# Determining the Content of Procedural Fairness

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It is usual to distinguish between the question of whether a decision maker is obliged to accord procedural fairness,[1] and the question of what procedural fairness requires of a decision maker where it applies. The former question concerns the implication of procedural fairness, while the latter relates to its content. In modern times, issues concerning implication have tended to dominate, as the courts have relentlessly expanded the boundaries of the duty. Now, however, there are indications that the emphasis is shifting to the content of procedural fairness.[2]

When issues of content come before the courts it is usually in the form of a question as to whether procedural fairness requires the observance of one or more specific procedural requirements. Consequently, the question of content encompasses a wide range of specific procedural questions on such matters as:[3] the giving of notice;[4] the extent to which a 'party' needs to be made aware of the opposing case and permitted to comment on adverse information; whether an oral hearing is required; whether an adjournment should be granted if requested; and whether the decision maker must have regard to the rules of evidence and allow cross-examination or legal representation. However there is also a more general and abstract aspect of questions of content. Linking the various specific procedural issues, and loosely guiding their consideration, is a rather vague principle to the effect that the requirements of procedural fairness are flexible and must depend upon what is fair in the circumstances of a particular case.[5] This general principle of 'flexibility' is, in effect, the fundamental principle which guides the approach of the courts in determining the content of procedural fairness. Its significance is apparent, not only from the frequency with which it is stated by the

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1 The term 'procedural fairness' is used interchangeably with 'natural justice' throughout, although the former term will be preferred: See *Kioa* v *West* (1985) 159 CLR 550, 585 (Mason J), 601 (Wilson J).

2 See eg: *Kioa* v *West* (1985) 159 CLR 585 (Mason J), 612 (Brennan J); *Haoucher* v *Minister for Immigration and Ethnic Affairs* (1990) 93 ALR 51, 53 (Deane J).

3 For general accounts of the kinds of issues which may arise see eg: M Aronson and N Franklin, *Review of Administrative Action* (Sydney, Law Book, 1987) 145–91; M Allars, *Introduction to Australian Administrative Law* (Sydney, Butterworths, 1990) 261–71 (subsequently: Allars, *Introduction*).

4 It is often said that notice is the minimum content of natural justice: eg Allars, *Introduction* 262. However this has been questioned by Justice Brennan's adoption of the suggestion that the content of natural justice is reducible to 'nothingness': *Kioa* v *West* (1985) 159 CLR 550, 615.

5 See eg below fn 8 to 11. This is particularly so in relation to the hearing rule. The principle of flexibility seems to be given less prominence in relation to the bias rule. However it is clearly still applicable: *R* v *Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 552–3.

courts, but also from the text book treatments of content, which typically give flexibility pride of place as the first principle to be stated.[6] However, despite the widespread acknowledgment of this principle, there appears to be little in the way of rigorous analysis of its effect and justification.

In this article I will not discuss specific procedural issues in any detail. Instead I wish to focus on the manner in which the content of the hearing rule[7] of procedural fairness is determined, and in particular, on the principle of flexibility just mentioned. The approach of the courts to the determination of content will be examined in Part I and evaluated in Part II, while Part III offers suggestions for reform.

## PART I: THE APPROACH OF THE COURTS TO THE DETERMINATION OF CONTENT

### (a) The principle of flexibility and the meaning of 'fairness'

An obvious starting point in describing the flexible nature of the content of procedural fairness is provided by the well-known statement of Tucker LJ in *Russell* v *Duke of Norfolk*:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.[8]

This passage has been approved by the High Court[9] together with a rider added by Kitto J who, after quoting the above passage, continued:

> What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances.[10]

There are a number of other statements to similar effect,[11] but these suffice to

[6] See eg Aronson and Franklin, op cit 145–6; Allars, *Introduction* 261–2; E I Sykes, D J Lanham and R R S Tracey, *General Principles of Administrative Law* (3rd ed, Sydney, Butterworths, 1989) 179; H W R Wade, *Administrative Law* (6th ed, Oxford, Clarendon Press, 1988) 530–2.

[7] The bias rule will not be discussed. Some, but not all, of the issues considered in this article are also relevant to the bias rule.

[8] [1949] 1 All ER 109, 118.

[9] *R* v *Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 552–3. Lord Justice Tucker's statement has also been approved by the Privy Council and the House of Lords: see *University of Ceylon* v *Fernando* [1960] 1 All ER 631, 637 (PC); *Furnell* v *Whangarei High Schools Board* [1973] AC 660, 679 (PC); *Wiseman* v *Borneman* [1971] AC 297, 308, 311, 314–5.

[10] *Mobil Oil Australia Pty Ltd* v *FCT* (1963) 113 CLR 475, 504 (Kitto J).

[11] The most important of which are conveniently collated by Brennan J in *Kioa* v *West* (1985) 159 CLR 550, 613–15. See also *Lisafa Holdings Pty Ltd* v *Gaming Tribunal* (1992) 26 NSWLR 391, 401 (Kirby P).

illustrate the principal features of the approach to determining content. It is possible to discern several related propositions in these passages. First, there is an implication that a wide range of matters will need to be taken into account as part of the circumstances which determine the requirements of procedural fairness.[12] This in turn implies that the procedures which are imposed will vary greatly in the sense that the range between the extremes of what may be required will be very great. The need for such variability in the content of procedural fairness is undeniable. It is necessary, as Sir Gerard Brennan has explained, in order to deal with the 'diversity of administrative actions' now encompassed within the widening reach of procedural fairness.[13] That diversity has increased in recent times with the courts extending the circumstances in which procedural fairness applies, and this in turn has increased the need for variability.[14]

A second proposition can be identified in the respective assertions of Tucker LJ and Kitto J that the requirements of procedural fairness cannot be determined by reference to a 'definition' or a 'fixed body of rules'.[15] This refusal to permit procedural fairness to be reduced to 'rules' must inevitably come at some cost to certainty and predictability.[16] However there are two ways in which it might be justified. One approach would be to argue that 'fixed rules' are precluded by the very nature of the concept of 'fairness'. It might be said that this concept is one which turns on everyday understandings and thus is too elusive to reduce to rules. However that does not explain why the law needs to use an everyday notion of fairness in the first place. A better approach may be to argue that, in view of the variety of circumstances in which procedural fairness must be applied, any attempt to reduce the principles to precise rules would result in unacceptable complexity.

A third proposition can be identified in Kitto J's adoption of the broad and undefined test of what is 'fair' in the circumstances of a given situation as the ultimate determinant of what procedural fairness requires. This emphasis on the notion of fairness as the central concept in determining content is

[12] As to the kinds of matters which may be relevant see eg *Russell* v *Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ); *Mobil Oil Australia Pty Ltd* v *FCT* (1963) 113 CLR 475, 504 (Kitto J); *R* v *Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553; *Salemi* v *MacKeller [No 2]* (1977) 137 CLR 396, 444 (Stephen J); *NCSC* v *News Corporation Limited* (1984) 156 CLR 296, 312 (Gibbs CJ); *Kioa* v *West* (1985) 159 CLR 550, 563 (Gibbs CJ), 584–5 (Mason J), 601 (Wilson J).

[13] Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review' in M Taggart (editor) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Auckland, OUP, 1986) 18–35, 27.

[14] Consider, for example, the decisions extending procedural fairness to the highest levels of government, where the imposition of requirements which are too onerous might seriously impair the operation of government, eg *FAI Insurances Ltd* v *Winneke* (1982) 151 CLR 342; *Minister for Arts Heritage and Environment* v *Peko-Wallsend Ltd* (1987) 75 ALR 218.

[15] See also the similar statements in *Wiseman* v *Borneman* [1971] AC 297, 308 (Lord Reid) and *NCSC* v *News Corporation Limited* (1984) 156 CLR 296, 312 (Gibbs CJ).

[16] For a recent account illustrating the problems of inconsistency which can result from the lack of guidance provided by procedural fairness, see M Crock, *Administrative Law and Immigration Control in Australia: Actions and Reactions* (unpublished Ph.D. Thesis, University of Melbourne 1992), 192–204 (section 4.4.2).

supported by other well-known dicta referring to natural justice as 'fairness writ large and juridically'[17] and 'fair play in action'.[18] Although there was debate in the 1970s as to whether fairness should be recognised as an independent doctrine, the High Court appears to have now effectively extended natural justice to incorporate fairness.[19] In doing so, most of the judges expressly endorsed fairness as the test of what procedural fairness requires.[20]

What do the courts mean when they refer to 'fairness' in this context? The passages quoted above all come from judgments in which arguments based on natural justice were rejected.[21] Viewed in context the references to fairness appear to be made with the object of emphasising the limited content of procedural fairness in the relevant circumstances, as requiring only what would be widely understood to be fair, without need for explanation. This explains why these judgments make no attempt to explain or describe what constitutes fairness, since the very reason for using the term was to suggest that which is so obvious as not to require explanation. If this is correct then 'fairness' is used in these passages in its ordinary everyday meaning.

However, I suggest that if the content of procedural fairness is equated with fairness used in this sense, a number of problems arise. First, such an approach assumes the existence of a broad consensual notion as to what is fair in procedural terms. I doubt that this is so[22] and, even if it is, I would suggest that any such notion of fairness is likely to fall a long way short of what most judges would regard as appropriate. The involvement of judges in the judicial process must affect their perception of procedural propriety and give them greater sensitivity to procedural issues than the ordinary person. Secondly, this approach arguably discourages judges from justifying their decisions on content in principled terms. If the concept of 'fairness' indicates a standard that is widely understood, this implies that judges may simply pronounce upon what is 'fair' in the circumstances without needing to give any precise description or explanation of that standard. This in turn undermines the value of such decisions as precedent.

It appears to me that the current approach of the courts to the use of the concept of fairness tends to straddle two incompatible approaches. One is to

[17] *Furnell* v *Whangarei High Schools Board* [1973] AC 660, 679 (PC).

[18] *Wiseman* v *Borneman* [1971] AC 297, 309 (Lord Morris of Borth-y-Gest).

[19] See *Kioa* v *West* (1985) 159 CLR 550; M Allars, 'Fairness: Writ Large or Small?' (1987) 11 *Syd LR* 306.

[20] *Kioa* v *West* (1985) 159 CLR 550, 563 (Gibbs CJ), 585 (Mason J), 601 (Wilson J), 612–15 (Brennan J).

[21] Justice Kitto's comments were made in the course of concluding that natural justice, if applicable, would not require a Board of Review to disclose to a taxpayer *all* material it took into account in exercising a statutory power: *Mobil Oil Australia Pty Ltd* v *FCT* (1963) 113 CLR 475, 501–4. The comments of the majority of the Privy Council in *Furnell's* case were made in a judgment holding that a statutory disciplinary code was not 'unfair' despite the fact that it permitted suspension without a prior opportunity to be heard: *Furnell* v *Whangarei High Schools Board* [1973] AC 660, 682–3. Similarly, Lord Morris's comments in *Wiseman's* case were made in the course of holding that a statutory procedure was not unfair: *Wiseman* v *Borneman* [1971] AC 297, 309–10.

