LEGISLATIVE ACTION BY SUBORDINATE AUTHORITIES AND THE REQUIREMENT OF A FAIR HEARING

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[*The reach of the rules of natural justice or procedural fairness has been increasingly expanded by the courts in recent years. Yet the taking of legislative action by a subordinate authority has continued to be regarded as being beyond review on the grounds of breach of these rules. The author examines the courts' traditional approach in this area, and isolates the bases upon which the immunity of legislative action has rested. He criticizes the reasons advanced by the courts for maintaining this immunity, and suggests that a general requirement of consultation in connection with the taking of legislative action could be usefully imposed.*]

The past thirty years has seen an extraordinary extension of the applicability of the rules of natural justice, both in Australia and in the United Kingdom. This extension has involved both the rule requiring that a fair hearing be given, and the rule against bias, although it is the first of these rules, the so-called rule of *audi alteram partem*, with which this article is concerned. The obligation to accord a fair hearing is now imposed upon persons and bodies which are discharging functions which could scarcely even in the loosest sense be characterized as quasi-judicial;[1] arenas in which the hearing rule has traditionally met with the stiffest judicial opposition are now subjected to its sway;[2] and the concept of 'procedural fairness' is being used to extend the applicability of the hearing rule still further, whatever effect this process may ultimately have upon the content of that rule.[3] Everywhere, it would seem, new and exciting frontiers are being opened up to the requirement of a fair hearing, to the obligation on the part of an authority to permit a person affected by its decision to participate in the making of that decision.[4]

Yet, at least one area in which the hearing rule has traditionally been denied

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1 The exercise of a judicial or 'quasi-judicial' function was once commonly regarded as a prerequisite to the implication by the courts of a duty to observe the rules of natural justice. See *e.g. R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Limited and others* [1924] 1 K.B. 171, 205 *per* Lord Atkin; *R. v. Legislative Committee of the Church Assembly; Ex parte Haynes-Smith* [1928] 1 K.B. 411, 416 *per* Lord Hewart. This approach was decisively rejected in the landmark case of *Ridge v. Baldwin and others* [1964] A.C. 40, and has not since found favour; see *e.g. Kioa and others v. West and another* (1985) 159 C.L.R. 550.

2 Notable examples of this phenomenon include the increasing willingness of the courts to imply a requirement that a hearing be given in the context of the making of reports (see *e.g. Re Erebus Royal Commission; Air New Zealand v. Mahon* [1983] N.Z.L.R. 662), the making of decisions under a prerogative power (see *e.g. Council of Civil Service Unions and others v. Minister for the Civil Service* [1985] 1 A.C. 374, and the making of decisions relating to immigration (see *e.g. Kioa and others v. West and another* (1985) 159 C.L.R. 550).

3 This would seem to be the effect of the decision of the High Court in *Kioa and others v. West and another* (1985) 159 C.L.R. 550, and see especially the judgments of Mason J. 584-5, and Brennan J. 620-2; see also Allars, M., 'Fairness Writ Large or Small' (1987) 11 *Sydney Law Review* 306.

4 The term 'hearing' is used throughout this article in a relatively broad sense, as connoting an opportunity for a person affected by an action to participate in the making of the decision to take that action through the presentation of submissions aimed at influencing the mind of the responsible authority. It is not intended to imply the necessity for the adoption of quasi-judicial procedures, or even the giving of an oral hearing. As will be seen, the appropriate form of participation in relation to

any extensive operation has remained largely untouched by this tide of judicial reappraisal. This may very loosely be termed the area of 'legislative action'.[5] Whatever degree of procedural protection may be required in a situation where the action of an authority affects the rights or interests of a person individually, and is based upon considerations personal to the individual thus affected, the general rule has historically been (and apparently remains) that nothing need be afforded by way of hearing where the interests of a person are adversely affected solely through the making by a subordinate authority of some more or less general standard or rule, which affects the interests of that person only by virtue of his or her membership of the wider class to which the rule or standard is addressed, and is based upon considerations of 'public policy', rather than upon any matters personal to the affected individual. This rule has been applied with little regard to the impact of the particular action upon the individual concerned, and in circumstances where that impact has been such that had the action in question been 'individualized', significant procedural protections would undoubtedly have been required. The rule concerning legislative action thus stands as an increasingly lonely island in the sea of participatory procedures which have been imposed by the courts.

The object of this article is to outline the content and operation of that rule, and to subject it to critical analysis. To this end, it traces the rule through the cases, notes the reasons which the courts have offered for its existence, and identifies the limitations which the courts have placed upon its application. It then considers the adequacy of the reasons advanced by the courts for development of the rule. It concludes that these reasons are not ultimately convincing, at least as comprising a justification for a rule of general application, and that there is in fact a strong argument for the imposition of participatory procedures in many circumstances where an authority takes action which affects individuals by virtue of their being included within a class to which some general policy-based rule or standard is addressed. Finally, by way of conclusion, the article considers the means by which such a legal requirement of appropriate participation might be achieved. In particular, the possible future roles of the courts and Parliament in this context are outlined.

1. *THE RULE*

'Legislative action' affecting persons not as individuals but as members of a class to which a rule or standard is made applicable may take an almost infinite variety of forms. Some few of the cases which have revolved around the question of whether persons affected by such action are entitled to receive a hearing before

many examples of legislative action might well be better described as involving 'consultation' rather than 'hearing', though each concept is merely a variation on the general theme of participation; see *infra* 598, and see generally, Galligan, D., *Discretionary Powers* (1986) 339–48; 360–78; Eisenberg, M. E., 'Participation, Responsiveness and the Consultative Process: an Essay for Lon Fuller' (1978) 92 *Harvard Law Review* 410.

[5] For a discussion of the term 'legislative' as used in this context, see *infra* 571–73. It should be noted at this stage that this article addresses itself to the exercise of legislative power by subordinate authorities, rather than by Parliament itself. Quite different considerations apply to the exercise of Parliament's supreme legislative authority; see *infra* 595.

it is taken have concerned the making of subordinate legislation setting the fees to be charged by solicitors,[6] the making of orders fixing the price at which certain goods may be sold,[7] the passage of local government by-laws regulating the use of classes of land,[8] the making of determinations by a statutory tribunal as to the maximum wages to be paid to teachers,[9] and the decision of a local council to increase the maximum number of taxi driver's licences which it would issue.[10] Nor is this list in any sense exhaustive.

What all such legislative actions have in common are two features. The first is that the person seeking the opportunity to influence the decision as to whether the action in question should be taken is affected not individually by that action, in the sense that it singles him or her out for its exclusive operation, but rather as a member of a class, in the sense that the action is directed to and operates upon a group of individuals, of which any particular person is merely a component part. This may be contrasted with the usual situation in which a litigant will invoke the aid of the courts in seeking to secure a right to a hearing, where the decision made or to be made is directed immediately and personally to that individual. Such a decision would be one whereby a person was refused a licence, or was expelled from an association. Thus, to take the example of the making of an order setting the fees to be charged by solicitors, an individual solicitor is affected by such an order not personally, in the sense that it is addressed to him or her alone, but only as a member of the wider class of solicitors which will be bound by the rule which it embodies.

The second general characteristic of legislative action follows from the first. Just as it is not directed towards individuals, nor is it based upon considerations personal to any particular individual. It is, as is often if somewhat vaguely put, based upon considerations of 'policy', upon a belief that the decision embodies a course of action which will redound to the public good in the field addressed by that decision,[11] rather than upon the view that the decision is 'just' or 'appropriate' having regard to the position and circumstances of any given individual.

Once again, such action may be contrasted with the usual class of decisions which are the subject of a claim by an affected individual to a hearing. The decision, for example, to remove a person from public office or to degrade them from a university degree will be based upon considerations personal to the individual concerned. However, an order setting the fees of solicitors, to continue the illustration, will hardly be based upon considerations personal to any given solicitor, and will only partly be founded upon considerations relating to

6 *Bates v. Lord Hailsham of St Marylebone and Others* [1972] 3 All E.R. 1019.

7 *E.g. Bread Manufacturers of N.S.W. and others v. Evans and others* (1982) 38 A.L.R. 93; *In re Gosling* (1943) 43 S.R. (N.S.W.) 312; *F. E. Jackson and Company Limited v. Price Tribunal (No. 2)* [1950] N.Z.L.R. 433.

8 *E.g. Homex Realty and Development Co. Ltd v. Village of Wyoming* (1980) 116 D.L.R. (3d) 1; *Atkinson et al. v. Municipality of Metropolitan Toronto* (1976) 69 D.L.R. (3d) 193; *Wiswell et al. v. Metropolitan Corporation of Greater Winnipeg* (1965) 51 D.L.R. (2d) 754.

9 *Charlton v. Members of the Teachers Tribunal* [1981] V.R. 831.

10 *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association and another* [1972] 2 Q.B. 299.

11 See *e.g.* Galligan, D. J., 'The Nature and Function of Policies Within Discretionary Power' [1976] *Public Law* 332, 332; Sharpe, J., *The Administrative Appeals Tribunal and Policy Review* (1986) 33; *Shorter Oxford English Dictionary* (3rd ed.).

solicitors generally. It will be based rather upon policy, upon a view of what the public good requires in the matter of the fixing of solicitors' fees, having taken into account the multifarious factors pertaining to that question. In this sense, legislative decisions are policy decisions.

At this stage, a point of some importance must be made concerning the use of the term 'legislative', both in this article and by the courts and learned authors, to describe the class of action to which this article is directed. In at least one sense, the term has the potential to mislead. It cannot be too clearly understood that the mere fact that a particular action may be described as 'legislative', in the sense that it produces a result which has the binding quality of law, will not lead the courts to draw the conclusion that the taking of that action is automatically subject to no requirement of the prior participation of those affected by it.

The courts have stressed that what is important for the purposes of what may be termed the 'legislative exception' to the rule of *audi alteram partem* is not the formal quality of a particular action, but rather its substance.[12] Accordingly, in order to qualify as 'legislative' for the purpose of being excluded from any requirement of a hearing, an action must exhibit the substantial qualities of a truly legislative act. Without embarking upon a lengthy discussion of the concept of 'legislation' and the meaning of the term 'legislative', it is suggested that the cases show that the two crucial characteristics here are those previously identified as being inherent in legislative action for the purposes of the present discussion: namely, that the action is general, in that it is directed towards a class rather than towards a particular individual, and that it is policy-based, in the sense that it moves upon wider considerations of the public good, rather than upon any factors specifically referrable to a given person.[13] In any event, conceptually impeccable or not, this is the general sense in which the term legislative is used in the present context by the courts,[14] and however much confusion it may provoke, it is of necessity adopted here.

Acceptance of this particular meaning of the term 'legislative action' has two significant practical consequences, which may usefully be noted at this point. First, an action taken which is formally legislative, in the sense that it has the binding quality of law, but which is substantially non-legislative, in the sense that it is neither general nor policy-based, will not be excluded from the requirement of a hearing by virtue of the rule discussed in this article. For example, a statutory rule removing a specific person from a specific office upon individual

12 See *e.g. Bates v. Lord Hailsham of St Marylebone and others* [1972] 3 All E.R. 1019, 1024 *per* Megarry J.; *Homex Realty and Development Co. Ltd v. Village of Wyoming* (1980) 116 D.L.R. (3d) 1, 25 *per* Estey, J., 9 *per* Dickson J.; *CREEDNZ Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172, 188-9 *per* Richardson J.

