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**PROCEDURAL FAIRNESS IN JUDICIAL REVIEW
OF MIGRATION DECISIONS:
THE EVOLUTION OF A FUNDAMENTAL COMMON LAW PRINCIPLE**

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**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF JURIDICAL STUDIES**

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ABSTRACT

Procedural fairness has undergone significant evolution from a moral limit on the exercise of power to a fundamental principle of the common law. The thesis explains and reconciles this evolution of procedural fairness in Australia in the context of judicial review of decisions made under the *Migration Act 1958* (Cth).

By historical analysis of the origins and development of the principles of procedural fairness, the thesis identifies values and concepts underlying those principles. The High Court's current conception of fairness, as protecting individual rights and interests in the exercise of power, evolved from the idea that there is a morally correct and just way to decide things. The thesis explains how by judicial development the implication of the obligation to observe procedural fairness in Australia, in the context of migration decisions, was shaped and informed, expressly and implicitly, by these values and concepts.

The thesis explains the basis for the current restatement of procedural fairness as a fundamental principle of the common law, the relationship between procedural fairness and the principle of legality, and the positioning of procedural fairness as a principle or presumption of statutory construction. The thesis suggests that the explanation rests in legal coherence, in particular defining the obligation to observe procedural fairness in terms of an implied limit on the exercise of statutory power. The thesis also suggests that the dual presumptions created by recognising procedural fairness as a fundamental principle buttressed by the principle of legality, practically deny the exclusion of the principles in all but a limited number of cases.

ACKNOWLEDGMENTS

DECLARATION OF ORIGINALITY

I hereby certify that this thesis is entirely my own work and that any material written by others has been acknowledged in the text.

The thesis has not been presented for a degree or for any other purposes at The University of Sydney or at any other university or institution.

The empirical work undertaken for this thesis (interviews, questionnaires and observations) was approved by The University of Sydney Human Research Ethics Committee (HREC).

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I INTRODUCTION

This thesis is about two particular aspects of procedural fairness.¹ First, it is about how the implication of the obligation to observe procedural fairness has evolved in Australia, in the context of judicial review of decisions made under the *Migration Act 1958* (Cth) ('the Act'),² and the values that underpin these developments. Secondly, it is about the recognition of procedural fairness as a fundamental principle of the common law, and the consequences that follow from such recognition.

The thesis is, therefore, concerned with procedural fairness in the context of the exercise of statutory power.³ It is not concerned with the undoubted requirement to provide procedural fairness when judicial power is exercised.⁴ Nor is the thesis concerned with the exercise of other forms of power such as those exercised by domestic bodies,⁵ nor of procedural fairness within that context. Nor is the thesis concerned with the manner in which an obligation to afford procedural fairness might arise in the context of decisions made by a private body affecting an individual within, or absent, a contractual relationship.⁶ Nor, finally, is the thesis concerned with the other rule of procedural fairness, the bias rule.⁷

¹ The law is stated as at 1 November 2014.

² In this thesis, the phrase 'migration decision' is primarily used to describe administrative determinations made under the *Migration Act 1958* usually on whether a person had the status of a refugee under the Article 1A(2) of the *United Nations Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 2545 UNTS 189 ('the Convention'), as amended by *The Protocol Relating to the Status of Refugees* adopted by the United Nations General Assembly on 16 December 1966 ('the Protocol').

³ This includes what otherwise might be considered to be the exercise of non-statutory powers, when the powers exercised are considered to be steps taken under and for the purposes of the exercise of a statutory power. See in this respect the discussion, in Chapter VIII: Procedural Fairness as a Fundamental Principle, of the High Court decision in *M61/2010E v The Commonwealth* (2010) 243 CLR 319.

⁴ *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396.

⁵ That is, a private body exercising "public law functions" or where the "exercise of its functions have public law consequences": *R v Panel on Take-overs and Mergers; Ex parte Datafin* [1987] QB 815, 847.

⁶ See generally *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759; *CECA Institute Pty Limited v Australian Council for Private Education and Training* (2010) 30 VR 555; and Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th ed, 2013) 128-146.

⁷ This rule requires a decision-maker to be free from bias, actually and ostensibly: *Ebner v Official Trustee* (2000) 205 CLR 337.

Procedural fairness, in the present context, is essentially about providing an individual with a fair hearing when the exercise of statutory power might defeat, destroy or prejudice that individual's rights or interests.⁸ In this situation, the obligation to observe procedural fairness refers to the basic, yet flexible and varied, obligation to provide fair processes in the exercise of the statutory power. What a fair hearing requires is not "*immutably fixed*",⁹ but will vary "*according to the circumstances in which the repository is to exercise the power*",¹⁰ including the particular statutory provisions governing the exercise of the power.¹¹

The determination of whether procedural fairness conditions the exercise of power is an exercise in statutory construction *viz.*, it requires the court to define the limits of the power in question.¹² This, of course, is the very province of judicial review itself: that is, the determination by the court of whether the exercise of power was lawful, or not.¹³ When a statutory power is conditioned on the requirement that procedural fairness be observed in its exercise, an exercise of statutory power that fails to observe this requirement, if challenged in judicial review, will be invalid.¹⁴

It is important to emphasise the limits of judicial review and of procedural fairness as a ground of review. Judicial review in the context of administrative decision-making is tasked with ensuring the legality of decision-making: the Court does "*not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's powers*".¹⁵ Judicial review is thus concerned with preventing a repository of statutory power from exceeding the powers assigned to it by law;¹⁶ but it is not concerned with the merits of the particular decision, which are for the repository of the power.¹⁷ Procedural fairness is similarly

⁸ *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Plaintiff S10 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

⁹ *Assistant Commissioner Condon v Pompano Pty Limited* (2013) 87 ALJR 458, 494.

¹⁰ *Kioa v West* (1985) 159 CLR 550, 612.

¹¹ *Mobil Oil Australia Pty Limited v Commissioner for Taxation* (1963) 113 CLR 475, 503-504.

¹² *Plaintiff S10 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

¹³ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492.

¹⁴ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259.

¹⁵ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.

¹⁶ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

¹⁷ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.

not concerned with the merits of an exercise of power, but with the observance of fairness in the procedures adopted for the exercise of power.¹⁸

The thesis begins with an historical analysis of the origins of the principles of natural justice, as procedural fairness was then called,¹⁹ its relationship with natural law and an identification of the ideals and values that provided its justification and rationale.

The analysis then covers the transformation of natural justice from being a moral limit on the exercise of power into positive law as the ‘principles’ of natural justice. In this transformation the courts began to explain natural justice more exactly, by a principle compendiously called the *audi alteram partem* rule.²⁰

As part of this, a larger issue was beginning to take shape. Unspoken rule of law ideas were simultaneously bound up in these developments. The courts were supplying the “*omission of the legislature*”,²¹ and conditioning the exercise of power on the requirement that the principles of natural justice be observed so as to “*shield from unfairness*” those affected by the exercise of statutory power.²² The underlying premise of the approach adopted had the form of what is now known as the principle of legality,²³ with a concomitant presumption that the principles of natural justice should apply to the exercise of power of this kind. This approach resonates today, and provides, as explained later, the contemporary justification for the restatement of procedural fairness in the High Court decision in *Plaintiff S10 v Minister for Immigration and Citizenship*.²⁴

¹⁸ *Kioa v West* (1985) 159 CLR 550, 622; *VEAL of 2002 v Minister for Immigration and Multicultural Affairs* (2005) 225 CLR 88, 95; *SZBEL v Minister for Immigration and Multicultural Affairs* (2006) 228 CLR 152, 160.

¹⁹ The phrases are used interchangeably in the thesis.

²⁰ Which essentially means: hear the other side.

²¹ *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194.

²² *Century Metals & Mining NL v Yeomans* (1989) 40 FCR 564, 589.

²³ This is a common law principle of statutory construction that presumes that the legislature does not intend to curtail fundamental rights and principles and requires, as a further expression of this presumption, the legislature to use irresistibly clear language to do so: *Potter v Minahan* (1908) 7 CLR 277; *Coco v The Queen* (1994) 179 CLR 427.

²⁴ (2012) 246 CLR 636.

These historical developments, the values identified and the strong, yet at that time unexpressed, rule of law ideas are central to understanding the current status of procedural fairness *viz.*, how and why procedural fairness came to be considered a fundamental principle of the common law, and the legal consequences of this classification. They also serve to explain much of the development in terms of when the principles apply.

The thesis then analyses the refinement and expansion of the principles of procedural fairness by the courts, so as to broaden the instances of their engagement.

The principles of procedural fairness were, initially, fixed on rights and interests that had a distinctly Victorian feel to them. Rights that were deeply rooted in the common law, such as the right of a person in (or entitled to) possession of premises to exclude others, were rights of the kind that the principles of procedural fairness would protect in the exercise of statutory powers.²⁵ But as society evolved, and activities became increasingly regulated by governmental powers and discretions, different kinds of rights and interests were created that were not readily compartmentalised into the rights and interests of the 19th century.

Adaptation is part of the “*genius*” of the common law,²⁶ in that the first statement of principle is not the last. And so it was with the principles of procedural fairness, as the thesis later develops.

The courts responded to these developments by expanding the kind of rights and interests which would attract the requirement to observe procedural fairness in the exercise of statutory power. This expansion accommodated these changing societal conditions, by the courts fashioning further rules that continued to focus on the rights and interests of the individual, but with a distinctly contemporary edge to them.

The progressive thinking by the courts in this way carried over into procedural fairness in judicial review of migration decisions. The thesis explains two foundational events in the

²⁵ This was one of the underlying ‘rights’ in question that were infringed in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.

²⁶ *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520, 585.

development of procedural fairness in Australia in this area: first, the High Court decision in *Kioa v West*,²⁷ that amongst other matters restated the basic principle of when procedural fairness applied; and, secondly, the development of a revised judicial approach to the construction of the Act in connection with claims for, and determinations of, refugee status. The revised approach confirmed the jurisdiction of the Federal Court, notwithstanding that the determinations were made absent statutory footing,²⁸ to review on the ground of denial of procedural fairness under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).²⁹ This approach, in particular, was a further reflection of the core values of procedural fairness, as earlier described.

Chronologically, it was at this point that, in relation to migration decisions, common law principles of procedural fairness and statute intersected. The rapid expansion and infiltration of procedural fairness into administrative decision-making in the post-*Kioa* period resulted in amendments to the Act, in 1992,³⁰ that were intended to exclude altogether common law principles of procedural fairness from applying to merits reviews conducted by the Refugee Review Tribunal ('the Tribunal').³¹ This intent was manifest in the detailed procedural provisions contained in Part 7 of the Act, designed to achieve a statutory form of fairness by the Tribunal, but also in the express prohibition upon the Federal Court undertaking judicial review of a decision by the Tribunal on the ground of denial of procedural fairness.³²

The thesis explains the constructional approach taken by the Federal Court when faced with these limits *viz.*, on one view, the Court essentially ignored the statutory intent. The result was

²⁷ (1985) 159 CLR 550.

²⁸ The determinations of refugee status were made by a committee called the Determination of Refugee Status Committee – the DORS Committee. See further Chapter V, 'Judicial Review, Judicial Creativity and Natural Justice in the post-*Kioa* period' where these developments and the role of the DORS Committee are explained further.

²⁹ These developments, that have their origins in decisions of the Federal Court, were confirmed by the High Court in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

³⁰ The amendments were contained in the *Migration Reform Act 1992* (Cth).

³¹ The Tribunal was created as part of the amendments brought about by the *Migration Reform Act 1992*. It was tasked with undertaking merits reviews of migration decisions, as defined earlier *viz.*, administrative determinations made as to refugee status.

³² Section 476(2)(a) of the Act precluded judicial review in the Federal Court in relation to Tribunal decisions where "a breach of the rules of natural justice occurred in connection with the making of the decision".

the Court giving effect to its conception of fairness by supplementing the statutory procedures with common law principles of procedural fairness. This approach illustrated judicial reluctance, evident in procedural fairness values from early times, to permit the derogation of rights absent those conceptions of fairness in decision-making being met.

The consequence of the judicial approach resulted in further amendments to the Act, in 1998,³³ in connection with the procedural provisions that were required to be followed by the Tribunal. But here as well, as later explained, the common law principles of procedural fairness, and the values within it, were exerting strong constructional control over the interpretation given to the now modified provisions in Part 7 of the Act by the Federal Court and the High Court.

The combined effect of the judicial approach to Part 7 of the Act, that is, the response of the Federal Court and the High Court to the amendments in 1992 and 1998, resulted in further amendments to the Act in 2002.³⁴ This time, rather than undertake further tinkering with the procedural provisions, so as to preclude the practical application of common law notions of procedural fairness in the conduct of statutory review, the Government took a more direct approach: by legislating to exclude altogether their operation in that context.³⁵

Procedural fairness jurisprudence developed to accommodate, and neutralise, the gradual reach of the 1992 and 1998 amendments to the Act. The developments were thus essentially about the implication of common law principles of procedural fairness within the statutory scheme. Following the amendments to the Act in 2002, the focus of the jurisprudential developments was different: now it was about determining the manner in which the principles of procedural fairness could be excluded from the statutory scheme. Against this statutory intervention, the thesis explains the basis for the recognition of procedural fairness as a fundamental common law principle, the relationship between procedural fairness and the

³³ The amendments were contained in the *Migration Legislation Amendment Act (No.1) 1998* (Cth).

³⁴ The reforms were contained in the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).

³⁵ The specific amendment, that related to Part 7 of the Act, was section 422B(1) of the Act. That section provided: "(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with".

principle of legality, and the consequences of attempts to curtail the application of procedural fairness.

More recently, following the High Court decision in *Plaintiff S10*, procedural fairness has undergone restatement. Since that decision, procedural fairness is a principle or presumption of statutory construction conditioning the exercise of statutory power, buttressed by the principle of legality. The thesis analyses the significance of this decision for procedural fairness and advances explanations for the revised approach.

II NATURAL LAW, NATURAL JUSTICE AND THE IMPORTANCE OF RIGHTS

A. *Introduction*

In its earliest forms, the normative justification for natural justice was anchored in the idea that it was a manifestation of the internal morality of the law. In time, natural justice became a kind of indefeasible right, and by the late 19th century the courts had boldly declared that no proposition was “*more clearly established*” than that a person cannot incur the loss of liberty or property until the person had a fair opportunity of being heard.¹ Natural justice, thus, was transformed from a moral limitation on the exercise of power into positive law, and mainstream jurisprudence.

In this early period, although the courts were largely focussed on the process and its interconnectedness to the outcome,² that is, in ensuring that the processes were the morally correct way of deciding matters, larger issues were beginning to take shape. What was happening was that the courts were fashioning their own rules and principles that focussed upon, and attached to, the rights of the individual. What emerged was a coherent body of principles – natural justice in action – that were engaged in instances where the exercise of power sought to infringe the rights of the individual. These principles, building on the notion that there was a right and fair way to decide things, developed a related idea: that these principles presumptively should condition the exercise of power.

B. *Natural justice: creation and early justification*

1. *Natural justice, natural law and the law of God*³

Natural law – that is, the moral or natural principles of natural right and wrong – has a close association with natural justice;⁴ indeed, the very phrase ‘natural justice’ is said to reflect the

¹ *Bonaker v Evans* (1850) 16 QB 170, 171 (Parke B).

² This is the instrumental justification for natural justice *viz.*, observance of natural justice enhances the likelihood of a correct determination on the merits: see Paul Craig, ‘Legitimate Expectations: A Conceptual Analysis’ (1992) 108 *Law Quarterly Review* 79, 85.

close relationship between the two.⁵ In its earliest form, natural justice – being part of the immutable laws of nature – was a moral directive about how decisions should be made.⁶

Although the historical and philosophical foundations of natural justice in English law are said to be ‘insecure’,⁷ with inexact origins,⁸ procedural fairness, or natural justice as it was then called, was thoroughly well established by the 17th century. In this time period, by reference to Seneca’s *Medea*,⁹ the maxim *quia quicunque aliquid statuerit parte inaudita altera aequum licet statuerit, haud aequus fuerit*¹⁰ was imported into legal discourse,¹¹ and held to invalidate administrative (and legal) decisions, or actions taken against an individual, where the repository of power proceeded against the individual “without hearing him answer to what was objected, or that he was not reasonably warned...”.¹²

A like explication of the juridical foundations of the rule was expressed in *The King v The Chancellor, Masters and Scholars of the University of Cambridge*.¹³ In that case, one Bentley had

³ In H W R Wade and C F Forsyth, *Administrative Law*, (10th ed 2009) 374, the phrase “natural justice, natural law, the law of God and ‘common right and reason’” was used.

⁴ Sir John Salmond, *Jurisprudence*, (7th ed 1924) 26-29. In Paul Finnis, *Natural Law and Natural Rights* (1st ed 1980) 280, natural law was defined as the “set of principles of practical reasonableness in ordering human life and human community” and it was there suggested that the term was, at least historically, synonymous with ‘natural right’, ‘intrinsic morality’ and natural reason in action. In *Calvin’s Case* (1608) 77 ER 377, 391-2, Coke LCJ described natural law in the following way: “...the law of nature is part of the law of England...the law of nature was before any judicial or municipal law...the law of nature is immutable...The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction...and this is...the moral law, called also the law of nature”.

⁵ S A De Smith, *Judicial Review of Administrative Action* (3rd ed 1973) 135 citing A L Goodhart, *English Law and the Moral Law* 65.

⁶ Peter Cane, *An Introduction to Administrative Law* (3rd ed 1996) 91. In *The Queen v MacKellar; Ex parte Ratu* (1977) 137 CLR 461, 483 Murphy J said, of natural justice, that it was “an aspect of due process, traceable in English law at least back to Magna Carta”.

⁷ S A De Smith, *Judicial Review of Administrative Action* (3rd ed 1973) 136.

⁸ Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (2002) 12. In H W R Wade and C F Forsyth, *Administrative Law*, (10th ed 2009) 403 it was described as an ‘ancient rule of wide application’.

⁹ Lucius Anneus Seneca (4 BC – 65AD, Roman philosopher and dramatist), *Medea* lines 195-199.

¹⁰ Which translates as: he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right; or because whoever settles something without hearing the other side, even if he settles it fairly, does not act fairly.

¹¹ *Boswell’s Case* (1583) 6 Co. Rep 48b, 52a; *Bagg’s Case* (1615) 11 Co. Rep 93b, 99a; *R v Gaskin* (1799) 3 TR 208, 210 (Lawrence J); *R v Archbishop of Canterbury* (1859) 1 EL & EL 545, 559 (Lord Campbell CJ); *The Commissioner for Police v Tanos* (1957) 98 CLR 383, 395-6 (Dixon CJ and Webb J).

¹² *Bagg’s Case* (1615) 11 Co. Rep 93b, 99a.

¹³ (1723) 1 Strange 557.

been deprived of his degrees and found guilty of contempt of the vice chancellor. To the latter charge, he had been given no notice. He sought mandamus to restore his degrees. On appeal, Fortescue J said:¹⁴

...the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence on Adam, before he was called upon to make his defence. Adam (says God) where art thou? Has thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.

By this time, and by these cases, natural justice was transformed by the courts from the natural law – a moral and ethical limitation on the exercise of power¹⁵ – to positive law, reflecting a basic, fundamental principle that a person cannot be denied his or her rights without being heard: this was the *audi alteram partem* rule.¹⁶ And, even then, the rule became sharpened, based on these authorities, such that it was declared that “no proposition can be more clearly established than that a man cannot incur the loss of liberty or property...until he has had a fair opportunity of answering the charge against him...”.¹⁷

Although it has been suggested that procedural fairness emerged, in part, by the desire of the judiciary to “assert the supremacy of the common law over statute” thereby “imposing certain procedural constraints on its operation”, the merits of this contention are somewhat debatable.¹⁸ Again, although there have been suggestions that the existence of some “common

¹⁴ (1723) 1 Strange 557, 567.

¹⁵ Sir William Holdsworth, *A History of English Law*, (4th ed 1936) 445.

¹⁶ The rule, in this form, was stated by Lord Kenyon Ch. J in *R v Benn and Church* (1795) 6 TR 198, 198 and then in *R v Gaskin* (1799) 3 TR 208, 210. In *R v Gaskin*, Lord Kenyon described the rule as “one of the first principles of justice”. In *Ex parte Ramshay* (1852) 18 QB 173, 190 Lord Campbell CJ described *audi alteram partem* as a principle “of eternal justice”.

¹⁷ *Bonaker v Evans* (1850) 16 QB 170, 171 (Parke B).

¹⁸ Paul Craig, *Administrative Law*, (1st ed 1983) 262-3. There is no doubt that early cases can be identified which, in broad terms, support the argument that there was a struggle between the Courts and the judiciary concerning the supremacy of one, over the other. Thus in *Dr Bonham’s Case* (1610) 8 Co. Rep 113b, 118a it was asserted that “in many cases, the common law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void...”. The principle sought to be asserted was described by Street CJ, in *Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 373, 386, as a “brave assertion”. Similarly, in *Day v Savadge* (1614) Hobart 85, 80 ER 235, Hobart CJ said that “an Act of Parliament, made against natural equity,

law rights” may “go so deep” that they can operate as a restraint upon the exercise of legislative power,¹⁹ the courts have, to date, steadfastly refused to recognise that this is so.²⁰ Nevertheless, there has not been any emphatic rejection of the principle; indeed there have been not infrequent dicta, some quite recent, that suggest that the occasion for the argument has not yet arrived.²¹

Whatever be the correct position, in later cases the focus was different, directed towards the protection of individual rights by conditioning, rather than confronting, the exercise of statutory power. The courts were acting on the persistent, and basic, assumption that the common law principles of natural justice applied to decision-making.²²

2. *The early authorities: the importance of ‘rights’.*

If, in its earliest form, natural justice was a moral directive about how decisions should be made, then its transformation into positive law was about why natural justice applied: to protect rights and interests and the liberty of the individual. Initially, through this evolution, the principles of natural justice were recognised as applying in four areas of administrative

*as to make a man Judge in his own case, is void in itself...”. Other cases, where similar statements were made, included *City of London v Wood* (1701) 88 ER 1592 and *Campbell v Hall* (1774) 98 ER 1045. In *Campbell* it was said that the King in Parliament “cannot make any new change contrary to fundamental principles”, although this remark was specifically rejected by the Privy Council in *Liyanage v The Queen* [1967] 1 AC 259.*

¹⁹ *New Zealand Drivers’ Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390 (Cooke J); *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (Cooke J); *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (Cooke J). In *Fraser*, Cooke J alluded to natural justice being a possible right of this kind. See also *Momcilovic v R* (2011) 245 CLR 1, 216 (Crennan and Kiefel JJ).

²⁰ The suggestion was rejected in England by Lord Reid in *British Railways Board v Pickin* [1974] AC 765, 782. Similarly, Lord Simon said that the “courts in this country have no power to declare enacted law to be invalid” ([1974] AC 765, 798); see also *R (Jackson) v Attorney General* [2006] 1 AC 262, 282 (Lord Bingham of Cornhill). Based on *Pickin*, Street CJ in *Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 373, 387 said that he was constrained by the absence of authority to accept “that there is no such doctrine standing alone”. The question was identified but not explored in *Union Steamship Co of Australia v King* (1988) 166 CLR 1, 10 and in *Durham Holdings Pty Limited v State of NSW* (2001) 205 CLR 399, 409-410.

²¹ *South Australia v Totani* (2010) 242 CLR 1, 29-30 (French CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 46 (French CJ); 1089 (Crennan and Kiefel JJ). See also *R (Jackson) v Attorney General* [2006] 1 AC 262 where this question, in the context of the doctrine of parliamentary supremacy and whether it admits to qualification, was left open by Lord Steyn ([2006] 1 AC 262, 302); by Lord Hope of Craighead ([2006] 1 AC 262, 303-304); by Lord Walker of Gestingthorpe [2006] 1 AC 262, 314; and by Baroness Hale of Richmond [2006] 1 AC 262, 318.

decision-making;²³ deprivation of privileges;²⁴ the service of summonses in summary proceedings;²⁵ regulation of the clergy;²⁶ and dismissal from office.²⁷ However, in time it came to be recognised that the principles of natural justice extended more widely to circumstances involving deprivation, or loss, of personal²⁸ and property rights.²⁹

Through these cases it is possible to detect something more than simply the court organising and categorising when and where the principles of natural justice had been held to operate. Closely analysed, it is suggested, the courts were fixing on the infringement of the rights, interests and liberty of the individual as being the underlying rationale – a more contemporary justification – for the application of the principles of natural justice. This justification, as explained in Chapter III, very much has its foundations in rule of law concepts, or has shades of them: that is, broad ideas of proper and due process as a precondition to the legality of

²² William Cornish et al, *The Oxford History of the Laws of England* (2010) vol XI, 506.

²³ *Ibid*, 137-142; D J Hewitt, *Natural Justice* (1st ed 1972) 92; S A De Smith, *Judicial Review of Administrative Act* (3rd ed 1973) 136-139; Harry Woolf, Jeffrey Jowell and Andrew Le Suer, *De Smith, Woolf & Jowell's Principles of Judicial Review* (1999) 250-252; William Wade and Christopher Forsyth, *Administrative Law* (9th ed 2004) 477-479.

²⁴ *James Bagg's case* (1615) 11 Co. Rep 93. In that case, Bagg was deprived of the privilege of him being a burgess of Plymouth by reason of his unbecoming conduct towards the mayor. The disenfranchisement occurred by the corporation, but without notice to him. The phrase 'deprivation of privileges' was given to this class of case by Lord Reid in *Ridge v Baldwin* [1963] 2 All ER 66, 72. The Court held that although the corporation "*had authority either by charter or by prescription to move any one from the freedom, and that they have just cause to remove him without (a) hearing him in answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party (b)...such removal is against justice and right*". *The King v The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Strange 557 was also a deprivation of privileges case.

²⁵ In these cases the Court held that the service of the summons, and thus the notice of the hearing, was a condition precedent to the validity of the proceedings: *R v Dyer* (1703) 1 Salk 181; *R v Benn and Church* (1795) 6 TR 198. Modern authorities to this effect include *Cameron v Cole* (1944) 68 CLR 571; *Posner v Collector for Interstate Destitute Persons (Victoria)* (1946) 74 CLR 461; *Taylor v Taylor* (1979) 143 CLR 1; and *Hoskins v Van Den-Braak* (1998) 43 NSWLR 290.

²⁶ *Bonaker v Evans* (1850) 16 QB 162 which concerned the Consistory Court issuing an order for sequestration against a vicar.

²⁷ *Ridge v Baldwin* [1963] 2 All ER 66, 72 (Lord Reid) citing *R v Gaskin* (1799) 8 Term Rep 209; *R v Smith* (1844) 5 QB 614.

²⁸ *Wood v Woad* (1874) 9 LR 190. There the issue involved a member of a marine insurance association who was expelled by an executive of that association. The member had no notice of an investigation into, and adjudication on, his conduct prior to being expelled. The member successfully challenged the expulsion as void, it being made without notice to him. A modern day authority involving a member of a private club, and the application of the principles of procedural fairness, is *McClelland v Burning Palms Surf Lifesaving Club* (2002) 191 ALR 759.

²⁹ *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.

exercises of power, including statutory power, that affect the rights, interests or liberty of the individual.

This approach, although made in the context of natural justice, can be detected as operating more broadly in other areas. It was, as Lord Devlin writing extra-judicially has remarked, a case of judges being obstructive, but in a very specific sense:³⁰ the refusal of the judiciary to “act on the ordinary meaning of words” in a statute. What was occurring was that the judiciary were searching for “the philosophy behind the Act and what they found was a Victorian Bill of rights, favouring...the liberty of the individual, the freedom of contract and the sacredness of property...”.³¹ In these cases, if the legislation interfered with these notions, the courts would either “assume that it could not mean what it said or to minimise the interference by giving the intrusive words the narrowest possible construction...”.³² And so it was with natural justice: it conditioned the exercise of power when it sought to infringe rights of this kind, or analogous ones.

In what follows, three areas are the subject of focus in illustrating the link between the principles of natural justice, as they evolved, and the underlying rights to which the principles refer: first, cases involving property rights; secondly, cases involving personal rights; and, thirdly, cases involving deprivation of liberty. In this analysis, we see the courts explaining the application of the principles to the specific kinds of rights that were held to have been infringed. And in doing so, we see, at its most fundamental level, what the principles of natural justice were designed to do: to protect the range of rights to which the law has always attached supreme importance – the rights, interests and liberty of the individual.

At the outset, an introductory – a definitional – point should be made. Although the cases have identified ‘property’ rights as distinct from ‘personal rights’, the dichotomy, it is suggested, is one of convenience and categorisation only: the infringement of a property right is an

³⁰ Lord Devlin, *Judges and Lawmakers*, (1976) 39 *Modern Law Review* 1, 13-14.

³¹ *Ibid* 14.

³² *Ibid*.

infringement of a person's property. It is on this basis that, it is argued, the focus of the courts has been on the individual – that is, the rights, interests and liberty of the individual.

The classic statement of the principle of natural justice was expressed in *Cooper v Wandsworth Board of Works*.³³ Although the case is perhaps best remembered for the declaration by Justice Byles that where a statute was silent on whether natural justice would apply to the exercise of a power “*the justice of the common law will supply the omission of the legislature*”,³⁴ it is a clear example of the favouring of rights by the courts.

In *Cooper*, the district board had power to demolish a house where the builder neglected to give the board notice of his intention to build seven days prior to laying or digging the foundation. The plaintiff was in the course of building his house, but had neglected to give the board notice of this fact. The board demolished the dwelling, and gave no notice to the plaintiff of its intent to do so. It also sought to recover, under the terms of the empowering statute, the expenses of demolition. The plaintiff sued the board in trespass, to which the Board contended that it had the statutory power to act as it did, without the giving of notice, and thus could not be guilty of trespass.

To the lack of notice, Byles J said:³⁵

It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially... That being so, a long course of decisions, beginning with Dr Bentley's case, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The judgment of Mr Justice Fortesque, in Dr Bentley's case, is somewhat quaint, but is very applicable, and has been the law from that time to the present.

But what engaged this principle was the right – or rights – of the plaintiff infringed: they were variously described as being “*deprived of his property*”,³⁶ that the demolition of the dwelling

³³ (1863) 14 CB (NS) 180.

³⁴ cited by Brennan J in *Kioa v West* (1985) 159 CLR 550, 609.

³⁵ (1863) 14 CB (NS) 180, 194-5.

³⁶ *Ibid* 187 (Erle CJ).

and the steps to recover the costs of doing inflicted upon the plaintiff “*a heavy loss*”,³⁷ and that the plaintiff’s “*property is affected and his purse is further affected*”.³⁸ The conduct of the board was also important because, as Byles J observed, the nature of their acts – namely demolition and seeking to recover the costs of doing so – were such that “*they had to determine the offence, and they had to apportion the punishment as well as the remedy*”.³⁹

Although there was clear jurisdiction of the court to intervene in cases where there had been a denial of natural justice and it involved the infringement of property rights, later cases gave the idea of property rights a more expansive and liberal meaning. The interest did not have to amount to a “*legal or beneficial interest in specific ascertainable land, chattels or money*”.⁴⁰ Hence it came to extend to cases involving expulsion from clubs, associations and trade unions. In these cases, the courts were showing some creativity in identifying the property right said to have been infringed: the property right being described as the payment of membership fees to belong to an association;⁴¹ the property right being the interest that the member had “*in the general assets [of the club] as long as he remained a member*” or, expressed negatively, the deprivation of property to which membership entitled the person;⁴² the right to “*receive the benefits which by its rules follow from membership*”.⁴³ In some such cases, involving expulsion from a club, the right said to be involved, was characterised as personal: the rules of natural justice attached to the power to expel because the body seeking to expel could “*blast a man’s reputation for ever – perhaps ruin his prospects for life...*”.⁴⁴

In cases where the individual suffered pecuniary loss – a penalty – or charges of misconduct were involved the courts displayed no hesitation in intervening if the requirements of natural justice had not been met.⁴⁵ We have earlier seen, in *Cooper v Wandsworth Board of Works*, that the case was one that, to use the words of Lord Devlin, concerned the ‘sacredness of property’,

³⁷ Ibid 189 (Erle CJ).

³⁸ Ibid 193 (Willes J).

³⁹ Ibid 194.

⁴⁰ *Makin v Gallagher* [1974] 2 NSWLR 559, 579 (Holland J).

⁴¹ *Wood v Woad* (1874) LR 9 Exch 190 (expulsion from membership of a mutual insurance society).

⁴² *Rigby v Connol* (1880) 14 Ch D 482 (expulsion from a trade union).

⁴³ *Osborne v Amalgamated Society of Railways Servants* [1911] 1 Ch 540, 562 (Fletcher Moulton LJ).

⁴⁴ *Fisher v Keane* (1878) 11 Ch D 353, 363 (Jessel MR).

but also the levying of what was in substance a fine (the costs incurred by the board in the demolishing the dwelling) or a penalty.

A further example of the court intervening in cases where there was in substance a penalty or a fine was *Bonaker v Evans*.⁴⁶ The case involved a writ of sequestration issued from the Consistory Court to a vicar following the failure of the vicar to reside, contrary to a declaration by a bishop, in a designated location. At trial it was accepted that the sequestration order had issued without notice to him.

The Court held that there had been a breach of the principles of natural justice in the issuing of a sequestration order without the vicar having a “*fair opportunity of answering the charge against him*”.⁴⁷ The basis for the operation of the principles rested on the characterisation of the impact of the conduct on the vicar that was infringed as being penal in character. As Parke B explained “*although one of the objects of the proceeding by sequestration may be to enforce future residence, another is clearly to punish past delinquency...it is partly in the nature of a penalty*”. Further, the cumulative effect of multiple sequestration orders could mean the “*loss of living...[it] certainly must be treated as penal*”.⁴⁸

The characterisation of the effect of the decision as penal in character also explains the basis for the decisions in the service of summonses in summary proceedings cases. In these cases, the courts required strict compliance relating to service of the summons because the consequence of the failure to serve was a conviction, and the levying of a penalty – something that the Court described as akin to being “*punished*”.⁴⁹

The essential feature of this class of cases was the exposure of the individual to a process that, albeit not necessarily criminal, involved the risk of conviction and the imposition of punishment or a penalty. In this way the courts were proceeding on the basis that although the proceedings were not criminal, there was the potentiality of adverse personal consequences. In criminal

⁴⁵ *Dean v Bennett* (1870) LR 6 Ch App 489; *Fisher v Keane* (1878) 11 Ch D 353.

⁴⁶ (1850) 16 QB 162.

⁴⁷ *Ibid* at 172 (Parke B, delivering the judgment of the Court).

⁴⁸ *Ibid*.

proceedings the right to a fair trial is undoubted and a fundamental principle of the common law: analogically, the courts were holding that the principles of natural justice arose in situations where the proceedings were not criminal, but there were potentially grave consequences to the individual.⁵⁰

This was the point that was made, in the context of an expulsion case, in *Fisher v Keane*.⁵¹ There Jessel MR said that a committee should “*be very careful before they expose one of their fellow-members to such an ordeal. They ought to gravely consider, when proceeding to enforce such a rule as this, whether he has committed any offence at all, and especially whether he has committed such an offence as will warrant their branding him with the name of an expelled member of their club*” and that they should not “*convict a man of a grave offence which shall warrant his expulsion from the club, without fair, adequate, and sufficient notice, and an opportunity of meeting the accusations brought against him*”.⁵²

This leads to the third area where the principles of natural justice have evolved with watchful concern: over the liberty of the individual. It has done this in two areas: cases that, traditionally, involved deprivation of liberty and in cases where although there has been no actual deprivation of liberty, there were “*grave consequences*” for the individual.

The right to personal liberty is the “*most elementary and important of all common law rights*”.⁵³ In *Williams v The Queen*, Mason and Brennan JJ said that personal liberty “*was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature*”.⁵⁴ In another context, personal liberty has been described as “*so quintessential a human right*”.⁵⁵

⁴⁹ *R v Benn and Church* (1795) 6 TR 198 (Lord Kenyon).

⁵⁰ *Kanda v Government of Malaysia* [1962] AC 322.

⁵¹ *Fisher v Keane* (1878) 11 Ch D 353.

⁵² *Fisher v Keane* (1878) 11 Ch D 353, 360-361, 362. A modern authority to the same effect is *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

⁵³ *Trobridge v Hardy* (1955) 94 CLR 147, 155 (Fullagar J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ).

⁵⁴ (1986) 161 CLR 278, 292.

⁵⁵ *Secretary of State for the Home Department v JJ* [2008] 1 AC 385, 418 (Lord Hoffman).

The kinds of case that concern the liberty of the individual – or more accurately as involving the deprivation of liberty – ordinarily involve incarceration or imprisonment⁵⁶ or detention,⁵⁷ or restrictions that have these substantive features, such as ‘control orders’.⁵⁸ In these cases, usually the application of the principles of natural justice is assumed, and the real question relates to the content of those principles.⁵⁹

Although there are differences between actual deprivation of liberty (that is, incarceration) and infringement of rights (for example, personal security) that have serious consequences, the justification for the application of the principles of natural justice in either case is the same. As Murphy J explained in *The Queen v MacKellar; Ex parte Ratu* – an immigration deportation case:⁶⁰

Deportation is always very serious. Although it is not a criminal proceeding, it imposes a severe penalty and may inflict considerable hardship. It may adversely affect the person deported in personal and business relationships, employment and other ways.

Similar points, to that made by Murphy J in *Ratu*, have been made in cases involving applications for protection visas under the *Migration Act 1958* (Cth). In *Re Minister for*

⁵⁶ Ibid at 412 (Lord Bingham of Cornhill).

⁵⁷ *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319. Australia has a system of mandatory detention in connection with unlawful non-citizens. As Gleeson CJ described it in *Al-Kateb v Godwin* (2004) 219 CLR 562, 571, the *Migration Act 1958* provides “for administrative detention of unlawful non-citizens. For present purposes, unlawful non-citizens are aliens who have entered Australia without permission, or whose permission to remain in Australia has come to an end”.

⁵⁸ *Secretary of State for the Home Department v MB* [2008] 1 AC 440. Expressed generally, in Australia these are a form of order that controls the movement and freedom of an individual made by the Court under the *Criminal Code* (Cth), upon application by an authorised person, and made to “substantially assist in preventing a terrorist act”, or matters of that kind: *Thomas v Mowbray* (2007) 233 CLR 307, 325 (Gleeson CJ). In the United Kingdom these are a form of order that controls the movement and freedom of an individual made for purposes connected with protecting the “members of the public from the risk of terrorism”: *Prevention of Terrorism Act 2005 (UK)*, section 1(1). The orders are made by the Secretary of State or by the Court on application by the Secretary of State: *Prevention of Terrorism Act 2005 (UK)*, see sections 1(1) and 1(2).

⁵⁹ See, in the context of control orders, *Secretary of State for the Home Department v MB* [2008] 1 AC 440. Although the case had a European, and thus human rights, dimension, Lord Bingham collected the English authorities and confirmed that persons would be entitled “to such measure of procedural protection as is commensurate with the gravity of the potential consequences”: [2008] 1 AC 440, 473. In Australia, where the plaintiff was denied a protection visa on security grounds following an assessment that the plaintiff was a risk to security, it was accepted that the plaintiff was entitled to procedural fairness in such assessment: *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1.

⁶⁰ (1977) 137 CLR 461, 484. Murphy J’s judgment was a dissenting one, but similar remarks have been made to it: see *Salemi v MacKellar [No.2]* (1977) 137 CLR 396, 421 (Gibbs J).

Immigration and Multicultural Affairs; Ex parte Miah,⁶¹ McHugh J described the interest of an applicant for a protection visa as involving “*personal security. The consequences for him include returning to face serious threats to his personal security, if not to his life*”.⁶² And in *Plaintiff S157/2002 v Commonwealth*,⁶³ also a case involving an application for a protection visa, Gleeson CJ described the rights of an individual in such circumstances as “*fundamental*”.⁶⁴

C. Conclusion

The transformation of natural justice – from being a moral directive about how decisions should be made – into mainstream jurisprudence showed the importance that the courts placed upon the rights of the individual, now more expansively interpreted, and their insistence that any interference with them by statutory power have proper and strict pedigree. In connection with the principles of natural justice, any exercise of statutory power affecting the rights of any individual without adherence to them would be invalidated by the courts. The principles and approach remained very much impressed with the values and ideals that can be traced to ‘natural justice’ when it was a moral limitation on power: fairness and the importance of rights.⁶⁵

In tandem was a related idea, yet to be shaped into a working principle in the area of natural justice – namely, that the principles of natural justice would not be construed by a court to have been excluded by the words in a statute absent clear expression. Lord Devlin described this approach as being one that assumed that the language “*could not mean what it said*”.⁶⁶ It operated, as earlier discussed, as a ‘persistent’ assumption that impliedly limited the manner of

⁶¹ (2001) 206 CLR 57.

⁶² (2001) 206 CLR 57, 102.

⁶³ (2003) 211 CLR 476.

⁶⁴ (2003) 211 CLR 476, 494.

⁶⁵ See Susan Kneebone, ‘Natural Justice and Non-Citizens: A Matter of Integrity?’ (2002) 26 *Melbourne University Law Review* 355, 358 where the values within natural justice were said to reflect “*the substance of the principle*”.

⁶⁶ See n.30, above.

decision-making. Now this approach is described as the principle of legality, a principle that we next see is sourced in rule of law ideas.

III THE RULE OF LAW, THE PRINCIPLE OF LEGALITY AND NATURAL JUSTICE

A. *The rule of law*

1. *Introduction*

The rule of law, being a protean concept,¹ has a range of meanings. Although there are more expansive and contemporary explanations of the rule of the law, an uncontested aspect of the rule of law is that it is concerned with the legality of government acts: ensuring that governmental actions that affect the legal rights, duties or liberties of persons have proper and strict “*legal pedigree*”.²

This Chapter is not concerned with the “*ongoing and open ended*” debate about the content of the rule of law.³ Rather it has, as its particular focus, the rule of law and how the principles of natural justice fit within it; and it also has, as its particular focus, the connection between the principles of natural justice and the ‘principle of legality’ – a principle itself derived from the rule of law.⁴

A number of matters can be drawn from the analysis that follows. First, so far as the rule of law is concerned, the academic debate – divided on the precise meaning of the rule of law and its content – has a measure of commonality: the principles of natural justice can be sourced to the rule of law. This derivation has assumed some importance in England, where there is no written constitution, as part of the overall way in which the courts have justified judicial review.⁵ In Australia, this derivation has been less significant: in Australia the courts have had neither the occasion nor need to examine, in line with its historical association with natural law, whether the

¹ *R (Cart) v Upper Tribunal* [2011] QB 120, 137 (Laws LJ, Owen J agreeing).

² William Wade and Christopher Forsyth, *Administrative Law* (10th ed 2009) 17.

³ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 415 (French J).

⁴ *Electrolux Home Products Pty Limited v Australian Workers Union* (2004) 221 CLR 383, 396 (Gleeson CJ).

⁵ In England, the constitutional justification for judicial review is increasingly accepted, academically and by the Courts, to be the rule of law, and the values that are said to be shades of it. For the academic views, see for example, Lord Woolf et al, *De Smith's Judicial Review* (6th ed 2007) 10; Auburn et al, *Judicial Review – Principles and Procedure*, (2013) 7. For the judicial views, see for example, *R (G) v Immigration Appeal Tribunal* [2005] 1 WLR 1445, 1453 (Lord Phillips MR, delivering the judgment of the Court) and *R (Cart) v Upper Tribunal* [2012] 1 AC 663, 690 where Lord Phillips PSC (Lords Hope, Rodger and Brown agreeing) said that “*the rule of law requires that*

juridical foundations of natural justice are to be truly found in, and justified by, the rule of law.⁶ Nevertheless in Australia, as in England, judicial review has been justified by the rule of law.⁷

Further, rule of law values and ideas remain important in gaining a proper understanding of the present jurisprudential setting of natural justice in Australia. This is so for two reasons. First, the location of the principles of natural justice within the rule of law provides a sure footing for its characterisation as a fundamental principle of the common law. The importance of this classification comes from a related idea *viz.*, the principle of legality. It is through this principle – a presumption against interference with fundamental rights and principles absent clear statutory language – that the courts have protected fundamental rights and principles; and it is through the application of this principle that the courts have protected the principles of procedural fairness from erosion by statute. And, secondly, rule of law values and ideals bear strong similarities to the values and ideals that underlie the principles of natural justice, as identified in Chapter II, particularly legality and fairness. And it is those values, as explained further in Chapters 6 and 7, that have informed the ingrained reluctance in the Federal Court to construe the provisions in the *Migration Act 1958* (Cth), relating to merits reviews conducted by the Refugee Review Tribunal in claims for protection visas, as conferring a form of statutory procedural fairness of an inferior kind to the common law.

the laws enacted by Parliament, together with the principles of common law that subsist with those laws, are enforced by a judiciary that is independent of the legislature and the executive”.

⁶ However, views have been expressed from time to time by judges that would support this view. For example, in *The Queen v MacKellar; Ex parte Ratu* (1977) 137 CLR 461, 483 Murphy J said, of natural justice, that it was “*an aspect of due process, traceable in English law at least back to Magna Carta*”.

⁷ In Australia the basis for judicial review has been the rule of law: see *Church of Scientology v Woodward* (1982) 154 CLR 25, 70; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492. In the Commonwealth sphere there is the added Constitutional element under section 75(v) of *The Constitution*. That section provides “*an entrenched minimum provision of judicial review*” and provides a means of “*assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them*”: *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

2. *The rule of law: its early form*

The rule of law is not itself a ‘law’,⁸ but a concept or statement of constitutional principle.⁹ In its early form, derived from the mediaeval “*theory that law of some kind – the law of God or man – rules the world*”,¹⁰ the rule or supremacy of law meant simply: that the law bound all persons, be they rulers or subjects, and that justice according to law was due to all.¹¹ Used in this sense, the ideal has been pithily expressed as “*government by law and not by men*”.¹²

There is no universally accepted definition of the rule of law; rather, it has been said to be a “*contestable concept*”,¹³ to have “*chameleon like*” qualities,¹⁴ and to be a protean conception that has an “*elusive and multiple nature*”.¹⁵ The different theories espoused, and the different meanings of it, have been subject to ongoing and minute analysis.¹⁶ To some, the rule of law is descriptive of, and confined to, the formal notions of law; but to others, the rule of law, whilst encompassing these formal notions, contains a substantive dimension: rights or norms are said to be derived via this alternate construct.

⁸ Nor is it a direct source of legal rights actionable at the suit of a citizen against the State: *Northern Territory v Mengel* (1994) 185 CLR 307. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 McHugh and Gummow JJ said that the “*rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution*”.

⁹ Geoffrey Walker, *The Rule of Law*, (1st ed 1988) 3.

¹⁰ Sir William Holdsworth, *A History of English Law Volume X* (2nd ed 1966) 647.

¹¹ Sir William Holdsworth, *ibid.*, 647. In William Dunham, ‘Regal Power and the Rule of Law: A Tudor Paradox’ (1964) 3 *Journal of British Studies* 24, 56 it was said that a more sophisticated version of the rule of law emerged in England in Tudor times (1485-1603 AD) that made the concept “*an antonym for arbitrary discretion in governance and a synonym for due process*”.

¹² Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 196. Similar phrases have been employed. For example, Greek philosopher Aristotle said: “*it is more proper that law should govern than any one of the citizens*”: see William Ellis, *A Treatise on Government. Translated from the Greek of Aristotle* (1778), 172; see also the decision of the Supreme Court of the United States of America in *Marbury v Madison* (1803) 5 US 87, 103 where Marshall CJ said: “*The government of the United States has been emphatically termed a government of laws, and not of men*”; A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1st ed, 1885) Lecture V, 172, 177; and John Toohey, ‘A Government of Laws, and Not of Men’ (1993) 4 *Public Law Review* 195.

¹³ Paul Craig, ‘Legislative Intent and Legislative Supremacy: A reply to Professor Allan’ (2004) 24 *Oxford Journal of Legal Studies* 585, 586.

¹⁴ Keith Mason, ‘The Rule of Law’, in P D Finn (ed), *Essays on Law and Government* (1995) 114.

¹⁵ *R (Cart) v Upper Tribunal* [2011] QB 120, 137 (Laws LJ, Owen J agreeing).

¹⁶ In *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 415 French J described the academic debate as “*ongoing and open-ended*”.

In 1885 British constitutional theorist Albert Venn Dicey gave the rule of law its most influential and classical description.¹⁷ According to Dicey democracy and the political institutions of England rested on two related “*features*”: the undisputed supremacy – and omnipotence – of Parliament and the supremacy or rule of law.¹⁸

Dicey argued that the rule of law consisted of three distinct, though kindred, concepts.¹⁹ The first was that no person was punishable “*or can be lawfully made to suffer in body or goods except for distinct breach of law established in the ordinary legal manner before the ordinary courts of the land*”.²⁰ In this respect, Dicey’s first concept was to be contrasted to the exercise of uncontrolled arbitrary power. The second was that “*no man is above the law*” – that is, there was “*universal subjection of all classes to one law administered by the ordinary courts*”.²¹ This was the idea of legal equality. The third was that the law of the Constitution was not the source “*but the consequence of the rights of individuals, as defined and enforced by the Courts*”.²² It is to be expected – this was, after all, constitutional theory – that there was no explicit reference to the principles of natural justice within Dicey’s kindred concepts. Nevertheless, as we next see, later explications of the rule of law, sometimes building on what Dicey had said, see natural justice as an aspect of the rule of law.

¹⁷ A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1st ed, 1885) Lecture V, 176-216. In H W Arndt, ‘The Origins of Dicey’s Concept of the Rule of Law’ (1957) 31 *Australian Law Journal* 117 it is suggested that the roots of the theory, as expressed by A V Dicey, are to be found in the text written by W E Hearn, *The Government of England* (1st ed 1867) - where it was said (p.2) that “*every power and every privilege, to whomsoever it belongs, is given by the law, is exercised in conformity with the law and by the law must be extended or extinguished*”.

¹⁸ A V Dicey, *The Law of the Constitution* (9th ed, 1945) 183-184. Since that time, Dicey’s theory has been subject to examination (and criticism) “*from every conceivable perspective*”: Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *Public Law* 467, 467.

¹⁹ A V Dicey, *ibid.* See Chapter IV: ‘The Rule of Law: Its Nature and General Applications’, pp 183-205.

²⁰ *Ibid* 188.

²¹ *Ibid* 193.

²² *Ibid* 203.

3. *The rule of law: a contemporary evaluation*

The contemporary treatment of the rule of law is different to the Diceyan theory of it, but features of Dicey's theory subsist: it has been suggested to remain "*a compelling idea, although variously interpreted*".²³ Professor Craig has suggested that the post Diceyan theories can be divided broadly in two:²⁴ first, a formal theory of the rule of law; the second a substantive theory of the rule of law.

By the formal theory, the rule of law is descriptive of the formal notions of law and legality: whether the law has been properly enacted, whether the law clearly describes the norm that must be followed by the individual and whether it satisfied the temporal element of the law by being prospective.²⁵ Underpinning this concept is the necessity to maintain a division between legal questions and political theory – what the law should be – and the need to ensure that to maintain the utility of the rule of law, it should not be subjected and infused with an array of political, social,

²³ Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (6th ed 2007) 10. In Australia, Dicey's theory of the rule of law has been referred to: see for example *Green v The Queen* (2011) 244 CLR 462, 472 (French CJ, Crennan and Kiefel JJ), in the context of the 'parity principle' in criminal sentencing and *Leeth v The Commonwealth* (1992) 174 CLR 455, in the context of the principle of 'legal equality'. In England, there remains some criticism of, and resistance to, the idea that Parliamentary sovereignty was absolute: see *R (Jackson) v Attorney General* [2006] 1 AC 262. Lord Steyn ([2006] 1 AC 262, 302) suggested that this aspect of Dicey's theory "*can now be seen to be out of place*", although it was the general principle of English constitutional law. See also Lord Hope ([2006] 1 AC 262, 303-4); Baroness Hale ([2006] 1 AC 262, 318).

²⁴ This is the categorisation given to the competing theories by Professor Craig: see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467. See also Paul Craig, 'Fundamental Principles of Administrative Law' in David Feldman (ed) *English Public Law* (2004) Chapter 13. In William Wade and Christopher Forsyth, *Administrative Law* (10th ed 2009) 19, this dichotomy of the differing theories of the rule of law was described as a "*balanced analysis*". The categorisation is one of convenience, but also serves to highlight the divide between views advanced. Other descriptions have been used. Thus, Ronald Dworkin has called the formal conception, 'rule book conception' and the substantive conception, 'rights conception': see Ronald Dworkin, *A Matter of Principle*, (1985) 11 ff.

²⁵ This is the view of the rule of law propounded by Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195. See also, Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467 where Professor Craig also argues that Dicey's rule of law theory was a formal conception of the rule of law. In William Wade and Christopher Forsyth, *Administrative Law* (10th ed 2009) 17-20 the analysis and explanation of the rule of law is very much along formal lines perhaps reinforced by the suggestion (at p.19) that in addition to what they describe as central principles of the rule of law – a mirror of Professor Craig's formal conception – "*the rule of law has a large periphery of controversial aspects*". Possibly serving to emphasise that the authors support the rule of law having a confined formal construct, the authors argue (at p.20) that as a "*legal principle its value is greatest if it is not stretched beyond the core based doctrine centred upon legality, regularity and fairness, always with emphasis on rejection of arbitrary power*".

economic and other ideals: the purpose of the rule of law is not to “*propound a complete social philosophy*”.²⁶

It has been suggested that what has been termed the formal conception of the rule of law is better explained by the idea of ‘legality’: that legality is the primary meaning of the rule of law.²⁷ In this context, ‘legality’ is the “*antithesis of arbitrariness*”.²⁸ Specifically, in addition to being an antonym for arbitrariness, the principal idea conveyed by the rule of law is the notion that when governmental acts affect the legal rights and liberties of an individual, they are required – in order to be valid – to have strict obedience to the law in their enactment and their application – failing which, if challenged in court, invalidity will result.²⁹ In more succinct terms, it has said that the principle of legality is that all “*public power must be based on law. Governments and citizens are subject to the law*”.³⁰ Legality, in this sense, means under law, and obedience to it.

By the substantive theory, the rule of law embraces the formal theory, but with a substantive and positive dimension: identifiable values and norms are said to be derived from the rule of law.³¹ Thus, by this substantive theory of the rule of law, the rule of law is a principle of “*institutional morality inherent in any constitutional*

²⁶ Joseph Raz, *ibid.*, at 195. Geoffrey Walker, *The Rule of Law* (1st ed 1988) 5, has advanced similar arguments suggesting that the content of any ‘substantive’ conception must be kept to the minimum necessary to avoid the rule of law becoming a “*hollow mockery*”.

²⁷ William Wade and Christopher Forsyth, *Administrative Law* (10th ed 2009) 17. Jeffrey Jowell and Dawn Oliver, *The Changing Constitution*, (6th ed 2007) 10 said that legality means obedience to the law: the law must be followed and, when directed to public officials exercising statutory power, it requires that those persons act within power.

²⁸ *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307, 346 (Lord Bingham).

