

Natural justice: too much, too little or just right?

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Natural justice - striking a balance between law and administration

It borders on legal heresy to suggest that there is too much natural justice. On the contrary, the steady expansion of the natural justice hearing obligation in recent years would perhaps suggest that there is not enough.

But, indeed, there can be too much of a good thing. Excess can be as damaging as a deficiency.

The doctrine of natural justice is undeniably an important thread in our legal heritage. The positive impact of the doctrine on public administration is clear for all to see. It has become well-known and commonly practised that decision-making should be free of bias and conflict of interest, and that a person affected adversely and directly by an administrative decision should be given a prior warning and opportunity to comment. This adherence to natural justice goes well beyond administrative practice and is now rooted in many statutory schemes that spell out the hearing or adjudication procedures that must be followed by decision-makers.

Nor, at a doctrinal level, does natural justice impede the government administration from implementing statutory purposes and objectives. An unyielding principle is that natural justice is merely a doctrine of procedural fairness. It does not speak to the merits of an administrative decision. Natural justice has been likened to a last meal before the hanging, but even so it affirms a fundamental principle that procedural integrity is important, whatever the substantive outcome.

Why, then, can there be too much natural justice? The answer given in this paper is that the hearing rule of natural justice has developed in a way that does not strike an appropriate balance between competing considerations - fairness to the individual, as against practical administrative considerations, such as the importance of finality, efficiency and lack of formality in administrative decision-making. Natural justice is a doctrine of law, but it must develop sensibly as a doctrine of administrative law.

A secondary theme in the paper is that natural justice principles have been too heavily influenced by legal and judicial notions of how decisions should be made. One way of explaining this point is to observe that courts face few of the difficulties that dominate recent case law developments on natural justice. By and large, all that a court has to do is to schedule a date for hearing, give sufficient advance notice to the parties so that they can prepare for the hearing, allow sufficient time at the hearing for each party to present its case and to question the case presented by the other side, then retire to prepare a judgment that

addresses and resolves the issues in dispute between the parties. Difficult issues can arise along the way for a court - for example, whether to shorten the cross-examination of a witness, or allow an adjournment at the request of a party to gather more evidence - but even on those issues there are clearly-established principles to guide the court. Usually, too, the court will have the benefit of argument by legal counsel in clarifying the issues and deciding how to rule on any procedural question. The long-experience of the judge in dealing with similar procedural questions is also a great advantage.

In summary, it is well known what a court has to do to accord natural justice. As a consequence, it is infrequent that a court decision is set aside for a breach of the hearing rule of natural justice.

It is no longer simple in administrative decision-making to decide what is required to comply with natural justice. The guidelines provided by courts are often presented in soothing tones - 'the principles of natural justice do not comprise rigid rules'¹, 'natural justice ... requires fairness in all the circumstances'², and '[p]rocedural fairness, properly understood, is a question of nothing more than fairness'³ - but the apparent simplicity and flexibility of that approach can mask the complexity of the administrative setting in which practical answers have to be found.

Administrative decisions evolve from a process that can be hard to script. There is usually no single occasion or hearing when all the issues and competing evidence is brought together. The matters to be resolved in making a decision can change and unfold unpredictably. There can be multiple parties who have an interest in or might be adversely affected by a single decision, and who want to be heard and to comment on what others have said. The documentation for the decision - letters, submissions, internal briefing papers, case summaries, and other assorted documents - can be received at irregular times. The administrative process may also necessitate that many different officials be consulted or given the file before a decision is made.

Difficulties of those kinds have arisen in many of the recent cases in which courts have ruled that administrative decisions were made in breach of natural justice. There are nowadays few reported instances in which the breach of natural justice consisted of a total failure by the decision-maker to provide a hearing to a person against whom an adverse decision was later made. In nearly every reported case the person was aware that a decision would be made, was given an opportunity to comment, and exercised that right, often at multiple stages in the decision-making process. And yet a lapse of judgment or wrong choice by the decision-maker at a particular stage of the process has resulted in the entire process being declared invalid.

The following discussion looks at some recent cases and issues under three headings. The first heading deals with cases in which the decision-maker was in breach of natural justice by failing to seek comments from a person on an adverse assessment that had been made internally within the agency of the person's case or application. The second and third headings discuss some practical examples of where it can be difficult to comply with natural justice without disregarding other demands upon an agency.