13 See *e.g. Minister for Industry and Commerce v. Tooheys Ltd* (1982) 42 A.L.R. 260, 265-6 *per* Bowen C.J.; de Smith's *Judicial Review of Administrative Action* (4th ed., 1980) 71-2; Wade, H. W. R., *Administrative Law* (5th ed., 1982) 733-4; Pearce, D. C., *Delegated Legislation in Australia and New Zealand* (1977) 1-2; Aronson, M. and Franklin, N., *Review of Administrative Action* (1987) 248-51

14 See e.g. *Bread Manufacturers of New South Wales and others v. Evans and others* (1982) 38 A.L.R. 93, 101–3 *per* Gibbs C.J.; *Wiswell et al. v. Metropolitan Corporation of Greater Winnipeg* (1965) 51 D.L.R. (2d) 754, 763 *per* Hall J.; *F.A.I. Insurances Limited v. the Honourable Sir Henry Arthur Winneke and others* (1982) 151 C.L.R. 342, 398 *per* Wilson J.; *kioa and others v. West and another* (1985) 159 C.L.R. 550, 619–20 *per* Brennan J.

grounds would not be truly legislative, and might well be subject to some requirement of a fair hearing.[15]

Secondly, and correspondingly, a given action may not have the formal quality of law, but may nevertheless be substantially legislative in the sense of being both policy-based and general. Such action would thus normally fall for exclusion from the *audi alteram partem* rule as constituting legislative action. An example here might be the adoption of an administrative policy by a government agency charged with the making of welfare payments to 'distressed' persons, which policy was to the effect that individuals in economic hardship because they had voluntarily resigned their employment did not qualify as 'distressed' persons. Such action would be 'legislative', in that it would be both general and policy-based. The above points made, however, it will be seen that the cases in which the requirement of a hearing has been excluded on the basis of the 'legislative exception' do indeed usually involve the making of formally legislative instruments. Nevertheless, what was important to the courts in these cases was not the fact that the instruments concerned possessed the formal quality of binding law, but rather their truly legislative (that is general and policy-based) character.

A final matter to be noted is that the mere fact that a statutory power is sufficiently broad to authorize the taking by an authority of truly legislative action (in the sense that the term is used in this article) will not preclude the requirement of some form of hearing in circumstances where that power is actually exercised in a given case in a substantively non-legislative fashion. The decisions of the courts show that what is important here is not the nature of the power involved, but the individual manner of its exercise.[16] Thus, to take a useful example, the making of a local government by-law effectively regulating the use of particular land in a particular way, on grounds relating specifically to the owner of that land, would not be characterized as legislative for the purpose of determining the applicability of any requirement of a hearing, merely because the power to make that by-law could also be resorted to in order to make instruments which were legislative in the true sense of that term.[17]

We may now turn to an examination of the cases in which the rule regarding legislative action has been expounded. That rule can be traced in a rather undeveloped form through the early part of this century, and into the latter half of the nineteenth century.[18] The earliest references to the rule are not detailed, are vague and are of no great utility in shedding light on its origin or rationale. Nevertheless, the general rule that a person affected by legislative action was not entitled to a hearing before the taking of that action would appear to have been

[15] For a different illustration of the same principle see *Homex Realty and Development Co. Ltd v. Village of Wyoming* (1980) 116 D.L.R. (3d) 1.

[16] *E.g. Bread Manufacturers of New South Wales and others v. Evans and others* (1982) 38 A.L.R. 93; *Wiswell et al. v. Metropolitan Corporation of Greater Winnipeg* (1965) 51 D.L.R. (2d) 754; *Dunlop v. Woollahra Municipal Council* [1975] 2 N.S.W.L.R. 446.

[17] *Homex Realty Development Co. Ltd v. Village of Wyoming* (1980) 116 D.L.R. (3d) 1.

[18] *Phillips v. Eyre* (1870) 6 Q.B. 1, 22 *per* Willes J.; *In re The Local Government Board: Ex parte the Commissioners of the Township of Kingstown* 16 L.R.Ir. 150, 157 *per* Palles C. B.; *R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Limited and others* [1924] 1 K.B. 171, 192 *per* Bankes L.J.

firmly established for at least the past forty years. Thus, in 1943, Jordan C.J. was able to endorse such a rule in a case concerning the making of an order fixing the price of milk, and betrayed no consciousness that he was breaking new ground in so doing.[19] Indeed, the correctness of such a rule was plainly viewed as being beyond all dispute.

Since that time, numerous cases have endorsed the general proposition that truly legislative action is subject to no requirement of a prior hearing. One of the better-known of these cases, already referred to in this article, was that of *Bates v. Lord Hailsham of St Marylebone and others*.[20] This case concerned the making of a general statutory order fixing the level of remuneration for solicitors. In denying that the making of such an order was predicated upon the giving of a hearing to those who would come within its terms, Megarry J. stated:

> I do not know of any implied right to be consulted or make objections, or any principle on which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack . . .; but what is important is not its form but its nature, which is plainly legislative.[21]

In Australia, statements to similar effect have emanated, on a number of occasions, from the High Court. In *Salemi v. Mackellar (No. 2)* Jacobs J. noted that the duty to act fairly (and so, in appropriate circumstances, to accord a hearing) did not arise unless the action in question directly affected the person concerned 'individually and not simply as a member of the public or a class of the public': such decisions were 'political' or 'policy' decisions, and not subject to judicial review.[22] Similar views were expressed by Wilson J. in *F.A.I. Insurances Ltd v. Winneke*,[23] where his honour stated that the requirement of a fair hearing could not be applied where decisions were 'of a legislative character or of a kind which affect the community as a whole or large sections of it'.[24] The basic proposition that action which could be characterized as being truly legislative was not subject to any of the requirements of natural justice was accepted by the Court in *Bread Manufacturers of New South Wales and others v. Evans and others*, although this acceptance was accompanied by warnings against being too ready to dispose of a case merely through the attachment of the label 'legislative', rather than through an analysis of the actual nature of the exercise of power involved.[25]

Finally, and most recently, in *Kioa and others v. West and another*, Brennan J. noted the general inapplicability of the rules of natural justice to the exercise of:

> . . . a statutory power of a strictly legislative nature . . . for the interests of all members of the public are affected in the same way by the exercise of such a power[26]

19 *In re Gosling* (1943) 43 S.R. (N.S.W.) 312, 318.
20 [1972] 3 All E.R. 1019.
21 *Ibid.* 1024.
22 (1977) 137 C.L.R. 396, 452.
23 (1982) 151 C.L.R. 342.
24 *Ibid.* 398.
25 (1982) 38 A.L.R. 93, and see especially 101-4 *per* Gibbs C.J., and 118-9 *per* Mason and Wilson JJ.
26 (1985) 159 C.L.R. 550, 620.

In the same case, Mason J. delivered a judgment to similar effect on this point, citing the words of Jacobs J. in *Salemi (No. 2)*,[27] and doubting the applicability of the rules of natural justice to decisions affecting the public generally, as opposed to those which affected particular individuals personally.[28]

Thus, it would seem clear that the courts recognize the existence of a broad rule to the effect that action which is truly legislative in character is immune from the requirements of natural justice in general, and from the requirement that a fair hearing be given in particular. It may be noted in connection with the judicial pronouncements referred to above that this exclusion is not based upon the formal status of legislative instruments; as previously has been suggested, it centres rather around the inherent characteristics of truly legislative action — the generality of application of that action, and its foundation in policy considerations.

This rule has also been recognized by writers in the field of administrative law, and has met with varying degrees of approval. The fourth edition of de Smith's *Judicial Review of Administrative Action* notes that the courts have not extended their enthusiasm for the implication of a requirement of a hearing from the administrative to the legislative field, and expresses some doubts as to whether such an approach has been entirely desirable.[29] Professor Wade acknowledges that courts have indeed followed this path, but displays no particular disquiet.[30] Craig also accepts that the courts have hitherto rejected the imposition of a hearing requirement in connection with the taking of legislative action, but is far from impressed by this course, and considers the question of what procedural requirements might properly be imposed in the legislative context.[31]

In Australia, Aronson and Franklin are of the view that while the mere classification of a function as 'legislative' or 'quasi-legislative' will not in and of itself preclude the imposition of a requirement of a hearing, any judicial extension of procedural fairness into the area of law and policy-making will be confined to certain special and narrowly confined circumstances.[32] Sykes, Lanham and Tracey accept that the requirement of a hearing will not be imposed in connection with a decision which affects large numbers of people, but suggest that a right to a hearing might exist where the affected class is sufficiently small.[33] What all these texts thus have in common is a view, based firmly upon the existing case law, that where a given action is truly legislative, in the sense of being addressed to large numbers of persons rather than to any particular individual, and of being based upon policy rather than personal considerations, there will be little (if any) chance of the courts bringing the requirement of a prior hearing into play. This view is what may be referred to for the purposes of this article as the 'legislative exception' to the fair hearing rule.

27 (1977) 137 C.L.R. 396, 452.
28 (1985) 159 C.L.R. 550, 584.
29 de Smith, *op. cit.* 181-2.
30 Wade, *op. cit.* 506-7.
31 Craig, P., *Administrative Law* (1983) 206, 216-9.
32 Aronson, M. and Franklin, N. *op. cit.* 94-5.
33 Sykes, E., Lanham, D. and Tracey, R., *General Principles of Administrative Law* (2nd ed., 1984) 148.

Before going on to consider the rationale of this exception, it is appropriate to note an important feature of the process by which the courts have gone about excluding any requirement of a hearing in connection with the taking of legislative action. Historically, the claim to such a hearing has been made as part (and a most important part) of a wider claim to natural justice.[34] As such, it could be rejected by a court in any particular case through the adoption of either one of two significantly different chains of reasoning.

On the one hand, the court could determine that, for whatever reason, the rules of natural justice were entirely inapplicable to a given example of legislative action. Were this first course to be followed, it would then become unnecessary for the court to consider the further question of what, on the assumption that natural justice did apply, was required by fairness in the way of a hearing. In other words, under this first approach, the exclusion of the rules of natural justice at the outset would mean that the court would never have to consider the question of what fairness would require in all the circumstances, of what degree of procedural protection would be appropriate in a given situation, after a careful weighing of the relevant interests of individual and society. All such questions would be merely speculative in light of the initial determination that natural justice did not apply.[35]

An alternative means by which a court might deny the applicability of any hearing requirement to a legislative action would be to hold that the rules of natural justice did apply — that a duty to treat an affected person fairly in all the circumstances did thus arise — but to go on to hold that this duty did not in the circumstances of the particular case require the giving of a hearing, or at least not the giving of a hearing in the sense in which that term is ordinarily used.[36] Under such an apporoach, the court does not simply avoid the question of what is fair. Rather, that court is still required to actively consider the issue of what is 'fair' in relation to a particular legislative action, and to ensure that its perception on this point is reflected in the degree of procedural protection which it is prepared to impose. However, in settling upon the appropriate degree of procedural protection, the court has a range of options available, from a full judicial-style hearing, virtually to 'nothingness'.[37] The important thing, however, is that regardless of

[34] To the extent that any concept of fairness is different in nature from that of natural justice (a question which is clearly beyond the scope of this article), this statement needs to be modified. A claim to a hearing in connection with action which might properly be characterized as being truly legislative has been asserted under the specific rubric of 'fairness' in a number of cases: see *e.g. R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299; *Gardner and another v. Dairy Industry Authority of New South Wales* [1977] 1 N.S.W.L.R. 505. However, a detailed analysis of the complex relationship between fairness and natural justice is not part of this work, and for present purposes they are treated essentially as being one and the same thing.

[35] Historically, this threshold test has been much favoured by the courts as a means of excluding the requirement of a hearing. However, the approach outlined in *Kioa and others v. West and another* (1985) 159 C.L.R. 550 would seem to indicate that the High Court will be less inclined in the future to rule against the applicability of natural justice at the outset: see especially the judgment of Mason J. at 584, and see Allars, *op. cit.* 313, 321.

