply, rather than as a matter of common law (at pp 407-8). In his view, legislative intention is the foundation upon which a requirement to apply the principles of natural justice rests (at p 409). Critically, therefore, an understanding of the requirements of natural justice requires the usual process of statutory interpretation. By way of legitimate aid to that process, he relied upon matters identified in earlier cases (which he recognised not to be exhaustive), namely:

- (a) the statutory text;
- (b) the interests affected by the statute; and
- (c) the repository of the power.

In his view expectations could not be relevant to whether or not the legislature intended the principles of natural justice to apply, but could be relevant to the content of the obligation in a particular case (at p 412).

All members of the High Court were clear that the application of the rules of natural justice were not to be overridden (if they would otherwise apply) save by a clear indication of that intention.

The principles as set out in *FAI v. Winneke* were elaborated upon in *Kioa v West*⁷ which concerned deportation orders made against two Tongan citizens. Their infant daughter was also an applicant in the judicial review proceedings, albeit that no deportation order had been made against her. The delegate relied upon a number of factors including breach of undertakings made by the applicant parents and deliberate remaining in Australia as prohibited immigrants. The critical consideration relied upon by Mason J in departing from earlier authority was that as legislation required the Minister to give reasons for the decision if requested to do so, it could no longer be suggested that the existence of an obligation to comply with the requirements of procedural fairness was inconsistent with the statutory framework of that it would entail administrative inconvenience which was destructive of the statutory objects (at p 586).

The case is most often recognised for establishing that there is a common law duty to act fairly in the making of administrative decisions which affect rights, interests, and legitimate expectations subject only to the clear manifestation of a contrary statutory intention (at p 584 *per* Mason J).

Mason J set out what has come to be the guiding principles of natural justice:

It is a fundamental rule of the common law doctrine of natural justice ... that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given the opportunity of replying to it. ... The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.

And

The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations. (at p 585)

However, the duty does not attach to every decision of an administrative character as many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way (at p 584). The example Mason J used was a decision to impose a rate or general charge for services which indirectly affects the rights, interests or expectations of citizens generally but does not attract the duty to act fairly because it affects the individuals merely as a member of the public or a class of the public, and it is truly a policy or political decision.

Thus, following *Kioa v West*, the critical question is generally not whether the rules of natural justice apply, but what they require in the circumstances of the particular case.

Of critical significance to any understanding of the significance of *Kioa* is Mason J's statement that procedural fairness would not in all cases require notice in advance of a deportation order and of the grounds on which it is to be made. He described that as going too far (at p 586). Rather, that would serve only to facilitate evasion and frustrate the objects of the statute where the order is to be made in respect of a prohibited immigrant. Thus, where the reason for the making of the order is that the person is a prohibited immigrant, the dictates of natural justice do not require the giving of any advance notice of the proposed making of the order (at p 586). The situation is different, however where the reasons relate to reasons that are personal to the person concerned, i.e relate to his conduct, health or associations.

Similarly, generally fairness does not require the giving of any opportunity to be heard in relation to a refusal of a further entry permit. However, where the decision-maker intends to reject the application relying upon information from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter. Similarly, such obligation may be owed where there is a refusal in circumstances materially similar to earlier circumstances in which a permit had been granted (at p 587). And if a refusal is to be attended by the making of a deportation order, the case for holding that an opportunity to be heard be given is unquestionably stronger. Mason J held that there were only two matters in respect of which fairness required that the applicant have an entitlement to be heard, but there was no right to be heard in respect of other material which consisted of policy, comment and undisputed statements of fact (at p 588).

Brennan J reiterated his earlier expressed view that review on the basis of breach of natural justice depends upon the legislature's intention that the observance of the principles of natural justice, as appropriate to the circumstances of a particular case, be a condition of the valid exercise of the power, and there is no common law right to be accorded natural justice independently of statute. That view must be treated with some caution in the light of later cases applying the rules of natural justice to common law powers.