²⁹ William Wade and Christopher Forsyth, *Administrative Law* (10th ed 2009) 17; Jeffrey Jowell and Dawn Oliver, *The Changing Constitution*, (6th ed 2007) 10. See also Lord Irvine, ‘The Spirit of Magna Carta continues to resonate in modern law’ (2003) 119 *Law Quarterly Review* 227, 243 where Lord Irvine stated that the “*doctrine of legality mandates that government action cannot proceed arbitrarily and without lawful authority*”.

³⁰ The Hon A M Gleeson, ‘Legality – Spirit and Principle’, Second Magna Carta Lecture delivered 20 November 2003, 2 <<http://www.hcourt.gov.au/publications/speeches>> at 22 July 2013.

³¹ There are a number of theorists who advocate the substantive conception or the rights conception including Jeffrey Jowell (see, for example: ‘Beyond the Rule of Law: Towards Constitutional Judicial review’, (2000) *Public Law* 671; ‘The Rule of Law’s Long Arm: Uncommunicated Decisions’ (2004) *Public Law* 246; *The Changing Constitution* (6th ed 2007) Chapter 1); T R S Allan, *Constitutional Justice – A Liberal Theory of the Rule of Law* (2001) 16-17, 77 and generally Chapters 3 and 5; Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 75 where Lord Bingham included, within the rule of law the requirement that the “*law must afford adequate protection of*

democracy” and is made up by a series of values – said to include the values of “*legality, certainty, consistency, accountability, efficiency, due process and access to justice*”.³² The theory advocates that by the rule of law, all power in democratic society must be exercised in a manner that is “*constrained*” by these underlying values.³³

In Australia, the rule of law is an assumption upon which *The Constitution* has been framed.³⁴ Yet for a concept so central to our Constitutional and democratic setting, there has been, perhaps surprisingly, little judicial attention to its precise meaning. A number of explanations – occasionally contradictory – for this have been, or can be, advanced: the principle is “*too clear and well understood*” to require explanation;³⁵ or, in the specific context, the basic tenet of the concept is unarguable; or because it manifests itself “*more as an absence than a presence*” it is not easy to define.³⁶ There is undoubtedly a degree of truth in each of these reasons. There are, it is suggested, more satisfying explanations: the first, as has been pointed out earlier, is that there is no settled meaning of the concept except at its core – that is, to the extent the concept has a settled content, it extends only to simple or formal conceptions of the rule of law and not to substantive ones; and, secondly, in the absence of necessity, courts “*do not write theses on abstract constitutional concepts, even though they frequently employ them*”.³⁷

Although the Australian courts have eschewed defining the concept of ‘the rule of law’ or explicitly adopting a theory of it,³⁸ the cases do shed light on what falls within it. Thus, it has been said that “*whatever else it involves, ‘the rule of law’ posits*

fundamental human rights” albeit acknowledging that the inclusion of this would not be “*universally embraced*”; Lord Woolf et al, *De Smith’s Judicial Review* (6th ed 2007) 11.

³² Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (6th ed 2007) 10-13.

³³ *Ibid* at 24.

³⁴ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

³⁵ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67.

³⁶ Geoffrey Walker, *The Rule of Law* (1st ed 1988) 3.

³⁷ Paul Craig, ‘Fundamental Principles of Administrative Law’ in David Feldman (ed) *English Public Law* (2004) 698.

³⁸ There have been judgments that have made reference, in general terms, to the work of A V Dicey: for example, *Leeth v The Commonwealth* (1992) 174 CLR 455, 485 (Deane and Toohey JJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27-

legality as an essential presupposition for political liberty and the involvement of electors in the enactment of laws;³⁹ that it embraces equal justice or “*equality before the law*” in the context of sentencing in connection with offences against the criminal law;⁴⁰ that it ensures that persons affected by administrative decisions “*should have access to the courts to challenge those decisions*” thereby justifying a strict construction of privative clauses;⁴¹ that the “*maintenance of the rule of law, depends upon the providing of professional legal services so that citizens may know their rights and obligations, and have the capacity to invoke judicial power*”;⁴² that it “*reflects values concerned in general terms with abuse of power by the executive and legislative branches of government*”;⁴³ that it supports the “*subjection of all persons to the law*” and the “*equality of all persons under the law and before the courts*”;⁴⁴ and that the provision of a “*fair and unprejudiced trial*” is a “*touchstone of the existence of the rule of law*”.⁴⁵

These statements reflect interpretations of the rule of law that are purely formal, and in their context focus upon uncontroversial inclusions in the rule of law such as legality, equality and fairness.

4. *The rule of law and natural justice*

Within the formal/substantive conceptions of the rule of law, earlier described, there is a significant intersection of common principle. In the first place, as has been

28 (Brennan, Deane and Dawson JJ); *Green v The Queen* (2011) 244 CLR 462, 472 (French CJ, Crennan and Kiefel JJ).

³⁹ *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 47 (Gummow and Bell JJ).

⁴⁰ *Green v The Queen* (2011) 244 CLR 462, 472 (French CJ, Crennan and Kiefel JJ), citing A V Dicey, *Introduction to the Study of the Law of the Constitution* (7th ed 1908) 198, in the context of consistency in the punishment of offences against the criminal law reflected what is described as the ‘parity principle’. See also *Lowe v The Queen* (1984) 154 CLR 606; *Wong v The Queen* (2001) 207 CLR 584 on the parity principle having its origins in rule of law ideals.

⁴¹ *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597, 614 (Gaudron and Gummow JJ); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

⁴² In *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J) it was held that there was no basis in the Constitution for implied freedom of communication about legal rights.

⁴³ *Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1, 23 (McHugh and Gummow JJ).

⁴⁴ *Leeth v The Commonwealth* (1992) 174 CLR 455, 485 (Deane and Toohey JJ).

⁴⁵ *Hinch v The Attorney General* (1987) 164 CLR 15, 58 (Deane J).

mentioned, the formal conception of the rule of law subsists within the substantive conception of the rule of law.

But more importantly, beneath the formal conception reside a body of principles that are derived from the basic statements and ideas of the rule of law and its application in democratic society. Joseph Raz, an advocate of a formal conception of the rule of law, suggested that there were eight principles that could be so drawn – one of which was that the *“principles of natural justice must be observed”*.⁴⁶ Raz’s explication of the rule of law including – as a ‘principle’ – the principles of natural justice was founded on natural justice being *“obviously essential for the correct application of the rule of law and thus... to its ability to guide action”*.⁴⁷

The substantive conception of the rule of law likewise embraces natural justice as an underlying value,⁴⁸ although different explanations have been advanced about why this is so. One explanation justifies natural justice as a ‘value’ directly from Dicey’s theory and his *“features of the rule of law...that no person should be condemned unheard”*.⁴⁹ On this explanation natural justice is *“associated with his notion of legality”*.⁵⁰

An alternate justification is based on the rule of law being interpreted as an ideal of constitutionalism viz., the ideal assumed by the rule of law is each citizen’s equal dignity, to which equality and due process are important constituents. On this account, the rule of law rests on the notion that the law is a co-operative endeavour between citizen and state, and that natural justice *“reflects the sense in which*

⁴⁶ Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 201. The others suggested by Raz (pp.199-201) were that (1) all laws *“should be prospective, open and clear”*; (2) laws *“should be relatively stable”*; (3) the making of laws *“should be guided by open, stable, clear and general rules”*; (4) the *“independence of the judiciary must be guaranteed”*; (5) *“principles of natural justice must be observed”*; (6) the Courts should have review powers *“over the implementation of the other principles”*; (7) The Courts *“should be easily accessible”*; (8) the discretion of *“the crime preventing agencies should not be allowed to pervert the law”*.

⁴⁷ Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 201.

⁴⁸ Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (6th ed 2007) 12; see also Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 80 where Lord Bingham described the necessity of fair adjudicative procedures as forming his seventh sub-rule that he derived from the rule of law; Geoffrey Walker, *The Rule of Law* (1st ed 1988) 37-38; T R S Allan, *Constitutional Justice – A Liberal Theory of the Rule of Law* (2001) 16-17, 77 and generally Chapters 3 and 5.

⁴⁹ Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (6th ed 2007) 12.

⁵⁰ Ibid.

government under the rule of law entails a moral dialogue between citizen and state".⁵¹

The location of the principles of natural justice within ideas embraced by the rule of law, and the rule of law itself, is not merely of academic or theoretical interest. The acceptance of the foundation of natural justice in this way has important consequences. This is because, in addition to its close association with natural law, and its otherwise impressive common law ancestry, it provides an alternate, or further, jurisprudential basis for natural justice to be explained as a fundamental principle or, as it was expressed in *Commissioner of Police v Tanos*, as a "*deep rooted principle of the law*".⁵² The description of natural justice in this way, as we see in the next section of this Chapter, engages the related rule of law principle: the principle of legality.

To the extent that the courts have had occasion to address the relationship between the rule of law and the principles of natural justice, the principles of natural justice have also been positioned within, and were thus justified by, the rule of law. In England, this has been expressly stated to be so. In *R (Anufrijeva) v Home Secretary*,⁵³ Lord Steyn described 'elementary fairness', in that case the right of an individual to have a decision to cease payments of social security communicated to her before the cessation of such payments, as "*reinforced*" by the rule of law. More specifically, Lord Steyn considered that the rule of law "*requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected*".⁵⁴ Later cases supported this approach.⁵⁵

⁵¹ T R S Allan, *Constitutional Justice – A Liberal Theory of the Rule of Law* (2001) 77.

⁵² (1958) 98 CLR 383, 395-6 (Dixon CJ and Webb J). It was similarly described in *Saeed v Minister for Immigration* (2010) 241 CLR 252, 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). There, after making reference to the decision in *Coco v The Queen* – a case about fundamental rights (entry on private property to install a listening device) and the presumption against a statutory intent to interfere with them – their Honours remarked that the "*same may be said as to the displacement of fundamental principles of the common law*".

⁵³ (2003) 3 WLR 252, 266 (Lords Hoffmann, Millett and Scott agreeing).

⁵⁴ *Ibid.* In *R v Home Secretary; ex parte Pierson* [1998] AC 539, 591, Lord Steyn had earlier stated that the rule of law "*enforces minimum standards of fairness, both substantive and procedural*".

⁵⁵ Thus in *R (Roberts) v Parole Board* [2005] 2 AC 738, 788 Lord Steyn considered that the fundamental right to a 'fair hearing' would be emptied of "*all meaningful content*" if a particular procedure was adopted as part of a hearing inquiring into whether a prisoner should be released

In Australia, although the relationship between the rule of law and natural justice has generated less judicial interest than in England, to the extent it has, the jurisprudence indirectly supports the same approach. The support derives, in the Commonwealth sphere, not only because the rule of law is an assumption upon which the Constitution has been framed,⁵⁶ but more specifically from section 75(v) of the *Constitution*. That provision, which provides a constitutional “*entrenched minimum provision of judicial review*” where constitutional writs are sought against officers of the Commonwealth, ensures that they “*obey the law and neither exceed nor neglect any jurisdiction which the law confers upon them*”.⁵⁷

This explanation very much fits with the rule of law idea of ‘legality’, as earlier explained. The recognition of this fact can be seen in the judgment of French J in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*.⁵⁸ In that case, French J said that, consistent with the “*essential elements of the rule of law...official power must be exercised as authorised by the Parliament and in accordance with the subject matter and the conditions both substantive and procedural imposed by the Parliament*”.⁵⁹ The reference to conditions ‘imposed’ by Parliament, including ‘procedural’ conditions, should be taken to include the principles of natural justice: subject to their exclusion in the requisite way, the principles of natural justice condition the valid exercise of power and the failure to fulfil the condition renders its exercise invalid.⁶⁰

on licence. In these circumstances, Lord Steyn considered the procedures, in seeking to override this fundamental right, were “*contrary to the rule of law*”. See also *Home Secretary v MB* [2008] 1 AC 478.

⁵⁶ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

⁵⁷ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 514. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 McHugh and Gummow JJ said that the “*rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government*”.

⁵⁸ (2002) 123 FCR 298.

⁵⁹ *Ibid* at 416. See also the similar dicta of Lord Steyn in *Pierson*, n.55, above.

⁶⁰ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259.

B. *The principle of legality*

1. *Introduction*

We have earlier seen that the idea of legality, in the sense of adherence and obedience to law, sits at the centre of the concept of the rule of law.⁶¹ In this setting, it was used to describe the formal notions of the rule of law and also to express a legal conclusion: the antithesis of arbitrary power. It is apparent, however, that the phrase ‘the principle of legality’ has been used more expansively in recent times, and in at least three different ways. It is important that these differences be identified, and the subject matter of this part of the Chapter made clear.

On occasions the use of the phrase – ‘the principle of legality’ – has been in the context of a restatement, and application, of an aspect of the rule of law. Thus in *Sabapathee v The State*,⁶² the phrase was used by the Privy Council to explain the requirement that an offence against the criminal law be defined with clarity to “enable a person to judge whether his acts or omissions will fall within it”.⁶³ The use in this way of the phrase can be seen to be an orthodox application of a principle of the rule of law *viz.*, the necessity of laws – particularly criminal laws – to be “*certain and predictable*”.⁶⁴ On other occasions the phrase has been used interchangeably with the rule of law. Thus, as we have earlier seen, the phrase was used to describe essential elements of the rule of law *viz.*, all “*public power must be based on law. Governments and citizens are subject to the law. This is the essence of the principle of legality*”.⁶⁵ Yet on other occasions the use of the phrase has been confined to a statement of a principle of statutory construction – described as the principle of legality. Thus, in *Saeed v Minister for Immigration and Citizenship*,⁶⁶ it was said that

⁶¹ See A V Dicey, *Law of the Constitution*, (10th ed 1959) 414 where he said that the “*supremacy of the law of the land both calls forth the exertion of the Parliamentary sovereignty, and leads to it being exercised in a spirit of legality*”. In Lord Irvine, ‘The Spirit of Magna Carta continues to resonate in modern law’ (2003) 119 *Law Quarterly Review* 227, 243 Lord Irvine described legality as a “*fundamental common law doctrine*”.

⁶² [1999] 1 WLR 1836.

⁶³ *Ibid* at 1842 (Lord Hope, delivering the judgment of the Privy Council).

⁶⁴ Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (6th ed 2007) 10; Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 198-200.

⁶⁵ The Hon A M Gleeson, ‘Legality – Spirit and Principle’, Second Magna Carta Lecture delivered 20 November 2003, 2 <<http://www.hcourt.gov.au/publications/speeches>> at 22 July 2013.

⁶⁶ (2010) 241 CLR 252.

this principle of statutory construction was a presumption that it was “*highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness*”.⁶⁷

It is this third dimension to ‘legality’ – the principle of statutory construction – that is the subject of this part of the Chapter. By this principle of construction, there is a presumption against a court concluding that the language contained in a statutory instrument evinces a statutory intent to curtail fundamental rights, freedoms or principles absent clear statutory language or expression.⁶⁸ It is thus a principle of restraint,⁶⁹ operating as a gatekeeper of the status quo unless the statute, by express words or necessary implication,⁷⁰ makes the contrary position clear.⁷¹

2. *Legality: a clear statement principle*⁷²

The principle of legality has long been recognised as a principle of statutory construction,⁷³ but its description as the ‘principle of legality’ is of more recent

⁶⁷ Ibid at 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). There is, even in this judgment, some confusion in terminology. Their Honours stated, immediately after the passage quoted above, that this presumption “*derived from the principle of legality*”. In fact, it is the principle of legality.

⁶⁸ A concise statement of the principle was stated by Brennan J in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 thus: “*Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation*”.

⁶⁹ In *International Finance Trust Co Limited v NSW Crime Commission* (2009) 240 CLR 319, 349, French CJ described the principle of legality as a “*conservative principle*”. In John Doyle, ‘Common Law Rights and Democratic Rights’ in P D Finn (ed), *Essays on Law and Government* (1995) 144, 158 it was not described as the principle of legality, but as a rule of construction “*that operates as a restraint on government power*”.

⁷⁰ *Potter v Minahan* (1908) 7 CLR 277; *Coco v The Queen* (1994) 179 CLR 427.

⁷¹ It has been described, academically, in slightly different terms. Thus, in David Dyzenhaus, Murray Hunt and Michael Taggart, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1 *Oxford University Commonwealth Law Journal* 5, 6 the principle was stated to be that “*broadly expressed discretions are subject to the fundamental values, including values expressive of human rights, of the common law*”.

⁷² This heading was taken from J J Spigelman, ‘Principle of legality and the clear statement principle’ (2005) 79 *Australian Law Journal* 769.

⁷³ The principle of construction has been suggested to be too well known “*to require authority to support it*”: see John Doyle, ‘Common Law Rights and Democratic Rights’ in P D Finn (ed), *Essays on Law and Government* (1995) 144, 158.

origin.⁷⁴ Although the underlying principle had been applied in the courts since (at least) 1560,⁷⁵ the first occasion – in either the United Kingdom or Australia – when this phrase was used to describe this principle was in *R v Secretary of State to the Home Department; Ex parte Pierson*.⁷⁶ In that case, the principle of legality was explained by Lord Steyn by reference to the third edition of *Cross, Statutory Interpretation*:⁷⁷

Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well recognised rules ... Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament.

⁷⁴ The use of the phrase ‘principle of legality’ has been subjected to criticism. In F A R Bennion, *Bennion on Statutory Interpretation* (5th ed 2008) 823 it was said that the “*true principle here is not ‘legality’ but that the courts should be slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out. There is nothing new in this: it is a well established interpretative principle*”. In Philip Sales, ‘A comparison of the principle of legality and section 3 of the Human Rights Act 1998’ (2009) 125 *Law Quarterly Review* 598, 600 a similar point was made. It was also suggested that the principle be renamed as the “*principle of respect for constitutional rights and principles or the principle of respect for the constitutional order – less snappy but perhaps more accurate*” (at p. 607 and fn 45). In *Momcilovic v The Queen* (2011) 245 CLR 1, 177, Heydon J remarked that the principle “*might have been better named, for it is hoped that everything a court does rests on legality*”.

⁷⁵ In *R (Morgan Grenfell & Co Limited) v Special Commissioner of Income Tax* [2003] 1 AC 563, 607 Lord Hoffman traced the principle of legality “*at least to Stradling v Morgan (1560) 1 Pl 199*”. In Australia, the decision in *Stradling v Morgan* was applied by O’Connor J in *Bowtell v Goldsbrough Mort & Co Limited* (1906) 3 CLR 444, 457.

⁷⁶ [1998] AC 539, 587. There Lord Steyn described the principle in these terms having taken the phrase from *Halsbury’s Laws of England*, 4th ed. reissue, vol. 8(2) (1996), page 13, paragraph 6. This principle is firmly established in England: see *R (Jackson) v Attorney General* [2006] 1 AC 262, 318 (Baroness Hale of Richmond) stated that the “*courts will...decline to hold that Parliament had interfered with fundamental rights unless it has made its intentions crystal clear*”. See also *Wheeler v Leicester City Council* [1985] 1 AC 1054, 1065 (Browne-Wilkinson LJ); *R v Secretary of State for the Home Department; Ex parte Stafford* [1999] 2 AC 38, 48 (Lord Steyn; Lords Goff, Browne-Wilkinson, Slynn and Clyde agreeing); *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130 (Lord Steyn; Lord Browne-Wilkinson agreeing), 131 (Lord Hoffman); *R (Morgan Grenfell & Co Limited) v Special Commissioner of Income Tax* [2003] 1 AC 563; *R (Roberts) v Parole Board* [2005] 2 AC 738; *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307; *Ahmed v Her Majesty’s Treasury* [2010] 2 AC 534.

⁷⁷ John Bell and George Engle, *Cross, Statutory Interpretation* (3rd ed 1995) 165, cited approvingly in *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587-588 (Lord Steyn).

In Australia, the judicial foundation for the principle was the decision in *Potter v Minahan*.⁷⁸ In that case O'Connor J restated the proposition from *Maxwell on Statutes*, (1905) 4th ed., p. 121 thus:⁷⁹

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

These explanations of the working relationship between Parliament and the courts describe the principle of legality; and the hypothesis of it has been accepted to be an aspect of the rule of law.⁸⁰ The statement of principle, firmly established in Australian jurisprudence,⁸¹ provides both the rationale and a justification for the principle: the improbability of Parliament seeking to abrogate fundamental rights and principles without using statutory language that made the position unambiguously clear.⁸² It is only when the language of the statute bears this character that the court can – and will – conclude that “*the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic*

⁷⁸ (1908) 7 CLR 277. The first edition of this text by Benjamin Maxwell, then called *On the Interpretation of Statutes* (London, 1875) 66 contained the same quotation that was referred to by O'Connor J. The footnote to the quote provides the citation (but not the name) for the decision of Marshall CJ, delivering the opinion of the United States Supreme Court, in *United States v Fisher* (1805) 2 Cranch 360, 390. There Marshall CJ said: “*Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects*”.

⁷⁹ (1908) 7 CLR 277, 304.

⁸⁰ *Electrolux Home Products Pty Limited v Australian Workers Union* (2004) 221 CLR 309. There Gleeson CJ adopted the phrase ‘the principle of legality’ and said that the principle was not “*merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law*” (221 CLR 309, 329).

⁸¹ In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 it was stated that the principle had been “*strictly applied*” by the High Court since *Re Bolton; Ex parte Beane* (1987) 162 CLR 514.

⁸² *Bropho v Western Australia* (1990) 171 CLR 1, 18 (The Court). It has been argued that the premise of the rule now rests not on this presumption, but upon a normative refinement whereby the Courts should prevent the derogation of rights by the legislature: see Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372.

rights, freedoms or immunities but has also determined upon abrogation or curtailment of them".⁸³

These justifications suggest some, but not all, of the rule of law values that inform the principle of legality. The focus on the importance of the legislature, in seeking to curtail fundamental rights, principles etc, has as its starting point the need for the language – the intent of Parliament – to be expressed in irresistibly clear language identifies one value: the rule of law value that the enacted law should be "*open and clear*".⁸⁴ Lord Hoffman in *Simms* put the matter more directly *viz.*, that fundamental "*rights cannot be overridden by general or ambiguous words*".⁸⁵ A second rule of law value is also suggested: the avoidance of "*abuse of power by the executive and legislative branches of government*".⁸⁶ This value embraces the idea of limiting discretionary power, to avoid its arbitrary use, and ensuring that grants of statutory power are exercised "*in accordance with the subject matter and the conditions both substantive and procedural imposed by the Parliament*".⁸⁷

3. *Fundamental rights, freedoms and principles*

There are, in the passages extracted from *Pierson* and *Potter v Minahan*, differences in language that define the scope of the principle. Thus, the reference in *Pierson* was for the presumption of the principle of legality to apply in connection with longstanding "*principles of constitutional and administrative law*". The reference in *Potter v Minahan* was for the presumption of the principle of legality to apply, possibly more expansively, in connection with "*fundamental principles, infringe rights, or depart from the general system of law*".

⁸³ *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

⁸⁴ See Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195; *Sabapathie v The State* [1999] 1 WLR 1836.

⁸⁵ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

⁸⁶ *Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1, 23 (McHugh and Gummow JJ).

⁸⁷ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 416 (French J).

Notwithstanding the difference in the language used to describe the principle of legality,⁸⁸ the ambit of the presumption is clear enough: where rights or principles that are recognised at law as fundamental are statutorily curtailed, the presumption against such curtailment is engaged. It thus has no, or minimal, application in instances where lesser forms of common law rights and principles – not considered ‘fundamental’ – are sought to be restricted, or curtailed.⁸⁹ The “*contextual backcloth*” to the operation of this principle is thus the classification of the fundamental right, freedom or principle infringed.⁹⁰

In England the principle has been refined so that it applies when there is a possible infringement of a ‘constitutional right’, albeit that the cases use that phrase interchangeably with ‘fundamental right’ or ‘basic right’.⁹¹ Although the courts have declined to provide an exhaustive list of ‘constitutional rights’, because to do so would “*bound to be controversial*”,⁹² the cases have demonstrated that the kinds of rights that are ‘constitutional’ – and thus protected by the principle of legality are considerable.⁹³ They include the right to procedural fairness – or as it is more

⁸⁸ In *Potter v Minahan* the principle of legality was expressed to apply in connection with “*fundamental principles, infringe rights, or depart from the general system of law*”. By contrast, in *Coco v The Queen* (1994) 179 CLR 428, 437, Mason CJ, Brennan, Gaudron and McHugh JJ described the principle as covering “*fundamental rights freedoms and immunities*”; in *S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492, Gleeson CJ described the principle as covering “*fundamental rights or freedoms*”; in *Harrison v Melham* (2008) 72 NSWLR 380, 382, Spigelman CJ described the principle as covering “*fundamental rights, immunities and freedoms*”.

⁸⁹ In *Malika Holdings Pty Limited v Stretton* (2001) 204 CLR 290, 298 McHugh J said that “*care needs to be taken in declaring a principle to be fundamental. Furthermore, infringement of rights and departures from the general system of law are in a different category from fundamental principles. Some rights may be corollaries of fundamental principles. See also Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269, 284 (McHugh J); *Electrolux Home Products Pty Limited v The Australian Workers’ Union & Ors* (2004) 221 CLR 309, 328-329 (Gleeson CJ); *R v Janceski* (2005) 64 NSWLR 10, 24 (Spigelman CJ); *Harrison v Melham* (2008) 72 NSWLR 380, 382-3 (Spigelman CJ), 409 (Basten JA); *Momcilovic v R* (2011) 245 CLR 1, 47 (French CJ).

⁹⁰ *R v Home Secretary; Ex parte Stafford* [1999] 2 AC 38, 49 (Lord Steyn).

⁹¹ See *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 408 (Lord Bingham). Lord Rodger ([2006] 2 AC 395, 419) remarked that fluctuations “*in terminology are only to be expected since the operation of the canon of construction*” depends upon matters of substance: the right is “*perceived to be so important that Parliament must squarely confront what it is doing when it interferes with it and must accept the political cost*”.

⁹² *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 423 (Lord Walker).

⁹³ These ‘constitutional rights’ have been listed in Auburn et al, *Judicial Review – Principles and Procedure*, (2013) 289-295 and they include the right to life; the right of access to justice, the right not to self-incriminate and like matters.

commonly expressed in English public law jurisprudence in this specific context – the right to a fair hearing.⁹⁴

Since *Potter v Minahan*, the principle has been restated and applied by the High Court;⁹⁵ and in a range of situations,⁹⁶ including restricting access to the courts;⁹⁷ where property was compulsorily acquired without compensation;⁹⁸ where the right of a person in possession of premises to exclude others was curtailed;⁹⁹ and, in cases where rights were affected, by orders of a court, without an opportunity to be heard before the making of an order.¹⁰⁰

In Australia, specifically in the context of the procedural fairness – where this principle has been engaged – there have been judicial decisions that have described procedural fairness not as a right, but as a principle: in *Commissioner of Police v Tanos*¹⁰¹ it was there described by Dixon CJ and Webb J as a “*deep rooted principle of the law*”,¹⁰² and it was similarly described by the plurality in *Saeed v Minister for Immigration*.¹⁰³

In *Saeed*, after making reference to the decision in *Coco v The Queen*,¹⁰⁴ a case about fundamental rights (entry on private property to install a listening device) and the presumption against a statutory intent to interfere with them, their Honours

⁹⁴ See, for example, *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787; *R (Anufrijeva) v Secretary of State for the Home Department* [2003] 3 WLR 252; *R (Roberts) v Parole Board* [2005] 2 AC 738; *Secretary of State for the Home Department v MB* [2008] 1 AC 440.

⁹⁵ *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396; *Annetts v McCann* (1990) 170 CLR 596, 598; *Bropho v Western Australia* (1990) 171 CLR 1, 18; *Coco v The Queen* (1994) 179 CLR 427, 437; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492; *Al-Kateb v Godwin* (2004) 219 CLR 562, 577; *Electrolux Home Products Pty Limited v The Australian Workers' Union & Ors* (2004) 221 CLR 309, 329; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; *X7 v Australian Crime Commission* (2013) 248 CLR 92.

⁹⁶ See further JJ Spigelman, ‘Principle of legality and the clear statement principle’ (2005) 79 *Australian Law Journal* 769, 775, where the cases involving the application of the principle have been collected.

⁹⁷ *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 588.

⁹⁸ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

⁹⁹ *Durham Holdings Pty Limited v State of NSW* (2001) 205 CLR 399.

¹⁰⁰ *Coco v The Queen* (1994) 179 CLR 427.

¹⁰¹ *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396.

¹⁰² (1958) 98 CLR 383.

¹⁰³ *Ibid* at 396 (Dixon CJ and Webb J).

¹⁰⁴ (2010) 241 CLR 252, 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

remarked that the “*same may be said as to the displacement of fundamental principles of the common law*”.¹⁰⁵ By implication, the plurality, it is suggested, were classifying procedural fairness as a principle. Such a conclusion fits with existing authority which has described procedural fairness, in the context of the principle of legality, as “*rules*”: see, as an early example, *Annetts v McCann*¹⁰⁶ and, as a recent example, *Momcilovic v R*.¹⁰⁷

There is, it is suggested, no need to distinguish between natural justice as a principle and the right to which the principle refers.¹⁰⁸ The approach taken in *Saeed* is adopted here, treating natural justice as a principle for the purposes of the principle of legality.

C. Conclusion

Like the principles of natural justice, the principle of legality has, as its primary justification, the protection of individual and property rights – albeit ones considered ‘fundamental’. The instances where the courts have approached questions of construction in this manner and applied the principle make this clear. So understood, and as the decision of the High Court in *Potter v Minahan* further demonstrates, the principle was not new, or the creation of judges in modern times devising new means to limit the reach of statutory power. The principle of legality was a fundamental principle, intermittently used and probably overlooked until cases arose evoking its “*contemporary and undiminished force*”.¹⁰⁹ Properly and

¹⁰⁴ *Coco v The Queen* (1994) 179 CLR 427.

¹⁰⁵ (2010) 241 CLR 252, 271. In *International Finance Trust Co Limited v New South Wales Crime Commission* (2009) 240 CLR 319 (at [41]), French CJ described procedural fairness in the judicial paradigm as a “*fundamental common law principle*.”

¹⁰⁶ (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh J).

¹⁰⁷ (2011) 245 CLR 1, 47 (French CJ).

¹⁰⁸ As earlier pointed out, the position in England, is that ‘natural justice’ is described as a right – essentially a right to a fair hearing. For an intermediate position, that argues that the principles of natural justice are derivatives of substantive rights and should themselves be classified as a ‘right’ “*against risks*”, see Larry Alexander, ‘Are Procedural Rights Derivative Substantive Rights?’ (1998) 17 *Law and Philosophy* 19.

¹⁰⁹ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 521 (Brennan J).

historically understood, what Lord Steyn did in *Pierson* was simply rebrand a well-established principle.

There is, of course, more to the relationship between the principles of natural justice and the principle of legality. As Lord Steyn has remarked,¹¹⁰ the principle of legality provided the “*intellectual justification*” for the classic statement of the principle made by Justice Byles in *Cooper v Wandsworth Board of Works* viz., “*although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature*”.¹¹¹

As this Chapter has explained, although the principle of legality has been employed by the courts as the means of protecting fundamental rights, freedoms and principles from erosion by statute, its explicit use – and actual application – in connection with procedural fairness is of more recent origin. The development of natural justice as a fundamental principle started with the High Court decision in *Commissioner of Police v Tanos*,¹¹² but the decision – the significance of it – remained quiescent for an extended period of time, albeit that it was referred to in some judgments of the High Court.¹¹³

The decision in *Tanos* explained the principles of natural justice on a wider jurisprudential, and historically significant, footing. Natural justice was not just explained as a ‘legal’ principle, but as something immeasurably more significant. Supported by a “*long course of authority*” dating back some 400 years,¹¹⁴ and by foundational authorities that themselves saw the principles of natural justice as having derived from the laws of ‘God’,¹¹⁵ natural justice was described as a “*deep*

¹¹⁰ *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 588.

¹¹¹ (1863) 14 CB (NS) 180, 195.

¹¹² (1958) 98 CLR 383.

¹¹³ It was referred to, in broad terms and only by reference to His Honour’s decision in *Kioa v West*, by Mason CJ in *South Australia v O’Shea* (1987) 163 CLR 378, 386; and by McHugh J in *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 680, where His Honour made specific reference to the decision in *Tanos* and the principle it established.

¹¹⁴ (1958) 98 CLR 383, 396 (Dixon CJ and Webb J). The case referred to was *Boswel’s Case* (1583) 6 Co. Rep 48b. See also Susan Kneebone, ‘Natural Justice and Non-Citizens: A Matter of Integrity?’ (2002) 26 *Melbourne University Law Review* 355, 357 where natural justice was described as a “*fundamental principle of universal application*”.

¹¹⁵ *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194.

rooted principle of the law".¹¹⁶ Natural justice was recognised to be a fundamental principle of the common law.

More recently, the decision – specifically, the conclusion that natural justice was a fundamental principle of the common law – assumed considerable importance when there were successive statutory attempts to modify, and later exclude altogether, procedural fairness in the determination of claims for protection visas under the *Migration Act 1958* (Cth). Before this point was reached, natural justice in Australia (and, for that matter in England) went through a twilight period, and then a revival.

¹¹⁶ (1958) 98 CLR 383, 396.

IV A NEW DYNAMIC FOR NATURAL JUSTICE: THE DEVELOPMENT OF A MODERN SYSTEM OF ADMINISTRATIVE LAW

A. Introduction

Until the decision in *Kioa v West*,¹ the High Court jurisprudence delivered mixed, and at times opaque, signals about whether – and if so, in what way – the principles of natural justice applied outside judicial decision-making, or processes approaching this.² Until the early 1980s common law principles of natural justice in an administrative context were still to take root: the Court was still grappling with the basic requirement of when the principles of natural justice would apply.

The High Court's early dealings with natural justice were very much aligned to the thinking that underpinned decisions such as *Cooper v Wandsworth Board of Works*³ viz., in any case where a person or body is given authority to decide whether a person will suffer pecuniary loss or deprivation of property, the principles of natural justice applied.⁴ As early as 1912 the High Court had declared that the principles were “*thoroughly well established*”.⁵ Yet from the early 1960s until the late 1970s, there were distinct signs that the High Court was retreating from this position and giving the principles of natural justice a confined, and strictly defined, role in an administrative context. What occurred in this period mirrored, historically, the judicial constriction of the principles that had occurred in England in the period from the early 1900s until the decision in *Ridge v Baldwin*.⁶

¹ (1985) 159 CLR 550.

² In Australia the “*customary and convenient*” description of the natural justice hearing rule is procedural fairness: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366 (Deane J). The phrase was widely used in the various judgments of the High Court in *Kioa v West* (1985) 159 CLR 550, 584-5 (Mason J); 601 (Wilson J); and 631 (Deane J). The authorities in Australia, at least until *Kioa* (but sometimes beyond) use the phrase ‘natural justice’ and for consistency this term has been used in this Chapter.

³ (1863) 14 CB (NS) 180.

⁴ *The Municipal Council of Sydney v Harris* (1912) 14 CLR 1; *Gillen v Laffer* (1925) 37 CLR 210.

⁵ *The Municipal Council of Sydney v Harris* (1912) 14 CLR 1, 6-7 (Griffith CJ).

⁶ *Local Government Board v Arlidge* [1915] AC 120 might be seen to represent the low-point of English decisions. In that case, a local Council made a closing order in respect of a house as being unfit for human habitation. An appeal was made to the Board who appointed an inspector to hold an inquiry. The inspector provided a report to the Board and the Board confirmed the closing order without providing the report to Arlidge and without hearing from him. The House of Lords unanimously rejected the suggestion that the principles of natural justice required the provision of

Undoubtedly, a new dynamic for natural justice was created by the decision of the House of Lords in *Ridge v Baldwin*,⁷ particularly the holding that the principles of natural justice were required to be observed whenever a body had a duty to decide what the rights of an individual should be.⁸ Yet the impetus created by that decision did not extend, initially, to concordant development of principles in Australia. It was only in the late 1970s and early 1980s that there were signs that a new dynamic would be repeated in Australia. The new dynamic coincided with, and was initiated by, administrative law reforms in this period that created a modern day system of administrative law in the federal sphere.⁹

The legislative changes brought about by the administrative law reforms were far-reaching.¹⁰ Relevantly for natural justice, these changes culminated in the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the establishment of the Federal Court of Australia as a specialised court to undertake judicial review in the field of federal administrative decision-making.¹¹ The justification for these widespread changes clearly influenced the thinking of the judiciary and their implementation effected a pronounced repositioning of the supervisory role that the courts – notably the Federal Court – would play in

the report to Arlidge and, moreover, any suggestion that the Courts might supplement the statutory procedures.

⁷ *Ridge v Baldwin* [1964] AC 40.

⁸ *Ridge v Baldwin* [1964] AC 40, 75.

⁹ The reforms had their origins in a series of reports: The Report of the Commonwealth Administrative Review Committee, August 1971 (the 'Kerr report' – Parliamentary Paper No.144 of 1971); The Interim and Final Report of the Committee on Administrative Discretions (the 'Bland Committee' – Parliamentary Paper Nos. 53 and 316 of 1973); and the Prerogative Writ Procedures – Report of Committee of Review (the 'Ellicott Committee' – Parliamentary Paper No. 56 of 1973).

¹⁰ The reforms resulted in the enactment of the following legislation: the *Administrative Appeals Tribunal Act 1975* (which, broadly, permitted merit review of decisions made by Federal statutory bodies); the *Federal Court of Australia Act 1976* (which created the Federal Court and had jurisdiction conferred upon it by the *Administrative Decisions (Judicial Review) Act 1977*); the *Ombudsman Act 1976* (which, broadly, permitted independent investigation of complaints against Federal statutory bodies); the *Administrative Decisions (Judicial Review) Act 1977* (which, broadly, permitted judicial review of decisions made by Federal statutory bodies); and the *Freedom of Information Act 1982* (which, broadly, permitted access to documents held by Federal statutory bodies). The reforms are discussed in G D S Taylor, 'The New Administrative Law' (1977) 51 *Australian Law Journal* 804; Geoffrey Flick, *Federal Administrative Law* (1st ed 1983); D C Pearce *Commonwealth Administrative Law* (1st ed 1986).

¹¹ Under the *Administrative Decisions (Judicial Review) Act 1977*, denial of natural justice formed a specific ground for review. Section 5(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* enables a person aggrieved by a relevant decision to seek an order for review on the ground

reviewing the legality of federal administrative decision-making. These reforms undoubtedly provided the environment within which judicial development of the principles of natural justice was able to occur. Indeed the decision in *Kioa v West* was made possible by these reforms.¹² The rapid development of the principles of natural justice in the Federal Court in the post-*Kioa* period and use of natural justice as a ground of review, the subject of Chapter V, was further demonstration of this new thinking and new role that the courts had assumed.

In general terms, this Chapter charts the modern day restatement of the basic principle of natural justice and how it came to be so. We will see, in this examination, an important shift in emphasis by the courts – a development of the common law – from the negative aspect of the principle to the positive aspect of it. Whereas the early invocations of the principle can be seen to be comparatively benign statements about when the principles of natural justice might apply, the statements which emerged later in the period reversed this position: by the time of the High Court decision in *Kioa v West*,¹³ the High Court was holding that the principles applied *unless* excluded by plain words of necessary intentment.

Further, in the examination that follows in this Chapter, we see further evidence of judicial responses to reflect changing societal conditions and the proliferation of activities regulated, by powers and discretions, by Government and statutory authorities. In these areas the courts breathed new life into natural justice by the creation of devices to circumvent, and expand, the historically narrow kind of rights and interests that natural justice evolved to protect. This occurred in three ways. First, by the courts side-stepping strict legal categorisation of rights and interests and undertaking a broader, contemporary evaluation of the effect of the decision on the individual in the ultimate determination of whether natural justice ought to apply.

“that a breach of the rules of natural justice occurred in connection with the making of the decision”.

¹² In *Kioa* the High Court held that the enactment of the *Administrative Decisions (Judicial Review) Act 1977* was such that deportation decisions were reviewable under that Act. The High Court considered that the legislative changes were such that its decision in *Salemi v MacKellar [No. 2](1977) 137 CLR 396*, made before the enactment of that Act, to the effect that deportation orders were not conditioned upon the observance of the principles of natural justice was no longer determinative of this issue.

¹³ (1985) 159 CLR 550.

Secondly, by the development of the concept of legitimate expectation. And, thirdly, by judicial recognition of a duty to act fairly. In each situation, although not being traditionally considered a right or interest, the courts came to hold that the exercise of a power, that might defeat, destroy or prejudice an interest or expectation of this kind, was conditioned on the observance of natural justice.

B. *The path of deviation*¹⁴

During the 1960s and 1970s three matters emerged that combined to stultify the development of the principles of natural justice in Australia. The first was the maintenance of the need for the repository of power to be characterised as ‘quasi-judicial’ as a precondition to natural justice applying to the exercise of that power. We will see that the High Court’s initial reluctance to discard this prerequisite simply perpetuated the error that was corrected by the House of Lords in 1963 in *Ridge v Baldwin*.

The second was the narrow and confined kinds of rights that could be protected by natural justice. In the migration context this issue assumed some considerable importance because of a line of authority that established that illegal entrants had no rights.¹⁵ Again, the domestic position stood in marked contrast to the position in England in the post *Ridge v Baldwin* era where a more liberal, contemporary view had prevailed and natural justice held to extend to cases where lesser kinds of interests and legitimate expectations might be defeated or destroyed by the exercise of statutory power.

The third was attitudinal: even where the principles of natural justice were found or assumed to exist, and there was a right or interest of the relevant kind, some judgments from the High Court demonstrated a clear reluctance to find a particular

¹⁴ This was the phrase used in S A de Smith, *Judicial Review of Administrative Action* (2nd ed, 1968) 137. The period was also described as one marked by ‘confusion of doctrine’ in Ian Holloway, *Natural Justice and the High Court of Australia – A Study in Common Law Constitutionalism*, (2002) 67.

statutory framework provided inadequate procedural safeguards so as to hold that common law principles of natural justice coexisted.¹⁶ This judicial restraint again had parallels to the position in England in the early part of the twentieth century.¹⁷

1. *The 'quasi-judicial' characterisation*

As late as the 1960s the High Court maintained that the principles of natural justice did not apply to administrative decision-making unless the repository of power was characterised as 'quasi-judicial' – in the sense of being required to act in a way analogous to judicial process. This was surprising not only because the decision of the House of Lords in *Ridge v Baldwin*¹⁸ discredited such an approach – something

¹⁵ *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170 (Lord Denning MR) applying *Ex parte Venicoff* [1920] 3 KB 72 and *Ex parte Soblen* [1963] 2 QB 243; *Salemi v Mackellar [No.2]* (1977) 137 CLR 396.

¹⁶ For example in *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509, 524 discussed further below, the High Court unanimously held that once the legislature in statute had addressed the question of natural justice, it was not for the common law to engraft “upon it some provision which the Court might think more consonant with a complete” opportunity to be heard.

¹⁷ See the discussion on the decision in *Local Government Board v Arlidge*, n 6 above.

¹⁸ [1964] AC 40. The error in the approach, corrected by the House of Lords in *Ridge v Baldwin*, was the idea that the principles of natural justice only applied in an administrative context to a decision-maker characterised as 'judicial like' and that, short of such characterisation, the Courts would not impose on the decision-maker a duty to observe natural justice. The error stemmed from the decisions in *R v Electricity Commissioners* (1923) 1 KB 171; *R v Legislative Committee of the Church Assembly*; *Ex parte Haynes-Smith* (1927) 1 KB 411; *Nakkuda Ali v Jayaratne* [1951] AC 66.

that appears to have been overlooked by the High Court decisions of the time¹⁹ – but because there was a body of High Court authority which held to the contrary.²⁰

In fact, the application of the principles of natural justice was never conditioned upon this requirement; rather the point that was made by the early authorities was that an indicator that natural justice applied was because the particular administrative act or exercise of power was akin to judicial act or exercise of power.²¹ However, although the phrase was used as a means to legitimise the intervention by the courts and the requirement for the principles to apply to administrative action, in time rather than being a ‘principle’ facilitating the application of the principles of natural justice in an administrative context, it came to restrict them. The threshold point for the application of the principles of natural justice thus turned on the judicial characterisation of whether the act or exercise of

¹⁹ For example *Mobil Oil Australia Pty Limited v Federal Commissioner of Taxation* (1963) 113 CLR 475 and *Testro Bros Proprietary Limited v Tait* (1963) 109 CLR 353. *Ridge v Baldwin* [1964] AC 40 was decided by the House of Lords on 14 March 1963. The case of *Mobil Oil Australia Pty Limited v Federal Commissioner of Taxation* was argued in the High Court on 23-26 October and 13-16 November 1962, and decided on 15 October 1963. The only member of the Court that made reference to the decision, and the principle it reaffirmed, was Kitto J (113 CLR 475, 502-3). The other members of the Court (Dixon CJ, McTiernan, Taylor and Windeyer JJ) made no reference to the decision. Although it might reasonably be argued that the decision in *Mobil Oil* did not mandate the High Court engaging with these issues – the case was stated to the High Court on defined issues – the same cannot be said about the decision in *Testro Bros Proprietary Limited v Tait*. The case of *Tait* was argued on 24, 27-29 May 1963 (after the decision in *Ridge v Baldwin*) and decided on 16 August 1963, and it called for a decision on whether the characterisation of the process as quasi-judicial was a necessary precondition to the principles of natural justice applying. Despite the decision in *Ridge v Baldwin* being raised in argument, and relied upon by Kitto J in his dissenting judgment, a majority (McTiernan, Taylor and Owen JJ) made no reference to this decision and endorsed the line of cases overruled by the House of Lords in *Ridge v Baldwin*.

²⁰ For example, *The Municipal Council of Sydney v Harris* (1912) 14 CLR 1; *Gillen v Laffer* (1925) 37 CLR 210; *Delta Properties Proprietary Limited v Brisbane City Council* (1955) 95 CLR 11. So in *Harris* Griffith CJ ((1912) 14 CLR 1, 6-7), after referring to a number of earlier English cases including *Cooper v The Wandsworth Board of Works*, said that the principles of natural justice “may be taken to be thoroughly well established in English law. It is not confined... to strictly judicial proceedings, but applies to any case in which a person or public body is invested with authority to decide. Whenever a public body is entrusted with power to decide whether a person shall suffer pecuniary loss the principle applies.”

²¹ In *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, where Willes J described the powers of a local board, empowered to demolish a house where the builder neglected to give the board notice of intention to build seven days before proceeding to lay or dig the foundation, as having “always been considered judicial...”. Similarly, in *Hopkins v Smethwick Local Board of Health* [1890] LR QB 712 a case that also involved a demolition order by a local board, the Court of Appeal approved and applied *Cooper*. Wills J, delivering judgment in the Queens Bench Division, held that in “condemning a man to have his house pulled down, a judicial act is as much implied as in fining him...and as the local board is the only tribunal that can make such an order its act must

power was quasi-judicial – in which case the principles applied – or ‘purely administrative’ – in which case the principles did not.

The rise in the requirement for the repository of power to be acting judicially can be traced to two decisions: *R v Electricity Commissioners*²² and *R v Legislative Committee of the Church Assembly; Ex parte Haynes-Smith*.²³ In *R v Electricity Commissioners*, Atkin LJ famously described the instances when the writs of prohibition and certiorari would issue:²⁴

Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench exercised in these writs.

The decision was understood by later authority as requiring the processes to be quasi-judicial, and the body to act ‘judicially’, for the courts to have jurisdiction to grant prerogative relief, and thus to the instances where the courts would impose on the decision-maker a duty to observe natural justice.²⁵

These decisions provided the background for the decision of the Privy Council in *Nakkuda Ali v Jayaratne*.²⁶ In that case the respondent, the Controller of Textiles in Ceylon cancelled the appellant’s textile licence under regulations which empowered him to do so when the Controller had “*reasonable grounds to believe...that any dealer is unfit to be allowed to continue as a dealer*”. The appellant sought certiorari against the Controller. The Controller contended that certiorari did not lie because, in cancelling the appellant’s licence, he was acting in an administrative capacity. In finding that the Controller was not amenable to the writ of certiorari, Lord Radcliffe,

be a judicial act...” ([1890] LR QBD 712, 714-5). As Rich J crisply said, in *Gillen v Laffer* (1925) 37 CLR 210, 229, the “*nature of the thing done – deprivation of property – implies judicial act*”.

²² (1923) 1 KB 171. In *Ridge v Baldwin* the House of Lords held that the proper understanding of Atkin LJ’s judgment did not support the imposition of the superadded requirement of the ‘body to act judicially’.

²³ (1927) 1 KB 411.

²⁴ (1923) 1 KB 171, 205.

²⁵ In *R v Legislative Committee of the Church Assembly; Ex parte Haynes-Smith*, it was held that the decision in *R v Electricity Commissioners* required, for prerogative relief to issue, that the “*body has the duty to act judicially*” (1927) 1 KB 411, 415 (Lord Hewart CJ).

²⁶ [1951] AC 66.

who delivered the judgment of the Board, did not accept that the Controller was acting in a quasi-judicial capacity.²⁷

It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari.

Lord Radcliffe ultimately found that the acts of the Controller were administrative, not judicial, in character and thus certiorari was not available: natural justice was thus not required to be observed in connection with the administrative functions so exercised.

The House of Lords, in *Ridge v Baldwin*, emphatically rejected the need for this superadded element holding it inconsistent with early authority and, in any event, based on a misunderstanding of what Atkin LJ had held in *R v Electricity Commissioners*. In Australia, despite authorities in the early 1960s endorsing this precondition,²⁸ the rejection of it barely registered in High Court thinking. And this was so despite the correction that was made to recent High Court authority that had confirmed the ‘superadded’ requirement. Thus in *Banks v Transport Regulation Board (Vic)*²⁹ Barwick CJ simply expressed preference for the approach in *Ridge v Baldwin* and declined to follow *Nakkuda Ali* – but emphasised that his judgment was not a decision on natural justice;³⁰ and the other members of the Court did not deal with the issue at all.³¹

²⁷ [1951] AC 66, 77.

²⁸ *Mobil Oil Australia Pty Limited v Federal Commissioner of Taxation* (1963) 113 CLR 475 and *Testro Bros Proprietary Limited v Tait* (1963) 109 CLR 353.

²⁹ (1968) 119 CLR 222.

³⁰ (1968) 119 CLR 222, 239.

³¹ McTiernan, Kitto, Taylor and Owen JJ. The decision in *Banks*, and the correction that Barwick CJ made, passed almost unnoticed: the decision in *Banks* was mentioned only in the judgments of Gibbs J and Stephen J in *Salemi v MacKellar [No. 2]*. Thereafter it disappeared, in the short term, from administrative law jurisprudence.

2. *Rights and interests: a narrow construct*

The principles of natural justice had been accepted to condition the exercise of administrative power in cases where there was a legally recognisable right or interest that could be affected by such exercise of power. This included cases where there was deprivation of property;³² a right;³³ a privilege;³⁴ damage to reputation;³⁵ and loss of liberty.³⁶ In all these cases the exercise of power could readily be seen to affect legally defined interests. But where there was no readily identifiable legal right or interest involved, the application of the principles was excluded altogether.

The decision in *Nakkuda Ali* drew attention to the need to have a legally recognisable right before the principles of natural justice would condition the exercise of power. In that case, in supporting the conclusion that the acts of the Controller were purely administrative, Lord Radcliffe held the conclusion that the act was administrative was supported by the interest – a licence – said to have been infringed. In the words of Lord Radcliffe:³⁷

It is that characteristic that the Controller lacks in acting... In truth, when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it.

The judgment did not expand upon why, in terms, natural justice did not protect this interest, but it was built on the notion that a licence was merely a permission to do something and implicit in the conferral of a licence is the correlative right to revoke it at will.

³² *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; *The Municipal Council of Sydney v Harris* (1912) 14 CLR 1.

³³ In *R v Electricity Commissioners; ex parte London Electricity Joint Committee Company* [1923] 1 KB 171, Atkin LJ (at 205) described the determinative question as being whether the decisions affected “the rights of subjects”.

³⁴ *James Bagg’s case* (1615) 11 Co. Rep 93; *The King v The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Strange 557.

³⁵ *Fisher v Keane* (1878) 11 Ch D 353; *Dawkins v Antrobus* (1879) 17 Ch D 615.

³⁶ *Bonaker v Evans* (1860) 16 QB 162.

³⁷ [1951] AC 66, 78, citing *R v Electricity Commissioners* (1923) 1 KB 171 and *R v Legislative Committee of the Church Assembly; Ex parte Haynes-Smith* (1927) 1 KB 411.

The decision of the Court of Appeal in *R v Metropolitan Police Commissioner; Ex parte Parker*³⁸ not only confirmed the need for a legally recognisable interest as an essential prerequisite to the application of the principles of natural justice, but served to exclude a particular kind of interest from protection altogether: licences or interests analogous to them.

In *Parker* the Commissioner had revoked the taxi cab licence of the applicant on the ground that he had used his taxi cab for an unauthorised purpose. Parker claimed that he was denied natural justice in the process of this revocation and sought an order quashing the Commissioner's decision. The Court denied Parker relief and in doing so Lord Goddard CJ rejected the contention that any revocation of the licence was required to conform to the principles of natural justice:

...the very fact a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. The licence is nothing but a permission, and if one gives a man permission to do something it is natural that the person who gives the permission will be able to withdraw the permission. As a rule, where a licence is granted, the licensor does not have to state why he withdraws his permission...

Although the decision in *Nakkuda Ali* was neither referred to in argument nor in any of the judgments delivered, the outcome of both cases can be seen to rest on the same premise: a licence, including its revocation, was not an interest that natural justice served to protect. The focus in each case was very much directed towards assigning a legal characterisation, uninfluenced by economic or other considerations, to the interest said to have been infringed. And, where such characterisation was absent, natural justice simply did not apply to the exercise of the power: natural justice would not protect something the law did not recognise.

By the 1960s the courts in England and Australia were sensing the self-evident unfairness in the outcome of cases of this kind where strict legalism overrode any consideration of the effect, economic or otherwise, of the decision or exercise of administrative power on the individual. Modern day interests often did not fit into the compartments of rights or privileges fashioned by the courts in the early to mid

³⁸ [1953] 1 WLR 1150.

20th century.³⁹ The judicial response, dealt with in the following sections, was three-fold.

First, the courts expanded the enquiry into the nature of the right or interest affected beyond a rigid legal classification to a consideration of the economic consequences that the exercise of power had on the individual. By this development the courts justified their intervention in licence cases where the exercise of power resulted in the revocation or forfeiture of the licence. Secondly, the courts developed the concept of legitimate expectation. By this development the courts justified their intervention in cases where the exercise of power infringed an expectation that it would not be fair to deny without an opportunity to be heard. And thirdly, the courts developed a duty to act fairly. By this development the courts justified their intervention into cases involving applications for licences or privileges.

