

# Kumarangk (Hindmarsh Island) and the politics of natural justice under settler-colonialism

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## Abstract

This paper examines the progression of the Kumarangk (Hindmarsh Island) case, and the legal construction of public participation in the making of political decisions. In the process of examining the politics of competing interests in land, the paper reflects on the challenge of the tension between Indigenous interests in land and developmentalism in relation to the Australian jurisprudence of procedural fairness and natural justice. The argument running through the article concerns the question of how the liberal restraint on power, where that power creates rather than infringes upon rights, may also play its role in the maintenance of relations of settler-colonial dispossession.

*You get 100% for law and zero for politics.*<sup>1</sup>

*In Mr Sebastian's affidavit he refers to what he describes as "white fella law". By that reference, I have taken Mr Sebastian to be referring to the law of this country other than Aboriginal law. I do not think it is appropriate to describe that body of law as "white fella law". The truth of the matter is that it is Australian law for all Australians regardless of their colour.*<sup>2</sup>

Administrative law scholars have come to emphasis over recent years that an appreciation of the various normative positions and political theories which underlie or constitute the "background" to public law is central to a proper understanding of its operations and effects. "Differing conceptions of both constitutional and administrative law," writes PP Craig, "reveal themselves to be reflections of deeper controversies concerning differing conceptions of the democratic society in which we live".<sup>3</sup> In the Australian context, Margaret Allars has also remarked on the importance of an engagement with "the values and

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<sup>1</sup> Robert Tickner to Senator Christabell Chamarette, in response to the Senator's suggestion that he could make a declaration prior to obtaining Cabinet approval, because "You're the minister": *Tickner v Bropho* (1993) 114 ALR 409 at 429.

<sup>2</sup> *State of Western Australia & Others v Minister for Aboriginal & Torres Strait Islander Affairs* (1994) 54 FCR 144 at 150, per Carr J (*Crocodile Park 1*)

<sup>3</sup> Craig, PP, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990) at 4; see also Harlow, C, "Changing the mindset: the place of theory in English administrative law" (1994) 14(3) OJLS 419-34 and Loughlin, M, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992).

understandings which underlie the legal system...providing a critique or advocating reform on the basis of a philosophical commitment".<sup>4</sup>

One of the examples used by Allars is the set of Federal Court cases revolving around the application of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (*Heritage Act*), concerning *Kumarangk* (Hindmarsh Island)<sup>5</sup> and the Broome *Crocodile Park*.<sup>6</sup> Her analysis indicates how their outcomes arose from the Federal Court's particular construction of the democratic principles underlying the *Heritage Act*, principles which require "public participation to be effective and capable of making the minister's decision informed and hence rational".<sup>7</sup> The theoretical perspectives at play in these cases include interest group pluralism and civic republicanism, and Allars also suggests that feminist political theory might be helpful in developing an approach to participation and procedural fairness capable of producing less divisive outcomes.<sup>8</sup>

In this essay I will use a critical examination of jurisprudence of the *Heritage Act* cases<sup>9</sup> to develop this line of argument specifically in relation to the politics of competing interests in land under settler-colonialism, as well as the broader significance of these cases for our understanding of the operation of law, the courts and judicial review in Australian political and social life. These cases are of particular interest because of the complex challenges posed by Indigenous interests in land to the liberal pluralist model of political and social life lying at the heart of contemporary public law, including the question of exactly how developmentalist interests in land are legitimately to be reconciled with those of the country's Indigenous inhabitants.

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<sup>4</sup> Allars, M, "Theory and administrative law: law as form and theory as substance" (1996) 79 *Canb Bull Pub Admin* 20 at 20

<sup>5</sup> *Chapman & Ors v Minister for Aboriginal & Torres Strait Islander Affairs & Ors* (1995) 133 ALR 74; 55 FCR 316 (*Chapman v Tickner*); *Norvill v Chapman* (1995) 133 ALR 226

<sup>6</sup> *Crocodile Park 1* note 2; *State of Western Australia & Others v Minister for Aboriginal & Torres Strait Islander Affairs* (1995) 37 ALD 633 (*Crocodile Park 2*); *Minister for Aboriginal & Torres Strait Islander Affairs v State of Western Australia* (1996) 66 FCR 40 (*Crocodile Park 3*)

<sup>7</sup> Allars note 4 at 32

<sup>8</sup> *ibid* at 28-9

<sup>9</sup> *Norvill v Chapman* note 5 needs to be approached as one element, *inter alia*, of the body of natural justice jurisprudence which emerged around the other *Heritage Act* cases, for reasons which will become as we go.