[36] It would seem that whatever may once have been thought to be the position, the content of the *audi alteram partem* rule may (in an appropriate case) be such that no hearing at all will be required. However, this position will only be reached after the question of what is fair in the circumstances has been fully addressed; see *Kioa and others v. West and another* (1985) 159 C.L.R. 550, 587 *per* Mason J., 615-6 *per* Brennan J. and 633 *per* Deane J.

[37] *Ibid.*

the degree of procedural protection which it ultimately decides to impose, the court must address the question: what is fair? As readily can be seen, there is a very great difference here, both in terms of the task before a court, and in terms of its mode of proceeding, according to which method it adopts in considering the question of whether procedural protections are to be implied in connection with the taking of a given legislative action.

The point to note at this stage, is that as regards legislative action, the courts have almost invariably chosen the first line of reasoning as a means of reaching the conclusion that no requirement of a hearing exists.[38] Thus, the giving of a hearing to a person affected by legislative action is excluded not on the basis that, all things considered, fairness does not require that a hearing be given, but rather on the basis that any requirement of hearing is to be ruled inapplicable from the outset, without the question of fairness ever having been substantively addressed. For all the courts know, in any given situation this might as a matter of fact be entirely unfair — but the question of fairness does not as such arise. Thus, entirely freed from the need to address the substantive issue of fairness, the courts are likewise relieved from any obligation to consider whether a balancing of the relevant individual and social interests might not produce the result that fairness would require the imposition of at least some limited degree of procedural protection, even were that to involve something which would be a good deal less than what might be termed a 'full hearing'.[39]

This approach to the question of the necessity of a hearing in the case of legislative action would appear to have survived the ongoing metamorphosis of natural justice into 'procedural fairness', tentatively achieved in *Kioa*.[40] It may be noted at this point that it will be argued elsewhere in this article that a serious deficiency in the approach of the courts to legislative action is this tendency to rule out any question of a hearing at this 'applicability stage', rather than after having carried out a careful evaluation of what would be fair in all the circumstances.[41] For immediate purposes, however, this methodology of the courts is simply noted.

By way of conclusion to this section of the article, it may be stated confidently that there exists a well-recognized general rule that no requirement of a prior hearing will be attached by the courts to an action which is substantively legislative — that is, to an action which affects individuals only as members of a class to which the rule or standard which it embodies is addressed, and which is based upon policy considerations as to what the public good requires in the relevant

[38] *E.g. Bates v. Lord Hailsham of St Marylebone and others* [1972] 3 All E.R. 1019; *Gardner and another v. Dairy Industry Authority of New South Wales* [1977] 1 N.S.W.L.R.; *Attorney-General of Canada v. Inuit Tapirisat of Canada* (1980) 115 D.L.R. (3d) 1; *CREEDNZ Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172; *Bread Manufacturers of New South Wales and others v. Evans and others* (1982) 38 A.L.R. 93.

[39] One result of the adoption of this approach has been that the courts have not had to face the question of whether fairness might, for example, require some degree of essentially non-adjudicatorial participation, which would not involve a hearing in the traditional sense, such as a measure of consultation; see *infra* 592–3, 598.

[40] (1985) 159 C.L.R. 550, 585 *per* Mason J., 619 *per* Brennan J.

[41] *Infra* 596–7.

circumstances, rather than upon considerations personal to any particular individual.[42] Judicial warnings against the exclusion of a right to a hearing merely on the basis of having labelled a given function as legislative notwithstanding,[43] it is clear that this rule continues to apply in Australian administrative law to the present day.

2. *RATIONALE OF THE RULE*

It is not possible to formulate any single cohesive proposition and to regard it as embodying the rationale for the exclusion of legislative action from the requirement of a hearing by the courts. Rather, one can identify a number of varying arguments resorted to by the courts on different occasions to justify, alone or in combination with other grounds, the conclusion that legislative action is not subject to any requirement that a prior hearing be given to those whom it affects. It must be appreciated that the different grounds or reasons outlined here do not each appear in every judgment which denies the applicability of the hearing requirement to legislative action. Varying grounds are relied upon in different ways in different judgements, and these grounds frequently overlap to a confusing extent. What this section of the article attempts is a statement of the main themes which emerge from the cases. No attempt is made at this stage to criticize those themes; this is done in a later section of the article.[44]

At least six main grounds have been relied upon by the courts as a basis for excluding legislative action from the scope of the hearing requirement of the rules of natural justice.

The first of these focusses not so much upon the theoretical question of whether or not the courts *should* imply the requirement of some sort of hearing in relation to legislative action, but rather upon the suggestion that the role of the courts in implying procedural protections has historically been confined to situations possessing characteristics not to be found in legislative action. On this level, the argument is not about the desirability of the courts' requiring that hearings be given in connection with legislative action; it simply comprises an observation that such a course would factually involve a radical extension by the courts of their supervisory role in the implication of minimal standards of procedural propriety.

In its strongest, and essentially outdated form, this argument may suggest that the courts will only enforce the requirement of a hearing where an authority is disposing of something in the nature of a *lis inter partes*,[45] which will clearly not be the case in the context of legislative action. The disposition of a *lis inter partes*, as embodying the notion of a suit between parties to be judged by an

42 For a discussion of the limitations of or exceptions to this rule see *infra* 582–6.

43 *E.g. Bread Manufacturers of New South Wales and others v. Evans and others* (1982) 38 A.L.R. 93, 102-3 *per* Gibbs C.J.; *Charlton v. Members of the Teachers Tribunal* [1981] V.R. 831, 845 *per* McGarvie J.; *F. E. Jackson and Company Limited v. Price Tribunal (No. 2)* [1950] N.Z.L.R. 433, 447 *per* Hutchison J.

44 *Infra* 590–96.

45 *E.g. In re Gosling* (1943) 43 S.R. (N.S.W.) 312, 318 *per* Jordan J. The relevance of a *lis inter partes* or something analogous thereto is acknowledged in *Bread Manufacturers of N.S.W. and others v. Evans and others* (1982) 38 A.L.R. 93, 116-9 *per* Mason and Wilson JJ.; *Homex Realty and Development Co. Ltd v. Village of Wyoming* (1981) 116 D.L.R. (3d) 1, 25 *per* Estey J.

impartial adjudicator upon proofs of reasoned evidence presented by the parties themselves, represents the paradigm of judicial, or at least of quasi-judicial behaviour.[46] To say, therefore, that a hearing need not be given in the case of legislative action because that action does not involve anything in the nature of the disposition of a *lis inter partes* is to come perilously close to saying that the applicability of the rules of natural justice is confined to bodies discharging a judicial or quasi-judicial function. However, it has been abundantly clear, at least since *Ridge v. Baldwin and others*,[47] that this proposition is not correct, and that the existence of a *lis inter partes* and of a body properly characterizable as exercising judicial or quasi-judicial power are not indispensable requirements for the application of rules of natural justice.[48]

In more recent cases, the argument outlined above has been put in a somewhat milder, and rather more convincing form. While it is acknowledged that the rules of natural justice may apply in circumstances which involve neither the existence of a *lis inter partes*, nor the exercise of judicial or quasi-judicial power, it is argued that the further away one moves from such a situation, the less prepared the courts will be to intervene and to require the provision of a hearing. It is then suggested that the extension of the requirement of a hearing to legislative action would involve so radical a departure by the courts from the position which they currently occupy upon the question of the circumstances which attract the operation of the *audi alteram partem* rule that it could not be contemplated. The flavour of this argument runs through a great many of the cases concerning legislative action.[49] It may, perhaps, be crudely summarized as being to the effect of 'This would be going a great deal further than we have hitherto been prepared to go'. As suggested above, this argument is essentially a statement of past practice and precedent, rather than a proposition of principle. Its correctness on its own terms is considered elsewhere in this article.[50]

The second major argument, frequently resorted to by the courts, is most certainly based upon a proposition of principle. It turns upon the fact that, as has been noted earlier,[51] legislative action embodies a decision of policy. This fact has provided the courts with two grounds for refusing to require the procedural protection of a hearing in relation to the taking of such action. The first, is that to do so would involve them in reviewing decisions of policy, and this they will not do. The suggestion here is that by imposing procedural requirements in respect of the taking of legislative action the courts would be trespassing into the area of policy, and into the realm of legislative, rather than judicial authority.[52]

[46] See de Smith, *op. cit.* 83-5; *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd* [1949] A.C. 134.

[47] [1964] 1 A.C. 40.

[48] See de Smith, *op. cit.* 83-5; Craig, *op. cit.* 258; Wade, *op. cit.* 449; see also *New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal and others* [1957] N.Z.L.R. 167, 205 *per* Cooke J.

[49] *E.g. Bread Manufacturers of New South Wales and others v. Evans and others* (1982) 38 A.L.R. 93, 116-9 *per* Mason and Wilson JJ.; *Homex Realty and Development Co. Ltd v. Village of Wyoming* (1981) 116 D.L.R. (3d) 1, 25 *per* Estey J.

[50] *Infra* 590.

[51] *Supra* 571–2.

[52] See *e.g. Salemi v. Mackellar* (1977) 137 C.L.R. 396, 452 *per* Jacobs J.; *F.A.I. Insurances Ltd v. Winneke* (1982) 151 C.L.R. 342, 398 *per* Wilson J.; *White v. Ryde Municipal Council* [1977] 2 N.S.W.L.R. 909, 912 *per* Moffit P.

The second argument is clearly closely connected to the first, though it is less often expressly adverted to by the courts, as opposed to the commentators.[53] It tends to move through the cases under cover of vague propositions as to the extreme inadvisability of the courts seeking to impose their perceptions of procedural fairness in connection with the making of policy decisions. This argument is essentially comprised in the proposition that, quite apart from any questions concerning the basic constitutional propriety of the courts imposing procedural requirements upon the taking of legislative action, judges are sufficiently ill-suited to the task of devising such requirements by virtue of their training, experience and outlook, as to be incapable of performing that task effectively.

Here, it may be urged that what the judges are familiar with are the procedural requirements appropriate to the resolution of disputes within their own mode of operation, the adjudicatorial mode, involving as it does the impartial resolution of disputes between particular parties on grounds personal to those parties, and upon the basis of material put forward by those parties.[54] This sphere of activity is remote from that involving generally applicable, policy-based legislative activity, and the judges could not be reasonably expected to devise procedural protections which would operate appropriately in a sphere so far removed from their own. Again, the persuasiveness of each of these arguments is considered elsewhere.

The third argument is essentially a practical one, and derives from the nature of legislative action as being directed to a frequently wide class of persons, rather than to any particular individual. A recurrent justification in the cases for refusing to require that a hearing be given in such circumstances is that it would simply not be feasible for the authority in question to hear all those affected by the action concerned.[55] To require an authority whose action will affect large numbers of persons to hear each of those persons before acting would, say the courts, be patently absurd.[56] It would be astronomically costly, time-consuming and generally wasteful of scarce public resources. Moreover, the implication of a requirement of a hearing rests ultimately upon the intention of Parliament, and Parliament in conferring upon a subordinate authority the power to take legislative action could not possibly have intended such a preposterous result.

A fourth argument which is occasionally raised, and which is obviously related to some of the arguments already noted, is that accountability for procedural impropriety or unfairness which occurs in connection with the taking of legislative action is to be exacted not by the courts, but by other bodies.[57] Logically, the

[53] *E.g.* de Smith, *op. cit.* 182; Loughlin, M., 'Procedural Fairness: A Study in the Crisis of Administrative Law' (1978) 28 *University of Toronto Law Journal* 215.