Brennan J described the principles of natural justice as having a flexible quality which chameleon-like evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power (at p 612).

- (a) The statute must first be construed, in part to ascertain whether the rules of natural justice apply, and if so, whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require (at p 614).
- (b) Another factor of significance is whether or not the power is apt to affect the interests of an individual alone, or in a way that is substantially different from the way in which it is apt to affect the interests of the public at large (in which case there may be a presumption that the rules of natural justice would apply, subject to being displaced by, for example, the administrative framework created by the statute within which the power is to be exercised).
- (c) Factors of relevance will be the limited interest affected, and any statutory provision giving an entitlement at a later stage to raise a challenge. This is of particular relevance to preliminary decisions, or steps prior to a decision (at p 620).
- (d) But a repository of power is not bound to give a hearing to an individual whose interests are affected where the repository is not bound to, and does not propose to, have regard to those interests in exercising the power (at p 620).
- (e) The question of standing may also be relevant (at p 621). Thus, the question may be whether or not the individual has a special interest in the subject matter of the litigation.
- (f) The requirements of the principles of natural justice in a particular case must be tested by reference to what the repository of power knew at the time of the exercise of power, or what he would have known if he had adopted a reasonable and fair procedures (at p 627). This is because the court must place itself in the shoes of the repository of power.
- (g) Whether there is anything in the administrative framework, for example a need for speed or secrecy in making the decision, which would make it unreasonable to provide an opportunity to be heard (at p 629).

- (h) Where the repository of power is bound or is entitled to have regard to the interests of an individual, it may be presumed that the observance of the principles of natural justice conditions the exercise of the power in relation to that person (at p 619).

Critically, the requirements of natural justice may range from a full-blown trial into nothingness (at p 615). This recognition has become critical in future cases. Brennan J. specifically recognises that the requirements of natural justice may be diminished even to nothingness to avoid frustrating the purpose for which the power was conferred (at p 615).

On the facts of the case, Brennan J held that there was only a failure to accord natural justice only in respect of one allegation that had not been put to the applicants, but not more generally. Moreover, the delegate's failure to rely upon this matter in his reasons did not prevent it being a relevant matter upon which the applicants had a right to be heard (at p 628). Provided it was credible relevant and significant to the decision to be made, then the opportunity to deal with it should have been given (at p 629).

In *Annetts v McCann*⁸ the High Court held that the parents of a child who had died had a common law right to be heard in opposition to any potential adverse finding in relation to themselves or their son at a Coroner's inquest, but had no right to make submissions on the general subject matter of the inquest. The Coroner's decision refusing to hear submission from counsel representing the parents was quashed. This finding was based upon:

- (a) the fact that the Coroner had granted the parents representation at the inquest. That was held to create a legitimate expectation that the Coroner would not make any finding adverse to the parents' interest without first given them the opportunity to be heard in opposition to that finding; and
- (b) their interests included the interest in protecting the reputation of themselves and their son.
- (c) The Coroner could not lawfully make any finding adverse findings against them personally or against their son without first giving them the opportunity to make submissions against the making of such a finding.

The limit on the scope of submissions which the court held the parents were entitled to make is indicative of the very precise nature of the identification of the interests which gave rise to such entitlement. Whilst it was obviously the case that any findings in relation to the death of their son would impact upon the parents, their rights to procedural fairness were limited to matters upon which adverse findings might be made.

In *Ainsworth v Criminal Justice Commission*⁹ the High Court found that the rules of natural justice applied to the Criminal Justice Commission in respect of report tabled in Parliament which it made which made a number of adverse findings in relation to persons involved in the poker machine industry. This was so even though the Commission's powers were only to make recommendations, and not to implement its findings as the relevant interests affected were those in reputation. The High Court recognised that not all investigative steps or reports had to be exercised with procedural fairness, but they did if they adversely affected a legal right, interest, or legitimate expectation.