The overall line of argument will be that it is important to reflect on the extent to which the jurisprudence of natural justice which has emerged in Australian courts is an example of what Stanley Fish calls “the trouble with principle”: the problematic moral and political outcomes of attempts to organize law around the application of supposedly neutral, abstract principles (such as the content of procedural fairness) made to operate in detachment from the specific social, historical and cultural characteristics of the particular situations to which those principles are being applied.<sup>10</sup> Despite the repeated judicial assertions that the expression “procedural fairness” is meant to convey “the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case”,<sup>11</sup> in these *Heritage Act* cases we find the same legal principles developed in the context of protecting potential deportees and the parents of tragically killed children from the actions of government, affording equal shelter to property developers impatient with Aboriginal resistance to the never-ending march of progress. Should we be questioning then, the extent to which judicial review, as well as restraining the power of government, may also be operating to maintain the existing power relations of settler colonialism?

### **Between natural justice and ultra vires**

When the Chapmans took the Minister for Aboriginal and Torres Strait Islander Affairs to the Federal Court in 1994 to challenge his declaration under the *Heritage Act* of *Kumarangk* as a site of Aboriginal heritage significance, Justice O’Loughlin found that there were two decisive problems with the way the declaration had been made. First, the notice published by the reporter, Professor Saunders (as required by s10(4)), was deficient because (a) it did not identify the area claimed as being of significance in Aboriginal culture clearly enough, and (b) the subject of women’s business emerged after the publication of the original notice, requiring further public notice.<sup>12</sup> Second, the Act required the Minister to “consider” all the

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<sup>10</sup> Fish, S, *The Trouble with Principle* (Cambridge, Mass.: Harvard University Press, 1999)

<sup>11</sup> *Kioa v West* (1985) 159 CLR 550 at 585, per Mason J; cf also *Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475 at 504, per Kitto J; *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118, per Tucker LJ

<sup>12</sup> *Chapmen v Tickner* note 5 at 104, 121-2

representations attached to Professor Saunder's report; he both failed to give the whole body of representations enough of his "consideration", and failed to "consider" himself those representations which were supposed to constitute the core of the case for heritage significance, the envelopes containing the details of the women's business.<sup>13</sup>

The minister's appeal was heard a year later, when the Full Bench confirmed O'Loughlin J's judgment. In an "explanatory statement" preceding the judgment, the Court emphasised that the case did not turn solely on the question of whether the minister had read the material concerning women's business.<sup>14</sup> It was that defect in combination with others - that the minister had not read the other representations, that his decision had relied so heavily on the women's business, and that the original public notice was deficient - which led the Court to confirm O'Loughlin J's setting aside of the minister's decision.

The two judgments move between the principles of procedural fairness - the rights of interested parties to have enough information to put an informed case - and *ultra vires* - did the Minister do as the Act requires him? The issue of adequate notice straddled both types of principle, being both a requirement of the Act and a reasonable procedural fairness requirement.<sup>15</sup> The Full Bench's hearing of the Minister's appeal thus appears to render the concern with the "secrecy" of Aboriginal women's religious beliefs<sup>16</sup> rather superfluous and misplaced, with the critical *legal* issue being the Minister's actions failing to conform to the requirements of the Act.