[22] See M Loughlin, 'Procedural Fairness: A Study of the Crisis in Administrative Law Theory' (1978) 28 *U Tor LJ* 215, 238.

equate the content of procedural fairness with fairness as commonly understood. If this is the approach used then the concept of fairness need not, and probably cannot, receive any detailed exposition. However the courts must be careful that they are in fact applying a standard which is commonly understood, rather than one which is shared only by judges and barristers or by lawyers in general. If the latter is the case then the courts are using a different approach which involves the use of fairness as a technical legal term. If so there is a strong argument[23] that its content does require reasonably precise exposition. It may not be necessary to reduce fairness to a 'fixed body of rules', but arguably it is necessary to express the standards assumed by the concept in terms of principles which are capable of general application.

I should not be taken to suggest that the approach of the courts in determining the content of procedural fairness is entirely devoid of principles capable of general application.[24] However I would suggest that in many cases the courts have tended to appeal to an undefined concept of fairness in lieu of formulating such general principles. There will usually be a detailed examination of the circumstances of the case. If the procedure followed is found to be inadequate there may be some explanation given as to why some other procedure would be more fair. But there is rarely any principled explanation given as to why a particular standard was held to apply in particular circumstances. The usual explanation is simply that the standard adopted by the court was 'fair'.[25]

It must be acknowledged that if, as has been suggested, there is a lack of general principle governing the determination of content, there is good reason for this deficiency. As Sir Gerard Brennan has noted, the variety of situations which must be governed by any such principles makes this a 'formidable task'.[26] There is clearly a conflict here between the courts' desire to maintain flexibility in the requirements of procedural fairness and the need to formulate principles which maximize certainty and predictability.[27] The nature

[23] This argument will be developed further in Part II.

[24] An example of a principle which I would accept as becoming reasonably well defined is the requirement, illustrated by *Kioa* v *West* (1985) 159 CLR 550, that a person be given an opportunity to address prejudicial material obtained by the decision maker from another source.

[25] It is not possible here to survey the vast number of decisions concerning the content of procedural fairness in order to demonstrate the contentions made here conclusively. However I list below some recent examples (a selection only) which I believe to illustrate the approach described. I am not suggesting that these decisions are necessarily wrong, but rather that they tend to be justified by resort to an undefined concept of fairness in lieu of principled explanation. See *O'Rourke* v *Miller* (1985) 59 ALJR 421; *R* v *Commissioner of Police; Ex parte Parker* (1986) 18 IR 13; *Hempel* v *Attorney-General (Cth)* (1987) 77 ALR 641; *Village Roadshow Corporation Ltd* v *Sheehan* (1987) 17 FCR 324; *R* v *Nutter, Ex parte McCubbin* [1988] 2 Qd R 581; *Ex parte Bone; Robins and the Shire of Greenough* [1990] WAR 94; *Opitz* v *Repatriation Commission* (1991) 23 ALD 40; *Mair* v *Bartholomew* (1992) 108 ALR 182.

[26] Brennan, op cit 27–8.

[27] Adherents of the Critical Legal Studies movement might be inclined to regard this as a 'fundamental contradiction', see eg D Kennedy, 'The Structure of Blackstones's Commentaries' (1979) 28 *Buffalo Law Review* 205, 211–21; M Kelman *A Guide to Critical Legal Studies* (Cambridge Mass, Harvard University Press, 1987), 3–4, ch 1; cf A Altman, *Critical Legal Studies — A Liberal Critique* (Princeton, Princeton University

of this conflict will be considered further in the second part of this article. However it is necessary first to identify several other issues relating to the courts' approach to determining what fairness requires.

### (b) Determining what fairness requires in the circumstances

The issues raised above relate to the meaning of fairness in general. Further issues arise in relation to the determination of what is fair in the circumstances of a particular situation. First, there is a question as to where the primary responsibility lies for determining what is fair in a particular situation (ie what procedural fairness requires in that particular case). Is this to be determined solely and conclusively by what a reviewing court considers to be fair in the circumstances? An alternative approach might be to regard the question of what fairness requires in a particular case as a matter for the decision maker to decide, as if it were a question of fact or some other matter within the jurisdiction or discretion of the decision maker to determine.[28] Yet another possible approach could be to treat this as a matter for the court to decide, subject to the court being required to show deference to the decision maker's views on this.

Another distinct but related issue concerns the factual basis to be used by the court in reviewing the question of what fairness requires. The court could determine what fairness requires on the basis of the facts which were known (or which ought to have been known) to the decision maker when the decision was made. Or it could decide on the basis of its own view of the facts on the evidence available either at the time of the decision or the review.

Despite the fact that there is now an enormous body of precedent dealing with procedural fairness, it would appear that the issues outlined above have been expressly addressed only relatively rarely. Nevertheless, there has been at least occasional judicial consideration of these matters, more directly in England than in Australia. Consequently I will review the English decisions first.

#### *(i) The English Authorities*

Although rarely stated expressly, the traditional approach appears to have been that it is the reviewing court's view of what fairness requires that determines the content of procedural fairness in any particular case. The fact that the views of decision makers as to what fairness requires are not often

Press, 1990) especially ch 4 and 186–9. This may be so, but in my view the law does (and must) seek at least a temporary compromise between these contradictory goals. Reconciliation of these goals may not be possible (see A C Hutchinson, 'The Rise and Ruse of Administrative Law and Scholarship' (1985) 48 *Modern Law Review* 293, 300), but the real issue issue is whether the existing compromise can be improved, and if so, how. The identification of a 'fundamental contradiction' may be useful to the extent that it assists in answering this question.

[28] Presumably, on any approach, a decision maker will be able to *exceed* what fairness requires. This simply means that fairness is a minimum standard. It is not the same as giving the decision maker primary responsibility for determining what that standard requires in a particular case.

discussed implies as much.[29] Furthermore it has been held that, in a case before a jury, the question of whether there has been compliance with the principles of natural justice is a question of law to be decided by the judge, rather than the jury.[30]

A different approach is seen in a line of authority dealing with the question of the circumstances in which procedural fairness will require a tribunal to allow legal representation of parties. In *R* v *Secretary of State for the Home Department; Ex parte Tarrant*[31] ('*Tarrant*'), the Divisional Court[32] drew together a number of authorities to hold that, even though natural justice would not give a prisoner a right to be legally represented before a board of visitors, the board would nevertheless have a discretion to allow such representation.[33] The Court held that the exercise of this discretion could itself be subject to review, so that a failure by the board to consider a request for representation would amount to a failure to exercise discretion and would allow the court to set the decision aside.[34] This approach implies that the question of what procedural fairness requires in a particular case[35] is not simply a question of law to be decided conclusively by a court, but rather, is a matter within the discretion of the decision maker. The difference that this makes, in practical terms, is demonstrated in the judgment of Webster J. Rather than baldly stating when legal representation will or will not be required, Webster J seeks to describe the considerations which need to be taken into account in determining this question.[36] Furthermore, in determining whether the board's decisions should be quashed, Webster J does not ask simply if it was fair for the board to refuse representation, but rather, whether 'no board of visitors, properly directing itself, could reasonably decide not to allow the prisoner legal representation'.[37]

In *Tarrant* the notion that a tribunal has a discretion as to whether to permit legal representation was used, in effect, to extend the ambit of review, since it allowed the court to intervene on the basis that the board had not considered whether to allow representation, even though there was no right to

[29] However it is possible that the concept of fairness already has an element of deference built in to it. In considering what fairness requires in a particular case a reviewing court may be said to be looking to what a reasonable person would consider to be fair. If this is so, it ought to be expressly recognised and authoritatively established, as otherwise it is unlikely that such an approach will be consistently applied.

[30] *Russell* v *Duke of Norfolk* [1949] 1 All ER 109, 116–17, 120; cf *New York Properties Pty Ltd* v *Commissioner of Taxation* (1985) 7 FCR 401, 414 where Beaumont J (Northrop J concurring) held that the question of whether an adjournment was required by the principles of natural justice would involve no error of law unless it could be said that refusal of the adjournment was based on irrelevant or extraneous considerations.

[31] [1985] 1 QB 251. I am indebted to Professor Enid Campbell for bringing this case to my attention.

[32] Kerr LJ and Webster J.

[33] [1985] 1 QB 251, 272–78, 294–7. The main authorities relied on by the court to support the existence of such a discretion were: *Enderby Town Football Club Ltd* v *Football Association Ltd* [1971] Ch 591; *R* v *Visiting Justice at Her Majesty's Prison Pentridge; Ex parte Walker* [1975] VR 883; and *Maynard* v *Osmond* [1977] QB 240.

[34] [1985] 1 QB 251, 283–7, 297.

[35] ie as to whether legal representation should be permitted.

[36] [1985] 1 QB 251, 285–6.

[37] Id 287.

representation. However this approach is a 'two-edged sword', as Webster J clearly realised,[38] for it must follow that if the discretion is properly exercised, it cannot be overturned in the absence of a right of appeal to the court.[39] The decision in *Tarrant* has been approved by the House of Lords in *R* v *Board of Visitors of H.M. Prison, The Maze; Ex parte Hone*,[40] where Lord Goff of Chieveley, with the other Law Lords concurring, expressly recognised that disciplinary tribunals have a discretion in determining whether natural justice requires legal representation.[41] However his Lordship did not find it necessary to consider whether this means that a court can only intervene if that discretion is exercised unreasonably, or to consider whether such a discretion exists in relation to other aspects of natural justice.

An approach similar to that in *Tarrant* is seen also in *R* v *Monopolies and Mergers Commission; Ex parte Matthew Brown plc*[42] ('*Matthew Brown*'). Macpherson J held that, in reviewing the procedure of the UK Monopolies and Mergers Commission, the question for the court is 'whether the commission has adopted a procedure so unfair that no reasonable commission or group would have adopted it'.[43] This appears to treat the question of what procedural fairness requires as one for the Commission to decide, although no authority was cited for this proposition. A competing approach is seen in the earlier unreported decision of *R* v *South West London Supplementary Benefits Appeal Tribunal; Ex parte Bullen*.[44] In this earlier decision, Lord Widgery CJ (with Donaldson J and Mars-Jones J concurring) concluded that a decision of a tribunal to refuse an adjournment[45] could be quashed if it were shown to be wrong, without any need to show that 'no equivalent tribunal properly instructed could have reached this decision'.[46] However Lord Widgery CJ does appear to have accepted that a degree of deference is appropriate when reviewing adjournment decisions.[47]

The most explicit consideration of these issues is found in the Court of Appeal decision in *R* v *Panel on Take-overs and Mergers; Ex parte Guinness Plc*[48] ('*Guinness*'). The decision deserves careful consideration. Guinness Plc sought judicial review of a decision of the Panel,[49] arguing that the Panel had

[38] Ibid.

