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IS THERE TOO MUCH NATURAL JUSTICE? (1)

Justice Deirdre O'Connor*

- address to a meeting of the South Australian chapter of the Australian Institute of Administrative Law, held on 10 September 1992, in Adelaide.

The theme of this seminar is: 'Is there too much natural justice?' I am going to speak on the Federal administrative law experience, particularly the experience in administrative tribunals. While there are many ways in which tribunals such as the Administrative Appeals Tribunal (AAT) and the Social Security Appeals Tribunal (SSAT) might be improved, I would suggest that one way we could make these institutions less effective is to throw out the rules of natural justice.

Natural justice is, of course, more accurately referred to as procedural fairness. Fairness is a flexible concept, and what is fair in one situation may not be fair in another. It is for this reason that the content of the rules of procedural fairness are not fixed and immutable, but vary with the circumstances. In a case where a person's livelihood is at stake, the content of the rules is pretty much the same as the rights of a party in court proceedings. The party whose interests may be affected by the decision is entitled to notice that the decision may be made, an oral hearing with an opportunity to cross-examine witnesses and adduce evidence, and to be represented by a legal practitioner.

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The factors which can affect the contents of the rules of natural justice include the nature of the interest affected and the nature of the power to be exercised. Ultimately, however, it is a question of what a statute bestowing a decision making power intended. The two limbs of the natural justice are the right to be heard and present evidence, and the right to have a matter determined by an unbiased adjudicator. I would have thought that there was not much quarrel with the bias rule. Rather, it is the right to be heard that raises the question: 'Is there too much natural justice?'

Federal administrative review system

One feature of the Federal administrative review system is that, in some areas, there is a two-tiered system of review. These areas are, notably, social security, veterans' entitlements and students' assistance matters. In these areas, decisions of boards and tribunals (such as the SSAT) can themselves be reviewed by the AAT.

In this context, it is necessary to keep in mind that the rules of procedural fairness which the first-tier review bodies are required to apply are affected by the very fact that there is another tribunal by which the decisions of first-tier bodies can be reviewed. In addition, statutory modification of the right to be heard is quite usual. For instance, in the case of the SSAT, the Secretary of the Department of Social Security (DSS) has no right at all to make representations to the tribunal.

Procedural fairness

As mentioned before, the rules of procedural fairness are variable. It is very important to recognise that they are not an injunction to behave like a court.

The rules of procedural fairness are sufficiently flexible to allow for the following:

- Tribunals can limit the number of witnesses called by a party. If the number of witnesses being called by a party is such that the hearing of a matter becomes too lengthy, then the tribunal can refuse to allow more witnesses to be called. Of course, the tribunal must always be prepared to hear why these additional witnesses are necessary.

- Similarly, if a witness is unlikely to establish anything that has not already been established, or if a witness simply adds 'more of the same' to the evidence, then the tribunal can refuse to hear the evidence. The same applies to other forms of evidence.

- The rules of procedural fairness only require cross-examination when there is no other equally-effective means of controverting material which has been placed before the decision maker. What advocates and parties often try to achieve by cross-examination can be more effectively achieved by bringing evidence in rebuttal, whether it be by bringing a new witness or some other evidence. No tribunal is required to allow cross-examination just because advocates feel like doing battle with

the weapons with which they are most familiar.

- Indeed, there is no general right to cross-examination. In *O'Rourke v Miller*,[1] the High Court held that there was no denial of procedural fairness in circumstances where a police officer's probationary appointment was terminated on the basis of complaints from two members of the public. The officer was not given the opportunity to cross-examine the two members of the public. The Court (Deane J dissenting), on a construction of the relevant regulations, considered that a probationary constable only has a right to have the opportunity to be presented with the material against her or him and to present material in response.

- At the level of the AAT, it will generally be the case that a party is entitled to cross-examine a person whose oral evidence forms part of the case against her or him. Nonetheless, any tribunal has wide discretion to control its processes, including the power to avoid irrelevancies and to curb repetition (*Wednesbury Corporation v Minister of Housing and Local Government*[2]).

- The classic case where cross-examination is useful is where a witness' credit is in issue. Where there is medical evidence, cross-examination may help to define the limits of what a doctor has said or to establish that the medical opinion is based on a particular set of facts. Other evidence may then establish that this basis for the opinion is in fact wrong.

The essential point is that the rules of procedural fairness are flexible. Of themselves, these rules cannot be ossifying, as they are inherently flexible.

However, this flexibility itself is a source of problems. Because the rules of procedural fairness are flexible, there can be a tendency for decision makers to apply them at the highest level. If parties (and, more particularly, their legal representatives) are allowed to do what they want and to control the proceedings then there will be no denial of procedural fairness. There is a temptation to apply the maximum rules of procedural fairness for the reason that this obviates the need to worry about whether a response tailor-made for the individual situation will stand up to judicial review. This can also be in some cases a form of laziness on the part of the decision maker.

In the AAT, the tendency to give maximum content to procedural fairness is compounded by the fact that most of the members of the Tribunal have been trained as lawyers. Many parties before the Tribunal are represented by lawyers. The result is that the proceedings of the Tribunal are sometimes conducted with more regard to the procedures of the courts than with regard to the question of fairness.

The AAT is required by its Act to conduct its proceedings with 'as little formality and technicality, and with as much expedition, as the requirements of this Act and of every relevant enactment and proper consideration of the matters before the Tribunal permit'.[3] However, this requirement does not feature highly in judgments of the Federal Court. It has not prevented the Federal Court holding that a party is

entitled to withhold material evidence until the hearing of a matter in order that the party may use it in cross-examination of the other party. On appeal from the AAT, the Federal Court will find an error of law if procedural fairness has not been accorded. It will not find an error of law because there has been insufficient informality, flexibility or expedition, although these are factors relevant to the question of what constitutes fairness in the circumstances. It is perhaps unrealistic to expect members of the AAT whose decisions are subject to review by the Federal Court to apply the rules of fairness flexibly and efficiently if, on appeal, the decision will be set aside if the Court does not agree with the Tribunal's assessment that, in the circumstances, procedural fairness was accorded to the party. In these circumstances, it is natural to err on the side of giving as much fairness as possible.