[54] See generally Fuller, L., 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; Galligan D.J., *Discretionary Powers* (1986) 340-1.

[55] See *e.g. Gardner and another v. Dairy Industry Authority of New South Wales* [1977] 1 N.S.W.L.R. 505, 518-9 *per* Hutley J.A., 534 *per* Samuels J.A.; *White v. Ryde Municipal Council* [1977] 2 N.S.W.L.R. 909, 921 *per* Reynolds J.A. One suspects that this consideration has also been an unarticulated factor in many other decisions.

[56] *Ibid.*

[57] See *supra* n. 52; and see *White v. Ryde Municipal Council* [1977] 2 N.S.W.L.R. 909, 913 *per* Moffit P.; *Essex County Council v. Ministry of Housing and Local Government* (1967) 18 P.Sc.R. 531, 539 *per* Plowman J.; *Dunlop v. Woollahra Municipal Council* [1975] 2 N.S.W.L.R. 446, 477 *per* Wootten J.

identity of these avenging organs varies according to the identity of the body taking the legislative action of which complaint is made. In the case of essentially legislative action taken by a Minister under a statutory power, it might be Parliament.[58] The same could be true in the case of action by a statutory authority. Where the relevant legislative action emanates from an elected body, such as a local council, the suggestion may be made that the correcting authority is the collective body of electors, and that the remedy lies not through the courts but through the ballot box.[59] To whatever factual circumstances it may be applied, the essence of the argument is that redress for procedural impropriety in connection with the taking of legislative action lies not with the courts, but with some non-judicial authority.

The fifth argument, like the third, seeks to derive validity from the fact that legislative action is policy-based. It stresses that a decision based on policy is centred upon considerations of the public good, rather than upon considerations relevant to any particular individual. Consequently, what is the point of requiring an authority to hear what any individual has to say on the question of whether or not a particular legislative action should be taken? Put bluntly, what could he or she say which could possibly have any relevance to or influence upon the policy-based decision of the authority?[60]

The sixth argument, which is raised comparatively infrequently, rests upon a supposedly relevant analogy between the position of Parliament when exercising its supreme legislative power, and the position of a subordinate authority when it takes legislative action. Each, it is (quite indisputably) maintained, is taking action which is essentially legislative in nature. It is clear that an Act of Parliament cannot be challenged on the basis that it was not preceded by the giving of a hearing to those whom it would affect. Consequently, it is suggested, the same conclusion must follow in respect of the taking of legislative action by subordinate authorities.[61]

Finally, a rather tentative suggestion would occasionally seem to be raised that there exists something distinctive about the way in which the interests of a person are affected by legislative action which justifies the conclusion that a hearing will not be required. This suggestion is usually contained in a statement to the effect that interests are not 'directly' or 'immediately' affected by legislative action.[62] On one interpretation, these expressions might be intended merely to signify that a person will be affected by such action not as an individual, but as a member of a class. However, it may be that they are intended to convey some suggestion that the interference wrought by a legislative action with the interests of a person is not so substantial as that achieved by an administrative or quasi-judicial

[58] *Essex County Council v. Ministry of Housing and Local Government* (1967) 18 P.Sc.R. 531, 539 *per* Plowman J.

[59] *Dunlop v. Woollahra Council* [1975] 2 N.S.W.L.R. 446, 477 *per* Wootten J.

[60] *E.g. Gardner and another v. Dairy Industry Authority of New South Wales* [1977] 1 N.S.W.L.R. 505, 534 *per* Samuels J.A.

[61] *E.g. In re Gosling* (1943) 43 S.R. (N.S.W.) 312, 318 *per* Jordan C.J.; see also Flick, G., *Natural Justice* (1984) 38-9.

[62] *E.g. Kioa and others v. West and another* (1985) 159 C.L.R. 550, 584 *per* Mason J.; *Gardner and another v. Dairy Industry Authority of New South Wales* [1977] 1 N.S.W.L.R. 505, 534 *per* Samuels J.A.

decision, or that the interests so interfered with are in some way different, and less worthy of protection. For these reasons, this suggestion must be noted and addressed.

These, then, are the major justifications most commonly advanced by the courts for declining to imply a right to a hearing in the case of legislative action. As will readily be seen, some of these justifications are undeniably vague and they likewise show a clear tendency to shade into one another. Nevertheless, taken together, they constitute the ground upon which the courts have chosen to stand in excluding legislative action from any requirement of a hearing. A critical examination of these justifications will be undertaken in that section of this article which assesses the question of whether the exclusion by the courts of the requirement of a hearing from the field of legislative action is or is not appropriate.[63] For now, it is appropriate to briefly summarize the seven major justifications advanced by the courts for the non-applicability of the hearing requirement to the taking of legislative action. They are:

1. that to require a hearing would be to radically extend the circumstances in which the courts have hitherto been prepared to imply such a requirement;
2. that to do so would be inconsistent with the nature of legislative action as comprising a policy decision, both in the sense that the courts should not review policy, and in the sense that they are ill-equipped to devise procedural protections appropriate to the making of policy decisions;
3. that it would be impossible for an authority to give a hearing to all those affected by its legislative action;
4. that the remedy for procedural impropriety or unfairness in the taking of legislative action lies with bodies other than the courts;
5. that there is nothing that an affected individual could say that would affect the decision of an authority to take a given legislative action;
6. that legislative action taken by Parliament is subject to no requirement of a hearing, and consequently, that the same conclusion follows in relation to the taking of legislative action by any other authority;
7. that something concerning the manner in which legislative action affects the interests of those to whom it applies, or something in the nature of the interests thus affected, justifies the conclusion that any requirement of a hearing is inappropriate.

3. *LIMITS UPON THE APPLICATION OF THE RULE*

To this point, what has been done is to formulate a statement of the general rule that a hearing will not be required to accompany the taking of legislative action, and to isolate the major grounds upon which the courts have relied in establishing that general rule. Thus far, the rule itself has been presented as being essentially absolute within its potential field of operation. However, it may now be noted that the cases do suggest the existence of certain limits or exceptions to the rule, which have had the effect of requiring that some opportunity of participation be afforded to affected persons before the taking of legislative action, though admittedly in very limited circumstances.

63 *Infra* 590–96.

It must be stressed in this connection that it is not possible to isolate a series of well-defined exceptions to the rule that a hearing will not be required in the case of legislative action. Rather, one can identify a number of factors which would appear to influence the courts in deciding whether or not to depart from the general rule. In any particular case, the presence of all or some of these factors may prompt the court to require that the taking of the action in question be accompanied by some form of hearing. It may be noted, of course, that it is always open to Parliament to pre-empt the decision of the courts on this point by imposing a statutory requirement of a hearing in connection with the taking of action which is clearly legislative. The matters outlined below are those which have influenced the courts in implying a requirement for a hearing where no such statutory direction has been given.

The first matter which may be remarked upon is the very obvious one that in every case in which the courts have required that legislative action be accompanied by some form of hearing, the person claiming the right to that hearing has suffered some special affection of his or her interest by that action, beyond that which might be suffered by a member of the wider public. Thus, in *Bread Manufacturers of New South Wales and others v. Evans and others*,[64] the High Court was prepared to imply a right to a hearing in certain circumstances on the part of manufacturers of bread affected by an order fixing the price of that commodity. Likewise, in *New Zealand Licensed Victuallers Association of Employers v. Price Tribunal and another*,[65] an association representing those who sold draught beer at off-licenses was held to be entitled to make submissions before an order was made which set the price at which draught beer could be sold. A number of other illustrations of this point exist.[66]

It would appear that in no case has a person with an interest no greater than that of an ordinary member of the public been held to be entitled to a hearing in connection with the taking of legislative action. For example, there is no equivalent to the *Evans* decision from the consumer's point of view, wherein a vexed consumer of a product has been accorded a right to a hearing before the making of an instrument setting the price of that product. It must be noted that the mere fact that a person is specially affected by a legislative action does not mean that he or she will be entitled automatically to a hearing — far from it.[67] Rather, this factor tends to operate as a *sine qua non*.

A second, and closely allied factor, revolves around the width of the class affected (or specially affected) by the legislative action in question. The narrower the class affected in the relevant way, the more likely are the courts to imply some requirement of procedural protection. Thus, the specially affected class in

64 (1982) 38 A.L.R. 93.

65 [1957] N.Z.L.R. 167.

66 *E.g. Charlton v. Members of the Teachers Tribunal* [1981] V.R. 831; *F. E. Jackson and Co. Ltd v. Price Tribunal (No. 2)* [1950] N.Z.L.R. 433; *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299.

67 For example, it might be argued that the association of solicitors concerned in *Bates v. Lord Hailsham of St Marylebone and others* [1972] 3 All E.R. 1019 was subject to a sufficient degree of 'special affection' by the order concerned to be afforded a hearing.

Evans[68] (bread manufacturers) and *New Zealand Licensed Victuallers*[69] (sellers of draught beer) was comparatively small. The same may be said of the relevant class in *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association and Another*,[70] which was comprised effectively of Liverpool's taxi drivers. Significantly, in all three of these cases, the concerned class was conveniently able to put its concerns before the authority involved through an organized association. This fact highlights the most obvious reason underlying the courts' willingness to relax their rule against requiring a hearing in the context of legislative action where the specially affected class is comparatively small, and most particularly, where it is also well organized. In such circumstances, the practical difficulty of hearing all of those who wish to be heard will be greatly reduced, thus removing one objection to the grant of a hearing.

This leads on to the next point. It would seem clear that the likelihood of a court implying some right to a hearing in connection with the taking of legislative action will be correspondingly increased according to the degree to which the giving of a hearing to the class affected is, in the broadest sense of the word, practicable. This has a number of aspects, and to some extent (though not entirely) covers the ground represented by the two factors previously detailed. Relevant will be the size of the affected class; the extent to which the interests of those seeking a hearing may be easily recognized;[71] whether or not some umbrella body or association exists to aggregate and present the arguments of those affected;[72] and also the extent to which the relevant legislative action is taken within a context in which a pre-existing machinery can be utilized to conduct the hearing claimed.[73] Most of the cases in which a hearing has been required in respect of legislative action, and particularly those which occurred in the context of the making of price-fixing orders,[74] have exhibited these features to a high degree.

A factor which has constantly influenced the courts in deciding whether or not to imply a right to a hearing in relation to the taking of legislative action has been the extent to which the action in question can be regarded as bearing some similarity to the disposition of a *lis inter partes*, and thus to the functioning of a quasi-judicial body. As has already been noted,[75] the taking of action addressed generally to a class and based upon policy rather than individual considerations can never in any real sense fit within the confines of the term 'quasi-judicial', or involve the disposition of a true *lis inter partes*. Nevertheless, some situations of

68 (1982) 38 A.L.R. 93.
69 [1957] N.Z.L.R. 167.
70 [1972] 2 Q.B. 299.
71 See *supra* 575.
72 A factor which was present in such cases as: *Bread Manufacturers of New South Wales and others v. Evans and others* (1982) 38 A.L.R. 93; *New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal and others* [1957] N.Z.L.R. 167; *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association and another* [1972] 2 Q.B. 299.
73 *E.g. Charlton v. Members of the Teachers Tribunal* [1981] V.R. 831; *F. E. Jackson and Co. Ltd v. Price Tribunal (No. 2)* [1950] N.Z.L.R. 433.
74 *E.g. New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal and others* [1957] N.Z.L.R. 167; *F. E. Jackson and Co. Ltd v. Price Tribunal (No. 2)* [1950] N.Z.L.R. 433.
75 See *supra* 578–9.

legislative action do approach this scenario far more closely than others. This is most obvious where the body exercising authority is described as something such as a 'Tribunal', and habitually conducts itself through the receipt of submissions from interested 'parties'.[76] It may be contrasted with the more typical situation where a body presents no other appearance than that of discharging a legislative function and normally operates independently of any formal practice of input by those who are affected by its decisions.