¹ *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 513 per Aickin J.

² *O'Rourke v Miller* (1985) 156 CLR 342 at 353 per Gibbs CJ.

³ Justice Deirdre O'Connor, 'Is there too much natural justice? (1)' (1994) 1 *AIAL Forum* 82 at 86.

The conclusion drawn from these examples is not that the cases were necessarily wrongly-decided but that they illustrate the need for a broader debate on how to frame the principles of natural justice.

Seeking comments on an internal agency assessment

The hearing rule of natural justice requires that a person be told ‘the case to be met’ and have an opportunity to comment in reply. That has crystallised into a principle that a person be given an opportunity to respond to ‘adverse information that is credible, relevant and significant’.

The difficulty of applying that principle is illustrated by *Kioa v West*⁴, in which Brennan J first enunciated that standard. Mr Kioa faced deportation after the expiration more than a year earlier of his student visa. He was given two opportunities to present his case - at an interview with a Departmental officer and in a submission from the Legal Aid Commission of Victoria. Following that, an internal paper was prepared within the Department to brief the decision-maker on the case. The internal paper referred to a point made in the Legal Aid submission, that Mr Kioa had been providing pastoral care to other illegal immigrants from Tonga, but added: ‘his active involvement with other persons who are seeking to circumvent Australia’s immigration laws must be a source of concern’. By majority, the High Court held that this internal remark - described variously as ‘extremely prejudicial’, ‘clearly prejudicial’, and ‘credible, relevant and damaging’ - gave rise to the breach of natural justice.

It is debatable whether that was a reasonable description of the remark in the internal paper. The alternative view put by Gibbs CJ in dissent was that the remark was merely ‘the officer’s comment on material put before the Department by Mr Kioa and his solicitor’ and reflected Government policy.

Putting that debate to one side, the more significant point to emerge from *Kioa* is that natural justice placed an obligation on the decision-maker, before reaching a decision, to notify a person of any adverse comment made by other officers of the agency during their internal discussion and analysis of a case. That obligation existed even if - as in *Kioa* - there was nothing to suggest that the decision-maker had been influenced by the internal comments in reaching a decision.

The difficulty of imposing a rule to that effect on administrative decision-making is that it makes it difficult to know what and when to disclose. It is characteristic of the decision-making process that there will be many documents on file that summarise and analyse the issues, and comment upon points made in letters and submissions received from a person. Nor will it be a simple matter to collect all adverse comments together and provide them to a person for comment. If other documents are subsequently received or prepared, the need may arise for a further round of disclosure and comment. And possibly another round after that.

These difficulties post-*Kioa* are not imagined, but real. It is common now in administrative decision-making for more than one hearing to be given to a person, through abundant caution. It is equally common to hear administrators discuss their uncertainty about what should be

⁴ (1985) 159 CLR 550.

disclosed, and to seek legal advice on the matter. This can complicate and lengthen the process of making a decision.

Two examples - from among many⁵ - illustrate this difficulty, of what and when to disclose. The first example, *Conyngham v Minister for Immigration and Ethnic Affairs*⁶, concerned a sponsorship application by Mr Conyngham on behalf of an American singing group, Buck Ram's Platters, to visit Australia for a concert tour. Under Government policy, an objection could be lodged by the relevant union representing Australian performing artists. The objection could be considered by a National Disputes Committee, comprising a senior officer of the Department, a union nominee, and a person nominated by sponsor organisations.

The Committee in this case had before it the original and a supplementary objection lodged by Actors Equity, as well as Mr Conyngham's reply to the original objection. The Committee prepared a report for the Minister, unanimously recommending that the application be refused under the Government policy designed to safeguard the employment opportunities of Australian performing artists. The Committee noted that Actors Equity had cast doubt on the good reputation and standing of Mr Conyngham, but rejected that assertion and concluded that on the material available to the Committee he was a suitable sponsor.

The Federal Court held that there had been a breach of natural justice, because Mr Conyngham had not been told of Actors Equity's supplementary objection, only the original objection. Nor was the Minister shown the supplementary objection, and the Committee in its report had expressly rejected the thrust of that objection. The Court nevertheless ruled that the objection contained an allegation of serious impropriety that should have been put to Mr Conyngham. The Court explained that there was a real risk of unconscious prejudice influencing the Committee's report and flowing through into the decision of the Minister - 'the mere possibility is enough'⁷.