Reasons for procedural fairness

We cannot reject the application of the rules of procedural fairness if, in the circumstances, to do so is to lose more than we gain.

The notion underlying procedural fairness is that, by ensuring that the process is fair, the chances that an unbiased decision maker will make the best decision in the circumstances is maximised. That is why a party must be able to bring all the relevant evidence before the decision maker. Cross-examination is designed to test the accuracy and truthfulness of evidence.

The purpose of administrative review is to get better decisions made. Without achieving this goal, administrative review would be futile. If a review body simply repeats the exercise engaged in by the primary decision maker then its decisions are unlikely to be significantly better.

In making their decisions, review bodies need to base their decisions on the best quality evidence available. One side of the story is not the best quality evidence available. The SSAT does not hear both sides of the story and, from time to time, cases come before the AAT where the SSAT's decision would have been a lot better had the Secretary of DSS put the other side of the story. In one such case recently, DSS made a decision to recover overpayments of unemployment benefit from a recipient, on the basis that he had not declared his wife's income. The recipient's case was that he was not living with his wife but was entitled to benefit at the married rate because he was living with another woman in a marriage-like relationship and she was not employed. In such a case, the credit of the persons concerned is crucial. The SSAT had no reason not to accept the veracity of what it was told by the recipient.

Under cross-examination at the AAT hearing, the recipient was asked about a fishing trawler. He denied any knowledge of it. On the next day of hearing, the recipient was taken by his counsel through documents relating to a fishing trawler and signed by a person using the same name as that of the recipient. He denied it was his signature. On the final day of hearing, the recipient changed his entire story, admitting that he had owned the fishing trawler. In light of these admissions, the Tribunal was not able to accept the version of events put by him in relation

to other matters in which it was necessary to prefer the recipient's evidence over that of other witnesses.

The usefulness of cross-examination is also often apparent in veterans' cases heard by the Tribunal. In cases where a veteran has operational service, he or she will be entitled to a disability pension if it is established that there is a reasonable hypothesis connecting the disability with war service. Medical experts often give opinions heavily influenced by notions of scientific proof and feel understandably uncomfortable with a concept that a mere hypothesis can be said to establish a causal link. In the result, there is often a situation in which a medical witness for the veteran says that there is a hypothesis linking a disability and war service. The Repatriation Commission then presents evidence from an expert that the two are not linked. However, when asked under cross-examination 'would you say the hypothesis is not reasonable?', it is not unknown for the expert to be unwilling to go this far. In this way, cross-examination can be a great help in clarifying just what the positions of the various members are.

It is also important to recognise that, by broadening the type of evidence which can be admitted in tribunal proceedings to include hearsay, opinion and other evidence which the courts have traditionally regarded as unreliable, there is a need to ensure that other safeguards are adequate. One of these safeguards is procedural fairness.

Criticism of procedural fairness

Criticism of procedural fairness arises because the process which is perceived to result is seen as defective. The process is seen as legalistic. It is seen as lengthy and costly. It is seen as inaccessible. But these defects in the process are not always the result of procedural fairness.

It is very popular to criticise tribunals such as the AAT for being too legalistic. To a degree, some of this legalism is unavoidable. The *Administrative Appeals Tribunal Act 1975* provides for the presidential members of the AAT to all be lawyers and allows for parties to be legally represented. As I mentioned above, the presence of lawyers is one factor which tends to make proceedings legalistic. It has to be recognised that there are plenty of cases before the AAT in which all the trappings of court proceedings are entirely appropriate. For instance, in one matter I heard last year, the parties were all either government agencies or major corporations. The parties other than the government agency were all represented by QCs. The agency was represented by a barrister. In such a case, the parties may well operate most efficiently in a court-like environment, simply because that is the environment with which they are most familiar.

Of course, that is not a typical case. There are many cases in which the tribunal should try to be as flexible as possible. But legalism is a product of the inflexible application of procedures, not the product of giving too much fairness. The same can be said for the criticism that the Tribunal is too slow and is inaccessible. It is not the application of procedural fairness that makes it so. It is the application of procedures in inappropriate circumstances.

There is a down-side to procedural fairness. It is time-consuming. We cannot totally eliminate that.

The real question is: 'How can we ensure that fairness is given without applying procedures inappropriately?' An interesting example is provided by the proposed Refugee Review Tribunal. It is proposed that the rules of procedural fairness will be applied by spelling-out the procedures to be followed. The Refugee Review Tribunal will operate on a non-adversarial system, similar to that of the existing Immigration Review Tribunal. Failure to follow these procedures would be a ground of judicial review. This would replace the ground that the rules of natural justice were not observed.[4] This seems to be an attempt to preserve the essence of the rules of procedural fairness while minimising the down-side.

The AAT is attempting to make hearings happen more quickly and last for a shorter period when they do. One way the Tribunal is doing this is by having more rigorous pre-hearing processes, in the course of which, parties can attempt to settle disputes and define issues. Evidence can be outlined in advance and statements of facts and contentions and issues used to help see exactly where there is a dispute.

There is also a need to be more flexible in hearing processes, especially where there are unrepresented parties involved. Inappropriate language, such as words like 'discovery' and 'cross-examination', make unrepresented applicants feel as if they are in over their heads. Instead, parties should be told precisely what it is they are being asked to do. For instance, instead of saying 'you may now cross-examine the witness' we should be saying 'you can now ask the witness a few questions'.

Procedural fairness, properly understood, is a question of nothing more than fairness. When it is understood in these terms, then the question 'Is there too much natural justice?' becomes little more than 'Is there too much fairness?'. Preventing people having their say can be convenient. But is it fair?