3. *Rights and interests: a contemporary evaluation*

The decisions in *Nakkuda Ali* and *Parker* identified one class of interest – a licence – that was not protected by the principles of natural justice. In both cases, the courts had determined that the principles of natural justice did not apply to the revocation of the licences by adherence to strict legalism: the interest in question was akin to a licence therefore the law did not recognise any legal interest. These cases were later termed ‘forfeiture’ or ‘revocation’ cases because an existing position was taken away or licence revoked.⁴⁰

The rigidity that the decisions in *Nakkuda Ali* and *Parker* advocated was soon discarded and replaced by a more contemporary approach to determine the nature of the right or interest and, thus, whether natural justice would condition the exercise of power that affected that right or interest. The courts, through this process, were able to justify the imposition of the obligation to observe natural

³⁹ An attempt was made by the Privy Council in *Durayappah v Fernando* [1967] 2 AC 337 to provide some criteria - the so called ‘Durayappah factors’ - to determine when the principles would apply. This attempt was largely unsuccessful as the judicial responses explained above demonstrate.

⁴⁰ *McInnes v Onslow* [1978] 1 WLR 1520.

justice in the exercise of the power in ‘forfeiture’ or ‘revocation’ of licence cases by undertaking an evaluation of the economic impact that an adverse decision would have on the individual to thus find a right.

So in *R v Barnsley Council; Ex parte Hook*⁴¹ where the Council sought to revoke a street trader’s licence, the Court of Appeal rejected the idea that there was no right that was infringed by the Council’s decision. Lord Denning MR described the revocation as “*depriving him of his livelihood*”;⁴² and Scarman LJ described the cancellation of the licence as a serious matter because it revoked a licence that “*enabled its holder to earn his living*”.⁴³

The High Court had followed a similar path in *Banks v Transport Regulation Board (Vic)*.⁴⁴ In *Banks* the High Court was required to determine whether the revocation of a taxi licence by the Board was property or a ‘civil right’ although, strictly, the case did not involve any question relating to natural justice.⁴⁵ Nevertheless, an issue arose about the competency of the appeal to the High Court, it being contended that there was no right of appeal to the High Court because the judgment appealed from did not involve any “*claim, demand, or question to or respecting any property or civil right...*”.⁴⁶

It was argued that, by reference to *Nakkuda Ali* and *Parker*, there was no right of appeal because the licence was not property or a right and that the conferral of a licence was akin to the grant of a permission to do something that otherwise would be unlawful. The Court held that there was ‘property or civil right’ and thus the appeal as of right was competent. But of the judgments delivered, only Barwick CJ specifically addressed the arguments supported by the decisions in *Nakkuda Ali* and *Parker*.

⁴¹ [1976] 1 WLR 1052.

⁴² *Ibid* at 1058.

⁴³ *Ibid*.

⁴⁴ (1968) 119 CLR 222.

⁴⁵ Barwick CJ, although referring to *Ridge v Baldwin* and expressly confining the possible operation of the decision of the Privy Council in *Nakkuda Ali*, said that the case “*is not a case depending upon a denial of natural justice*” (1968) 119 CLR 222, 239.

⁴⁶ Section 35(2) of the *Judiciary Act 1902* (Cth).

Barwick CJ rejected the idea that a taxi licence was a mere licence capable of being withdrawn, without reason, by the person who granted the permission. Importantly, Barwick CJ rejected the characterisation that found favour with Lord Goddard CJ in *Parker*. His Honour held that the licence was “*property which provided a means...of the livelihood of the holder of the licence*”.⁴⁷ Thus, in His Honour’s judgment the issue was not determined merely by compartmentalising the interest to meet a legal description but involved evaluation of the economic detriment to the individual:⁴⁸

...I do not find the description of the licence which found favour [in Parker] appropriate to a statutory licence to which a fit and proper person has a right and which relates to such an occupation as that of a cab driver...

Although these developments were significant and served to cover cases where a licence was sought to be revoked or forfeited, there remained other cases that still did not readily fit into a classification of a forfeiture or revocation of a licence. The first were expectation cases – ordinarily where an applicant has a legitimate expectation from what had occurred that an application will be granted.⁴⁹ The second were application cases – where the decision related to an application for a right, position or interest.⁵⁰ However we will see, in the next section of this Chapter, that although legitimate expectation satisfactorily dealt with expectation cases, legitimate expectation did not satisfactorily deal with all aspects of the lesser forms of interest: application cases – that is, where an applicant applies for a right. It was in this area that the decision in *Kioa*, and English developments during the 1960s and 1970s, sought to construct an overarching duty to act fairly and so necessitate the observance of natural justice in application cases.

⁴⁷ (1968) 119 CLR 222, 233.

⁴⁸ (1968) 119 CLR 222, 231. In J M Evans, *de Smith’s Judicial Review of administrative Action* (4th ed 1980) 189 this approach was described as a “*realistic assessment of the economic effect upon the individual*”.

⁴⁹ *McInnes v Onslow* [1978] 1 WLR 1520.

⁵⁰ *Ibid.*

4. *Legitimate expectation*

It was against the narrow formulation of rights and interests that the concept of legitimate expectation emerged. By this concept, a reasonable expectation of a benefit carried with it a correlative opportunity for a person, who would be affected by the exercise of a power to withdraw or not renew that benefit, to put a case against the exercise of the power in that adverse way.⁵¹ So understood, legitimate expectation was a judicially crafted means to supplement the narrow formulation that natural justice attached to the exercise of a power only where the power had the capacity to interfere with an individual's rights or interests.⁵² And so, where the exercise of a power had the capacity to interfere with an individual's legitimate expectations, the exercise of the power was conditioned on the observance of natural justice.

(a) *The development of legitimate expectation*

The decision in *Schmidt v Secretary of State for Home Affairs*⁵³ established that the principles of natural justice applied to instances where an individual had a legitimate expectation "of which it would not be fair to deprive him".⁵⁴ In that case Lord Denning MR, after acknowledging that an alien – an illegal immigrant – had no right to enter except by 'licence' of the Crown,⁵⁵ proclaimed the idea that an expectation might be sufficient to attract the obligations of fairness in administrative decision-making.⁵⁶

The speeches in Ridge v. Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some

⁵¹ The concept had its genesis in the decision of the English Court of Appeal in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.

⁵² It has also been described as one of Lord Denning's 'balance seeking legal doctrines' in Ian Holloway, *Natural Justice and the High Court of Australia – A Study in Common Law Constitutionalism*, (2002) 142.

⁵³ [1969] 2 Ch 149. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 310 McHugh J described the doctrine as having been "invented" by Lord Denning.

⁵⁴ [1969] 2 Ch 149, 170.

⁵⁵ *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170 (Lord Denning MR) applying *Ex parte Venicoff* [1920] 3 KB 72 and *Ex parte Soblen* [1963] 2 QB 243.

⁵⁶ [1969] 2 Ch 149, 170.

right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

Within a relatively short timeframe the concept of legitimate expectation was ratified as orthodox principle by the English Court of Appeal,⁵⁷ by the House of Lords,⁵⁸ and by the Privy Council.⁵⁹

In time legitimate expectation came to cover three classes of cases involving applications for benefits.⁶⁰ First, cases where the court concluded that there was a reasonable expectation of a benefit that the court concluded could not be refused except where the principles of natural justice had been observed.⁶¹ Secondly, where the expectation of a benefit arises from a representation or an undertaking by the decision-maker.⁶² And, thirdly, where the expectation of a benefit arises from a statement that procedures,⁶³ or the existence of a regular practice,⁶⁴ would be followed by the decision-maker.

⁵⁷ *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, 191 (Lord Denning MR) and 195 (Edmund Davies LJ). In fact Lord Denning went so far as to suggest that legitimate expectation had the consequence of the discarding of the rights/licences distinction: *R v Gaming Board for Great Britain; Ex parte Benaim* [1970] 2 QB 417, 430 (Lord Denning; Lord Wilberforce and Phillimore LJ agreeing).

⁵⁸ *O'Reilly v Mackman* [1982] 3 WLR 1096.

⁵⁹ *Attorney General of Hong Kong v Ng Yuen Shin* [1983] 2 WLR 735.

⁶⁰ See generally Paul Craig, 'Legitimate Expectations: A Conceptual Analysis' (1992) 108 *Law Quarterly Review* 79, 82-84. In Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed 2004), 398-9 the second and third class of case - namely, 'representation or undertaking' cases or a 'statement' that a procedure would be followed - were one class, not separate ones. There have been judicial attempts to classify them as well: see *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374, 408 (Lord Diplock) and *R v Devon County Council; Ex parte Baker* [1995] 1 All ER 73, 88-89 (Simon Brown LJ).

⁶¹ An example of this class of case is *FAI Insurance Limited v Winneke* (1982) 151 CLR 342 - discussed further below - where the High Court held that a workers compensation insurer applying for a renewal of its licence to offer insurance had an expectation that its approval would be renewed or not refused without an opportunity to respond to matters raised against the issue of a further licence.

⁶² An example of this class of case was *R v Liverpool Corporation: ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 where a local council was held to its undertaking not to grant more taxi licences until legislation controlling private hire cars was in force. Another example was *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 WLR 735 where the Hong Kong Government was held to its undertaking that illegal immigrants, otherwise liable to be deported, would have any application to remain in Hong Kong 'treated on its merits'.

⁶³ An example of this class of case was *R v Home Secretary; Ex parte Khan* [1984] 1 WLR 1337. In that case it was held that a legitimate expectation was created by a statement that the Home Office would follow its procedures in connection with determining whether to permit adoption.

⁶⁴ *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374, 401 (Lord Fraser).

(b) *Legitimate expectation in Australia*

Despite the growing body of English cases supporting the principles of natural justice conditioning the exercise of administrative powers that could defeat or destroy a legitimate expectation, the High Court displayed no initial enthusiasm for the concept.⁶⁵

So, in *Salemi v Mackellar [No.2]*⁶⁶ the High Court held, relying on the line of authority that denied illegal entrants any rights,⁶⁷ that a deportation order could be made by the Minister, without affording the aggrieved person – an illegal immigrant – the right to be heard.

Barwick CJ concluded that as the applicant was an illegal immigrant, he was unlawfully present and liable to detention and deportation. In these circumstances, Barwick CJ held that the applicant had no “*relevant right*” such that it could not be said that the “*power to order deportation [was] a power to affect a right of the prohibited immigrant*”.⁶⁸

To similar effect was the judgment of Gibbs J.⁶⁹ His Honour also held that the Minister was not obliged to observe the principles of natural justice when making a deportation order, remarking that this “*conclusion is consistent with that reached in a number of cases in which it has been held that an alien is not entitled to be heard before a deportation order is made against him*”.⁷⁰

The minority views in *Salemi* were themselves somewhat disparate in point of principle. Stephen J concluded that the plaintiff had a sufficient right – a legitimate expectation – there being no statutory indication to the contrary, so as to require

⁶⁵ The present status of the concept is uncertain beyond having a role in connection with questions of content: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1. In *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 Gummow, Hayne, Crennan and Bell JJ described legitimate expectation as “*an unfortunate expression which should be disregarded*”.

⁶⁶ (1977) 137 CLR 396.

⁶⁷ *Ex parte Venicoff* [1920] 3 KB 72; *Ex parte Soblen* [1963] 2 QB 243.

⁶⁸ (1977) 137 CLR 396, 404.

⁶⁹ Aickin J agreeing on this point: (1977) 137 CLR 396, 460. Barwick CJ, Gibbs J and Aickin J represented the statutory majority of the Court.

⁷⁰ (1977) 137 CLR 396.

the Minister to observe the principles of natural justice prior to the making of the deportation order.⁷¹

Jacobs J considered the critical issue about whether the requirements of natural justice were required to be observed to be a narrow one. Although there was passing reference to legitimate expectation in Jacobs J's reasons for judgment, to Jacobs J the threshold question was a matter of statutory intent because the "*legislature is assumed by the courts to be aware of the principles of natural justice which are a part of the common law*";⁷² and, as the power to order deportation was expressed in general language, this was an indication that the legislature had "*left it to the courts to decide when and how the principles of natural justice should be applied in the exercise of the executive power of deportation*".

The final member of the minority, Murphy J, held, somewhat bluntly, that the power to deport was "*conditioned by rules of natural justice*".⁷³ It appears that His Honour proceeded on the basis that the rules applied because a deportation order "*has serious consequences for the person against whom it is made. He becomes liable to be taken and imprisoned and deported*".⁷⁴ Thus, on this analysis, the applicant had a recognisable right such that the deportation power had to be "*exercised in accordance with the principles of natural justice*".⁷⁵ This reasoning implicitly eschews reliance upon principles of legitimate expectation as a means to affix the principles of natural justice to lesser forms of rights and relies very much upon a broader, contemporary basis for the application of the principles.⁷⁶

⁷¹ (1977) 137 CLR 396, 441-2. The authorities referred to by Gibbs J were *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, *Ex parte Venicoff* [1920] 3 KB 72 and *Ex parte Soblen* [1963] 2 QB 243.

⁷² (1977) 137 CLR 396, 451.

⁷³ (1977) 137 CLR 396, 456.

⁷⁴ *Ibid.*

⁷⁵ (1977) 137 CLR 396, 457. In this respect, this broader classification of rights and interests fits within the High Court decision in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 which approached a factually similar case in this way.

⁷⁶ We will shortly see, when considering the High Court decision in *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, that whilst other members of the Court conclude that the applicant in that case had a legitimate expectation which was capable of protection, Murphy J again determined the obligation to observe natural justice as attaching to a 'right': "*The exercise of the power will probably have an adverse effect on the person and his reputation and possibly his*

The ultimate acceptance of the concept of legitimate expectation was reached in *Heatley v Tasmanian Racing and Gaming Commission*.⁷⁷ In that case the applicant was issued with a notice warning him off racecourses in Tasmania. The notice issued without prior notice and without the applicant being given an opportunity to make representations to the Commission for the notice not to issue. The High Court held that the power to issue the warning off notice carried with it an obligation to observe the principles of natural justice. The point of interest is the specific holding, of a majority of the Court, that the principles of natural justice attached to the exercise of a power which could affect a legitimate expectation.

Barwick CJ, who dissented, maintained a strict view – similar to the one he expressed in *Salemi v MacKellar [No. 2]* – about what rights were capable of protection by the application of the principles of natural justice. His Honour rejected the idea that the applicant had any legal rights which were or could be affected by the issuance of a warning off notice, and rejected the idea that legitimate expectation added – by extension and relaxation – a lesser form of interest which secured protection of natural justice:

The applicant had no relevant legal right other than the right, if any, which a member of the public has to enter or to remain upon a privately owned racecourse. If a member of the public has, with the consent and indeed at the invitation of the racecourse proprietor entered the course he has but a revocable licence, terminable without reason, and instanter...no member of the public has a right to entry to such a course. Thus, the giving of the notice...does not affect any legal right of the person who, being a member of the public, seeks entry or having been admitted has no legal right to remain.

Three other members of the Court decided the case by invocation of the concept of legitimate expectation,⁷⁸ and the remaining member of the majority decided the case by application of existing principle, holding that the warning off notice affected a right.⁷⁹

livelihood. It will seriously alter his legal position. If he enters a racecourse, he becomes liable to...penalties...": (1977) 137 CLR 487, 495.

⁷⁷ (1977) 137 CLR 487.

⁷⁸ Stephen J, Mason J and Aickin J.

⁷⁹ Murphy J – who held that the principles of natural justice were required to be followed because the exercise of the power to issue the notice would affect the right, or rights, of the applicant. See n 76, above.

Mason J accepted that the applicant had a legitimate expectation which attracted the requirements of natural justice in the exercise of the power to issue a warning off notice. The expectation was expressed as being *“that he would be admitted to race meetings on racecourses in Tasmania on payment of the stipulated charge, whatever that might be, an expectation that would be defeated by the issue”* of a warning off notice.⁸⁰

Aickin J couched the expectation in terms which admit differing conclusions: the first was that the legitimate expectation was that members of the public *“expect that if they present themselves at the gate of a football ground or a racecourse or a dog-racing course and tender the stated entrance fee that they will be admitted, because generally speaking it is in the interests of the owner or occupier that they should in fact attend the relevant game or meeting, and upon receiving such permission they then have what is properly called a right as against all the world (save the owner) to remain there for the duration of the relevant event”*.⁸¹ In this passage, Aickin J described this initially as an expectation but in the later part this was termed a right. The ultimate holding on this issue was stated by Aickin J in the following terms:⁸²

The statutory power [to issue a warning off notice] is one which enables the Commission to destroy that right, as well as to destroy the expectation that they will on future occasions be granted the like right in respect of subsequent race meetings.

This is the historical and jurisprudential setting for the High Court decision in *FAI Insurance Limited v Winneke*.⁸³ The arguments in the case had a narrowness about them: the contention was that the relevant decision was made by the Governor and accordingly the principles of natural justice could not, and did not, apply. But it was the wider holding in the case which marks why this decision was – and is – so important: not only did the High Court cement legitimate expectation as doctrine, but the decision firmly established the fundamental rule upon which the principles

⁸⁰ (1977) 137 CLR 487, 494.

⁸¹ (1977) 137 CLR 487, 509.

⁸² *Ibid.*

⁸³ (1982) 151 CLR 342. Following the decision in *Heatley*, the High Court considered a further ‘warning off’ case in *Forbes v New South Wales Trotting Club Limited* (1979) 143 CLR 242.

of natural justice rest: namely, that when a statutory authority has the power to affect rights, interests and legitimate expectations, then the exercise of that power is conditioned on the observance of the principles of natural justice unless excluded by plain words of necessary intendment.

In *Winneke* the appellant FAI, who had carried on business as a workers compensation insurer for 20 years, sought renewal, by application to the Minister of Labour and Industry, of its licence to offer workers compensation insurance. This application was unsuccessful. The appellant was advised of the matters which resulted in the Minister deciding not to recommend to the Governor in Council that the appellant be granted a licence, but the appellant was not provided with an opportunity to deal with those matters before the Governor refused to grant the approval.

The High Court held that FAI, in applying for renewal of its licence had a legitimate expectation *“that its approval would be renewed or at the very least that it would not be refused without its having an opportunity of meeting objections raised against it”*.⁸⁴

Although a number of the Justices upheld the appeal, without reference to the concept of legitimate expectation,⁸⁵ four members of the majority upheld the appeal on the basis that the exercise of the power affected the legitimate expectation of the appellant, and that the principles of natural applied to such exercise.⁸⁶ In a

However, as it was conceded that the issue of a warning off notice, to be effective, was required to observe the principles of natural justice, no relevant point of principle arose.

⁸⁴ (1982) 151 CLR 342, 369 (Mason J). Other members of the Court delivered judgments expressing similar views: 151 CLR 342, 348 (Gibbs CJ); 351-2 (Stephen J); 377 (Aickin J); 399 (Wilson J) except Brennan J.

⁸⁵ Gibbs CJ, although referring to the applicant as having a ‘legitimate expectation’, decided the case on the basis that in cases *“such as the present, the exercise of the power to grant or refuse a renewal of an approval”* will be subject to the rules of natural justice (151 CLR 342, 348-9). Brennan J doubted whether legitimate expectation played any role in the interpretation of statutory intent, but, like Gibbs CJ, concluded that *“the text of a statute is not construed as intending to deny the protection of a hearing to a person who is liable to be prejudiced unless that intention clearly appears”* and that natural justice attached to ‘interests’, rather than ‘rights’ or ‘legitimate expectations’: *“The aptitude of the exercise of the power to affect proprietary or financial interests or reputation furnishes a surer ground for implying that the principles of natural justice are to be applied in its exercise”* (151 CLR 342, 412-413).

⁸⁶ Stephen J at 151 CLR 342, 351-2; Mason J at 151 CLR 342, 360-2; Aickin J at 151 CLR 342, 376-378; Wilson J at 151 CLR 342, 395.

judgment which has turned out to be both relevant and influential in current times,⁸⁷ Mason J stated the primary rule and the role of legitimate expectation as follows (citations omitted):⁸⁸

The fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power....The application of the rules is not limited to cases where the exercise of the power affects rights in the strict sense. It extends to the exercise of a power which affects an interest or a privilege...or which deprives a person of a 'legitimate expectation', to borrow the expression of Lord Denning MR in Schmidt v Secretary of State for Home Affairs, in circumstances where it would not be fair to deprive him of that expectation without a hearing (Salemi v MacKellar (No 2)).

The judgment of Mason J is, in point of principle, similar to the judgments delivered by Stephen J and Jacobs J in *Salemi* in that all advocate the primary rule as being that natural justice conditions the exercise of power unless excluded by clear words of necessary intent. We see, in a later section of this Chapter,⁸⁹ that these judgments represented a revision in thinking of the High Court as to when the principles of natural justice would apply.

5. *The duty to act fairly*

Although a legitimate expectation was an effective mechanism for the creation of a new range of interests that were entitled to be protected by the principles of natural justice, legitimate expectation could not conceptually cover the remaining lesser form of interest or case usually denied protection by the principles of natural justice: where an applicant applies for a right. In these kinds of case – application cases – there was no expectation; and nor was there a revocation or forfeiture of a licence, or something like a licence. In these cases the courts had, to this point, yet to identify an analytically sound way to imply the principles of natural justice.

⁸⁷ Applied by the High Court in *Plaintiff M61 of 2010 v Commonwealth* (2010) 243 CLR 319.

⁸⁸ (1982) 151 CLR 342; Stephen J generally agreeing (151 CLR 342, 351); both Aickin J (151 CLR 342, 376-7); Wilson J (151 CLR 342, 390-1) and Brennan J (151 CLR 342, 412-413) delivered reasons in similar terms to that of Mason J.

⁸⁹ See below: 'Judicial shift: a revised approach for the High Court'.

At the same time that legitimate expectation was developing, English decisions began to make reference to the notion of a decision-maker having a duty to act fairly. By this concept the courts erected a limited implied obligation to act fairly in the execution of the administrative function.⁹⁰ Like legitimate expectation, when found to exist it signalled when the law would require natural justice to be observed in the exercise of statutory power.

The invocation of a duty to act fairly first emerged in *Re HK (An infant)*.⁹¹ In that case HK sought to enter the United Kingdom, and was entitled to do so under the *Commonwealth Immigrants Act 1962* “if he satisfied an immigration officer that he was the child of a Commonwealth citizen and was under 16 years of age”.⁹² HK had been detained at London airport, having come from Pakistan, by an immigration officer who decided that HK was not under the age of 16 years. HK was thus refused entry into the United Kingdom, and ultimately an order was made for his return to Pakistan. HK sought to quash the decision that he should be refused admission into the United Kingdom, arguing that the rules of natural justice required him to be given an opportunity to satisfy the immigration officer, if the officer had formed the view that he was over the age of 16 years, that he was below that age.

Lord Parker CJ considered that the rules did apply.⁹³

...even if an immigration officer is not in a judicial or quasi - judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly.

⁹⁰ S A de Smith, *Judicial review of Administrative Action* (3rd ed 1973) 208. In *Pearlberg v Varty* [1972] 2 All ER 6, 17 Lord Pearson described the ‘duty’ as a “procedural safeguard”, implying an “obligation to act with fairness” in the exercise of administrative or executive functions. See also Margaret Allars, ‘Fairness: Writ Large or Small’, (1987) 11 *Sydney Law Review* 306.

⁹¹ [1967] 2 QB 617.

⁹² *Ibid* at, 625 (Lord Parker CJ).

⁹³ [1967] 2 QB 617, 630. Salmon LJ similarly determined that natural justice applied to the decision of the immigration officer, and gave some attention to the nature of the interest which attracted it expressing the view that whenever “a person is called upon to exercise a statutory power and make a decision affecting basic rights of others are such that the law impliedly imposes upon him a duty to act fairly...Their decision is of vital importance to the immigrants since their whole future may depend upon it. In my judgment it is implicit in the statute that the authorities in exercising these powers and making decisions must act in accordance with the principles of natural justice.”

Despite Lord Parker CJ believing that his judgment went “*further than is permitted on the decided cases*”,⁹⁴ the case can be explained on a relatively narrow basis and within the existing principles, simply by reason of the fact that, unlike the alien deportation cases (where there is no right – statutory or otherwise) the immigrant in fact had a recognisable right – a statutory right to enter if certain facts were established.

Nevertheless, there are, it is suggested two matters of significance to be drawn from the decision in *Re HK*. First, it represented an important shift in judicial thinking: in the space of some few years, between that decision and *Schmidt*, there was clear demonstration of judicial unease at the class of rights, deserving of procedural safeguards in an administrative context, which were not protected by the existing principles of natural justice. Secondly, the requirement of a decision-maker to act fairly – expressed by both Lord Parker CJ and Salmon LJ – in determining the rights of an individual represented not only a change of emphasis, but was indicative of the courts seeking to find some underlying and all-embracing idea that justified the intervention of the courts and the imposition of notions of fairness in the exercise of administrative functions.

In addition to immigration cases,⁹⁵ this duty to act fairly was held to require a local government corporation, the taxi licensing authority, to adhere to an undertaking not to grant more licences until legislation controlling private cars was in force.⁹⁶ It was held to require a Gaming Board, that was empowered to provide a certificate enabling a person to secure a gaming licence under an enacted ‘Gaming Act’, to “*give the applicant an opportunity of satisfying them of the matters [in the Act]. They*

⁹⁴ [1967] 2 QB 617, 630.

⁹⁵ See also *In re Mohamed Arif (an Infant)* [1968] 1 Ch 643; *R v Secretary of State for the Home Department; Ex parte Mughal* [1974] 1 QB 313.

⁹⁶ *R v Liverpool Corporation: ex parte Liverpool Taxi Fleet Operators’ Association* [1972] 2 QB 299, 308 (Lord Denning MR); 310-311 (Roskill LJ). Although the Privy Council in *Attorney General of Hong Kong v Ng Yuen Shin* [1983] 2 WLR 735 explained this case as being a case of legitimate expectation, none of the judgments in the *Liverpool Taxi Fleet* case make reference to the concept. It is suggested that the *Liverpool Taxi Fleet* case can also be understood as one invoking the general obligation of fairness.

must let him know what their impressions are so that he can disabuse them".⁹⁷ It was held to require medical referees, and a Police inquiry into the fitness of a serving police officer, *"to act fairly ... [and for the police officer] to have a fair opportunity of correcting or contradicting any statements made to his prejudice"*.⁹⁸ And it was held to require inspectors investigating the affairs of a company, where their work and report may lead to adverse comment or legal consequences against an individual, to act fairly and to give a person a *"fair opportunity for correcting or contradicting what is said against him"*.⁹⁹

Leading up to its decision in *Kioa v West* the High Court was slowly working through the development of a body of principles expanding the kind of interest that the Courts recognised as capable of protection by the principles of natural justice. It had done this through the mandate, given by the decision in *Banks*, to undertake an evaluative social and economic, rather than strict legal, consideration of 'interests'; and it had done this through the development of legitimate expectation and its assimilation into domestic administrative law. Unlike in England, however, there was no incremental development of a duty to act fairly. But *Kioa* was emphatically to change that.

The decision in *Kioa v West* went well towards diluting the significance of the need to have a legally recognisable right of any particular kind before the principles of natural justice would be engaged in the exercise of statutory power. And the decision did this broadly in two ways. First, Mason J and Brennan J went to some lengths to develop and explain a range of legal justifications for implying natural justice in application cases. Secondly, the decision endorsed a presumptive application of the principles that had the effect of engaging the principles subject only to unambiguous statutory expression to the contrary.

In *Kioa* it was argued that two Tongan citizens, a husband and wife and their child (an Australian citizen), who were to be deported, were entitled to an opportunity to

⁹⁷ *R v Gaming Board for Great Britain; Ex parte Benaim* [1970] 2 QB 417, 430 (Lord Denning MR; Lord Wilberforce and Phillimore LJ agreeing).

⁹⁸ *R v Kent Police Authority; Ex parte Godden* [1971] 2 QB 662, 669 (Lord Denning MR).

be heard before orders for their deportation were made by the Minister. In making the order, the delegate of the Minister relied upon departmental submissions which the Court held were prejudicial, and which were not drawn to the attention of the applicant husband.

The threshold issue in the case was whether the principles of natural justice applied at all:¹⁰⁰ current High Court authority had confirmed that illegal immigrants had no rights and that the principles of natural justice did not apply to a deportation order.¹⁰¹

Gibbs CJ dissented, concluding, as His Honour did in *Salemi v MacKellar [No. 2]*, that the making of a deportation order was not subject to the principles of natural justice.¹⁰² The remaining members of the Court all concluded that not only had the statutory framework considered in *Salemi* and *Ratu* changed to the extent that those cases did not determine the outcome in the present case, but that the changed statutory environment in fact evinced an intent that the Minister should observe the principles of natural justice.¹⁰³

Mason J initially expressed the principle in traditional terms: the obligation to observe the principles of natural justice arose where the making of “*administrative decisions which affect rights, interests and legitimate expectations...*”. But Mason J

⁹⁹ *In re Pergamon Press Limited* [1971] 1 Ch 388, 399 (Lord Denning MR); *Maxwell v Department of Trade and Industry* [1974] 1 QB 523.

¹⁰⁰ The relief sought in *Kioa* was under the section 5(1)(a) of the ADJR Act which relevantly permits an aggrieved person to apply for an order for review where “*a breach of the rules of natural justice occurred in connection with the making of the decision*”. The section had been held to mean “*that relief may be sought where rules of natural justice are applicable in the exercise of a power and effect had not been given to them*”: *Minister for Immigration and Ethnic Affairs v Haj-Ismail* (1982) 57 FLR 133, 140 (Bowen CJ and Franki J). Hence a necessary precondition to an entitlement to relief was to establish that the principles of natural justice in fact applied.

¹⁰¹ *Salemi v MacKellar [No. 2]*(1977) 137 CLR 396; *R v MacKellar; ex parte Ratu* (1977) 137 CLR 461.

¹⁰² (1985) 159 CLR 550, 567.

¹⁰³ Wilson J (159 CLR 550, 600) concluded that there was no statutory intent supportive of the view that the Minister was “*not obliged to observe the dictates of procedural fairness*” and accordingly this was an available ground for review. His Honour did not undertake a wider analysis of when the principles of natural justice would apply. Deane J (159 CLR 550, 630-1) agreed with Mason J and Wilson J to the extent that their Honours concluded that the statutory framework had sufficiently changed so as to require the Minister to observe the principles of natural justice, but did not undertake any further analysis on the implication of the principles.

went further, it is suggested, than any domestic authorities at this time and proclaimed an entirely new approach to the implication of natural justice.

Mason J approached the matter in terms of principle this way:¹⁰⁴

The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations....

Mason J explained and developed this further:¹⁰⁵

In the ordinary course of granting or refusing entry permits there is no occasion for the principles of natural justice to be called into play. The applicant is entitled to support his application by such information and material as he thinks appropriate and he cannot complain if the authorities reject his application because they do not accept, without further notice to him, what he puts forward. But if, in fact, the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter If the application is for a further temporary entry permit and it is made in circumstances which are relevantly similar to those in which the earlier permit was granted, the applicant may have a legitimate expectation that the further entry permit will be granted or will not be refused in the absence of an opportunity to deal with the grounds on which it is to be refused. And if the refusal is to be attended by the making of a deportation order, the case for holding that procedural fairness requires that such an opportunity be given is unquestionably stronger.

There are four strands to Mason J's reasoning when dealing with application cases.

The first strand was the general expression of a requirement for a statutory power being "exercised fairly" adopting procedures that were "fair to the individual". This broad invocation of fairness as a determinative concept essentially restated the English duty to act fairly. In fact, Mason J had earlier spoken of a "common law duty to act fairly". In this duty, the "interests of the individual" were expressed not only at a level of generality, divorced from historical considerations of rights and interests,

¹⁰⁴ (1985) 159 CLR 550, 585.

¹⁰⁵ (1985) 159 CLR 550, 587.

but as being one of several matters for consideration before implying the duty. Like its English counterpart, the focus was on implying natural justice in limited circumstances in the execution of administrative decision-making with no particular significance assigned to the presence (or otherwise) of any underlying right or interest.

The second strand of the reasons related to what Mason J termed were the ordinary cases. These cases involved applications for a benefit of some kind. In these cases there would be *“no occasion for natural justice to be called into play”* because an applicant can supply such information and material to support the application that the applicant desires and a decision-maker is entitled to reject without more that which is put forward. However, in a practical sense, this class of case was very much limited by the third and fourth strands of Mason J’s reasons and by the fairly narrow way in which His Honour in *Winneke* had defined the ordinary class of application case.¹⁰⁶

The third strand of Mason J’s reasons provided for an exception to the ordinary application case and perhaps is the most enduring feature of Mason J’s judgment in *Kioa*. In Mason J’s view if material considered by the decision-maker – and upon which the decision is likely to turn – was from sources other than the applicant, then different considerations applied: in such situations the principles of natural justice were required to be observed by the decision-maker and the applicant would be *entitled* to deal with that particular matter. Mason J supported this statement by the decision in *Re HK* and the reasons of Mason J very much mirror the justification for imposing the duty to act fairly in that case viz., the need to tell the ‘immigrant’ his impression *“so that the immigrant can disabuse him”*.¹⁰⁷

¹⁰⁶ *FAI Insurance Limited v Winneke* (1982) 151 CLR 342. Mason J in *Winneke* had defined the ordinary application cases as ones where the *“issues are not clearly defined; they often involve policy issues, and though they raise the general suitability of the applicant to hold a licence, they do not often generate allegations of past misconduct”*: (1982) 151 CLR 342, 361. The corollary being where these considerations do not apply, then the principles can - and probably will - condition the exercise of a statutory power in an application case. The reasons of Mason J in *Kioa* could thus be understood as being an instance of ‘past misconduct’ in the sense that an adverse view was taken about the applicant. See also *Commissioner for ACT Revenue v Alphaone Pty Limited* (1994) 49 FCR 576.

¹⁰⁷ *In re HK* [1967] 2 QB 617, 630.

This basis for requiring natural justice to be observed was a development of significance. It is suggested that Mason J, whilst recognising the distinction between application and expectation cases, rests the implication for the need to observe natural justice in application cases on entirely new, and propositionally distinct, grounds: the need to bring the critical issue or factor upon which the decision is likely to turn to the attention of the individual.¹⁰⁸ This part of the reasoning is not based upon legitimate expectation or some broader definition of a right or interest but hinges upon the decision-maker relying upon information obtained from another source, not dealt with by the applicant and upon which the decision is 'likely to turn'.¹⁰⁹ Thus, although the requirement to bring to the attention of the individual adverse allegations from another source was a well-established requirement of a fair hearing, Mason J implicitly treated a failure to comply with this obligation as part of the implication test.

The fourth way in which Mason J was prepared to justify intervention and the application of the principles of natural justice was by reference to legitimate expectation. In this connection Mason J was prepared to hold that in cases where the application for a further permit was made in 'similar circumstances' to the earlier one, then there may be a legitimate expectation that *"the further entry permit will be granted or will not be refused in the absence of an opportunity to deal with the grounds on which it is to be refused."*

Brennan J approached the matter differently to Mason J, and gave the term 'interest' an expansive and modern day meaning:¹¹⁰

There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought

¹⁰⁸ (1985) 159 CLR 550, 587.

¹⁰⁹ A similar approach, as Mason J noted in *Kioa*, was taken by the Court of Appeal in *R v Gaming Board; Ex parte Beniam* [1970] 2 QB 417, 430-1 - a case concerning a failed application for a gaming certificate that would enable a person to apply for a gaming licence. In that case Lord Denning MR (Lord Wilberforce and Phillimore LJ agreeing) said that the Board who was to determine the application had a duty to act fairly requiring an applicant to be given an opportunity to satisfy the statutory criteria, but also a requirement to observe natural justice if there was material that is adverse to the grant that has been received by the decision-maker. In those circumstances the Court held that it was incumbent upon the decision-maker to advise the applicant of the substance of the material to enable a response to be provided.

¹¹⁰ (1985) 159 CLR 550, 616-7.

that a modern legislature, when it creates regimes for the regulation of social interests - licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials - intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy, should be accorded less protection than legal rights.

Brennan J sought to convey two ideas. The first was that the law – the principles of natural justice – needed to respond to application cases by acknowledging the proliferation of government regulation of the kind described. The second was that persons dependent upon government distribution of rights, privileges and benefits, had a kind of ‘new property’ which carried with it the right to the procedural protection provided by natural justice, notwithstanding that there was no legal ‘right’.¹¹¹

Brennan J’s judgment is a clear example of the ‘new thinking’ that was occurring in the judiciary in the period following the federal administrative law reforms in the 1970s. The tenor of Brennan J’s reasons echoed a key plank in what the authors of the Kerr Report considered justified expansive administrative law reform:¹¹² the widespread expansion of activities regulated by Government and statutory bodies and the exercise of discretionary power by them. On Brennan J’s thesis, the denial of some right, privilege or benefit claimed would be legally sufficient to afford the applicant an entitlement to natural justice in connection with the relevant administrative decision.

When the various strands of Mason J’s judgment are compared with the reasons of Brennan J, it is evident that *Kioa* remodelled natural justice and when it applied. Both Mason J and Brennan J dealt with how the Courts would approach cases where individuals apply for a benefit, interest or privilege. But the judgments also dealt with the matter at a higher level of principle, the effect of which was to obviate – at

¹¹¹ Charles Reich, ‘The New Property’ (1964) 73 *Yale Law Journal* 733; Ronald Sackville, ‘Property, Rights and Social Security’ (1978) 2 *UNSW Law Journal* 246, 247-8, 252; Ian Holloway, ‘Natural Justice and the New Property’ (1999) 25 *Monash University Law Review* 85, 88-9; Ian Holloway, *Natural Justice and the High Court of Australia – A Study in Common Law Constitutionalism*, (2002).

least in a practical sense – the need for a type of right, interest or expectation that traditionally had been recognised as one capable of being protected by the principles of natural justice in connection with administrative decision-making.

Mason J considered that the principles of natural justice applied “*subject only to the clear manifestation of a contrary statutory intention*”.¹¹³ The consequence of this development was that the critical question would be not whether the principles apply, but “*what does the duty to act fairly require in the circumstances of the case?*”.¹¹⁴ Brennan J adopted similar reasoning, but approached the principle as one of statutory intent *viz.*, when the “*legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention*”.¹¹⁵ Again Brennan J considered, like Mason J, that as “*it is seldom possible to say that the legislature intends to exclude observance of natural justice in the exercise of a statutory power...the more frequently addressed question is what the principles of natural justice require in the particular circumstances*”.¹¹⁶

We will shortly see that this presumptive application of the principles of natural justice is perhaps the most significant development in this period. Before doing so, one further issue should be noted. The judgments of Mason J and Brennan J in *Kioa* also addressed the ‘root source’ of the obligation to observe the principles of natural justice,¹¹⁷ although they adopted competing positions on it.¹¹⁸

¹¹² The Report of the Commonwealth Administrative Review Committee, August 1971 (the ‘Kerr report’ – Parliamentary Paper No.144 of 1971), paragraphs [15]-[16].

¹¹³ (1985) 159 CLR 550, 584.

¹¹⁴ (1985) 159 CLR 550, 585.

¹¹⁵ (1985) 159 CLR 550, 609.

¹¹⁶ (1985) 159 CLR 550, 612.

¹¹⁷ See generally the discussion in William Wade and Christopher Forsyth, *Administrative Law* (10th ed 2009) 33-34; in Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th ed 2013) 117-123; in Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (2002) Chapter 7; Stephen Gageler, ‘Legitimate expectation: Comment on the article by the Hon Sir Anthony Mason’ (2005) 12 *Australian Journal of Administrative Law* 111

¹¹⁸ In fact, the debate commenced well before that decision. Thus, by way of example, in *Brettingham-Moore v St Leonards Corporation* (1969) 121 CLR 509, 521 Barwick CJ (Menzies J and Windeyer J agreeing) rejected an argument that the principles of natural justice presumptively applied, and dealt with the matter in a way consistent with implied statutory intent theory. Then, in contrast to this judgment, in *Twist v Randwick Municipal Council* (1976) 136 CLR 106, Barwick CJ (at 109-110)

According to Mason J the obligation was a common law one – the ‘common law duty’ theory. On this theory, as explained by Mason J, the common law principles of natural justice exist independently of the statute and attach to – or regulate – the exercise of the power, with the duty to act fairly only being displaced by a clear manifestation of contrary legislative intent.¹¹⁹

The alternate view, expressed by Brennan J, was that the obligation depended upon the construction of the statute – the implied statutory intent theory. On this theory, as explained by Brennan J, the obligation to observe the principles of natural justice was to be derived by implication from the legislation that creates the power following a process of statutory construction.¹²⁰

The debate about the correctness of each theory ebbed and flowed, but by the early 1990s, the High Court had held that the obligation to observe the principles of natural justice was a common law duty.¹²¹ The law was, in this respect, considered to be settled.¹²² Notwithstanding this, episodically some judgments in the High Court sought to ‘leave open’ the very issue that had been decided,¹²³ or expressed views

different to the one he favoured the common law as the source of the obligations. Mason J expressed a similar view (at 112-113). Jacobs J suggested, at a point, that the applicability of the principles of natural justice depended upon the “*legislative intent*” (at 118-119).

¹¹⁹ (1985) 159 CLR 550, 584 (Mason J).

¹²⁰ (1985) 159 CLR 550, 609 and 614-5 (Brennan J). The view is, of course, the doctrine of ultra vires. In William Wade and Christopher Forsyth, *Administrative Law* (10th ed 2009) 30, the authors describe the central principle of this doctrine as being that “*a public authority may not act outside its powers*”. Thus, by this theory, the limits of statutory power are determined by their proper construction.

¹²¹ *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 574-5 (Mason CJ, Dawson, Toohey and Gaudron JJ).

¹²² In addition to the authorities discussed, in Australia, two intermediate Courts of Appeal – the Full Court of the Supreme Court of Victoria and the NSW Court of Appeal – had both held that the source of the obligation to observe the principles of natural justice was the common law duty theory: see *Victoria v Master Builders’ Association of Victoria* [1995] 2 VR 131, 138-139 (Tadgell J), 148 (Ormiston J) and 157-160 (Eames J) and *Vanmeld Pty Limited v Fairfield City Council* (1999) 46 NSWLR 78, 91-92 (Spigelman CJ) and 114-115 (Powell JA). In *Vanmeld*, Spigelman CJ (at 91) remarked that the “*view that the duty to accord procedural fairness is only an issue of statutory interpretation, consistently taken by Sir Gerard Brennan, has not prevailed*”. The Full Federal Court had also held that the common law duty theory was the accepted basis for the obligation to observe the principles of natural justice: see *May v Commissioner of Taxation* (1999) 92 FCR 152.

¹²³ Thus, the question was left open in *Abebe v The Commonwealth* (1999) 197 CLR 510, 553-4 (Gaudron J); in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 100-101 (Gaudron and Gummow JJ), 142-143 (Hayne J); in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 84-85 (Gaudron J); in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 93 where the High Court,

that were inconsistent with them.¹²⁴ The issue remained, essentially, quiescent until the High Court decision in *Plaintiff S10/2011 v Minister for Immigration*,¹²⁵ when the plurality described the debate as proceeding upon a “false dichotomy and is unproductive”. It was said to be this, according to the High Court, because the principles of natural justice were principles or presumptions of statutory construction that itself form part of the common law.¹²⁶ The consequences of this restatement, and the reasons for it, are explained later in Chapters 8 and 9.

6. *Judicial Restraint*

In the pre-*Kioa* period, even where there was a right or interest of the relevant kind, some judgments of the High Court demonstrated a clear reluctance to find a role for common law principles of natural justice where the statute provided some form of procedural safeguards to protect those rights or interests.¹²⁷ This caution was a reflection of a wider philosophical issue about the role of the court in proceedings for judicial review and whether the court should involve itself in prescribing minimum procedural standards in connection with administrative decision-making. The courts in England had, during its period of deviation,¹²⁸ desisted in involving itself in this area, and assumed a role of “rigorous self restraint”.¹²⁹ The courts in Australia did likewise, and this was the third reason for the stultification of the principles of natural justice during the 1960s and 1970s.

inconsistently, referred to the support for the obligation to afford procedural fairness by reference to Brennan J’s judgment in *Kioa v West* and numerous other judgments of Brennan J that were supportive of the ultra vires theory, as well as the majority judgment in *Annetts v McCann*; and more recently in *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 352 (the Court).

¹²⁴ Thus, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 74-75 the ultra vires doctrine was endorsed by Gleeson CJ and Hayne J by specific reference to the judgments of Brennan J in *Kioa v West* and in *Annetts v McCann*.

¹²⁵ (2012) 246 CLR 636, 666 (Gummow, Hayne, Crennan and Bell JJ).

¹²⁶ See further, in this respect, Chapter VIII: Procedural Fairness as a Fundamental Principle and Chapter IX: Conclusion.

¹²⁷ For example, *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509.

¹²⁸ This was the period from the 1920s until the decision in *Ridge v Baldwin*.

¹²⁹ J M Evans, *de Smith’s Judicial Review of Administrative Action* (4th ed 1980) 165.

(a) *A secondary role for natural justice?*

In this period, and leading up to some decisions of the High Court in the late 1970s, there were overt signs that judicial orthodoxy respected the primacy of Parliament – here, Parliament’s right to determine via the particular statutory framework what fairness in a given case should require of a decision-maker. Three decisions of the High Court in the period serve to illustrate the secondary role that some judges, particularly Barwick CJ, believed the principles of natural justice played, and should play, to the will of Parliament expressed in statute.

In *Brettingham-Moore v St Leonards Municipality*¹³⁰ the issue was whether the principles of natural justice applied to a Commission of enquiry set up to report to the Governor. The statute establishing the Commission provided that, where a person or body was aggrieved by the recommendations contained in the Commission’s report, such person or body could petition the Governor and thereafter was entitled to appear in support of the petition before the Commission before a final report could be issued by the Commission.

Barwick CJ considered that the statutory scheme adequately provided natural justice to those affected, holding that the opportunity to deal with an adverse report once published, “*would...in this type of statutory scheme...satisfy the common law requirements of natural justice*”.¹³¹ Importantly, Barwick CJ addressed the role that the courts were to play in defining the content, in a given case, of natural justice as being one that was subject to legislative intention:¹³²

The case is not one in which the legislature is silent as to the right to be heard, so that the common law can fill the void. The legislature has addressed itself to the very question and it is not for the Court to amend the statute by engrafting upon it some provision which the Court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material.

¹³⁰ (1969) 121 CLR 509.

¹³¹ *Menzies and Windeyer JJ* agreeing.

¹³² (1969) 121 CLR 509, 524.

Barwick CJ returned to this theme in *Twist v Randwick Municipal Council*.¹³³ *Twist* concerned a local council issuing a demolition order in respect of a dilapidated building. Following the making of such an order, the owner of the land was entitled to appeal to the District Court on facts and law, and with the right to call evidence. The owner did not appeal within the time prescribed and the question became whether the rules of natural justice attached to the making of the demolition order, notwithstanding the right of appeal so conferred.

Barwick CJ dismissed the appeal restating the limited, and secondary, role of natural justice to the expressed will of the Parliament such that “*if the legislation has made provision for that opportunity to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate*”.¹³⁴ Barwick CJ reasoned that “*even if the legislature having taken the matter in hand has not provided an adequate protection for the citizen in every possible situation, the court has no warrant to amend the legislation or to supplement it by orders intended to fill the suggested deficiency*”.¹³⁵

In the third case, *Salemi v MacKellar (No.2)*,¹³⁶ Barwick CJ approached the possible implication of the principles of natural justice differently to the way in which he dealt with the matter in *Brettingham-Moore* and in *Twist*. Both the timing and tenor of this judgment are significant. This part of Barwick CJ’s reasoning is likely to be responsive to a shift, at the very least an emerging precedential basis for a shift, in the judicial attitude to the implication of the principles of natural justice from this period. Although Barwick CJ acknowledged that the question which was required to be addressed for the common law principles to apply was whether the statutory power was, as a matter of construction, qualified – plainly he approached it with more than a measure of judicial caution:¹³⁷

¹³³ (1976) 136 CLR 106.

¹³⁴ (1976) 136 CLR 106, 110.

¹³⁵ (1976) 136 CLR 106, 111.

¹³⁶ (1977) 137 CLR 396.

¹³⁷ (1977) 137 CLR 396, 401-2.

It is most important, in my opinion, that the courts do not transgress the line dividing the judicial from the legislative function. To do so is to weaken both functions which ought for the health of society to retain their mutual independence.

Judicial restraint, in the way identified, can thus explain the outcome in many cases where relief was granted in proceedings for judicial review based upon a failure to observe the principles of natural justice, and to those where it was not. Thus, the courts held that there had been a denial of natural justice where a local council passed a resolution that land could not be drained, without hearing the party affected by the order;¹³⁸ where there was a failure to give notice that a house would be the subject of an order that it was a disorderly house;¹³⁹ and where there had been a failure to give notice that a person had been warned off horse race courses.¹⁴⁰ Conversely, as just explained, the right to the benefit of any common law obligations of natural justice were held not to exist where a local council had made a demolition order over premises without giving notice to the land owner before the order was made, but where there was a full right of appeal on fact and law to a court;¹⁴¹ and where there was a right to petition a Governor not to accept recommendations in a Commission report.¹⁴² In these latter classes of cases, adequate protections were thought to have been legislatively prescribed; and any judicially imposed obligation requiring further procedural safeguards was thought to be an unnecessary supplement.

(b) Judicial shift: a revised approach for the High Court

In the period from late 1976 to mid 1977 the High Court handed down four decisions which involved issues of natural justice.¹⁴³ In these decisions there was a shift in judicial thinking, and opposing views were expressed by different members of the

¹³⁸ *Delta Properties Pty Limited v Brisbane City Council* (1955) 95 CLR 11.

¹³⁹ *Commissioner of Police v Tanos* (1958) 98 CLR 383.

¹⁴⁰ *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487.

¹⁴¹ *Twist v The Council of the Municipality of Randwick* (1976) 136 CLR 106.

¹⁴² *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509.

¹⁴³ *Twist v Randwick Municipal Council* (1976) 136 CLR 106; *Salemi v MacKellar (No.2)* (1977) 137 CLR 396; *R v MacKellar; ex parte Ratu* (1977) 137 CLR 461; and *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487. The first of these decisions (*Twist*) was delivered on 17 November 1976 and the last (*Heatley*) on 7 July 1977.

Court about when the principles of natural justice applied. The difference was significant. Whereas the High Court had been emphasising and applying the negative aspect of the principles – giving them limited scope to operate where statutory schemes had provided a form of hearing – the High Court was now emphasising and applying the positive aspect of the principles – giving them scope to operate unless the statutory scheme expressly excluded their operation. These developments reflected a revised approach for the High Court: there was no longer any evidence, or suggestion, of “*rigorous self restraint*”,¹⁴⁴ nor was there any evidence that the High Court considered that common law principles of natural justice should, without question, play a secondary role to the will of the Parliament, when a limited form of statutory procedural fairness had been prescribed.

In *Twist* both Mason J and Jacobs J approached the question of implication of the principles of natural justice from the obverse position to that taken by Barwick CJ. Whereas Barwick CJ rejected the position that the implication of principles of natural justice was warranted unless the statutory context, by proper judicial method, warranted such an implication, both Mason J¹⁴⁵ and Jacobs J¹⁴⁶ started from the position that the principles of natural justice *would* apply unless the context demanded otherwise.

The judgments of Barwick CJ and Mason J rest on propositionally different foundations. In Barwick CJ’s view the common law principles of natural justice were not engaged when the legislature has specifically dealt with the provision of a hearing before a determination is made. In Mason J’s view the rules of natural justice continued to apply unless the statutory context demands the contrary and provides something, possibly not less than a full rehearing of the original decision. Further, the judgments rest on philosophically different foundations. In Barwick CJ’s view the statutory provision of some form of opportunity to be heard denies the scope for any form of supplement by common law principles of natural justice. Mason J’s view

¹⁴⁴ J M Evans, *de Smith’s Judicial Review of Administrative Action* (4th ed 1980) 165.

¹⁴⁵ (1976) 136 CLR 106, 114.

¹⁴⁶ (1976) 136 CLR 106, 118-9.

is the obverse, with the common law principles to apply unless excluded by the statutory context.

In *Salemi v MacKellar (No.2)*,¹⁴⁷ although the applicant failed in his contention that the principles of natural justice applied to the Minister when making a deportation order, three members of the Court gave further impetus to what Mason J and Jacobs J had said in *Twist*.¹⁴⁸ And by the decision in *Heatley v Tasmanian Racing and Gaming Commission*,¹⁴⁹ a majority of Justices supported the proposition drawn from *Cooper v Wandsworth Board of Work*¹⁵⁰ and the High Court decision in *Tanos*¹⁵¹ that a statutory authority having a power to affect the rights of a person is bound to observe the principles of natural justice *unless* the statutory context by express words of plain intendment exclude their operation.¹⁵²

Similar statements, emphasising the positive aspect of the principle, were made in the various judgments in *FAI Insurances Limited v Winneke*.¹⁵³

These developments lead Mason J in *Kioa* to declare that the principles of natural justice applied “*in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention*”.¹⁵⁴ The emphasis upon the positive, rather than the negative, aspect of the principle was such that natural justice presumptively applied to administrative and governmental decision-making that affected the rights, interests or legitimate expectations of an individual.¹⁵⁵

¹⁴⁷ (1977) 137 CLR 396.

¹⁴⁸ (1977) 137 CLR 396, 440 (Stephen J); 451 (Jacobs J); and 456 (Murphy J).

¹⁴⁹ (1977) 137 CLR 487.

¹⁵⁰ (1863) 14 CB (NS) 180.

¹⁵¹ (1958) 98 CLR 383.

¹⁵² (1977) 137 CLR 487, 499-500 (Aickin J); Stephen J and Mason J agreeing.

¹⁵³ (1982) 151 CLR 342, 348 (Gibbs CJ); 351-2 (Stephen J); 360 (Mason J); 377 (Aickin J); 399 (Wilson J); 413 (Brennan J). Murphy J dissented considering that the decision was not susceptible to judicial review (151 CLR 342, 374).

¹⁵⁴ (1985) 159 CLR 550, 584.

¹⁵⁵ A similar phrase was used by McHugh J *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 311. Similarly in *Haoucher v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 648, 653, Deane J considered that the law had developed to the point where it could be said that natural justice applied generally to “*governmental executive decision making*” – although the breadth of this statement has been doubted: see Aronson, above n 60, 370.

C. *Conclusion*

The period leading up to and including the decision in *Kioa* was marked by judicial development designed to reinvigorate natural justice as a means to provide procedural protection to rights, interests, legitimate expectations and benefits, redefined to fit the new era of administrative law in Australia. Notwithstanding the significance of these developments, the most enduring legacy from the period was the restatement of the principle, and the emphasis placed on the positive aspect of it, about when natural justice would apply *viz.*, the principles applied unless excluded by plain words of necessary intendment. The consequence of the principle being explained and applied in this way was that the nature of right or interest, which had assumed considerable importance in the pre-*Kioa* period and resulted in various judicially crafted devices used to expand the kind of rights and interests capable of being protected by natural justice, became all but an irrelevancy: now natural justice would condition the exercise of a statutory power unless excluded by clear words of the statute. The judicial focus in the post-*Kioa* period would not relate to implication, but to content.