A similar approach was taken by the Court in *NIB Health Funds Ltd v Private Health Insurance Administration Council*⁸. The Council, comprising a Commissioner and four part-time members, administered an insurance fund that assessed and adjusted the liability of private health benefit organisations to make payments to aged and chronically ill patients. At regular intervals the Council would decide how much was owing or payable to the fund by individual insurers, to produce a zero sum calculation. NIB made a detailed submission to the Council that it had miscalculated its liability in a past period, and requested an adjustment, notwithstanding that the decisions for that period had been made and notified to all organisations. The request was the subject of consultation over a few months between NIB and officers of the Council.

⁵ There were numerous examples in the ten years following *Kioa* of Immigration Department decisions being set aside because of a failure to invite comment from a person on an issue noted on the Departmental file. It is now less common for Department decisions to be challenged directly, following the creation in the 1990s of the Migration and Refugee Review Tribunals. See, for example, *Taveli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 435, 447; *aff'd* (1990) 23 FCR 162; *Minister for Immigration and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77; *Singthong v Minister for Immigration and Ethnic Affairs* (1989) 18 FCR 486; *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 339. See also the discussion in *Bromby v Offenders' Review Board* (1990) 22 ALD 249.

⁶ (1986) 68 ALR 423; reversed but not on this point (1986) 11 FCR 528.

⁷ *Ibid* at 432.

⁸ (2002) 74 ALD 679.

The Council requested its Chief Executive Officer to prepare a report on NIB's submission. Her report was strongly worded and attributed NIB's predicament to its own management deficiencies. The Court held that the failure of the Council to put those allegations to NIB and seek its response amounted to a breach of procedural fairness. The Council had sought to counter that finding during the trial by having three of its five members (the other two were unavailable) give evidence to the Court that they had not been influenced by the CEO's report. Apart from doubting that the Council was not influenced by a forthright report of that kind, the Court held that the failure to disclose the report created a real risk of prejudice, albeit subconscious. The material in the CEO's report was credible, relevant and significant, and a bona fide disavowal or reliance upon it by the Council members would not suffice to warrant its non-disclosure to NIB.

A criticism that can be made of each of those cases is that they exhibit a tendency to treat the officials who advise the decision-maker as being at arm's length, rather than an integral step in the decision-maker's analysis of the issues. The opinions of the adviser are treated as though they were submissions put by an opposing party, raising new issues that warrant a response from the subject of the decision. Doubtless there will be instances in which an adviser does raise a substantially new and unexpected issue that warrants a response, but to put that gloss on every candid or adverse comment by an adviser is to misconstrue the adviser's role and the way that administrative decisions are made.

A decision-maker is not expected to disclose his or her own preliminary or draft thoughts in advance of reaching a decision⁹. Why, then, should a different rule apply to the preliminary evaluation of the adviser, when to all intents and purposes the adviser is conjoined to the decision-maker by assisting in the deliberation of a matter. To require that a separate hearing be given because the adviser's views are 'credible, relevant and significant' is to misapprehend the administrative process. To go even further and require a hearing if there is 'a real risk of prejudice, albeit subconscious'¹⁰ is to take a step too far.

A useful comparison can again be made with how natural justice applies to courts. After the parties have been given an opportunity to present their case, the court retires to analyse the evidence and submissions and to prepare the reasons for judgment. It is known that judges discuss cases in chambers with other judges and associates - but there is no suggestion that the parties should be recalled for a further hearing after that internal deliberation. Nor is it uncommon for judgments to deal with issues in a way different to the submissions of the parties, to develop novel principles of law, to cite cases and propositions that were not raised during the hearing, and to comment on the credibility or veracity of witnesses in terms that were not foreshadowed during the hearing.

Those actions, taken too far, can constitute a breach of natural justice, but otherwise they are accepted as being part and parcel of the process by which courts formulate findings and reach decisions. The essential requirement is that a party should know in advance the issues to be decided by the court and be given a fair opportunity to present a case. It seems curious that the hearing rule as applied to executive decision-making should be more demanding.

⁹ *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502 at 506.