* Justice O'Connor is President of the Administrative Appeals Tribunal.

1 (1985) 156 CLR 342.

2 (1966) 2 QB 275.

3 *Administrative Appeals Tribunal Act 1975*, s33.

4 Press release by the Minister for Immigration, Local Government and Ethnic Affairs, dated 15 July 1992.

IS THERE TOO MUCH NATURAL JUSTICE? (2)

A State perspective

The Hon Justice LT Olsson*

- address to a meeting of the South Australian chapter of the Australian Institute of Administrative Law, held on 10 September 1992, in Adelaide.

Introduction

The theme of this seminar is (and, no doubt, is intended to be) provocative.

I gather that, in large measure, it stems from the suggestion made by Professor Julian Disney earlier this year that 'natural justice' will often be the enemy of real justice, when pursued with obsessive legalistic vigour.

The point then being made by the Professor arose in the course of his consideration of the chain of forms of procedure currently and typically to be found in some Federal systems of administrative review. He was particularly focusing upon the existing complexity of processes in some first-tier tribunals in Federal systems within which, as he perceived the situation, the adoption of complex procedures to comply with traditional principles of natural justice has meant that many people are effectively prevented from getting any form of justice at all. He argued that there was a danger that well-meaning lawyers could encrust the system of review at lower levels with a whole range of apparent safeguards which, in practice, are counter-productive.

However, I take my brief to range somewhat wider than that aspect and to extend to the implications of the general concept of natural justice as it is known to the common law.

Against that background, it becomes necessary to commence by sketching some contrasts between the Federal and State administrative review processes.

State review processes

It is fair to say that, in contradistinction with the Federal environment, with its present fairly extensive (and, at times, complex) processes of administrative review, the evolution of formal, tiered systems of review of administrative decisions in South Australia is still in its relatively early and embryonic stages. Apart from resort to the Ombudsman, the remedies for review of primary decision making authorities available to an aggrieved member of the public are relatively limited and, in the main, based on resort to the established common law courts.

In addition to the general activities of the various major government Departments and agencies there are, of course, a significant number of bodies or administrative boards and tribunals (many of the them of a licensing or regulatory nature) which are established by State legislation and make important decisions having the potential profoundly to affect the lives and activities of a wide variety of members of the public.

In some instances, there are formally-established review processes but, certainly so far as day-to-day public administration is concerned, there is no general right of access to a body of the nature of an Administrative Appeals Tribunal or the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977.*

Formal appellate processes are provided for in relation to decisions of regulatory-type bodies in most cases. However, these are very much the province of the lawyer and the appeal normally lies to the District or Supreme Court. It may be an appeal *stricto sensu* or an appeal by way of re-hearing. In this paper, I do not attempt to analyse or discuss these. I will concentrate solely on decision making processes in relation to which no such appeal lies.

Often the sole legal remedy available, in relation to general administrative decisions of the Departments of State and Government bodies or agencies, is by way of a formal application for judicial review to the Supreme Court - once more, very much the province of the lawyer.

It is only in a limited number of situations, such as the administration of the Workcover scheme, that a multi-level, true administrative review system has been established. There, the first-tier review is intended to be a fairly informal, internal, inquisitorial-type procedure, followed by a more traditional type of appeal to a quasi-judicial review tribunal. There is yet a further right of appeal, limited to questions of law, from the Tribunal to the Supreme Court.

It follows that the type of procedural problem specifically adverted to by Professor Disney does not tend to exist in the State sphere. Certainly in the Workcover area, it has never been suggested that the process is complex, inappropriate and generally inimical to processes of good administration or the legitimate interests of persons affected, although the drafting of the legislation leaves a good deal to be desired.

One is tempted to suggest that, on the contrary, at our present stage of development, there may well not be enough natural justice. Indeed, it may fairly be said that, in some situations at least, there are not really any effective, practical remedies for aggrieved persons affected by first instance public administration processes at the State level at all.

The concept of natural justice applied

No-one would, I think, seek to quarrel with the assertion that efficiency in public administration must clearly be one major goal of any modern community and that certainty and expedition are important aspects of efficiency.[1] Equally, it may reasonably be conceded that absolute fairness in decision making may, to some extent, be an unattainable dream in pragmatic terms. A proper balance may need to be struck between the need for practical efficiency and the notion of fairness to those affected by decisions taken.

Be that as it may, there is (and always has been) an inherent tension between, on the one hand, the public sector decision maker who desires to get on with the job without hindrance and, on

the other, the long-suffering (and somewhat cynical) members of the public who, in Australian parlance, have a not unnatural desire to 'keep the bastards honest'.

In many instances, the only means of doing so in this State has been by way of a formal action in the Supreme Court, seeking the exercise of its inherent jurisdiction to conduct a judicial review of the decision sought to be impugned.

It should be said that, until relatively recent times, actions of this type were quite infrequent. However, particularly since the old prerogative writ procedure was abolished and was replaced (in the 1987 Rules of Court) with a less technical and rather more extensive remedy, the Court has, not infrequently, been called upon to consider a fairly wide range of problems.

Indicative of these have been applications to review:

- decisions of correctional services authorities concerning the treatment of prisoners;
- decisions of public sector authorities related to discipline and dismissal of employees;
- decisions of the health authority concerning rationalisation and projected closure of country hospitals;
- a decision of a Minister concerning the exercise of a discretion as to a scheme related to the rationalisation of a prawn fishery; and
- decisions of a licensing authority bearing on the grant or refusal of fuel re-selling licences;

to identify but a few.

These clearly reflect an increasing consciousness within the community that public sector decision makers are by no means infallible or immune from a proper questioning of the validity of their processes.