V JUDICIAL REVIEW, JUDICIAL CREATIVITY AND PROCEDURAL FAIRNESS IN THE POST-*KIOA* PERIOD: 1985 - 1992

A. Introduction

This Chapter, which covers the period from 1985 to 1992, covers the extension of judicial review to areas of ‘refugee decision-making’,¹ specifically determinations as to whether a person had the status of a refugee,² that were not previously reviewable on the footing that the decisions were non-statutory, and the development of common law principles of procedural fairness within that broad context in the post *Kioa v West* period. This period, and this Chapter, is the background to an examination, undertaken in successive Chapters, of the evolution and development of common law principles of procedural fairness within a specific, and regularly evolving, statutory context – the *Migration Act 1958* (‘the Act’).

Subsequent Chapters analyse the evolution and development of common law principles of procedural fairness within those Parts of the Act that relate to ‘refugee claims’ and, where necessary, beyond:³ Chapter VI covers the period 1992 to 1998;⁴ Chapter VII covers the period 1998 to 2002;⁵ and Chapter VIII covers the period 2002 to date.⁶

In this Chapter two distinct features are drawn from the 1985 - 1992 time period: one directly ‘related’ to procedural fairness, the other only indirectly so. The first relates to procedural fairness and the decision in *Kioa v West*.⁷ What the decision in *Kioa v West* explained was when the principles of procedural fairness applied and,

¹ That is, administrative determinations made under the *Migration Act 1958* on whether a person had the status of a refugee under the Article 1A(2) of the *United Nations Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 2545 UNTS 189 (‘the Convention’), as amended by *The Protocol relating to the Status of Refugees* adopted by the United Nations General Assembly on 16 December 1966 (‘the Protocol’).

² By Article 1A(2) of the Convention, as amended by the Protocol, the term ‘refugee’ applies to any person who “owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country...”.

³ Specifically Parts 7 and 8 of the Act.

⁴ Chapter VI: Part 7 of the *Migration Act: An Analogue of the Common Law*.

⁵ Chapter VII: Procedural Fairness as a Normative Element in Construction.

⁶ Chapter VIII: Procedural Fairness: A Fundamental Principle.

⁷ (1985) 159 CLR 550.

when they did, gave an idea about what the principles required of a repository of statutory power particularly – as was the situation in that case – when there was information adverse to the interests of the applicant in question. There was considerable enthusiasm and appetite, in the Federal Court, for the possibilities opened up by *Kioa* and judicial review on this ground generated a considerable measure of criticism from the government.⁸ And it was this enthusiastic application of the principles of procedural fairness, following this decision, that resulted in statutory reforms in 1992 expressly designed to curtail it.⁹

The second distinct feature of this period, not immediately related to procedural fairness,¹⁰ was the conclusion of the High Court, in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*,¹¹ that ‘refugee decision-making’, absent an entry permit or valid entry into Australia,¹² was reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ‘ADJR Act’). This latter aspect was a continuation of a similar theme identified in the previous Chapter *viz.*, the court declining to hold that a broad statutory discretion denied the application of the principles of procedural fairness and denied judicial review under the ADJR Act. In essence, what occurred was the consideration of the refugee ‘status’ decision (which was, to that point, held not amenable to judicial review, unless the individual had validly entered Australia) with the entry permit decision (which was amenable to judicial review) so as to confer jurisdiction in relation to the former.

⁸ During the second reading speech to the Migration Reform Bill 1992, it was termed the “*somewhat open ended [doctrine] of natural justice*”: Commonwealth, Parliamentary Debates, House of Representatives, 4 November 1992, 2620 (Gerry Hand, Minister for Immigration Local Government and Ethnic Affairs).

⁹ This was through the *Migration Reform Act 1992*. The reforms brought about that Act are dealt with in Chapter VI.

¹⁰ The decision, at lower tiers, involved claims that there had been a denial of natural justice but this complaint was rejected at first instance (by Keely J (1987) 14 ALD 172)) and that decision was upheld on appeal by the Full Federal Court (Sweeney, Jenkinson and Neaves JJ (1988) 15 ALD 751). No such claim was advanced in the appeal to the High Court.

¹¹ (1989) 169 CLR 379.

¹² Before the High Court decision in *Chan*, the High Court had held, in *Mayer v Minister for Immigration and Ethnic Affairs* (1985) 157 CLR 290, that jurisdiction existed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to review a decision of the DORS Committee in relation to an individual who had validly entered Australia. This case is discussed later in the Chapter.

This was a substantive shift by the High Court that simply side-stepped prior authority to the contrary: it was judicial decision-making, the signs of which have earlier been seen, specifically tailored to permit judicial review in refugee decision-making. More relevantly, it was further evidence that the principles of procedural fairness applied to protect the rights of those individuals affected by an adverse determination of their status as a refugee built upon a revised construction of sections 6 and 6A of the Act.¹³ That said, although the approach was tinged with creativity, it was by no means activist, as later explained.

The combined effect of these matters resulted in statutory intervention that was expressly designed to restrict the role of the court in undertaking judicial review on procedural fairness grounds in the refugee area: these were the amendments brought about by the *Migration Reform Act 1992* ('the 1992 Act'). And it was these amendments that led to the carving out of these 'claims' as reviewable under the ADJR Act, and the creation of a separate system of administrative decision-making and defined procedures for judicial review in the Federal Court.¹⁴

It is convenient to deal first with the extension of judicial review into non-statutory refugee decision-making.

B. *Refugee claims and judicial review*

1. *Restrictions on judicial review: refugee claims and sections 6 and 6A of the Migration Act*

Historically, those individuals seeking a determination that they had the status of a refugee under the Convention occupied a unique place in Australian administrative law. This was because the manner in which an individual came to 'enter' Australia, and thereafter how that individual made their claim for refugee status, determined whether or not judicial review, under the ADJR Act, or at all, was available from an

¹³ The first being the *Migration Legislation Amendment Act 1989* and second being the *Migration Reform Act 1992*.

¹⁴ Specifically these changes occurred through the introduction by the *Migration Reform Act 1992* of new provisions in the Act – namely, Part 7 and 8. See further Chapter VI: 'Part 7 of the *Migration Act*: An Analogue of the Common Law'.

adverse determination of their status under the Convention.¹⁵ Fundamentally, the entitlement to judicial review turned upon whether or not the individual had entered Australia by virtue of an entry permit: if they had, any adverse determination relating to their status as a refugee could be the subject of judicial review under the ADJR Act; if they had not entered on such a permit, then judicial review under the ADJR Act was not available. The High Court decision in *Chan*, as we next see, unified this position by discarding such distinctions although there were clear signs that the courts were moving towards this position before then.

To understand this development – what the High Court decided in *Chan* – it is necessary to provide a short overview of the immigration system relating to ‘refugees’ that existed at that time.

From 1977 until 1992 a committee, called the Determination of Refugee Status Committee (the ‘DORS’ Committee) determined whether or not an individual was a person to whom Australia owed protection obligations. The DORS committee was not the subject of specific statutory criteria or foundation; rather it was established by administrative arrangement to advise the Minister on these claims.¹⁶ The DORS Committee was made up of four members, from separate Government departments, with a representative of the Office of the United Nations High Commissioner for Refugees attending in an observer capacity.¹⁷ The DORS Committee, using guidelines, determined whether the applicant was a refugee. A recommendation

¹⁵ See Mary Crock, ‘Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?’ (1996) 18 *Sydney Law Review* 267, 275-276 and Sean Cooney, ‘The Codification of Migration Policy: Excess Rules? – Part 1’ (1994) 1 *Australian Journal of Administrative Law* 125, 126-129 for concise accounts of the discretionary nature of the scheme at this time.

¹⁶ *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.

¹⁷ The establishment and workings of the DORS Committee has been discussed in academic writings including *Geoff Warburton*, ‘The Rights of Non-Citizens in Australia: Modes of Reviewing Exercises of Discretionary Power under the Migration Act 1985 (Cth)’ (1986) 9 *University of NSW Law Journal* 90, 93-94; *Patricia Hyndman*, ‘Australian Immigration Law and Procedures Pertaining to the Admission of Refugees’ (1988) 33 *McGill Law Journal* 717, 729; *Dianne Ayling and Sam Blay*, ‘Australia and International Refugee Law: An Appraisal’ (1989) 9 *University of Tasmania Law Review* 245, 258-259; *Andreas Schloenhardt*, ‘Australia and the Boat-People: 25 Years of Unauthorised Arrivals’ (2000) 23(3) *University of NSW Law Journal* 33, 36-37; and in *Roz Germov and Francesco Motta*, *Refugee Law in Australia* (2003) Ch 3. The workings of the DORS committee has similarly been the subject of judicial exposition: see, for example, *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290, 300-1; *Akyaa v Minister for Immigration and Ethnic Affairs* [1987] FCA 137 at [12]; *Gunaleela v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 543, 545.

was made to the Minister, to reject, accept or defer the application pending further enquiry, albeit the ultimate decision remained with the Minister.¹⁸ Although the determination made by the DORS committee was, thus, a determination made without statutory foundation and although the Act itself did not expressly confer upon the Minister the authority to make such a determination, the decision made by the Minister was held, by the High Court in *Mayer v Minister for Immigration and Ethnic Affairs*,¹⁹ to be made by implied authority under section 6A(1)(c) of the Act,²⁰ but only in relation to those persons who had entered Australia.

In reaching this decision, a majority rejected an argument that the terms of section 6A of the Act conferred no authority on the Minister to determine refugee status, but only required the existence of such a determination as an objective fact.²¹ The majority further held that section 6A(1)(c) of the Act should, as it attached “*statutory consequences to a determination by the Minister that the holder of the a temporary entry permit has the ‘status of a refugee’... be construed as impliedly conferring upon the Minister statutory authority to make that determination*”.²² In this situation, the determination that denied the applicant ‘refugee status’ was made “*under an enactment*”, so as to engage the ADJR Act.²³

Absent an entry permit, section 6 of the Act established the basic framework for ‘non-citizens’ and their entry into Australia: by requiring a non-citizen to be the holder of an entry permit.²⁴ However, ‘entry into Australia’ was specifically excluded

¹⁸ *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.

¹⁹ *Ibid.*

²⁰ Section 6A(1)(c) of the Act provided that an “*entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say – ... (c) he is the holder of a temporary entry permit which is in force and the Minister has determined... that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees...*”.

²¹ (1985) 157 CLR 290, 302 (Mason, Deane and Dawson JJ).

²² *Ibid.*

²³ Section 3 of the ADJR Act provided that a “*decision to which this Act applies*” meant “*a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition)... (a) under an enactment...*”.

²⁴ Section 6(1) of the Act provided that a “*non-citizen who, not being the holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited non-citizen*”. Section 6(2) of the Act provided that an “*officer may, in accordance with this section and at the request or with the consent of a non-citizen, grant to the non-citizen an entry permit*”. For a general discussion of the

by the Act in situations that commonly arose in refugee claims *viz.*, the making of the claim when first arriving in Australia without an entry permit. In these situations, the Act deemed the ‘non-citizen’ not to have entered Australia.²⁵ Further, in addition to holding an entry permit, or having ‘entered’ Australia, the individual making the refugee claim was required to secure a determination that they were a person to whom Australia owed protection obligations.

The practical effect of this construction of sections 6 and 6A of the Act was twofold. First, as the Full Federal Court explained in *Gunaleela v Minister for Immigration and Ethnic Affairs*,²⁶ any decision that the person did not have refugee status was not a decision made under the Act;²⁷ and, there being no ‘decision’, judicial review under the ADJR Act was therefore not available in relation to any such determination.²⁸ Secondly, the critical decision then became the determination made to not grant a temporary entry permit under section 6(2) of the Act. However, that decision was held, by reason of the very broad nature of the discretion conferred, to be essentially unfettered and thus, in practical terms, unreviewable in proceedings for judicial review.²⁹

2. *Conjoining applications: judicial creativity and access to judicial review.*

There is no reason to think that, prior to the decision in *Chan*, the courts were not alive to the artificiality and arbitrariness involved in refugee decision-making and the

two types of entry permits (a permanent entry permit or a temporary entry permit): see the general discussion by Mason J in *Kioa v West* (1985) 159 CLR 550, 589.

²⁵ See sections 36A(3) and (8) of the Act.

²⁶ (1987) 15 FCR 543.

²⁷ (1987) 15 FCR 543, 555-556 (The Court). See also *Tang v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 177; *Minister for Immigration and Ethnic Affairs v Maitan* (1988) 78 ALR 419; *Damouni v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 87 ALR 97.

²⁸ (1987) 15 FCR 543.

²⁹ The discretion in section 6(2) of the Act was described as “*relevantly unfettered*”: *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, 383 (Jackson J; Fox and Burchett JJ agreeing); see also *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528, 538 (Sheppard J; Beaumont and Burchett JJ agreeing). The short point, established by these (and earlier) cases was this. The discretion was construed as a wide one that related to the ‘national interest’ of who should be permitted to enter (or remain) in Australia and that, accordingly, decisions of this kind had been entrusted to the Minister (or Departmental Officers) and not to the Courts.

distinction in review rights that followed depending upon whether there had been entry into Australia. If, on the one hand, an application for refugee status was made following entry into Australia on a permit, then the provisions of the ADJR were engaged and judicial review available where an adverse decision was made.³⁰ If no entry was made, then the adverse decision was not susceptible to review at all: the recommended refusal of refugee status by the DORS committee would not constitute a decision that was reviewable under the ADJR Act because the DORS Committee decision was “*without statutory foundation, undefined by any identified statutory obligation or control and devoid of any direct statutory or legal effect*”;³¹ and, similarly, the Minister’s decision, having no statutory footing absent an entry permit, was likewise not made “*under an enactment*”.³²

In fact, the signs that the courts recognised the reality of this situation were evident before the decision in *Chan*, and part of the impetus derived, as we next see, from the decision in *Kioa v West*. The key to this revised approach was finding a statutory basis for the exercise of the power to decide the refugee determination, or the relationship between such a determination and the exercise of a statutory power, so as to fit within the threshold requirement to jurisdiction under the ADJR Act.³³

In *Akyaa v Minister for Immigration and Ethnic Affairs*,³⁴ by somewhat subtle means, the position that had been established by the Full Federal Court in *Gunaleela* was circumvented.

In *Akyaa*, the applicant (and her daughter), who had been in Australia some years prior and been denied refugee status on that occasion, arrived at Sydney airport on a flight from Singapore. She completed an incoming passenger card, describing herself

³⁰ *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.

³¹ *Akyaa v Minister for Immigration and Ethnic Affairs* [1987] FCA 137, although in *Gunaleela v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 543, the Full Court left open the question of whether the DORS committee’s recommendation, as opposed to the Minister’s decision, could be challenged under the ADJR Act.

³² The ADJR Act permits judicial review, on defined grounds, in all ‘decisions’ made “*under an enactment*”, including conduct “*engaged in for the purpose of making a decision*” unless exempted by the Act: see sections 3(1) and 3(5) of the ADJR Act.

³³ Namely, that there be a decision made “*under an enactment*”: see section 5(1) of the ADJR Act. This provision was described as the “*linchpin*” to the ADJR Act: see *Griffith University v Tang* (2005) 221 CLR 99, 117 (Gummow, Callinan and Heydon JJ).

as ‘migrating to Australia’, as well as a two page document seeking political asylum. A Departmental officer, the Court found, treated documents as an application for an entry permit together with an application for ‘refugee status’. The application for an entry permit was rejected, and the applicant was not found to be a person to whom Australia owed protection obligations under the Convention.

The applicant sought judicial review in the Federal Court under the ADJR Act, in part on the ground that she had been denied procedural fairness via the failure of the Departmental Officer to put adverse material to her, and this application was upheld applying *Kioa v West*.

The route that the trial judge, Gummow J, took to reach this result was significant. Gummow J, although accepting that the applicant had not entered Australia and accepting that there was no statutory footing upon which the determination of refugee status was made, held that in substance there was one application. In adopting this approach, Gummow J reasoned that in these circumstances, and in considering whether to grant an entry permit, “*the decision-maker was bound to have regard to the claim to refugee status*”.³⁵ By these shorts steps, the otherwise unreviewable became reviewable. Gummow J went a way further holding that, in the circumstances, there had been a denial of natural justice in the consideration of the claim to refugee status, and this was so even though that denial occurred at the stage of consideration by the DORS committee, rather than the delegate who was taken to have made the determination to refuse the entry permit and the claim to refugee status.

The approach of Gummow J, which was not isolated,³⁶ may be summarised this way. Once the applications, for an entry permit and for a determination on whether the

³⁴ [1987] FCA 137.

³⁵ Ibid at [35]. In *Osman-Lloyd v Minister for Immigration and Ethnic Affairs* (1987) 17 FCR 353, 370, in the context of an application for judicial review under the ADJR Act in relation to a claim under s.6A(1) of the Act for a temporary entry permit based on compassionate grounds likewise considered that the latter claim was relevant to the consideration of the decision on whether to grant the entry permit.

³⁶ A further example of a ‘finding’ that there was a conjunction of applications, so as to confer jurisdiction under the ADJR Act in circumstances where the applicant unsuccessfully applied (and thus did not have) an entry permit or a determination that they had ‘refugee status’, was *Dahlan v*

individual was owed protection obligations, were taken in substance to be one, the practical consequence was that the Court had jurisdiction to undertake judicial review of both determinations under the ADJR Act. Further, if the decision in this last respect was by a delegate, as Gummow J considered it was, then this was part of the decision which attracted the ADJR Act; and if it was the decision of the DORS Committee then that too, according to Gummow J, was reviewable because any breach of the rules of natural justice was “‘in connection’ with the making of the decision of the delegate” under section 5(1)(a) of the ADJR Act.³⁷

3. *The High Court decision in Chan: the availability of judicial review in refugee claims*

The assimilation of refugee decision-making into mainstream judicial review was, ultimately, legitimised by the High Court decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*.³⁸ The immediate significance of this decision was the confirmation by the High Court that decisions made by the Minister based on recommendations made by the DORS committee were subject to judicial review under the ADJR Act.

In *Chan*, the applicant entered Australia illegally in 1980. He applied for refugee status in 1982, and in 1983 a delegate of the Minister rejected the application based

Minister for Immigration, Local Government and Ethnic Affairs (1989) 217 ALR 121. There Hill J concluded (217 ALR 121, 125) that the decision to refuse to recognise the applicant as a person to whom Australia owed protection obligations held there was jurisdiction under the ADJR Act because although such a decision “was, while not one under the Act directly, ‘conduct engaged in for the purpose of making a decision’ which by s 3(5) of the AD(JR) Act includes ‘the doing of any act or thing preparatory to the making of the decision, including the taking of evidence or the holding of an enquiry or investigation’. It follows that the court has jurisdiction under the AD(JR) Act to review the decision”. Thus, although the basis of the exercise of jurisdiction under the ADJR Act was different to that identified by Gummow J in *Akyaa*, the aggregation of applications mirrored the approach taken in that case. See also, as a further example, *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363, 370 where Lee J, in dealing with an application, under s.6A(1) of the Act for an entry permit based on compassionate grounds, did likewise.

³⁷ [1987] FCA 137 at [36]. Section 5(1) of the ADJR Act provides that a “person aggrieved by a decision to which this Act applies...may apply...for an order for review in respect of the decision on any one or more of the following grounds: (a) that a breach of the rules of natural justice occurred in connection with the making of the decision...”. The correctness of the approach of Gummow J was recently endorsed by French CJ and Kiefel J in their joint judgment in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 654.

³⁸ (1989) 169 CLR 379.

on a recommendation to this effect made by the DORS Committee. The application was reconsidered, based on a suggestion that the original decision was legally invalid, but the same decision was made by a delegate of the Minister. This second decision was, like the first, based upon a recommendation made by the DORS Committee that the application be rejected. The applicant did not have an entry permit, and an appeal against the refusal by a delegate to grant one was not pursued in the High Court. The appeal thus squarely raised the jurisdiction of the Court to undertake judicial review of the decision to refuse refugee status.

In the High Court an issue was raised by the Minister, relying upon the decision of the Full Federal Court in *Gunaleela v Minister for Immigration and Ethnic Affairs*,³⁹ about the jurisdiction under the ADJR Act to review the decision that refused to recognise the applicant as a person to whom protection obligations were owed.⁴⁰

The High Court had little doubt that there was jurisdiction under the ADJR Act notwithstanding the applicant for refugee status did not hold an entry permit, and in so holding considered the application for an entry permit and that for refugee status to be interconnected. Thus, approaching the matter in this way, Mason CJ considered the jurisdiction of the Act was engaged not only by way of decision under section 6A(1) of the Act, but because there was conduct being 'engaged in' for the purposes of making a decision:⁴¹

The refusal by the delegate of the application for refugee status was a decision made in the context that Mr Chan was then applying for a temporary entry permit and would apply for a permanent entry permit under s 6A(1) if his application for refugee status succeeded. There is a strong case for saying that in this setting the delegate's decision amounted to a decision under s 6A(1) and, if not, to "conduct engaged in for the purpose of making a decision" to which the AD(JR) Act applies: see ss 3(5), 6(5) of the AD(JR) Act. Refusal by the delegate of the application for refugee status was conduct engaged in as part of procedures leading to the ultimate unavailability of a permanent entry

³⁹ (1987) 15 FCR 543.

⁴⁰ At first instance in the Federal Court this issue was conceded, and the concession was maintained on appeal to the Full Federal Court – see, for example, the reasons of McHugh J in *Chan* (1989) 169 CLR 380, 420. In the High Court, as the reasons of McHugh J there record, although there was "no attempt to resile from the stand taken", it was suggested that "there was some doubt about whether the decision was 'made under an enactment' within the meaning of the ADJR Act".

⁴¹ (1989) 169 CLR 379, 386.

permit. It matters not that the antecedent decision was not made by the person who makes the decision to which the Act applies...

The other judgments delivered were similarly supportive of the engagement of the jurisdiction conferred by the ADJR Act either as a decision under an enactment and thus reviewable under section 5 of the ADJR Act,⁴² or as conduct engaged in for the purpose of making a decision and thus reviewable section 6 of the ADJR Act,⁴³ or reviewable under both sections 5 and 6.⁴⁴

Fundamentally, all judgments supported the approach to jurisdiction on the basis that the applications could be treated as one:⁴⁵ in that way there was a decision made under section 6A(1) of the Act – and, for the purposes of the ADJR Act, either reviewable as a decision in its own right or conduct engaged for the purposes of making such a decision.

Although aspects of the decision in *Chan* attracted some criticism, particularly in connection with the manner in which the Court came to conclude that jurisdiction under the ADJR Act was engaged,⁴⁶ later High Court decisions confirmed its correctness.⁴⁷ In any event, at least in connection with refugee decision-making,

⁴² (1989) 169 CLR 379, 394-5 (Dawson J).

⁴³ (1989) 169 CLR 379, 411 (Gaudron J).

⁴⁴ (1989) 169 CLR 379, 404 (Toohey J); 421 (McHugh J).

⁴⁵ For example, Dawson J (169 CLR 379, 394), reasoned that the consideration of “*both the issue of a temporary entry permit and the determination of refugee status were before the Minister as part of the process for seeking an entry permit under s.6A(1) of the Migration Act*”.

⁴⁶ See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 55. The same criticism is made in later editions: (4th ed, 2009) 62 and in Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th ed, 2013) 69-70. The argument there advanced was that, in relation to whether it was an element of a ‘decision’, the reasons of the Court could not be correct as no decision in connection with the permanent permit decision had been or could be made and the application was premature; and, in relation to whether it was a decision itself, this was “*unconvincing*”. It is unnecessary to ‘resolve’ this debate about the correctness of *Chan* but the following should be noted in related to these criticisms. First, the decision was supported by the decision in *Minister for Immigration and Ethnic Affairs v Liang* (1996) 185 CLR 259; and, secondly, the critical part of the judgments assess the application for an entry permit and an application for recognition as a refugee as a combined application not singular ones, which the criticism appears to assume: although this does not dispose of the fact that in *Chan*, there was no appeal in connection with the failure to appeal the refusal to issue an entry permit.

⁴⁷ *Minister for Immigration and Ethnic Affairs v Liang* (1996) 185 CLR 259, 273 where Brennan CJ, Toohey, McHugh and Gummow JJ said that the making of the adverse refugee determination was correctly characterised “*either as conduct engaged in for the purpose of the Minister's making of a decision as to the grant of an entry permit under s 6A(1) or as a determination as to refugee status made in exercise of a power conferred by that sub-section*”.

events were to overtake this development, and serve to entrench it: statutory intervention occurred in two significant respects that sidelined any debate, at least in this area of administrative decision-making.

The first intervention was via the *Migration Legislation Amendment Act 1989* (‘the 1989 Act’). The amendments to the Act, made by the 1989 Act, arose as a consequence of the report by the Committee to Advise on Australia’s Immigration Policies.⁴⁸ From a general administrative law perspective, the amendments to the Act were intended to curtail unfettered decision-making,⁴⁹ and to attain a better quality, and structure, of administrative decision-making.⁵⁰ However, the amendments, so far as they related to refugee claims and refugee decision-making, were more limited:⁵¹ determinations with respect to refugee status continued to be made by the DORS Committee until 1992.⁵²

⁴⁸ The CAAIP was established in September 1987 with terms of reference which required it to report on the “*guiding principles which should shape Australia’s immigration policies...and for administrative and legislative mechanisms necessary for the implementation of immigration policies*”. The CAAIP submitted its final report on 16 May 1988, and made 73 recommendations, and a proposed form of legislation to give effect to these recommendations. In relation to ‘refugees’, the Government did not accept the proposal (contained in the draft legislation) for there to be an independent refugee commissioner to hear onshore refugee claims, and retain the DORS system. The draft legislation also proposed abolition of section 36 of the Act - the provision that deemed non citizens refused arrival not to have ‘entered’ Australia and that proposal also was rejected with the Minister stating that “*the Government believes that this would create a certain pull factor and could place Australia in the situation faced in some countries where there are tens of thousands of onshore refugee claimants*”: Commonwealth, *Parliamentary Debates*, Senate, 8 December 1988, 3753 (Senator Robert Ray, Minister for Immigration, Local Government and Ethnic Affairs).

⁴⁹ During the second reading speech for the *Migration Legislation Amendment Bill 1989*, it was said that the reform process was driven by the need for there to be a curtailment of the wide discretion given to the Department to control immigration and to formalise decision-making guidelines which were “*perceived to be obscure, arbitrarily changed and applied and subject to day to day political intervention in individual cases*”: see Commonwealth, *Parliamentary Debates*, House of Representatives, 1 June 1989, 3447 (Mr Holding, Minister Assisting the Minister for Immigration, Local Government and Ethnic Affairs).

⁵⁰ In general terms the amendments included the removal of broad discretionary decision-making at the primary level, structuring the decision-making through the notification of policies and guidelines to be followed by those deciding upon immigration, the establishment of merits review for administrative decision-making via an independent administrative review body and appeal rights, confined to questions of law, to the Federal Court.

⁵¹ See Part III, section 64B of the Act.

⁵² James Crawford, ‘Australian Immigration Law and Refugees: the 1989 Amendments’, 1990 2 *International Journal of Refugee Law* 626, 629. This paper contains a detailed overview of the changes brought about by the 1989 amendments.

Nevertheless, rather than reverse the position affirmed by *Chan*, amendments to section 6 of the Act, brought about by the 1989 Act, served to confirm it: section 6 of the 1989 Act repealed section 6A(1) of the Act, and replaced it with a comparable provision.⁵³ Thus, the power that existed under section 6A(1)(c) of the Act to ‘determine’ refugee status, became a power to make a determination under section 11ZD of the Act.⁵⁴ This new provision was later held to support the same construction reached in *Chan*.⁵⁵ Later this new provision was also repealed, and replaced by a new provision.⁵⁶ And that provision too was repealed following the wider reforms brought about by the 1992 Act.

A further point should be made about these amendments, and they bear directly on the outcome in *Chan*, earlier described. To the extent that criticism could be made about the decision masking a kind of activism by the Courts – contriving a result to ensure that refugee claimants had access to judicial review – these amendments answer it. The repeated re-enactments of legislation in the same, or substantially similar, terms to that construed by the High Court in *Chan* confirmed the Court’s construction accorded with the Parliamentary intent.⁵⁷

⁵³ The re-enactment of a provision, with comparable or identical wording, by Parliament following judicial construction of them creates a presumption that the words “*bear the meaning*” already attributed to them: see *Re Alcan Australia Limited; Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106 (the Court).

⁵⁴ The section was entitled: “*Circumstances in which permanent entry permits may be granted to non-citizens after entry into Australia*” and included a subsection relating to a person having been determined a ‘refugee’ – see section 11ZD(1)(d) of the Act. This section was renumbered, by section 35 of the 1989 Act, as section 47(1)(d) of the Act. Although it has been suggested (see James Crawford, above, p. 630) that the obvious intent of the retention of the DORS committee, and the basic structure of the Act, was to ensure that refugee decision-making was kept outside the Act, the decision in *Chan* and the comparable provision that was introduced to replace section 6A(1) of the Act ensured the continuing availability of judicial review in these cases and were taken to be made ‘under; the Act for that purpose.

⁵⁵ *Minister for Immigration and Ethnic Affairs v Liang* (1996) 185 CLR 259, 274 where Brennan CJ, Toohey, McHugh and Gummow JJ said that once “*again, if there was statutory power to ‘determine’ refugee status it could only have been implied from the fact that a condition of grant of a permanent entry permit was a ‘determination’ of refugee status. The same analysis of the ‘decision’ would still apply*”.

⁵⁶ Section 22AA of the Act which provided: “*If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee*”. This amendment, as the plurality noted in *Liang* (1996) 185 CLR 259, 274, was the “*first time that the power of the Minister was expressly provided by the Act*”.

⁵⁷ *Re Alcan Australia Limited; Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106 (the Court).

In any event, the second phase of statutory amendments neutralised any debate about the legitimacy of judicial review in migration decision-making: judicial review in those cases was specifically provided for by the 1992 Act, as we later see in Chapter VI.⁵⁸

C. *Adverse material: the application of Kioa in the Federal Court*

In the post *Kioa* period leading up to the amendments to the Act brought about by the 1992 Act, a body of jurisprudence emerged in the Federal Court that revealed the true extent of what *Kioa v West* may require in a given case and the sort of procedural rigour that the courts would now impose upon a decision-maker in proceedings for judicial review. If *Kioa* can be said to establish, as a specific ‘rule’ of procedural fairness, that procedural fairness requires that a person whose interests are affected by an exercise of power should be given an opportunity to deal with “*information that is credible, relevant and significant to the decision to be made*”,⁵⁹ then in the period up to 1992 many judgments in the Federal Court gave clear indications about what this, in a practical sense, required.⁶⁰

At least initially, in the post *Kioa* period, there were signs that, perhaps, the decision would not yield any differences in the way in which the court would require decision-makers to draw what might be termed ‘adverse information’ to the attention of the individual concerned. Thus, it had been held that “*an obligation to accord a hearing does not usually carry with it an obligation to direct the attention of*

⁵⁸ Although judicial review, on natural justice grounds, was precluded in the Federal Court by these amendments: see Chapter VI: ‘Part 7 of the *Migration Act*: An Analogue of the Common Law’.

⁵⁹ *Kioa v West* (1985) 159 CLR 550, 624 (Brennan J). Mason J (159 CLR 550, 587), formulated the test slightly differently, emphasising “*the need to bring to a person’s attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it*”.

⁶⁰ And it extended as well to the High Court: *Haoucher v Minister of State and for Immigration and Ethnic Affairs* (1990) 169 CLR 648 – a decision that continued the march of ‘natural justice’ into other aspects of Governmental decision-making. In that case the High Court held that an individual who succeeded in overturning a deportation order before the Administrative Appeals Tribunal was entitled to a ‘hearing’ if the Minister decided that there were, consistent with Government policy, ‘exceptional circumstances’, for declining to follow the Tribunal’s decision and was also entitled to know the nature of the material relied upon to conclude that there were such ‘exceptional circumstances’.

an affected person to omissions in his or her case".⁶¹ Further, some decisions had affirmed that there was no general obligation on the part of the decision-maker to initiate enquiries on the part of an applicant,⁶² or to make a case for the applicant,⁶³ or that, ordinarily, an applicant cannot complain if, without further notice, the material put forward is rejected by the decision-maker.⁶⁴

In the period leading up to the early 1990s, there were a considerable number of reported cases involving judicial review, on procedural fairness grounds, in the migration area in the Federal Court.⁶⁵ As the decisions bear out, the Federal Court began to take a distinctly different approach to what the principles of procedural fairness would require of a decision-maker when in possession of material that was "*credible, relevant and significant to the decision to be made*".⁶⁶

⁶¹ *Century Metals and Mining NL v Yeomans* (1989) 40 FCR 564, 593 (Full Federal Court). Other decisions had been to like effect: see *Sullivan v Department of Transport* (1978) 20 ALR 323, 343; *Singh v Minister for Immigration and Ethnic Affairs* (1985) 9 ALN N 13 (Wilcox J). However, before the decision in *Century Metals* a differently constituted Full Federal Court had accepted the proposition, following from *Kioa v West*, that, as a general rule "*when some consideration personal to the applicant is to be taken into account against him or her the rules of natural justice require that the applicant be given a chance to comment or contradict*": *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502, 506 (Fox J); 512 (Neaves J).

⁶² *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 288, 392-3 (Toohey J); *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167; *Ertan v Minister for Immigration and Ethnic Affairs* (1986) 11 FCR 382.

⁶³ *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 170 (Wilcox J).

⁶⁴ *Geroudis v Minister for Immigration and Ethnic Affairs* (1990) 19 ALD 755 (French J). See also *Minister for Immigration, Local Government and Ethnic Affairs v Kumar* (unrep., Full Federal Court, 31.5.90).

⁶⁵ The cases included *Taveli v Minister for Immigration, Local Government & Ethnic Affairs* (1989) 86 ALR 435; *Minister for Immigration, Local Government & Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77; *Barrett v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 129; *Renevier v Tuong* (1989) 18 ALD 614; *Broussard v Minister for Immigration, Local Government & Ethnic Affairs* (1989) 21 FCR 472; *Luu v Renevier* (1989) 19 ALD 521; *Minister for Immigration, Local Government & Ethnic Affairs v Kurtovic* (1990) 21 FCR 193; *Detsongjarus v Minister for Immigration, Local Government & Ethnic Affairs* (1990) 21 ALD 139; *Hamera v Minister for Immigration, Local Government & Ethnic Affairs* (1990) 22 ALD 436; *Hossain v Minister for Immigration, Local Government & Ethnic Affairs* (1991) 23 ALD 771; *Somaghi v Minister for Immigration, Local Government & Ethnic Affairs* (1991) 31 FCR 100; *Pancharatnam v Minister for Immigration, Local Government & Ethnic Affairs* (1991) 26 ALD 217; *Buksh v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 647; *Li Fang v Minister for Immigration, Local Government & Ethnic Affairs (No.2)* (1992) 33 FCR 568; *Xia v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 27 ALD 668.

⁶⁶ *Kioa v West* (1985) 159 CLR 550, 624 (Brennan J).

An example of this renewed approach was the decision in *Broussard v Minister for Immigration and Ethnic Affairs*.⁶⁷ The case concerned an application for permanent resident status under section 6A of the Act, and was a proceeding for judicial review under the ADJR Act.

In *Broussard* the applicant sought judicial review of a decision of a delegate of the Minister to decline permanent resident status to him. One of the grounds was a failure to observe the principles of procedural fairness. The complaint arose in the following circumstances. The applicant contended, as one of the grounds to support his claim for residency, that he would have no financial support in his country of origin. Contrary to the applicant's case, the delegate found, based upon the absence of evidence from the applicant's family members (specifically, his brothers) that they were unable to assist the applicant, that he would have such assistance available in his country of origin.

The issue was whether there had been a failure to afford procedural fairness to supplement the perceived difficulties with the application – the failure to provide corroboration from the brothers of the applicant – by requiring this issue to be brought to the attention of the applicant for his comment or response. Gummow J held that the circumstances of the case required the decision-maker to bring what the delegate considered to be a critical issue to the attention of the applicant or his legal advisers. This procedural requirement stemmed from the fact that the delegate proposed to take into account this matter, adverse as it was to the interests of the applicant.⁶⁸

In the present case, as matters transpired, a critical issue or factor... on which the administrative decision was likely to turn was the absence of corroboration of claims and assertions made on various matters by the applicant. There was a need to bring that critical issue or factor to the attention of the applicant or his solicitor.... This case demonstrates the point ...that the principles of natural justice are of variable content and have a flexible quality which evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power. In the present case, the attitude of the delegate as to what would be required by way of

⁶⁷ (1989) 21 FCR 472.

⁶⁸ (1989) 21 FCR 472, 481.

probative material on a number of issues was of central importance to the decision-making process she adopted in deciding to accept the recommendation of the panel to maintain the decision refusing the application for the grant of resident status.

There were other developments that went beyond the decision in *Broussard*. In *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*,⁶⁹ the Full Federal Court took the matter some way further, holding that the adverse material or matters which would need to be ‘put’ to an applicant by a decision-maker, prior to making the decision, included the conduct of the applicant.

In that case the applicant, an Iranian national, applied for recognition as a refugee, which was refused. He then applied for resident status on humanitarian grounds. This application was also refused. However following the rejection of this second application, the applicant sent a letter to the Iranian Embassy in Canberra, which included statements critical of the Iranian regime. An application for reconsideration of the delegate’s decision refusing to recognise him as a refugee was made and decided after this letter had been sent. That reconsideration affirmed the earlier decision refusing to recognise him as a refugee and determined that the applicant was not, despite his claim to the contrary, a refugee *sur place*.⁷⁰ In this last respect, it was found that the applicant had not acted in good faith in sending the letter to the Iranian Embassy.

The applicant challenged the decision to refuse him a protection visa by application under the ADJR Act. This application was dismissed at first instance in the Federal Court, and an appeal was brought from that dismissal.

In the Full Court, the applicant complained that he had been denied procedural fairness because the finding as to lack of good faith was of particular importance in determining, at the time of reconsideration, whether the applicant was a refugee *sur place*; and that, despite having dealings with the departmental officers in this period prior to the reconsideration of the decision to deny him refugee status, he was never

⁶⁹ (1991) 31 FCR 100.

⁷⁰ A person “*who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee ‘sur place’*” – see paragraph 94 of the Handbook on Procedures and Criteria for Determining Refugee status, 1979 UNHCR.

given an opportunity to respond to the suggestion that he lacked good faith in sending the letter. Gummow J upheld this contention, concluding:⁷¹

...in a particular case, fairness may require the applicant to have the opportunity to deal with matters adverse to the applicant's interests which the decision-maker proposes to take into account, even if the source of concern by the decision-maker is not information or materials provided by the third party, but what is seen to be the conduct of the applicant in question.

Jenkinson J delivered a separate judgment agreeing with the conclusion of Gummow J.⁷² Keely J dissented, holding that there had been no denial of procedural fairness.⁷³ Keely J held that as the applicant and his solicitor had been invited to submit all relevant matters before the reconsideration of the protection visa would take place, and no further information was submitted in response, there was accordingly no denial of procedural fairness.⁷⁴

The significance of this decision is twofold. First, the Court recognised that, in certain cases, the obligation to put adverse conclusions could extend to circumstances where the conclusion was based on material submitted by the applicant, or by the conduct of the applicant in question. This was unquestionably a practical development of principle. Secondly, the acceptance of this principle by the Court impliedly overruled (at the very least confined) the decision of French J in *Geroudis v Minister for Immigration, Local Government and Ethnic Affairs*,⁷⁵ which held that an applicant cannot complain if, without further notice, the material put forward is rejected by the decision-maker.

In that case, French J held that a finding by a delegate that a letter, alleged to have been sent by the applicant seeking residency from the Department, was 'not genuine' was not a procedurally unfair finding notwithstanding that the decision-maker did not alert the applicant to the prospect of making such a finding.

⁷¹ (1991) 31 FCR 100, 119.

⁷² (1991) 31 FCR 100, 108.

⁷³ (1991) 31 FCR 100, 101.

⁷⁴ (1991) 31 FCR 100, 101-102.

⁷⁵ (1990) 19 ALD 755.

Another aspect of the development in the content of the principles of procedural fairness following the decision in *Kioa* related to uncommunicated material which was found to be misleading. In *Barrett v Minister for Immigration, Local Government and Ethnic Affairs* the Full Federal Court considered that procedural unfairness would thereby occur:⁷⁶

...it may be that where the decision-maker acts substantially upon a departmental submission which is not communicated to the other side, the decision is vitiated if that submission is seriously misleading as to the facts. That may be argued to be such a 'fundamental flaw in the decision making process'... as to make the decision bad on the ground that the decision making process was, even if through no fault of the decision-maker himself, 'seriously defective or irregular'...

D. Conclusion

The period following *Kioa v West* until the introduction of the 1992 Act contained two important legal developments for refugee claims specifically, and the principles of procedural fairness more generally. The first was that the refugee claimants had access to courts and the procedural protection of judicial review,⁷⁷ something which the High Court to this day has regarded as fundamental.⁷⁸ The second was the rapid uptake of the revised vision of procedural fairness proclaimed by *Kioa v West*.

In relation to the first development, we saw in Chapter IV the courts dispensing with strict legal categorisation and undertake a broader contemporary evaluation of the effect of the decision on the individual in the determination of whether the principles of procedural fairness applied. And so it was here, albeit within a specific statutory context: the courts were searching for a statutory footing in the exercise of the power not only because that engaged jurisdiction under the ADJR Act, but because that dispensed with the need to identify, explicitly, the particular 'right' in the context of a process that was held to have no statutory footing. Although recent

⁷⁶ (1989) 18 ALD 129, 133 (Pincus, Gummow and Lee JJ).

⁷⁷ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

⁷⁸ *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

authority might tend to suggest that there was a particular ‘right’ involved,⁷⁹ the principles of procedural fairness were, in this time period, still very much in the early stages of a resurgence following the decision in *Kioa v West*.

In relation to the second development, applications for judicial review on procedural fairness grounds “flourished” in this period,⁸⁰ and the principles themselves underwent ‘refinement’ in the ways discussed, as well as into new areas of governmental decision-making.⁸¹ The developments generated ‘tension’,⁸² and attracted criticism, some of it pointed: it was said that the judges were ‘activist’;⁸³ that procedural fairness created a “*legal obligation of inexact dimension*”;⁸⁴ and, by the government, that procedural fairness had cast ‘open ended’ obligations on decision-makers.⁸⁵ These developments were identified to as justifying the amendments brought about by the 1992 Act:⁸⁶ but without the first development, at

⁷⁹ The ‘right’, arguably, being imprisonment – and thus deprivation of liberty – at the direction of the Executive for longer than otherwise whilst the decision as to refugee status was being determined: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 353 (the Court). The ‘right’, again arguably, was, as Mason J described in *Kioa v West* (1985) 159 CLR 550, 582, “*relating to...status*”.

⁸⁰ In Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 53, applications for judicial review under the ADJR involving ‘natural justice’, in this period, were said to have “*flourished*”.

⁸¹ For example, the situation in *Haoucher v Minister of State and for Immigration and Ethnic Affairs* (1990) 169 CLR 648 requiring, on the facts of that case, a ‘hearing’ at the stage of Ministerial exercise of statutory power to a person adversely affected by it.

⁸² Stephen Gageler, ‘Impact of Migration Law on the Development of Australian Administrative Law’, (2010) 17 *Australian Journal of Administrative Law* 92.

⁸³ For example, the Federal Court was described in Henry Burmester, ‘Commentary’ (1996) 24 *Federal Law Review* 387 as having an “*entirely non-deferential approach*” with activist ‘intrusions’.

⁸⁴ John McMillan, ‘Judicial Restraint and Activism in Administrative Law’ (2002) 30 *Federal Law Review* 335, 341. Perhaps the most obvious response to this would be, as Lord Reid said in *Ridge v Baldwin* [1964] AC 40, 65: “*The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more definite than that*”; or another would be the remarks of Lawton LJ, in *Maxwell v Department of Trade and Industry* [1974] 1 QB 523, 539, responding to a criticism about the difficulty in defining ‘fairness’: “*Like defining an elephant, it is not easy to do although defining fairness in practice has the elephantine quality of being easy to recognise*”.

⁸⁵ During the second reading speech to the Migration Reform Bill 1992, it was termed the “*somewhat open ended [doctrine] of natural justice*”: Commonwealth, Parliamentary Debates, House of Representatives, 4 November 1992, 2620 (Gerry Hand, Minister for Immigration Local Government and Ethnic Affairs). See also Philip Ruddock, ‘Refugee Claims and Australian Migration Law: A Ministerial Perspective’ (2000) 23(3) *University of NSW Law Journal* 1, 6-7. This claim is, in any event, very much debateable. The decisions, particularly by modern day standards, are very much orthodox.

⁸⁶ See Chapter VI: ‘Part 7 of the *Migration Act*: An Analogue of the Common Law’.

least in connection with refugee decision-making, the decision in *Kioa* could not have taken root.

VI PART 7 OF THE MIGRATION ACT: AN ANALOGUE OF THE COMMON LAW

A. Introduction

The *Migration Act 1958* ('the Act') was substantially amended by the *Migration Reform Act 1992* ('the 1992 Act').¹ That Act introduced two new Parts to the *Migration Act 1958*: Part 7 which, in general terms, introduced a system for the review of protection visa decisions by a new tribunal, the Refugee Review Tribunal (the 'Tribunal') and the procedure the Tribunal was required to adopt when undertaking such reviews; and Part 8 which, in general terms, provided a comprehensive prescription of the grounds of review available to the Federal Court in respect of Tribunal decisions.² The prescription of grounds was both positively and negatively expressed: seven grounds of review were prescribed, in section 476(1) of the Act, and two grounds of review were prohibited, in section 476(2) of the Act.

In terms of prescribed grounds of review that were available, two are presently relevant. The first was section 476(1)(a) of the Act, a section that provided a ground of review where the "*procedures that were required by this Act...to be observed in connection with the making of the decision were not observed*". This provision, as explained later, assumed some prominence in the way in which the Federal Court came to undertake judicial review on the ground that there had been a denial of procedural fairness. The second was section 476(1)(f) of the Act, a section that provided a ground of review where "*the decision was induced or affected by fraud or by actual bias*". The immediate importance of this ground of review was the exclusion of apprehended bias: when taken with section 476(2)(a) of the Act, set out next, the combined effect was to preclude apprehended bias as a ground of review available in the Federal Court in respect of Tribunal decisions. This thesis, as earlier explained, is not concerned with that aspect

¹ Although the *Migration Reform Act 1992* received Royal Assent on 7 December 1992, Part 4B, which was scheduled to come into operation on 1 November 1993 was deferred until 1 September 1994 and applied to all applications for protection visas which had not been determined before that date. The amendments contained in the 1992 Act were, by the *Migration Legislation Amendment Act 1994*, renumbered as were the Parts. Part 4A became Part 7 of the *Migration Act* and Part 4B became Part 8 of the *Migration Act*. As most decisions refer to the Parts and sections as renumbered following the *Migration Legislation Amendment Act 1994*, the references in this Chapter will be to the Parts and sections as renumbered by that Act.

² Part 4B contained sections 166L to 166LK. The critical provision, dealing with judicial review of Tribunal decisions, was section 166LB(1) of the Act. This section became section 476(1) of the Act and it prescribed the seven grounds of review that were available.

of natural justice, but only with procedural fairness or, as it is commonly called, the hearing rule.³

There were, as mentioned, two grounds of review that were prohibited in the Federal Court. The first was the prohibition against judicial review, by section 476(2)(a) of the Act, where “*a breach of the rules of natural justice occurred in connection with the making of the decision*”. The second was the prohibition against judicial review, by section 476(2)(b) of the Act, on the ground of unreasonableness.⁴

These amendments to the Act were enacted with the specific intent to curtail judicial review, in these ‘migration’ cases, on the ground that there had been a denial of procedural fairness. This keystone reform was said to be necessary in light of uncertainty that had arisen “*concerning what is required to make a legally valid decision because of the uncertain content of natural justice, or procedural fairness, as that concept has evolved and continues to evolve in the courts*”.⁵ These two new Parts introduced by the *Migration Reform Act 1992* were designed to achieve this end. In respect of Part 7 of the Act, according to the Second Reading Speech for the *Migration Reform Bill*, these procedures were considered a comprehensive ‘code’,⁶ with the consequence that common law principles of procedural fairness would be excluded.⁷ And to ensure this occurred, the enactment of a specific provision in Part 8 of the Act – section

³ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 256.

⁴ Section 476(2)(b) of the Act prohibited judicial review in the Federal Court where the ground was that “*the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power*”.

⁵ Migration Reform Bill Explanatory Memorandum, p.6 at [25].

⁶ Ordinarily a “*code expresses the entirety of the law on the subject matter with which it deals*”: see *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57, 110 (Kirby J); see also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed 2006) 272, where a ‘code’ was described as an Act that “*gathers together all the relevant statute and case law on a given topic and restates it in such a way that it become the complete statement of the law on that topic*”.

⁷ Migration Reform Bill 1992, second reading speech House of Representatives, Minister for Immigration Local Government and Ethnic Affairs, 4.11.92, Hansard at p.2620 stated that the procedure in place “*will replace the somewhat open ended [doctrine] of natural justice*”. The explanatory memorandum to the *Migration Reform Bill 1992* (at [44]) gave an indication about how the Parliament considered the changes by explaining that to “*ensure procedural fairness, procedures for decision-making which embody the principles of natural justice have been set out in the Reform Bill*” and that the intent was to replace uncodified principles “*with clear fixed procedures which are drawn from those principles*” (at [51]).

476(2)(a) of the Act – prohibited the Federal Court in undertaking judicial review on the ground of denial of natural justice.⁸

However, as explained in the following sections of this Chapter, these reforms failed to achieve their stated aims. Although the introduction of section 476(2)(a) of the Act precluded judicial review of a decision of the Tribunal in the Federal Court on the ground of denial of natural justice, that Court was simply side-stepped: aggrieved parties took their natural justice challenges directly to the High Court. The explanation of how this occurred – the procedural bifurcation – is dealt with in the next section of this Chapter. This was the first reason accounting for the failure of these reforms.

The introduction of section 476(2)(a) of the Act by no means signalled the demise of common law principles of procedural fairness in either the High Court (where the amendments precluding judicial review on the ground of denial of procedural fairness did not apply) or for that matter in the Federal Court. In fact in the Federal Court, it is argued, the opposite occurred: not only did judicial review on procedural fairness ‘styled’ grounds not abate, but neither did the judicial insistence on common law standards of procedural fairness. Procedural fairness became a ‘norm’ of construction, it is later argued. In this way, the principles of procedural fairness had a significant constructional influence on the way in which the courts went about construing the provisions in Part 7 of Act. This was the second reason that accounted for the failure of the reforms brought about by the *Migration Reform Act 1992*.

It is the approach taken, in the Federal Court in particular, to the construction of the provision of Part 7 of the Act that is the principal subject of this Chapter. It was this approach that resulted in the further tranche of amendments to Part 7 of the Act in 1998,⁹ as well as to the later ones in to Part 8 of the Act in 2001.¹⁰ This Chapter covers the developments to 1998, and Chapter VII continues with them in the period 1998 to 2001.

⁸ Section 166LB(2)(a) provided that an application for judicial review could not be made on the ground that “a breach of the rules of natural justice occurred in connection with the making of the decision”. This section became section 476(2)(a) of the Act.

⁹ See the *Migration Legislation Amendment Act (No.1) 1998*.

¹⁰ See the *Migration Legislation Amendment (Judicial Review) Act 2001*.

In the context of Part 7 of the Act, the method adopted in the Federal Court was somewhat nuanced because the jurisdiction of the Court had been specifically excluded by section 476(2)(a) of the Act. Undeterred by this provision, the jurisprudence developed ostensibly within the statutory framework – but in substance the jurisprudence mirrored the common law principles of the natural justice hearing rule.¹¹ It was its analogue. The principles of procedural fairness became a presumptive method of construction employed to bring common law principles of procedural fairness within Part 7 of the Act, and as a means of construing Part 7. By this means the Federal Court bypassed section 476(2)(a) of the Act,¹² and undertook judicial review of Tribunal decisions by section 476(1)(a) of the Act – the section that permitted judicial review in the Federal Court in instances of non-observance of the statutory procedures in Part 7.¹³

B. *Procedural bifurcation and codification: defective law reform*¹⁴

Section 476(2)(a) of the Act prohibited the Federal Court in undertaking judicial review on natural justice grounds. The High Court considered section 476(2) of the Act to be a valid constitutional limitation on the jurisdiction conferred on the Federal Court.¹⁵ However, the truncation of the Federal Court’s jurisdiction had an unintended consequence: it required

¹¹ Ordinarily this should have resulted in any attempts to circumvent the statutory language by indirect means – or by preferring form over substance – as being repudiated by the Courts applying general principles of statutory construction (having regard to the purpose and objects of the legislation: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355) and more specific ones such as construing a statute so that what cannot be done directly, cannot be done indirectly: *Collins v Blantern* (1767) 95 ER 347; *Secretary, Department of Treasury and Finance v Kelly* (2001) 4 VR 595 at [10] (Ormiston JA); *Emad Trolley v Pty Limited v Shigar* (2003) 57 NSWLR 636, 650 (McColl JA).

¹² Section 476(2)(a) of the Act provided that an application for judicial review could not be made to the Federal Court on the ground that “a breach of the rules of natural justice occurred in connection with the making of the decision”.

¹³ Section 476(1)(a) of the Act provided that judicial review to the Federal Court was available where on the ground where the procedures required by the Act “to be observed in connection with the making of the decision were not observed”.

¹⁴ This being the description given to the disparate schemes for judicial review by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 658 [154]. See generally for a description of the system in this time period: Ronald Sackville, ‘Judicial Review of Migration Decisions: An Institution in Peril?’ (2000) 23 *UNSW Law Journal* 190, 191.

¹⁵ *Abebe v The Commonwealth* (1999) 197 CLR 510.

applicants seeking to challenge Tribunal decisions, on the ground of denial of procedural fairness, to commence proceedings for judicial review in the original jurisdiction of the High Court – there being no attempt to curtail that Court’s jurisdiction – invoking section 75(v) of *The Constitution* and the issue of constitutional writs directed to the Tribunal.¹⁶ The High Court’s jurisdiction was, simply, “*more extensive*” than the limited grounds available to the Federal Court under Part 8 of the Act.¹⁷

The consequence of this fracturing of the procedures for judicial review, where there was a complaint involving denial of procedural fairness, was the need to commence proceedings in the original jurisdiction of the High Court as well as seeking judicial review in the Federal Court on any remaining prescribed grounds in section 476 of the Act. This was the “*procedural bifurcation*” that Gummow J in *Eshetu* was describing:¹⁸ an individual aggrieved by an adverse ‘migration decision’ by the Tribunal simply bypassed section 476 of the Act, to the extent the challenge involved a denial of procedural fairness.