It is fair to say, then, that the question of the Chapmans' right to question the legitimacy of the heritage significance of *Kumarangk* was effectively set aside,<sup>17</sup> and that there is no real need to see things in terms of a fundamental conflict between Anglo-Australian and

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<sup>13</sup> *Chapman v Tickner* note 5 at 123-5

<sup>14</sup> *Norvill v Chapman* note 5 at 229

<sup>15</sup> As O'Loughlin J put it, "The inadequacy of the notice meant that the Chapmans and Messrs Barton and Knott, along with other interested persons, were denied natural justice. It also meant that the Minister lacked jurisdiction to make the s10 declaration" *Tickner v Chapman* note 5 at 128

<sup>16</sup> Partington, G, "Determining sacred sites - the case of the Hindmarsh Island Bridge" (1995) 71(5): *Current Affairs Bulletin* 4-11

<sup>17</sup> O'Loughlin J also pointed out that one of the Chapmans' central points of contention, whether the claimants were the "real" traditional owners, was irrelevant under the terms of the *Heritage Act*, which "makes no reference to use, occupation or ownership;" "it was not to the point that there may have been competing Aboriginal claimants with respect to areas that were said to be areas of significance to Aboriginals....I do not

Aboriginal law; that the subsequent Royal Commission and legislative enforcement of the building of the bridge<sup>18</sup> should be seen as relatively isolated cases of a lack of sympathy with Aboriginal culture, rather than a manifestation of a deep-seated conflict between different sets of legal and political principles. “With a small amount of adjustment and reinterpretation,” wrote Nathan Hancock, “it may be possible *within the current system* to establish cultural heritage claims without trespassing on the very Aboriginal laws, customs and traditions which the *Heritage Act* was intended to protect”.<sup>19</sup> Margaret Allars also observes that contemporary administrative law can and does make exceptions to openness and full disclosure, especially when there are statutory provisions made.<sup>20</sup>

There were also a number of aspects of O’Loughlin J’s judgment which the Full Bench did not consider in *Norvill v Chapman* because they had fallen in the Minister’s favour, he was not appealing against them, nor were the Chapmans cross-appealing, which brought restrictions on disclosure from another quarter altogether. These concerned his Honour’s fuller position on procedural fairness, which included the question of an interested party’s right of access to information provided to the decision-maker. The Chapmans had argued that procedural fairness in this case required that they be provided with the details of the case for the significance of the area, in particular with a copy of Deane Fergie’s anthropological report on the women’s business, contained in one of the “secret envelopes”.

O’Loughlin J rejected this argument, stating that the statute did not require this of either the reporter or the Minister, particularly when balanced against the primary concern of the statute - the expeditious protection of areas and sites of Aboriginal heritage significance from damage and injury - within a particular time frame. For O’Loughlin J, then, Parliament, in its particular drafting of the *Heritage Act*, *impliedly* restricted the content of procedural

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consider that there was any obligation on Professor Saunders to identify the “traditional owners” of the areas that were the subject of her report”: *Chapman v Tickner* note 5 at 112

<sup>18</sup> Andrews, N, “Dissenting in paradise? The Hindmarsh Island Bridge Royal Commission” (1998) 5(1 & 2) *CanbLR* 5-76; Harris, M, “The narrative of law in the Hindmarsh Island Royal Commission” in M Chanock and C Simpson (eds) *Law and Cultural Heritage* (Melbourne: La Trobe University Press, 1996) 115-39 [special issue of *Law in Context* 14(2)]; Pengelly, N, “Before the High Court: The Hindmarsh Island Bridge Act. Must laws based on the Race power be for the “benefit” of Aborigines and Torres Strait Islanders? And what has bridge building got to do with the race power anyway?” (1998) 20 *SydLR* 144-57

<sup>19</sup> Hancock, N, “Disclosure in the public interest? Is full disclosure of secrets required by current heritage legislation?” (1996) 21(1) *AltLJ* 19 at 20

fairness, through its imposition of a particular procedure and time frame on its overall aims and intentions.<sup>21</sup> His Honour balanced the aims and intentions of the Act, its time constraints, and the requirements of procedural fairness in a way which places the outer limits of the content of procedural fairness at the achievement of the aims of the Act, limits which resulted in “no obligation on the part of the minister to give to [the Chapmans] any opportunity to make submissions on the reports of Professor Saunders and on the reports of such anthropologists and archaeologists as may have been referred to or relied upon by her in the compilation of her report”.<sup>22</sup>

Questions of confidentiality and the secret nature of Aboriginal religious beliefs thus seem to be positioned in the wings of the real legal issues governing the operation of the *Heritage Act*. At the same time, however, the very different treatment given to the principles governing the related question of disclosure by both Carr J and the Full Bench of the Federal Court, appear to move in entirely the opposite direction, in a way which returns the politics of competing interests in land back to the centre of the legal and political stage. But to understand that we first have to go back to the development of the High Court’s jurisprudence of natural justice.