It may fairly be commented that, since the landmark decision of the House of Lords in *Ridge v Baldwin & Ors*,[2] the Australian courts have adopted a reasonably robust attitude towards the nature and scope of the remedy of judicial review. They have conceded the applicability of such a remedy to a wide range of executive, ministerial and administrative functions on an open-class basis, where it has been considered that the relevant decision making must, in absence of statutory provision to the contrary, be carried out in what has been termed a spirit of judicial fairness[3] or, to otherwise express it, in discharge of a duty to act fairly.

It is trite to say that the courts have consistently held that the judicial review process is limited in its scope. The Court is not concerned with the merit or otherwise of the substance of the decision making but only to ensure that there is procedural fairness in the decision making process.

So it is that Dawson J recently commented in *Attorney-General (NSW) v Quin*[4] that:

> In recent years the trend has been to speak of procedural

> fairness rather than natural justice in order to give greater flexibility to the extent of the duty than is possible merely by reference to a curial model.

He went on to express the warning that, in the context of judicial review, care must be exercised to ensure that the duty to act fairly is identified only with procedural obligations. There is some danger that the duty formulated in such a way may prove elastic.

What has given rise to some difficulty is the formulation of the nature of the duty, when it arises, and who may seek to enforce it. The law has by no means been static in these areas and the Courts have deliberately kept their options open to meet new and changing situations as they arise.[5]

So it is that one logically commences with the dictum of Mason J (as he then was) in *Kioa & Ors v West & Anor*,[6] to the effect that:

> The 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 statutory intention.

In *Quin's* case the High Court accepted the general ambit of the remedy of judicial review, as expressed by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[7] in these terms:

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

In *Quin*, Dawson J commented that such a definition was now to be preferred to the earlier summation of Lord Upjohn, in *Durayappah v Fernando*,[8] where he said:

> In their Lordships' opinion there are three matters which must always be borne in mind when

> considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.

He made the point that this passage:

> ... may no longer be wholly apt to describe the considerations which give rise to a duty to observe the principles of natural justice or procedural fairness. It is now clear that the first of the matters mentioned must be taken to include something less than a right - a legitimate expectation. What the passage does make plain is that, if a legitimate expectation is the basis of the duty to observe a fair procedure, it is because that legitimate expectation is of an ultimate benefit which is, in all the circumstances, entitled to the protection of that procedure and not because the procedure itself is legitimately expected.

As Mason CJ stressed in *Quin* (at p 13) the list of circumstances in which a legitimate expectation may arise is by no means closed.

From the point of view of the decision making authority, the critical practical problem is to be able to discern who may have *locus standi* to seek judicial review and, thus, to whom due notice ought to be given and from whom appropriate representations ought to be entertained and considered. As has been said, 'notice is truly at the very heart of natural justice'.

This is a topic which I had occasion to canvass in my recent judgment in *Walsh & Others v Motor Fuel Licensing Board*.[9] As I there pointed out, the published authorities render it clear that the law is far from definitive as to when *locus standi* will be accorded.

The decided cases render it clear that, *prima facie*, a person whose rights, interests or legitimate personal expectations are affected in a direct or immediate way will normally be entitled to invoke the remedy of judicial review. Conversely, the Court will be slow to entertain an application by a person who is only affected by a decision in an indirect and consequential manner.

Although that may be an accurate general summation of the situation, there can be no doubt that, at the end of the day, there nevertheless remains a residual discretion in the Court to accord *locus* where it is satisfied that the particular circumstances fairly warrant it doing so. (See, for example, the discussion of this question in *The Queen v The Corporation of the City of Burnside; ex parte Ipswich Properties Pty Ltd and Another*[10]). The concept of possession of a 'real' or 'substantial' interest as a basis for *locus standi* has

found favour in some cases (see *Forster v Jododex Australia Pty Ltd & Anor*,[11] *Phillips & Anor v New South Wales Fish Authority*,[12] *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation*[13] and *Green v Daniels & Ors*[14]) but these are only non-definitive statements in relation to specific, anecdotal circumstances in which a discretion has in fact been exercised.

It follows that, on the State scene, public sector decision makers need to be vigilant, to ensure that procedures leading to decisions having the potential to affect adversely the legitimate interests of members of the community accord those persons what the North Americans like to term 'due process', before decisions are made. But I see none of the complexity adverted to by Professor Disney. Nor have I seen any substantial indications that the present situation is reacting oppressively and adversely in relation to public sector decision making.

If there are defects in current processes, they rebound mainly against those persons who would like to seek judicial review. They arise by reason of the fairly restricted remedy available in most areas and the very considerable cost of seeking that remedy by an action in the Supreme Court. Even given a far better awareness by the community of what litigious remedies are available, there are, in fact, relatively few actions for judicial review commenced.

My researches indicate that, in the calendar year 1991, only 31 such actions were commenced. Certainly it is my anecdotal experience that, where such cases have been run, they have had a significant impact on improving the decision making processes involved rather than impeding such processes in an undesirable manner. My main concern is that the range of remedies within the State area of jurisdiction is simply far too restricted, with the result that persons who have a legitimate grievance do not take action, because they have neither the desire nor the financial capacity to engage in major litigation to test the situation. No doubt public sector decision makers are not unaware of that situation.

From my perspective, the question posed by the theme of the seminar must be answered in the negative. We have yet to experience any of the difficulties associated with the scenarios referred to by Professor Disney. Hopefully, our legislators will learn from the Federal experience.

At the moment, it is difficult to judge what developments are likely to take place in South Australia concerning review of public sector decision making and when. In general, this State has, for example, been slow to embrace the concept of erecting a general administrative appeals tribunal. Instead, it has adopted something of a band-aid approach of creating some specialist first instance appeal bodies related to specific areas. Often, these are primarily constituted by lay persons, although some have a legally-qualified presiding officer.

With the long-awaited advent of freedom of information legislation, there may be some upsurge in activity directed towards review of decision making, not only as to process but also as to merit.