¹⁰ *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 74 ALD 679 at 698 per Allsop J.

Practical dilemmas in applying natural justice principles

Another criticism of the doctrine of natural justice as it has developed in recent years is that it fails to accommodate some practical dilemmas in administrative decision-making. Situations arise in which it can be problematic to provide procedural fairness as commonly understood. It is doubtful, however, that the law sufficiently acknowledges this point.

One such situation is personnel selection. When a person is being interviewed for appointment or promotion, the selection committee will usually have a viewpoint already about the applicant's strengths and weaknesses, sometimes based on frank referee comments. There is no doubt that those preliminary views are 'credible, relevant and significant', and pose a conscious and prejudicial risk for an applicant. Yet to put all those matters to the applicant during the course of the interview is likely to leave the applicant feeling shattered and ambushed by the experience. Instead, the preferable course is to rely on the tact, wisdom and good faith of the selection committee. The common practice of requiring that at least three people constitute a committee, including at least one person from outside the organisation, and that the committee prepare a written report, is the better means of ensuring procedural fairness.

Another difficult situation arises in the evaluation of commercial tenders. Those submitting tenders will usually list the personnel who will deliver a project if the tender is successful. The government agency assessing the tenders will sometimes have a prior view about the suitability, competence or integrity of one of the listed personnel, and may be disinclined to have that person work on the project. Otherwise, the tender looks strong and competitive, and the tenderer may be told quietly about the personnel concern. What else should be done? Should there be a separate natural justice hearing for the person whose character is doubted? That person is a third party to the tender process, but with a reputation and career to protect. Yet to provide such a hearing poses a distinct danger of distorting the tender process and sending it down a side alley. It is nevertheless hard to escape the conclusion, on an orthodox analysis, that natural justice would require that a hearing be provided.

A third situation of real difficulty is one commonly faced by Ombudsman offices in finalising investigation reports. A report critical of an agency's administrative performance is, indirectly at least, a criticism of the agency officers who were responsible for the agency action. They may not be named, but their identity will be known at least to other officers in the agency and perhaps to members of the public dealing with the agency. Is it adequate to provide a draft of the report to the agency and rely upon it to consult and protect the interests of its staff? Or should a separate hearing be given to each staff member who is indirectly criticised? And if so, should that hearing be given prior to the draft being shown to the agency, for the reason that the draft may be altered in light of what the person has to say? If that is done, the agency is likely to complain that it was not shown the different drafts that were under consideration and that impinge on the agency's interest in defending its administrative performance. The situation can become more complex if the person whose complaint gave rise to the investigation insists that natural justice confers an equal right upon them to be a part of the dialogue. To provide multiple hearings will inevitably lengthen the process and fuel one of the most common criticisms of investigations, that they take too long.

It is not to be expected that there is a simple answer to every question concerning the application of natural justice. But nor should it be thought that a principle of 'fairness in all

circumstances’ will provide a doctrinal answer to all questions. The resolution of this dilemma must be a doctrine that leaves scope for those at the agency level who grapple with these practical problems to develop a response that is measured and defensible in the circumstances.

There is some recognition of that point, in the oft-cited observation of Gleeson CJ in *Lam* that ‘the concern of the law is to avoid practical injustice’¹¹. Generally, however, it is doubtful that the doctrine of natural justice as it has developed in recent years does allow agencies sufficient scope to shape a code of fairness that is adapted and responsive to the agency’s circumstances.

A recent example of this point is the decision of the High Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*¹². The file of documents forwarded by the Department of Immigration to the Refugee Review Tribunal (as required by legislation), contained an unsolicited letter alleging that the applicant for a protection visa worked for a foreign government and had been accused of killing a political opponent. The letter was authored but requested confidentiality. The Tribunal did not disclose the existence or contents of the letter to the applicant during the proceedings, but noted its existence in the reasons for decision affirming the denial of a protection visa. The Tribunal declared that it gave no weight to the letter as the author sought confidentiality and the claim could not be tested.

The High Court held unanimously that the Tribunal had denied procedural fairness to the applicant and that its decision should be set aside. The adverse information in the letter was credible, relevant and significant, and should have been put to the applicant. The Court acknowledged that the Tribunal sought to act fairly, but added that ‘the procedure it in fact adopted was not fair’.