The High Court recognised that the question of procedural fairness must be tested by reference to a decision-making process as a whole. Thus, 'where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if the decision-making process, viewed in its entirety, entails procedural fairness.' However, that requires a proper analysis of the purpose and role of the particular

report. In this case it was the final step in the discharge of the Commission's functions and responsibilities. And subsequent Parliamentary processes were in truth separate and distinct and served a quite different purpose.

Moreover, the functions and responsibilities of the Commission and of the Parliamentary Committee are separate and distinct and serve quite different purposes.

In *Minister for Immigration and Multicultural Affairs ex parte Lam*¹⁰ the High Court considered the role of legitimate expectation in procedural fairness in the context of a case concerning cancellation of an immigrant's visa on character grounds. The issue was whether a representation that the department wished to contact the carers of the applicant's children gave rise to an obligation as a matter of procedural fairness not to cancel his visa without having made contact with the children's carers. The High Court held that there was no denial of procedural fairness and very much curtailed the role of legitimate expectation in determining the precise content of the obligations of procedural fairness.

Gleeson CJ held that the content of the obligation of procedural fairness may be affected by what is said or done in the course of the decision making process, and by developments in the course of that process, including representations made as to the procedure to be followed. However, the ultimate question must in every case be whether or not there has been unfairness, not whether an expectation has been disappointed (at p 510). The concern of the law is to avoid practical injustice (at p 511). Here the applicant could show neither a subjective expectation in consequence of which he did or failed to do anything, nor any loss of an opportunity to put information or argument to the decision-maker (at p 511).

McHugh and Gummow J held that the rules of procedural fairness require that a person's attention is drawn to the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it. If that approach is adopted, there is no need to have recourse to the doctrine of legitimate expectation (at 522).

In *Commissioner for ACT Revenue v Alphaone*¹¹ the Full Court of the Federal Court considered whether or not there was a breach of the requirements of procedural fairness in having had regard to the fact that the company was trading in x-rated videos without a licence when deciding that it was not a fit and proper person to hold a licence. The company had admitted that it had done so. Thus, there was no breach of the requirements of procedural fairness as there was no right to make submission beyond the original application in those circumstances. There was no unfairness in the decision that it was not a fit and proper person to hold a licence. This was so even though the Commissioner had relied in his decision upon substantial evidence that the company had been selling x-rated videos without a licence.

In a passage which has been frequently relied upon in subsequent cases, the Court held (at pp 591-2) that:

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources, which are put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

Following these cases the following principles emerge:

- (a) The burden of establishing a breach of procedural fairness is always upon the applicant.
- (b) The rules of natural justice will be implied into legislation unless they are clearly excluded. But:
 - (i) that is subject to the rules of natural justice per se not frustrating the legislative purpose.
 - (ii) Construction of the legislation may, in an appropriate case, indicate that the rules of natural justice will not apply.
- (c) In a multi-tiered decision-making process the requirements of procedural fairness will be tested by reference to the decision-making process as a whole. However, this requires a careful assessment of what is, or is not, part of the same decision-making process.
- (d) In the vast majority of cases the question is not whether the rules of natural justice apply, but whether they can be availed of by the individual involved, and what the content of the rules are.
- (e) The concern of the law is with avoiding practical injustice. This may require specific evidence of detriment in appropriate cases.
- (f) The requirements of natural justice may properly range between a full-blown trial, and nothingness.
- (g) That depends upon the precise circumstances of the individual case.
- (h) It also depends upon an assessment of competing concerns which can be construed as part of the statutory purpose, such as speed or secrecy.
- (i) Individuals are only entitled to natural justice:
 - (i) where their interests are directly affected and/or they are sufficiently interested. This may cover rights, interests, and legitimate expectations;
 - (ii) it covers the right to reputation, and may cover reputation of family members in limited circumstances;
 - (iii) these tests will have an inevitable, but not necessarily complete, overlap with the rules for standing;
 - (iv) where they are personally affected in a manner different from the public at large or a class of the public.
- (j) The requirements of natural justice may be expanded or limited by reference to the precise statutory provisions, and by reference to the administrative mechanisms, applicable. The relevant legislative scheme, if any, should always be the starting point in an analysis of the requirements of natural justice.
- (k) There is no general right to be heard in relation to all decisions which directly affect individuals in a personal capacity. It only applies in relation to material relied upon by a decision-maker which is adverse to the interests of the individual, which is credible, relevant and significant, and upon which he or she has not yet had a right to be heard as part of the decision-making process. Thus, an individual may only have a right to be heard in relation to certain specified matters relevant to the decision.