Self-evidently, the jurisdiction conferred by section 75(v) of *The Constitution*, being an alternate pathway to judicial review based on procedural fairness grounds, denied any practical impact upon the limitation contained in section 476(2) of the Act. This reality constituted a substantive impediment to fulfilling the statutory objective to reduce judicial review based on breach of the principles of procedural fairness. In fact it neutralised the operation of section 476(2)(a) of the Act, and the intent to limit judicial review in these cases.¹⁹ In real terms, all that the limit on the

¹⁶ Section 75(v) of *The Constitution* provides that the High Court shall have original jurisdiction “*in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth*”. The phrase ‘constitutional writs’ is a “*shorthand expression*” of the writs available under that section: *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 93 (Gaudron and Gummow JJ). The High Court exercising this original jurisdiction was empowered to undertake judicial review unconstrained by section 476(2)(a) of the Act in cases where such relief was claimed: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

¹⁷ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 470 (von Doussa J).

¹⁸ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 658 [154].

¹⁹ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

Federal Court's jurisdiction achieved was delay, increased costs and inefficient administration of judicial review of refugee claims.²⁰

Earlier it was pointed out that the prescribed procedures in Part 7 of the Act were intended to be a 'code', the effect of which was to exclude common law principles. That is, the statutory procedures were designed to not only govern the proceedings before the Tribunal, but to 'cover the field'. As it turned out, these statutory provisions were never argued, or held to be, a code such that common law principles could never play a role.²¹ Ultimately, by the time the High Court had determined that Part 7 was not a code,²² Part 7 had been significantly amended by the *Migration Legislation Amendment Act (No.1) 1998*.²³

For procedural fairness, the procedural bifurcation had another – a wider – consequence the significance of which was not distinctly recognisable in the jurisprudence at this time *viz.*, common law principles of procedural fairness were not extinguished by the amendments contained in Part 7 of the Act. This principle was itself implicit in two related ways: first, by reason of the presence of section 476(2)(a) of the Act *viz.*, the existence of the section and the

²⁰ *Abebe v The Commonwealth* (1999) 197 CLR 510. Although in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 658 [154] Gummow J expressed the view, obiter, that remitter of applications for relief under section 75(v) of the Constitution under section 44 of the *Judiciary Act 1903 (Cth)* might be possible despite section 485(3) of the *Migration Act*, His Honour later accepted that remitter was not open: *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe* (1998) 152 ALR 177, 180.

²¹ In fact in none of the cases that reached the High Court in the time period before the legislation was amended by the *Migration Legislation Amendment Act (No.1) 1998* (amendments that came into effect from 1 June 1999) did the Minister seek to argue that the procedures in Part 7 of the Act had provided a Code or exhaustive statement of the procedural obligations that the Tribunal was required to comply with to ensure the legality of the decision. There were three cases that reached the High Court that concerned Part 7 of the Act in this form following the 1992 reforms. The first was *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611. In that case, the substantive point was whether the requirements of section 420 of the Act were 'procedures' so as to enable judicial review by the Federal Court under section 476(1)(a) of the Act. The second was the decision in *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82. In that case the prosecutor sought the issue of prerogative writs on the basis that the Tribunal acted in breach of the rules of natural justice by innocently misleading him about what materials were before it, and would be considered by it. Although open to argue, the Minister did not during argument submit that the procedures in Part 7 were a 'code' thereby excluding common law principles of natural justice: (2000) 204 CLR 82, 101 (Gaudron and Gummow JJ); 130 (Kirby J). The third was the decision in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470. In that case the substantive point was whether the delay in decision-making by the Tribunal, of itself, constituted a denial of natural justice.

²² *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57.

prohibition on judicial review on the ground of denial of procedural fairness assumed procedural fairness existed independently of the procedural provisions in Part 7 of the Act, and, secondly, in the acceptance, by the High Court, that although the Federal Court could not undertake judicial review on procedural fairness grounds, the principles nevertheless applied and review was available in the original jurisdiction of the High Court.²⁴ These cases proceed upon an identifiable premise *viz.*, that the Act, and Part 7 in particular, had not excluded the common law principles of procedural fairness. The true explication of this, the underlying presumptive application of the principles of procedural fairness, was still to be fully understood within the context of the Act.

C. *Part 7 of the Migration Act: judicial ‘implication’*

1. *Introduction*

In the following sections of this Chapter we see how the procedural fairness jurisprudence developed within Part 7. It is argued that the judges were implying – and then applying – common law notions of procedural fairness into the provisions of the Act (principally via sections 420 and 425 of the Act), and exercising jurisdiction based on a ‘so-called’ breach of procedure under section 476(1)(a) of the Act:²⁵ form, not substance, was controlling.

The striking feature that emerges from the case analysis was not only the willingness of the Federal Court to imply common law notions of procedural fairness, but the approach the decisions took in doing so: the outcome was an implication to a statutory provision otherwise silent on a particular issue of procedure. And by this process of supplementation of the procedures in Part 7 of the Act, the jurisdiction of the Federal Court remained: judicial review

²³ By operation of Schedule 3, the amendments took effect from 1 June 1999 (see *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315; *Xie Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315 (1999) 95 FCR 543 (Cooper J)).

²⁴ *Abebe v The Commonwealth* (1999) 197 CLR 510; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

²⁵ Section 476(1)(a) of the Act provided that that an application for judicial review could be made to the Federal Court where “*procedures that were required by this Act or regulations to be observed in connection with the making of the decision were not observed*”.

was not being pursued based on an alleged breach of common law principles of procedural fairness, but upon a failure to adhere to the statutory criteria spelt out in Part 7 of the Act that was construed to be indistinguishable from it. Judicial review in the Federal Court, on this latter ground, was specifically authorised by section 476(1)(a) of the Act. In part this was legitimate – authority did support the ultimate approach;²⁶ but in other ways it was fiction – the law was ‘developing’ in this manner, informed by the prohibition in section 476(2)(a) of the Act, that studiously avoided the engagement of such authorities.²⁷

A similar development concerned the provision relating to notice required to be given to an applicant before the Tribunal conducted a hearing.²⁸ Section 426 of the Act provided, relevantly, that the Tribunal was required to notify the applicant that he or she was “*entitled to appear before the Tribunal to give evidence*” and that the applicant was entitled to request the Tribunal obtain evidence from a person or persons specified by them – but the Tribunal, although required to “*have regard to the applicant’s wishes*” was not required to obtain the evidence. Here the construction given to section 426 of the Act was in keeping with the common law principles relating to the hearing rule and the importance that the common law had attached to the provision of reasonable – and actual – notice. And in this way, as well, common notions of procedural fairness remained a dominant influence in the construction of Part 7 of the Act.

It is important, before undertaking the case analysis that follows, to define more specifically the process, it is argued, that was adopted in the Federal Court in approaching the construction of Part 7 of the Act. The process that was undertaken was not premised upon the positive aspect of the rule *viz.*, that the principles of procedural fairness applied unless excluded by plain words of necessary intendment – notwithstanding that the High Court decision in *Kioa v West* had

²⁶ *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

²⁷ An example of the extremities of the approach was the decision of Burchett J in the Full Federal Court in *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300 where His Honour sought to justify an approach to the construction of sections 420 and 425 of the Act not on the footing of construing the legislation as part of domestic law, but by buttressing a construction by reference to the need for a construction of these provisions that was in conformity with Australia’s treaty obligations under the *Convention Relating to the Status of Refugees*. This decision was overtured by the High Court, as explained later in the Chapter. See also John McMillan, ‘Federal Court v Minister for Immigration’, (1999) 22 *AIAL Forum* 1 where the author gives a broader account of judicial activism in judicial review of immigration decision-making.

established this,²⁹ and *Annetts v McCann* had at that time recently restated it.³⁰ The impact of the prohibition in section 476(2)(a) of the Act, as mentioned, is a likely explanation for this silence. Nor, invariably, was there reference to standard interpretative principles or techniques to discern purpose and meaning.³¹ Although there were notable exceptions to this approach,³² what in reality occurred was that the process of statutory construction was approached on the footing that the language of the statute would be interpreted against the background of, and as a restatement of, common law principles of procedural fairness. It is in this way, it is suggested, that the common law principles came to be ‘implied’ into Part 7 of the Act.³³

2. Common law principles: the hearing rule

Expressed at a general level,³⁴ the fundamental aspects of the common law hearing rule cover three requirements that are designed to achieve fairness in decision-making.³⁵ first, there must

²⁸ The requirements prescribed for giving notice of the hearing was provided by section 426 of the Act.

²⁹ (1985) 159 CLR 550.

³⁰ (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 574-5 (Mason CJ, Dawson, Toohey and Gaudron JJ).

³¹ For example, by applying section 15AA of the *Acts Interpretation Act 1901* that provides that in “*interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation*” – see also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; or by applying the principle of legality or, as it is sometime called, the presumption against alteration of common law rights and principles absent unmistakably clear language: see *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J) and generally Chapter III: ‘The Rule of Law and the Principle of Legality’.

³² See *Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324 where Lindgren J undertook a thorough and conventional analysis of the interaction between sections 420 and 476 of the Act.

³³ The description ‘implied’ is to be contrasted with implying words into statute when “*the actual intentions of the drafter have usually been fulfilled, but the text does not give effect to the underlying purpose or object of the legislation*”: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed 2006) 51. In these situations the words of the statute are “*construed to conform with the intention, where they may so reasonably be construed*”: *R v Young* (1999) 46 NSWLR 681, 681 (Spigelman CJ).

³⁴ These requirements can be considered presumptively applicable, subject to differing circumstances positing a different outcome. As has been often stated, the principles of procedural fairness are not fixed, but of variable content. Thus, in *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 Tucker LJ said: “*There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth*”. Kitto J in *Mobil Oil Australia Pty Limited v Commissioner of Taxation (Cth)* (1963) 113 CLR 475, 503-504 made the same point, as did Brennan J in *Kioa v West* (1985) 159 CLR 550, 612- 615, and the authorities there collected.

be an opportunity to make representations;³⁶ secondly, there must be an opportunity given to attend any hearing scheduled to take place;³⁷ and, thirdly, there must be an opportunity to know ‘the case’ to answer, and to prepare for the hearing.³⁸ Within these general principles, are other, more specific, ones that might arise in a given case – for example, the opportunity to know the case and to make representations may require the person to be given an opportunity “to deal with adverse information that is credible, relevant and significant to the decision to be made”.³⁹

Although there were some decisions of the Federal Court that construed provisions in Part 7 of the Act as being indistinguishable in substance and effect to the common law principles of procedural fairness,⁴⁰ these decisions were impliedly overruled by the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu*.⁴¹ At the same time there was a growing body of cases where it was expressly recognised that the jurisdiction to review was considerably narrower than the common law, and that Part 7 did not provide the “full panoply of procedural protections” that the common law, and other forums, might provide.⁴²

Irrespective of the competing positions, by incremental judicial process the procedural fairness obligations cast by the common law were being filtered into the Act by reason of the general

³⁵ In *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 256 the plurality described the concern of the natural justice hearing rule as requiring “procedural fairness be applied in the process of decision making in circumstances where a person’s right or interests may be affected by the decision”.

³⁶ *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; *Wood v Woad* (1874) LR 9 Ex 190; *Delta Properties Pty Limited v Brisbane City Council* (1955) 95 CLR 11; *Mahon v Air New Zealand* [1984] AC 808. This obligation would extend, in a given case, to providing an opportunity to adduce evidence on the critical issue or issues: see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 121 (McHugh J).

³⁷ *James Bagg’s Case* (1615) 11 Co. Rep. 93; *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; *Wood v Woad* (1874) LR 9 Ex 190.

³⁸ *Ceylon University v Fernando* [1960] 1 WLR 223; *Kanda v Government of the Federation of Malaya* [1962] AC 322; *Ridge v Baldwin* [1964] AC 40; *In re K (Infants)* [1963] Ch 381.

³⁹ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 256 – applying *Kioa v West* (1985) 159 CLR 550. See also *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

⁴⁰ See, for example, *Thambythurai v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 661. In that case, Finkelstein J considered that the provisions, specifically section 420 of the Act, created an obligation of the kind referred to by Deane J, in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, as “acting judicially” (see (1997) 50 ALD 661, 662).

⁴¹ (1999) 197 CLR 611 where the High Court rejected a construction of section 420 of the *Migration Act* as providing for procedural rights analogous to the principles of natural justice.

⁴² See, for example, *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315, 322 (Sackville J).

exhortatory provisions, and some of the more specific ones, to inform the obligations of the Tribunal. In this way the common law principles of procedural fairness either survived by process of statutory implication or by imposing analogous principles through the statutory procedures.

These judicial developments can be illustrated by reference to the procedures provided by Part 7, and the limiting of the Federal Court's jurisdiction to review decisions of the Tribunal on 'procedural fairness' grounds by section 476(2)(a) of the Act. In subsequent decisions, four provisions assumed prominence in the Federal Court's decisions on how Part 7 would operate, and the ongoing role that common law principles of procedural fairness would play: section 420 ("*Refugee Review Tribunal's way of operating*");⁴³ section 425 ("*where review on the papers is not available*");⁴⁴ section 426 ("*Applicant may request Refugee Review Tribunal to call witnesses*");⁴⁵ and section 476 ("*Application for review*").⁴⁶

3. *Judicial implication: section 420 of the Migration Act*

Within a relatively short period of time from the commencement of the amendments, differing views emerged in the Federal Court about whether section 476(2)(a) of the Act, in practical terms, deprived the Federal Court of jurisdiction to undertake review where there had been procedural unfairness, applying common law notions. The debate, initially, turned on section

⁴³ Section 420 stated the object of the Tribunal, in the exercise of the powers conferred on it, was to "*pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick*" (section 420(1)). And, in reviewing a decision, the Tribunal was not bound "*by technicalities, legal forms or rules of evidence*" and was required to act "*according to substantial justice and the merits of the case*" (section 420(2)(a) and (b)).

⁴⁴ Section 425(1) provided that where the Tribunal was required to conduct a hearing – essentially in all cases where it was not prepared to make the decision most favourable to the applicant for review (section 424) – the Tribunal was required to give the applicant "*an opportunity to appear before it to give evidence*" but, subject to this entitlement, section 425(2) provided that the Tribunal was not "*required to allow any person to address it orally about the issues arising in relation to the decision under review*".

⁴⁵ The heading is somewhat misleading, as the provision extends beyond the calling of witnesses. Section 426 provided that the Tribunal was also required to notify the applicant that he or she was "*entitled to appear before the Tribunal to give evidence*" and that the applicant was entitled to request the Tribunal obtain evidence from a person or persons specified by them – but the Tribunal, although required to "*have regard to the applicant's wishes*" was not required to obtain the evidence.

420 of the Act. Section 420 of the Act provided that the object of the Tribunal, in the exercise of the powers conferred on it, was to “*pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick*” (section 420(1)) and, in reviewing a decision, the Tribunal was required to act “*according to substantial justice and the merits of the case*” (section 420(2)(b)).

The issue raised was whether some of the language section 420 of the Act conferred a source of statutory procedural rights (the content which would, ultimately, be determined by the court upon application for judicial review) to enable judicial review under section 476(1)(a) of the Act. Thus, if there had been a failure to afford ‘substantial justice’ or where the procedures of the Tribunal had not been ‘fair or just’, then the court could undertake judicial review.

Interpreted in this way, section 476(2)(a) of the Act and the restriction it placed upon the Federal Court exercising judicial review in procedural fairness cases was neutralised: a conclusion by a court that there was an absence of ‘substantive justice’ or that the procedures were neither ‘fair nor just’ would entitle the court to exercise jurisdiction to undertake judicial review essentially on common law procedural fairness grounds. This construction of section 420 of the Act, and the potentiality for section 420 providing a source of ‘procedural rights’, was expressed by Davies J in *Yao v Minister for Immigration and Ethnic Affairs* thus:⁴⁷

Although section 420(1) specifies only an objective, the Migration Act intends that the procedures adopted by the Refugee Review Tribunal will be "fair" and "just". If this has not occurred in the present case, the applicant will be entitled to seek relief under section 476(1) of the Migration Act on the ground that the procedures required by the Migration Act to be observed in connection with the making of the decision have not been observed.

There were other decisions to similar effect.⁴⁸ Some were in emphatic terms, suggesting that section 420 amounted to a statutory equivalent of procedural fairness at common law. Thus in

⁴⁶ Section 476(1)(a) of the Act provided that an application for judicial review could be made to the Federal Court where “*procedures that were required by this Act or regulations to be observed in connection with the making of the decision were not observed*”.

⁴⁷ *Yao v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 583, 602. The other members of the Court, Black CJ and Sundberg J, did not address section 420 in their joint judgment.

⁴⁸ For example, *Sarbit Singh v Minister for Immigration and Ethnic Affairs* [1996] FCA 902 (Lockhart J); *Caragay v Minister for Immigration and Multicultural Affairs* (1997) 49 ALD 539 (Emmett J).

Thambythurai v Minister for Immigration and Multicultural Affairs,⁴⁹ Finkelstein J proffered the following construction of section 420:⁵⁰

...only one obligation is imposed which is an obligation to act in a manner Deane J in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 366–7...referred to as ‘acting judicially’. The precise content of an obligation to act judicially is dependant upon the terms of the statute creating the tribunal. But, subject to the terms of the relevant statute, the ordinary incidents of a duty to act judicially include “the absence of the actuality or the appearance of disqualifying bias and the according of an appropriate opportunity of being heard” (Bond at CLR 367) in conformity with the traditional rules of procedural fairness.

However, there were other decisions which denied section 420 as conferring any form of rights or statutory procedural safeguards;⁵¹ or if they did, denied that these procedural safeguards could be the subject of judicial review in the Federal Court, by reason of section 476(2)(a) of the Act, if the Tribunal failed to comply with them because in substance they were breaches of the principles of procedural fairness.⁵²

Although a five-member Full Federal Court expressly declined to add to the debate (or resolve it),⁵³ a later Full Federal Court held, in *Eshetu v Minister for Immigration and Ethnic Affairs*,⁵⁴ that section 420 of the Act provided rights which enabled judicial review when the mechanism of review fails to meet the statutory prescription in section 420. Indeed, Davies J went some way further, suggesting that Part 8 of the *“Migration Act has substituted for the rules developed by the common law...rules of its own...If the procedures of the Tribunal have not met that prescription, the decision of the...Tribunal may be set aside. It matters not that the breach may also have amounted to a breach of the rules of procedural fairness developed by the common*

⁴⁹ (1997) 50 ALD 661.

⁵⁰ (1997) 50 ALD 661, 662.

⁵¹ For example, *Sun v Minister for Immigration and Ethnic Affairs* [1997] FCA 324 (Lindgren J) – a decision approved by the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611. In *Sun*, Lindgren J held (at p.15) that section 420 – which stated the object of the Tribunal, in the exercise of the powers conferred on it, was to *“pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick”* – did not establish ‘procedures’ of the kind that could be reviewed by the Federal Court under section 476(1)(a) of the Act.

⁵² For example, *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 474 (Hill J); *Dai v Minister for Immigration and Ethnic Affairs* (1997) 144 ALR 147 (Sackville J).

⁵³ *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553 (Black CJ, von Doussa, Sundberg and Mansfield JJ).

law. The matter is to be determined not by the common law but by the words of the statute. A breach of the statute is not saved by section 476(2)".⁵⁵

The Court thus held, by majority,⁵⁶ that section 420 created procedures and that section 476(1)(a) of the Act applied to those procedures. The consequence being that, where there had been procedure adopted which did not accord 'substantial justice' or was not 'fair' or 'just' (including a breach of the principles of procedural fairness) there was a statutory breach amenable to judicial review under section 476(1)(a) of the Act.⁵⁷

However this conclusion was overturned on appeal to the High Court, with the High Court unanimously concluding that section 420 of the Act was facultative, and did not create procedural rights and corresponding rights of review under section 476(a)(a) of the Act.⁵⁸ In *Eshetu*, Gleeson CJ and McHugh J explained the proper function of section 420 in the following way:⁵⁹

In s 476(2)(b) the legislature has expressed an intention to define the jurisdiction of the Federal Court in such a manner as to exclude review of a Tribunal's decision upon the ground presently under consideration...

It is not an acceptable approach to statutory interpretation to negate the clear intention of the legislature by reliance on s 420 of the Migration Act. In any event, s420, when understood in its legal and statutory context, is an inadequate foundation for an attempt to overcome the provisions of s 476(2).

...The history of legislative provisions similar to s 420 was examined in Qantas Airways Ltd v Gubbins...They are intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals...

⁵⁴ (1997) 71 FCR 300.

⁵⁵ (1997) 71 FCR 300, 305-6. Burchett J (71 FCR 300, 317) reached a similar conclusion, but did so by giving effect to sections 420 and 425 of the Act.

⁵⁶ The other member of the Court, Whitlam J, dissented.

⁵⁷ This decision was followed by a later Full Federal Court in *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 and another Full Federal Court in *Velmurugu v Minister for Immigration and Ethnic Affairs* (1997) 48 ALD 193.

⁵⁸ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

⁵⁹ (1999) 197 CLR 611, 628.

Not only did the High Court overrule this line of construction, it also exposed the illegitimacy of the method that had been adopted – that is, an approach to construction that fails to approach the principle question of construction without due regard to the statutory intention.⁶⁰

Once the High Court had, in *Eshetu*, determined the scope of section 420 as being merely facultative, and its limits clearly defined, judicial attention simply turned to other provisions as the means to import common law notions of procedural fairness, and thus permit judicial review in the Federal Court pursuant to section 476(1)(a) of the Act.

4. *Judicial implication: section 425 of the Migration Act*

The High Court decision in *Eshetu* did not result in section 420 of the Act no longer featuring in any of the ways in which the Federal Court sought to imply common law principles of procedural fairness into Part 7 of the Act. It was to play a secondary and confirmatory role to other sections – notably section 425 of the Act which was held to permit the importation of the common law principles or principles analogous to them. Indeed section 425 of the Act was also to play a part in the injection of common law principles into the statutory framework of Part 7.

Section 425(1) of the Act provided that the Tribunal “*must give the applicant an opportunity to appear before it to give evidence*”.⁶¹ However, despite this obligation, section 425(2) of the Act provided that “*the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review*”.⁶²

That section 425 of the Act became the focus of decisions by the Federal Court, through which to facilitate this, is unsurprising. This was not only because the section had been described as a

⁶⁰ In this context, the reference to intent is the statutory intent manifested by the legislation: see *Wik Peoples v Queensland* (1996) 187 CLR 1, 168-169 (Gummow J); *Alcan (NT) Alumina Pty Limited v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, 46-47 (Hayne, Heydon, Crennan and Kiefel JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 264-265 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Certain Lloyd’s Underwriters v Cross* (2012) 87 ALJR 131, 137-138 (French CJ and Hayne J), 151 (Kiefel J).

⁶¹ Section 425(1)(a) of the Act.

⁶² Section 425(2) of the Act.

“central feature of a fair system of administrative merits review”,⁶³ but more fundamentally it was the principal means through which the Tribunal was to afford an applicant procedural fairness.

The cases dealing with section 425 of the Act – at least initially – made two things clear. The first was that Part 7 of the Act did not provide the full array of ‘procedural protections’ that might have been available had common law principles of procedural fairness governed proceedings before the Tribunal.⁶⁴ The second was that the language and purpose of section 476(2)(a) of the Act was unambiguous:⁶⁵ to define, by exclusion, the jurisdiction of the Court in relation to judicial review where it was based upon an alleged failure to observe the principles of procedural fairness in connection with the making of the decision by the Tribunal. The corollary being that if, in substance, the complaint was one of procedural unfairness, then judicial review was not open in the Federal Court.

This last point is well illustrated by the decision in *Thanh Phat Ma v Billings*.⁶⁶ There Drummond J explained the interaction between the obligation of the Tribunal to observe the principles of procedural fairness and the capacity of the Federal Court to correct a failure to observe them thus:⁶⁷

...it follows that the Parliament has adopted a process in which an applicant for review is entitled to expect that his application will be dealt with by the RRT in accordance with the principles of natural justice, but, if that does not happen, he is left without any remedy. But I think this is what Parliament must be taken to have intended.

⁶³ *Minister for Immigration and Multicultural Affairs v Capitley* (1999) 55 ALD 365, 371 (Wilcox and Hill JJ).

⁶⁴ *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315, 331 (Sackville J).

⁶⁵ *Tranh Phat Ma v Billings* (1996) 71 FCR 431 (Drummond J); *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 474 (Hill J); *Dai v Minister for Immigration and Ethnic Affairs* (1997) 144 ALR 147 (Sackville J).

⁶⁶ *Tranh Phat Ma v Billings* (1996) 71 FCR 431, 442.

⁶⁷ *Ibid* at 442. In *Eshetu* Gleeson CJ and McHugh J affirmed the importance, in construing the provisions in Part 7 to the legislative intent, reflected in section 476(2)(a) of the Act, to define the jurisdiction of the Federal Court so as to exclude review upon the grounds of denial of procedural fairness – and, further, that it “was not an acceptable approach to statutory construction to negate the clear intention of the legislation” by resort to general provisions that to circumvent this intent.

In this way the decisions of the Federal Court recognised, again initially, the specific role of section 425 of the Act. In *Minister for Immigration and Multicultural Affairs v Cho*, Tamberlin and Katz JJ explained the working of the section in this way:⁶⁸

We do not consider that there is any special significance in the reference to the word 'genuine' which would expand the content of s 425 beyond the ordinary and natural meaning of the language used. According to its terms the section simply requires that an opportunity be given to the applicant to appear and give evidence.

In a separate judgment delivered, Sackville J endorsed this approach, giving the section a similarly limited operation:⁶⁹

Section 425(1)(a), as its language and context make clear, is directed to ensuring that the applicant has an opportunity to appear before the RRT to give evidence, in cases where the RRT cannot decide in favour of the applicant simply on the papers. It is not concerned with procedural irregularities at the hearing that do not deny the applicant the opportunity to appear to give evidence. Procedural irregularities of that kind, whatever other consequences they may have, do not constitute a breach of s 425(1)(a) and thus do not provide a ground of review under s 476(1)(a) of the Migration Act.

Yet despite these judicial statements, judicial review of so called 'procedural irregularities' was the very thing that flourished in the Federal Court.

The approach taken to the interpretation of section 425 of the Act by the Federal Court can be clearly seen in two types of cases – first, in connection with the hearing conducted by the Tribunal; and, secondly, where there was a need, consistent with the decision in *Kioa v West*, for the Tribunal to 'warn' an applicant about adverse material. As the following demonstrates, these provisions provided the gateway through which decisions of the Federal Court imported common law principles of procedural fairness – giving full effect to the common law hearing rule.

⁶⁸ *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315, 323. Although, as later explained, other parts of this judgment gave licence for a more expansive understanding of the obligations cast upon the Tribunal when conducting a hearing under section 425 of the Act.

⁶⁹ *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315, 331. This reasoning was endorsed by Kiefel J in *Singh v Minister for Immigration and Multicultural Affairs* [2000] FCA 1858 at [19]-[20].

(a) *Section 425: a real opportunity to be heard*

In the post-*Eshetu* period section 425 of the Act became the principal means through which the Federal Court came to insist upon adherence to broader common law principles of procedural fairness.

The first steps taken in this process were by implying notions of reasonableness into section 425 – viz., that the opportunity to attend, and participate in, the hearing must be a *reasonable* one. Thus, in *Budiyal v Minister for Immigration and Multicultural Affairs*,⁷⁰ Tamberlin J held that the proper construction of the provision required an “*implication that the opportunity provided was a reasonable one*”.⁷¹

The implication or conditioning the exercise of this power by notions of reasonableness was unexceptional.⁷² But later ‘implications’ were more expansive, in effect becoming a substitution for the language of the section. Thus, in *Minister for Immigration and Multicultural Affairs v Capitly*,⁷³ a Full Federal Court held that the opportunity which was prescribed in section 425 must be a “*real opportunity*” and a continuing opportunity which took “*into account...the circumstances which from time to time exist, up until the opportunity is either availed of or not*”.⁷⁴

Although this decision concerned the failure to provide an adjournment when the applicant was sick and could not attend the prescribed date for review, the implication was expressed at a higher level – the opportunity to attend and participate was required to be a “*real*” one. Still more was to occur in terms of this process of ‘implication’ into section 425 of the Act. In later

⁷⁰ (1998) 82 FCR 166.

⁷¹ (1998) 82 FCR 166 – a decision approved by the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Capitly* (1999) 55 ALD 365 and endorsed by Kirby J in *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597, 626.

⁷² In *Abebe v The Commonwealth* (1999) 197 CLR 510, Gaudron J said that “*it is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition of the exercise of that power that it be exercised reasonably...*”. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 650 (Gummow J); *Kruger v Commonwealth* (1997) 190 CLR 1, 36 (Brennan CJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 645 (Crennan and Bell JJ); *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618, 631 (French CJ) and 641-642 (Gageler J).

⁷³ (1999) 55 ALD 365, 371 (Wilcox and Hill JJ).

⁷⁴ *Ibid* at 371 (Wilcox and Hill JJ).

cases in the Federal Court supported a construction of section 425 that the hearing, conducted under that section, had to be not only “real” but “genuine” and that a “real” and “genuine” opportunity to attend and participate in a hearing would not occur if “*relevant evidence is not admitted or misleading statements are made by the decision maker which discourage an applicant from calling or preceding with a particular line of evidence*”.⁷⁵

Construed this way, the section readily became the provision through which the courts could – and did – impose common law principles of procedural fairness.

The decisions also showed that the court judiciously regulated, and guarded against, attempts to confine the opportunity that an applicant had to a hearing under section 425 of the Act by limiting the notice given to the applicant of such a hearing. In this sense, the supplanting of the statutory obligations by common law principles of procedural fairness in connection with the hearing was matched by judicial stringency in attempts to water down, adversely to an applicant, the right to a hearing by limiting the notice given advising of such a hearing.

In *Xie v Minister for Immigration and Multicultural Affairs*,⁷⁶ the Tribunal sent a letter to the applicant advising that the applicant had a right to a hearing, but that if no response was provided to the Tribunal within 21 days that the Tribunal would assume that the applicant did not propose to attend a hearing. The applicant was not notified of this letter and its contents, although his migration agent had received the letter. The Tribunal determined the application for review in the absence of the applicant.

The Court, in allowing an appeal, held that the right to reasonable notice of a proposed hearing under section 425 could not be the subject of limitation. Indeed the Court emphasised the mandatory nature of the section in holding that the Tribunal had “*no statutory power to impose conditions...as to the exercise of [the] statutory right to give evidence on the hearing of [the]*

⁷⁵ *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315, 323 (Tamberlin and Katz JJ); *Gebeyehu v Minister for Immigration and Multicultural Affairs* [1999] FCA 1274, [64] (Weinberg J).

⁷⁶ (1999) 95 FCR 543.

application for review by imposing time limits within which an election to be heard must be made".⁷⁷

This case, and other cases, emphasised the centrality and importance of the hearing provided by section 425 of the Act within Part 7, and the role that notice played in it.

There were other decisions that expanded the purview of section 425 and, thus, the power of the Federal Court to review decisions of the Tribunal ostensibly on the ground of a failure to follow the procedures in Part 7 of the Act, but in substance judicial review on denial of procedural fairness grounds. Thus, a breach of section 425 could be made out, and correlative right to pursue judicial review in the Federal Court under section 476(1)(a) of the Act, in the following situations: when an applicant was not given sufficient time to reflect on the evidence he or she was to give, or facts that he or she wished to draw to the attention of the Tribunal;⁷⁸ where there had been a failure to conduct the hearing with the assistance of proficient interpretation;⁷⁹ where the Tribunal obtains information, of which the applicant is unaware, and proposes to use it against the applicant;⁸⁰ or where the Tribunal fails to bring to the attention of the critical issue or factor on which the decision is likely to turn;⁸¹ or where the Tribunal misleads an applicant and that results in an applicant refraining from calling or proceeding with a particular line of evidence.⁸²

⁷⁷ (1999) 95 FCR 543, 551 (Cooper J). The Full Federal Court in *Cabal v Minister for Immigration and Multicultural Affairs* [2001] FCA 546 held (Wilcox, Whitlam and Marshall JJ at [18]) held that the decision of Cooper J in *Xie* stood "for the proposition that the RRT is not entitled to cancel the hearing, and make a decision without a hearing, simply because the applicant does not reply".

⁷⁸ *Sook v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584, 598 (Moore J) applying *Budiyal v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 166.

⁷⁹ *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507 (Kenny J); *Singh v Minister for Immigration and Multicultural Affairs* [2000] FCA 1858 (Kiefel J) and the authorities collected at [21]: affirmed on appeal (2001) 115 FCR 1.

⁸⁰ *Singh v Minister for Immigration and Multicultural Affairs* (1997) 49 ALD 640 (Tamberlin J).

⁸¹ *Budiyal v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 166.

⁸² *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315; *Gebeyehu v Minister for Immigration and Multicultural Affairs* [1999] FCA 1274 (Weinberg J).

(b) *Section 425: adverse conclusions*

Although the decision in *Kioa v West*⁸³ had established that a requirement of the hearing rule involved the dual obligation of a decision-maker to warn a party of the risk of an adverse finding affecting that person's rights, interests or legitimate expectations and the need to provide an opportunity for that person to adduce evidence or make submissions directed to such issue, the structure of the Act following the amendments made by the 1992 Act was silent on how these principles were to be applied. Presumably, consistent with the idea that the provisions in Part 7 were a 'code', it was intended by Parliament that common law principles would be displaced by the procedures within that Part.⁸⁴ It was not to be.

Again, section 425(1) of the Act became the means through which the Federal Court filled these voids by application of the common law principles of procedural fairness. This was so despite the limits placed on that section by section 425(2) of the Act: section 425(1) of the Act provided that the Tribunal "*must give the applicant an opportunity to appear before it to give evidence*",⁸⁵ however, despite this obligation, section 425(2) of the Act provided that "*the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review*".⁸⁶

In 'warning' cases the authorities, albeit without expressly stating so, supported the implication of the common law principles by reference to section 425 of the Act. So, in *Singh v Minister for Immigration and Multicultural Affairs*,⁸⁷ Tamberlin J supported the need to act in conformity with the principles in *Kioa* by reference to section 420 and section 425.⁸⁸

⁸³ (1985) 159 CLR 550.

⁸⁴ The difficulty with assuming – or presuming – the procedures would apply is that none of the provisions in Part 7 dealt specifically with this kind of issue. In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, the High Court accepted that even in the more detailed provisions contained in Part 7 at that time – Part 7 following amendments to it made by the *Migration Legislation Amendment Act (No.1) 1998* – there were no procedures that covered what the Tribunal should do in 'adverse conclusion' cases.

⁸⁵ Section 425(1)(a) of the Act.

⁸⁶ Section 425(2) of the Act.

⁸⁷ (1997) 49 ALD 640.

⁸⁸ *Ibid* at 646.

*There is no requirement in s 425 that an applicant must be informed of every piece of evidence or every consideration or line of reasoning which the tribunal might adopt in assessing his or her credibility. Under s 425(2) the tribunal has, in my view, a discretion to allow a person to address it orally about the issues arising in relation to the decision under review. Of course, the position is different where the tribunal obtains information, of which the applicant is unaware, and proposes to use it against the applicant. In such circumstances it is necessary to inform the applicant of such material and to seek submissions on it: compare *Kioa v West*... *FAI Insurances Ltd v Winneke*...; and *Cole v Cunningham*.... There is a need to bring to an applicant's attention the critical issue or factor on which the administrative decision is likely to turn so that he or she may have an opportunity of dealing with it.*

Although the obligation cast on the Tribunal to act in this way was expressly stated by Tamberlin J, the statutory foundation for this obligation was less clearly articulated in the judgment. The dispositive finding on this issue was expressed in terms of the applicant having every “*opportunity*” to deal with the issues before the Tribunal (this being the language of section 425) and that this was a requirement of “*substantial justice*” (this being the language of section 420).⁸⁹ Putting this ambiguity to one side, the critical point was that the obligations cast upon a decision-maker by *Kioa v West* were imported into the Act to coexist with the other procedural safeguards.⁹⁰

(c) *The High Court and section 425*

In the period 1992 to 1998, the High Court considered, in addition to the decision in *Eshetu*, two cases that touched on the interaction of the common law principles of procedural fairness and Part 7 of the *Migration Act*. The first was the decision in *Re Refugee Tribunal; Ex parte Aala*;⁹¹ the second was the decision in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*.⁹²

⁸⁹ Ibid.

⁹⁰ In *Meadows v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 370, the Full Federal Court held the obligation to draw adverse material to the attention of the applicant arose by virtue of section 420 (by Einfeld J at 90 FCR 370, 381-382; by von Doussa J at 90 FCR 370, 383) or by operation of sections 420 and 425 (by Merkel J at 90 FCR 370, 387-388).

⁹¹ (2000) 204 CLR 82.

⁹² (2005) 228 CLR 470.

In *Aala* the proceedings involved the invocation of the original jurisdiction of the High Court to issue constitutional writs based on alleged denial of procedural fairness. Thus the decision did not deal with Part 7 of the Act, or any question of the proper construction of any section within it. The importance of the High Court decision in *Aala* was the conclusion that denial of procedural fairness constituted jurisdictional error and that the constitutional writs, under section 75(v) of the *Constitution*,⁹³ would issue where that ground had been made out.⁹⁴

In *NAIS* the central issue in the proceedings was about delay, described as “*extraordinary*”,⁹⁵ in the Tribunal making a decision. Specifically, the particular complaint was that there had been, by reason of the excessive delay in making the relevant decision, procedural unfairness.⁹⁶ The Court divided, as had the Full Federal Court,⁹⁷ on whether a denial of procedural fairness had been shown. All members of the majority were influenced, in determining that there had been procedural unfairness in the proceedings before the Tribunal, by the statutory framework including sections 420 and 425.

Gleeson CJ held that a “*procedure that depends significantly upon the Tribunal’s assessment of individuals may become an unfair procedure, if by reason of some default on the part of the Tribunal, there is a real and substantial risk that the Tribunal’s capacity to make such an assessment is impaired*”.⁹⁸ The particular default in this case was the delay, or the drawing out,

⁹³ Section 75(v) of the *Constitution* provides that the High Court shall have original jurisdiction “*in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth*”.

⁹⁴ The writ of prohibition will issue when there has been a denial of procedural fairness, with other writs issuing in consequence upon that prohibition: *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90-91 (Gaudron and Gummow JJ).

⁹⁵ (2005) 228 CLR 470, 473 (Gleeson CJ) picking up the description made by the judge at first instance, Hely J: [2003] FCA 333 at [2].

⁹⁶ The critical dates, taken from the judgment of Gleeson CJ (2005) 228 CLR 470, 473, are as follows. An application for review was lodged with the Tribunal on 5 June 1997. The Tribunal held oral hearings on 6 May 1998 and 19 December 2001. The Tribunal handed down its decision on 14 January 2003.

⁹⁷ In the High Court, the majority were Gleeson CJ, Kirby J, Heydon and Callinan JJ; the minority were Gummow J and Hayne J. In the Full Federal Court the majority were Hill J and Marshall J; the minority was Finkelstein J ((2004) 134 FCR 85).

⁹⁸ (2005) 228 CLR 470, 475-6. Kirby J’s reasons were substantially the same as Gleeson CJ – see (2005) 228 CLR 470, 502-3.

of the statutory procedures that there was a material diminishing of the Tribunal's "*capacity to discharge its statutory obligations*".⁹⁹

Callinan and Heydon JJ held that there had been a denial of procedural fairness because "*the proceedings have not been fairly conducted, by reason of the delays*" and that procedural unfairness can arise not only from a "*denial of an opportunity to present a case, but from a denial of an opportunity to consider it*".¹⁰⁰ In their Honours' view, a denial of an opportunity to consider the case presented by the applicants occurred when the decision-maker disabled itself from giving consideration to the presentation of a case by reason of the delay.

The majority judgments rest on an entirely justifiable, but somewhat impressionistic, response to the delay as providing the factual platform upon which to conclude that the statutory functions had miscarried procedurally – thus giving rise to procedural unfairness at common law. For Gleeson CJ and Kirby J, the critical question was "*one of fairness of procedure*".¹⁰¹ For Callinan and Heydon JJ the overarching question was whether the proceedings had been "*fairly conducted*".¹⁰²

Both minority judgments rested upon a more narrowly framed question: whether "*delay has denied an interested party a proper opportunity to present its case*".¹⁰³

Understood in this way it is possible to identify a significant difference in principle between the majority and minority judgments, and a possible extension of it. For the minority the determination of whether there has been a lack of procedural fairness is examined through this issue – that is the *opportunity* to be heard. Conversely, the majority judgments arguably enable an evaluative judgment to be made by a reviewing court of the hearing overall to determine whether it had been 'fair'.

⁹⁹ (2005) 228 CLR 470, 476.

¹⁰⁰ (2005) 228 CLR 470, 526.

¹⁰¹ (2005) 228 CLR 470, 475 (Gleeson CJ); 492 (Kirby J).

¹⁰² (2005) 228 CLR 470, 526.

¹⁰³ (2005) 228 CLR 470, 484 (Gummow J); 509 (Hayne J).

Although the majority judgments make reference to the statutory obligations of the Tribunal – the judgment of Gleeson CJ being a good example of this – and use the legislative framework as a bench mark upon which to measure the delay and its impact on the decision-making process, no judgment anchored the outcome to either breach of the statutory procedures or to the common law principles of procedural fairness being implied into a specific provision or provisions of Part 7.

Reference should be made to two further decisions of the High Court that dealt with Parts 7 and 8 of the Act in this form, albeit that the cases were decided after the Act had been amended in 1998,¹⁰⁴ and in 2002.¹⁰⁵ The first decision was *Minister for Immigration and Multicultural Affairs v Bhardwaj*;¹⁰⁶ the second decision was *Drachnichnikov v Minister for Immigration and Multicultural Affairs*.¹⁰⁷

In *Bhardwaj*, the applicant became ill the day before a scheduled hearing, and the applicant's agent sent a letter by facsimile to the Tribunal seeking an adjournment of it. Due to an error on the part of the Tribunal, that letter was not brought to the attention of the Tribunal member – who, when the applicant did not attend, proceeded to conduct the review in the absence of the applicant. The Tribunal, in undertaking this review, dismissed the application and affirmed the delegate's decision to cancel the applicant's visa.

Upon learning of the error, and the decision having been made, the applicant's agent sent a further letter by facsimile to the Tribunal seeking a further hearing of the application. The Tribunal rescheduled a hearing and, thereafter, published a decision that revoked the cancellation of the applicant's visa. The Minister appealed this decision contending that the structure of the statutory scheme was such that it was beyond the power of the Tribunal, having made the first decision, to make the second decision.

¹⁰⁴ See the *Migration Legislation Amendment Act (No.1) 1998*.

¹⁰⁵ See the *Migration Legislation Amendment (Procedural Fairness) Act 2002*.

¹⁰⁶ (2002) 209 CLR 597. This case concerned the cancellation of the student visa. The review of this decision was undertaken by the Immigration Review Tribunal ('the IMR'). The procedures that the IMR was required to follow, when conducting a review, were prescribed (in Part 5 of the Act) in terms that were comparable to those in Part 7 of the Act. Any application for judicial review, from a decision of the IMR, was also limited by Part 8 of the Act.

The High Court rejected this construction, by majority.¹⁰⁸ However the significance of this decision, for present purposes, lies outside this ultimate holding. In reaching the conclusion that the second ‘decision’ was within power, the reasons of the majority resulted, in practical terms, in a circumvention of the prohibition against judicial review on procedural fairness grounds: in the circumstances of that case, the Court concluded that there had been a denial of procedural fairness that amounted to a failure to exercise jurisdiction and, further, that a denial of procedural fairness amounted to jurisdictional error. In their joint judgment, Gaudron and Gummow JJ expressed the matter in the following terms:¹⁰⁹

The failure of the Tribunal to give Mr Bhardwaj a reasonable opportunity to present evidence and argument had the consequence that it did not reach a decision after considering evidence and argument against the cancellation of his visa. That being so, it follows that the Tribunal did not conduct a review as required by the Act...

To say that the [first] decision was not a ‘decision on review’ for the purposes of...the Act is simply to say that it clearly involved a failure to exercise jurisdiction, and not merely jurisdictional error constituted by the denial of procedural fairness.

The decision in *Drachnichnikov* continued the approach evident from *Bhardwaj*. In *Drachnichnikov*, the High Court held that a failure to “respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord [the applicant] natural justice” and was also a “constructive failure to exercise jurisdiction”.¹¹⁰ Characterised in this way, the consequence of a denial of procedural fairness was not only that there was a jurisdictional error, but that judicial review was available, or at least arguably so, in the Federal Court under section 476(1)(e) of the Act.¹¹¹

¹⁰⁷ (2003) 77 ALJR 1088.

¹⁰⁸ Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ constituted the majority; Kirby J dissented.

¹⁰⁹ (2002) 209 CLR 597, 612.

¹¹⁰ (2003) 77 ALJR 1088.

¹¹¹ It was accepted by the Minister (77 ALJR 1088, 1100-1101) that although there was not a specified ground in section 476(1) of the Act covering a failure to exercise jurisdiction, judicial review would in these circumstances be permitted under section 476(1)(e) of the Act – that section providing that judicial review was permitted when the “decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the

5. *Judicial implication: notice and section 426*

The remaining provision which received particular judicial attention, as a means through which to embed common law principles of procedural fairness into Part 7 of the Act, was section 426 of the Act. This section required an applicant to be notified of the entitlement to appear and give evidence before the Tribunal and the entitlement to make a request to the Tribunal to call evidence.¹¹² The section also entitled the applicant to make a request to the Tribunal to call evidence, but that such a request had to be made within seven days of the notification given by the Tribunal.¹¹³

Here the approach of the Federal Court was a little different to the approach taken in connection with section 425 of the Act. This was because the Act prescribed the obligation – the giving of notice of the hearing before the Tribunal. The substantive question thus turned upon the consequences of non-compliance with the statutory requirements.

The common law principles of procedural fairness always attached supreme importance to notice: the courts have premised the declaration of the basic – and fundamental – right to be heard on the existence of notice. The opportunity to be heard cannot exist if notice is not given; and the opportunity is not a real one unless that notice enables a reasonable opportunity to prepare and deal with the case required to be met. The absence of notice, as we have seen in earlier Chapters, is the paradigm case of procedural unfairness, and ordinarily invalidates decisions made where there has been such failure.¹¹⁴

decision...". Gummow and Callinan JJ (77 ALJR 1088, 1093); Kirby J (77 ALJR 1088, 1100); and Hayne J (77 ALJR 1088, 1102) inclined to accept that this was so.

¹¹² Sections 426(1)(a) and (b) of the Act.

¹¹³ Section 426(2) of the Act.

¹¹⁴ There are limited exceptions that may displace this presumption such as matters involving national security, urgency and the like. See generally in this respect, Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th ed 2013) 452-459, where the 'exceptions' are catalogued.

And so it was with section 426 of the Act: giving of notice under section 426 was held to be a necessary – a mandatory – step for there to be compliance with the obligation under section 425 of the Act.¹¹⁵

This conclusion – the characterisation of the words of the section as being obligatory rather than simply directory – meant that a failure to comply with the terms of it invalidated any decision made in consequence.¹¹⁶ This provided a basis for review in the Federal Court based on section 476(1)(a) of the Act – there being a failure to observe “*procedures that were required by this Act...to be observed in connection with the making of the decision...*”.

A more important issue that arose in connection with section 426 related to the interaction between section 426, the regulations that sought to deem service of the notice on an applicant and the hearing envisaged by section 425.

The decisions of the Federal Court established that there was no linguistic connection between the regulations that sought to deem service of the notice under section 426 and the hearing that was prescribed in section 425.¹¹⁷ That is, the fact that notice might be deemed to have been received, by operation of a regulation, did not answer the question of whether in fact it was received; nor did it answer whether the hearing conducted subsequently was a genuine and real one.¹¹⁸ Thus, if it be shown that the applicant did not in fact receive notification of the hearing, then irrespective of the deeming provisions contained in the regulations, the court

¹¹⁵ See *Sook v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584; *Alwar v Minister for Immigration and Multicultural Affairs* (1999) 57 ALD 343; *Rahman v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 391.

¹¹⁶ The conclusion that the failure to comply with section 426 invalidated any hearing conducted subsequently proceeded largely on the basis that the failure to comply with the notice provisions could not be excused. The judgments, for example, do not make reference to the leading case on the test for determining invalidity when there has been a failure to comply with a statutory provision regulating the exercise of a statutory power (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355).

¹¹⁷ In *Uddin v Minister for Immigration and Multicultural Affairs* (1999) 165 ALR 243, 250, Hely J stated that there was “no linguistic point of contact between s425 and [the regulation], suggesting that those regulations were not meant to play a role in respect of s425”. See also, to like effect, *Kamkar v Minister for Immigration and Multicultural Affairs* (1996) 71 FCR 424 (North J).

¹¹⁸ See *Sook v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584 (Burchett J; Moore J and Katz J not deciding); *Uddin v Minister for Immigration and Multicultural Affairs* (1999) 165 ALR 243; *Haddara v Minister for Immigration and Multicultural Affairs* (1999) 106 ALR 401; *Rahman v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 391.

upon review would be entitled to conclude that there had not been a real hearing under section 425 of the Act. So understood, compliance with section 426 was a necessary, but insufficient, step towards discharging the obligations of the Tribunal to conduct a hearing under section 425 of the Act. Put another way, the giving of notice would not “*necessarily exhaust the section 425 obligation*”.¹¹⁹

A further aspect of the construction of section 426 related to the person who was required to receive the notification. In this respect as well, the court adopted a strict and mandatory approach to the notice requirements, holding that that the notification to the applicant be both actual and personal: thus notification of the hearing had to be in fact received by the applicant, and not “*someone other than the applicant*”.¹²⁰

Seen together sections 425 and 426 of the Act – and the interpretations that they were given by the Federal Court – in all practical respects ensured that the requirements of the common law principles of procedural fairness not only continued to operate despite the introduction of Part 7 of the Act. Further, construing the provisions in this manner also ensured that judicial review in the Federal Court was also available via section 476(1)(a) of the Act.

D. *Conclusion: Part 7 – An Analogue of the Common Law*

The 1992 Act was the first attempt by Parliament to prescribe the nature and extent of procedural fairness required to be observed by the Tribunal during its review process, to the exclusion of the common law. The dilemma facing the courts was stark: if there was a denial of procedural fairness on conventional common law grounds by the Tribunal, there was no basis for review by the Federal Court because of the prohibition in section 476(2)(a) of the Act. Although it was thought, at the time, that these amendments were likely to “*greatly reduce the*

¹¹⁹ *Haddara v Minister for Immigration and Multicultural Affairs* (1999) 106 ALR 401, 407 (Lehane J). See also *Uddin v Minister for Immigration and Multicultural Affairs* (1999) 165 ALR 243, 249 (Hely J).

¹²⁰ *Sook v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584.

scope for judicial creativity”,¹²¹ the opposite in fact occurred. The result was judicial creativity, and common law principles became a presumptive method of construing the provisions in Part 7 of the Act.

Thus, the Part 7 jurisprudence developed seamlessly in line with common law principles of procedural fairness – such that, in substance and in application, the provisions came to mirror them. There was no clearer indication or recognition of the ‘developments’ than the wide ranging amendments to Part 7 introduced in 1998 by the *Migration Legislation Amendment Act (No.1) 1998*.¹²² The practical effect of the decisions, in this period, was that the common law natural justice hearing rule had been implied, principally, into section 425 of the Act: it was the common law that had informed the meaning of the section.

Although there were suggestions that the grounds of review were narrower than the common law,¹²³ the combined protection provided by judicial implication of common law principles into section 425, the mandatory and strict nature with which section 426 was interpreted and the correlative review rights that were available when there was non-compliance, provided procedural safeguards to protect rights which were, it is suggested, the equal of the common law. Importantly, at the first sign of attempts made to whittle down common law principles of procedural fairness, the Federal Court tasked itself with the job of impressing within the statutory framework procedural fairness principles which were the analogue of the common law. When faced with more detailed attempts to exclude the common law principles of procedural fairness, the courts turned to a more principled approach: the presumptive application of the principles of procedural fairness unless excluded by clear words of plain intent. This latter approach is the significant development in the periods that follow.

¹²¹ See, for example, Mary Crock, ‘Judicial Review and Part 8 of the Migration Act: Necessary Reform of Overkill?’ (1996) 18 *Sydney Law Review* 266, 280.

¹²² These amendments are covered in the next Chapter, but generally provided detailed prescriptions of the actual procedures that the Tribunal was to follow when conducting a hearing under section 425 of the Act. Again, these amendments were designed to oust the operation of the common law principles of natural justice.

¹²³ For example, in *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315, 324 (Tamberlin and Katz JJ) it was said that “*the content and extent of the statutory opportunity to give an applicant an opportunity to appear and give evidence is narrower than the general law principles of natural justice would normally require*”.

VII PROCEDURAL FAIRNESS AS A NORMATIVE ELEMENT IN CONSTRUCTION: 1998 - 2001

A. Introduction

This Chapter covers a period of around three years, and its boundaries are legislatively defined: at one end is the *Migration Legislation Amendment Act (No.1) 1998* ('the 1998 Act') – an Act that commenced on 1 June 1999;¹ at the other end is the *Migration Legislation Amendment (Procedural Fairness) Act 2002* ('the 2002 Act') – an Act that commenced on 4 July 2002.²

The 1998 Act was Parliament's response to the ineffectiveness of the *Migration Reform Act 1992* in excluding common law principles of procedural fairness from operating within Part 7, Division 4 of the *Migration Act 1958*.³ The 2002 Act was the Parliament's response to – a legislative correction of – the High Court's decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*,⁴ viz., the procedures in Part 7 of the Act did not constitute a 'code of procedure' nor did the prescription of detailed procedures exclude common law principles of procedural fairness.

In between these two pieces of legislation there were other developments that shaped this period, and the period that was to follow. Two were judicial – the High Court decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*,⁵ and the High Court decision in *Minister for Immigration and Multicultural Affairs v Yusuf*.⁶ The other was legislative – the introduction of the *Migration Legislation Amendment (Judicial Review) Act 2001* ('the 2001 Judicial Review Act') and a 'privative clause'.⁷ These events, linked closely in time, explain a

¹ See sections 2 and 3 of, and Schedule 3 and Note 1 to, that Act.

² See section 2 of that Act.

³ The *Migration Act 1958* will be referred to as 'the Act'. Part 7, Division 4 of the Act dealt with the 'conduct of review' before the Refugee Review Tribunal. In this Chapter, the reference to Part 7 of the Act is a reference to the procedures in that Division.

⁴ (2001) 206 CLR 57.

⁵ Ibid.

⁶ (2001) 206 CLR 323.

⁷ The *Migration Legislation Amendment (Judicial Review) Act 2001* repealed the existing Part 8 of the Act, and introduced a new Part 8. These amendments commenced on 2 October 2001. The most significant feature of this amended Part was the introduction, in section 474 of the Act, of a privative clause – that is, a clause that seeks to oust the jurisdiction of the Courts "to review the acts of public officers or tribunal in order to enforce compliance with the law": see *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 483 (Gleeson CJ).

change in focus for procedural fairness and the ongoing and developing role that the ground would play in proceedings for judicial review in this area.