In such circumstances, where a body which operates by way of the making of legislative orders nevertheless presents a substantially 'judicialized' picture, in terms of its habitual mode of proceeding, nomenclature and/or composition, the courts will be more inclined to reach the conclusion that it is legally bound in a given case to afford the opportunity of a hearing. In reaching such a conclusion it is clear that the courts will be particularly eager to discern some statutory intention that this result was intended by Parliament.[77] The considerations which will impel a court to the conclusion that a body taking legislative action is nevertheless functioning in a manner analogous to that of a quasi-judicial body vary greatly from case to case, and are sometimes rather tortuously articulated.[78] Nevertheless, this is an important factor in the application by the courts of a hearing requirement to legislative action, and has been particularly evident in the context of price-fixing.[79] It must be understood that this factor frequently applies co-incidentally with those previously considered.

A further matter pertinent here is the presence of any statutory indicia in the Act conferring power upon the authority in question. Of course, Parliament itself may expressly require that a hearing be given in connection with the taking of legislative action.[80] Quite apart from this possibility, however, is the situation where the courts can glean a rather more vague intention on the part of Parliament, garnered from sundry expressions used in the parent legislation. The tendency to find such indicia would appear to be particularly strong where the courts have already determined that the body in question is engaged in a task analogous to the disposition of a *lis*.[81]

It would also seem that there is some authority to the effect that where a body has previously given an undertaking not to take particular legislative action without first affording the opportunity of a hearing to an affected class, it will not be suffered to reneg upon that undertaking. This would seem to be the message conveyed by *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association and Another*,[82] although the facts of that case were undeniably

[76] *E.g. New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal and others* [1957] N.Z.L.R. 167, and see the comment by Wade in [1957] 15 *Cambridge Law Journal* 117; see also *Charlton v. Members of the Teachers Tribunal* [1981] V.R. 831.

[77] *E.g. New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal and others* [1957] N.Z.L.R. 167, 203-4 *per* Cooke J.

[78] *E.g. Charlton v. Members of the Teachers Tribunal* [1981] V.R. 831; *Perron and another v. Central Land Council* (1985) 60 A.L.R. 575.

[79] See *supra* n. 74.

[80] Clearly, in such a case, the question of the implication by the courts of a requirement of a hearing will not arise.

[81] See *supra* n. 76. For example, in *F. E. Jackson and Co. Ltd v. Price Tribunal (No. 2)* [1950] N.Z.L.R. 433, the fact that the authority in question was termed a 'tribunal' in the parent act was considered relevant (*per* Hutchison J. at 448).

[82] [1972] 2 Q.B. 299.

exceptional,[83] and a number of the other factors discussed above were also admittedly present.[84] Nevertheless, the *Liverpool Corporation* case does apparently stand for the proposition that where an authority would not otherwise be required to give a hearing in connection with the taking of legislative action, it may be compelled to do so on the basis of its own express undertaking.

It may also be the case that an authority taking legislative action could be obligated to afford a hearing on the basis that its past practice of granting a hearing in similar circumstances gave rise to a legitimate expectation that this practice would be followed in the future, even where no other legal requirement for the provision of a hearing could be said to exist. This possibility would derive some support from the decision of the House of Lords in *Council of Civil Service Unions and others v. Minister for the Civil Service*,[85] where an Order-in-Council affecting a large number of persons and based on policy considerations was assumed on the reasoning outlined above to be amenable to a requirement that a hearing be given, subject to (presently irrelevant) considerations pertaining to national security.[86] Similar considerations would also seem to have been present, at least in a vestigial form, in some of the decisions where 'legislative' bodies were held to be discharging functions analogous to the quasi-judicial, partly on the basis of an examination of their usual mode of operation.[87]

Finally, an entirely negative factor may usefully be noted. The identity of the particular body taking legislative action may influence the court against imposing a requirement that a hearing take place. This will occur where the nature of the body is such that the court considers it inherently implausible that Parliament would predicate the taking of legislative action by that body upon the giving of a hearing.[88]

This concludes a necessarily brief outline of the factors which may influence a court to impose a requirement of a hearing in relation to the taking of a particular legislative action. It must be appreciated that these factors are closely interrelated, and will usually be applied in tandem by the courts. Despite their occasional utilization, however, the basic position remains as indicated in the first section of this article: the general rule is that no hearing will be required to be given in connection with the taking of legislative action. The limitations outlined above have been applied so as to require the giving of a hearing in the case of legislative action only in comparatively rare and isolated instances.

4. *CRITIQUE OF THE RULE*

In assessing the validity of the rule concerning legislative action, three basic points will be made. The first is that quite independently of any criticism which

83 See Evans, J., 'The Duty to Act Fairly' (1973) 36 *Modern Law Review* 93, 93-5.
84 For example, the relevant class was small, specially affected and represented by an association.
85 [1985] 1 A.C. 374.
86 *Ibid.* 399-401 *per* Lord Fraser; 411-2 *per* Lord Diplock; 416-7 *per* Lord Roskill.
87 *E.g. Charlton v. Members of the Teachers Tribunal* [1981] V.R. 831.
88 *E.g. Attorney-General of Canada v. Inuit Tapirisat of Canada et al.* (1980) 115 D.L.R. (3d) 1, 15 *per* Estey J. in relation to the Canadian Federal Executive Council; see also *CREEDNZ Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172, 177 *per* Cooke J. regarding the New Zealand Executive Council.

may be made of the particular justifications advanced by the courts for its development, certain basic and essentially abstract considerations do exist which suggest the general desirability of affording the opportunity of some form of hearing to those affected by legislative action. These considerations are too often forgotten amid the labyrinthine maze of the law relating to natural justice or procedural fairness, and should be kept firmly in mind in the present context.

The second is that upon close analysis, the justifications usually advanced by the courts for excluding the right to a hearing in connection with the taking of legislative action, while reflective of some valid concerns, are by no means as convincing as might at first be assumed. This fact is of particular significance in view of the existence of the general considerations previously mentioned which are supportive of a right to a hearing in this context.

The third, and final point, is that whatever admitted degree of validity may be possessed by the arguments raised by the courts, they should not be resorted to in order to justify the conclusion that the rules of natural justice/fairness are entirely inapplicable to the taking of a particular legislative action, as is presently the case.[89] Rather, their effect should lie in determining the content of the procedural protection required by those rules in the relevant circumstances.

There are at least four essentially abstract considerations which would suggest the general desirability of persons who are affected by legislative action being permitted to put their views before the relevant authority prior to the taking of the action concerned. They are quite simple concepts, and may be stated comparatively briefly. It is not argued that the existence of these factors alone automatically necessitates the conclusion that a hearing should be afforded in every circumstance before the taking of legislative action. Rather, it is suggested that their presence requires that a comparatively powerful case be mounted before the usual total exclusion of the hearing requirement in the context of legislative action may be justified.

The first of these rather humble, but undeniably important considerations, relates to the practical effect of legislative action upon those who come within its terms. Essentially, this effect will be precisely the same as it would have been had the person concerned been the subject of an entirely individual decision to the same end,[90] the taking of which decision would (assuming it satisfied the other relevant criteria) certainly have been subject to the requirement of a hearing. This may be illustrated by a hypothetical example. The practical difference, from the point of view of the lay object of the exercise of a power, between being told 'You are to have your licence as a street vendor withdrawn because we believe that it is inappropriate that you continue to hold such a licence', and being told 'You can no longer operate as a street vendor because we have passed a by-law prohibiting the operations of all such persons', is nil. Questions relating to the motivation and form of exercise of the power being put aside, its practical effect upon the individual concerned is identical: he may not operate as a street

[89] See *supra* 576–7.

[90] See *Guyot and another v. Evans and others* [1980] 1 N.S.W.L.R. 636, 672 *per* Lee J.; *New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal* [1957] N.Z.L.R. 167, 202 *per* Cooke J.

vendor; his livelihood is, to that extent, destroyed. Yet in the one case, he will ordinarily be entitled to a hearing, in the other not. This identity of practical effect is clearly relevant in any consideration of the question of whether or not some form of hearing should attend the taking of legislative action.[91]

The second consideration to be borne in mind, and one which is closely related to the first, revolves around the perception of relative fairness which will be created in the mind of a person affected by the taking of legislative action. One of the fundamental objects of the rules of natural justice/fairness must be to ensure that the object of the exercise of a power believes that he or she has been treated fairly in all the circumstances of the case. Such an object is perhaps seen most clearly in relation to the rule against bias, but it clearly underlies the hearing rule as well.[92] This aspect of natural justice may also be seen to have a societal, as well as an individual aspect. Just as the rules of natural justice are directed towards ensuring an individual perception of fairness in relation to a given decision, so they are intended to promote a wider societal perception of fairness in relation to decision-making generally.

Applying this in the context of the taking of legislative action, it is not difficult to reach the conclusion that particular individuals or groups of individuals might quite justifiably feel that they had been treated most unfairly if they were substantially affected by legislative action without having received any opportunity whatsoever to participate in the making of the decision to take that action. Society at large might share this impression. In any event, the mere fact that the activities of all street vendors were prohibited in a given case, as opposed to those of a particular street vendor (to continue the example), would not necessarily serve to displace any such impression of unfairness at either the individual or the societal level. The point being made here is not that this consideration immediately mandates the conclusion that fairness requires all legislative action to be accompanied in every case by the giving of a full hearing. Rather, it is suggested that one of the underlying rationales of natural justice might well support the proposition that the exclusion of all forms of participation in such cases should not lightly be undertaken.

A third consideration relates to the place held in our democratic society by the concept of participation in the taking of decisions which affect one. It may be quite plausibly suggested that this concept of participation, whether by way of a hearing or some analagous proceeding, is a value which lies at the very heart of that system. As such, it should not readily be excluded from a particular class

[91] There is one category of legislative action where the effect may be slightly different. In the case both of legislative action which has the force of law and of an individual decision made by a competent authority, a person who is the object of that action or decision will be immediately affected thereby. However, a mere administrative policy (which may for the purposes of this article fall within the category of legislative action) cannot be automatically dispositive of cases in the same way: *R. v. Port of London Authority; ex parte Kynoch Limited* [1919] 1 K.B. 176. Practically speaking, however, the distinction is likely to be of little importance to a person who falls squarely within the terms of such a policy.

[92] *Cf.* Aronson and Franklin, *op. cit.* 92; and see generally: Macdonald, R., 'Judicial Review and Procedural Fairness in Administrative Law' (1979) 25 *McGill Law Journal* 523 and (1980) 26 *McGill Law Journal* 4; Galligan, D.J., *Discretionary Powers* (1986) 327-5.

of cases, or at least, not readily be held not to be a legal incident of the exercise of power in such cases. As Tribe remarks:

> . . . the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is to be done with one.[93]

As has been seen, legislative action can determine quite as firmly as individualized action 'what is to be done with one'. Indeed, the fact that legislative action can determine the fates of large numbers of persons rather than the fate of only one individual might well be thought to underline a particular need for the application of the 'presumption of participation', as it has been called.[94] Once again, it does not follow from this that there cannot be countervailing considerations, theoretical or practical, which lead to the conclusion that in the case of a particular legislative action, no degree of participation may be permitted. What does follow, however, is the conclusion reached in respect of the preceding two considerations addressed: that it cannot simply be assumed that no degree of participation should be required in respect of the taking of action which affects the rights and interests of persons, merely because that action is directed to no particular individual and is policy-based. Compelling reasons in a particular case may necessitate such a conclusion, but it should not be reached by way of the application of some general rule.