- (l) Natural justice will ordinarily not give rise to a right to be heard in relation to questions of policy or general application.
- (m) Natural justice will not ordinarily give rise to rights which frustrate the purpose for which power is conferred.
- (n) In an appropriate case, the requirement is that the person's attention is brought to the critical issue of factor on which a decision is likely to turn, and he is given an opportunity of dealing with it. This may also involve being given the opportunity, in an appropriate case, of dealing with evidence that is credible, relevant and significant.
- (o) In general terms, beyond this, the requirements of natural justice will depend upon:
 - (i) The nature of the right, interest or expectation affected,
 - (ii) The nature of the decision-maker, and
 - (iii) The question for the decision-maker and the factors relevant thereto.
- (p) Whilst this is not absolutely clear, the weight of authority is that the requirements of procedural fairness should ordinarily be tested by reference to the knowledge of the decision-maker at the time of the decision. However, this should not be misinterpreted as important a reasonable test for procedural fairness. The question is always – is the procedure fair.

Practical examples of the requirements of procedural fairness

Legitimate expectation

In *Attorney General (NSW) v Quin*¹² the High Court considered the relevance of expectations created by a decision-maker to the precise requirements of procedural fairness in the context of the appointment of stipendiary magistrates to on the basis of a failure to comply with the requirements of natural justice. By this time the procedure for the appointment had altered, and a new test applied. The applicant sought to compel the older test to be applied to the reconsideration of his appointment. He was unsuccessful on the basis that the new policy was not ultra vires and he could not therefore require the Attorney-General to consider his case other than by reference to the then applicable policy. This case shows the clear divide between procedural, and substantive, fairness.

In *Attorney General (HK) v NG Yuen Shiu*¹³ an illegal entrant challenged a removal order on the basis that his case had not been considered on its merits contrary to the announced policy of the government that each removal case would be determined on its merits. Given that representation, it was held not to be fair to not follow the promised procedure in making the decision. This represents a principle which is somewhat removed from the hearing rule set out above, and strays towards a substantive entitlement to a particular form of treatment. The only reason why a hearing was required was because the Government said that it would conduct a hearing.

A similar approach has been adopted in relation to representations by public bodies that they will conduct an independent, impartial and thorough assessment treating all relevant interested parties in the same way in *Century Metals v. Yeomans*¹⁴ which concerned an inquiry by a Government Minister into a proposal to reopen mining in Christmas Island. That case has been further relied upon in cases concerning tenders for Government contracts.

The importance of the legislative context

The role of the legislative context in effectively expanding the requirements of procedural fairness can be seen by the High Court in the case of *SZBEL v MIMIA*¹⁵. In that case the legislation purported exhaustively to state the requirements of procedural fairness. However, the High Court construed the requirement under s 425 of the Migration Act that the individual be invited to attend a hearing to 'give evidence and present arguments relating to the issues arising in relation to the decision under review' as requiring that the individual be specifically informed of issues which the tribunal believed to arise, in circumstances where the individual applicant was entitled to assume that the only 'issues arising in relation to the review' were those identified by the delegate when refusing his application at first instance. Thus, it was a breach of the requirements of that section to find against him on the basis of a rejection of the plausibility of parts of his account, when he had not been specifically informed that the plausibility of those accounts were live issues before the tribunal (no point as to them having been taken below). This was because the applicant was entitled to assume that the reasons given by the delegate identified the issues that arose in relation to the decision, for the purposes of s 425.