For procedural fairness, during this time, there was little development of principle – the decision in *Miah* was very much an isolated exception to this. The confined nature of this period, and the rapidity of legislative amendment, had the consequence that, by the time cases involving the Act in this form reached the High Court (or even the Full Federal Court), it was often the case that the Act had been further amended or the jurisprudence – either under Part 7 of the Act or dealing with common law principles of procedural fairness – had moved on.⁸ And, to the extent that High Court decisions were delivered during this period, they related to the statutory provisions before the amendments made by the 1998 Act.⁹ Nevertheless, some significant matters relating to procedural fairness do emerge from this time period, either by positive development or by default, and it is these matters that are the subject of this Chapter.

First, in the analysis of the relevant amendments, it is argued, the statutory procedures in Part 7 of the Act, supplemented by common law principles, provided an overall system that was procedurally fair, often in excess of any procedural fairness requirements that might have been imposed by the common law.

Secondly, the fundamental nature of procedural fairness and its presumptive application was still to uniformly filter through to the jurisprudence in connection with Part 7 of the Act. We have seen in earlier Chapters the development of common law principles of procedural fairness – in particular the establishment of the fundamental principle *viz.*, that the principles of procedural fairness applied whenever administrative decision-making affected the rights, interests or legitimate expectations of the individual unless excluded by plain words of

⁸ See, for example, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 (the obligations under section 424A of the Act as it stood following the amendments made by the 1998 Act – decided 18 May 2005); *VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 (undisclosed and adverse material not relied upon by the Tribunal and the role of section 424A of the Act as it stood following the amendments made by the 1998 Act – decided 6 December 2005); and *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 (the obligation to identify ‘issues’ in connection with the review under section 425 of the Act as it stood following the amendments made by the 1998 Act – decided 15 December 2006).

necessary intendment.¹⁰ To the extent any doubt remained about whether the High Court decision in *Kioa v West* had established this principle, it was dispelled by successive decisions of the High Court – first in *Annetts v McCann*,¹¹ and then in *Ainsworth v Criminal Justice Commission*.¹² In both these cases the positive aspect of the principles was emphasised: the principles presumptively applied unless excluded in the requisite way.¹³ Yet in this period, like the earlier period 1992 to 1998,¹⁴ the fundamental principle was still to gain a firm footing: the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*, revealed a divided Court,¹⁵ and even the majority judgments revealed differing approaches on this very issue. This was the background to the next phase in the development of procedural fairness and its contemporary restatement and recognition as a fundamental principle of the common law.¹⁶

Thirdly, despite the amendments made by the 1998 Act – or because of them – we see a revised approach by the courts to the construction of the provisions in Part 7 of the Act. By that constructional approach the principles of procedural fairness were a controlling influence on the construction of the specific provisions in Part 7 of the Act. This approach was different to the one described in Chapter VI where the Federal Court, in particular, went about expansively supplementing the generally expressed provisions that informed the approach of the Refugee Review Tribunal ('the Tribunal') conducting its review with common law principles of procedural fairness. The greater definition in the procedures that the Tribunal was to follow, when conducting its review, meant that the earlier approach was no longer a viable method of

⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 – decided 3 May 2001; and *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 – decided 8 August 2002.

¹⁰ See Chapter IV A New Dynamic for Natural Justice: The Development of a Modern System of Administrative Law.

¹¹ (1990) 170 CLR 596.

¹² (1992) 175 CLR 564.

¹³ In *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396, Dixon CJ and Webb J described when the Court would conclude that common law principles of natural justice had been excluded: “*But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment*”. See further Chapter VIII: Procedural Fairness as a Fundamental Principle.

¹⁴ See Chapter VI: Part 7 of the *Migration Act 1958*: An Analogue of the Common Law.

¹⁵ (2001) 206 CLR 57.

construing the provisions of Part 7 of the Act. Adaptation was necessary, and by this revised approach common law principles of procedural fairness informed the construction of the meaning of the specific provisions within Part 7 of the Act.

B. *The Amendments to Part 7 of the Migration Act 1958: An Overview*

The amendments introduced by the 1998 Act brought about substantial changes to Part 7 of the Act – specifically by the prescription of more detailed procedures for the conduct of reviews by the Tribunal.¹⁷ The amendments were expressed to have broadly two purposes: first, to “improve the immigration decision making system” and to “introduce certain safeguards for applicants by introducing a code of procedure”.¹⁸ Although the Parliamentary debates record that the legislative response was, from the government’s perspective, initiated at least in part because of the belief that some “judges make decisions where their view of the world is the premier factor, rather than the law”,¹⁹ the Parliamentary materials do not bear out any particular complaint underlying the greater legislative intervention. Nevertheless, it is apparent, bearing in mind that the amendments introduced were directed to the ‘procedure’ that the Tribunal was to adopt when conducting a review, the 1998 Act can be seen to be a reaction – a legislative correction – by Parliament directed to the way the courts came to deny the amendments brought about by the *Migration Reform Act 1992* from satisfying their objectives.

¹⁶ See Chapter VIII: Procedural Fairness as a Fundamental Principle.

¹⁷ Although the Act had been amended between the *Migration Reform Act 1992* and the *Migration Legislation Amendment Act (No.1) 1998*, the amendments were minor. The first involved the renumbering of the Act effected by the *Migration Legislation Amendment Act 1994*. The second was to exclude from judicial review decisions made by the Minister to substitute more favourable decisions to an applicant under section 417 of the Act - see Section 3, Schedule 1, of the *Migration Legislation Amendment Act (No.5) 1995*. The third involved an inconsequential amendment to section 475 of the Act – see section 17 of the *Migration Legislation Amendment Act (No.6) 1995*.

¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1123 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs).

¹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1125 (Con Sciacca, Shadow Minister for Immigration and Shadow Minister Assisting the Leader of the Opposition on Multicultural Affairs). When the *Migration Amendment Bill (No. 1)* was read for the second time, this was the response made to an article which appeared in the Australian Newspaper on 30 November 1998 where the Minister for Immigration and Ethnic Affairs is reported to have stated that which is quoted.

The amendments made by the 1998 Act were considerably more prescriptive than the rather limited,²⁰ and generally expressed, procedural provisions that appeared in Part 7 of the Act until this time. Relevantly, there were three provisions which involved substantive changes to Part 7 of the Act and the steps that the Tribunal was required to take, or procedures it was required to follow, when conducting a review under section 414 of the Act. The first was section 424A of the Act. This section, headed “*Applicant must be given certain information*”, dealt with ‘adverse conclusions’ and prescribed the manner in which such information was brought to the attention of the individual prior to a determination being made. The second was the repeal of section 425 of the Act, and its substitution with a new section 425. The new section 425 of the Act, headed “*Tribunal must invite applicant to appear*”, dealt with the hearing conducted by the Tribunal. The third was section 425A of the Act – a new section, headed “*Notice of invitation to appear*”, which dealt with notice of the hearing – specifically, the minimum notification period required to be provided to an applicant before a hearing could be convened.²¹

In the examination that follows it is clear that the procedural requirements of Part 7 of the Act were on no view less than any common law procedural fairness requirements. In fact, it is suggested that under the amendments made by the 1998 Act, statutory hearing procedures went further than the common law principles of procedural fairness.

C. *Part 7 of the Migration Act 1958: Statutory Procedural Fairness*

1. *Section 424A: adverse conclusions*

Section 424A of the Act is one example of how the procedures in Part 7 of the Act went beyond what common law principles required.

Section 424A(1) of the Act provided:

“(1) Subject to subsection (3), the Tribunal must:

²⁰ The relevant amendments appeared in Part 7, Division 4 (‘conduct of review’) of the Act.

²¹ See sections 425A(1) and (3) of the Act.

- (a) *give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
- (b) *ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*
- (c) *invite the applicant to comment on it”.*

Section 424A(1) of the Act was enlivened when the Tribunal determined that there was information that the Tribunal considered would be the, or part of the, reason for affirming the decision under review.²² In this situation, written particulars of the information were required to be provided by the Tribunal to the applicant by one of the methods in section 441A of the Act.²³ However, the obligation to give the particulars cast by section 424A(1) of the Act was excluded if the information was of the kind referred to in section 424A(3) of the Act – namely, general information relating to a class of persons, not specifically about the applicant;²⁴ or information that “*the applicant gave for the purpose of the application*”;²⁵ or information that was non - disclosable.²⁶

By its terms section 424A(1) of the Act closely mirrored the dual obligations cast upon a decision-maker as discussed in *Kioa v West*:²⁷ these obligations being the need to warn a party of the risk of an adverse finding affecting that person’s rights, interests or legitimate expectations and the need to provide an opportunity for that person to adduce evidence or make submissions directed to such issue. Although following the 1992 reforms, section 425 of the Act had been construed to co-exist with the common law requirements explained by *Kioa v*

²² *Naing v Minister for Immigration and Multicultural Affairs* (2000) 97 FCR 336, 342; *Nader v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 352, 366; *VEAJ v of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 291, 301; *SRFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 252 at [48].

²³ Section 424A(2) of the Act – that section relevantly providing that the “*invitation must be given to the applicant by one of the methods specified in section 441A...*”. See also *NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 214, 218 (the Court).

²⁴ Section 424A(3)(a) of the Act.

²⁵ Section 424A(3)(b) of the Act.

²⁶ Section 424A(3)(c) of the Act.

²⁷ (1985) 159 CLR 550.

West,²⁸ the intent of section 424A of the Act was to not only enshrine the general statement of principle established by that decision,²⁹ and to define the obligations, but to exclude any further ‘procedural fairness’ requirements in these situations.

However, the section was not construed to exclude common law principles of procedural fairness in situations where section 424A(1) of the Act was not engaged.³⁰ Further, in at least four respects it is apparent that section 424A of the Act went beyond the requirements of them.

The first extension related to the mandatory nature of section 424A(1)(a) of the Act – which required the Tribunal to provide the applicant with “*particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review*”.³¹ The language is deliberate, and significant. It reflects, it is suggested, the oft overlooked distinction between the judgment of Mason J and that of Brennan J in *Kioa v West*.³²

It will be remembered that in *Kioa*, Mason J expressed the requirement of procedural fairness as requiring the decision-maker “*to bring to a person’s attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing*

²⁸ The obligation upon the Tribunal when dealing with ‘adverse conclusions’ was a requirement of the hearing conducted under section 425 of the Act: see *Singh v Minister for Immigration and Multicultural Affairs* (1997) 49 ALD 640; *Minister for Immigration and Multicultural Affairs v Capitley* (1999) 55 ALD 365.

²⁹ For example, *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27, 40 (Merkel J); *SAAY v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 393 at [35] (the Court); *SRFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 252 at [52] (the Court).

³⁰ This was the issue that arose in *VEAL v Minister for Immigration and Multicultural Affairs* (2005) 225 CLR 88. In *VEAL*, the Tribunal received an anonymous, and confidential, letter which undercut the factual basis for the applicant’s claim for a protection visa. The Tribunal did not raise, or put, the contents of the letter to the applicant, nor did it raise with the applicant the fact that it had received this letter. The Tribunal, at the end of its statement of reasons, however, stated that it gave the contents of the letter “*no weight*” in making the findings that it did. The High Court held, applying the dicta of Brennan J in *Kioa v West viz.*, that information that is “*credible, relevant and significant*” could not be dismissed by the decision-maker in the way that it was and thus deny the obligation to reveal, in some way, the information contained in the letter. In this situation the Court held the situation was covered by the common law *viz.*, “*the obligation to accord the applicant procedural fairness*”.

³¹ The section was expressed in language usually considered to be mandatory or obligatory: “*must give*”. And this was the construction that was reached by the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

³² (1985) 159 CLR 550.

with it”.³³ Brennan J, on the other hand, postulated a test requiring, at least ordinarily, less of a decision-maker than the Mason J formulation. For Brennan J the obligation cast upon a decision-maker was to provide a person with “*an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made*”.³⁴ The formulation by Brennan J, as the High Court pointed out in *Saeed v Minister for Immigration and Citizenship*,³⁵ would not necessarily deny that in certain cases bringing the specific issue to the attention of the person may be required, but is narrower than that of Mason J: a requirement under the formulation of Mason J was the requirement to bring the critical issue to the attention of the individual. The language of section 424A(1)(a) of the Act picks up this distinction and enshrines the mandatory nature of Mason J’s formulation.

The second extension of the common law principles of procedural fairness brought about by section 424A(1) of the Act was in the requirement, contained in section 424A(1)(b), that not only must the adverse material be brought to the attention of the applicant and the applicant be invited to comment upon it, but that the Tribunal must ensure “*so far as is reasonably practicable that the applicant understands*” the significance of the material to the decision under review. Again, it is suggested that this was an enhancement of the common law position:³⁶ the common law had never recognised the need for the decision-maker to not only draw the ‘adverse material’ to the attention of the individual, but to take steps to see that the individual understood it.³⁷

³³ (1985) 159 CLR 550, 587.

³⁴ (1985) 159 CLR 550, 629.

³⁵ (2010) 241 CLR 252. See further below: ‘Part C (ii) Section 424A: the High Court decision in SAAP’.

³⁶ See, for example, *Frost v Kourouche* [2014] NSWCA 39 at [35] where Leeming JA (Beazley P and Basten JA agreeing) said: “*There is a well established line of authority for a complementary proposition to that in Kioa...The complementary proposition is that it is not necessary, in order to discharge the obligation to accord procedural fairness, to go further*”.

³⁷ In cases involving Part 7 of the Act, the authorities established that it formed part of the requirements under section 425 of the Act for the Tribunal to provide an interpreter where necessary to enable the applicant to present his or her claim, failing which ‘procedural error’ (that is, a failure to follow the procedures prescribed by the Act) would occur entitling the Federal Court to undertake judicial review pursuant to section 476(1)(a) of the Act: see *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507 (Kenny J); *Cotofan v Minister for Immigration and Multicultural Affairs* [2000] FCA 1042 (Emmett J); *Singh v Minister for Immigration and Multicultural Affairs* [2000] FCA 1858 (Kiefel J). However, these cases do not support a wider principle, founded in the common law, of the kind prescribed in section 424A(1)(b) of the Act.

A third extension arose in connection with situations where common law requirements of procedural fairness did not require any action on the part of a decision-maker in situations broadly approaching adverse conclusions. At common law, the procedural fairness requirements as explained by Mason J in *Kioa*, did not arise in three situations:³⁸ first, in connection with issues which are implicit in the nature of the decision; secondly, in connection with issues which are implicit in the exercise of the statutory power; and, thirdly, in connection with adverse conclusions “*which would...obviously be open on the known material*”.³⁹

Section 424A(1)(b) of the Act, it is suggested, did away with these distinctions. The focus of the section was subjective and positively driven, by the use of mandatory language (“*must...ensure*”), towards having the applicant comprehend and thereafter engage with the critical issue – itself further defined by the requirements in section 425 of the Act.⁴⁰

In a fourth respect, as well, section 424A of the Act travelled beyond the common law requirements of procedural fairness. Section 424A(2) of the Act required the information that was required to be given to the applicant under section 424(1)(a) of the Act to be by one of the methods prescribed by section 441A of the Act.⁴¹ It was held, in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*,⁴² that not only did such an requirement continue once a hearing had been convened under section 425 of the Act, but the failure to do so was invalidated the decision even if no practical – or any – injustice occurred.⁴³

³⁸ *Commissioner for ACT Revenue v Alphaone Pty Limited* (1994) 49 FCR 576, 592; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161-2; *Minister for Immigration v SZGUR* (2011) 241 CLR 594, 599.

³⁹ *Minister for Immigration v SZGUR* (2011) 241 CLR 594, 599 (French CJ and Keifel J).

⁴⁰ In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, the High Court held that section 425 of the Act should be construed to mean that the issues in any review were those as defined by the delegate, in the decision under review, unless the Tribunal advised the applicant of a contrary position. See further the discussion on section 425 of the Act.

⁴¹ A similar construction of the section was reached by a Full Federal Court in *NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 214, 218 (the Court).

⁴² (2005) 228 CLR 294.

⁴³ In this respect, the decision overruled a number of Federal Court decisions to the contrary effect: see, for example, *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27; *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396; *SAAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 356; *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298; *NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 214.

Although, once engaged, section 424A of the Act obliged the Tribunal to give particulars, as opposed to the evidence itself, of such adverse material to the applicant and invite the applicant to comment upon such material,⁴⁴ there were limits to the practical operation of the section. In the first place, the obligation cast upon the Tribunal did not extend to “*the subjective appraisal by, or the thought process of, the Tribunal*” – the reason being that matters of this kind were not ‘information’.⁴⁵ In this respect, the statutory position mirrored the common law position.⁴⁶

Further, as the decision in *SZBYR v Minister for Immigration and Multicultural Affairs* makes clear,⁴⁷ section 424A of the Act did not cover situations that arose by reason of shortcomings in the material presented by an applicant.

In that case, the applicant provided a statutory declaration in support of his application for a protection visa. There were discrepancies between the statutory declaration and the oral evidence that the plaintiff gave before the Tribunal conducting a review. The Tribunal drew these discrepancies, between his oral evidence and statutory declaration that he had submitted, to his attention and invited comment. The applicant complained, in proceedings for judicial review, that the statutory declaration was ‘information’ within the meaning of section 424A of the *Migration Act* and that the Tribunal fell into jurisdictional error by not providing written notice of this ‘information’.

The High Court rejected this complaint holding that ‘information’ within the meaning of section 424A(1) relates to “*the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence*”.⁴⁸ Critically, in the context of refugee claims,

⁴⁴ *Naing v Minister for Immigration and Multicultural Affairs* (2000) 97 FCR 336; *Nader v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 352; *Carlos v Minister for Immigration and Multicultural Affairs* [2001] FCA 301; *SRFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 252; *NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 156 FCR 205.

⁴⁵ *Tin v Minister for Immigration and Multicultural Affairs* [2000] FCA 1109; *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396; *NADH v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 ALR 264.

⁴⁶ *Commissioner for ACT Revenue v Alphaone Pty Limited* (1994) 49 FCR 576, 592; *Minister for Immigration v SZGUR* (2011) 241 CLR 594, 599.

⁴⁷ (2007) 81 ALJR 1190.

⁴⁸ (2007) 81 ALJR 1190, 1196.

this required an assessment by the Tribunal of information “*in terms of its dispositive relevance*” to the claims made by the applicant and is not dependent upon the use subsequently made by the Tribunal.⁴⁹

In this last respect, the High Court, in *SZBYR*,⁵⁰ endorsed the following statement of principle, made by Finn and Stone JJ in *VAF*, that section 424A(1):⁵¹

...does not encompass the tribunal's subjective appraisals, thought processes or determinations ... nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc.

In this respect, the High Court rejected an approach, adopted in the Federal Court,⁵² which involved the Court assessing compliance with section 424A of the Act as necessitating an ‘unbundling’ and examination of the Tribunal reasons to ascertain whether or not an issue was the reason, or part of the reason, for affirming the decision. This construction followed from the temporal point at which the section operated: namely, “*in advance – and independently - of the Tribunal’s particular reasoning on the facts of the case*”.⁵³

Although there were three specific exceptions to the requirement to ‘give particulars’, set out in section 424A(3) of the Act, in practical terms one of them gave some scope for the Federal Court to ‘construe’: section 424A(3)(b) of the Act. By that subsection, ‘particulars’ were not required to be given to an applicant if it related to information which “*the applicant gave for the purpose of the application*”.⁵⁴

This section, it is suggested, sought to negate any requirement to comply with the obligation cast in terms of section 424A(1) of the Act in cases which turned on information provided (or not provided) by an applicant, or upon conduct of an applicant. On this construction, the

⁴⁹ *MZXBQ v Minister for Immigration and Citizenship* (2008) 166 FCR 483, 492 (Heerey J).

⁵⁰ (2007) 81 ALJR 1190, 1196.

⁵¹ *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471, 476-477.

⁵² See, for example, *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396; *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214.

⁵³ (2007) 235 ALR 609, 615.

⁵⁴ Section 424A(3)(b).

amendment in section 424A(3)(b) of the Act would overcome decisions of the Federal Court that extended the ‘*Kioa* principles’ to cover cases where the decision turned on the absence of corroboration – as it did in *Broussard v Minister for Immigration and Ethnic Affairs*;⁵⁵ or the decision turned on a finding that the applicant acted in bad faith – as it did in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*.⁵⁶

In *Al Shamry v Minister for Immigration and Multicultural Affairs*⁵⁷ the Federal Court construed this section in the narrowest manner, holding that the information referred to in section 424A(3)(b) of the Act was not the information that the applicant gave in making the initial application for a protection visa, but the information that the applicant provided to the Tribunal. Madgwick J reasoned, and the Full Court upheld,⁵⁸ that textual analysis and the “*manifestly beneficial purpose*” of the legislation mandated this construction.⁵⁹ Although later decisions questioned the construction,⁶⁰ the Full Federal Court followed the decision in *Al Shamry*.⁶¹ This was a clear example of the Federal Court favouring a construction that sought to limit any derogation from the statutory forms of procedural fairness, even when to do so went beyond what the common law principles had recognised. However, in 2007 section 424A(3) of the Act was amended to make clear that the information that was not required to be disclosed to an applicant included particular information provided by the applicant.⁶²

⁵⁵ (1989) 21 FCR 472 – the failure to have the applicant’s brother corroborate a claim made by the applicant that he would have no financial support in his country of origin.

⁵⁶ (1991) 102 ALR 339 – the applicant, after his application for a humanitarian visa was rejected, sent a letter to the Iranian embassy critical of the Iranian regime.

⁵⁷ [2000] FCA 1679.

⁵⁸ *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27.

⁵⁹ [2000] FCA 1679 at [23], [28].

⁶⁰ For example, *Minister for Immigration and Multicultural and Indigenous Affairs v Awan* (2003) 131 FCR 1 (Gray A-CJ).

⁶¹ *SAAY v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 393; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214. In *SZBYR v Minister for Immigration and Multicultural Affairs* (2007) 235 ALR 609, 615 the High Court was not required to determine the correctness of these decisions, argument having proceeded on the basis that these decisions were correct.

⁶² Section 424A(3)(ba) of the Act was introduced by the *Migration Amendment (Review Provisions) Act 2007* and provided that one further type of information that did not need to be provided to an applicant under section 424A – namely information that “*the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department*”. Section 424A(3)(ba) of the Act only applied to applications for review lodged after 29 June 2007. This amendment was

2. *Section 424A: the High Court decision in SAAP.*

Fundamentally, the High Court decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*⁶³ was about whether section 424A of the Act applied at any stage of the decision-making process where the Tribunal considered that particular ‘information’ would be a reason for, or part of the reason for, affirming the decision under review – including during a hearing conducted under section 425 of the Act. In that case, during a hearing, the Tribunal identified three particular matters that arose in connection with evidence given by the daughter of the applicant. Each matter was potentially adverse to the applicant. The Tribunal invited, and received, an oral response to each matter during the hearing. An invitation was extended to the applicant and her adviser to make further submissions following the hearing, but none were forthcoming. The Tribunal relied upon the daughter’s evidence, and it determined the application adverse to the applicant.

The applicant challenged the decision on two, related, grounds: first, that, properly construed, section 424A of the Act required the Tribunal to provide her with written particulars of the adverse matters even though a hearing under section 425 of the Act had been convened; and, secondly, that this failure to do so was contrary to the mandatory requirements of the Act and thereby constituted jurisdictional error.⁶⁴

The majority upheld the construction advanced *viz.*, that written particulars were required to be provided, concluding that the structure of Part 7 of the Act, did not compel or require a sequential process (and construction) so that, once the hearing under section 425 of the Act had been convened, section 424A of the Act no longer had a role to play.⁶⁵ Further, the majority held that the requirements under section 424A of the Act were mandatory – ‘imperative duties’

a specific response to the decisions of the Full Federal Court that had held that material of this kind was required to be drawn to the attention of the applicant.

⁶³ (2005) 228 CLR 294.

⁶⁴ The decision involved the form of Part 7 of the Act that was introduced following the amendments made by the *Migration Legislation Amendment Act (No.1) 1998*, but was heard by the High Court on 8 and 9 August 2004, and decided on 18 May 2005. The applicant sought relief under section 39B of the *Judiciary Act 1901* (Cth) – that section empowering the Court to issue constitutional writs against the Tribunal to enforce the law.

⁶⁵ McHugh J, Kirby J and Hayne J each delivered separate judgments reaching the same conclusions on both issues.

– attaching to the valid exercise of jurisdiction by the Tribunal.⁶⁶ In this respect the majority held that the provision of particulars orally, even though complete and in the circumstances fair – as adjudged by common law standards of procedural fairness – would not comply with the statutory directive in section 424A(1) of the Act. The consequence of this latter conclusion being that the failure to comply with the statutory requirements in section 424A of the Act invalidated the decision.

The consequence of the ultimate holding in the case was that whenever the Tribunal formed the view that section 424A(1) of the Act was engaged, written particulars were required to be provided to the applicant even though, for example, the adverse issue might only have arisen during the hearing conducted.

In *SAAP* the case was argued on the basis that, in the alternative to the contention that there had been a failure to comply with the terms of section 424A of the Act, there had been a failure to provide procedural fairness to the applicant applying common law principles. In the High Court only two justices dealt, in terms, with whether there had been a failure to provide procedural fairness.⁶⁷ Both upheld the following conclusion by Mansfield J at first instance:⁶⁸

I do not consider that those common law rules were breached by the Tribunal in this instance. The applicant had an opportunity to put her case, and was aware of the matters which were of significance to her case which emerged from the evidence of her elder daughter. She also had an opportunity of responding to those matters, partly by what was put to her during the hearing and partly by being able to make submissions about those matters following the hearing.

This aspect of the decision thus emphasised the fourth extension of the statutory procedures over the common law *viz.*, a failure to comply with the requirements of the Act invalidated the decision even if no injustice occurred.

⁶⁶ Picking up the language used in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992.

⁶⁷ Gleeson CJ and Gummow J were required to deal with the alternate case in view of the fact that both had concluded that section 424A of the Act did not apply at the hearing before the Tribunal. The majority, constituted by McHugh J (228 CLR 294, 322), Kirby J (228 CLR 294, 345) and Hayne J (228 CLR 294, 355) expressed no conclusion about whether there had been a failure to afford procedural fairness at common law.

The decision in *SAAP* brought about further legislative change through the *Migration Amendment (Review Provisions) Act 2007* ('the 2007 Act') – an Act that commenced on 28 June 2007.⁶⁹

By the 2007 Act, Section 424AA was introduced to cover the provision of information provided to an applicant at a hearing following an invitation to appear made pursuant section 425 of the Act. At such hearing the Tribunal was empowered to orally provide the applicant with “*clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision is under review*” and if such particulars were given, then the procedure in section 424AA(b) of the Act was required to be complied with. This procedure included advising the applicant that additional time could be sought to deal with the information raised and providing for additional time to deal with it. It is suggested that the introduction of this section was to overcome the practical difficulties which followed from the High Court decision in *SAAP* – namely, that as the obligation under section 424A of the Act was an ongoing one, if an issue emerged during a hearing, then compliance with the mandatory requirements of the section required the hearing to be adjourned, and written particulars compliant with section 424A(2) of the Act provided. Thus the disruption and inconvenience which occurred by reason of an adjournment of a hearing would be, upon the procedure in section 424AA being invoked, avoided.

The policy and purpose of section 424AA mirrored that of, and was complementary to, section 424A of the Act;⁷⁰ the difference simply related to the manner in which the obligations were to be fulfilled (orally, rather than writing), and their timing (during the hearing, rather than before or following an adjournment of the hearing). However, the primacy of the obligation to comply with section 424A remained but simply could be satisfied during the hearing if the procedures in section 424AA were successfully invoked.

⁶⁸ *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 577, [43]; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 304 (Gleeson CJ); 337 (Gummow J).

⁶⁹ See section 2 of the 2007 Act.

⁷⁰ *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 415.

Section 424A of the Act itself underwent significant amendment. By the amendments brought about by the 2007 Act, the section required the Tribunal to give “*clear particulars*” of information that “*the Tribunal considers would be the reason, or part of the reason, for affirming the decision is under review*”, rather than simply providing ‘particulars’ of such information.⁷¹ Further, whereas before the amendments the Tribunal was required to ensure, “*as far as reasonably practicable*”, that the applicant understood why the information was “*relevant to the review*”, the amendments now required the Tribunal to ensure (in addition) that the applicant understood “*the consequences of the information being relied on in affirming the decision under review*”.⁷²

3. *Section 425: the hearing*

It will be remembered that section 425 of the Act, as it stood before the amendments made by the 1998 Act, was the principal provision through which the courts imposed common law requirements of procedural fairness into Part 7 of the Act, the 1998 Act repealed section 425 of the Act, and inserted a new one.

The new Section 425 of the Act, subject to some limited exceptions,⁷³ required the Tribunal to invite the applicant to appear before the Tribunal “*to give evidence and present arguments relating to the issues arising in relation to the decision under review*”.⁷⁴ This was a significant enhancement to the limited right to appear under the repealed section 425 of the Act – a section that at the time simply gave an applicant a right to appear to give evidence but the

⁷¹ Section 424A(1)(a) of the Act.

⁷² Section 424A(1)(b) of the Act.

⁷³ These exceptions, which are set out in section 425(2) of the Act, were where the Tribunal considered that it should decide the review in the applicant’s favour (section 425(2)(a)); where the applicant consents to the Tribunal deciding the matter without an appearance (section 425(2)(b)); or where there has been a failure to give information requested under section 424 or to comment on information under section 424A (section 425(2)(c)).

⁷⁴ Section 425(1) of the Act.

Tribunal was “not required to allow any person to address it orally about the issues arising in relation to the decision under review”.⁷⁵

However, despite the detail in the section, and in the procedures in Part 7 of the Act, a number of decisions emphasised the continued importance that the courts placed on the ‘fairness’ of the hearing provided by section 425 of the Act. Construing the section against the backdrop of common law notions of procedural fairness – which is what occurred – ensured that fairness eventuated.

The decision of the High Court in *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* involved a narrow question arising out of the Tribunal’s obligation to conduct a hearing under section 425 of the Act.⁷⁶

In that case, after conducting a hearing under section 425 of the Act, the Tribunal indicated that it would write to, and seek a response from, the applicant about inconsistencies in the applicant’s version of events adduced to support the granting of a protection visa. As it happened the Tribunal failed to write to the applicant, and the Tribunal thereafter determined the matter. The applicant challenged the determination, contending that he was denied procedural fairness in not having the further opportunity to address the matters raised by the Tribunal.

The High Court upheld the appeal, and in doing so explained the basis for concluding that there had been a denial of procedural fairness in the case as resting upon two duties: the first was the duty to review the decision once an application for review had been filed;⁷⁷ the second was the duty to invite the applicant to appear and present arguments.⁷⁸ Against the background of these duties, the plurality explained:⁷⁹

One aspect of the overall duty to review was the duty to invite the appellant to give evidence and present arguments: s 425(1). The duty to review therefore entailed a

⁷⁵ See section 425(2) of the Act, prior to the amendments by the 1998 Act.

⁷⁶ (2004) 221 CLR 1 – decided 8 December 2004.

⁷⁷ Section 414 of the Act.

⁷⁸ Section 425 of the Act.

⁷⁹ (2004) 221 CLR 1, 8 (McHugh, Gummow, Callinan and Heydon JJ).

statutory duty to consider the arguments presented and in that way to afford the appellant procedural fairness. That implied that if the Tribunal thought that the arguments had been presented so inadequately that the review could not be completed until further steps had been directed and performed, it could not be peremptorily concluded by the making of a decision before that direction was complied with or withdrawn.

Although these ‘duties’ were sourced within Part 7 of the Act, there were undeniably strong procedural fairness themes in the reasons for judgment. The duties on the Tribunal were very much conditioned on affording the applicant procedural fairness.

The decision of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* was a further example of the role that common law principles played within the confines of the hearing provided by section 425 of the Act.⁸⁰ In that case, the applicant sought review of a decision of a delegate who did not accept the accuracy of an event relied upon by the applicant. The Tribunal refused the application finding that two other events, relied upon by the applicant, were implausible despite not challenging them or subjecting the applicant to questioning about these events by the Tribunal member.

Although the facts of this case appeared to fall squarely within the purview of section 424A of the Act, the High Court decided the case without any reference to this section.⁸¹ Instead, section 425 of the Act was the focus of the High Court judgment.

The High Court concluded that unless the Tribunal advised the applicant to the contrary, an applicant was entitled to proceed on the basis that the issues before the Tribunal would be those matters upon which the applicant failed before the delegate. This followed, in the opinion of the Court, because section 425 provided that an applicant was to be invited “*to give evidence and present arguments relating to the issues arising in relation to the decision under review*” and because it was the Tribunal that was to identify the issues.⁸² In this sense, “*the issues*” had a specific, rather than general, meaning: the issues would be those that arose

⁸⁰ (2006) 228 CLR 152 – decided 15 December 2006.

⁸¹ The argument proceeded on the basis that the existence and content of the obligation to accord procedural fairness was not directly affected by any provision of the Act: (2006) 228 CLR 152, 161.

⁸² (2006) 228 CLR 152, 162-3 (the Court).

before the delegate unless the Tribunal identified others, and the reference to “*the issues*” was not simply a reference to the entitlement to a visa application.

The backdrop to this construction, as earlier pointed out, was the decision of the Full Federal Court in *Australian Capital Territory Revenue v Alphaone Pty Limited*,⁸³ which the High Court regarded as “*fundamental principle*”:⁸⁴ the construction reached on section 425 of the Act, in this respect, was thus consistent with this and largely informed by it.

Section 425 of the Act was also construed to require, in a given case, an invitation to a further hearing. That is, that if the circumstances were such that a new or an additional issue arose in, or subsequent to, the initial hearing, discharge of the statutory mandate in section 425 of the Act could necessitate a further hearing to be conducted.⁸⁵

4. *Section 425A: notice*

Section 425A of the Act required notice of the invitation to appear to be given to an applicant, setting out details of the proposed hearing.⁸⁶ The notice was required to be “*given*” to the applicant by one of the methods prescribed by section 441A of the Act.⁸⁷ The “*period of notice given*” to the applicant was required to be at least “*the prescribed period or, if no period is prescribed, a reasonable period*”.⁸⁸ And the notice was required to contain a statement “*of the effect of section 426A*” *viz.*, that once an invitation had been made, in instances when the applicant did not appear, the Tribunal could proceed to determine the review.⁸⁹

The combined effect of these provisions, it is suggested, were designed to overcome the effect of a number of Federal Court decisions in the period up to 1999 – specifically, those that held

⁸³ (1994) 49 FCR 576.

⁸⁴ (2006) 228 CLR 152, 162.

⁸⁵ *SZKTI v Minister for Immigration and Citizenship* (2009) 238 CLR 489, 505.

⁸⁶ Section 425A(1) of the Act.

⁸⁷ Section 425A(2) of the Act – although this did not apply to an applicant in immigration detention.

⁸⁸ Section 425A(3) of the Act.

that the 'deeming' of the service of the notice of the hearing did not determine whether it was received and, further, did not determine whether any hearing conducted was a 'real and genuine' one;⁹⁰ and also those decisions that held that the service of the notice, to be valid, had to be both actual and personal – that is, it had to be 'given' to the applicant and not another authorised to receive documents or accept service of them.⁹¹

There were two important changes brought about by the insertion of section 425A into Part 7 of the Act.

The first was that, by section 425A of the Act, notice could be given to the applicant by one of the methods prescribed by section 441A of the Act – that latter section permitted notice to be given in different ways but, importantly, enabled deemed notice to be given if the notice was served on a person "*authorised by the applicant to receive documents of that kind on behalf of the applicant*".⁹²

The second related to the period of the notice given. Earlier it was pointed out that the Federal Court had repeatedly held that the notice of the hearing had to be 'reasonable notice' and that what was reasonable was a question of fact in each case.⁹³ Further, decisions had held that the time prescribed, in the former section 426 of the Act, for the giving of notice to the Tribunal relating to an applicant's requests for the Tribunal to call oral evidence from nominated persons (*viz.*, seven days) did not inform what was reasonable in the context of the time required for reasonable notice for a hearing under section 425 of the Act.⁹⁴ The drafting of section 425A(3) of the Act, by the use of the disjunctive expression 'or', overruled this line of

⁸⁹ Section 426A concerned the consequences of an applicant failing to appear before the Tribunal, when invited to do so under section 425 – empowering the Tribunal to make a decision "*without taking any further action to allow or enable the applicant to appear before it*".

⁹⁰ See *Sook v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584 (Burchett J; Moore J and Katz J not deciding); *Uddin v Minister for Immigration and Multicultural Affairs* (1999) 165 ALR 243; *Haddara v Minister for Immigration and Multicultural Affairs* (1999) 106 ALR 401; *Rahman v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 391.

⁹¹ See, for example, *Sook v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584.

⁹² Section 441A(2) of the Act.

⁹³ *Minister for Immigration and Multicultural Affairs v Capitly* (1999) 55 ALD 365; *Budiyal v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 166.

⁹⁴ *Budiyal v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 166, 171.

decision:⁹⁵ if a time was prescribed, then that was the time which the applicant had to be given notice of the hearing under section 425 of the Act; reasonableness – that is, reasonable notice of the hearing – only became a consideration if there was no time prescribed in the notice.

D. *Common law principles of procedural fairness and Part 7 of the Act*

1. *The presumptive application of procedural fairness delayed*

In Chapter VI it was argued that the approach adopted by the Federal Court to the construction of the provisions in Part 7, Division 4 of the Act was essentially by a process of adding to the broadly expressed provisions, governing the manner in which the Tribunal conducted a review, with common law principles of procedural fairness. The result was that Part 7 of the Act had become a surrogate for common law principles of procedural fairness. It was also argued that the ultimate conclusions were undoubtedly justified by High Court jurisprudence,⁹⁶ even if the judicial method in reaching them was in principle flawed.

The 1998 - 2001 period was distinctly different to the previous one. This was a time of frequent, and widespread, legislative change to Part 7 of the Act.⁹⁷ The nature and extent of these changes, and the delay in important matters reaching – and being decided by – the High Court created practical problems in the coherent development of principle. For example, the High

⁹⁵ Section 425A(2) of the Act defined the period of notice to be “*the prescribed period or, if no period is prescribed, a reasonable period*”.

⁹⁶ *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 574-5 (Mason CJ, Dawson, Toohey and Gaudron JJ).

⁹⁷ In addition to the 2001 Judicial Review Act and the 2002 Act, Parts 7 and 8 of the Act were amended, in the period of this Chapter, by the following Acts. First, by the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* – and by this Act procedures were prescribed for giving and serving documents in migration matters. Relevantly for applicants for review, the Act repealed section 441A and prescribed a new section 441A with new procedures for the Tribunal giving documents to applicants (which included by electronic means) and prescribed when applicants are taken to have received a document from the Tribunal (section 441C). Secondly, by the *Migration Legislation Amendment Act (No.1) 2001* – and by this Act Part 8A and section 486A were introduced. By that section a time restriction, 35 days from the date of actual notification of the decision, was imposed in respect of applications for prerogative relief to the High Court. And, thirdly, by the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* – and by this Act jurisdiction to undertake judicial review of Tribunal decisions was conferred upon the Federal Magistrates Court. For a general overview of the legislative changes in and around

Court delivered judgment in *Muin v Refugee Review Tribunal* on 8 August 2002 – that is, after the amendments made by the 2002 Act – in relation to a matter that concerned Part 7 of the Act before the changes made by the 1998 Act.⁹⁸ Another example was the High Court decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*:⁹⁹ the High Court delivered judgment on 3 May 2001, but that too was a matter that concerned Part 7 of the Act before the changes made by the 1998 Act.¹⁰⁰

Further, the judgments themselves – not only from the High Court, but from the Federal Court – were often disparate, disjointed and assertions of principle were often expressed in a highly generalised manner. The High Court decision in *Miah*, discussed further below, was one example of an aspect of this. *Muin* can be taken as another.

In *Muin* the issue was whether the plaintiffs had been misled by the Tribunal and thus denied procedural fairness in the conduct of the review.¹⁰¹ Each member of the Court delivered a separate judgment.¹⁰² Some addressed specifically the interaction of common law principles of procedural fairness and the statutory provisions, in manner that suggested the law was both clear, and settled. Gaudron J expressed such a position:¹⁰³

It is now settled that, notwithstanding the limited grounds upon which an aggrieved person may seek review of a Tribunal decision in the Federal Court, the Tribunal is bound by the rules of natural justice and is, thus, bound to proceed in a manner that is procedurally fair.

this time period – see *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 399-400 (French J).

⁹⁸ (2002) 76 ALJR 966.

⁹⁹ (2001) 206 CLR 57.

¹⁰⁰ Strictly speaking, the decision in *Miah* did not directly concern Part 7 of the Act but concerned the extent to which the statute excluded the common law, at an earlier point in the administrative process, when a delegate of the Minister determined whether the applicant was a refugee. The decision is discussed later in this Chapter.

¹⁰¹ The case was commenced in the original jurisdiction of the High Court. Both cases involved the plaintiffs believing that the Tribunal would have regard to certain material, described as “*the Pt B documents*” – which contained background material such as reports, articles etc, relevant to their contention that they would be persecuted on racial grounds if returned to their country of origin – but it was found that the Tribunal “*did not have and did not have regard to the Pt B documents*”: (2002) 76 ALJR 966, 979 (Gaudron J).

¹⁰² The Court was constituted by Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ.

¹⁰³ (2002) 76 ALJR 966, 979.

McHugh J also expressed a similar view on the 'settled' state of the law:¹⁰⁴

There is no doubt that the Tribunal member was under a duty to accord...procedural fairness. Whenever a statute confers on a public official or tribunal the power to do something that affects a person's rights, interests or legitimate expectations, the official or tribunal must accord procedural fairness to the person affected unless the statute plainly indicates a contrary intention. This Court has already held that the rules of procedural fairness govern the exercise of power by the Tribunal.

Nonetheless, uncertainty about the interaction of principle existed in the Federal Court. Despite the fact that the Federal Court was precluded from undertaking judicial review on procedural fairness grounds, occasional overarching – or potentially overarching – statements of principle were made. Thus, in *Minister for Immigration and Multicultural Affairs v A*,¹⁰⁵ Merkel J expressed his view of the interaction between Part 7 of the Act and common law principles of procedural fairness:

*The legislature has considered and provided for the precise manner in which an opportunity to be heard is to be afforded in respect of a decision by the Minister to grant or to refuse to grant a visa. Therefore it is unlikely that a court, under the guise of procedural fairness, will engraft upon the legislature's provisions additional rights in respect of the same matters: see *Brettingham Moore v Municipality of St Leonards* ...*

This was a remarkably antiquated statement of principle to refer to and, perhaps more fundamentally, even by 1999 its correctness must have been open to serious doubt.¹⁰⁶

Nevertheless, despite the 'state' of principle, as earlier pointed out, the High Court had established the positive aspect of the fundamental principle: but it had yet to be fully comprehended, and applied, in the context of litigation concerning Parts 7 and 8 of the Act. But a series of matters would bring this issue to a head: the High Court decision in *Miah*, the legislative response to it – the 2002 Act – and the introduction of a privative clause by the 2001

¹⁰⁴ (2002) 76 ALJR 966, 989.

¹⁰⁵ (1999) 91 FCR 435, 442. The other members of the Court, Emmett J and Finkelstein J, delivered separate judgments and did not address the issue raised by Merkel J.

¹⁰⁶ This decision sits uneasily even with decisions around that era: see *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106. See also Chapter VIII, Part B, section C (i): 'Excluding procedural fairness: a simple question of statutory construction?'

Judicial Review Act, all ensured there was renewed focus and attention on procedural fairness as a ground of judicial review.¹⁰⁷

The decision in *Miah* is analysed in detail in the next Chapter in the context of statutory exclusion of the principles of procedural fairness,¹⁰⁸ but for present purposes it is sufficient to make the following points about this decision.

In *Miah*, a delegate of the Minister rejected the applicant's application for a protection visa. The applicant was advised of the decision, and of the right to apply to the Tribunal for review as well as the deadline for applying for such a review – twenty eight days.¹⁰⁹ Through inadvertence on the part of the applicant's solicitor, the application for review was not filed within time – the consequence being that the Tribunal had no jurisdiction to deal with any application for review of the delegate's decision.¹¹⁰ The applicant commenced proceedings in the High Court contending that he was owed, but denied, procedural fairness by the delegate.

The decision in *Miah*, propositionally, was thus about two issues: first, whether Part 7 of the Act and the procedures prescribed for the hearing before the Tribunal amounted to a 'code' – in the sense of ousting the operation of the common law at the earlier stage of decision-making (here the delegate's decision); and, secondly, whether, even if Part 7 of the Act was not a 'code', whether the specificity with which the procedures had been prescribed manifested an intent by Parliament to exclude the operation of common law principles of procedural fairness – again, specifically at the earlier stage of decision-making. So understood, although the case was really about the intersection of the common law and statute, the judgments delivered were somewhat mixed.

¹⁰⁷ Any denial of procedural fairness by the Tribunal would be a jurisdictional error and therefore not protected by the privative clause in section 474 of the Act: the consequence being that judicial review was available in the Federal Court, in addition to the High Court.

¹⁰⁸ See Chapter VIII: Procedural Fairness as a Fundamental Principle.

¹⁰⁹ Section 412(1) of the Act an "application for a review...must (a) be made in the apprised form; and (b) be given to the Tribunal...not later than 28 days after the notification of the decision...".

¹¹⁰ This time limit was held to a mandatory requirement and incapable of extension: see *Fernando v Minister for Immigration and Multicultural Affairs* (2000) 97 FCR 407 (the Court).

Gleeson CJ and Hayne J delivered a joint dissenting judgment that denied the principles any application at that stage of decision-making, considering that the presence of the requirement to give reasons by the delegate and the right to a full merits review meant that the statute had manifested an *“intention to address in detail the presently relevant requirements of procedural fairness, then the intention of Parliament will be decisive”*.¹¹¹

The majority judgments all supported the requirement for the delegate to observe the requirements of procedural fairness, although the approaches were somewhat different.¹¹² McHugh J, it is suggested, correctly identified and applied the fundamental principle in a way that today would be considered entirely orthodox *viz.*, that the *“common law rules of natural justice...are taken to apply to the exercise of public power unless clearly excluded”*.¹¹³

Although the majority judgments can be taken to support the proposition so identified by McHugh J, and each of the judgments contains similar statements of principle, the importance of the principle came to the fore in the period following the decision in *Miah*, and because of it: Parliament sought to overcome the decision by the introduction of the *Migration Legislation Amendment (Procedural Fairness) Act 2002* – an Act that sought to make clear that the procedures in Part 7 of the Act were *“an exhaustive statement of the natural justice hearing rule...”*.¹¹⁴

Yet despite the uncertainty about the fundamental nature of procedural fairness, as earlier described, procedural fairness exerted considerable influence in connection with Part 7 jurisprudence. This next section of the Chapter analyses how the principles of procedural fairness themselves were guiding the construction of Part 7 of the Act.

¹¹¹ (2001) 206 CLR 57, 75.

¹¹² Gaudron J, McHugh J and Kirby J constituted the majority.

¹¹³ (2001) 206 CLR 57, 93.

¹¹⁴ Section 422B(1) of the Act.

2. *Procedural fairness: a normative element in statutory construction*

In a sense, the constructional influence of the common law principles of procedural fairness was obvious: the 1998 Act was the consequence of the Federal Court supplementing the procedural provisions within Part 7 of the Act with these common law principles. Now that the 1998 Act had ‘filled the gaps’, and spelt out the procedure with greater particularity, the supplementation of the procedure with the common law was no longer readily achievable; and, in many respects, it was unnecessary as the statutory provisions themselves largely mirrored the common law. Nevertheless, in this period, the principles of procedural fairness remained influential in how these new provisions were construed: procedural fairness had a subtle, normative role in the interpretation of the provisions within Part 7 of the Act – in both the Federal and High Court.

There are three areas where this ‘approach’ can be identified: first, in relation to the nature of the procedure that was permitted by section 429 of the Act – the section that required the Tribunal hearing to be held “*in private*”; secondly, in connection with section 424A of the Act and ‘adverse material’; and, thirdly, in connection with the hearing conducted under section 425 of the Act. In these areas, discussed further in what follows, it is clear that the construction of the provisions of Part 7 of the Act needed to – and did – accommodate the principles of procedural fairness.

In *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs*,¹¹⁵ four individuals lodged applications for protection visas, and the background to each application was claimed to be common. A delegate of the Minister refused the claims and each applied to the Tribunal for a review of the decision. The Tribunal ‘heard’ the claims together; that is, although there were separate claims by each individual, one Tribunal member was requested to be, and was, assigned to hear and determine each application for review. The procedure that was adopted, with the agreement of each applicant, was that some applicants gave their evidence in the presence of some of the other applicants. The Tribunal affirmed the delegate’s decisions to refuse the protection visas, however, each applicant successfully appealed to the Federal

Magistrate's Court – despite agreeing to the procedure adopted – contending that, contrary to section 429 of the Act,¹¹⁶ there had not been a 'hearing' conducted in private and therefore jurisdictional error had occurred.¹¹⁷

The Minister's appeal to the Full Federal Court was allowed,¹¹⁸ but the applicants each appealed to the High Court seeking reinstatement of the orders of the Federal Magistrate's Court.

The High Court held, dismissing the appeal, that *"the presence of the other applicants while the appellant was giving his evidence did not mean that the hearing of his application was not in private"*,¹¹⁹ and in doing so made a number of points about the role of procedural fairness in the conduct of the proceedings before the Tribunal.

First, the High Court held that the Tribunal could conduct concurrent hearings - that is, deal with multiple applications for review – without being in breach of section 420 of the Act or section 429 of the Act so long as to do so *"is dictated by the objectives stated in section 420 and is consistent with procedural fairness"*.¹²⁰ In this respect, the High Court considered that the alternate construction – that to have each applicant give evidence in each review separately, that is, once as an applicant and also as a witness, would be protracted and inefficient: in this situation, it was pointed out, the accommodation of procedural fairness would require a *"'revolving door' process"*.¹²¹ Most importantly here, consistency with procedural fairness was informing the construction of the section.

Secondly, the High Court dealt with the appeal, implicitly, on the basis that common law principles of procedural fairness were the backdrop to the procedure that the Tribunal was to follow:

¹¹⁵ (2006) 230 CLR 486.

¹¹⁶ Section 429 of the Act provided that the hearing of the review by the Tribunal *"must be in private"*.

¹¹⁷ [2004] FMCA 796.

¹¹⁸ (2005) 145 FCR 523 (Moore J and Weinberg JJ; Kiefel J dissenting).

¹¹⁹ (2006) 230 CLR 486, 498 (The Court).

¹²⁰ (2006) 230 CLR 486, 498 (The Court),

¹²¹ (2006) 230 CLR 486, 498 (The Court); see also (2005) 145 FCR 523, 539 (Weinberg J).

...fairness would probably have obliged the Tribunal member to follow some procedure, in compliance with the Act, which would have enabled each applicant to know what the others had said. To the extent to which there were material inconsistencies, they were all entitled to deal with those inconsistencies. Since they were all relying on consistency, they were entitled to know of the extent of the consistency.

This passage is significant not only because ‘fairness’ – which can only be taken to mean procedural fairness – was directing the procedure but also because the passage recognises something more: that each applicant had an entitlement to know consistency of ‘information’ and the extent of it across all applications. The case may thus be seen as an extension to *Kioa v West*: not only was an applicant entitled to know of adverse material and entitled to respond to it, an applicant was entitled to know of corroborative material and to rely upon it.

The influence of common law principles of procedural fairness can be also be seen in the jurisprudence under section 424A of the Act – the section that, in general terms, dealt with the obligations of the Tribunal in relation to ‘adverse information’.¹²² In a series of cases the Full Federal Court implied fairness – procedural fairness – into section 424A of the Act as a controlling concept to when the section applied.¹²³ These decisions held that the process required by section 424A(1) of the Act required an interpretative assessment of the Tribunal’s reasons and an evaluative judgment about whether “*as a matter of fairness*” section 424A of the Act was engaged.¹²⁴

Although these attempts were later doubted by a Full Federal Court,¹²⁵ as running contrary to the High Court decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*,¹²⁶ the role that fairness played was not necessarily diminished by that decision. The approach of McHugh J is illustrative of this point.

¹²² By section 424A(1) the Tribunal was required to give particulars to an applicant that would be the reason or part of the reason, for affirming the decision under review.

¹²³ *Paul v Minister for Immigration and Multicultural and Indigenous Affairs* (2001) 113 FCR 396 (Allsop J; Heerey J agreeing); *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471, 481 (Finn and Stone JJ).

¹²⁴ *Paul v Minister for Immigration and Multicultural and Indigenous Affairs* (2001) 113 FCR 396, 432 (Allsop J; Heerey J agreeing).

¹²⁵ *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214.

¹²⁶ (2005) 228 CLR 294.

In holding that section 424A of the Act had a role that might remain notwithstanding that a hearing under section 425 of the Act had been convened, McHugh J justified his conclusion – that in this situation there should be written, not simply oral, particulars provided – by reference to five factors based on fairness. First, *“the object of the section must be to provide procedural fairness to the applicant”*;¹²⁷ secondly, by reasoning that the *“main purpose of the [Division 4] is to accord procedural fairness to applicants”*;¹²⁸ thirdly, by reference to section 420 and the requirement of the Tribunal to act ‘fairly’;¹²⁹ fourthly, by the need to *“deal fairly with applications for review must continue throughout the Tribunal’s review”*;¹³⁰ and, fifthly, because *“an applicant may not understand the significance of [information that is adverse]...it is in the interests of fairness that the applicant should be given an opportunity to comment on it”*.¹³¹

It is evident, it is suggested, that the approach of McHugh J saw notions of fairness as providing the essential justification for the construction. Although McHugh J acknowledged a degree of circularity that justified giving an applicant written notice of adverse material in this situation – that was built on an assumption that the obligation on the Tribunal was to *“deal fairly with applications for review”* continuing throughout the Tribunal’s review – McHugh J considered that *“given the rule that the principles of procedural fairness apply unless excluded by express words or necessary implication, the assumption seems sound”*.¹³²

In other ways too ‘fairness’ played a role in the interpretation of the section. Section 424A(3) of the Act provided exceptions to the general rule relating to disclosure of adverse material. One

¹²⁷ (2005) 228 CLR 294, 312.

¹²⁸ (2005) 228 CLR 294, 313.

¹²⁹ (2005) 228 CLR 294, 314-5.

¹³⁰ (2005) 228 CLR 294, 315.

¹³¹ (2005) 228 CLR 294, 316.