### **The Australian jurisprudence of procedural fairness**

In *Annetts v McCann*,<sup>23</sup> Mason CJ, Deane and McHugh JJ drew attention to the historical change in the High Court’s understanding of the doctrine of procedural fairness by pointing out that the majority’s view in *Testro Bros Pty Ltd v Tait*,<sup>24</sup> that a company inspector was not obliged to afford the affected company an opportunity to respond to matters which may give rise to adverse findings, would not prevail today. “It can now be taken as settled,” they wrote, “that, when a statute confers power upon a public official to destroy, defeat or prejudice a

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<sup>20</sup> Allars note 4 at 30

<sup>21</sup> *Chapman v Tickner* note 5 at 90

<sup>22</sup> *Chapman v Tickner* note 5 at 94

<sup>23</sup> (1990) 170 CLR 596 at 599-600; The development up to and including *Kiao* is discussed in Allars, M, “Fairness: write large or small?” (1987) 11 *SydLR* 306-25

<sup>24</sup> (1963) 109 CLR 353

person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment".<sup>25</sup>

Courts thus assume that Parliament intends the exercise of its powers, especially where they operate adverse to rights, interests and legitimate expectations, to be conducted according to the principles of procedural fairness: the legislative provisions creating, conferring or regulating an authority or power "are to be construed as impliedly requiring that [the] common law rules of procedural fair play be observed".<sup>26</sup> This presumption in turn requires a clear legislative intention to the contrary in the relevant statute if such an exercise of powers is to escape the common law's implication of procedural fairness.<sup>27</sup> However, as Mason J pointed out in *Kioa*, whether this is the case is rarely the critical issue; it is more often, "what does the duty to act fairly require in the circumstances of the particular case?"<sup>28</sup> This will correspondingly depend on "the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting," seen "in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations".<sup>29</sup>

Although the precise content of procedural fairness varies from case to case, generally there remain two core concerns surrounding the exercise of a power adverse to particular rights, interests and legitimate expectations: first, the right to *disclosure* of the information forming the basis of the decision-maker's determination and, second, the right to a *hearing* enabling a response to that information.<sup>30</sup> In practice, the two concerns are often interrelated,

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<sup>25</sup> *Annetts v McCann* note 23 at 598, per Mason CJ, Deane & McHugh JJ

<sup>26</sup> *State of South Australia v O'Shea* (1987) 163 CLR 378 at 416, per Deane J

<sup>27</sup> *Annetts v McCann* note 23 at 598, per Mason CJ, Deane and McHugh JJ; the line of authority for this construction runs through *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-96; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109-110; *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487 at 496, 500; *J v Lieschke* (1987) 162 CLR 447 at 456; *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648 at 680; *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 57 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 574-575

<sup>28</sup> *Kioa* note 11 at 585

<sup>29</sup> *Kioa* note 11 at 583-5

<sup>30</sup> "It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it" *Kioa* note 11 at 582, per Mason J

since perceived inadequate disclosure is frequently experienced as central to the inadequacy of the hearing. The entitlement to comment on “adverse material” does not, however, extend to the decision-maker’s “mental processes or provisional views” before the decision is made.<sup>31</sup>

One difficulty raised by this formulation of the doctrine of procedural fairness is that the complexity of what constitutes appropriate disclosure is left in the background.