I would have thought that the present piecemeal approach to this area is both inefficient and expensive and that there is much to be said for some simple, cohesive structure of the nature of a single, general administrative appeals tribunal. Quite apart from the economy and efficiency of such a structure, it would provide members of the public with a relatively inexpensive, simple and well-understood means of seeking redress as to both substance and process. The present legalistic approach falls far short of that description.

Finally, I should mention that, in the course of this discussion, I have primarily focused upon natural justice as related to primary decision making. It is stating the obvious to say that it also has an important part to play in relation to the review processes themselves, and aspects such as bias, and the requirement to disclose to parties material proposed to be taken into account and afford an opportunity to respond to it. Indeed, these aspects are no less relevant to primary decision making, particularly (but not exclusively) by tribunals or bodies to which the normal rules of evidence are not applicable. (*Sobey v Commercial and Private Agents Board*,[15] *Mahon v Air New Zealand*,[16] *R v Deputy Industrial Injuries Commissioner; ex parte Moore.*[17]) Given the obvious public policy exceptions adverted to in authorities such as *Minister for Immigration and Ethnic Affairs v Pochi*[18] and *R v Secker; ex parte Alvaro*,[19] these are fundamental and well-understood. This is a major topic which is well traversed in the essay of TJH Jackson reproduced in Harris and Waye, *Administrative Law.*[20]

I merely make the point that this is, on any view, such a basic requirement to fair decision making that it can, in my view, scarcely be suggested that its due observance can properly be said to contribute to the existence of too much natural justice. Without an insistence upon it the prospect of potential injustice is simply too acute to ignore.

* Justice Olsson is a judge of the Supreme Court of South Australia.

1 Whitmore, H and Aronson, M, *Review of Administrative Action* (1978, The Law Book Company Limited, Sydney).

2 [1946] AC 40.

3 *Perre Brothers v Citrus Organisation Committee* (1975) 10 SASR 555.

4 (1990) 93 ALR 1, at 38.

5 *Gaiman & Ors v National Association for Mental Health* [1970] 2 All ER 362.

6 (1985) 159 CLR 550, at 584.

7 [1985] AC 374, at 408.

8 [1967] 2 AC 337, at 349.

9 (1992) 162 LSJS 337.

10 (1987) 46 SASR 81.

11 (1972) 127 CLR 421, at 438.

12 (1969) 72 SR (NSW) 297.

13 [1977] 1 NSWLR 43.

14 (1977) 13 ALR 1.

15 (1979) 22 SASR 70.

16 [1984] AC 808.

17 [1965] 1 QB 81.

18 (1980) 31 ALR 666.

19 (1986) 44 SASR 60.

20 'Administrative tribunals and the doctrine of official notice: "Wrestling with the angel"', in Harris, MC and Waye, V (eds), *Administrative Law* (1991, Federation Press, Sydney), pp 120-145.

IS THERE TOO MUCH NATURAL JUSTICE? (3)

Professor Dennis Pearce*

- address to a meeting of the South Australian chapter of the Australian Institute of Administrative Law, held on 10 September 1992, in Adelaide.

At various times in history, judges have been warned to be slow to mount the unruly horse of public policy. There are similarities with the vigour with which judges should mount the natural justice horse. Certainly it is unlikely to win a dressage competition. It may, in fact, be more like a Thelwell pony - ever willing to unseat those that it is designed to assist.

The basic natural justice proposition is simple and entirely proper:

- a person should not be adversely affected by a government decision without being able to put a case that is relevant to their own concerns;
- a decision maker should not be biased.

The question nowadays is not whether these propositions should be abandoned but rather **how** they should be implemented. No one questions the original propositions - any decision making that offends them should not be regarded as valid. It is interesting to note that the courts and, indeed, the administration no longer debate the question as to when should the basic natural justice principles be implemented. This is one of the great contributions of the courts to our social order. It is salutary to remember that *Ridge v Baldwin*[1] was decided less than 30 years ago. Prior to that, we had witnessed a period in which the executive was able to make decisions almost without any constraint being imposed by the courts. The power of the executive was enormous and individuals were left with few means to question decisions which adversely affected them. The break-through came with *Ridge v Baldwin* talking about the need for natural justice to be adhered to when rights were affected, but even that was not sufficient, because of the problems surrounding the ambit of 'rights'. Thus, one saw the courts develop the law through such issues as whether the issue and renewal of a licence was a 'right': whether a person might have an expectation that a particular decision would be taken such as to attract a hearing: and rulings that decisions of ministers, governors, etc, were subject to the hearing rules.

Ultimately, the High Court, in *Kioa v West*,[2] brought the matter to the virtual point where any government decision affecting a person will attract 'procedural fairness'. Some points of nicety surrounding the question as to when is a person affected by a decision still remain to be resolved by the courts: see for example the decision in *Annetts*[3] relating to coronial inquiries and *Ainsworth*[4] relating to a report of the Criminal Justice Commission. The right to a hearing where a decision applies to the community generally continues to cause some problems in relation to the right of a hearing. However, the position now can be fairly seen as being that stated by Deane J in *Haoucher*:[5]

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

The question then becomes what is meant by 'procedural fairness'. The discussion of natural justice has always embraced what has been known as the variable content notion - that what might be regarded as procedurally fair in one case is insufficient in another. Conversely, a decision can be made without the full panoply of a judicial-type hearing being followed and yet be regarded as having satisfied procedural fairness. The real question that this seminar raises is whether the content of procedural fairness in relation to a particular decision may be so great as to defeat the object of fairness being provided to the individual concerned. We are not here concerned with a question of whether there should be procedural fairness - that is assumed - but the question is what form should it take.

In considering this matter, one needs to look to the concerns of most persons affected by government decisions - what it is that they seek in the decision making process. I suggest that the principal requirements are:

. Speed

- persons who are affected by government decisions are often destitute, homeless, sick, etc. What is essential to them is a quick decision.

. Finality

- much the same issues arise. A person will often need to know what their position is and not be required to be subjected to a series of appeals and re-hearings to resolve the matter.