Natural justice reduced to nothingness

At the other end of the spectrum, in two reported cases the rules of natural justice have been reduced to nothingness.

In the context of national security, the Federal Court recently considered the case of *Leghaie v Director General of Security*¹⁶ (Tamberlin, Stone and Jacobson JJ). In that case a visa had been cancelled on the basis of an adverse security assessment made by ASIO that the visa holder had been assessed as being directly or indirectly a risk to Australian national security. The Minister was, indeed, under the relevant legislation bound to cancel a residency visa if the holder was assessed by ASIO to be directly or indirectly a risk to Australia's national security.

Madgwick J at first instance noted that the security services were no less prone to mistakes than other decision-makers and thus the requirements of procedural fairness had not been excluded. Thus, there was an obligation as a matter of procedural fairness to consider what information could be provided to the individual without unduly detracting from national security. However, having considered confidential material provided by the Director-General of Security, Madgwick J concluded that the Director-General had given consideration to the possibility of disclosure and had appropriately balanced that against the requirements of national security. In the circumstances, the content of procedural fairness in relation to Leghaie's case was reduced to nothingness. Madgwick J stated that 'genuine consideration having been given by the Director-General to the question of disclosure, and in the absence of countervailing evidence, the balance was to be struck on the side of non-disclosure [65].'

On appeal the decision was affirmed. The issues were defined as the requirements of procedural fairness when considerations of national security intervene, and upon the weight to be given to the opinion of the Director-General as to the potential prejudice to national security. It was recognised that reasons of national security may make it impossible to disclose the grounds on which the executive proposes to act. In determining this, the Court recognised that it was ill-equipped itself to evaluate pieces of evidence obtained by ASIO, nor was it charged with that responsibility. The trial judge had been correct to find that in the absence of countervailing expert evidence, he was not in a position to form an opinion contrary to that stated by the Director-General. The court, however, satisfied itself that the Director-General had given personal, genuine consideration to the question of whether

disclosure would be contrary to the national interest. Thus, the balance was to be struck on the side of non-disclosure even where the consequence was to risk serious unfairness to the individual.

Another example of non-disclosure on the basis of the balancing of interests, albeit in a different context, can be found in the case of *Nicopoulos v. Commissioner for Corrective Services*¹⁷ where evidence in the form of a confidential affidavit was taken into account in order that the court could determine what, on the facts, the requirements of natural justice were. This case concerned a criminal law solicitor who had been excluded from prison and could thereby not feasibly continue his career which relied upon taking instructions from prisoners. The court held that, bearing in mind the confidential affidavits to which it had regard, the requirements of natural justice had in that case been elided to nothing. At [98] the Court held that the public interest in not admitting the confidential affidavits into evidence was outweighed by the public interest in preserving their secrecy or confidentiality – thereby modifying, indirectly by reference to s 130 of the *Evidence Act 1995*, the usual balance conducted in respect of a PII claim between non-admission and admission.

Some tax cases blurring the distinction between procedural and substantive unfairness

In *Pickering v DCT*¹⁸ it was held that there was arguably a duty of fairness which required like cases to be treated alike, breach of which would entitle the court to quash the Deputy Commissioner of Taxation's decision and obtain an order that he exercise his discretion according to law.

In *Bellinz v FCT*¹⁹ the Full Federal Court accepted that 'where a decision-maker, including the Commissioner of Taxation, has a discretion, a principle of fairness will require that that discretion be exercised in a way that does not discriminate against taxpayers: cf *Pickering v FCT* 97 ATC 4893 and, in another context, *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Island Commission* (1995) 59 FCR 369 at 387–8; 131 ALR 559. The same principle may be said to permit judicial review in matters of administration or procedure where a decision-maker acts unfairly by discriminating between different categories of persons.' However, that principle had no application where the Commissioner was applying a statute and had no discretion.