The final consideration here turns upon the fact that a major purpose of the rules of natural justice/fairness in requiring that a hearing be given is to improve the quality of decision-making. The central idea is that the giving of a hearing will ensure that the decision-maker is armed with all relevant information upon which to base his or her ultimate decision.[95] This remains equally true of the making of legislative decisions as of individual decisions, unless one subscribes to the view that individuals affected by legislative action as members of a class cannot possibly have any information to offer which may be relevant to the taking of the action in question. This proposition is considered elsewhere in this article,[96] but it is worth noting unequivocal dissent at this point. A person who would be affected by the taking of proposed legislative action may choose to argue against the course of action involved just as much by the presentation of cogent and rational argument against its utility as by advancing essentially irrelevant pleas for special consideration. Once again, in a purely abstract sense, participation does not here present itself as being fundamentally inconsistent with the taking of legislative action.

To summarize the argument to this point, what these four general considerations reveal is a picture suggesting significant theoretical grounds for the imposition of participatory procedures in relation to the taking of legislative action. These grounds are, however, necessarily subject to being overcome by specific

[93] Tribe, L., *Constitutional Law* (1978) 503, as quoted in Galligan, D.J., *Discretionary Powers* (1986) 333.

[94] Galligan, D.J., *Discretionary Powers* (1986) 336; see also Macdonald, *op. cit.* 4-8.

[95] See Wade, *Administrative Law* (5th ed., 1982) 414, 494; Aronson and Franklin, *op. cit.* 92; Galligan, D.J., *Discretionary Powers* (1986) 327-9; *Ackroyd v. Whitehouse (Director of National Parks and Wildlife Service)* [1985] 2 N.S.W.L.R. 239, 247 *per* Kirby P.

[96] *Infra* 595.

arguments based upon the peculiar nature of legislative action which demonstrate the inapplicability of any requirement in the nature of a hearing to such action. The various justifications advanced by the courts for the general rule regarding legislative action together comprise arguments directed to just such an end. What must now be done is to critically assess those justifications, particularly in light of the four background considerations identified above.

The first of these justifications was to the effect that for the courts to require a hearing in the context of legislative action would be to radically extend the application of the rules of natural justice/fairness beyond the bounds within which they presently function.[97] In particular, it would extend the operation of those rules still further from the paradigm of the disposition of a *lis inter partes* and the functioning of a quasi-judicial body, the situation in which they had their origin. In respect of this argument, two points may be made. The first is that it provides no theoretical justification for the exclusion of the requirement of a hearing in relation to the taking of legislative action: it simply comprises a factual observation that this would be a significant extension of the requirement of a hearing as the law stands at present. One possible answer to this observation is that it may well be that such an extension would be appropriate, and that the present law is deficient to that extent.

Moreover, it may be contested that so radical an extension of the applicability of the rules of natural justice would in fact be involved, or at least, that similarly great extensions have not taken place in the past. The sphere of operation of these rules has been extended to an extraordinary degree over the past forty years. As was noted in the introduction to this article, decisions which, in the past, could not conceivably have been regarded as being subject to the requirement of a hearing are now firmly established as being within the realm of natural justice.[98] This extension has, of necessity, seen the abandonment of the existence of a *lis inter partes* (or the functioning of a quasi-judicial body) as any real determinent of the applicability of the rules of natural justice. Many situations in which the rules now clearly apply bear only the vaguest similarity (if that) to the disposition by an impartial adjudicator of a suit between parties.[99] In light of this prodigious development of the law pertaining to natural justice in recent years, the suggestion that a becoming reticence to put themselves forward prevents the courts from implying the necessity for a hearing in the case of legislative action seems decidedly unconvincing.

The second justification advanced by the courts turned upon the nature of legislative action as embodying a policy decision. In this connection, it was first suggested that the courts should not imply the requirement of a hearing in relation to legislative action because to do so would involve them in reviewing policy decisions.[1] This argument is far from compelling. There is a world of difference between the implication of procedural protections in connection with

[97] See *supra* 578–80.

[98] See *supra* 568.

[99] For example, the decision by a Minister to deport an alien has little in common with the disposition of a *lis*. In no real sense is there a dispute between two parties and the Minister does not occupy the position of an impartial adjudicator.

[1] *Supra* 579–80.

the taking of policy decisions, and the review of those decisions themselves. The distinction is that between substantive and procedural review. In requiring that certain procedures be followed in respect of policy-based decisions, a court is in no way passing judgment upon the content of the policy involved, just as in requiring adherence to the rules of natural justice in the case of a decision concerning an individual a court is not commenting upon the merits of the decision which was taken. The effect of a failure to follow the requisite procedures may result in the invalidity of the decision in question, but this does not involve the review of the decision itself. As Professor Wade writes, 'However dominant policy may be, fair procedure remains the same'.[2]

A second sense in which the nature of legislative action as embodying a policy decision was said to render such action unamenable to the implication of a hearing requirement by the courts was on the basis that the courts, with no experience in the field of administration or government, would be incapable of devising participatory procedures appropriate to the peculiar circumstances of legislative action. Here, it may be acknowledged that most judges have little experience of administration and government. However, the importance of this fact should not be exaggerated. Over the years, the judges have used the flexibility inherent in the content of the rule of *audi alteram partem* to impose an almost infinitely variable range of hearing requirements in relation to a vast spectrum of governmental activity. In so doing, they have shown considerable dexterity in striking a balance between the interests of the individual and the state, and have had to cope with situations as diverse as those involving applications for government licences,[3] adverse finding of Royal Commissions[4] and decisions concerning immigration.[5] Increasingly, the courts are alive to the realities and peculiarities posed by government. It may thus be doubted whether they are quite as incapable as may be suggested of devising procedures which may be suitably applied to the taking of legislative action.

However, this argument against the imposition of a hearing requirement in the context of legislative action may be put in a rather different way, and at a rather deeper level. Such an argument might run as follows. In imposing participatory procedures, all the courts have to work with are the rules of natural justice: these are their only tools. Those rules can be used to require, in appropriate cases, the giving of a hearing. However, based as they are upon an analogy with the courts' own adjudicatory mode of proceeding, the procedures which may be imposed by reference to the rules of natural justice are suitable only in the context of the disposition of matters similar to those which come before the courts.[6] Such matters will involve decisions addressed to individuals and based upon considerations personal to those individuals, rather than generalized decisions which are based on policy. At this point, the argument begins to overlap with one already considered, namely, that the courts cannot extend their role in relation to

2 Wade, *Administrative Law* (5th ed., 1982) 579.
3 *E.g. F.A.I. Insurances Ltd v. Winneke* (1982) 151 C.L.R. 342.
4 *E.g. Re Erebus Royal Commission; Air New Zealand Limited v. Mahon* [1983] N.Z.L.R. 662.
5 *E.g. Kioa and others v. West and another* (1985) 159 C.L.R. 550.
6 *Cf.* Craig, *op. cit.* 261-71; Loughlin, *op. cit.*; Galligan D.J., *Discretionary Powers* (1986) 329.

the imposition of participatory procedures beyond situations which bear at least some significant similarity to the judicial.[7] The argument may, perhaps, be put at its simplest by saying that the rules of natural justice, intrinsically based as they are upon a notion of individual adjudication, simply cannot be stretched to accomodate the imposition of participatory procedures in the case of legislative action without breaking.

In response to this, a number of points may be made. Clearly, if the courts are to impose participatory procedures in relation to the taking of legislative action, they cannot be the same in nature as those which would apply to the trial of an action before a court. For one thing, the number of people involved would almost never permit the adoption of such a procedure.[8] For another, whereas a court, as a truly adjudicatory body, must (to a very considerable extent) decide an action on the basis of the material put before it by the parties (what is sometimes called the factor of 'strong responsiveness'),[9] a body which is making a decision based on policy — that is, upon notions of the public good — must be free to rely upon arguments not advanced by those appearing before it.

Nevertheless, the basic considerations outlined earlier in this section of the article continue to suggest the general desirability of some form of participation, albeit one tailored to the special circumstances of legislative action. Surely, the rules of natural justice or procedural fairness can be sufficiently freed from their judicial and adjudicatorial origins as to require a form of participation not totally inconsistent with the nature of legislative action. In this connection, it may be noted both that the content of the rule of *audi alteram partem* has historically been extremely variable, and that cases such as *Kioa*, in stressing the notion of 'procedural fairness', have greatly re-emphasized the degree of elasticity thus involved.[10] In such circumstances, it would not be too much to hope that natural justice or fairness,[11] however the concept may be characterized, could be utilized to devise appropriate participatory procedures which did not too restrictively mimic those applying in the judicial sphere.

An obvious possibility here would be the imposition of a requirement of 'consultation', whereby parties to be affected by proposed legislative action would be entitled to receive adequate advance warning that such action was contemplated, and be given sufficient opportunity to submit any comments which they cared to make.[12] The requirement of notification could be fulfilled, in appropriate circumstances, by the taking of steps to publicize the proposed measures, while a failure by affected persons to respond within a reasonable time

7 *Supra* 590–1.

8 See *supra* 580.

9 See generally Eisenberg, *op. cit.*

10 (1985) 159 C.L.R. 550, especially 584 *per* Mason J.; and see Allars, *op. cit.* 313.

11 As stated above (*supra* n. 4), it is clearly not the object of this article to become embroiled in the debate over the difference (if any) between natural justice and fairness, and the relationship between the two concepts (on the assumption that they may be separated). On such questions see Clark, D., 'Natural Justice: Substance and Shadow' (1975) *Public Law* 27; Mullan, D., 'Fairness: The New Natural Justice' (1975) 25 *University of Toronto Law Journal* 281; Macdonald, *op. cit.*; Taylor, G., 'Fairness and Natural Justice — Distinct Concepts or Mere Semantics' (1977) 3 *Monash Law Review* 191; Allars, *op. cit.*

12 See Galligan, D.J., *Discretionary Powers* (1986) 340-8; 360-78; de Smith, *op. cit.* 181-2; Craig, *op. cit.* 270; Macdonald, *op. cit.* 20.

would not affect the validity of the action once taken. 'Consultation' may not be exactly the same thing as a hearing, at least in the traditional sense of that word, but it is certainly closely related. Most importantly, that concept offers the opportunity for the imposition of some degree of procedural protection in the context of legislative action, without imposing the unacceptably onerous burden upon government which would be involved in a full conventional hearing. This concept of consultation will be returned to later.[13] For the moment, it is simply noted that if natural justice/fairness can extend to the imposition of a requirement of consultation, it can certainly cope with most of the difficulties posed by legislative action. In light of the distance which natural justice has come over the last forty years, there is reason to hope that it can stagger these few steps further.

This leads conveniently to the next argument raised against the imposition of participatory procedures in relation to the taking of legislative action, which is that the large number of persons affected precludes their being afforded any opportunity to express their views.[14] A preliminary point to be made here is that the truth of this proposition tends to depend upon the size of the class involved. It is not too difficult to imagine action being taken which would be undeniably legislative in character, but which would affect or specially affect only a class which was sufficiently small as to be capable of being given a hearing by the authority concerned; for example, a by-law made by a local council forbidding the operation of street vendors within its municipality, where only a dozen or so such persons actually existed. Another matter which is clearly relevant here is the existence of some organization which can aggregate the views of those affected and present them in a convenient and accessible form to the responsible authority.