¹³² (2005) 228 CLR 294, 315-6. At first instance in *SAAP* Mansfield J made a similar point in support of section 424A(1) having, when the preconditions were met, a role at the hearing. Mansfield J reasoned that as section 424A enacted a basic principle of procedural fairness, *“there is no reason why the legislature would not have intended that that principle should be excluded in respect of adverse information of which the Tribunal learns only at or during the hearing”*: [2002] FCA 577, [29].

exception to the disclosure obligation in section 424A(1) of the Act related to material that “*the applicant gave for the purpose of the application*”.¹³³

The pivotal issue of construction for this sub-section related to the meaning of the word ‘application’. In a number of decisions in the Federal Court, it was held that the word ‘application’ where it appeared in section 424A(3)(b) of the Act – and, thus, operated as an exception to the obligation to disclose adverse material in accordance with section 424A(1) – should be construed to mean the application that was filed, pursuant to section 418 of the Act, with the Tribunal and engage the process of merits review by the Tribunal.

In *Al Shamry v Minister for Immigration & Multicultural Affairs*,¹³⁴ Madgwick J held that there was no textual warrant for giving the word ‘application’ a different meaning to the one given in section 418 of the Act.¹³⁵ Importantly, Madgwick J further reasoned that “*fairness and efficiency*”¹³⁶ supported this construction:¹³⁷

The manifestly beneficial purpose of the legislation in question, enacted to meet Australia's obligations under the Convention, supports this construction of s424A...in many cases an applicant, upon arrival at the airport, will be in a foreign country, unable to speak English and without a passport. The degree of distress that such circumstances may engender, frequently compounded by tiredness after a long journey, suggests an imputable Parliamentary appreciation that a supposed record of information given under these circumstances ought fairly be provided to an applicant before it is held against him or her.

In the Full Court this construction was challenged, but unanimously upheld.¹³⁸

Ryan and Conti JJ agreed with the construction of Madgwick J,¹³⁹ and also reasoned that, to the extent that there was ambiguity in the expression ‘application’ as used in section 424A(3)(b), “*it*

¹³³ Section 424A(3)(b).

¹³⁴ [2000] FCA 1679.

¹³⁵ This being an assumption upon which legislation has been drafted - namely, the legislature use words uniformly in the same legislation, unless the context requires otherwise: *Registrar of Titles v (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J; Barwick CJ and Jacobs J agreeing).

¹³⁶ [2000] FCA 1679 at [24], [27].

¹³⁷ [2000] FCA 1679 at [28].

¹³⁸ (2001) 110 FCR 27.

¹³⁹ The third member of the Court, Merkel J, delivered reasons agreeing with Madgwick J: (2001) 110 FCR 27, 39-40.

*should be resolved against the Tribunal since subs(3) operates to relieve the Tribunal from affirmative obligations imposed by s424A(1) for the benefit of the applicant. Consistently with established principles, a construction should be adopted which preserves, rather than diminishes, that benefit”.*¹⁴⁰

Section 425 of the Act dealt with the obligation to provide an applicant with a hearing before the Tribunal, and it too was shaped by common law principles of procedural fairness. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*,¹⁴¹ the construction of section 425 of the Act was approached by the Court as embodying a “*fundamental principle*” in this area as explained by a Full Federal Court in *Australian Capital Territory Revenue v Alphaone Pty Limited*.¹⁴² In *SZBEL*, the High Court said:¹⁴³

In Alphaone the Full Court rightly said:

‘It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.’

This High Court, implicitly at least, recognised the symmetry between this ‘fundamental principle’ and the language of section 425 of the Act which gave the applicant an entitlement to “*to give evidence and present arguments relating to the issues arising in relation to the decision under review*”.¹⁴⁴ This symmetry led the Court to conclude that the ‘issues’ that are referred to

¹⁴⁰ (2001) 110 FCR 27, 34. Later Full Courts followed this decision: *SAAY v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 393; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214. In *SZBYR v Minister for Immigration and Multicultural Affairs* (2007) 235 ALR 609, 615 the High Court was not required to determine the correctness of these decisions, argument having proceeded on the basis that these decisions were correct.

¹⁴¹ (2006) 228 CLR 152.

¹⁴² (1994) 49 FCR 576. The decision in *Alphaone* is also well-known for the proposition that, putting to one side instances where a decision-maker is required to disclose issues to an individual, a “*decision-maker is not required obliged to expose his or her mental processes or provisional views to comment before making the decision in question*” (49 FCR 576, 592).

¹⁴³ (2006) 228 CLR 152, 162.

¹⁴⁴ *Ibid.*

in section 425 of the Act, should bear the same construction as those covered by the decision in *Alphaone*.¹⁴⁵

These judgments evidenced a clear acknowledgement of the influence that procedural fairness had in shaping the construction of Part 7 of the Act.

3. *Renewed focus: procedural fairness, the High Court decision in Yusuf and the privative clause.*

The High Court decision in *Minister for Immigration and Multicultural Affairs v Yusuf*¹⁴⁶ was a watershed in identifying the potential scope of errors that could be judicially reviewed by the Federal Court under section 476 of the Act – the section that enumerated the grounds of review that were available in connection with a Tribunal decision. In *Yusuf*, McHugh, Gummow and Hayne JJ explained that there was no statutory directive to give sections 476(1)(b) and (c) of the Act narrower meanings rather than their ordinary ones.¹⁴⁷ The consequence was that “*if the Tribunal identifies a wrong issue, asks a wrong question, ignores relevant material or relies on irrelevant material, it ‘exceeds its authority or powers’. If that is so, the person who purported to make the decision ‘did not have jurisdiction’ to make the decision he or she made, and the decision ‘was not authorised’ by the Act*” (and thus be a ground of review under section 476(1)(b) and (c) of the Act).¹⁴⁸ Further, acting in this way would also “*involve an error of law which involves an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found*”,¹⁴⁹ and so be within section 476(1)(e) of the Act.¹⁵⁰

¹⁴⁵ (2006) 228 CLR 152, 163.

¹⁴⁶ (2001) 206 CLR 323. See also *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 470 (von Doussa J).

¹⁴⁷ Section 476(1)(b) of the Act provided for judicial review in the Federal Court on the ground that “*the person who purported to make the decision did not have jurisdiction to make the decision*”; and section 476(1)(c) of the Act provided for judicial review in the Federal Court on the ground that “*the decision was not authorised by this Act or the regulations*”.

¹⁴⁸ (2001) 206 CLR 323, 351-352.

¹⁴⁹ *Ibid.*

¹⁵⁰ Section 476(1)(e) of the Act permitted judicial review in the Federal Court on the ground that the “*decision involved an error of law...*”.

To the extent that this decision provided a more expansive understanding of these grounds of review, and flagged the potential for further avenues for judicial review, the effect was short-lived. The High Court decided *Yusuf* on 31 May 2001 and the 2001 Judicial Review Act commenced on 2 October 2001.

Relevantly, the 2001 Judicial Review Act did two things: it repealed Part 8 of the Act and the positively and negatively expressed prohibition on seeking judicial review in the Federal Court on the ground of denial of procedural fairness,¹⁵¹ and introduced a new one. And within the new Part 8 of the Act was a privative clause – section 474 of the Act.¹⁵² A decision of the Tribunal to refuse to grant a visa was a ‘privative clause decision’.¹⁵³ The system of judicial review from the Tribunal to the Federal Court thus changed from the limited grounds in section 476(1) of the Act to judicial review, subject to the privative clause, based on the Federal Court’s jurisdiction under section 39B of the *Judiciary Act 1903 (Cth)*.¹⁵⁴

The privative clause was initially interpreted in the Federal Court, although there were some judgments that supported a contrary construction,¹⁵⁵ as not only constitutionally valid, but effective in excluding the obligation to observe procedural fairness.¹⁵⁶ In those decisions it was held that a decision of the Tribunal could not be successfully challenged if the decision conformed to the three provisos expressed by Dixon J in *R v Hickman; Ex parte Fox and Clinton*.¹⁵⁷ Those provisos, or pre-conditions to the valid exercise of power, were that the

¹⁵¹ See sections 476(1) and 476(2)(b) of the Act.

¹⁵² Section 474(1) of the Act provided that a privative clause decision: “(a) is final and conclusive; and (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account”.

¹⁵³ See sections 474(2) and (3) of the Act.

¹⁵⁴ Section 39B(1) of the *Judiciary Act 1903* relevantly provides that the original jurisdiction of the Federal Court “includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer...of the Commonwealth...”. This grant of jurisdiction was itself limited by the privative clause in section 474 of the Act.

¹⁵⁵ See, for example, *Walton v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 342; *Boake-Danquah v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 116 FCR 557; *Awan v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 120 FCR 1

¹⁵⁶ See, for example, *NAAX v Minister for Immigration and Multicultural Affairs* (2002) 119 FCR 312; *NAAG v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 195 ALR 207. In that case, Allsop J, after noting the division in the Court concerning the proper construction of section 474 of the Act, remarked that “the preponderance of those decisions (in number)” supported the view that Allsop J reached in that case.

¹⁵⁷ (1945) 70 CLR 598.

decision must be “*a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body*”.¹⁵⁸ This approach was subsequently approved by a five member Full Federal Court in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*.¹⁵⁹

Thus, so long as the three *Hickman* provisos were made out, judicial review on the ground of denial of procedural fairness was precluded: such decisions were protected by the privative clause in section 474 of the Act. With the introduction of the 2002 Act, described further in the following Chapter, this was a period of considerable uncertainty for procedural fairness as a ground of review in relation to migration decision-making. This was the situation that existed until the High Court delivered its decision, on 4 February 2003, in *Plaintiff S157/2002 v The Commonwealth*.¹⁶⁰

In *Plaintiff S157*, section 474 of the Act was construed so that if jurisdictional error was made out, then the decision in question was not a privative clause decision, within sections 474(2) and (3) of the Act, and thus not protected by the prohibition in section 474(1) of the Act.¹⁶¹ For procedural fairness the significance in such a construction was the fact that, as the earlier decisions in *Re Refugee Tribunal; Ex parte Aala*¹⁶² and *Minister for Immigration and Multicultural Affairs v Bhardwaj*¹⁶³ had earlier established, a denial of procedural fairness amounted to jurisdictional error and, therefore, outside the operation of the privative clause.¹⁶⁴ The corollary was the renewed interest in procedural fairness as a ground of review, and greater attention to the interaction between common law principles of procedural fairness and the statutory scheme in Part 7 of the Act.

¹⁵⁸ *Ibid* at 614-615.

¹⁵⁹ (2002) 123 FCR 298 (Black CJ, Beaumont and von Doussa JJ; Wilcox and French JJ dissenting).

¹⁶⁰ (2003) 211 CLR 476.

¹⁶¹ See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹⁶² (2000) 204 CLR 82, 101 (Gaudron and Gummow JJ).

¹⁶³ (2002) 209 CLR 597, 612 (Gaudron and Gummow JJ).

¹⁶⁴ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 490 (Gleeson CJ), 508 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

E. *Conclusion*

The period of this Chapter was marked by the deep involvement of the Parliament. Parliament had, via the 1998 Act, prescribed detailed procedural requirements to be observed by the Tribunal when conducting its review and the amendments were designed to exclude altogether common law principles of procedural fairness from operating within Part 7 of the Act. The process of judicial supplementation, as described in Chapter VI, in the period 1992 to 1998 initiated this legislative intervention.

Yet despite these changes, the principles of procedural fairness were pervasive. They exerted strong constructional influence over the interpretation given to specific provisions in Part 7 of the Act. The provisions of Part 7 of the Act were construed against the backdrop of common law principles of procedural fairness or, as they were sometimes neutrally described, construed against notions of fairness. The Courts were construing the provisions of Part 7 of the Act on the basis that the common law principles should inform the manner in which the Tribunal conducted administrative review.

This approach implicitly recognised the fundamental nature of the principles of procedural fairness and their presumptive application unless excluded by plain words or clear intent. Earlier decisions of the High Court had explicitly recognised this statement of principle, but the transposition into Part 7 of the Act was yet to occur. The outcome in *Miah* was the start of a correction to this, but the different judgments in that case highlight that there was still some way to go before the fundamental nature of the principles would be recognised and applied in this area.

The end of this period – the introduction of the 2002 Act and a clear attempt by Parliament to exclude any common law procedural fairness obligations operating within Part 7 of the Act added to the renewed focus on procedural fairness following *Plaintiff S157* – marks the commencement of the next phase in the development of procedural fairness: its contemporary recognition as a fundamental principle.

VIII PROCEDURAL FAIRNESS: A FUNDAMENTAL PRINCIPLE

A. Introduction

As explained in Chapter III, the principles of procedural fairness are considered to be fundamental and, as such, protected from statutory curtailment by the principle of legality. In the post-*Kioa period*, in view of the age of the authorities that are typically cited to support this trite proposition,¹ one could be forgiven for thinking that the principle of legality would have been engaged and, thus, referred to whenever there was an attempt to statutorily exclude the principles of procedural fairness.

The reality, at least until the High Court decision in *Saeed v Minister for Immigration and Citizenship*,² presents somewhat differently. Although the High Court, perhaps boldly, asserted that the principle of legality had been ‘strictly applied’ by it since its decision in 1987 in *Re Beane; Ex parte Bolton*,³ the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* presents a less emphatic view:⁴ so far as procedural fairness was concerned, the ‘strict application’ of the principle of legality was yet to occur. The decision in *Miah* was essentially about whether the principles of procedural fairness had been excluded by statute, yet only two of the five judges in the matter identified the principle of legality and gave realistic consideration to its application.⁵

In truth the decision in *Miah* reflected judicial uncertainty about the principle of legality, and the fundamental nature of procedural fairness. The decision in *Saeed* commenced a correction of this uncertainty, by a clear statement by the plurality that recognised the importance of natural justice and its characterisation as a fundamental principle of the common law. The High

¹ *The Commissioner of Police v Tanos* (1958) 98 CLR 383 and, later, *Annetts v McCann* (1990) 170 CLR 596 and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

² (2010) 241 CLR 252.

³ (2002) 213 CLR 543.

⁴ (2001) 206 CLR 57. See also Chapter VII: Procedural Fairness as a Normative Element in Construction: 1998 – 2001.

⁵ McHugh J ((2001) 206 CLR 57, 93, 97- 99 and 113) and Kirby J ((2001) 206 CLR 57, 113): there was a fleeting reference in the dissenting judgment of Gleeson CJ and Hayne J ((2001) 206 CLR 57, 73), and the principle was not raised in the reasons for judgment of Gaudron J.

Court decision in *Plaintiff S10 v Minister for Immigration and Citizenship*,⁶ in stating that the basis for the obligation to observe procedural fairness in a statutory context rests on a principle or presumption of statutory construction with a constitutional dimension to it, has now put this characterisation beyond doubt.

B. *Procedural fairness as fundamental principle*

1. *Excluding procedural fairness: a simple question of statutory construction?*

It was earlier explained, in Chapter IV, that a number of substantive issues emerged from the High Court decision in *Kioa v West*: the test for the implication of principles of procedural fairness *viz.*, whenever administrative decision-making affected the rights, interests or legitimate expectations of the individual; the positive implication of the principles of procedural fairness *viz.*, the principles applied to the exercise of power unless excluded; and the content of them. Putting to one side the decision of the High Court in *Commissioner of Police v Tanos*,⁷ the High Court had not been required to focus its attention on how the principles might be excluded: the jurisprudential debate up to *Kioa* was about when the principles applied.

The exclusion of the obligation to observe procedural fairness in the exercise of statutory power has always been recognised by the common law. The exclusion could occur expressly, or it could occur by necessary implication. Instances of exclusion by this latter means have included where the exercise of power was urgent,⁸ or where issues of national security arose.⁹ But even in these cases, no hard and fast rules existed, and no presumption against the obligation arose merely because the subject matter of the power involved an urgent or possible

⁶ (2012) 246 CLR 636.

⁷ (1958) 98 CLR 383.

⁸ See *De Verteuil v Knaggs* (1918) AC 557; *Marine Hull and Liability Insurance Co Limited v Hurford* (1985) 10 FCR 234; *South Australia v Slipper* (2004) 136 FCR 259.

⁹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Leghaei v Director General of Security* [2005] FCA 1576, affirmed on appeal (2007) 241 ALR 141.

national security issue:¹⁰ whether the obligation to observe procedural fairness existed fundamentally remained a question of construction of the statute.

Putting these examples to one side, the issue was not whether the obligation to observe procedural fairness could be excluded: rather the issue was the approach that was to be taken by the court to reach the conclusion that it had.

Initially, there were some signs that the courts might be disposed to conclude that the principles could, simply as a routine matter of statutory construction, be excluded. Somewhat ironically it was in *Ridge v Baldwin* – a case that is rightly thought to have created a new dynamic for modern day administrative law – that Lord Reid expressed the view that the principles of procedural fairness could be excluded simply as a matter of statutory construction, whenever “*a particular Act showed a contrary intention*”.¹¹

In Australia, similar statements had been made by the High Court. Indeed, in the pre-*Kioa* period, there was a clear willingness to conclude that legislation had disclosed a statutory intent so as to exclude the operation of the principles of procedural fairness, particularly where the legislation contained some provision that provided a person, who might be affected by the exercise of that power, with an opportunity to be heard. Thus in *Brettingham-Moore v St Leonards Municipality*,¹² Barwick CJ said:

The case is not one in which the legislature is silent as to the right to be heard, so that the common law can fill the void. The legislature has addressed itself to the very question and it is not for the Court to amend the statute by engrafting upon it some provision which the Court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material.

¹⁰ *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 where although the obligation to observe procedural fairness, in connection with a security assessment of a person seeking a protection visa, was conceded by the defendant, the Court accepted that the *Australian Security Intelligence Organisation Act 1979* (Cth) was conditioned to require the observance of procedural fairness: see, for example, French CJ (251 CLR 1, 49) and Heydon J (251 CLR 1, 97). The other members of the Court implicitly accepted this to be so, and proceeded to deal with whether the obligation had been breached.

¹¹ [1964] 1 AC 40, 73.

¹² (1969) 121 CLR 509.

The dictum of Barwick CJ was not an isolated one, confined to the unique nature of the issue in that case.¹³ This approach was reflected more widely in High Court jurisprudence in the period leading up to the decision in *Kioa v West*. In some circumstances it was concluded that an unconditional conferral of power suggested that the power could be exercised “free from any duty to observe the principles of natural justice”.¹⁴ Indeed even in *Kioa* itself some judgments revealed an approach, essentially echoing the dictum of Lord Reid in *Ridge v Baldwin*, holding that whether the principles applied was an orthodox question of statutory construction with no disposition towards their inclusion.¹⁵ In a way this was entirely explicable: until this decision the High Court had approached the implication of the principles of procedural fairness as being the substantive question, rather than approaching the matter from the starting point that the principles applied to the exercise of power to destroy, defeat or prejudice the rights, interests or legitimate expectations of a person unless excluded in the requisite way.¹⁶ Hence, rather than the inquiry being directed to whether the statute evinced an intent for the principles of procedural fairness to be observed, the correct enquiry should have been whether the statute evinces an intent for the principles to be excluded by plain words of necessary intendment.

That the tide of High Court decisions had, in the pre-*Kioa* period, focussed upon the negative aspect of the rule (and, thus, emphasis on whether the principles applied in a given case) rather than on the positive aspect of the rule (and, thus, emphasis on applying the principles unless

¹³ The issue there being whether the principles of natural justice applied to a Commission of Inquiry set up to report to the Governor. The statute establishing the Commission provided that, where a person or body was aggrieved by the recommendations contained in the Commission’s report, such person or body could petition the Governor and thereafter was entitled to appear in support of the petition before the Commission before a final report could be issued by the Commission.

¹⁴ *Salemi v MacKellar [No.2]* (1977) 137 CLR 396, 420 (Gibbs J), 460 (Aickin J agreeing with Gibbs J). See also to similar effect the decision of the High Court in *The Queen v MacKellar; Ex parte Ratu* (1977) 137 CLR 460, 464-5 (Barwick CJ); 470 (Gibbs J); 485-6 (Aickin J).

¹⁵ See, for example, Wilson J (1985) 159 CLR 550, 600 where His Honour directed enquiry to whether the legislation “evinces the intention...to observe the dictates of procedural fairness”.

¹⁶ See, generally, Chapter IV. This was the approach of Mason J in *Kioa v West* (1985) 159 CLR 550, 584 where His Honour referred to the obligation to afford 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”; and the approach of Brennan J ((1985) 159 CLR 550, 609) was to the same effect: “When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention”.

they were excluded) resulted in an earlier decision, being overlooked: the High Court decision in *Commissioner of Police v Tanos*.¹⁷

The decision in *Tanos* concerned the making of an ex parte order by the Supreme Court of NSW declaring certain premises to be a disorderly house pursuant to the *Disorderly Houses Act 1943* (NSW). One ground of challenge that was made to the order was that, being made ex parte, there was a denial of procedural fairness. In the context of dealing with this issue, Dixon CJ and Webb J discussed how legislative intent to exclude the principles might be demonstrated:¹⁸

But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment.

The Court concluded that although the regulations made under the Act empowered the judge, hearing the application for an order declaring premises disorderly, to either make the order ex parte or provide the affected person with an opportunity to be heard against the making of the order, a narrow construction favouring the preservation of the opportunity to be heard should be preferred. Thus, Dixon CJ and Webb J held that despite a construction available that left the choice of procedure to the Court, the regulation “ought not to be so interpreted. It should be understood as meaning that prima facie the course provided for [a hearing by the person affected] should be followed and only in exceptional or special cases should an immediate declaration be made”.¹⁹ So understood, the decision itself was a clear statement of the principle of legality, and its actual application.

Two further matters of significance emerge from the decision in *Tanos*. First, the jurisprudence that had some currency in the 1960s and 1970s with the High Court (and in England, as the dictum of Lord Reid in *Ridge v Baldwin* made clear) picked up only the first part of the principle viz., the obligation to observe the principles of procedural fairness was subject to a sufficient indication of legislative intent to the contrary. The second part of the principle (how that intent

¹⁷ (1958) 98 CLR 383.

¹⁸ *Ibid* at 396; Taylor J agreeing at 397.

¹⁹ *Ibid*.

must manifest itself) played no part in these decisions.²⁰ Secondly, the statement by Dixon CJ and Webb J, relating to the exclusion of the principles of procedural fairness was justified by reference to the fundamental nature of procedural fairness and to what is now described as the principle of legality, albeit that there was no specific reference to the principle, nor citation of any authority that established such principle.

Although, as has been pointed out, the course of High Court authority in this time period passed over this very significant judgment, some judges recognised and restated its importance.²¹ The importance of this principle, and how it remained quiescent for so long, can readily be explained: the courts had yet to work out the underlying principle explaining how the principles of procedural fairness were engaged. Once this was established, by the decision in *Kioa v West*, the next path in the evolution of procedural fairness was in the very area of statutory exclusion – or attempts at this – of the common law principles of procedural fairness.

2. *The period post Kioa v West: early indications of principle*

Following the High Court decision in *Kioa*, a number of cases came before the High Court that involved, in varying degrees, the principles of procedural fairness.²² In some cases, to the extent that the principles of procedural fairness were discussed, it was confined to their implication and their practical application: and, to the extent that dicta in some of the judgments

²⁰ See the above analysis concerning the decision in *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509; *Salemi v MacKellar [No.2]* (1977) 137 CLR 396; *The Queen v MacKellar; Ex parte Ratu* (1977) 137 CLR 460.

²¹ See, for example, Mason J in *The Queen v MacKellar; Ex parte Ratu* (1977) 137 CLR 460 where His Honour specifically endorsed the passage from the judgment of Dixon CJ and Webb J; Brennan J in *FAI Insurance Limited v Winneke* (1982) 151 CLR 342, 413: “...the text of a statute is not construed as intending to deny the protection of a hearing to a person who is liable to be prejudiced unless the intention clearly appears...”; and Mason J in *Kioa v West* (1985) 159 CLR 550, 584 where His Honour referred to the obligation to afford 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”.

²² It included the following cases: *The State of South Australia v O’Shea* (1987) 163 CLR 378; *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Attorney General for the State of NSW v Quin*; (1990) 170 CLR 1; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 – a bias case; *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

canvassed the exclusion of the principles, it also was confined and assumed no importance in the outcome.

Despite this, some of the judgments recognised the legislative clarity necessary for a court to conclude that the principles of procedural fairness were excluded. Thus in *South Australia v O'Shea*,²³ Mason CJ stated that the principles applied “*subject only to the clear manifestation of a contrary statutory intention*”;²⁴ and in *Haoucher v Minister of State for Immigration and Ethnic Affairs*,²⁵ McHugh J expressed the principle in terms specifically by reference to the decision in *Tanos*.²⁶ Although these judgments reflect current orthodoxy, there was still some way to go before the High Court was called upon to specifically address statutory attempts to exclude the common law principles of procedural fairness.

In *Annetts v McCann* the High Court determined how – and why – the principles applied in the context of coronial proceedings.²⁷ The case ultimately turned on the extent to which relatives of the deceased could be heard in opposition to any adverse finding made in relation to themselves or the deceased, but in doing so, the High Court gave some early indications about how the principles of procedural fairness might be excluded by “*plain words of necessary intendment*”. In this latter respect the decision in *Annetts* is an important – a landmark – decision in this area.

In *Annetts*, Mason CJ, Deane and McHugh JJ, after confirming that the presumptive application of the principles of procedural fairness where a “*statute confers power upon a public official to destroy defeat or prejudice a person’s rights, interests or legitimate expectations...unless they are excluded by plain words of necessary intendment*” discussed how that intent ought to manifest itself, by specific reference to the statement of the principle identified in *Tanos*:²⁸

In Tanos, Dixon CJ and Webb J said that an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from ‘indirect

²³ (1987) 163 CLR 378.

²⁴ *Ibid* at 386.

²⁵ (1990) 169 CLR 648.

²⁶ *Ibid* at 680.

²⁷ (1990) 170 CLR 596.

²⁸ (1990) 170 CLR 596, 598.

references, uncertain inferences or equivocal considerations'. Nor is such an intention to be inferred from the presence in the statute of rights which are commensurate with some of the rules of natural justice...

Two things should be said about the reasons of Mason CJ, Deane and McHugh JJ. First, although the judgment did not in terms make reference to the principle of legality, it is plain from the reference to *Tanos* and the language adopted that this is precisely the principle that was engaged to support the reasons for judgment. Further, notwithstanding that ultimately it was held that the principles of procedural fairness applied – hence the issue turned on what, relevantly, the content of the obligation was – the decision in *Annetts* is the contemporary authority that provides the dual justification for procedural fairness being a fundamental principle and the application, on questions of statutory curtailment, of the principle of legality.²⁹

In this period, in addition to the early statements of what is now described as the principle of legality, there was a body of case law that dealt with situations where the principles of procedural fairness were excluded: instances of staged decision-making leading to a final decision where, viewed in their entirety, the process was determined by the court to be fair.³⁰ Thus, in these situations, the principles of procedural fairness were excluded at particular stages of the decision-making process if the court concluded that the process, overall, was procedurally fair.

This was the dispositive conclusion of the High Court in *O'Shea*.³¹ That case involved a convicted sexual offender who had been declared by a judge to be incapable of exercising proper control over his sexual instincts and ordered that he be detained during Her Majesty's pleasure.³² He

²⁹ See generally Chapter III, Part B: The principle of legality relating to whether procedural fairness is a fundamental principle or a fundamental right.

³⁰ *South Australia v O'Shea* (1987) 163 CLR 378; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Johns v Australian Securities Commission* (1993) 178 CLR 408.

³¹ (1987) 163 CLR 378. The majority were Mason CJ, Wilson, Brennan and Toohey JJ; Deane J dissented. There were two appeals before the Court. The first was an appeal by the State that challenged the decision of the Full Court of the South Australian Supreme Court that declared the decision of the Governor to be void; the second was O'Shea's appeal in relation to procedures adopted by the Parole Board in returning him to custody. O'Shea's appeal was, unanimously, dismissed. Deane J dissented in the appeal by the State.

³² The order was made pursuant to the *Criminal Law Consolidation Act 1935 (SA)*. The order that the individual be held 'during Her Majesty's Pleasure' is a shorthand reference to the provisions in the *Criminal Law*

sought parole before a parole board – which recommended his conditional release. Notwithstanding this, the Governor,³³ who alone was empowered to permit the individual's release, declined to act upon the Parole Board's recommendation. The individual challenged the refusal of the Governor to act on the recommendation of the Parole Board, in part on the basis that he was denied procedural fairness at the stage of decision-making by the Governor: specifically it was argued that a further hearing was required before the Governor could exercise the power not to release him.³⁴

This argument was rejected, with the Court concluding (by majority) that overall the process was fair.³⁵ Mason CJ explained his conclusion on the basis that the "*hearing before the recommending body provides a sufficient opportunity for a party to present his case so that the decision-making process, viewed in its entirety, entails procedural fairness*".³⁶ The other members of the majority reached similar conclusions.³⁷

The question of exclusion of the principles of procedural fairness also arose in *Ainsworth v Criminal Justice Commission*.³⁸ The decision in *Ainsworth* is important in two respects. First, the Court affirmed the statement of principle made by Mason CJ, Deane and McHugh JJ in *Annetts v McCann* – namely, that the obligation to afford procedural fairness in the exercise of statutory power that could defeat, destroy or prejudice rights, interests and legitimate expectations was

Consolidation Act that provides that, upon the making of an order by the Court, the individual is to be detained until the Governor of the State directs (see section 77a(3)). Relevantly, the release by direction of the Governor was not to occur unless the Governor "*is satisfied, on the recommendation of the Parole Board, that he is fit to be at liberty and terminates his detention...*" (see section 77a(3)(b)(i)).

³³ The practice in the jurisdiction in question – South Australia – was for recommendations to be made to the Governor in Council based upon a Cabinet decision and that the Governor would act upon this advice: see *South Australia v O'Shea* (1987) 163 CLR 378, 410 (Brennan J).

³⁴ *Ibid* at 410 (Brennan J).

³⁵ Mason CJ, Wilson, Brennan and Toohey JJ were the majority; Deane J dissented.

³⁶ *O'Shea* (1987) 163 CLR 378, 389.

³⁷ Wilson and Toohey JJ, who delivered a joint judgment, concluded that procedural fairness was secured "*in the course of the Board's consideration of his case. But beyond that he is in the hands of the Government, which must accept political responsibility for his release*" and that in "*truth, Mr O'Shea will have had a full and final opportunity to adduce material and make submissions on the question of his release on licence in the course of the hearing before the Board*" (163 CLR 378, 402 and 403); and Brennan J who concluded that there was "*no lack of administrative fairness in a system in which a decision-maker reaches his decision on facts ascertained and evaluated by a board appointed by statute for that purpose provided the decision-maker does not take into account any other fact on which the affected person has had no opportunity to be heard*" (163 CLR 378, 410).

³⁸ (1992) 175 CLR 564.

implied and that this obligation could only be “*excluded by plain words of necessary intentment*”.

Further, the decision in *Ainsworth* affirmed a ‘principle’ from *O’Shea*. That principle was expressed to be that “*where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if ‘the decision-making process, viewed in its entirety, entails procedural fairness’*”.³⁹

The High Court in *Ainsworth* also emphasised a limit on the principle established by *O’Shea* – namely, that the entire process must be steps or stages in “*the one decision - making process*”.⁴⁰ Thus, two bodies will not be held to form part of that same decision-making process if they are “*not part of the same power structure*” but are separate and independent with different statutory functions.⁴¹ And the judgments in *O’Shea* suggested another – namely, that if the ultimate decision-maker “*intends to take account of some new matter, not appearing in the report of the recommending body, and the party has had no opportunity of dealing with it, the decision maker should give him that opportunity*”.⁴²

A further proposition has also been drawn from the decision in *O’Shea*, possibly in slightly wider terms than the ‘principle’ earlier referred to, from the reasons for judgment of Brennan J. Broadly expressed the proposition is that the right to be heard is negated at certain end levels of administrative decision-making, or when the specific matter for ultimate consideration are matters of general or public policy.

³⁹ Ibid at 578 (Mason CJ, Dawson, Toohey and Gaudron JJ).

⁴⁰ (1992) 175 CLR 564. See also *Johns v Australian Securities Commission* (1993) 178 CLR 408, 473 (McHugh J); *Hill v Green* (1999) 48 NSWLR 161, 193 (Fitzgerald JA, Beazley JA agreeing).

⁴¹ *Johns v Australian Securities Commission* (1993) 178 CLR 408, 474 (McHugh J). In that case, the High Court held that a decision by the ASC, to release transcripts of private examinations conducted by it to a Royal Commission and permit those transcripts to be used at any public hearing conducted by that Royal Commission, was a separate and independent statutory process to the functions conferred on the Royal Commission. Thus, any denial of procedural fairness by the ASC could not be ‘cured’ by procedural fairness afforded by the Royal Commission. Further, in *Ainsworth*, the principle established in *O’Shea* could not operate because the body that denied procedural fairness, the Criminal Justice Commission (‘the CJC’), was not engaged in the first stage of a two stage decision-making process that included the Parliamentary Committee that oversaw it. Rather, the CJC had separate and distinct statutory functions reposed in it: (1992) 175 CLR 564, 579.

In *O’Shea*, Brennan J held that in relation to “*general policy or the manner in which he should exercise his discretion on the ascertained facts are not matters on which an opportunity for a further hearing must be given. The pyramidal structure of administration by which the powers of discretionary decision-making are reposed in a...senior official standing at the peak of a bureaucracy could not operate efficiently if the decision maker were required to give an opportunity for a hearing in every case affecting an individual after that individual had had an opportunity, in the course of the administrative process, of dealing with every fact which is to be taken into account in reaching the decision*”.⁴³

The reasons for judgment of Brennan J have been applied by the High Court to support the proposition that a decision-maker, at the peak of the administration of a statute, is “*not required to give an opportunity for a hearing in every case affecting an individual who has had an opportunity of a merits review in the course of the administrative process*”.⁴⁴

3. *Conflicting principles: the High Court decision in Miah*

Unlike the earlier cases where excluding the principles of procedural fairness assumed no particular importance in the outcome,⁴⁵ the point (attempted exclusion of the principles of procedural fairness) squarely arose for determination in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*.⁴⁶ Notwithstanding the centrality of the issue in that case, the reasons for judgment by the members of the Court reflect not only differing views about the presumptive application of the principles of procedural fairness, but also about when they could be excluded.

⁴² (1987) 163 CLR 378, 389 (Mason CJ). See also the judgment of Brennan J – which was to the same effect ((1987) 163 CLR 378, 410).

⁴³ (1987) 163 CLR 378, 410. The first part of the reasons of Brennan J are consistent with earlier statements to the effect that decisions that affect persons “*as a member of the public or a class of the public*” are not conditioned on the observance of the principles of natural justice, at least in relation to ‘policy’ or ‘political’ decisions: *Salemi v Mackellar [No. 2]* (1977) 137 CLR 396, 452 (Jacobs J); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J); see also *Vanmeld Pty Limited v Fairfield City Council* (1989) 46 NSWLR 78, 96 (Spigelman CJ).

⁴⁴ *Plaintiff S10/2011 v Minister for Immigration* (2012) 246 CLR 636, 668 (Gummow, Hayne, Crennan and Bell JJ).

⁴⁵ Putting the decision in *South Australia v O’Shea* (1987) 163 CLR 378 to one side.

In *Miah*, the applicant sought, but was refused by a delegate of the Minister, a protection visa under the *Migration Act 1958 (Cth)*.⁴⁷ The Act provided that the applicant had a right, upon the lodgement of an application within the prescribed time,⁴⁸ to apply to the Refugee Review Tribunal ('the Tribunal') for a full merits review of the delegate's decision.⁴⁹ By an oversight the applicant's legal representatives failed to exercise this right within the prescribed time. This avenue of review being no longer available,⁵⁰ the applicant commenced proceedings in the High Court, for relief under section 75(v) of the *Constitution*,⁵¹ contending that he was denied procedural fairness by the delegate in the making of the initial determination. The delegate sought,⁵² and relied upon, information without informing the applicant of his intention to do so and without providing the applicant an opportunity to respond to the information.

The issues concerning the exclusion of the principles of procedural fairness were two, but they are interrelated. The first issue related to the significance – legal or otherwise – of the applicant's statutory right to have the delegate's determination subjected to a full merits review by the Tribunal. On this issue, the case mirrored the facts in *Twist v Randwick Municipal Council*.⁵³ The second issue arose in connection with an argument advanced by the Minister

⁴⁶ (2001) 206 CLR 57. See also Chapter VII: Procedural Fairness as a Normative Element in Construction: 1998 – 2001.

⁴⁷ 'The Act'.

⁴⁸ The application was required to be made "not later than 28 days after the notification of the decision": see section 412(1) of the Act.

⁴⁹ 'the Tribunal'.

⁵⁰ The time limit was held to be mandatory: see *Fernando v Minister for Immigration and Multicultural Affairs* (2000) 97 FCR 407.

⁵¹ That section confers original jurisdiction upon the High Court in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". The section provides "an entrenched minimum provision of judicial review" and provides a means of "assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them": *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). A denial of procedural fairness would mean that the delegate acted in excess of jurisdiction, and Constitutional writs would issue to compel the delegate to determine the application in accordance with law: *Plaintiff S157/2002; Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

⁵² Section 56(1) of the Act provided that in considering an application for a visa "the Minister may...get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa".

⁵³ (1976) 136 CLR 106. In that case, the local Council issued a demolition order in relation to a dilapidated dwelling. Upon the making of this order the landowner was entitled to appeal to the District Court with the right of appeal on questions of fact and law, and with the right to call evidence. Like in *Miah*, the landowner in

about the statutory scheme for the administrative review, by the Tribunal, of Ministerial determinations in connection with ‘refugee protection visa claims’. The argument that was advanced by the Minister was that the procedural provisions contained in Part 2, Division 3, Subdivision AB of the Act were a ‘code of procedure’, the consequence being that the common law principles were excluded altogether.

It is convenient to deal first with the code of procedure argument. In relation to this issue, the Court unanimously held that Subdivision AB did not – of itself – constitute a ‘code of procedure’ thereby excluding the operation of common law principles of procedural fairness. Gleeson CJ and Hayne J, who dissented in the overall result, considered the presence of detailed procedures for dealing with visa applications that were described in the Act as a “*code of procedure for dealing fairly, efficiently and quickly with visa applications*”,⁵⁴ as being “*significant, but its significance should not be overstated*”.⁵⁵ Ultimately, Gleeson CJ and Hayne J concluded that the resolution of this issue turned upon whether, as a matter of statutory construction, the procedures could be construed – which they were not – as providing a “*comprehensive statement of the requirements of natural justice*”.⁵⁶ The other members of the Court reached similar conclusions.⁵⁷

Notwithstanding unanimity in relation to the code of procedure issue, the Court divided over whether the principles of procedural fairness applied at the first tier of decision-making: expressed generally, the division turned on whether the provisions in Part 2, Division 3, subdivision AB of the Act evidenced the necessary intent to exclude procedural fairness at this level of decision-making. In a sense, the decision of the High Court in *Twist v Randwick Municipal Council*,⁵⁸ notwithstanding the differing approaches taken by members of the Court

Twist did not lodge an appeal within the time prescribed, and so sought to contend that Council, in making the demolition order, was required to observe the principles of natural justice but failed to do so.

⁵⁴ Part 2, Division 3, Subdivision AB of the Act dealt with the procedure for dealing with visa applications, and the extracted language appeared in the heading to the Subdivision. Section 13(1) of the *Acts Interpretation Act 1901* then provided that “*the headings of the Parts Divisions and Subdivisions into which any Act is divided shall be deemed to be part of the Act*”.

⁵⁵ (2001) 206 CLR 57, 70 and 73.

⁵⁶ *Ibid* at 73.

⁵⁷ (2001) 206 CLR 57, 85 (Gaudron J); 95-98 (McHugh J); and 113 (Kirby J).

⁵⁸ (1976) 136 CLR 106.

in that case, was a strong pointer to a likely outcome. In that case the presence of a full right of appeal – on fact and law from the initial decision made by the Council to a Court – was determinative in the Court concluding that failure to give the landowner notice before the making of the order did not invalidate it on denial of procedural fairness grounds.⁵⁹

A majority of the Court concluded, albeit by different means, that the principles of procedural fairness were required to be observed and that there had been a failure to observe these principles in connection with the delegate’s determination. The focus was upon this determination because an application for review by the Tribunal was not, owing to error, lodged in time. Thus, judicial review was sought of the delegate’s decision.

Justice Gaudron reviewed the provisions in Subdivision AB, concluding that the provisions were of two kinds: mandatory and permissive. Those sections that were permissive included two – one that entitled the Minister to seek further information (the one used by the Minister in the present case to secure the additional information), and the other entitled the Minister invite the applicant to provide additional information in a specified way.⁶⁰ In relation to these provisions, Gaudron J held that, there being no contrary indication in Subdivision AB, *“those powers are to be exercised to ensure procedural fairness, albeit in a manner that is quick and efficient. Accordingly, the obligation to accord procedural fairness is not excluded by subdiv AB”*.⁶¹

Justice Gaudron went further, concluding that the right to a review by the Refugee Review Tribunal was *“irrelevant”* because the *“existence of a right of review cannot deprive the provisions of subdiv AB of the meaning and effect which the heading to that subdivision directs”*.⁶²

⁵⁹ The reasons for judgment by the members of the Court in *Twist* differ in approach – hence the statement about the outcome of the decision being a pointer to the outcome, rather than the ratio decidendi (if there be one in connection with the natural justice issues) being determinative.

⁶⁰ See sections 56(1) and 56(2) of the Act.

⁶¹ (2001) 206 CLR 57, 85.

⁶² (2001) 206 CLR 57, 85. Her Honour justified this statement by citing *Twist v Randwick Municipal Council*, perhaps surprisingly bearing in mind that the outcome in that case suggested an opposite conclusion to the one Gaudron J reached.

Justice McHugh approached the matter by the presumptive application of the principles of procedural fairness – in this respect applying the decision in *Annetts v McCann*⁶³ – and focussed upon whether the provisions of Subdivision AB “display a legislative intention to exclude the common law rules of natural justice”.⁶⁴ Justice McHugh concluded that section 56(1) of the Act was permissive and that there was nothing in the Act or in section 56 in particular, that “indicates a clear intention to exclude this principle of natural justice”.⁶⁵

Further, His Honour then separately considered whether the availability of a right to merits review posited a different outcome – concluding that it did not. There were, principally two reasons why His Honour so held. First, McHugh J considered that there was “no general rule that a right of appeal or review necessarily denies or limits the application of the rules of natural justice”:⁶⁶ indeed, McHugh J considered the principle that there be ‘plain words of necessary intendment’ to exclude the obligation to provide procedural fairness had “led courts to reject the view that a right of appeal might provide an answer to a complaint that procedural fairness was denied in relation to an initial determination”.⁶⁷ So understood, the issue for McHugh J was whether the right to review the delegate’s decision provided the necessary legislative intent to exclude the principles of procedural fairness.

Secondly, although acknowledging the importance of a right of review, McHugh J concluded that the “consequences for the individual” did not outweigh the “inference to be drawn from the fact that the refusal of the application may put an applicant’s life or liberty at risk and, as a practical matter, will often – perhaps usually – mean that an applicant will be detained in custody pending the review of the delegate’s decision. That being so, it is proper to infer that the Parliament, by giving a right of review, did not intend to exclude the common law rules of natural justice where they were applicable”.⁶⁸

⁶³ (1990) 170 CLR 596.

⁶⁴ (2001) 206 CLR 57, 93.

⁶⁵ *Ibid* at 97.

⁶⁶ *Ibid* at 98.

⁶⁷ *Ibid* at 99, citing *Hill v Green* (1998) 48 NSWLR 161, 195.

⁶⁸ *Ibid* at 102.

The reasons for judgment of McHugh J, in this respect, drawing heavily upon the consequences to the individual from an adverse determination of a protection visa, has strong rule of law values impressed within it. It is a clear example of the principle of legality in action.

In fact, McHugh J's judgment, as a whole, was a prescient one. His Honour's reasons, as we later see,⁶⁹ reflect contemporary jurisprudence that emphasise (as McHugh J did) not only the presumption in favour of the implication of the principles of procedural fairness in the exercise of statutory power but the presumption against their exclusion by the engagement of the principle of legality.

Justice Kirby's reasons were to the same effect as McHugh J, albeit expressed somewhat differently.

His Honour's reasons, like McHugh J's reasons, relied in part upon the principle of legality. Relying upon the remarks of Lord Steyn in *Ex parte Pierson*, Kirby J held that once the Subdivision is construed as falling short of providing an exhaustive statement of the principles of procedural fairness, then *"ordinary presumptions which run so deep in the common law may be given effect. In the absence of the clearest possible indication to the contrary, courts will normally assume that an Australian parliament does not intend to work serious procedural injustice upon persons whose interests are adversely affected by legislation. This is not a presumption that challenges the authority of such parliaments. It is one respectful of the assumption that, in Australia, parliaments ordinarily act justly and expect the repositories of power under legislation to do likewise"*.⁷⁰

Consistently with this approach, Kirby J, in concluding that the principles of procedural fairness had not been excluded, stated that it *"would require much clearer words than exist in the Subdiv AB to convince me that the provisions of the Code exhaust the applicable rules of natural justice"* and that in *"the absence of the clearest possible indication to the contrary, courts will*

⁶⁹ See later in this Chapter: 'Part C3. The principle of legality re-emerges: the High Court decision in *Saeed*'.

⁷⁰ (2001) 206 CLR 57, 113.

*normally assume that an Australian parliament does not intend to work serious procedural injustice upon persons whose interests are adversely affected by legislation”.*⁷¹

It is necessary to refer to the dissenting judgment of Gleeson CJ and Hayne J to emphasise the uncertainty that remained, at this time, about basic principle, the fundamental nature of the principles of procedural fairness and the principle of legality.

Gleeson CJ and Hayne J, in dissent, held that the requirements of procedural fairness did not apply at this point of decision-making, concluding that the *“true construction of the statute will determine not only whether the rules of natural justice apply but also what those rules require”* and that where *“as in the present case, the statute addresses the subject of procedure with particularity, manifesting an intention to address in detail the presently relevant requirements of procedural fairness, then the intention of Parliament as to the issue that has arisen will be decisive”*.⁷²

In practical terms, their Honours held that what the applicant was entitled to, by way of ‘hearing’, was a consideration of the written information contained in the protection visa application. The reasons for the conclusion so reached was that the provisions in Subdivision AB *“read in the context of legislation which requires the decision-maker to give reasons, and entitles an unsuccessful applicant to a full review of the decision on the merits, evince an intention on the part of the legislature to prescribe comprehensively the extent to which, and the circumstances in which, the Minister or delegate is to give an applicant an opportunity to make comments or submissions, or provide information, in addition to the information in the original application or any supplementary information furnished by the applicant before a decision is made. That the provisions do not deal with other aspects of procedural fairness, such as rules about bias, does not suggest a contrary conclusion”*.

The reasoning of Gleeson CJ and Hayne J resembles the reasoning of Mason J in *Twist*: namely, the presence of a right to a full re-hearing does not of itself deny the primary decision-maker’s

⁷¹ *Ibid.*

⁷² (2001) 206 CLR 57, 75. This result was reached by Gleeson CJ and Hayne J without reference to the principle of legality or, for that matter, any authority such as *Commissioner of Police v Tanos*.

obligation to afford procedural fairness to an individual, but the existence of that right was one matter – a significant one – in the overall evaluation of whether the exercise of the right to appeal provides the “*exclusive remedy*” where there has been a denial of procedural fairness.⁷³

It is suggested that on this precise application of principle, the reasons for judgment of Gleeson CJ and Hayne J sit uneasily with the decision in *Annetts v McCann* and the stringency that is mandated before the court will determine that the exercise of statutory power was not conditioned on the observance of the principles of procedural fairness. The question is not limited simply to whether the legislation addresses the subject of procedure with particularity; rather the question is whether there are constructional choices open that would not render the legislation “*wholly frustrated*” in which case the principle of legality should operate to dictate a construction that preserves the exercise of power being conditioned on the observance of procedural fairness.⁷⁴

The various judgments in *Miah* highlighted differences at root level: Gleeson CJ and Hayne J readily reached the view that the principles of procedural fairness were excluded;⁷⁵ Gaudron J concluded that there was no intent for the principles of procedural fairness to be displaced and that accordingly the default position applied *viz.*, the principles of procedural fairness were required to be observed; whereas McHugh J and Kirby J drew, in part, upon the principle of legality to conclude that the legislative scheme did not evince a clear intent to curtail the operation of the principles of procedural fairness.

The differences reflect uncertainty about the fundamental nature of the principles of procedural fairness, and the significance that that characterisation had in the context of the kind of statutory language – that is, legislative intent – that would displace their operation. Thus, although the High Court declared, in *Daniels Corporation International Pty Limited v*

⁷³ (1976) 136 CLR 106, 117. As earlier outlined, the reasons of Gleeson CJ and Hayne J can be reconciled with the ‘principle’ drawn from the High Court decision in *South Australia v O’Shea* – that is, the requirements of procedural fairness will be satisfied if, viewed in their entirety, the procedures are fair.

⁷⁴ *Bropho v Western Australia* (1990) 171 CLR 1, 21.

⁷⁵ The reasons were, it is suggested, very much a practical application of the implied statutory intent theory, as explained by Brennan J in *Kioa v West*.

Australian Competition and Consumer Commission,⁷⁶ that the principle stated in *Potter v Minahan viz.*, the principle of legality had “been strictly applied by this Court since the decision in *Re Bolton; Ex parte Beane*”,⁷⁷ the decision in *Miah* can only be seen to be an exception to this strict application.

Two further points should be made about the decision in *Miah*. The first is that coherence undeniably points to the correctness of the outcome in that case. As the High Court explained in cases such as *O’Shea* and *Ainsworth*, the principle to be drawn from *O’Shea* was that the principles of procedural fairness may not be required at the end stage of decision-making if the procedures overall were fair and where, in substance, there is only one decision. In the situation that presented in *Miah*, this was not so. The initial delegate was empowered to determine, finally, the entitlement of the applicant to a protection visa subject to a right of review if the applicant was dissatisfied with the determination. In point of principle, procedural fairness should not be denied in such process nor, logically, should it be incumbent upon an applicant to pursue merits review in order to secure procedural fairness, as the minority judgment assumes. This does not, however, detract from the principle that if an aggrieved party does pursue merits review, this may ‘cure’ any denial of procedural fairness in the original decision.⁷⁸ The second point derived from *Miah* is that the outcome is consistent with a recognition that the principles of procedural fairness were fundamental, and consistent with the application of the principle of legality perhaps, the reasons of McHugh J aside, without the employment of the label – the principle of legality – in the reasoning process.

The decision resulted in amendments to the Act – the subject of the next part of this Chapter – specifically, provisions that sought to enact an ‘exhaustive statement’ of the principles of procedural fairness and, thus, a legislative attempt to reverse the effect of this decision.

⁷⁶ (2002) 213 CLR 543.

⁷⁷ *Ibid* at 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). The decision in *Re Bolton; Ex parte Beane* was decided in 1987: (1987) 162 CLR 514.

⁷⁸ *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 116 (Mason J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 111 (Kirby J). See also *Zubair v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 139 FCR 344, 354 (Finn, Mansfield and Gyles JJ); *Wende v Horwath* (2014) 86 NSWLR 674, 688 (Basten JA).

C. *Legislative intervention: attempts to exclude the common law*

1. *Amendments to the Migration Act 1958: reversing Miah?*

The Federal Government reacted to the High Court decision in *Miah* decision directly, and with some immediacy, by the introduction of the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (the ‘2002 Act’).⁷⁹ The 2002 Act, introduced specifically to overcome the decision in *Miah*,⁸⁰ contained provisions expressed to be “an exhaustive statement of the...natural justice hearing rule in relation to the matters it deals with”.⁸¹ The amendments introduced were said to be necessary to make clear the intent of the legislation – that is, “to make it expressly clear that particular codes in the Migration Act do exhaustively state the requirements of the natural justice hearing rule”.⁸²

This was, as pointed out in Chapter VII, a period of great uncertainty for procedural fairness in this area. In addition to the 2002 Act, which commenced on 4 July 2002, another significant development had occurred shortly before this: the privative clause, in section 474 of the Act, had been introduced – a provision that commenced on 2 October 2001. As explained in Chapter VII, the privative clause had been construed by the preponderance of Federal Court authority as precluding, in effect, judicial review of Tribunal decisions on the ground of denial of procedural fairness. Further, this construction of the privative clause was upheld, by a five member Full Federal Court in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*,⁸³ in a judgment delivered on 15 August 2002.

⁷⁹ These amendments commenced on 4 July 2002.

⁸⁰ *Saeed v Minister for Immigration* (2010) 241 CLR 252, 263; *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214, 225.

⁸¹ The amendments introduced provisions in relevantly identical terms covering the procedures in connection with visa applications – sections 51A, 87A, 118A, 127A, 357A and 422B of the Act. The authorities discussed in this section of the Chapter have dealt with three of them: section 51A(1) of the Act – this section applying where there had been an application by a non-citizen for a visa; section 357A(1) of the Act – this section applying where there had been an application by a non-citizen for a bridging visa; and section 422B(1) of the Act – this section applying where there had been an application by a non-citizen for a protection visa.

⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1106 (Mr Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs).

⁸³ These amendments commenced on 4 July 2002.

In view of the issues of construction that arose, in connection with these amendments, it is necessary to set out the provisions. Of central importance was section 422B of the Act, introduced in the following terms:⁸⁴

- (1) *This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*
- (2) *Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with. This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*

Part 7 of the Act dealt with the review, by the Tribunal, of protection visa decisions. Part 7, Division 4 dealt with the conduct of review by the Tribunal, and section 422B was contained within it. Other provisions, not within Division 4, are referred to in section 422B(2) – namely, section 416 (Division 2 – relating to the consideration of new information in later applications for review); section 437 (Division 7 – relating to restrictions on disclosure of certain information); section 438 (Division 7 – relating to the Tribunal’s discretion to disclosure of certain information); and Division 7A – relating to the giving and receiving of review documents).

2. *Early constructions: the Federal Court*

The provisions, that sought to ‘exhaustively’ state the natural justice hearing rule,⁸⁵ presented difficult constructional choices by the inclusion of the phrase *“in relation to the matters it deals*

⁸⁴ By schedule 3, section 17 of the *Migration Amendment (Review Provisions) Act 2007*, subsection (3) was added to section 422B and also to section 357A of the Act. That amendment provided: *“(3) In applying this Division, the Tribunal must act in a way that is fair and just”*. The section was to ensure that, notwithstanding section 422B(1) and section 357A(1), the procedures in the relevant Division of the Act were used in ways that were fair – thus putting to rest the fear that powers could be used in a way that were unfair, yet not result in any breach of the procedural requirements in relevant Division: see *Minister for Immigration and Multicultural and Indigenous Affairs v NAMW* (2004) 140 FCR 572, 600 (Merkel and Hely JJ); *SZLLY v Minister for Immigration and Citizenship* (2009) 107 ALD 352, 358 (Perram J); *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427.

⁸⁵ Sections 51A, 87A, 118A, 127A, 357A and 422B of the Act.

with”.⁸⁶ Specifically, the possible different constructions depended upon whether the “matters” that Division 4 “deals with” were to be determined by reference to the general subject matter of the Division or determined by reference to the particular provisions contained within it.