[39] Due to the limited nature of judicial review, the classic description of which was given by Lord Greene MR in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223, 228–31.

[40] [1988] AC 379.

[41] Id 394.

[42] [1987] 1 All ER 463; [1987] 1 WLR 1235.

[43] Id 467 (All ER) (Macpherson J, QBD); applied in *R* v *Bedfordshire CC; Ex parte C* (1986) 85 LGR 218, 223 (Ewbank J, QBD).

[44] The Times, 11 May 1976; (1976) 120 *Sol J* 437.

[45] Although there was an applicable statutory obligation to hear, Lord Widgery CJ appears to consider that the position is the same under the rules of natural justice.

[46] This part of Lord Widgery's judgment is quoted at length, with approval, in *R* v *Birmingham CC; Ex parte Quietlynn Ltd* (1985) 83 LGR 461, 493–5.

[47] See the passage quoted at (1985) 83 LGR 461, 494.

[48] [1990] 1 QB 146.

[49] The Panel was held to be subject to judicial review in an appropriate case despite its unincorporated status and complete lack of statutory or legal powers in the landmark decision of *R* v *Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815; [1987] 2 WLR 699; [1987] 1 All ER 564.

acted in breach of natural justice in refusing the company's requests for an adjournment. The application was refused by the Divisional Court,[50] which expressed its decision in terms suggesting an approach similar to that adopted in *Matthew Brown*. Watkins LJ (with Russell LJ & Tudor Evans J agreeing) approached the case by asking 'could the Panel reasonably have determined to refuse to adjourn, albeit that other equally well informed people might disagree, without being regarded as unfair to Guinness?'.[51] Watkins LJ concluded that there was 'nothing irrational, nor otherwise unreasonable, about the Panel's refusal to adjourn',[52] commenting that: 'We are not called upon to say, and I do not, that the decision was correct, for this is not an appeal against that decision.'[53]

Guinness Plc appealed arguing *inter alia* that the Divisional Court erred in assuming that the appropriate test was whether the Panel could reasonably refuse an adjournment, since the proper test was 'whether in all the circumstances the court considered the decisions in fact unfair to Guinness'.[54] The appeal was dismissed on the ground that it was not wrong or unfair in the circumstances to refuse an adjournment, however the court accepted the arguments of counsel for Guinness Plc as to the basis upon which the decision was to be reviewed. The approach adopted by the Court of Appeal is clearly inconsistent with that suggested in *Matthew Brown*, although the latter case was not discussed.[55]

Lloyd LJ concluded that the question as to whether the adjournment was properly refused was not to be answered by reference to *Wednesbury* unreasonableness.[56] 'Rather, the question has to be decided in accordance with the principles of fair procedure . . . *of which the courts are the author and sole judge.*'[57] Lloyd LJ unequivocally rejected an argument that it was for the Panel to determine what was fair in the circumstances,[58] asserting that 'in the last resort the court is the arbiter of what is fair'.[59] However his Lordship did accept that the court should give 'great weight' to the view of the Panel as to what is fair.[60]

Lord Donaldson MR, with whom Woolf LJ agreed,[61] concluded that this appeal should be decided by asking 'whether something has gone wrong of a nature and degree which require the intervention of the court', rather than by considering the separate heads of unreasonableness and unfairness. However

[50] *R* v *Panel on Takeovers and Mergers; Ex parte Guinness plc* (1988) 4 BCC 325.
[51] Id 344.
[52] Ibid.
[53] Id 347.
[54] [1990] 1 QB 146, 149.
[55] It was cited to the court: Ibid.
[56] ie by asking whether the decision was so unreasonable that no reasonable tribunal could have reached it. See *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223, 228–230.
[57] [1990] 1 QB 146, 184 (emphasis added).
[58] Id 185.
[59] Id 184.
[60] Ibid.
[61] Id 201. Woolf LJ gave additional reasons not relevant to the specific questions considered here.

his Lordship commented in passing on the correct approach to determining what natural justice requires:

> Whether the rules of natural justice have been transgressed is not to be determined by a *Wednesbury* test: 'Could any reasonable tribunal be so unfair?' On the other hand, fairness must depend in part on the tribunal's view of the general situation and a *Wednesbury* approach to that view may be well justified. If the tribunal's view should be accepted, then fairness or unfairness falls to be judged on the basis of that view rather than the court's view of the general situation.[62]

It is clear from these comments that both Lord Donaldson and Lloyd LJ reject the view that a reviewing court must accept any reasonable view of a decision maker as to what is fair in the circumstances. Rather, they consider that what fairness requires is a matter for the court to determine. To this extent *Guinness* is in conflict with the approach seen in *Tarrant* and *Matthew Brown*. Despite the House of Lords' approval of *Tarrant*, *Guinness* may be regarded as a stronger authority on this issue, since the Law Lords were not directly concerned with the manner in which decisions on the content of natural justice are to be reviewed.

However, the decision in *Guinness* does at least suggest that it may be appropriate for a reviewing court to show deference to the views of a decision maker as to 'the general situation' (per Lord Donaldson), or as to 'what is fair' (per Lloyd LJ). It is not clear to what extent these views depended upon the particular facts of *Guinness*. There are two factors which may have led the court to show a greater degree of deference in this case. First, the court may have been influenced by the exceptional nature of the Panel as a body operating without any formal legal powers, let alone powers derived from statute or the prerogative.[63] Woolf LJ expressly referred to the 'unique qualities' of the Panel as being important to the outcome of the appeal.[64] Secondly, it may have been significant that the case concerned the refusal of an adjournment, and that a right of appeal existed. Lord Donaldson refers to this as making it necessary that something more be shown than that the decision was wrong in order for judicial review to be available.[65] However it is submitted that the general comments quoted above do not appear to depend on these special features of the case.

It is not entirely clear what Lord Donaldson means in advocating a *Wednesbury* approach to 'the tribunal's view of the general situation'. It would appear that the Master of the Rolls is addressing the second issue described above, namely, the appropriate factual basis to use in determining what fairness requires. Lord Donaldson's comments suggest that the court must determine what is fair on the basis of the facts as found by the decision maker, provided that those findings are not unreasonable in the *Wednesbury* sense. It is implicit in this approach that procedural fairness is concerned, not with

[62] Id 178–9.
[63] See: *R* v *Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815; J Jowell, 'The Takeover Panel: Autonomy, Flexibility and Legality' [1991] *Public Law* 149.
[64] [1990] 1 QB 146, 192.
[65] Id 178.

ensuring 'absolute' fairness, but rather with the question of whether there has been some failure on the part of the decision maker in respect of the procedure adopted. This means that unfairness which results purely from facts which the decision maker could not reasonably have known of will not constitute a breach of procedural fairness. This approach has recently been endorsed by the House of Lords in *Al-Mehdawi* v *Secretary of State for the Home Department.*[66] The House of Lords there overturned a line of authority in the Court of Appeal[67] to the effect that a breach of natural justice can occur where a person is denied a hearing by the negligence of that person's own advisers, without fault on the part of the decision maker. In doing so the Law Lords appear to endorse implicitly the contentions put for the Secretary of State that procedural fairness is 'concerned solely with the propriety of the procedure adopted by the decision maker', so that a failure which is 'beyond the knowledge and control of the decision maker' cannot constitute a breach.[68]

Other English decisions of lesser authority provide implicit support for allowing decision makers a significant role in determining what fairness requires, but do not expressly address this as a theoretical issue. In *R* v *Norfolk County Council Social Services Department; Ex parte M*[69] Waite J quashed a decision to place the applicant's name on a child abuse register on the grounds that it was both unfair and unreasonable. However Waite J went on to suggest that it is not the function of the courts to substitute their views for those of the decision maker on the question of how to resolve the balancing exercise involved in deciding how the requirements of fairness should be met in such cases.[70]

> If therefore, it can be demonstrated in future cases that the particular procedure or range of inquiry followed . . . *has represented a genuine attempt, reasonable in all the circumstances*, to reconcile the duty of child protection on the one hand and the duty of fairness to the alleged abuser on the other, it is unlikely that the courts will intervene . . .[71]

There have also been assertions made in several English decisions to the effect that there can be no such thing as a 'technical' breach of natural justice.[72] This implies at least a deferential attitude to the procedure adopted by decision makers. Furthermore the House of Lords has recently indicated that the courts must avoid the temptation to use spurious arguments based on

[66] [1990] 1 AC 876. For comment, see: J Herberg, 'The Right to a Hearing: Breach without Fault?' [1990] *Public Law* 467.

[67] eg see *R* v *Diggines; Ex parte Rahmani* [1985] QB 1109; *R* v *Secretary of State for the Home Department; Ex parte Al-Mehdawi* [1989] 1 All ER 777; [1990] 1 AC 876 (CA).

[68] [1990] 1 AC 876, 894.

[69] [1989] 3 WLR 502; [1989] 2 All ER 359; approved *R* v *Harrow LBC* [1989] 3 WLR 1239, 1243–5; [1990] 3 All ER 12 (CA).

[70] [1989] 3 WLR 502, 511–2.

[71] Id 512 (emphasis added).

[72] eg *George* v *Secretary of State for the Environment* [1977] LGR 689; *R* v *The Chief Constable of the Thames Valley Police; Ex parte Cotton* (1990) 19 IRLR 344, 350, 351.

procedural fairness as an excuse for intervening where a decision does not accord with its own views.[73]

In summary, the decision in *Guinness* provides the most authoritative indication of the approach of the English courts in determining what procedural fairness requires. The approach of Lord Donaldson may allow decision makers to determine the facts upon which fairness is assessed. Beyond this, fairness appears to be a matter for the reviewing court alone to decide, although the possibility exists for the court to defer to the views of the decision maker. The approach of the Court of Appeal would seem to preserve the full flexibility of the notion of fairness for use by the reviewing court as the 'sole arbiter' of what is required. The possibility of the court showing deference to the views of the decision maker gives no guaranteed role to those views, and may in fact serve only to broaden the options of the reviewing court.

### *(ii) The Australian Authorities*

As in England it would seem to have been generally assumed by Australian courts that the question of what fairness requires is a matter for the courts alone to decide. A rare example of the expression of this assumed approach was provided by the recent decision in *Lisafa Holdings Pty Ltd* v *Gaming Tribunal [No. 3]*.[74] Mahoney JA, after discussing the Tribunal's own consideration of what procedural fairness required, commented:

> I do not mean by my reference to this matter that the findings of the Tribunal in relation to the requirements of natural justice are necessarily binding on this Court. It is, as I have said, for this Court to determine that matter.[75]

Nevertheless there are also passages which suggest a greater role for decision makers' views of fairness. One of the clearest is found in the judgment of Brennan J in *Kioa* v *West*. The passage is important, and deserves to be quoted at length:

> What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly. As the obligation to observe the principles of natural justice is not correlative to a common law right, but is a condition governing the exercise of a statutory power, the repository satisfies the condition by adopting a procedure *which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised.* When the question for the court is whether the condition is satisfied, the court must place itself

[73] *R* v *Independent Television Commission, Ex parte TSW Broadcasting Ltd* (1992) *The Times* March 30.
[74] (1992) 26 NSWLR 391.
[75] Id 409.