The model of procedural fairness imposed by the Court is clearly suited to the formal and ordered setting of a courtroom, where it is unthinkable that a court would receive information that was not disclosed to the parties. Administrative tribunal proceedings can be similar, but not always. Some tribunals principally decide ‘on the papers’, and may receive departmental files that contain ‘dob-in’ letters that are often best ignored rather than made a focus of the proceedings (for example, the Social Security Appeals Tribunal). As that suggests, the concept of procedural fairness that is appropriate to a curial setting will not necessarily be as suited to an administrative tribunal, and nor should all tribunals be treated the same. There should accordingly be some scope for those who administer a particular body or program to shape the code of fairness that will govern the proceedings.

Choosing when to make a decision

The difficulty that can be faced by an administrative body in dealing practically but fairly with unexpected problems is illustrated by two recent decisions of the ACT Supreme Court. The issue common to both cases was whether a tribunal could proceed to make a decision when there were unresolved issues of fact, or whether the proceedings should be adjourned to a later date.

¹¹ *Re Minister for Immigration and Multicultural Affairs v Lam* (2003) 214 CLR 1 at 14.

¹² (2005) 222 ALR 411.

The first case, *Singh v Sentence Administration Board (ACT)*¹³, concerned a decision by the Board to revoke the parole of a young woman convicted of manslaughter. She had been released on parole after serving four years of a ten year sentence. A condition of the parole order was that Ms Singh totally abstain from illicit substances. Two years into the parole she received a formal warning from the Board in respect of two admitted breaches of the parole condition. Another eight positive results for cannabis were recorded in the following three months, causing the Board to convene a parole hearing. Additional positive test results for cannabis and one for cocaine were recorded in the following weeks (some of which were made available to relevant parties only at the hearing).

Ms Singh gave evidence and was legally represented at the Board hearing. She admitted to three breaches, but was nonplussed about the other results and speculated about possible causes for an incorrect reading. The parole officer gave evidence that the more recent readings caused her to re-think her written report recommending closer parole supervision rather than a revocation of parole. Ms Singh's counsel sought an adjournment to allow further study of the test results and to obtain a psychiatric report that had been requested but was not available by the date of the Board hearing.

The Board proceeded to make a decision to revoke Ms Singh's parole. This was based on the previous warning about parole breaches, the admitted breaches, and the unsatisfactory explanation for the other test results. On review, the Supreme Court held that there had been a breach of natural justice, by reason of the Board declining to permit an opportunity to further explore the issues that were unresolved at the Board hearing.

The second ACT Supreme Court decision was *Eastman v Commissioner for Housing (ACT)*¹⁴. Mr Eastman had been sentenced to life imprisonment for murder in 1995. At the time he occupied a government-owned flat that he was allowed to retain on payment of rent while he challenged his conviction. This was confirmed five years later by a Housing Review Committee, which noted that a judicial inquiry was still on foot, and that the stability of Mr Eastman's mental health could depend on his continued tenure of the flat.

The following year he was given a notice that he was required to vacate the premises within six months. Media reports at the time referred to over 2000 applications on the public housing list. Mr Eastman's solicitor wrote a short letter of objection, and foreshadowed that a longer submission would be prepared. The Commissioner for Housing responded by saying that the decision to terminate the tenancy would stand and be referred to the Residential Tenancy Tribunal. That occurred at the six month mark for vacation of the premises.

The Tribunal scheduled a hearing date three weeks later. The notification to Mr Eastman only arrived ten days before the hearing date, because of a mail delay in the prison system (some attachments to the notification arrived a further seven days later). Mr Eastman immediately requested a two week suspension of the hearing date, to seek legal representation. A further request was made on his behalf for an audio or video link to be arranged for the hearing.

The Tribunal proceeded to make a decision on the scheduled day to terminate Mr Eastman's tenancy. The Tribunal noted an undertaking from ACT Housing that upon Mr Eastman's

¹³ [2004] ACTSC 74.

¹⁴ [2006] ACTSC 52.

release from prison he would be placed on the priority list and provided with public housing. Mr Eastman was neither represented nor participated in the hearing.

The Supreme Court held that the duty of the Tribunal to accord procedural fairness required it to grant the adjournment that Mr Eastman requested, to enable the possibility to be explored of whether he could participate in the hearing in a meaningful way¹⁵.