As Lindgren J pointed out, in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs*,⁸⁷ the difference depended very much upon the generality of the enquiry into the subject matter of the ‘Division’. Expressed generally, the enquiry would be directed to determining the subject matter of the Division and suggest a “single subject matter” – namely, the “conduct of review by the [Tribunal]”.⁸⁸ However, if the plural form was used, and the enquiry was directed to determining the ‘matters’ in the Division, it would be to the particular provisions in the Division dealing with aspects of the natural justice hearing rule.

Thus, on the general subject matter construction, the statutory forms of procedural fairness as expressed in the Act – to the exclusion of the application of any common law form of procedural fairness – applied to the conduct of the review by the Tribunal.⁸⁹ On the specific subject matters construction, the statutory forms of procedural fairness as expressed in the Act applied in respect of those particular matters set out in the Division, but otherwise the common law was left to determine the content of procedural fairness in connection with matters not so dealt with in or by the Division.⁹⁰

⁸⁶ They were described by French J in *WAID v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 220 at [57] as “not entirely without difficulty in its application”, and by Gray J in *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 170, 178 as “a difficult provision to construe”.

⁸⁷ (2003) 130 FCR 456 – a decision concerning the construction of section 357A of the Act.

⁸⁸ *Ibid* at 468.

⁸⁹ A construction favoured by decisions including *Wu v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 221 (Hely J); *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 562 (Heerey J); and *SZBDF v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 148 FCR 302 (Branson J).

⁹⁰ A construction favoured by decisions including *WAID v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 220 (French J); *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624 (French J); and *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 170 (Gray J).

Ultimately the Full Federal Court, in *Minister for Immigration and Multicultural and Indigenous Affairs v Lat*, was required to resolve the correctness of the competing constructions that had arisen.

In *Lat*, the applicant sought, but was refused by a delegate of the Minister, a business skills migrant visa. The applicant successfully challenged this decision, in proceedings for judicial review in the Federal Magistrates Court, on the ground that he was denied common law procedural fairness by the delegate's failure to put to the applicant "*that the visa might be refused on the ground that he may have a history of involvement in unacceptable business activities*".⁹¹ The Minister appealed the decision to the Full Federal Court arguing that, by operation of section 51A of the Act,⁹² no common law obligations to observe procedural fairness applied.

The Court allowed the appeal holding that section 51A of the Act precluded common law principles of procedural fairness applying to the delegate's consideration of the applicant's visa application – thereby confirming the general subject matter construction.⁹³ That is, the Court confirmed that the "*matters*" which the Division "*deals with*" was the assessment of visa applications by the delegate (rather than specific matters dealt with in the Division such as the provision of information to the applicant, the hearing that was required to be held and like matters) and common law principles of procedural fairness had been excluded entirely from such assessment.⁹⁴

The reasoning of the Court in *Lat* is, it is respectfully suggested, unsatisfactory on a number of levels. In the first place, the approach that commended itself to the Court was not to state, in

⁹¹ (2006) 1515 FCR 214, 223.

⁹² Section 51A(1) of the Act provided: "*This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with*".

⁹³ (2006) 151 FCR 214 (Heerey, Conti and Jacobson JJ – who delivered a joint judgment). On the same day the Full Federal Court, constituted by the same judges, delivered a further judgment applying *Lat*: *SZCIJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 62.

terms, the competing constructions adopted by judges at first instance, but rather to simply refer to the cases and state that the *“differing views are fully set forth in the passages from the judgments that we have referred to”*.⁹⁵ Although one could readily understand ‘short form’ reasons in disposing of an appeal where, say, an appeal was confined to challenges to facts or, as another example, an appeal confined to the application of facts to law, the present case – involving fundamental principle (the exclusion of what the Court acknowledged was a *“fundamental principle of public law”*) and conflicting decisions of single judges – warranted more.⁹⁶

Further, the reasons themselves, compressed into four paragraphs,⁹⁷ are less than clear and arguably contradictory.⁹⁸ For example, after stating that the amendments *“could hardly have made the intention of the 2002 amendments any clearer”* concluded that what *“was intended was that [the Division] provide comprehensive procedural codes which contain detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule”*, yet then proceeded to state that other *“aspects of the common law of natural justice, such as the bias rule are not excluded”*.⁹⁹ Perhaps all that was intended by this was a statement that the other aspect of natural justice, the bias rule was not excluded. Read literally, however, the judgment was suggesting that other aspects of the common law hearing rule operated notwithstanding section 422B(1) of the Act.

Moreover, the rejection of what has earlier been described as the specific subject matters construction appears in the context of the Court rejecting a submission put on behalf of the applicant: namely, that the provision (*viz.*, the words *“in relation to the matters it deals with”*) should be construed to *“mean that the decision-maker must, in each case, consider whether*

⁹⁴ Thus, applying this reasoning to section 422B(1) of the Act, the decision confirmed that the *“matters”* with which Division 4 *“deals with”* was the conduct of the review generally by the Tribunal – the consequence being that common law principles had been excluded from reviews conducted by it.

⁹⁵ *Ibid* at 225.

⁹⁶ (2006) 151 FCR 214, 223.

⁹⁷ *Ibid* at 225, [65] – [68].

⁹⁸ See further, below, where a later Full Federal Court in *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427, misunderstood the decision in *Lat* and in fact adopted the ‘specific subject matter’ construction that the Court in *Lat* rejected.

⁹⁹ *Ibid* at 225.

there is an applicable common law rule of natural justice and then examine the provisions ... to see whether it is expressly dealt with. We reject this submission".¹⁰⁰

Further, the manner in which the Court concluded that the intent of the provisions was "*especially plain*" and could hardly have been made "*any clearer*" not only denied the existence of the competing views expressed by judges at first instance (that the Court drew attention to), but overlooked the role – or possible role – that the principle of legality might play in resolution of this issue of construction. In this respect, notwithstanding that the Court acknowledged that the provision could reasonably be thought to be "*ambiguous...or obscure*", the Court simply moved to resolve this by reference to the Explanatory Memorandum and the Second Reading Speech. Neither the principle of legality nor any decision of the High Court that supported this principle – such as *Annetts v McCann* – was referred to. And this was despite the Court, earlier in the reasons for judgment, acknowledging that 'procedural fairness' was a "*fundamental principle of public law*".¹⁰¹

It is suggested that the manner in which the issue was dealt with by the Court, including the way the issue was picked up by a decision the same Full Federal Court delivered immediately following *Lat*,¹⁰² really was a reflection of the lack of understanding of the significance that attached to the conclusion, amply established by earlier High Court authority, that the principles of procedural fairness were fundamental principles of the common law and presumed, by the principle of legality, not to be curtailed unless excluded in the requisite way.

On this issue, the reasons of the Court could be contrasted to the reasoning of Gray J in *Moradian*.¹⁰³ There Gray J concluded that the intent manifested by the provision was more confined – "*to displace the principles of procedural fairness in some respects*".¹⁰⁴ Gray J concluded that, in such circumstances, there being some ambiguity in the language used, the issue then fell to be resolved by "*the fundamental principle, articulated in Annetts v McCann,*

¹⁰⁰ *Ibid* at 226.

¹⁰¹ (2006) 151 FCR 214, 223.

¹⁰² *SZCIJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 62.

¹⁰³ (2004) 142 FCR 170.

¹⁰⁴ *Ibid* at 178.

*that the principles of procedural fairness can only be excluded by 'plain words of necessary intendment'. In this respect ... [the provision]... may be viewed as containing 'indirect references, uncertain inferences or equivocal considerations', which do not disclose an intention on the part of the legislature to exclude the principles of procedural fairness with sufficient certainty".*¹⁰⁵

The decision in *Lat*, it is suggested, was shown by subsequent authority to be somewhat unsatisfactory. In one case the decision in *Lat* was 'distinguished'. Thus, in *Antipova v Minister for Immigration and Multicultural and Indigenous Affairs*,¹⁰⁶ Gray J side-stepped the principle so established by the decision in *Lat* considering the Full Court's reasons were "*observations, which are clearly obiter*".¹⁰⁷ Further, although giving these 'observations' "*great respect*" Gray J declined to follow them,¹⁰⁸ restating the conclusion he made in *Moradian*.¹⁰⁹

In another case, *Minister for Immigration and Citizenship v SZMOK*,¹¹⁰ a Full Federal Court, although purporting to apply *Lat*, did the opposite. Despite the decision in *Lat*, the Full Court in *SZMOK* proceeded upon the basis the provision in question (section 422B(1) of the Act) only excluded "*the common law natural justice hearing rule in relation to the matters dealt with in Div 4*".¹¹¹ The Court in *SZMOK*, consistent with the approach it took, considered that it was necessary to "*identify the matters with which Div 4 deals*" because "*the effect of s 422B is that, in relation to the matters thus summarised, Div 4 is an exhaustive statement of the requirements of procedural fairness*".¹¹² This decision was, contrary to *Lat*, supportive of a specific subject matters construction of the section.

¹⁰⁵ *Ibid* at 181.

¹⁰⁶ (2006) 151 FCR 480.

¹⁰⁷ *Ibid* at 507.

¹⁰⁸ Gray J stated: "*I cannot bring myself to accept that they are correct*".

¹⁰⁹ (2006) 151 FCR 480, 507-508. In *Saeed v Minister for Immigration and Citizenship* (2009) 176 FCR 53, 64 (Spender, Buchanan and Logan JJ) the Full Federal Court stated that the decision in *Lat* was not obiter, but was "*binding upon the judge of this Court who decided Antipova and should have been followed*".

¹¹⁰ (2009) 257 ALR 427.

¹¹¹ (2009) 257 ALR 427, 430 (Emmett, Kenny and Jacobson JJ).

¹¹² *Ibid* at 430-431.

Notwithstanding these contrary decisions, *Lat* was followed by successive Full Federal Courts.¹¹³ The construction (that found favour in *Lat* and was followed by successive Full Federal Courts) was however rejected by the High Court in *Saeed v Minister for Immigration and Citizenship*:¹¹⁴ the High Court restated the fundamental nature of the principles of procedural fairness, and affirmed the role that the principle of legality would play in statutory attempts to curtail their operation.

3. *The principle of legality re-emerges: the High Court decision in Saeed*

The High Court, in *Saeed v Minister for Immigration and Citizenship*,¹¹⁵ dealt with the operation of the provisions that sought to ‘exhaustively state’ the natural justice hearing rule – in that case, section 51A(1) of the Act.¹¹⁶ Specifically, the decision dealt with whether the provisions had the effect of excluding common law principles of procedural fairness such that the disclosure of information was not supplemented by common principles of procedural fairness, but only required to be provided in the manner and extent provided by the terms of Division 3 of Part 2 of the Act.¹¹⁷

In *Saeed* the applicant complained that she had been denied procedural fairness in that the delegate, who determined her application, concluded that she had provided material that was “*false and misleading*” in connection with her application for a visa.¹¹⁸ The delegate reached

¹¹³ *SZCIJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 62; *Saeed v Minister for Immigration and Citizenship* (2009) 176 FCR 53; *SZMKG v Minister for Immigration and Citizenship* (2009) 177 FCR 555.

¹¹⁴ (2010) 241 CLR 252. Two judgments were delivered: French CJ, Gummow, Hayne, Crennan and Kiefel JJ; Heydon J delivered separate reasons for judgment.

¹¹⁵ (2010) 241 CLR 252.

¹¹⁶ Section 51A(1) of the Act, which was in identical terms to section 422B(1) of the Act, provided that the subdivision “*is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with*”. Section 51A was contained in Part 2, Division 3, Subdivision AB of the Act. That subdivision dealt with the granting or refusal of certain classes of visas for non-citizens by the Minister or a delegate of the Minister.

¹¹⁷ Section 51A was contained in Part 2, Division 3, Subdivision AB of the Act. The disclosure provision was section 57 which provided that certain ‘relevant information’ was required to be disclosed to an applicant.

¹¹⁸ The applicant applied for a ‘Skilled – Independent Visa (Subclass 175)’. Such a visa can be granted if the applicant is living outside of Australia when the visa is granted. A criterion for the granting of the visa was a requirement

this conclusion based on the fact that, contrary to the documents that had been submitted in support of the applicant's employment in 'skilled occupation', the investigations that had been undertaken established that she had not been so employed. This adverse material was not provided to the applicant with an opportunity for comment. Her application for the visa was rejected. Being outside Australia, the applicant was not entitled to have the delegate's refusal reviewed by the Migration Review Tribunal.

The applicant, not having a right of review, sought a declaration and mandamus against the Minister contending that she had been denied procedural fairness.

In a sense the actual holding of the High Court was narrow: applying ordinary rules of statutory construction, it was held that Division 3 of Part 2 of the Act only applied to onshore visa applicants, not to offshore ones.¹¹⁹ Properly construed, therefore, the limitation in section 51A of the Act *viz.*, that Division 3 of Part 2 was "*an exhaustive statement of the... natural justice hearing rule in relation to the matters it deals with*", was not engaged because the provision of important information to offshore visa applicants was not a "*matter*" covered by the Division of the Act in question.¹²⁰ The corollary to such conclusion was that the common law principles of procedural fairness applied to the determination of the applicant's claim for a visa.

Nevertheless, the plurality went on to resolve the construction issue *viz.*, the qualification, to the declaration that section 51A(1) of the Act was an exhaustive statement of the requirements of the natural justice hearing rule, provided by the words "*in relation to the matters it deals with*". The plurality considered that "*a consideration of all the words 'the matters it deals with' directs attention to provisions within the subdivision or the group of sections which are operative*".¹²¹ The consequence of this construction was that provisions that 'deal with' 'matters', "*for the purposes of s 51A, will contain some procedural requirements which go some*

that the applicant for the visa had engaged in a skilled occupation for a prescribed time: see (2010) 241 CLR 252, 256-7.

¹¹⁹ French CJ, Gummow, Hayne, Crennan and Kiefel JJ. Heydon J delivered a separate judgment that agreed with the orders of the plurality.

¹²⁰ (2010) 241 CLR 252, 266-267 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). Heydon J delivered a separate judgment, supporting the orders proposed by the plurality, making reference to *Annetts v McCann* (241 CLR 252, 280).

*way towards satisfying the fundamental requirements of the natural justice hearing rule. Some such procedural requirements are necessary if s 51A is to operate and the procedures provided for are to be taken as exhaustive of the rule”, but that where procedures are not prescribed, then the common law principles of procedural fairness will continue to apply.*¹²² The decision thus involved acceptance of what earlier was described as the specific subject matters construction of the section.

The plurality also addressed the argument that the general subject matter construction was supported by extrinsic materials that served to demonstrate the purpose and objects of the section and surrounding provisions.¹²³ The plurality rejected the use and utility of the material as an aid in construing the provisions. In the first place, the plurality held that it was “*erroneous to look at extrinsic materials before exhausting ordinary rules of statutory construction*”.¹²⁴ In the second, the plurality dismissed the significance of the material remarking that statements “*as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning*”,¹²⁵ and that, in any event, the materials in question were “*expressed in general terms*” and not directed “*to the question of construction which arises and which concerns the identification of the matter dealt with*”.¹²⁶

The decision of the Court did not involve, in a dispositive sense, any engagement of broader principles of procedural fairness. Nevertheless the plurality judgment made reference – twice – to the principle of legality and the role that that principle was likely to play in any further

¹²¹ Ibid at 266.

¹²² Ibid at 267.

¹²³ The material was the Ministerial Second Reading Speech and the Explanatory Memorandum that accompanied the *Migration Legislation Amendment (Procedural Fairness) Bill 2002*. Material of this kind can be used as an aid to construction: see section 15AB of the *Acts Interpretation Act 1901* (Cth).

¹²⁴ (2010) 241 CLR 245, 265, citing *Catlow v Accident Compensation Commission* (1989) 167 CLR 543.

¹²⁵ Ibid at 264 – 265.

¹²⁶ Ibid at 271.

attempts to exclude the operation of common law principles within the Act.¹²⁷ The engagement of the principle was emphatic:¹²⁸

In Annetts v McCann Mason CJ, Deane and McHugh JJ said that the principles of natural justice could be excluded only by ‘plain words of necessary intendment’. And in Commissioner of Police v Tanos Dixon CJ and Webb J said that an intention to exclude was not to be assumed or spelled out from ‘indirect references, uncertain inferences or equivocal considerations’. Their Honours in Annetts v McCann added that such an intention was not to be inferred from the mere presence in the statute of rights consistent with some natural justice principles.

The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality...

There is, related to this, a further matter that can be drawn from the plurality judgment. To the extent that there have been differences in High Court authority about the manner in which the principles of procedural fairness might be taken to have been excluded by statute – exemplified by the differences in approach between the majority and minority judgments in *Miah* – the decision in *Saeed* was a strong restatement of the approach that subsequent authority would chart: the principle of legality would inform the construction of any attempt to exclude common law principles of procedural fairness.¹²⁹

D. Recent High Court decisions

Since *Saeed*, there have been a number of cases before the High Court that have involved issues of procedural fairness. One case involved a confined question of fact before a single Justice: *Gajjar v Minister for Immigration and Citizenship*;¹³⁰ one involved confirmation of

¹²⁷ (2010) 241 CLR 252, 258-259, 271. In the second reference to the principle, the Court, after making reference to the decision in *Coco v The Queen* (1994) 179 CLR 427, 437 where Mason CJ, Brennan, Gaudron and McHugh JJ said that the “Courts should not impute to the legislature an intention to interfere with fundamental rights”, remarked: “The same may be said as to the displacement of fundamental principles of the common law”.

¹²⁸ *Ibid* at 259.

¹²⁹ In *Saeed* the plurality endorsed the correctness of the reasons for judgment delivered by Gaudron J and by McHugh J in *Miah*: (2010) 241 CLR 252, 262.

¹³⁰ (2013) 87 ALJR 549. In that case it was held by Kiefel J that the information provided by the applicant for the purposes of a visa application was presumed by section 57 of the Act to be understood by the applicant; hence

earlier ‘principle’: *Minister for Immigration and Citizenship v Li*;¹³¹ and another involved a concession that the principles of procedural fairness applied to the exercise of the power in question, but a contention – upheld by the High Court – that there was no breach of these principles in the exercise of the power: *Plaintiff M47/2012 v Director General of Security*.¹³²

Two decisions of the High Court require separate attention. The first is the decision in *Plaintiff M61/2010E v The Commonwealth*;¹³³ the second is *Plaintiff S10/2011 v Minister for Immigration*.¹³⁴

In *Plaintiff M61/2010E* the plaintiffs contended that they were non-citizens to whom Australia owed protection obligations. By operation of section 46A(1) of the Act, because the plaintiffs entered an Australian territory at an “excised offshore place”,¹³⁵ they were not entitled to apply for a protection visa and were considered to be ‘offshore entry persons’. The Minister had power, pursuant to section 46A(2) of the Act, to dispense with the provisions of section 46A(1) of the Act “if the Minister thinks it is in the public interest to do so”.¹³⁶

it was unnecessary for the decision-maker to draw the applicant’s attention to the adverse nature of it notwithstanding its influential (and ultimately decisive) nature.

¹³¹ (2013) 249 CLR 332. In that case, French CJ held that the failure by the Migration Review Tribunal to accede to a reasonable request for an adjournment of a hearing made by an applicant amounted to a denial of procedural fairness and unreasonableness in the *Wednesbury* sense: see 249 CLR 332, 338, and 352. In relation to the procedural fairness ground, French CJ, applying the generally expressed principle stated by Gaudron and Gummow JJ in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 611, held that “a failure to accede to a reasonable request for an adjournment can constitute procedural unfairness”. The other members of the Court determined the outcome on the basis that the failure to accede to the request to adjourn the hearing amounted to the Tribunal failing to discharge its function of “deciding whether to adjourn the review” reasonably, and therefore according to law (Hayne, Kiefel and Bell JJ: 249 CLR 332, 369); or on the basis that the failure to accede to the request was unreasonable in the *Wednesbury* sense (Gageler J: 249 CLR 332, 380).

¹³² (2012) 251 CLR 1. In that case the applicant, who sought a protection visa under the Act, was subjected to a security assessment by the respondent – as part of the process for determining whether the applicant should be granted the visa sought. The Respondent conceded an obligation to afford the applicant procedural fairness when undertaking the assessment, and the Court unanimously held that it did so.

¹³³ (2010) 243 CLR 319.

¹³⁴ (2012) 246 CLR 636.

¹³⁵ This term is defined by section 5 of the Act. The effect of the definition is stated in a note to be “to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications”. By section 46A(1) of the Act, an application for a visa is invalid if made by an offshore entry person who is an unlawful non citizen.

¹³⁶ Section 46A(2) of the Act. The provision provides: “if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the

Each plaintiff was detained upon arrival, and at that time Departmental officials undertook a ‘Refugee Status Assessment’ – the ultimate purpose of which was to enable a submission to be put to the Minister on whether protection obligations were, or were not, owed and thus enable the Minister to determine whether to exercise the ‘dispensation’ powers in section 46A(2) of the Act.¹³⁷ The power conferred by section 46A(2) of the Act was to be exercised personally by the Minister (section 46A(3) of the Act) and the Minister was under no duty to consider the exercise of the power in any circumstance (section 46A(7) of the Act). Following the assessments, the Department concluded that the Australia did not owe the plaintiffs protection obligations, and they were denied protection visas. The decisions made were confirmed following an Independent Merits Review.¹³⁸

Each plaintiff sought relief in the High Court, complaining that there had been a denial of procedural fairness, and other errors of law. The Minister argued that the assessments that were undertaken had no statutory footing, and that they were “*no more than a non-statutory executive power to inquire*”.¹³⁹

The Court unanimously rejected this argument, holding that the “*inquiries undertaken in making a Refugee Status Assessment, and any subsequent Independent Merits Review, were inquiries made after a decision to consider exercising the relevant powers and for the purposes of informing the Minister of matters that were relevant to the decision whether to exercise one of those powers in favour of a claimant*”.¹⁴⁰

The significance of this conclusion by the Court was that, once the statutory foundations were identified, the engagement of the “*well established*” principles of procedural fairness followed –

determination”. The case also discussed other, similarly expressed, ‘dispensing provisions’ in the Act: see sections 48B, 195A, 351 and 417 of the Act.

¹³⁷ In *Plaintiff S10*, discussed later, the provisions in section 46A were described by the Court as dispensation powers. In the present case, the power in section 46A(2) was “*referred to as a decision to ‘lift the bar’*”: 243 CLR 319, 336.

¹³⁸ The plaintiffs were unlawful non-citizens and unable to apply for a visa, and for this reason they were unable to engage the provisions of the Act that would oblige the Minister to consider an applications for a visa. The Department permitted the plaintiffs to have the Departmental decision reviewed by an independent person.

¹³⁹ 243 CLR 319, 348. The argument here resembles those advanced in the era prior to the High Court decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. See in this respect Chapter V.

¹⁴⁰ (2010) 243 CLR 319, 351 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ – ‘the Court’).

there being no “*plain words of necessary intendment*” to so exclude their operation.¹⁴¹ Thus, whilst not dispositive of an issue in the proceeding, this was a further restatement by the Court, as there was in *Saeed*, of the importance of the principle of legality.

The Minister further argued, however, that even if there was a statutory footing for the exercise of power, that any power under section 46A(2) of the Act was not conditioned upon the observance of the principles of procedural fairness, because the power was “*not a power to destroy, defeat or prejudice a right; it is a discretionary power to confer a right*”.¹⁴² This submission was no less than an invitation to return to the pre-*Kioa* era with its narrow construct of rights *viz.*, that the principles of procedural fairness would only apply to legal rights, strictly construed. The argument was rejected by the Court by its application of the decision in *Annetts v McCann* and *FAI Insurances Limited v Winneke*:¹⁴³

It affected their rights and interests directly because the decision to consider the exercise of those powers, with the consequential need to make inquiries, prolonged their detention for so long as the assessment and any necessary review took to complete...the fact that individuals were content to have detention prolonged...must not obscure that what was being done, for the purposes of considering the exercise of a statutory power, had the consequence of depriving them of their liberty for longer than would otherwise have been the case.

When placed into its chronological context (following the decision in *Saeed*), the decision in *Plaintiff M61/2010E* was, like the decision in *Saeed* itself, an emphatic restatement by the High Court of its thinking about the principles of procedural fairness. The restatement occurred in two specific respects.

The first was that it was a fundamental principle and that, once the statutory footing was identified, the engagement of well-established principles followed *viz.*, the principles of procedural fairness presumptively applied, unless excluded in the requisite way. The second was that the Court rejected an argument that sought to limit rights, and thus the application of

¹⁴¹ (2010) 243 CLR 319, 351-352; 353-354. The Court supported its reasons on this issue, and the principle of legality, by reference to the decisions in *The Commissioner of Police v Tanos*, *Annetts v McCann* and *Saeed v Minister for Immigration and Citizenship* and should be taken to have further endorsed the principles of natural justice as fundamental.

¹⁴² *Ibid* at 352.

the principles of procedural fairness to such rights affected by the exercise of statutory power, in a regressive manner reminiscent of the pre – *Kioa* era.

In *Plaintiff S10/2011* the proceedings in the High Court arose out the failure of the plaintiffs to secure the exercise, by the Minister, of the dispensation provisions under the Act.¹⁴⁴ The plaintiffs contended that in deciding whether to consider the exercise of the dispensing power and in whether or not to exercise the power the Minister was obliged to observe the principles of procedural fairness.¹⁴⁵

The decision in *Plaintiff S10/2011* thus turned on the proper construction of the dispensing provisions in the Act.¹⁴⁶ Each provision had common features affecting the exercise of the power: the Minister was to exercise the power personally; the Minister was required to think that it was in the public interest to do so; the Minister had no duty to consider the exercise of the power. The Department had in place Ministerial guidelines that distinguished between *“requests which will not be referred to the Minister and those which may be referred to the Minister for consideration whether to exercise the relevant power...The effect...is that the adoption of the guidelines by the Minister represents decisions by the Minister that if a case is assessed as not meeting the guidelines, the Minister does not wish to consider the exercise of the dispensing power, and if a case is assessed favourably then the Minister does wish to consider that exercise”*.¹⁴⁷

¹⁴³ Ibid at 353.

¹⁴⁴ See n 130, above.

¹⁴⁵ The argument was put this way due to the factual differences between the respective plaintiffs. Thus, for example, Plaintiff S10, Departmental officers, applying the guidelines, did not refer the application to the Minister and in relation to a second request the Minister determined that he did not wish to consider exercising the dispensing power. And in Plaintiff S51, the Minister indicated that he would *“not intervene”* ((2012) 246 CLR 635, 645).

¹⁴⁶ There have been a number of cases, since *Plaintiff M61/2010E* and *Plaintiff S10*, before the High Court that have involved the dispensing provisions, although none have involved procedural fairness issues: see *Plaintiff M79/2012 v Minister for immigration and Citizenship* (2013) 87 ALJR 682; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 88 ALJR 324; *Plaintiff M150 of 2013 v Minister for immigration and Border Protection* (2013) 88 ALJR 735; *Plaintiff S4/2014 v Minister for immigration and Border Protection* (2014) 88 ALJR 847.

¹⁴⁷ (2012) 246 CLR 636, 665 (Gummow, Hayne, Crennan and Bell JJ).

Unlike the position in *Plaintiff M61/2010E*, in the present case the Minister had not decided to give consideration to exercising the dispensing provisions and the processes that were conducted were not those conducted by the Minister under the Act and nor for the purposes of exercising the dispensing power: they were Departmental processes which were, as French CJ and Kiefel J said, anterior to the exercise of statutory powers:¹⁴⁸

...each of the guidelines in this case does no more than facilitate the provision of advice to the Minister in particular cases and otherwise operate as a screening mechanism in relation to any requests which the Minister has decided are not to be brought to his or her attention. The issue of the guidelines itself did not involve a decision on the part of the Minister, acting under the relevant section, to consider the exercise of the power conferred by it.

The High Court rejected the submission that the Minister was obliged, in the ways asserted, to observe the principles of procedural fairness – although the approaches in the judgments differed.¹⁴⁹

Thus, French CJ and Kiefel J concluded that with no statutory duty to consider the exercise of the power, “no question of procedural fairness arises when the Minister declines to embark upon such a consideration”.¹⁵⁰ However, as their Honours pointed out earlier in their reasons, if the ultimate exercise of power was conditioned on the observance of the principles of procedural fairness, and the decision-maker relies entirely upon the Departmental advice that failed to observe them, then jurisdictional error may arise.

The plurality approached the matter differently, it is suggested. The focus in this judgment was upon whether, as a matter of statutory construction, the dispensing provisions “were conditioned on the observance of the principles of procedural fairness”.¹⁵¹ This was because the use of Ministerial guidelines, which determined what matters would be referred to the Minister for consideration of the exercise of the dispensing power, could not obviate the need to observe the principles of procedural fairness if the proper construction of the Act required their

¹⁴⁸ (2012) 246 CLR 636, 653.

¹⁴⁹ French CJ and Kiefel J delivered a joint judgment; Gummow, Hayne, Crennan and Bell JJ delivered a joint judgment (‘the plurality’); and Heydon J delivered separate reasons for judgment.

¹⁵⁰ *Ibid* at 655.

observance. The critical issue, for the plurality, thus turned upon whether on the “*proper construction of the Act, such requirements do arise*”.¹⁵² In this respect, it should be noted that framing the issue in this way was significant because it neutralised the presumption that the principles of procedural fairness applied whenever the interests of an individual were affected by the exercise of statutory power unless excluded in the necessary way.

The conclusion of their Honours was that the obligation to observe procedural fairness did not arise: the proper construction of the Act evinced the ‘necessary intendment’ to exclude their operation.¹⁵³

Upon their proper construction...the dispensing provisions are not conditioned on observance of the principles of procedural fairness...The use in the provisions of the Act in question here of language emphatic both of the distinctive nature of the powers conferred upon the Minister (as personal, non-compellable, ‘public interest’ powers), and of the availability of access to the exercise of those powers only to persons who have sought or could have sought, but have not established their right to, a visa is of determinative significance. It reveals the ‘necessary intendment’...that the provisions are not attended by a requirement for the observance of procedural fairness.

The plurality also likened the position of the Minister to that described by Brennan J in *South Australia v O’Shea*: “...namely where a senior official standing at the peak of the administration of the statute is not required to give an opportunity for a hearing in every case affecting an individual who has had an opportunity of a merits review in the course of the administrative process”.¹⁵⁴

In addition to determining the construction question that arose, the plurality judgment addressed the ‘debate’ about the true basis for the obligation to observe the principles of

¹⁵¹ Ibid at 668.

¹⁵² Ibid at 666. See also the discussion, on determining the limits on the exercise of statutory power, by Jeffrey Barnes, ‘Statutory Interpretation and Administrative Law’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press 2014), 119, 124-125.

¹⁵³ Ibid at 668. The remaining member of the Court, Justice Heydon, delivered a separate judgment that reached the same conclusion as the plurality. Heydon J (at p.671-672), in rejecting the plaintiffs’ argument, considered the public interest nature of the power vested in the Minister, as opposed to the ordinary – or, as His Honour described it, the conventional – regime for the granting of a visa, to be decisive in excluding the obligation to observe the requirements of procedural fairness.

¹⁵⁴ Ibid at 668.

procedural fairness in the statutory context.¹⁵⁵ Without specifically referring to the decision in *Saeed* on this issue (nor, for that matter, any ‘procedural fairness’ decision), the plurality judgment provided a more refined explanation – a restatement – of the issue:¹⁵⁶

The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in Zheng v Cai was identified as the interaction between the three branches of government established by the Constitution. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above. It is in this sense that one may state that ‘the common law’ usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.

The thrust of this passage rests on two overlapping propositions. The first is that the process of statutory construction involves the courts applying “*objective criteria of construction which are recognised as legitimate*”:¹⁵⁷ these criteria are the ‘principles and presumptions’ of statutory construction that the plurality judgment refers to. Their legitimacy derives from their acceptance by, and the Constitutional relationship between, the Executive, Parliament and the courts.¹⁵⁸ The second is that the obligation to observe the principles of procedural fairness in the exercise of statutory power is considered to be one such ‘legitimate’ principle or presumption upon which statutes will be construed. In this last respect, the proposition assumes the fundamental nature of procedural fairness by its very acceptance as a legitimate principle or presumption of statutory construction known and respected by the Parliament and the courts. Although not referred to, in substance and in effect, the Court was buttressing the

¹⁵⁵ See Chapter IV: ‘A ‘New Dynamic’ for Natural Justice: The Development of a Modern System of Administrative Law’.

¹⁵⁶ (2012) 246 CLR 636, 666.

¹⁵⁷ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 411 (French J).

¹⁵⁸ *Ibid.* See also *Zheng v Cai* (2009) 239 CLR 446, 455-456 (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

implication of the obligation to observe the principles of procedural fairness with the principle of legality.

E. *Conclusion*

In *Tanos*, the High Court recognised the fundamental nature of the principles of procedural fairness. Although the language employed did not in terms label the principles as ‘fundamental’, the citation of ancient authority, its description as a “*deep rooted principle of the law*” and the statement that the principles of procedural fairness could not be excluded by statutory intent assumed or “*spelled out from indirect references, uncertain inferences or equivocal considerations*” but only “*express words of plain intendment*” leave little room for debate about this.¹⁵⁹

The correctness of this categorisation was affirmed in the subsequent decisions of the High Court in *Annetts v McCann* and in *Ainsworth v Criminal Justice Commission*. In these later cases, the fundamental nature of the principles and the relationship to the principle of legality was assumed, rather than expressed. A consequence of this working assumption was that it resulted in insufficient appreciation of the true standing of procedural fairness as a fundamental principle of the common law in High Court jurisprudence until more recent times. The High Court decision in *Miah* was a clear example of this lack of appreciation: the contrasting approaches between the majority and dissenting judgments, and the differing approaches of the majority judgments themselves, are a reflection of this fact.

The decision in *Saeed* commenced a correction of this uncertainty, by a clear statement by the plurality that recognised the importance of procedural fairness and its characterisation as a fundamental principle of the common law. The decision in *Plaintiff M61/2010E* confirmed the correctness of this approach. The decision in *Plaintiff S10* revisited and restated these developments, and the practical status of procedural fairness today, and beyond: it has

¹⁵⁹ *The Commissioner of Police v Tanos* (1958) 98 CLR 383, 395-396 (Dixon CJ and Webb J).

entrenched the fundamental nature of procedural fairness, and the constitutional dimension to it, and entrenched the connection between procedural fairness and the further principle of statutory construction – the principle of legality.

IX CONCLUSION

In its earliest form, natural justice, like natural law, was closely associated with the moral or natural principles of right and wrong. Indeed, at this time, the normative justification for natural justice was anchored in the idea that it was a manifestation of the internal morality of the law. Natural justice was a moral limit on the exercise of power: it was a universal expression of how decisions should be made.

Understood in their historical context, the principles of procedural fairness were never morally neutral, and they have not remained so in the way in which they have been held to condition the exercise of statutory power in more recent times. The moral directive insisted on then, as now, was fairness in the process for deciding a matter that affected the rights or interests of an individual: ‘procedural fairness’ is the expression of the ethically correct – the ‘right’ – way to decide things. The full force of this requirement remains, and is reflected in the specific statement that individuals, when their fundamental rights are at stake, are entitled to expect more than good faith, they are entitled “*to expect fairness*”.¹ It is reflected in the more general statement that doing justice involves arriving at a decision in a just manner.² It is also reflected in the contemporary statement of the general principle itself *viz.*, “*...when a statute confers power to destroy or prejudice a person’s rights or interests, principles of natural justice regulate the exercise of that power...[unless excluded] by ‘plain words of necessary intendment’*”.³

Further, the transformation of this moral limit upon decision-making into positive law, by the courts fashioning the principles of procedural fairness, had at the forefront the protection of individual rights and interests. This added justification, reflected in the contemporary statement of the general principle, has remained a central value underpinning not only when procedural fairness applies *viz.*, whenever the exercise of statutory power affects the rights and interests of an individual, but in defining the limited instances of when it does not *viz.*, by clearly defined and expressed statutory abrogation.

¹ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 494 (Gleeson CJ).

² *Secretary of State v MB* [2008] 1 AC 440, 485 (Baroness Hale).

³ *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252, 258 applying *Annetts v McCann* (1990) 170 CLR 596, 598.

The identification of the values that shaped the principles of procedural fairness is of more than historical interest. The values, especially the court's current conception of fairness, have continued to inform the approach taken in the development of principle and explain the court's entrenched reluctance to countenance derogation of rights without common law procedural fairness principles applying to the exercise of power.

These values were evident, as explained in Chapter IV, in the way in which the courts developed explanations of the rights that would determine when the principles would apply in the exercise of statutory power: first, by the courts side-stepping strict legal categorisation of rights and interests and undertaking a broader evaluation of the effect of the decision on the individual in the ultimate determination of whether procedural fairness ought to apply; secondly, by the development of the concept of legitimate expectation;⁴ and, thirdly, by judicial recognition of a duty to act fairly in the sense of requiring the observance of procedural fairness where the exercise of statutory power affected rights or interests. In these areas the courts breathed new life into procedural fairness by the creation of devices to circumvent, and expand, the historically narrow kind of rights and interests that procedural fairness evolved to protect.

More specifically, in the migration area, the values were evident in an analogous development that occurred where determinations on refugee status were held to be amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* ('the ADJR Act'). As explained in Chapter V, the High Court and the Federal Court, in the post-*Kioa* period, redressed the inability of refugee claimants to seek judicial review in connection with their claims for refugee status. In these cases, the courts came to hold that non-statutory determinations relating to refugee status, made by the DORS committee,⁵ were amenable to judicial review under the ADJR Act. The courts combined the entry permit decision made under the *Migration Act 1958* ('the Act'), which was judicially reviewable, with the non-statutory decision on whether the person was a refugee, which was not judicially reviewable. The latter decision was held relevant to, and thus reviewable as part of, the entry permit decision.

⁴ A concept that was described by the plurality, in *Plaintiff S10 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658, as "unfortunate" and that it should be "disregarded".

⁵ This was the acronym for the Determination of Refugee Status Committee.

This development was built upon a revised construction of the former sections 6 and 6A of the Act and upon the very justification for procedural fairness itself: the protection of the rights of an individual from the exercise of power except where the exercise of power was procedurally fair.

The values were also evident, as explained in Chapter VI relating to the period from 1992 to 1998, in the way the Federal Court expansively construed the provisions of Part 7 of the Act. That is, on the footing that the language of the statute would be interpreted against the background of, and as a restatement of, common law principles of procedural fairness: in effect, Part 7 became an analogue of the common law.

The values were also evident, as explained in Chapter VII relating to the period from 1998 to 2002, in the way in which common law principles of procedural fairness informed the construction of the meaning of the specific provisions within Part 7 of the Act.

Overall, by these last two means, the legislative attempt to prescribe procedures in Part 7 of the Act that excluded the common law requirements of procedural fairness was rebuffed by the courts. The enforcement of minimum standards of fairness by the courts, although not acknowledged as such, ultimately rested on the values imbued in procedural fairness.

Independently of Part 7 of the Act, procedural fairness had developed, expressly, upon these values and supported the constructional approach that had been taken by the courts. The decision of the High Court, in *Annetts v McCann*,⁶ and the influential statement of principle in that case, reflected this fact.

The importance of the decision in *Annetts v McCann* lies not only in the fact that it restated the basic principle in a manner that encapsulated the values within procedural fairness, but in the fact that it unequivocally affixed them to a larger, more potent, idea: procedural fairness was a fundamental principle. Although that term was not used in the judgment, the fundamental nature of procedural fairness was assumed in three ways: in the idea that procedural fairness

⁶ (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). Shortly after this, the High Court in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 affirmed the correctness of this approach.

would regulate the exercise of the power; in the statement about how the obligation to observe procedural fairness might be excluded; and in the Court relying on the earlier decision in *Commissioner of Police v Tanos*, a decision that described procedural fairness as a “deep rooted principle of the law”.⁷

The recognition, and acceptance, of procedural fairness as a fundamental principle was not simply supported by the decision in *Tanos*. This classification implicitly recognised the impressive ancestry of the principles of procedural fairness,⁸ and that, at least historically, the principles of procedural fairness were designed to protect basic rights that the common law considered fundamental, such as loss of property, loss of liberty.

Further, the recognition of procedural fairness as a fundamental principle of the common law is not merely an emphatic way of stating that it is an important legal principle. Rather, as the decisions in *Tanos* and *Annetts v McCann* suggest, and as the later decisions in *Saeed v Minister for Immigration & Citizenship*⁹ and *Plaintiff S10 v Minister for Immigration and Citizenship*¹⁰ establish, the recognition of procedural fairness as a fundamental principle creates twin presumptions. The first is a presumption in favour of their application. The second is a presumption against their derogation absent clear statutory expression.

These dual presumptions, although evident from the decision in *Annetts v McCann*, remained quiescent until an attempt was made, by express enactment, to exclude altogether common law principles of procedural fairness from operating within Part 7 of the Act.¹¹ The legislative intervention provided the setting for their re-emergence.

The High Court in *Saeed*, as explained in Chapter VIII, decided the case in a fairly narrow way. But the wider holding by the Court delivered an undeniably clear message about the contemporary status of the presumptions: they were evoked with undiluted force with an

⁷ (1958) 98 CLR 383, 395.

⁸ In *Tanos* Dixon CJ and Webb J traced some of this history at least back to *Boswel’s Case* in 1583: see (1958) 98 CLR 383, 395 - 396.

⁹ (2010) 241 CLR 252.

¹⁰ (2012) 246 CLR 636.

¹¹ The enactment was the *Migration Legislation Amendment (Procedural Fairness) Act 2002*.

explanation that the presumption against interference with fundamental rights extended “to the displacement of fundamental principles of the common law” and that the presumptions derived from a further principle: the principle of legality.¹²

The decision in *Plaintiff S10* however restated these principles. Perhaps unusually, its significance does not derive from the actual holding in the case. Rather, its significance resides in the discussion, by the plurality, of basic principle, and its restatement. The wider holding by the plurality, impressionistically heterodox, is in fact the opposite: it implicitly recognises the historical origins of procedural fairness and its evolution, and embraces and restates the principle in a manner that enshrines procedural fairness as a fundamental common law principle with a constitutional dimension.

The specific issue decided by *Plaintiff S10* was whether the obligation to observe procedural fairness applied to the ‘dispensing provisions’ under the *Migration Act 1958*. It was held that they were not so conditioned. But beyond this, in terms of general principle, is where the real significance of the decision resides.

Now, according to the plurality, procedural fairness is a principle or presumption of statutory construction. Further, the competing theories about the source of the obligation *viz.*, the common law duty theory and the implied statutory intent theory, rested on a false premise: procedural fairness, being a principle or presumption of statutory construction, formed part of the common law. The decision went further: the obligation to observe procedural fairness was not based upon a common law duty to observe these principles. Rather, their implication was to be determined following a process of statutory construction with such implication deriving from the common law and not from the legislation that conferred the power.¹³

The reformulated test, as explained in Chapter VIII, distils into a single overarching enquiry directed to ascertaining, by reference to statutory intent,¹⁴ whether the obligation to observe

¹² (2010) 241 CLR 252, 259, 271.

¹³ This latter view was the one expressed by Brennan J in *Kioa v West* (1985) 159 CLR 550, 609 and 615.

¹⁴ The reference to intent is the statutory intent manifested by the legislation: see *Alcan (NT) Alumina Pty Limited v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, 46-47 (Hayne, Heydon, Crennan

procedural fairness applies to the statutory power. Although the test is in this sense unitary, all other principles and presumptions of statutory construction feed into it.¹⁵ This was because, as the plurality explained by reference to the decision of the High Court in *Zheng v Cai*,¹⁶ the process of statutory construction involves not only the mechanics of construing the text of the statute to discern its meaning, but involves a wider constitutional process of interaction between “*the three branches of government established by the Constitution*”.¹⁷ The wider process involves broader, background principles or presumptions of statutory construction – known by the Executive, the Parliament and the courts, and accepted as legitimate by each.¹⁸ These two tiers of construction, and the *Constitution* itself, provide the means through which a power conferred by statute is defined by the court. The principles of procedural fairness, as the plurality explained, form part of this wider process of construction: they, with other rules of interpretation, guide the court in reaching the proper construction of the statutory power and thereby define its limits.

If, however, the preferred construction points to an intent to exclude procedural fairness, the conclusion reached following the process is that the statute evinces the ‘necessary intendment’ that the obligation does not apply to the exercise of that power.

There is more to this decision in terms of principle for procedural fairness, in connection with its implication, and the manner in which it might be excluded.

The positioning of procedural fairness as a principle or presumption of the kind that is known and accepted by the Executive, the Parliament and the courts rests upon the principle of

and Kiefel JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 264-265 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 388-389 (French CJ and Hayne J), 405 (Crennan and Bell JJ); 411-412 (Kiefel J).

¹⁵ In *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 491, Gleeson CJ had made a similar point, namely that once the task is identified as being one of statutory construction “*all relevant principles of statutory construction are engaged*”.

¹⁶ (2009) 239 CLR 446.

¹⁷ (2012) 246 CLR 636, 666.

¹⁸ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 415 (French J). See also *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104, 196 where McHugh J expressed similar ideas about the role of background principles and presumptions that inform the process of statutory construction.

legality. It is against that background that the plurality stated that the “*common law*’ usually will imply” procedural fairness as conditioning the valid exercise of statutory power.¹⁹

The identification of the relevant enquiry as involving statutory construction necessarily promotes wider thinking about the implications for procedural fairness going forward. Two broad questions arise. The first is: what is the explanation for the revised approach? The second is: what does it mean for procedural fairness?

The basis for the restatement resides, at its core, in the explanation of when procedural fairness applies: when the statute, on its proper construction, conditions the conferral of the power “*to destroy, defeat or prejudice a person’s*” rights or interests upon the obligation to observe procedural fairness.²⁰ The approach is one that defines judicial review in terms of “*the extent of power*” and implied limits placed on such power.²¹

Although, as pointed out, the explanation for the revised approach was to place procedural fairness on its correct jurisprudential footing, the plurality did not pause to explain their justification for this correction. The case itself did not call for resolution of this issue, and consistent with this, was explained within existing principles established by decisions such as *South Australia v O’Shea*.²² Further, the High Court had, repeatedly and recently, remarked that it remained an open question whether different results eventuate from application of the different tests.²³ Nevertheless, without denying the possibility that others exist, legal coherence emerges as an obvious explanation. This, it is suggested, is evident in three ways.

First, the restatement aligns the obligation to observe procedural fairness to the accepted constitutional relationship between denial of procedural fairness, excess of jurisdiction and the remedy of prohibition. This requires some elaboration and reference to section 75(v) of the *Constitution*. That section confers original jurisdiction on the High Court to restrain officers of

¹⁹ (2012) 246 CLR 636, 666.

²⁰ *Annetts v McCann* (1990) 170 CLR 596, 598.

²¹ *Attorney General for NSW v Quin* (1990) 170 CLR 1, 36 (Brennan J).

²² (1987) 163 CLR 378.

²³ *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 352.

the Commonwealth from exceeding federal power.²⁴ It has been described as a constitutionally entrenched minimum provision of judicial review.²⁵ The section requires, for the constitutional writs of mandamus or prohibition to be granted,²⁶ demonstration of jurisdictional error.²⁷ In this context jurisdictional error means illegality in the sense of acting in excess of jurisdiction or ultra vires. In respect of each formulation used, the common idea involves defining, by a process of statutory construction, the limits of statutory power and establishing that the exercise of that power transcends those limits.

It is in this accepted constitutional setting that the restatement in *Plaintiff S10* needs to be understood. The enquiry common to the obligation to observe procedural fairness and the question of whether there has been an excess of jurisdiction is one of statutory construction. In the context of procedural fairness, this relationship was explained by Gaudron and Gummow JJ in *Re Refugee Tribunal; ex parte Aala*:²⁸

“It follows that, if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (and validly) limited or extinguished any obligation to accord procedural fairness, the officer exceeds jurisdiction in a sense necessary to attract prohibition under s 75(v) of the Constitution”.

²⁴ Section 75(v) of the *Constitution* provides that the High Court shall have original jurisdiction “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”. The writ of prohibition will issue when there has been a denial of procedural fairness, with other writs issuing in consequence upon that prohibition: *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90-91 (Gaudron and Gummow JJ).

²⁵ *S157/2002 v The Commonwealth* (2003) 211 CLR 476, 513. See for further discussion Jeremy Kirk, ‘The Entrenched Minimum Provision of Judicial Review’ (2004) 12 *Australian Journal of Administrative Law* 64; Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *Public Law Review* 14.

²⁶ The two constitutional writs are mandamus and prohibition. The section does not confer jurisdiction to grant certiorari. However, it has been held that the power to grant certiorari is ancillary to the jurisdiction conferred by s75(v) of the *Constitution* although it “does not expand the occasions when a writ of mandamus or prohibition would issue”: *Re Jarman; Ex parte Cook* (1997) 188 CLR 595, 604.

²⁷ *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82; *S157/2002 v The Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.

²⁸ (2000) 204 CLR 82, 101. The plurality in *Plaintiff S10* specifically referred to this passage in *Aala*: see (2010) 246 CLR 636, 666, fn 98. See also *Annetts v McCann* (1990) 170 CLR 596, 604-5 (Brennan J).

Secondly, the restatement indirectly acknowledges the link between procedural fairness and reasonableness as implied conditions on the exercise of statutory power.²⁹

The conclusion of Gaudron and Gummow JJ in *Aala*, set out above, was sourced in the reasoning of Brennan J in *Kruger v The Commonwealth*.³⁰ In that case, Brennan J stated that “when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised”.³¹ This statement of principle recognises, in common with procedural fairness, a further principle or presumption of statutory construction viz., the statutory power conferred must be exercised reasonably. And, continuing with the links between the two, the consequence of acting unreasonably, like a denial of procedural fairness, results in a repository of power exceeding jurisdiction.³² In short, the “power to act unfairly and unreasonably is presumed to be absent from any parliamentary grant”.³³

Thirdly, the restatement repositioned procedural fairness in line with other fundamental rights and principles and the way they could be abrogated by statute. What the common law duty theory of procedural fairness involved was the presumptive attachment of the obligation to observe procedural fairness to a power whenever the exercise of that power could defeat, destroy or prejudice a right or interest unless this presumption was excluded in the required way.³⁴ The practical burden was on demonstrating the exclusion: the presumed application was literally that – the principles could operate consistently within the statutory scheme. The jurisprudence, as explained in Chapter VIII, justified this approach by reason of the fundamental nature of procedural fairness. However in this respect, procedural fairness stood apart from

²⁹ *Annetts v McCann* (1990) 170 CLR 596, 604-5 (Brennan J).

³⁰ *Kruger v The Commonwealth* (1997) 190 CLR 1. The reasoning of Brennan J in *Kruger v The Commonwealth* was followed by Gummow J in *Minister for Immigration v Eshetu* (1999) 197 CLR 611, 650.

³¹ (1997) 190 CLR 1, 36.

³² *Minister for Immigration v Eshetu* (1999) 197 CLR 611, 650 where Gummow J noted an observation by Deane J in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 367 that *Wednesbury* ‘principles’ fell within a duty to act ‘judicially’ where such obligation exists. In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 371, Gageler J noted that the two concepts were “closely linked” and likewise made reference to Deane J’s dictum in *Bond*.

³³ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 427.

³⁴ *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

other fundamental rights. For example, in cases involving the privilege against self-incrimination, where a statute sought to abrogate the privilege, the courts did not make a presumption that the right was unaffected by the statute. Rather, the approach was simply to determine whether the preferred construction of the statute supported the abrogation of the privilege.³⁵

It remains to consider what these developments entail for procedural fairness. The central issue relates to exclusion of the principles of procedural fairness.

The reasoning of the plurality, although it principally focussed upon the implication of the obligation to observe procedural fairness, also affirmed that a similar principle or presumption operated in connection with their possible exclusion: the principle of legality. Although there was no direct reference to the principle of legality, its relationship with the principles of procedural fairness remains unaltered by *Plaintiff S10*. In fact, the ultimate conclusion in that case, that there was the “*necessary intendment*” to exclude the obligation to observe procedural fairness, was reached by the application of this very principle: the plurality specifically referred to the decision in *M61/2010E v The Commonwealth*³⁶ and the principle referred to in that case *viz.*, that the obligation to observe procedural fairness could only be excluded by “*plain words of necessary intendment*”.³⁷ These are the words of Mason CJ, Deane and McHugh JJ in *Annetts v McCann* and that decision, as earlier pointed out, engaged the ideas underlying, and the substance of, the principle of legality.

The recognition of the dual presumptions of statutory construction, in the way described, provide the framework within which exclusion of the obligation to observe procedural fairness in the statutory context, falls to be considered. It is the erection of these principles that inevitably mean that any attempted exclusion will either need to be express or, if it is to be implied, that the language of the statute is sufficiently emphatic, rather than indirect, uncertain

³⁵ See, for example, *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission* (2013) 251 CLR 196.

³⁶ (2010) 243 CLR 319.

or equivocal,³⁸ so as to demonstrate the ‘necessary intendment’ that the obligation has been excluded. On any view satisfaction of this requirement, against the presumption or principle supportive of the conditioning of the power so as to observe the obligation, is exacting.³⁹

The potential always exists for express exclusion of the principles of procedural fairness in the exercise of non-judicial statutory power. That is because it remains within the constitutional competence of the Parliament to exclude their operation. In other instances, whether procedural fairness has been excluded depends upon the preferred construction of the statute. In determining whether the necessary intendment exists, the Court has recognised the fundamental nature of procedural fairness and dual presumptions built upon this construct. These presumptions are substantive in effect, and the reality of these developments is such that procedural fairness will continue to condition the exercise of statutory power, except in a limited number of well-defined cases. This is because, absent clear expression in the statute evidencing a contrary intent, “*legislation will be construed on the basis that compliance with the principles of procedural fairness is a condition of the valid exercise of the powers conferred*”.⁴⁰

Procedural fairness has undergone significant evolution. That evolution, however, has remained true to its origins and the values that underlie it, such that the words of Byles J in *Cooper v Wandsworth Board of Works* still resonate with the same force that they did when they were proclaimed some 150 years ago *viz.*,⁴¹ “*that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature*”. It is just that now procedural fairness is termed a principle or presumption of statutory construction.

³⁷ (2012) 246 CLR 636, 668. The particular passage that the plurality relied upon from *M61/2010E v The Commonwealth* (2010) 243 CLR 319, 352 itself relied upon, for the principle stated, the decision in *Annetts v McCann* (1990) 170 CLR 596, 598.

³⁸ This is an adaptation of the language used by Dixon CJ and Webb J in *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396.

³⁹ This is somewhat different to the suggestion that the High Court has approached the exclusion of the principles of natural justice with increasing strictness or hardening: see Matthew Groves, ‘Exclusion of the Rule of Natural Justice’ (2013) 39 *Monash University Law Review* 285. It is to be remembered that, aside from *Plaintiff S10*, the cases have not turned on the manner of exclusion of the obligation to observe procedural fairness and *Plaintiff S10* itself involved application of orthodox principle.

⁴⁰ *The Wilderness Society of WA (Inc) v Minister for Environment* (2013) 45 WAR 307, 512 (Martin CJ).

⁴¹ (1863) 14 CB (NS) 180, 194.

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