> in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair.[76]

In respect of the factual basis upon which fairness is to be assessed, Brennan J clearly endorses the view that the relevant facts are those which were known, or which ought to have been known, to the decision maker at the time of the decision. A similar approach has been adopted in relation to the ground of 'unreasonableness' under *Administrative Decisions (Judicial Review) Act* 1977 ss 5(1)(e) and (2)(g).[77]

Justice Brennan's view is consistent with the comments of Lord Donaldson in *Guinness* and the House of Lords' decision in *Al-Mehdawi* v *Secretary of State for the Home Department.*[78] It is also supported by subsequent decisions in which judicial review has been refused where procedural defects have resulted from the conduct of a party's advisers without fault on the part of the decision maker.[79] In apparent conflict with this line of authority is a decision of the Full Court of the Queensland Supreme Court in which it was held that a promotee was denied natural justice on the hearing of an appeal against her promotion when her adviser (a departmental appointee) declined against her wishes to introduce certain evidence and call witnesses.[80] However, none of the authorities mentioned here were considered by the Full Court.

Justice Brennan's comments in the passage above also appear to endorse an approach to the determination of the requirements of fairness similar to that adopted in *Tarrant* and *Matthew Brown.* The italicised words imply that a reviewing court should not interfere unless the procedure adopted by the decision maker is unreasonable.

Brennan J makes these comments in the course of criticising the notion of 'legitimate expectation'. The High Court has not endorsed Justice Brennan's rejection of the notion of legitimate expectation[81] or his Honour's view that procedural fairness stems from statutory implication rather than a common law right.[82] However this does not necessarily mean that the majority of the High Court would reject the approach of Brennan J on the specific issues discussed above. None of the other judges in *Kioa* address these issues expressly. The manner in which their comments on content are framed suggests an assumption that the requirements of fairness are to be determined solely

[76] *Kioa* v *West* (1985) 159 CLR 550, 627 (emphasis added).

[77] *Prasad* v *Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549, 562–3. See also *Videto* v *Minister for Immigration and Ethnic Affairs* (1985) 69 ALR 342, 350–1; *J Wattie Canneries Ltd* v *Hayes* (1987) 74 ALR 202, 216–17; *Pashmforoosh* v *Minister for Immigration and Ethnic Affairs* (1988) 17 ALD 283, 286.

[78] See above fn 66 to 68.

[79] *Ertan* v *Hurford* (1986) 11 FCR 382, 388–9; *Koh Ah Soo* v *Tuchin* Federal Court Beaumont J, 30 April 1986 (unrep), 10–12. However, note that in some cases a decision maker may nevertheless have a limited duty to enquire: see Crock, op cit 196–7; Allars, *Introduction* 185–6.

[80] *R* v *Nutter; Ex parte McCubben* [1988] 2 Qd R 581 (Full Court).

[81] *Haoucher* v *Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Attorney-General (NSW)* v *Quin* (1990) 170 CLR 1.

[82] *Kioa* v *West* (1985) 159 CLR 550, 582 (Mason J), 593 (Wilson J); *Annetts* v *McCann* (1990) 170 CLR 596, 598; *Ainsworth* v *Criminal Justice Commission* (1991) 106 ALR 11, 16–17.

by the view of the reviewing court. However, given the absence of any clear discussion of this point, it must be doubted whether it has been properly considered by the Court.

Further support for allowing decision makers a significant role in determining the requirements of procedural fairness is provided by *Connelly* v *Department of Local Government*[83] ('*Connelly*'). It was argued in that case that the refusal of a tribunal to grant an adjournment to a party who was ill and unable to present his case in person constituted a breach of natural justice. The NSW Court of Appeal unanimously held that there was no breach of natural justice. Hope JA (Glass & McHugh JJA concurring) distinguished three situations: cases where there is no material justifying an adjournment; cases where refusing an adjournment would constitute a denial of natural justice and thus an error of law; and an intermediate category of cases where the material before the Tribunal leaves the matter to be determined 'as a matter of discretion in the ordinary sense'.[84] Hope JA appears to consider that, in this intermediate category of cases, the decision to grant or refuse an adjournment should be treated as an exercise of discretion which will be reviewable only if it is unreasonable. If so, this explains his Honour's statement that in order for the refusal of the adjournment to be regarded as a denial of natural justice 'it must be shown that it was a decision to which [the decision maker] *could not reasonably have come*'.[85]

The judgment of Hope JA in *Connelly* may be regarded as supporting the approach of Brennan J in *Kioa*[86] or, at the very least, as supporting a deferential approach to the views of decision makers on fairness.[87] His Honour's comments refer only to the grant or refusal of an adjournment, rather than the determination of procedural fairness generally. However there does not appear to be any compelling reason why different principles should apply in relation to other procedural requirements.[88] The test of reasonableness

[83] (1985) 11 IR 362 (NSW C of A).

[84] Id 365. This approach is similar to one suggested by Ellicott J in *Finch* v *Goldstein* (1981) 36 ALR 287, 304. Ellicott J there suggests that a promotions appeal committee might have a discretion to determine whether to allow legal representation and cross-examination, which the court would only interfere with in cases where the committee was under a duty so to decide.

[85] (1985) 11 IR 362, 366 (emphasis added).

[86] In fact the decision in *Connelly* was handed down three weeks before *Kioa*.

[87] Cf *Opitz* v *Repatriation Commission* (1991) 23 ALD 40 where there appears to be considerably less 'deference' shown to a Tribunal's refusal of an adjournment. Hill J held that it was a breach of procedural fairness for the AAT to refuse an adjournment where telephone contact could not be made to allow an applicant living in the Philippines to give oral testimony to supplement sworn evidence. One adjournment had already been given, and the lay advocate of the applicant had indicated that it would be a long time before contact could be made and had accepted that there was not a great deal that the applicant could say to supplement the sworn statements (44–5). Hill J commented that the issue was 'extremely difficult' but still concluded that procedural fairness was breached (48–9).

[88] In the case of judicial proceedings, the grant of an adjournment may be more 'discretionary' than other aspects of the court's procedure and this may justify an appellate court showing greater deference to the first instance decision: See eg *Bloch* v *Bloch* (1981) 55 ALJR 701, 703 (Wilson J); *GSA Industries Pty Ltd* v *NT Gas Ltd* (1990) 24 NSWLR 710; *Blazevski* v *The Judges of the District Court of New South Wales* NSW Court of Appeal, 10 November 1992 (unrep). However in the case of administrative proceedings

appears to be confined by Hope JA to the intermediate category. I suggest, with respect, that this approach could be simplified without changing its substance by regarding the threefold classification as a description of the effect of applying the reasonableness test in all cases. Cases falling within the two extreme categories would then be viewed as cases in which a reasonable decision maker would never, or always, be expected to grant an adjournment (as the case may be).

There are a number of decisions relating to domestic (non-statutory) tribunals which appear to endorse a deferential approach to the views of such tribunals as to the requirements of procedural fairness.[89] However it appears that the fact that these cases concerned domestic tribunals may have significantly affected the approach adopted.[90] Consequently these decisions are of limited value in determining the approach of the courts in relation to the exercise of statutory powers.

For the sake of completeness it is worth noting several related lines of authority before closing this discussion of the law. First, it has been held that the onus of establishing facts to support an alleged breach of procedural fairness is on the party applying for judicial review. This was affirmed recently by Clarke & Handley JJA (Kirby P dissenting) in *Bromby* v *Offenders' Review Board.*[91] Although this is clearly distinct from the question of whether the court should show deference to the decision maker's view of fairness, it may be considered to work in the same direction.

Secondly, the fact that the remedies of judicial review are discretionary may also allow the courts to show a degree of deference to the procedural determinations of decision makers. The courts have sometimes refused a remedy, even though a denial of procedural fairness has occurred, on the ground that the breach could not have made any difference to the ultimate decision.[92] This approach has been criticised on the basis that it requires the court to judge the merits of the decision in order to determine whether the breach could have made a difference.[93] The use of the discretion to refuse a remedy in this way is again quite distinct from the question of whether the courts should defer to a decision maker's view of fairness. Deference of the latter type affects the conclusion as to whether a breach of procedural fairness has occurred,

it is difficult to see why the treatment of adjournments should be regarded as any more 'discretionary' than other procedural questions, such as whether to allow an oral hearing, or cross-examination, or legal representation.

89 See eg *Hoolahan* v *Gietzelt* (1960) 1 FLR 469; *McNab* v *Auburn Soccer Sports Club Ltd* [1975] 1 NSWLR 54, 61; *McInnes* v *Onslow Fane* [1978] 3 All ER 211, 223; *Sweeney* v *Committee of the South East Racing Association* (1985) 75 FLR 191.

90 See *Sweeney* v *Committee of the South East Racing Association* (1985) 75 FLR 191, 195–6.

91 (1991) 51 A Crim R 249, 279.

92 See Allars, *Introduction* 276–7, Wade, op cit 533–5. A similar basis for refusing relief has been used in the UK in relation to other grounds of review also see eg *R* v *Broadcasting Complaints Commission; Ex parte Owen* [1985] QB 1153; *R* v *Monopolies and Mergers Commission; Ex parte Argyll Group plc* [1986] 1 WLR 763; [1986] 2 All ER 257; *R* v *Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815; *R* v *Independent Television Commission; Ex parte TSW Broadcasting Ltd* (1992) *The Times* February 7 (CA), upheld (1992) *The Times* March 30 (HL).

93 See eg Wade, op cit 534.

whereas the discretion to refuse a remedy only arises once such a breach is established.

Thirdly, there has also been support, both judicial and academic, for a deferential approach in other contexts, such as: the review of findings on jurisdictional facts;[94] the review of non-jurisdictional errors;[95] and judicial review generally.[96] Some would support the development of a general doctrine of deference, as in the United States.[97] Such calls for deference usually relate to administrators' interpretation of the legislation which governs them.[98] Some of the arguments which support deference in this context can also be used to support deference to administrators' procedural decisions. This is true, for example, of the case for deference succinctly stated by Lockhart J in *Toy Centre Agencies Pty Ltd* v *Spencer*:

> [T]he court must not require perfection from decision makers or impose such onerous duties upon them as to cause them to be afraid to make decisions, lest they be challenged on trivial grounds, or to preoccupy them with *minutiae*.
>
> The determination by the court of proper standards to be observed in decision making inevitably involves balancing the requirement of fair play to the citizen against the real problems that confront decision makers in the Public Service and calls for an approach by the court that is fair, practical and of common sense.[99]

However, procedural fairness raises at least some special considerations of its own, and it is these which will be addressed below.