A more fundamental point, however, is that the practicality or otherwise of affording a hearing in a given case depends almost entirely upon the type of 'hearing' contemplated. Judicial statements raising this argument tend to focus upon a hearing which involves personal notification, followed by an individual oral hearing, or at least the presentation of written submissions.[15] Clearly, there will be a great many examples of legislative action where it would be impractical to impose such requirements — though it would equally be the case that there would be some others where this would not be so. However, if resort is had to some considerably modified concept of hearing, such as that comprised in consultation, the number of occasions where virtually no participatory procedures could realistically be required would be comparatively few. The situation would surely be quite rare in which it would be entirely unreasonable to expect an authority to publicize the action which it proposed to take, to invite submissions and to consider such submissions as it received. Indeed, it is sometimes suggested that this is precisely the course voluntarily followed by authorities at the present time.[16]

[13] *Infra* 598.

[14] See *supra* 580.

[15] See *e.g. Gardner and another v. Dairy Industry Authority of New South Wales* [1977] 1 N.S.W.L.R. 505, 518-9 *per* Hutley J.A.

[16] See *e.g.* Wade, *Administrative Law* (5th ed., 1982) 766-7.

In this connection, it may be noted that one facet of the argument addressed above is that, the imposition of participatory procedures in relation to the taking of legislative action being patently absurd by virtue of the sheer impracticability of such a requirement, Parliament is not to be taken as intending an absurdity.[17] Were the reasoning advanced here to be accepted, Parliament would be intending not an absurdity, but merely good government.

The fourth argument considered here is that which essentially suggests that there is no role to be played by the courts in redressing procedural impropriety or unfairness in the context of legislative action, on the grounds that such a role is to be discharged elsewhere.[18] As was seen, the location of this alternative form of redress depended upon the nature of the original decision-making body. Thus, if a Minister made a decision without appropriate participation by those affected, the appeal would logically be to Parliament. In the case of an elected council, recourse could be had to the ballot box.

Again, a number of points may be made. The first is that such an argument could equally well be raised to defeat a claim for procedural protection by a person affected by an entirely personalized decision. For example, deportation decisions by a Minister, which are at least to some extent subject to the requirement of a hearing,[19] are highly public, and may be expected to come within the cognizance of Parliament. Why should it not be left to Parliament to remedy any unfairness which may arise in the course of the making of such decisions? Indeed, an essentially similar argument could be pressed even further with a view to suggesting that the use of a legislative power for an improper purpose, or upon irrelevant considerations should likewise be left to remedy by the legislature and not by the courts, as is presently the case.

Secondly, the validity of the argument must at least to some extent depend upon the factual likelihood of the alternative form of redress actually operating as an effective guarantee of fairness.[20] To suggest that a comparatively small group of people affected by a single legislative action taken by a Minister will be able to obtain redress by invoking the wrath of a Parliament dominated by that same Minister's cabinet colleagues is excessively naive.

Likewise, it seems improbable that a similarly small group of people would be able to revenge themselves effectively upon a local council through the ballot box. Elections, fought as they are over a multitude of issues, are blunt weapons, and can rarely be used successfully in this way. In any event, this argument ignores the damage which may be done through the courts allowing authorities to take legislative action without an appropriate degree of participation, and then leaving it to some other body to remedy the situation in due course, if ever. At the very least, such action may have been taken in the absence of important information, and thus be highly inadvisable. The opportunity should therefore be taken to remove this possibility at the earliest practicable point.

The next argument was that there was no need for an individual to be heard in

[17] See *supra 580.*
[18] See *supra* 580–1.
[19] *Kioa and others v. West and another* (1985) 159 C.L.R. 550.
[20] *Cf.* Galligan, D.J., *Discretionary Powers* (1986) 346.

relation to the taking of legislative action on the grounds that nothing which he or she could say would influence the decision of the relevant authority.[21] This argument seems to assume that an affected person could not possibly have anything to say which might affect the decision of an authority to take the legislative action proposed, either because the information presented would not be relevant to the policy considerations underlying the action in question, or because the authority has decided to take the action concerned regardless of what information it might receive suggesting such a course to be inappropriate.

As to the suggestion that an affected person would not be capable of presenting information pertinent to the taking of the legislative action concerned, this is clearly not supportable. A person may well seek to deter an authority from adopting a particular course of action by presenting cogent arguments against the policy option which it embodies. Strange to say, governmental authorities are not omniscient: they may be told something of which they are not aware, and might even change their minds. The further suggestion that affected persons should not be permitted to put their point of view because an authority has made up its mind 'once and for all'[22] really does not stand scrutiny. Just because an authority wishes to ignore opposing views does not mean that it should be entitled to do so. How can an authority guarantee that 'nothing it hears is going to change its mind' if it does not know what it is going to hear? No one suggests that the authority must change its mind, or even that it should want to change its mind — all that is proposed is that it should be prepared to listen to reasons as to why it should do so.

Another argument against the enforcement by the courts of participatory procedures in relation to the taking of legislative action was based upon the fact that the courts do not enforce such requirements against Parliament itself when that body legislates.[23] At the most fundamental level, this argument has little force. The inability of the courts to impugn an Act of Parliament essentially rests upon the broader doctrine of Parliamentary sovereignty.[24] Clearly, this doctrine in no way applies to the actions of subordinate legislative authorities. The question there is simply whether an implied intention may be discerned on the part of Parliament that their activities be predicated upon the adequate participation of persons affected thereby. It can hardly be assumed that on every occasion upon which Parliament invests a body with the power to take legislative action it intends that the body concerned should enjoy the same immunity from challenge as itself.

The final argument raised was that there was something about the manner in which legislative action operated upon the interests of affected individuals which justified the conclusion that those individuals were not entitled to invoke the aid of the courts in seeking an opportunity to participate in the decision to take the

21 See *supra* 581.

22 *Cf. F.A.I. Insurances Ltd v. Winneke* (1982) 151 C.L.R. 342, 398 *per* Wilson J.; but see *British Oxygen Co. Ltd v. Board of Trade* [Trade] A.C. 610, 625 *per* Lord Reid, in the context of the inflexible application of an administrative policy.

23 See *supra* 581.

24 *British Railways Board v. Pickin* [1974] A.C. 765.

action in question.[25] As has already been pointed out,[26] the practical effect of legislative action upon the object of that action is identical to that involved where action is directed specifically to a given individual, whether or not the courts are prepared to describe the persons thus affected as being affected 'directly' or 'immediately'. The same may be said of the nature of the interests involved. Thus, there would seem to be no independent point of principle raised here which would justify the exclusion of legislative action from the imposition of participatory procedures.

The conclusion thus reached is that the justifications which have been advanced by the courts are not entirely satisfactory, at least as comprising a rationale for the total exclusion of legislative action from the ambit of the natural justice/fairness principle, and the participatory procedures which that principle may impose. Yet, as has been pointed out, this is the use to which these justifications have ordinarily been put. Thus, the conclusion by a court that a particular action was truly legislative (in the sense that this term is used here) was relied upon to justify the further conclusion that, save in very exceptional circumstances,[27] the taking of that action was not subject to any requirement of fairness, and consequently, subject to the imposition of no participatory procedures whatsoever. It is suggested that this approach does not comprise an adequate response by the courts to the problem of legislative action, and this suggestion leads to the third aspect of this critique of the rule.

It cannot be denied that the area of legislative action poses real difficulties for the courts as regards the imposition of participatory procedures. While the variety of grounds advanced by the courts as justifications for the exclusion of legislative action from the ambit of any concept of fairness or natural justice and the participatory procedures based thereon have been criticized in this article, it must be conceded that many of these grounds do reflect a real complication involved in the application of a hearing requirement, at least in its traditional form, to the taking of legislative action. Thus, by way of example, the sheer numbers of persons who might seek to participate in the making of a decision to take particular legislative action is a matter of undeniable relevance. The same may be said of the fact that in given situations there may be mechanisms available for the vindication of procedural impropriety occurring in the context of legislative action other than those mechanisms presented by the courts.

What is contested here is not necessarily the relevance of some of these factors in the present context, but rather the particular use to which they have been put by the courts. As has been stated, that use has by and large been as a means to concluding that procedural protections are not to be imposed in connection with the taking of legislative action because no implication is to be made that Parliament, when conferring the power to take such action, ever intended that the recipient authorities should be subject to a requirement that they exercise that

25 See *supra* 581–2.

26 *Supra* 587–8, *and see Guyot and another v. Evans and others* (1980) 1 N.S.W.L.R. 636, 672 *per* Lee J.; *New Zealand Licensed Victuallers Association of Employers v. Price Tribunal and others* [1957] N.Z.L.R. 167, 202 *per* Cooke J.

27 See *supra* 582–6, as to the limitation upon the general rule concentrating legislative action.

power fairly.[28] Put simply, the unpalatable notion which lies at the heart of the rule regarding legislative action is that Parliament does not intend that a power to take such action should be exercised fairly. Participatory procedures are excluded by the courts, not on the basis that fairness or natural justice does not require their imposition, which in any given case might be a respectable enough conclusion, but rather on the basis that the nature of legislative action is ordinarily such that the very concepts of fairness and natural justice themselves are inapplicable.

It is this mode of reasoning to which objection is taken here. Consistently with the discussion which commenced this critique of the rule concerning legislative action,[29] it is suggested that there is in fact every reason for believing that the taking of legislative action should be subject to a general requirement that it be fair. It is also suggested that, in light of this fact, there is no particular reason to suppose that Parliament, in granting the power to take legislative action, should intend otherwise. As to what fairness would actually require in given circumstances, and the degree of procedural protection which Parliament may thus be taken to have intended should accompany the exercise of the power concerned, these are further questions, not to be rendered superfluous by too glib an answer to the prior and fundamental question of whether the taking of legislative action must be fair in all the circumstances.

Thus, it is argued here that the appropriate position to be adopted by the courts is not that the special nature of legislative action excludes any question of the applicability of a requirement of fairness from the outset, but rather that the character of legislative action may (and probably will) bear upon the actual procedures which will have to be followed in order that the requirements of fairness may be said to have been satisfied in any particular case. To put the matter in its usual form, the character of legislative action should go not to the applicability of the concept of natural justice or fairness in a given instance, but to the content of the participatory procedures which that concept will require.[30] Were the courts to operate in this way, they would be forced to squarely face the question of what is actually 'fair' in the circumstances of given legislative action, rather than resorting to the all too ready excuse of the 'legislative' character of that action as a means of avoiding its amenability to the concept of fairness altogether. Such an approach would be fundamentally consistent with the general approach apparently adopted by the High Court towards the general question of natural justice or 'procedural fairness' in *Kioa*.