Information can come before a decision-maker over a period of time, some of it may of a nature such that disclosure would undermine the purposes of the exercise of power.<sup>32</sup> Since the process of disclosure is time-consuming, any time restrictions placed on decision-making can constitute a barrier to disclosure, and

there may also be other reasons for restricting access to the information forming the basis of the decision, confidentiality being the most obvious. In *Kioa*, for example, Brennan J restricted the opportunity “to deal with adverse information that is credible, relevant and significant to the decision to be made” to “*the ordinary case where no problem of confidentiality arises*”<sup>33</sup>. What remains relatively unexplored, then, is how the doctrine of natural justice is to operate in those “extraordinary” cases where a problem of confidentiality does arise, especially within the complex nexus *between* confidentiality and the principles governing disclosure, two areas of legal principle which need to be seen as intimately related to each other.

### *Confidentiality*

Australian common law already makes a range of provisions for the confidentiality of information coming before the Court, under the broad umbrella of basing the rules governing the content of procedural fairness on the circumstances of the particular case.<sup>34</sup> PD Finn has noted that restraints on disclosure arise in relation to trade secrets and commercial information, private and professional relationships, public and private institutions, and the

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<sup>31</sup> *Commissioner for ACT Reference v Alphone Pty Ltd* (1994) 127 ALR 699 at 715, per Northrop, Miles and French JJ

<sup>32</sup> *National Companies and Securities Commission v News Corporation Limited* (1984) 156 CLR 29

<sup>33</sup> *Kioa* note 11 at 629

<sup>34</sup> e.g., *Victorian Broadcasting Network (1983) Pty Ltd v Minister for Transport and Communications* (1990) 21 ALD 689 at 697-8, per Hill J



“public interest”.<sup>35</sup> Deane Fergie also observes, for example, that the developers in the *Kumarangk* case were equally concerned to protect their commercial confidences.<sup>36</sup>

The notion of “public interest immunity” was explored in detail in the *Aboriginal Sacred Sites* case<sup>37</sup>, where Woodward J said that “in this country, a fresh category of public interest immunity should be recognized, covering secret and sacred Aboriginal information and beliefs”.<sup>38</sup> Although the Woodward J did maintain that the relevant legal claims had to be subject to some “forensic investigation”,<sup>39</sup> his Honour saw no obstacle to place restrictions on disclosure such that it “would be kept to the necessary minimum”.<sup>40</sup> However, this responsiveness in Australian law to the idea that some information should be regarded as confidential and protected by public interest immunity to a greater or lesser extent sits rather uneasily alongside the Federal Court’s accompanying position on disclosure.

#### *Disclosure*

In the *Broome Crocodile Park* case, for example, Carr J stated categorically that “the material on each side should be disclosed to the other side,” subject to the reservation that “it may not always apply to all persons interested in whether a declaration is made under s.10”.<sup>41</sup> The points accepted by Carr J included that procedural fairness required that

- the applicants were made aware of all relevant materials which were before or considered by the Minister;
- if the decision-maker was going to consider new material, disclosure of that new material to the other party.

The jurisprudential foundations for this construction were identified as being *Peko-Wallsend*,<sup>42</sup> *O’Shea*<sup>43</sup> and *Kioa*.<sup>44</sup>

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<sup>35</sup> Finn, PD “Confidentiality and the “Public Interest”” (1984) 58 ALJ at 497; c.f. *Sankey v Whitlam* (1978) 142 CLR 1

<sup>36</sup> Fergie, D, “Whose sacred sites? Privilege in the Hindmarsh Island Bridge debate” (1995) 72(2) *Current Affairs Bulletin* 14 at 20

<sup>37</sup> *Aboriginal Sacred Sites Protection Authority v Maurice (Re Warumungu Land Claim)* (1986) 64 ALR 247

<sup>38</sup> *ibid* at 256

<sup>39</sup> *ibid*, at 271, per Toohey J

<sup>40</sup> *ibid* at 256

<sup>41</sup> *Crocodile Park 2* note 6 at 678

<sup>42</sup> *Minister for Aboriginal Affairs & Another v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24

On appeal, the Full Bench agreed. The opposing parties' entitlement to "a proper opportunity to advance all legitimate arguments to avert a decision that might profoundly affect their interests" includes "proper notice of the case they have to meet".<sup>45</sup> Having the opportunity to "contradict or comment on" material before the Minister was seen as "consistent with and not at odds with the reporting and decision-making process envisaged by the Statute."<sup>46</sup>