### *(iii) Conclusion*

Although the courts appear generally to have assumed that the question of what procedural fairness requires is solely a matter for the reviewing court to decide, there is a growing body of decisions and dicta which favour a greater role for the views of decision makers. In England the decision in *Guinness* probably represents a setback for this development. Whether this is so depends on what is made of the uncertain support provided by this decision for a deferential attitude to decision makers' views in determining what fairness requires.

[94] Eg *R* v *Blakeley; Ex parte the Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54, 90–92 per Fullagar J; Aronson and Franklin, op cit 79–80.

[95] See Allars, *Introduction* 235.

[96] See eg *Toy Centre Agencies Pty Ltd* v *Spencer* (1983) 46 ALR 351, 359 (Lockhart J); *TVW Enterprises Ltd* v *ABT* (1986) 64 ALR 279, 283–4 (Muirhead J); D C Pearce, 'Judicial Review of Tribunal Decisions — The Need for Restraint' (1981) 12 *FL Rev* 167; D C Pearce, 'Executive versus Judiciary' (1991) 2 *PLR* 179, 191–2.

[97] Eg P Bayne, 'Fuzzy drafting and the interpretation of statutes in the administrative state' (1992) 66 *ALJ* 523. There is a great deal of literature on the US 'Chevron' doctrine, but for recent general accounts see eg Hon A Scalia, 'Judicial deference to administrative interpretations of law' [1989] *Duke LJ* 511; C R Sunsteen, 'Law and Administration after Chevron' (1990) 90 *Col LR* 2071; T W Merrill, 'Judicial Deference to Executive Precedent' (1992) 101 *Yale LJ* 969.

[98] See eg Bayne, loc cit.

[99] (1983) 46 ALR 351, 359.

In Australia these issues still await authoritative consideration. *Guinness* is likely to be regarded as persuasive, although its application has been doubted.[100] The comments of Brennan J in *Kioa* and Hope JA in *Connelly* provide some support for treating the views of decision makers as to what fairness requires as conclusive providing they are not reached unreasonably. However this appears to be contrary to the unstated assumptions underlying most decisions on content.

### (c) Summary

I have attempted above to survey the approach of the courts in determining the content of the hearing rule. The issues raised by this survey relate to three matters:

1. Problems arising from the principle of flexibility, in particular, the conflict between the need to maintain flexibility and the need to achieve a degree of certainty and predictability, and also issues about the meaning of 'fairness'.
2. The respective roles of decision makers and reviewing courts in determining what fairness requires in any particular case.
3. The appropriate factual basis upon which fairness is to be assessed.

In Part II, I propose to explore these matters further and provide some evaluation of the approach of the courts on these issues.

## PART II: EVALUATION

### (a) Flexibility and certainty

There is an obvious criticism which can be levelled at the principle of fairness described in the first part of this article, namely, that it undermines the certainty and predictability of procedural fairness. If the requirements of procedural fairness are determined by a notion of fairness which defies definition or reduction to rules, there will inevitably be a significant degree of uncertainty as to its application.

The suggestion that procedural fairness lacks certainty is nothing new. It was, for example, addressed at the modern resuscitation of natural justice in *Ridge* v *Baldwin*,[101] where Lord Reid rebutted the allegation that 'natural justice is so vague as to be practically meaningless' by demonstrating that legal principle need not be 'cut and dried'.[102] However Lord Reid's argument did not put an end to calls for the recognition of the importance of certainty and

[100] *Re Macquarie University; Ex parte Ong* (1989) 17 NSWLR 113, 140 (a decision of the Visitor to Macquarie University). However the decision in *Guinness* received only cursory consideration.
[101] [1964] AC 40, 64–5.
[102] Ibid.

predictability in the requirements of procedural fairness.[103] A noteworthy exchange occurred in the debate of the 1970s over the then emerging doctrine of 'fairness'.[104] Taylor argued that some authorities indicated a trend away from the application of general principles, and that this was causing natural justice to '[disintegrate] into a collection of individual cases of authority only on their very facts.'[105] In response to this Mullan suggested that some flexibility was necessary given the variety of decision-making functions. He asserted nevertheless that this need not prevent the development of principles to assist the court in its function of placing 'the particular decision-making power in the right place on the spectrum which represents the varying content of the rules of natural justice'.[106]

The argument of Lord Reid, echoed by Mullan, must be accepted as far as it goes. Procedural fairness does not need to be precise in order to provide adequate guidance for the courts. But this does not address a more subtle point, which is sometimes made: that the principles of procedural fairness do not provide sufficient guidance for those required to observe them.[107] According to this criticism, the problem is not so much one of uncertainty for the courts, but rather unpredictability for administrators. It is one thing for procedural fairness to provide sufficient guidance for the courts. It is another matter altogether whether procedural fairness allows an administrator (who may have no legal training) to determine what procedure is required in a particular situation. This point was recognised by Lord Guest in *Wiseman* v *Borneman*:

> Inferior tribunals should be in a position to know whether, in any particular case, they were called on to apply the principles of natural justice and to what extent those principles should be followed. It would be unsatisfactory if cases where statutory tribunals had been set up were to be decided ex post facto upon some uncertain basis.[108]

More recently this has been reinforced by Sir Gerard Brennan:

> The 'broad and flexible concept of fairness', as Cooke J described it,[109] no doubt creates some uncertainty in administration. I suspect it inspires

[103] See eg *Wiseman* v *Borneman* [1971] AC 297, 310 (Lord Guest); S Churches 'Justice and Executive Discretion in Australia' [1980] *Public Law* 397, 421; C Harlow & R Rawlings, *Law and Administration* (London, Weidenfeld and Nicolson, 1984) 82; R A Macdonald, 'Judicial Review and Procedural Fairness in Administrative Law' (1980) 26 *McGill LJ* 1, 14; G Johnson, 'Natural Justice and Legitimate Expectations in Australia' (1984) 15 *Fed LR* 39, 69; I Thynne & J Goldring, *Accountability and Control — Government Officials and the Exercise of Power* (Sydney, Law Book, 1987) 177.

[104] See eg D J Mullan, 'Fairness: The New Natural Justice' (1975) 25 *University of Toronto Law Journal* 281, 296–303 and the articles referred to therein. See also the text above at fn 19.

[105] G D S Taylor, 'Natural Justice — The Modern Synthesis' (1975) 1 *Mon LR* 258.

[106] Mullan, op cit 301.

[107] Eg the Explanatory Memorandum to the Migration Reform Bill 1992 (Cth) (at para 413(a)) justifies the codification of procedure in immigration matters on the grounds that the common law rules of natural justice 'have not provided the certainty needed for effective administration of the migration program'. (I am indebted to Jeffrey Barnes for bringing this Bill to my attention.)

[108] [1971] AC 297, 310; See also Churches, loc cit.

[109] *Daganayasi* v *Minister of Immigration* [1980] 2 NZLR 130, 145. [Brennan footnote.]

> administrators to judicialize their procedures in order to protect the validity of their actions, despite judicial depreciation of 'over-judicializing' administration.[110] The imprecision in the content of 'natural justice' and the *ex post facto* declaration of that content is one of the unsolved problems of administrative law and practice.[111]

It is difficult to evaluate the significance of this 'unsolved problem'. However, I believe it to be fundamental. To explain why, it is necessary to digress into questions of what it is that procedural fairness seeks to achieve and how its objectives can best be met.

### (b) The importance of educative effect

Procedural fairness, clearly, seeks to ensure that appropriate procedures are adopted in administrative decision making. There is room for debate as to whether this is an end in itself or merely a means to achieve better substantive decision making[112] but, in either case the object of the principles is to require appropriate procedure.

It is possible to distinguish two ways in which the courts, by developing and applying the principles of procedural fairness, can meet this objective:

1. through the 'corrective' function of the courts in providing a remedy in any particular case in which review is sought; and
2. through the 'educative' function of formulating principles to provide guidance to decision makers as to the appropriate procedure to adopt in future cases (and an incentive to follow such guidance).

This dichotomy adopts Atiyah's analysis of the 'dispute settlement' and 'hortatory' functions of the judicial process,[113] as applied to procedural fairness by Harlow and Rawlings.[114] Bayne has recently used a similar analysis to describe the 'normative' role of judicial review.[115]

The educative function is closely connected to, but not identical with, notions of certainty and predictability. Obviously, certainty and predictability will be important if the law is to achieve educative effect. But principles which are both certain and predictable could still fail to be educative if, for example, they are too complex to be understood by those to whom they apply. It is also possible that the manner in which principles are formulated may have some bearing on the degree of educative effect achieved. It may, for example, be more effective for requirements to be expressed in terms of

[110] See eg Lord Diplock in *Bushell* v *Secretary of State for the Environment* [1981] AC 75, 97. [Brennan footnote.]

[111] Brennan, op cit 28.

[112] It may be best to regard it as both. See eg R A Macdonald, 'Judicial Review and Procedural Fairness in Administrative Law: I' (1980) 25 *McGill LJ.* 520, 536–43; D J Galligan, *Discretionary Powers* (Oxford, Clarendon Press, 1986) Chapter 7; P P Craig, 'Legitimate Expectations: A Conceptual Analysis' (1992) 108 *LQR* 79, 85–6.

[113] P S Atiyah, *From Principles to Pragmatism* (OUP, 1978) reprinted at (1980) 65 *Iowa Law Review* 1249. See also the distinction drawn by R Pound between 'the function of deciding the controversy and the function of declaring the law for other controversies': R Pound 'Theory of Judicial Decision III' (1922–3) 36 *Harvard Law Review* 940, 941.

[114] Harlow & Rawlings, op cit 82–3.

[115] P Bayne, 'Judicial review and good administration' (1990) 64 *ALJ* 715, 716.

positive guidance as to what should occur, rather than negative condemnation of unacceptable conduct.[116] There will also be a need for the relevant principles to be communicated to the persons to whom they apply.[117]

The claim that procedural fairness provides insufficient guidance for administrators is, in effect, a charge that the principles are failing in their educative function. This raises the issue of the relative importance of the corrective and educative functions. There has been some jurisprudential debate as to the significance of the educative function of law in general and the means by which it is best achieved.[118] Recently, Atiyah has used the desirability of predictability to argue in support of legal formality[119] and in doing so has evoked a passionate defence of judicial creativity from Justice Kirby.[120] I need not discuss these broader issues,[121] as my concern here is more specific. I believe there are several reasons why, in the case of the principles of judicial review, and procedural fairness in particular, the educative function of the courts deserves special emphasis.[122]

First, given that judicial review is only sought in respect of a very small percentage of decisions,[123] it follows that it is only through educative effect that judicial review can have a meaningful effect on administrative action. It is inevitable that judicial review will continue to be marginal. The volume of

[116] See Bayne's discussion on whether reformulation of the principles of judicial review as principles of good administration would achieve greater normative effect: Bayne (1990) 64 *ALJ* 715. See also Committee of the JUSTICE — All Souls Review, *Administrative Justice — Some Necessary Reforms* Ch 2 6–23 recommending the adoption of non-statutory principles of good administration. This recommendation has been endorsed by Rt Hon Sir Harry Woolf, *Protection of the Public — A New Challenge* (London, Stevens & Sons, 1990) 122.