In *Daihatsu Australia and DCT*²⁰ Lehane J considered the earlier cases had been inclined to treat discriminatory treatment for which no reason or justification is advanced as a form of irrational decision-making. He saw a real difficulty in extending any claim based upon fairness beyond the scope of the case of *Sunshine Coast Broadcasters v Duncan*²¹ and that of *Pickering v FCT*²² in which Cooper J found that it was arguable (so as to defeat summary dismissal) that a duty of fairness could require that a discretion ... be exercised in the favour of three applicants if they were truly in the like situation to the two other comparators against which discriminatory treatment was alleged, so as to lead to a quashing of the decision.

Conclusion

There is little to be gained towards understanding the practical requirements of procedural fairness from an analysis of outcome between different cases. The best one can do is to seek to identify the governing principles, and then to apply them in the precise circumstances of the case. However, as with other tests based upon impression rather than a checklist, in any individual case the precise scope of the obligation may be difficult to discern. It appears, however, that the courts have remained at root true to the originating principles, albeit that there are some cases which are difficult to explain save by reference to the clear impression that the court had that some intervention was necessary in the particular case.

There is also a great need for caution between reasoning from cases involving fundamental rights, towards cases with a more commercial leaning. There is a great need for caution because underlying all cases in the context of migration, criminal law, and detention, is a real concern for the rights of the subject. Similar concerns simply are not motivating factors in many other contexts, where the reality is that the applicant is seeking to further his own economic interests.

Thus, it is necessary in all cases to subject claims to entitlements as a matter of procedural fairness to close scrutiny. There should be no assumption of a particular entitlement, nor should such cases be allowed to go through on the basis of broad assertions rather than careful analysis of all relevant factors. For in this area, there are no absolutes. There is merely a balancing of factors, in a flexible approach, seeking to ensure that there is no practical unfairness in the way in which a decision is made.

Endnotes

- 1 In order not to offend against the constraints set out by Brennan J in *A-G (NSW) v. Quin* (1990) 170 CLR 1 at 35-6.
- 2 [1964] 1 AC 40
- 3 [1971] AC 297
- 4 [1971] 1 Ch 388
- 5 [1990] 1 QB 146
- 6 (1981-2) 151 CLR 342
- 7 (1985) 159 CLR 550
- 8 [1990] 170 CLR 596
- 9 (1991) 175 CLR 564
- 10 (2003) 195 ALR 502
- 11 (1994) 49 FCR 576 at 590-1
- 12 (1990) 170 CLR 1
- 13 [1983] 2 AC 629
- 14 (1989) 40 FCR 564
- 15 (2006) 81 ALJR 515. SZBEL was applied by Buchanan J in *SZILQ v. Minister for Immigration & Citizenship* [2007] FCA 942 (it is understood that special leave to appeal has been granted) to require the RRT to hold a further hearing where, subsequent to the initial hearing (leading to a decision which was quashed) information relating to the applicant's claimed practice of Christianity in Australia was put before the RRT. Buchanan J. found that the burden in relation to motivation for conduct in Australia was on the appellant (s 91R(3)) and that there was no requirement to put such allegation to the appellant. Buchanan J. held that the appellant had not been invited to appear and make submissions and give evidence about one of the issues which were relevant in the case and had thus failed to comply with s 425. The denial of procedural fairness was the denial to the appellant of the opportunity to satisfy the statutory test in s 91R(3).
- 16 23 March 2007, [\[2007\] FCAFC 37](#)
- 17 [2004] NSWSC 562
- 18 (Cooper J, Federal Court – BC 9704089
- 19 (1998) 155 ALR 220 at 232-3
- 20 (2000) 182 ALR 239
- 21 (1990) 92 ALR 93
- 22 (1997) 97 ATC 4893