Re-thinking the principles of natural justice

The cases discussed in this paper were not straightforward. In each case the court fastened on an aspect of the administrative process that could have been done differently or better. It was certainly arguable in each case that there was a lapse in procedural fairness. On the other hand, it was known in each case that an adverse decision could be made, the core issues had been identified, and there was an opportunity for a submission to be made. There were also competing public policy considerations in each case, for example, for expedition in decision-making, or for a long-running issue to be resolved.

The point to be drawn from that analysis is that there is a need for healthy debate on whether there is 'too much natural justice'. That debate has not occurred. There is a tendency rather to speak of natural justice only in laudatory terms. As a result, the doctrine of natural justice has become steadily more demanding in its application to administrative decision-making. Indeed, a theme of this paper is that natural justice now imposes greater demands and uncertainty on administrative than on judicial officers.

A range of issues needs to be canvassed in any debate about natural justice. The first is that the principles about what is procedurally fair should be devised in a context that takes account of competing administrative demands. An example is that many tribunals and boards work under either an explicit statutory direction, or an implicit administrative expectation, to be 'fair, just, economical, informal and quick' or to proceed 'with as much expedition as the requirements of the legislation and a proper consideration of the matter to be decided permits'¹⁶. While much is heard in the cases about the extra steps that could be taken to ensure procedural fairness, rarely is there any mention of the competing pressure for administrative efficiency imposed by statute.

A reason why statutes expect speed and informality is that it produces a more beneficial outcome overall for the clients of government services. As former Ombudsman Professor Dennis Pearce has argued, most persons affected by government decisions expect speed ('a quick decision'), finality ('to know what their position is and not be ... subjected to a series of appeals'), cheapness, and accessibility ('to receive a decision with the minimal formality')¹⁷.

The same point was made forcefully by Professor Julian Disney in an earlier Administrative Law Forum:

¹⁵ A fresh decision was made by the Residential Tenancies Tribunal in May 2007 ordering that Mr Eastman vacate the flat. That decision was being challenged: 'Eastman back before court', *CanberraTimes*, 12 June 2007 at p 8.

¹⁶ See the discussion in R Creyke & J McMillan, *Control of Government Action: Text, Cases & Commentary* (2005, LexisNexis) at 157-160.

¹⁷ Dennis Pearce, 'Is there too much natural justice? (3)' (1994) 1 *AIAL Forum* 94 at 95.

When pursued with obsessive legalistic vigour, ‘natural justice’ is often the enemy of real justice. ... [A]doption 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. Well-meaning lawyers, and others who are involved in the administrative review system, should be very careful not to encrust the system at the lower levels with a whole range of apparent safeguards which, in practice, will harm many people in great need and may be of largely illusory benefit for many other people¹⁸.

A criticism along those lines was recently made by the Solicitor-General, Mr David Bennett QC, of the High Court decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁹. The thrust of the *SAAP* decision was that the Refugee Review Tribunal, in conducting a hearing by videolink had made a jurisdictional error by summarising orally the adverse evidence given minutes earlier by another witness (a daughter), rather than providing that evidence in writing as required (in the view of the Court) by s 424A of the *Migration Act 1958*. The Solicitor-General criticised the Court’s approach as ‘inflexible’, ‘calcifying the requirements of natural justice’, and a ‘bizarre turnaround [that left] fairness and flexibility, the key concerns of natural justice, ... to one side’. An example is that the decision could require the Tribunal, when adverse information arose at a hearing, to adjourn the hearing, provide details in writing and await a response, even if the applicant was represented at the hearing by a lawyer and was able to deal with the adverse information. *SAAP* also led to over 500 consent determinations being set aside by the RRT.

Another issue that should figure in any debate about natural justice is that other procedural safeguards have been built in to most administrative schemes that can result in adverse action against members of the public. These other safeguards can be more effective than principles of law in achieving administrative justice and protecting people. An example from two of the cases discussed earlier, *Conyngham* and *NIB*, is that the decision was to be made or based on advice from a committee that comprised industry peers and other non-government officials. Administrative processes are also more transparent, as a result of freedom of information legislation and the obligation to provide a written statement of reasons. External review of decision-making by the Ombudsman and other review bodies is also a regular feature.