[117] No doubt academics have a role to play in this, through the production of texts which make the law more accessible.

[118] See eg Atiyah, (1978) loc cit; J Stone, 'From Principles to Principles' (1981) 97 *LQR* 224; and P S Atiyah, *Pragmatism and Theory in English Law* (London, Stevens & Sons, 1987) 126ff. Atiyah criticised what he claimed to be a shift in modern times 'from principles to pragmatism', whereby the courts have become more concerned with the particular case at hand and less concerned with the hortatory effect of their decisions. Stone disputed this and challenged Atiyah's assumptions regarding the manner in which hortatory effect is achieved (but without disputing the desirability of the law achieving such effect). Stone argued that the development of principles requires a gestation period of 'pragmatism'. In the case of procedural fairness, it is surely high time for that gestation period to be brought to a fruitful end.

[119] P S Atiyah, 'Justice and Predictability in the Common Law' (1992) 12 UNSWLJ 448.

[120] Justice M Kirby, 'In Praise of Common Law Renewal' (1992) 15 UNSWLJ 462.

[121] I should not be taken to be opposing judicial creativity. It seems to me that the fact that the courts change the law need not unduly undermine its educative effect, provided that change does not occur too frequently.

[122] See generally: B Jinks, 'The "New Administrative Law": Some Assumptions and Questions' (1982) *Australian Journal of Public Administration* Vol XLI, No. 3 September 209, 217–18, cautioning against focussing on the correction of administrative errors at the expense of prevention; Macdonald, (1980) 25 *McGill LJ* 520 and (1980) 26 *McGill LJ* 1, 14; Bayne (1990) 64 ALJ 715. See also the references to comments on the significance of certainty supra fn 103, 105, 107–8.

[123] Bayne (1990) 64 ALJ 715, 716. See also the interesting comments by Volker on the low levels of use of all review avenues in respect of the 3 million decisions per year taken by the Department of Social Security: D Volker, 'The Effect of Administrative Law Reforms — Primary Level Decision-Making' (1989) 58 *Canberra Bulletin of Public Administration* 112.

administrative decision making is so great that, if judicial review were to be sought in anything more than a tiny proportion of decisions, both the administrative system and the court system would grind to a halt.

Secondly, the value of the corrective function of the courts in reviewing for breach of procedural fairness in any particular case is arguably relatively limited. This is due in part to the limited nature of judicial review itself, which means that where review is successful it may provide no more than a 'pyrrhic victory',[124] as a quashed decision may simply be made again with the same result. However there is an even more fundamental limitation on the corrective effect of procedural fairness. The expense and delay involved in enforcing the principles of procedural fairness (through judicial review) in any particular case is likely to cause prejudice to one or both parties, or to the public interest generally. The very fact that judicial review is required or sought means that the decision making process in that case (viewed as a whole) will be far from ideal. To put this another way, the remedy which is intended to correct problems of process may be said itself to introduce problems of process.[125] It is quite conceivable that the detriment to the process caused by a party seeking judicial review (in terms of delay, expense etc) could far outweigh the procedural defect which is corrected.[126] It may be argued then that the principles of procedural fairness can only fully achieve appropriate procedure or process in cases where those principles are observed by virtue of educative effect, so that no enforcement is necessary.

Finally, it is in my view essential to maximize the educative effect of judicial review if it is to be regarded as being of benefit to society as a whole, rather than just those who have the means to use it. There is quite clearly a lack of equality of access to judicial review. As Pearce has said:

> The courts may be open to all but they are really only available to those who can afford to pay or who can so arrange their affairs as to be able to afford to lose.[127]

This inequality of access affects all areas of law, but arguably is of particular concern in the case of Administrative Law, since governmental action affects the interests of many who are unable to afford litigation.[128] I would suggest

[124] M Allars, (1987) 11 *Syd LR* 306.

[125] See also D Pearce, 'Is there too much natural justice? (3)' Australian Institute of Administrative Law Newsletter No 12 (1992) 14.

[126] If, from the perspective of the applicant, judicial review for procedural fairness causes greater detriment than it cures, it will presumably not be sought. But this is not an answer to the criticism. The applicant may not be able to make this calculation in advance, and will presumably not consider detriment to other parties or to the public interest.

[127] D Pearce (1981) 12 *FL Rev* 167. See also T G Ison, 'The Sovereignty of the Judiciary' (1985) 10 *Adelaide Law Review* 1, 4; J Disney, 'Access, Equity and the Dominant Paradigm' in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (Canberra, Australian Institute of Administrative Law Inc, 1992) 1, 2–3; D Tracey 'Access to Administrative Law: The ARC's Multicultural Project' in McMillan, op cit 128, 128–9.

[128] The issue of access to administrative review has been addressed in a number of reports of the Administrative Review Council: *Access to Administrative Review Stage 1: Notification of Decisions and Rights of Review* Report No 27 (Canberra, AGPS, 1987); *Access to Administrative Review: Provision of Legal and Financial Assistance in Administrative Law Matters* Report No 30 (Canberra, AGPS, 1988); *Access to Administrative Review by Members of Australia's Ethnic Communities* Report No 34 (Canberra, AGPS, 1991);

that this is not a problem which can be solved simply by increasing legal aid funds.[129] Our society cannot afford to have every social issue determined and regulated by the legal system. Some rationing of access is inevitable, and it is also inevitable that such rationing will favour the powerful and those with more (in financial terms) at stake. Such persons are arguably the major beneficiaries of the 'corrective' function of law.[130] I believe that the courts should recognise this problem of inequality of access and (where relevant) take it into account in determining the direction the law should take, for example by being particularly alert to the interests of those who are effectively 'unrepresented' before the court by reason of their lack of access.[131] One way this can be done is by the courts seeking to maximize educative effect in order to reduce the need for corrective action and thereby reduce the injustice which flows from inequality of access to corrective action.

In fact the importance of maximizing educative effect has been widely recognised by commentators, both in relation to judicial review and procedural fairness.[132] The challenge which this holds out is aptly described by Macdonald:

> Procedural review must consist of more than the establishment of rules to be followed by administrative decision makers; it must perform an educative function, encouraging the development of certain paradigms of decision and engendering commitment to them.[133]

### (c) Does procedural fairness achieve sufficient educative effect?

Clearly, the principles governing procedural fairness must maintain a balance between the corrective and educative functions. Determining where that balance lies may be difficult and controversial. One problem is that there is a serious lack of empirical evidence about the educative effect of judicial review

*Annual Report 1991–2* (Canberra, AGPS, 1992) 23–6, 28–9. Further discussion is provided in many of the papers in McMillan, op cit. However even if the proposals of the ARC are implemented this would not, in my view, absolve the judiciary from its responsibility to address this issue where possible.

129 I should not to be taken to be opposing an increase in legal aid funds. I am merely suggesting that although such an increase may help, it will not eradicate the problem.

130 See Goldring's comments on the major beneficiaries of the 'New Administrative Law': J Goldring, 'Public Law and Accountability of Government' (1985) 15 *FL Rev* 1, 37. See also the more general discussion of the significance of unequal distribution of power to the assessment of the value of procedural fairness in: E Tucker, 'The Political Economy of Administrative Fairness: A Preliminary Enquiry' (1987) 25 *Osgoode Hall Law Journal* 555, 609–13.

131 Some judges appear to be sensitive to this issue already. See, for example, *Attorney-General (NSW)* v *Quin* (1990) 93 ALR 1, 26 (Brennan J):

> If the courts were permitted to review the merits of administrative action whenever interested parties were prepared to risk the costs of litigation, the exercise of administrative power might be skewed in favour of the rich, the powerful, or the simply litigious.

132 See eg the articles noted at fn 122 and also: G D S Taylor, 'May Judicial Review Become a Backwater?' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s Problems and Prospects* (Auckland OUP 1986) 153, 177–8; M Bouchard, 'Administrative Law in the Real World: A View from Canada' in M Taggart (ed) op cit, 179, 191.

133 Macdonald (1980) 26 *McGill LJ* 1, 14.

in general.[134] What evidence that does exist is equivocal, but provides at least some support for Bayne's conclusion that 'judicial review is not having the normative effect that it might'.[135] It is highly desirable that further evidence bearing on this question be obtained.[136] It would also be useful to know more about how the *ex post facto* determination of the content of procedural fairness affects administrators, and whether it constitutes a significant problem in practice.[137] It would be surprising if it does not, given that questions concerning content are becoming increasingly important as the reach of the principles grows.[138]

A further problem arises from the value judgments which necessarily underlie any view as to how much educative effect is enough. I doubt that many will dispute the desirability of maximizing educative effect. But what may be controversial is the extent to which the substantive content of the law should be modified to achieve this end. Mullan comments that 'Presumably, uncertainty and lack of predictability are preferable to the certainty and predictability of a bad regime of rules.'[139] However, it may be that a compromise is preferable to both of these alternatives, since the achievement of greater educative effect arguably justifies some consequential weakening of the substantive rules.

Despite these difficulties in assessing the appropriate balance, there seems to me to be a strong case to suggest that the courts have paid insufficient regard to the importance of educative effect in developing the principles governing the content of procedural fairness. The evidence for this has been discussed in Part I.[140] The principle of flexibility and the refusal of the courts to reduce procedural fairness to definitions or rules[141] make perfect sense if viewed only in the context of a court exercising its corrective function in a particular case. Such an approach ensures that the court will require no more or less than what is fair in that case. But it does so at the expense of educative principles which might otherwise be developed. Similarly, the determination of what fairness requires by reference only to the views of the court may seem

134 Several commentators have noted this. See for example: W H Angus, 'The Individual and the Bureaucracy: Judicial Review — Do We Need It?' (1974) 20 *McGill LJ* 177; J Goldring, 'Administrative Law: Teaching and Practice' (1986) 15 MULR 489, 499–500; Bayne (1990) 64 ALJ 715, 716.

135 Id 717. Equivocal evidence on this was also provided in papers presented at a Conference on 'Ten Years of the Federal Administrative Decisions (Judicial Review) Act' and published in (1991) 20 *FL Rev* 1–164 (note in particular the papers by E Willheim, P Bray, J Hall and N Williams). See also D O'Brien, 'The Impact of Administrative Review on Commonwealth Public Administration' in M Harris and V Waye (eds) *Administrative Law* (Sydney, The Federation Press, 1991) 101.