Of course, the conclusion that the taking of legislative action had to be predicated upon participatory procedures which were fair in all the circumstances of the particular case would not mean that harassed government authorities would be required to hold thousands of oral hearings upon every occasion when they increased the rates. It would seem clear that the range of participatory procedures which may be imposed under the rubric of natural justice or fairness are almost infinitely variable, and are capable of being adapted to virtually any

[28] See *supra* 576–7.
[29] *Supra* 586–90.
[30] See the general approach adopted by Mason J. in *Kioa and others v. West and another* (1985) 159 C.L.R. 550, 584.

circumstance where those concepts may be held to apply. It may be that in some circumstances of legislative action, it would be concluded that fairness required nothing in the way of a hearing, as it does presently in the case of certain individualized decisions.[31]

However, such a conclusion would be based not upon the comfortable assertion that no question of fairness arose, but rather upon a careful assessment of what fairness required in all the circumstances of the case. A number of factors could doubtless be utilized by the courts in determining the appropriate degree of participation by persons affected by a given legislative action, some drawn from the general law of natural justice, others flowing from the peculiar characteristics of legislative action. Without seeking in any sense to be exhaustive, such factors might include the importance and singularity of the interest affected,[32] the seriousness of the effect of the relevant action upon a person,[33] the extent to which some form of participation could be imposed without the creation of undue administrative difficulties[34] and the extent to which affected persons had the opportunity to have an input into the decision-making process at some other stage.[35]

As was suggested earlier, the concept of consultation is of obvious relevance here. While there would doubtless be a great many cases of legislative action where a participatory procedure in the form of an ordinary hearing would not be required by fairness in all the circumstances, cases where a requirement of consultation would be entirely inapplicable would be far fewer. Many types of legislative action which have hitherto been free of any legal requirement of fair procedure would not be unduly restricted by a requirement that: a) the proposal that the relevant action be taken receive an appropriate degree of publicity; b) that interested members of the public be given sufficient information to form a judgment of the proposal; c) that such persons be able to make written submissions concerning that proposal; and d) that the responsible authority consider those submissions.[36] To suggest, for example, that truly legislative action such as that comprised in a proposal by a public body to alter the basis upon which it imposes rates should be subject to such a procedural requirement hardly seems outrageous, or to threaten the fabric of good government. Indeed, quite the opposite would seem to be the case. Of course, the concept of consultation is

31 See *Kioa and others v. West and another* (1985) 159 C.L.R. 550, 584-7 *per* Mason J., 615-6 *per* Brennan J., 633 *per* Deane J.; but see Clark, *op. cit.* 28-32.

32 *Cf. Alfred Thangarajah Durayappah of Chundikuly, Mayor of Jaffna v. W. J. Fernando and others* [1967] 2 A.C. 337, 349; Galligan, D.J., *Discretionary Powers* (1986) 347-9; but see *Kioa and others v. West and another* (1985) 159 C.L.R. 550, 618 *per* Brennan J.

33 *Cf. Durayappah v. Fernando* [1967] 2 A.C. 337, 349; *Kioa and others v. West and another* (1985) 159 C.L.R. 550, 619 *per* Brennan J.

34 It is in this sense that the numbers of persons who might wish to express a view in relation to the taking of given legislative action would be relevant.

35 See Galligan, D.J., *Discretionary Powers* (1986) 345-6.

36 This is essentially the statutory scheme of consultation comprised in the Subordinate Legislation Act 1962 (Vic.), as to which see *infra* 600–1; and see generally Craig, *op. cit.* 269–73; Wade, *Administrative Law* (5th ed., 1982) 766-8; Garner, J., 'Consultation in Subordinate Legislation' [1964] *Public Law* 105; Eisenberg, *op. cit.*; Jergensen, A., 'The Legal Requirements of Consultation' [1978] *Public Law* 290; Galligan, D.J., *Discretionary Powers* (1986) 341, 372-8; *Rollo and another v. Minister of Town and Country Planning* [1948] 1 All E.R. 13, 17 *per* Lord Greene M.R.

itself highly flexible, and could be made more or less onerous as fairness required according to the circumstances of the case.

Thus, the fundamental criticism of the attitude of the courts to the imposition of participatory procedures in relation to legislative action must be that they have relied upon a variety of factors to entirely exclude such action from the ambit of any concept of natural justice or fairness, and the procedural protections which it might impose. These factors, which may be relevant to a determination of the content of the procedures to be imposed by reference to a concept of fairness in a particular case, do not serve to adequately justify the exclusion of that notion itself. Nor are those factors in and of themselves entirely convincing. The proper position must be that the taking of legislative action is, in principle, subject to a requirement of fairness, and the question thus is what will be required by fairness in the way of participatory procedures in any particular case. An almost infinite variety of options are open to the court which asks this question. As was suggested, one of the most interesting of these will be some notion of consultation.

5. *CONCLUSION — THE FUTURE*

One obvious question here is whether the courts are ever likely to move in the direction suggested by this article. Until recently, such a prospect would have been very bleak indeed. In particular, as has been noted, the courts exhibited a strong tendency to dispose of cases in which the requirement of a hearing in connection with the taking of legislative action was urged upon them by holding that the rules of natural justice or fairness did not apply, thereby obviating the need to consider the question what might be fair participatory procedures in all the circumstances of the case before them.

Rather more hope is offered by the approach adopted by the High Court in *Kioa*.[37] In that case, the Court showed a marked preference for resolving the question of whether a person was entitled to participate in the making of a decision not by means of determining the applicability of the rules of natural justice or 'fairness' at the outset, but rather by considering what those rules would require in the circumstances of the particular case.[38]

While it is true that the judges who addressed the issue in *Kioa* clearly saw the area of legislative action as comprising an exception to the applicability of this approach,[39] it may be pointed out that these comments were obiter. Certainly, any move by the High Court towards an emphasis upon the general applicability of a duty of fairness and the need to determine the content of that duty in particular circumstances, and away from a comparatively rigid 'applicability approach', is a move conducive to the implication of procedural protections in respect of legislative action. It may also be noted that some (admittedly not many) other cases are suggestive of a softening in the attitude of the courts specifically upon the question of requiring a degree of participation in the context

[37] (1985) 159 C.L.R. 550.
[38] See especially the judgment of Mason J. 584, and see Allars, *op. cit.* 313, 321.
[39] *Per* Mason J. 584, *per* Brennan J. 620, *per* Deane J. 633.

of legislative action.[40] Nevertheless, it is abundantly clear that the courts are not presently on the verge of imposing some requirement similar to that of consultation in connection with the taking of legislative action.

It may be that the courts will eventually move in this direction. On the other hand, there are obvious obstacles in the way of such a shift in judicial opinion. Doubtless, the Courts would view with considerable distaste the prospect of having to devise a system of procedural protection capable of dealing with the particular problems of legislative action.[41] Moreover, the natural conservatism of the judges would in all probability reinforce this tendency.

Of course, judicial activism is not the only means by which procedural protection might be applied to the taking of legislative action. It would be perfectly possible for Parliament to take the lead. Were this to occur, problems which revolved around the traditional application of the rules of natural justice and the reluctance of the courts to modify their historic position would largely dissipate. Thus, legislation imposing some general requirement of consultation in the context of legislative action, which contained appropriate exceptions and limitations, would answer most of the criticisms advanced in this article. It may be noted here that in the United States, the Administrative Procedures Act has had the effect of requiring that consultation occur in connection with the taking of a wide range of legislative action.[42]

A general legislative requirement of consultation could be left to enforcement by the courts in accordance with the ordinary law relating to procedural *ultra vires*. Clearly, such a requirement would have to be very broadly expressed, and considerable effort would need to be expended by the courts with a view to giving substance to its practical operation. However, given the appropriate legislative impetus and mandate, it might be hoped that the courts would not prove unequal to the task. Doubtless, an initial period of uncertainty would ensue, but as precedents evolved and governmental authorities conformed their practices to the decisions of the courts, a more structured picture would gradually evolve. If the evolution of that picture required the courts to become rather more knowledgable about the practicalities and intricacies of government on the way, there are those who would suggest that this is not an entirely bad thing.

It would also be possible for the legislature to provide for a system of procedural protection in connection with the taking of a wide class of legislative action without involving the courts at all. Such a system operates at the present time in Victoria under the Subordinate Legislation Act 1962, and turns essentially upon the concept of consultation. The Act requires that in respect of every

[40] *E.g. R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association and another* [1972] 2 Q.B. 299, where at least Lord Denning (at 307) regarded the taking of general policy-based action as being subject to a broad duty to act fairly; *Council for Civil Service Unions and others v. Minister for the Civil Service* [1985] 1 A.C. 374, where the House of Lords seem to have acted on a similar assumption; and see the judgment of Brennan J. in *Kioa and others v. West and another* (1985) 159 C.L.R. 550, 620-3, which may suggest that as long as a person affected by legislative action is 'specially affected' (in the sense of being affected in a manner which is different from that in which the rest of the public is affected), he or she will be entitled to the benefit of the rules of procedural fairness.

[41] See Aronson and Franklin, *op. cit.* 94-5; de Smith, *op. cit.* 181-2.

[42] See Craig, *op. cit.* 206-8; and see generally Davis, K., *Administrative Law Treatise* (2nd ed., 1979) 1, chapter 6.

statutory rule[43] which imposes an appreciable burden, cost or disadvantage upon a sector of the public, adequate consultation be undertaken.[44] The degree of consultation is to be commensurate with the impact of the rule upon the sector of the public involved.[45]

Furthermore, any statutory rule of the type described above is also subject to the preparation of a 'regulatory impact statement'.[46] This document is required to contain (*inter alia*) a statement of the objectives of the rule,[47] a statement of the alternative means of achieving those objectives,[48] and a cost-benefit analysis of these different means, including that which comprises the policy option embodied in the rule.[49]

As part of the impact statement process, the responsible governmental authority must publicize the fact that the rule is being made, and that a copy of the impact statement will be made available to members of the public on application.[50] It must call for submissions from the public in relation to the impact statement, and consider those submissions when received.[51] Any failure to carry out the requisite degree of consultation, or to properly conduct the impact statement process, has the effect that the rule in question is subject to report to the Victorian Parliament by the Legal and Constitutional Committee,[52] a Joint Investigatory Committee thereof.[53] This Committee examines the contents and process of the making of every statutory rule in Victoria.[54] In its report, the Committee may recommend that Parliament disallow the statutory rule in question, either in whole or in part.[55]

Thus, in Victoria, a statutory condition of consultation applies in respect of a wide range of legislative action[56] which would undoubtedly be subject to no requirement of participation at common law. Enforcement is by means of Parliamentary scrutiny, rather than through the courts. Whether a breach of the participatory procedures of the Act outlined above could also lead to a court holding the legislative action in question invalid on the grounds of procedural *ultra vires* is presently obscure.[57] It would, of course, be possible to devise a hybrid system for the enforcement of a statutory requirement of consultation, whereby certain forms of legislative action (such as 'statutory rules' or their equivalent) were scrutinized by Parliament, while others were left to the supervisory attentions of the courts.

43 As defined in s. 2.
44 Schedule 2, guideline 3(e).
45 *Ibid.*
46 Ss. 11 and 12; Schedule 2, guideline 3(f).
47 Sub-s. 12(2); Schedule 3, para. 1.
48 Sub-s. 12(2); Schedule 3, para. 2.
49 Sub-s. 12(2); Schedule 3, para 3.
50 Sub-s. 12(1).
51 *Ibid.*
52 Sub-s. 14(1)(j).
53 Parliamentary Committees Act (1968) (Vic.) s. 5.
54 Subordinate Legislation Act (1962) (Vic.) ss. 5 and 6.
55 *Ibid.*
56 This requirement, however, only extends to 'statutory rules' as defined in s. 2. Among the exclusions thus effected are local government by-laws.
57 See *Philip Morris Ltd v. State of Victoria* [1986] V.R. 825.

In any event, the future holds fascinating possibilities concerning the imposition of procedural protections in connection with the taking of legislative action. This article has identified the general rule articulated by the courts that they will not require anything in the nature of a hearing in relation to such action. It has isolated the reasoning underlying that rule, and the limits placed upon the operation of the rule. It has suggested that the justifications for the rule are not wholly convincing, and that in particular, a general requirement of adequate consultation could usefully be imposed upon the taking of legislative action. Whether the courts will themselves move towards the imposition of such a requirement, or whether legislatures will impose it upon them, or indeed, whether either of these things will occur, is unknown. What is strongly maintained, however, is that the present state of the law is highly unsatisfactory, and that the taking of legislative action should be subject to a general requirement of fair participatory procedures, whether that requirement is founded in the common law, or in statute.