Finally, it is important in any debate about natural justice to reconsider some of the standards and principles that have become accepted doctrine. An example given earlier in this paper is the principle that a person should have a right to be told of any ‘credible, relevant and significant’ comment made during the internal deliberation on a matter. Two other issues also warrant reconsideration.

One is the issue of whether the obligations imposed by the hearing rule are displaced or minimised where a person has a right of appeal on the merits to an administrative tribunal. In earlier cases the courts gave an affirmative answer to that question. An example is *Twist v Randwick Municipal Council*²⁰, decided in 1976, in which the High Court rejected a natural justice challenge to the validity of a Council demolition order of a private house, for the

¹⁸ J Disney, ‘Access, Equity and the Dominant Paradigm’ in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992, AIAL Administrative Law Forum) 1 at 7.

¹⁹ (2005) 215 ALR 162: see D Bennett, ‘Is natural justice becoming more rigid than traditional justice’ (2006) *AIAL 3rd National Lecture Series* 5.

²⁰ (1976) 136 CLR 106. See also *R v Marks; Ex parte Australian Building Construction Employees and Builders Labourers’ Federation* (1981) 147 CLR 471, and *Marine Hull & Liability Insurance Co Ltd v Hurford* (1986) 10 FCR 476.

reason that the owner had a right to appeal on issues of fact and law to the District Court. A contrary view was taken by the High Court in 2001 in *Re Minister for Immigration and Multicultural Affairs; ex parte Miah*²¹. A right of appeal on the merits to the Refugee Review Tribunal did not displace the obligation of the primary decision-maker to invite Mr Miah to comment on information relied upon by the decision-maker concerning political changes that had occurred in Bangladesh since Mr Miah had lodged his protection visa application.

As a general comment, it is difficult to see why natural justice should have become more rather than less demanding as applied to primary administration, given the development over the period of a far better system for independent review of primary decisions.

Another settled but questionable principle concerns the exercise of a court's discretion to refuse relief notwithstanding a breach of natural justice. A person is ordinarily entitled to relief, and the court will refuse relief on discretionary grounds only if satisfied that the breach could have had no bearing on the outcome²². A couple of examples illustrate the scope for courts to take a more robust view of when to exercise the discretion to refuse relief.

The first example is *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs*²³. The Federal Court declared invalid the report from a public inquiry into the Aboriginal heritage impact of the proposed Hindmarsh Island Bridge in South Australia. The defect lay in the notice for the public inquiry, which did not delineate precisely the area of land under consideration nor the apprehended injury or desecration (in this case, to the secret folklore of the Ngarrindjeri women). Against that, the inquiry was required by statute to be conducted within 60 days, over 400 submissions were made to the inquiry, and the plaintiffs in the proceedings knew the details not in the notice.

The second example is *Re Refugee Review Tribunal; ex parte Aala*²⁴. The High Court declared invalid a decision by the Refugee Review Tribunal to refuse a protection visa to Mr Aala. The Tribunal had indicated in general terms to Mr Aala that it had before it the papers from earlier tribunal and court proceedings, when in fact (through oversight) the Tribunal did not have four handwritten documents that Mr Aala had provided to the Federal Court. Against that, Mr Aala's application had been rejected twice by the Tribunal, he had presented evidence on both occasions, the four handwritten documents were acknowledged by the Court to be unsworn and of uncertain evidentiary status, and the application to the High Court was made in the original rather than the appellate jurisdiction of the High Court because the time period for appealing had expired.

Conclusion

There are, in summary, three themes in this paper. The first is the need for robust debate about how far the hearing rule of natural justice should be taken. Even fundamental doctrines of public law can give rise to practical problems or face competing considerations. Secondly, natural justice is procedurally focussed, whereas administration for the most part is outcome focussed. Procedure and outcome are both important, and a proper balance needs to be struck.

²¹ (2001) 206 CLR 57.

²² *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; and *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at 88-89, 116-117, 154-155.

²³ (1995) 37 ALD 1.

²⁴ (2000) 204 CLR 82.

Arguably, the balance has swung too far towards procedural protection. Thirdly, this imbalance may have arisen because natural justice has been too heavily influenced by legal and judicial notions of how decisions should be made. It is odd that, in some instances at least, natural justice now imposes greater procedural burdens and uncertainty on administrative as opposed to judicial decision making.