. Cheapness

- few persons affected by government decisions have the wherewithal to spend on an expensive system of decision making.

. Accessibility

- persons affected need to be able to receive a decision with the minimal formality on their part.

A system of decision making that guarantees ultimate correctness or accuracy in decision making is likely to run counter to these desirable essentials of the decision making process. Detailed fact-finding, careful balancing of issues, etc, will be slow. Some persons affected by government decisions can afford to have this occur but they will be few in number.

A hearing process that is adversarial will deter persons from using it. If representation is essential, problems of cost and the forbidding nature of the whole process will prevent those affected from entering upon the field. Even formal procedures without representation will deter those who cannot cope with matters that are generally outside the ordinary range of their day-to-day living experience. Of course, the more formal the procedures the more likely representation will be required and the more probable that cost will be incurred that is beyond the means of persons affected by the decisions in question.

What I am saying here is that the adoption of procedures that may be seen as providing a fair means by which persons may achieve a decision favourable to them from a government may, in fact, be counter-productive because they will limit applications by the person affected. An elaborate review procedure is also vulnerable from an entirely different angle. It may be seen as being too expensive to be tolerable by a government that is looking to reduce expenditure. This decision will be made easier if the number of instances when the review procedure is used is low in proportion to the number of decisions. And yet it may well be that this lack of use is not because of a happiness with the original decision making process but because the procedures adopted have deterred persons from making use of the review process.

One can see examples of tribunals functioning in what would appear to be a manner that breaches the procedural fairness rules but which is nonetheless justifiable because of advantages that flow from those apparent breaches. The presence of a departmental officer on the Social Security Appeals Tribunal, on the face of it, would seem to raise a breach of the bias rule. However, it has the affect of avoiding what would otherwise probably be seen as a need for the Department to be represented before the Tribunal which would, in turn, almost certainly lead to a need for representation by the applicant. Secondly, the presence of a departmental officer on the panel avoids the need for formal proof of many policy issues that are germane to the Tribunal's decision, thus reducing the formality of proceedings and increasing its speed of decision making.

The absence of lawyers from the operation of the Immigration Review Tribunal could well be seen to represent a lack of procedural fairness, having regard to the significance of the issues that have to be dealt with by that Tribunal. However, the reduction in cost that has flowed from the absence of representation, together with the consequential increase in the speed of decision making, has produced a circumstance in which the Tribunal proceedings have not been seen by the Department as disadvantageous. The extraordinary reluctance of the immigration authorities to allow review

of their decisions, which has been the hallmark of their approach in the past, has been overcome by the approach adopted at the tribunal hearings. The apparent breach of the rules has thus advantaged clients by ensuring that a review mechanism is available.

Another way in which this question of the extent of natural justice in decision making can be looked at is by having regard to the overall continuum of decision making. The standard pattern nowadays is for there to be an original decision, facility for an internal reconsideration of that decision and then an external review body in the form of a tribunal. The question arises whether natural justice should be accorded a person at each stage of this process. The answer to that is, clearly, 'yes' but the issue really turns on the level of procedural fairness that should be followed. The overwhelming number of cases will be resolved at one of the first two stages, ie, the original decision or on internal reconsideration. The factors mentioned previously of speed, cost and informality are of significance in determining the procedure to be followed at these points. If one dresses up the decision making process with all the trappings of natural justice at each point in the continuum of decision making, the system will grind to a halt and that is not to the advantage of the citizen, let alone the government. Visa applications are, for example, processed at overseas posts in some countries at a rate of about one a minute. To require greater consideration of each visa application would result in many fewer being processed or markedly greater costs having to be assigned to the consideration process. It is unlikely that the latter would occur and so the Department opts for quick consideration, knowing that, if in fact it makes a decision adverse to the applicant, natural justice issues can be picked up at a later stage in the process, through internal reconsideration or external review.

The attitude of the courts in cases of this kind is significant. One can see instances where the court has been strongly influenced by the fact that appeal mechanisms exist and has found that it is not necessary for a wide range of procedural safeguards to be accorded at the lower level decision making points. However, often a decision is based on a perceived injustice in a particular case. A precedent is thereby established for the management of that particular range of decisions but that precedent does not necessarily have regard to the implications of the procedure required for a large number of decision. The point at issue is that the applicant's position should not be weighed only against the interests of the decision making agency. Other individuals have a stake in the procedure that is adopted and setting too high a level of procedural fairness can, for the reasons mentioned previously, operate adversely to a large number of the persons affected by the decision making process.

I have been speaking of lower level decision making - decisions that involve many individuals or persons who are dependent upon the government for the provision of services. There will always be individual instances that will raise very difficult considerations and for it to be apparent that the processes adopted have not provided procedural fairness to the bodies affected.

Procedural fairness is the great protection against bureaucratic unfairness. The question is not whether we have too much natural justice - the principle of natural justice must drive decision making. The real issue is that those who are creating models for the procedure to be followed, whether they be public servants or judges, need to be aware that an excess of procedure can be counter-productive. It cannot be assumed that the provision of additional procedural steps will necessarily be to the advantage of persons affected by the decisions in question.

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1 [1964] AC 40.

2 (1985) 159 CLR 550.

3 *Annetts v McMann* (1990) 97 ALR 177.

4 *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11.

5 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 93 ALR 51, at 53.

ADMINISTRATIVE REVIEW COUNCIL REPORT NO. 35 - RULE MAKING BY COMMONWEALTH AGENCIES

Stephen Argument*

In *Newsletter No 11*, the Shadow Attorney-General and Shadow Minister for Justice, Mr Peter Costello MP, referred to the recent report by the Administrative Review Council (ARC), entitled *Rule making by Commonwealth agencies*.[1] This is a significant Report and it is likely that the current Government will take some sort of formal action in response to its recommendations before the end of this current Parliament. It is, therefore, timely to consider the background to and the substance of the Report in some more detail.