136 This has been recognised by the Administrative Review Council, which has the topic of 'departmental practices following adverse court or tribunal decisions' on a list of reserve topics to be pursued when resources permit: *Annual Report 1991–2* (Canberra AGPS 1992) p 7. (I am indebted to Jeffrey Barnes for drawing this to my attention.)

137 For a recent indication that it is a problem see: E Willheim, 'Ten Years of the ADJR Act: From a Government Perspective' (1991) 20 *FL Rev* 111, 115.

138 It has been suggested on several occasions that it is the content, rather than the applicability, of natural justice which is now the crucial question: See eg supra fn 2.

139 Mullan, op cit 299.

140 See Part I(a), especially the text beginning supra fn 24.

141 See text supra beginning fn 15.

reasonable enough in the individual case. However the flexible nature of 'fairness' makes it extremely difficult for decision makers to predict what those views will be, and this significantly undermines the educative function of procedural fairness. Exactly how decision makers respond to this is unclear. Some may 'over-judicialize' their procedures,[142] and this is probably a lesser evil,[143] although it may have serious consequences for efficiency. However it is also possible that some decision makers may conclude that, given the difficulty of determining what the law requires, they are best to ignore it and simply do what they think best.

There can be no effective criticism of the current approach, however, unless it can be shown that there is some means of increasing educative effect without unduly compromising the substantive principles. This is the issue which will be taken up in Part III.

## PART III: INCREASING THE EDUCATIVE EFFECT OF PROCEDURAL FAIRNESS

This article has concentrated on what may be called the 'common law' principles governing the content of procedural fairness, that is, the principles devised by the courts to determine what procedural fairness requires.[144] In this Part, I discuss a number of measures which might be adopted as a means of increasing the educative effect of these common law principles. Before I do, however, it is first necessary to consider to what extent the determination of content is appropriately left to the common law to regulate.

### (a) Legislative prescription of procedure — what role?

In most cases the question of what procedural fairness requires in particular circumstances is left to the courts to decide; this being determined, with due regard to the relevant statutory context, in accordance with the principles described in Part I. However the legislature can, and sometimes does, accept greater responsibility for ensuring that appropriate procedures are adopted. It is always open to the legislature, when conferring powers or imposing duties, to provide expressly that particular procedures must be observed. Such procedures may be described with varying degrees of specificity, and may apply

[142] Brennan, op cit 28; Justice Deidre O'Connor, 'Is there too much natural justice? (1)' Australian Institute of Administrative Law Newsletter No 12 (1992) 1, 3.

[143] But see J Disney in McMillan (ed), op cit 7:

> When pursued with obsessive legalistic vigour, 'natural justice' is often the enemy of real justice. That may seem a startling statement, but I have seen too many instances where adoption of complex procedures to comply with traditional principles of 'natural justice' has meant that many people are effectively prevented from getting any form of justice at all.

[144] Brennan J maintains that natural justice is not a common law right, but rather, an implied condition on the exercise of statutory power. However even Brennan J appears to accept that the determination of what procedural fairness requires in particular circumstances involves more than simply discerning the intention of the legislature. See *Kioa* v *West* (1985) 159 CLR 550, 613–15, 627.

either to supplement or replace the common law principles of procedural fairness.

While it is not uncommon for the legislature to impose express procedural requirements, such provisions are rarely comprehensive, and there is usually little consistency between one set of requirements and another.[145] However, calls have been made by both commentators and law reform bodies for greater legislative prescription of administrative procedures.[146] The measures advocated have varied in scope from proposals for the co-ordinated specification of procedures for individual tribunals,[147] to the enactment of a uniform code of procedure to govern tribunals[148] or even a wider range of decision makers.[149] With respect to the means of effecting such requirements, consideration has been given to the use of primary legislation,[150] delegated legislation,[151] guidelines or standards,[152] and various combinations of the foregoing.[153] The United States has long had administrative procedures legislation,[154] and legislation also exists in other jurisdictions.[155] A draft Commonwealth Bill was prepared in 1977,[156] but never passed.[157]

The arguments for and against the legislative prescription of administrative procedures have been considered at length elsewhere[158] and I do not wish to

[145] See A Robbins, *Administrative Tribunals in Victoria* (Melbourne, Victoria Law Foundation, 1982) 182–4.

[146] *The Royal Commission of Inquiry into Civil Rights* (the 'McRuer Report') (Ontario, 1968) Report No 1 Vol 1 Chapter 14 (subsequently: McRuer Report); Commonwealth Administrative Review Committee, Report PP 1971/144 (Canberra, Commonwealth Government Printing Office, 1971) 96–101 (subsequently: CARC Report); K J Keith *A Code of Procedure for Administrative Tribunals* (Auckland, Legal Research Foundation Inc, 1974); Robbins, op cit 182–93; G A Flick, *Natural Justice* (2nd ed, Sydney, Butterworths, 1984) 23–5; Law Reform Commission of Canada, *Independent Administrative Agencies* Report No 26 1985, 47–73 (subsequently: LRCC Report); G Hill, *Administrative Procedures Legislation in Australia* (LL.M. minor thesis, Monash University, 1986). I am indebted to Professor Enid Campbell for reminding me of the significance of the legislative prescription of procedures, and for referring me to many of the materials discussed here.

[147] Robbins, op cit 183. See also (re New Zealand) Keith, loc cit.

[148] CARC Report, 100–1; Robbins, op cit 184–93; Flick, op cit 23–5; Hill, loc cit. See also (re New Zealand) G S Orr, *Report on Administrative Justice in New Zealand* (Government Printer, Wellington 1964) 76–7.

[149] Law Reform Committee of South Australia, Report No 82 (1984) 40–41. See also (re Canada) LRCC Report, 47–73.

[150] Robbins, op cit 190; Law Reform Committee of South Australia, op cit 40.

[151] CARC Report, 101; LRCC Report.

[152] Keith, op cit 49–51.

[153] CARC Report, 100–1; LRCC Report, 47–73.

[154] *Administrative Procedure Act* 1946. This is the legislation which has inspired many of the calls for codes of procedure in Commonwealth countries.

[155] Eg Alberta (*Administrative Procedures Act* RSA 1980 cA-2) and Ontario (*Statutory Powers Procedures Act* RSO 1990 cS.22).

[156] Administrative Tribunals (Procedures) Bill 1977.

[157] Hill, op cit 23–7. A draft bill was also prepared but not enacted in New Zealand (Tribunals Procedure Bill 1985): See M Taggart, 'The Rationalisation of Administrative Tribunal Procedure: The New Zealand Experience' in R Creyke (ed), *Administrative Tribunals: Taking Stock* (Canberra, Centre for International and Public Law, 1992).

[158] For Commonwealth literature see eg the references cited supra fn 146, 148–9, and also: McRuer Report Vol 1 Chapters 11–14; J A Farmer, 'A Model Code of Procedure for Administrative Tribunals — An Illusory Concept' (1970) 4 NZULR 105; M Taggart,

review them here. The narrower question which must be considered is the extent to which legislative prescription provides a solution to the shortcomings of the common law principles described in Parts I and II above. The proponents of legislative prescription have argued, amongst other things, that it has the potential to increase certainty and predictability as to what procedures are required,[159] and also heighten awareness of the requirements amongst both administrators and the public.[160] With careful drafting, a legislative statement of procedure might achieve clarity and precision, and also provide a concise yet authoritative statement of principle which is more easily disseminated amongst both administrators and the public.[161] These considerations all suggest that procedural codes may offer an important means of increasing the educative effect of procedural requirements.

With respect to the suggestion of a uniform code of procedure, it would seem to me that, whatever other benefits this measure may have,[162] it is unlikely on its own to overcome the problems discussed in Part II. It is generally accepted that the need for procedures to vary according to the nature and functions of different tribunals means that such a code could not be comprehensive, but rather would only provide a set of minimum requirements.[163] If it is left to the common law to 'supplement' the code when fairness requires it, the problem of *ex post facto* determination of content will remain.

If the unpredictability of the common law principles is to be avoided, the legislative prescription of procedure will need to be comprehensive, so that the common law principles can be excluded. This may be possible using another approach which has often been advocated, whereby detailed procedures are prescribed for individual tribunals or decision makers, either instead of, or in addition to, a general uniform code of minimum standards.[164] This, in my view, is the approach which is likely to provide the greatest guidance to decision makers on procedural matters. However it will be important that the procedures prescribed in any particular case are comprehensively described and are such as to permit adequate participation.[165]

One criticism which has been levelled at this approach of individualised prescription of procedure is that the legislature does not have the time, resources or expertise necessary to prescribe comprehensive procedures for

op cit 91–120. In addition there is a vast amount of material on the US *Administrative Procedure Act* 1946.

159 McRuer Report, 211; Keith, op cit 47–9; Robbins, op cit 182–3.

160 Robbins, op cit 189; LRCC Report, 51-2; Hill, op cit 31–3.

161 It is also possible that, by framing such a statement in terms of positive guidance (as part of a 'code of good administration'), its normative effect may be increased. See Bayne, (1990) 64 ALJ 716.

162 Eg it may well achieve greater consistency between the procedure of different tribunals or increase awareness of the particular requirements it contains.

163 McRuer Report, 210; Orr, op cit 76; Keith, op cit 47; Flick, op cit 22.

164 See eg: McRuer Report, 212–13; CARC Report, 100–1; Keith, op cit 44–51; Flick, op cit pp 22–3; LRCC Report.

165 The *Migration Reform Act* 1992 (Cth) provides an example of individualised legislative prescription of procedure combined with the express exclusion of procedural fairness: see new ss 166D–166DF, 166LB. However I have some doubts as to whether the procedures prescribed are adequate or sufficiently comprehensive.

each tribunal and agency.[166] This is a valid point, but one that can be answered by delegating authority to the tribunal or agency in question to make its own procedural rules. There are also other arguments in favour of requiring administrators to devise their own procedural rules. It is the administrators themselves who will have experience of the relevant area and so should be best placed to foresee the procedural issues which are likely to arise.[167] Furthermore, if administrators devise their own procedural requirements, that in itself should increase their awareness (and hence the educative effect) of the requirements. It has been argued however that administrators may lack the necessary degree of objectivity to devise their own procedural rules,[168] and that such an approach will not achieve sufficient uniformity in the procedures of different bodies.[169] A possible answer to these objections could be to require scrutiny and supervision of such rule-making by a body such as the Administrative Review Council.[170] This may not provide a complete solution,[171] however it should, in my view, be possible to reduce any inconsistency to an acceptable level.