Both Carr J and the Full Bench considered that such disclosure requirements were capable of standing alongside conformity to any confidentiality concerns to the appropriate standard. In the absence of agreement on disclosure, stated the Full Bench, "upon a confidential and limited basis", the requirements of natural justice "might well permit disclosure by the reporter subject to strict conditions designed to preserve confidentiality to the greatest extent possible in all the circumstances".<sup>47</sup> However, this rather lukewarm and diffident formulation, that procedural fairness "might well permit" disclosure which preserves confidentiality "to the greatest extent possible", appears to prioritize disclosure above confidentiality, and it remains uncertain to what "extent" confidentiality would indeed be preserved.

Compare, for example, the words of Toohey J in the *Aboriginal Sacred Sites* case, who pointed out that a rejection of the public interest immunity argument did *not* have as its corollary the notion "that any documents in its possession or in the possession of others for its purposes must necessarily be disclosed to the public at large or even to all those participating in the proceedings of a court or tribunal".<sup>48</sup> Woodward J, too, made it much more explicit how the principles of disclosure and confidentiality should be balanced, and according to what principles:

In my opinion, the proper protection of minority rights is very much in the public interest, as is respect for deeply held spiritual beliefs. In particular, the rights and

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<sup>43</sup> O'Shea note 26

<sup>44</sup> This position was also reiterated recently by Carr J in *State of Western Australia v Native Title Registrar* [1999] FCA 1593 (16 November 1999, unreported)

<sup>45</sup> *Crocodile Park* 3 note 6 at 53

<sup>46</sup> *ibid* at 54-6

<sup>47</sup> *ibid* at 58

<sup>48</sup> *Aboriginal Sacred Sites* note 37 at 271

beliefs of the Aboriginal people of Australia should be accorded a special degree of protection and respect in Australian courts. Thus I can well imagine a court finding on balance, for example, that the outrage in an Aboriginal community caused by a forced disclosure of information about a sacred site, would outweigh the importance in that particular criminal or civil trial of precisely identifying the place or explaining why it was sacred.<sup>49</sup>

In both the *Crocodile Park* and *Kumarangk* cases, however, it was not necessary for the Federal Court to deliberate on whether it should indeed frustrate the primary purpose of the Statute in favour of legislative aims concerning disclosure and fairness *implied* by the common law, primarily because the other procedural defects in the Minister's action were so serious and inescapable.<sup>50</sup>

The concern shown by O'Loughlin J for *balancing* the principles of confidentiality and disclosure within the overall purpose of the *Heritage Act* thus resonates more with the earlier approaches of Woodward and Toohey JJ than does the weight placed by the other Federal Court Justices on disclosure, and his Honour's position is here supported by Lord Reid's observations that before the Courts exercise their power regarding procedural fairness, "it must be clear that the statutory procedure is insufficient to achieve justice *and that to require additional steps would not frustrate the apparent purpose of the legislation*".<sup>51</sup>

### **Conclusion: procedural fairness as "whitefella law"?**

In her review of the *Heritage Act*, Elizabeth Evatt recommends statutory provision for confidentiality, a more generous time frame, allowance for the Minister to delegate some aspects of the "consideration" process, and a separate, above all *non-adversarial* process of assessment of the question of Aboriginal significance.<sup>52</sup> Justice Carr's defense against the concept of "whitefella law", that it is law "for all Australians regardless of their colour", is thus sustainable to the extent that the Australian legal system seems, in principle, capable of

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<sup>49</sup> *ibid* at 256

<sup>50</sup> Burchett J indicated that although "the additional failure to consider the representation regarding the "women's business" was not the ground of the decision," it does, however, "raise important questions" *Norvill v Chapman* note 5 at 254

<sup>51</sup> *Wiseman v Borneman* [1971] AC 297 at 308, emphasis added

<sup>52</sup> Evatt, E, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*  
<<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt/index.html>>

establishing rules for the operation of procedural fairness and democratic participation in governance which can be regarded as just and legitimate by all the affected parties.