Background

On 7 May 1992, the ARC tabled in the Parliament its Report to the Attorney-General No. 35, on rule making by Commonwealth agencies. The project which produced the Report arose out of a conference on rule making which was conducted on 31 August 1989. After that conference, an issues paper was produced and released to the public on 30 June 1990. The issues paper sought input from both the public and from Commonwealth agencies on a range of issues which operated as the terms of reference for the project.

Having received numerous responses to the issues paper, the ARC conducted a series of public seminars

on the preliminary proposals formulated in relation to the project.[2] Those public seminars were conducted in Melbourne, Sydney and Canberra in April and May and 1991. Representatives of the ARC also spoke to the Report at the Institute's 1991 administrative law forum. Following the public seminars, the ARC began work on the final Report.

Summary of major recommendations of Report

The Report recommends that a new Act, to be called the Legislative Instruments Act, be enacted. That Act would set up a new system of classification, drafting, consultation and publication which would apply to every instrument that is 'legislative in character', unless the instrument is explicitly excluded from the operation of the Act. It would incorporate the substance of section 46A and Part XII of the *Acts Interpretation Act 1901* and the provisions of the *Statutory Rules Publication Act 1903*, which would, in turn, be repealed. This would place most of the relevant statutory requirements relating to subordinate legislation within a single piece of legislation.

Significant amendments to the Commonwealth Government's *Legislation Handbook* are also proposed. They include the insertion of criteria which would determine whether or not a matter was appropriately dealt with in primary or subordinate legislation. Matters which would only be dealt with by primary legislation are:

- significant questions of policy, including new policy or fundamental changes to existing policy;
- rules which have a significant impact on individual rights and liberties;
- provisions creating offences which impose significant criminal penalties (imprisonment or fines or more than $1 000 for individuals or more than $5 000 for corporations);
- administrative penalties for regulatory offences;
- provisions imposing taxes;
- significant fees and charges (more than $1 000);
- procedural matters that go to the essence of a legislative scheme; and
- amendments to Acts of Parliament.

The Report recommends that the *Legislation Handbook* be amended to include criteria on which to determine whether or not an instrument is 'legislative in character'. It is significant to note that these criteria are to be set out in the *Legislation Handbook* and not in the proposed new Act. This point is dealt with in greater detail below.

The Report recommends that the new Legislative Instruments Act should apply to all instruments of a legislative character, unless the operation of the Act is specifically excluded by the relevant enabling provision (Recommendation 3). If the operation of the Act is excluded, the Report envisages that agencies be required to provide an explanation for the exclusion, in order to satisfy the concerns that would be expressed by

the Senate Standing Committee for the Scrutiny of Bills in terms of their exclusion from Parliamentary scrutiny (para 3.19 of the Report).

Other recommendations deal with the drafting, settling and nomenclature of legislative instruments. They envisage an increased role for the Office of Legislative Drafting (a Division of the Attorney-General's Department) in the preparation of legislative instruments, which would be called 'rules' rather than the myriad of confusing terms ('determinations', 'directions', 'guidelines', 'notices','principles', etc) which are currently applied to such instruments.

There are also recommendations concerning public consultation in relation to instruments. Subject to certain exceptions, public consultation would be required prior to the making of any 'rule'. The recommendations would require a statement to be made as to the public consultation that has been undertaken in relation to the instrument and, if none has been undertaken, the reasons why such consultation was thought not to be necessary.

The proposed Legislative Instruments Act would also require that where legislation applied, adopted or incorporated a document by reference, that document must be tabled with the legislation. Failure to do so would lead to the incorporating provision ceasing to have effect. The Report recommends that once the document has been tabled, the Parliament would be able to scrutinise it to see whether or not the provision allowing for the application, adoption or incorporation should be disallowed.

The proposed new Act would provide for all existing 'principal instruments of a legislative character' to be sunsetted, on a timetable which would be set out in the Act.

The proposed Legislative Instruments Act would establish a Legislative Instruments Register. This register would take the place of the existing Statutory Rules Series but would also include all instruments to which the Act is subject.

The Report also contains recommendations about the role of the Senate Standing Committee on Regulations and Ordinances, including recommendations relating to that Committee's terms of reference (Recommendations 17 and 18) and to the tabling and disallowance provisions contained in the Acts Interpretation Act (Recommendations 19 to 21).

Comments on the recommendations

The recommendations contained in the Report are, on the whole, to be encouraged. If Mr Costello's comments in *Newsletter No 11* are any indication, it is evident that at such time as the recommendations are put into a legislative form, they will receive bipartisan support in the Parliament.

The recommendations concerning the nomenclature of instruments and those aimed at providing better drafting and more comprehensive publication of these instruments address matters which various bodies, including the Scrutiny of Bills and Regulations and Ordinances Committees, have been raising for many years. Similarly, the recommendation relating to incorporation of documents by

reference addresses a problem which the Scrutiny of Bills Committee has also raised quite frequently.

The recommendations relating to what matters are appropriately dealt with in primary rather than other forms of legislation and those dealing with which instruments are to be subject to the proposed new Legislative Instruments Act are of particular interest. For many years, the Scrutiny of Bills Committee has made comments about matters which, in its opinion, are not appropriately dealt with in the form in which they come before the Parliament. Though the recommendations contained in the Report are commended, they do not necessarily address this problem.

The Report recommends that the relevant criteria by which to determine what should only be dealt with by primary legislation should be set out in the *Legislation Handbook*. Such matters are already dealt with in the *Legislation Handbook*. The *Legislation Handbook* currently states:

> 3.2 While it is not possible to list every situation where legislation is needed, legislation will be required to -
>
> (a) impose taxes, charges or authorise the borrowing of funds;
>
> (b) appropriate money;
>
> (c) impose obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);
>
> (d) confer enforceable rights on citizens or organisations; or
>
> (e) create statutory authorities.