Why, then, did Mr Sebastian make the “whitefella law” remark? Because the *political* and *legal* theory operative within the principles governing procedural fairness depend in their turn on an underlying or background *social* and *cultural* theory. How one understands the way participation and procedural fairness can and should operate is itself based on a particular conception of society, the person, knowledge and property. In particular, one can operate with either a “contracted” view of social relations, a universalistic one in which real, existing economic and political interests as well as social relations of power recede from view, and the world is composed only of more or less equal citizens and agencies of government, or with an “expanded” view which recognizes prior interests and power relations and the position of the law within that field of unequal interests and power.

While it is true that there is not an *irreconcilable* conflict between “whitefella” law and Aboriginal law, the actual operation of Australian law can look, feel and taste remarkably like “whitefella” law when legislatures and Courts work with the “contracted” view of social relations, keeping the existing power relations of settler-colonialism invisible, and pretending that the rights of property developers to make money should be thought about in more or less the same way as the rights of individuals about to be deported. In *Norvill v Chapman*, for example, Justice Burchett said:

But Aboriginals, just like all their fellow members of the community, if they wish to avail themselves of legal remedies, must do so on the law’s terms. To take away the rights of other persons on the basis of a claim that could not be revealed to the maker of the decision himself would be to set those rights at nought in a way not even the Inquisition ever attempted.<sup>53</sup>

Apart from raising the eyebrows of any student of the Inquisition,<sup>54</sup> this particular formulation, coming hard on the heels of his Honour’s citation of Woodward and Toohey JJ’s settling of this question in the *Aboriginal Sacred Sites* case, suggests a particular sort of

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<sup>53</sup> *Norvill v Chapman* note 5 at 254, per Burchett J

<sup>54</sup> See, for example, Kamen, H, *The Spanish Inquisition* (London: Phoenix, 1998)

underlying lack of sympathy for the confidentiality concerns.<sup>55</sup> It is particularly significant in revealing the profound ambivalence *within* Australian legal thought, given that his Honour then proceeded to propose precisely the practical *solution* to the “women’s business” problem, namely, appointing a second, female, Minister or member of the Executive Council.

Australian courts thus seem to be sending out contradictory messages. On the one hand, “the significance of areas and objects of profound cultural and spiritual significance to Aboriginals” should be appreciated, and the interests of settlers/develops should not prevail “without any proper or informed consideration of the interests of Aboriginals”.<sup>56</sup> On the other hand, rules governing such consideration are established which set out from a presumption of equality in social, political and economic relations, rather than the reality of settler-colonial inequality, tending to produce outcomes in which legislative attempts to effect such consideration remain largely ineffective. Participation and procedural fairness thus end up becoming merely the battleground upon which those power relations are fought out by other, legal, means.

Stanley Fish has recently suggested that “the trouble with principle” is that it can be mobilised in relation to such a wide variety of concerns, within varying contexts, and he notes its “transverse” character, its ability to be utilized in support of outcomes which by most other criteria would be regarded as contradictory, when Courts try to treat social context as if it does not matter.<sup>57</sup> The question this argument raises in relation to the Australian Courts’ jurisprudence of natural justice, looking at *Norvill v Chapman* and the other *Heritage Act* cases, is whether the protection of the rights, interests and legitimate expectations of individuals accused of crimes and threatened with deportation, entrepreneurs, property developers, refugees, insurance companies and so on according to a universal set of democratic principles might not have a paradoxical operation, making Australian law “whitefella” law despite all the Courts’ best intentions. There can be no doubt that Australian

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<sup>55</sup> It is also a formulation encouraging the less ambiguously hostile interpretation in Partington, G, “Determining sacred sites - the case of the Hindmarsh Island Bridge” (1995) 71(5): *Current Affairs Bulletin* 4-11

<sup>56</sup> *Tickner v Bropho* (1993) 114 ALR 409 at 419, per Black CJ

courts understand that refugees and property developers are not *really* interchangeable, but it remains unclear what conclusions they can and should draw from this understanding.

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<sup>57</sup> Fish note 10; a similar point was made by Carol Smart in *Feminism and the Power of Law* (London: Routledge, 1989)

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