An important question that needs to be asked is how the recommendations contained in the Report offer anything different.

Similarly, the Report recommends that the criteria for determining whether or not an instrument is 'legislative in character' (and, therefore, subject to the proposed Legislative Instruments Act) should be set out in the *Legislation Handbook* and not in the Legislative Instruments Act. Doubts may be expressed about the likely success of such an approach in ensuring that all instruments which are legislative in character are in fact made subject to the proposed new Act, given that it would appear to be incumbent on the bureaucracy to decide whether, in the light of the relevant criteria, the relevant instrument should be subject to the onerous obligations of the new Act. It is already evident (from the reaction of bureaucrats in sessions such as the one conducted at the 1991 administrative law forum) that the bureaucracy is unlikely to embrace the recommendations with great enthusiasm.

The Report addresses this point as follows:

3.20 One potential difficulty could be uncertainty at the margin over whether instruments are legislative or administrative in character. A comparable issue presently arises under the *Administrative Decisions (Judicial Review) Act 1977* ('AD(JR) Act') which applies to all decisions of an administrative character. The meaning of the term, 'administrative character', has been partly elucidated by case law dealing with the ambit of the AD(JR) Act. By extension that case law has also helped to develop the meaning of the corresponding term 'legislative character'.

3.21 Under this model, failure to recognise that a particular instrument is legislative and to comply with the procedures of the Legislative Instruments Act where the Act was not expressly excluded would have substantive consequences. Any action taken under the instrument would be rendered ineffective. The instrument would never have commenced operation because it would not have been published in the Legislative Instruments Register.

3.22 The Council would not expect this difficulty to be significant in practice. In cases of doubt, it is likely that agencies will clarify the status of instruments by exempting them from the Act and justifying the exemption to the Scrutiny of Bills Committee. One justification may be that the agency considers the instrument to be administrative in character and subject to the AD(JR) Act, but that it is seeking exemption from the Legislative Instruments Act to remove any lingering doubt. In making their initial assessment of instruments, agencies would derive guidance from the characteristics of legislation set out earlier in this chapter. In the interests of accessibility those guidelines should be published in the *Legislation Handbook.*

The sentiments expressed by the ARC in paragraph 3.22 may be regarded as more than a little optimistic. Of greater concern, however, is the proposition (stated in paragraph 3.21) that agencies are likely to comply with the requirements of the proposed Legislative Instruments Act because the validity of their instruments would be put at risk if they do not.

This proposition raises 2 obvious difficulties. First, it should be noted that others would not share the ARC's faith in either the capacity of agencies to deal with the sort of compliance strategy that this 'do it, or else' approach involves or, indeed, the soundness of this 'risk management' approach to the question, of itself. Second, there is the problem that, under the system proposed, possibly invalid instruments would retain their validity so long as they were not successfully challenged, thereby placing the emphasis on those affected by the instruments to challenge them. Needless to say, this would require a court challenge. While this might be considered a reasonable suggestion if the persons affected by an instrument

are, say, broadcasters or pharmaceutical manufacturers, it seems less palatable when the relevant persons are welfare beneficiaries or, even, 'ordinary' citizens.

As to the significance of these points from a Parliamentary perspective, it would appear that, under the proposed new scheme, the Scrutiny of Bills Committee would still be in the position of having to scrutinise carefully all legislation in order to determine whether (a) there is an inappropriate delegation of legislative power involved and (b) whether the exercise of legislative power is insufficiently subject to Parliamentary scrutiny. These are matters on which the Committee and the bureaucracy have often taken a different view and on which they will, no doubt, continue to take a different view.

Concluding comments

As indicated at the outset of this article, this is a significant report by the ARC. It addresses some problems which have been the subject of great concern (particularly in the Parliamentary sphere) for some time. On the whole, the recommendations made by the ARC in response to these problems are rational and reasonable. However, there are still some doubts as to whether they offer a complete solution to this difficult area of legislative activity.

* Stephen Argument is the Secretary to the Senate Standing Committee for the Scrutiny of Bills. However, the views expressed in this article are his own.

1 Costello, P, 'Administrative review, Parliament and the courts', (11) *Australian Institute of Administrative Law Newsletter*, pp 22-30.

2 See 'Fair and open decision making - 1991 Administrative Law Forum', (66) *Canberra Bulletin of Public Administration* (October 1991), pp 150-4. See also Argument, S, 'Rule making by Commonwealth agencies', (6) *Australian Institute of Administrative Law Newsletter*, pp 17-23.

such as a vote being carried on the voices. Thus a head count has been avoided.

Given the present composition of the standing committees, it makes good sense for committees to adopt a practice such as the rule of thumb described above. It enhances the prospect of the Senate as a whole being prepared to adopt the committee's report rather than re-open the debate and go through the usual committee of the whole procedure. This in turn would allow for the Senate chamber itself to deal more expeditiously with the legislation before it, without this more expeditious processing resulting in a lesser examination of the provisions.

The anomaly regarding 'the numbers' has the potential to hamper the use of the more expeditious procedures. It could mean that the time savings envisaged when the new scheme was adopted (that is, less debate in the chamber on matters which have been dealt with in committees) would remain to be realised to any significant extent. This would be so particularly if votes taken in committees had to be re-run in the chamber merely because the different numbers would give a different result.

* *Bronwyn McNaughton is secretary to the Senate Standing Committee on Legal and Constitutional Affairs but the views expressed here are entirely her own and do not reflect the views of the committee or the Department of the Senate.*

A NEW LOGO

The executive of the AIAL has chosen a logo:

aial AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW (INCORPORATED)

aial AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW (INCORPORATED)

It is intended that the logo will be used on correspondence, public notices, etc. This is being worked upon at the moment.

AGM

Please note that the AIAL's AGM will be held on Thursday 26 September at University House on the campus of the Australian National University. Alan Cameron, the Commonwealth ombudsman, will be guest speaker. See the enclosure in this Newsletter for details.