I suggest then, that the legislative prescription of procedure, preferably through supervised rule-making by administrators themselves, may offer a viable means of addressing the problem of *ex post facto* determination of content. However it will not always be practical or appropriate. In order to prescribe suitable procedural rules it will be necessary to foresee what procedural issues are likely to arise. This may be difficult, if not impossible, where the relevant substantive powers are broad and may be exercised in a variety of different circumstances. Moreover, while procedural rules offer the possibility of clarity and precision, they will not always be more educative than looser standards. Precision implies greater complexity, and that complexity may itself undermine the educative effect of rules for certain decision makers in certain contexts. Whereas procedural rules may be very helpful to a decision maker with legal training who makes regular use of those rules, they are less likely to assist a decision maker with no legal training who refers to the rules only on rare occasions and consequently never becomes familiar with them.

Further guidance, at a more theoretical level, about the limitations of legislative prescription, may be provided by the work of Galligan on the regulation

[166] McRuer Report, 209–10; Keith, op cit 46; Robbins, op cit 184; Flick, op cit 22–3.
[167] Flick, op cit 22.
[168] Robbins, op cit 184.
[169] CARC Report, 100; Flick, op cit 22–3.
[170] The ARC would undoubtedly require a significant funding increase to allow it to perform such a role. However, the ARC does already concern itself with Tribunal procedure at a general level. It is currently engaged in a review of 'Procedures of Commonwealth Administrative Review Tribunals'. A Discussion Paper was prepared in October 1991, and work is proceeding on a draft report.
[171] There has, for example been criticism of the success of the UK Council on Tribunals in performing such a role. See eg CARC Report, 100, Flick, op cit 22. However it may be that the Council's recent adoption of model rules will improve its effectiveness. See Council on Tribunals, *Report on Model Rules of Procedure for Tribunals* 1991 Cm 1434.

of substantive discretionary powers.[172] Legislative prescription involves what may be described as a 'rule-based' approach to confining the discretion of a decision maker to determine what procedure to adopt. A distinction is sometimes drawn between rule based regulation and the conferral of discretion. However, as Galligan has demonstrated,[173] these alternatives are more properly viewed as opposite ends of a continuum in which the width of discretion afforded to a decision maker varies according to the precision of the standards which are imposed. The 'rule-based' approach of prescribing relatively precise standards is consistent with an ideal of decision making which is sometimes called the 'comprehensive planning' model.[174] This model advocates an approach to decision making whereby an attempt is made to understand and foresee the relevant issues to be addressed and deal with them in a comprehensive plan.[175] At the other end of the continuum is the approach which sets only very loose standards and is consistent with an 'incrementalist' ideal of decision making whereby problems are addressed as they occur.[176] Galligan discusses a range of factors relevant in determining the appropriate balance between more and less precise standards in structuring discretion.[177] Although Galligan's concern is the exercise of discretion to make substantive determinations, some of the factors he mentions[178] appear to be equally relevant in assessing the place of precise standards governing procedure, and are consistent with the intuitive comments suggested above. Thus, Galligan suggests that there is a prima facie case for formulation of reasonably precise standards to guide 'individualized, recurring decisions',[179] while the case for looser and more flexible standards strengthens as decisions become more complex or variable, and the degree of recurrence decreases.[180]

Galligan's analysis provides some useful indications as to the circumstances in which the legislative prescription of procedure is most likely to be appropriate. An obvious case for such an approach is that of a tribunal established to make recurring decisions on matters which are specified with reasonable definition. It is not surprising then that most proposals for legislative prescription have tended to focus on the procedure of tribunals. However the rapid growth of procedural fairness in modern times has ensured that it now applies to an extremely wide range of decision making. Much of this, arguably, is not suitable for the legislative prescription of procedure, either because there is not a sufficient degree of recurrence to make prescription worthwhile, or because the factors which need to be considered are too complex or unpredictable for prescription to be practicable. Examples which

[172] Galligan, op cit. It should be noted that Galligan does not use these principles in this way, but rather appears to regard the determination of fair procedure as being distinct from other discretionary contexts. See ch 7.
[173] Id chs 1 & 4.
[174] Id 117–28.
[175] Id 120–2, 127–8.
[176] Id 122–3, 127–8.
[177] Id chs 2–4.
[178] This brief summary is intended to indicate the relevance of Galligan's work. However it does not do justice to his analysis.
[179] Galligan, op cit 177.
[180] Id 172–3.

come to mind include decisions involving high level decision makers or a significant policy element,[181] preliminary reports and investigations,[182] and powers which may need to be exercised urgently.[183] In cases such as these, I suggest, the incrementalist approach of the common law may offer significant benefits, due to the difficulty of predicting in advance the factors which may need to be considered in determining how to proceed.

It would appear then, that legislative prescription may have an important role to play in increasing the educative effect of procedural requirements, at least in relation to the procedure of tribunals with a strong adjudicative function. However, legislative prescription will only be appropriate in a limited range of circumstances. Consequently the incrementalist approach of the common law principles must continue to play a major role, and there remains a need to address the problems which that approach raises.

### (b) Reforming the common law principles determining content

The question I wish to address here is how the common law principles governing the content of procedural fairness can be improved to address the shortcomings discussed in Parts I and II. In evaluating the possible approaches, I will concentrate on their effectiveness in guiding procedure in informal and less predictable contexts, as opposed to the procedure of the more formal tribunals. In relation to the latter, there is considerable potential for legislative prescription, as discussed above.

Before considering some of the measures the courts could adopt it may be helpful to explain the nature of the question which needs to be addressed. In essence it is a question of how best to control the power or authority of a decision maker to determine what procedure to adopt. This notion of controlling power or authority is a familiar one to administrative lawyers, although it usually arises as a question of how to control power or authority to make decisions concerning substantive rather than procedural matters. In that context we are familiar with the notion that powers may be confined by standards of varying precision,[184] which are enforced by rights of review of varying degrees of stringency. Thus, for example, a power to grant licences may be governed by standards precise enough to be called rules or (at the other extreme) by loose discretionary standards, and may be subject to full de novo merits review by a tribunal or court, or (at the other extreme) be controlled only by judicial review. A similar analysis can be applied to the power or authority of a decision maker in determining how to proceed when making a decision. Clearly the decision maker must reach some conclusions as to

[181] As in eg *FAI Insurances Ltd* v *Winneke* (1982) 151 CLR 342; *O'Shea* v *Parole Board of South Australia* (1987) 73 ALR 1; *Minister for Arts Heritage and Environment* v *Peko-Wallsend Ltd* (1987) 75 ALR 218.

[182] As in eg *Romeo* v *Asher* (1991) 29 FCR 343; *Ainsworth* v *Criminal Justice Commission* (1992) 106 ALR 11.

[183] As in eg *Heatley* v *Tasmanian Gaming and Racing Commission* (1977) 137 CLR 487; *Marine Hull and Liability Insurance Co Ltd* v *Hurford* (1985) 62 ALR 253, on appeal (1986) 67 ALR 77.

[184] See Galligan's analysis, discussed supra fn 172–180.

procedure in order to make the decision. The question is, what standards should govern a decision maker's choice of procedure, and on what basis is that choice to be reviewed?

As indicated in Part I, the traditional approach of the courts to this question has apparently been to provide only the loose standard of 'fairness' to guide decision makers, but to review on the basis of the court's own view of what fairness requires.[185] In effect the reviewing court substitutes its own decision as to what procedural fairness requires in the circumstances for that of the decision maker. This language echoes that used to describe 'merits review' and distinguish it from the more limited role of the courts in judicial review of setting limits on the exercise of discretion.[186] This does not mean that the determination of the content of procedural fairness encroaches on 'merits',[187] as the reviewing court only substitutes its decision on the question of how to proceed, not on the substantive matter to be decided. However the justification for this approach appears to rest[188] on an assumption that, when the legislature confers authority to make a substantive determination, it does not intend to confer authority to determine conclusively what procedure to adopt in making that determination. The soundness of that assumption may be open to question, particularly in cases where legislation expressly confers discretion as to how to proceed.[189]

It was shown in Part I that some lines of authority have departed to some extent from the traditional approach.[190] In the discussion which follows I will draw on some of the alternative approaches examined in Part I in considering whether there is an approach open to the courts which might be preferable to the traditional approach.

### *(i) A more deferential approach*

One possibility would be for the courts simply to show greater deference to the views of decision makers in determining what procedural fairness requires in particular circumstances. This is the approach which appears to have been endorsed by the English Court of Appeal in *Guinness*.[191] A number of strong arguments can be made in support of such an approach.

First, it is at least arguable that, in some cases, decision makers may be better qualified than a reviewing court to determine what is fair (in a procedural sense) in a particular situation. Clearly, judges have great expertise in respect of the procedure of tribunals based on the judicial model. However

[185] This is, for example, the approach which is endorsed in *Guinness*, subject to comments leaving open the possibility of the court adopting a deferential attitude. See above in section I(b)(i).

[186] *Minister for Aboriginal Affairs* v *Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J).

[187] The dinstinction between merits review and judicial review is, in any case, problematic. See eg Allars, *Introduction to Australian Administrative Law* 162–3.

[188] In respect of statutory powers at least.

[189] As, for example, in relation to the AAT and the SART. See *Administrative Appeals Tribunal Act* 1975 (Cth) s 33; *Student Assistance Act* 1973 (Cth) s 29.

[190] See section I(c).

[191] See above beginning at fn 48.

procedural fairness now extends far beyond such cases. The more removed the circumstances are from the judicial model, the less value the experience and expertise of judges will be.[192] There may well be procedural issues affecting decisions of an administrative character[193] which the courts are not best equipped to decide. It is possible that a decision maker may have a better understanding of the significance of a proposed decision to a person affected, and so may be better placed to assess what fairness requires. There are a number of other broader considerations, of less certain effect, which the courts may have difficulty assessing. These include such matters as the urgency of proposed action,[194] and the implications of procedural requirements for resource allocation.[195]

Secondly, it is possible that the limitations of judicial review procedure may in some cases impair the ability of a reviewing court to determine what is fair in a particular case. The ability of the court to assess fairness may, for example be inhibited by the convention that members of tribunals should not actively oppose applications for judicial review of their decisions.[196] The High Court has expressly discouraged tribunals from becoming protagonists where their decisions are challenged for breach of procedural fairness.[197] If a tribunal does oppose such an application, it risks an award of costs against it, even if the application for review is unsuccessful.[198] While this approach is

[192] Although it must be conceded that an increasing number of judges also have experience of government administration. See Johnson, op cit 70.

[193] I use this term in a loose sense to indicate decisions at the other extreme from those based on the judicial model.

[194] *Marine Hull & Liability Insurance Co Ltd* v *Hurford* (1985) 62 ALR 253, 259–60 (Wilcox J); *Kioa* v *West* (1985) 159 CLR 550, 615 (Brennan J); *J Wattie J Canneries Ltd* v *Hayes* (1987) 74 ALR 202; *Grech* v *Minister for Immigration, Local Government and Ethnic Affairs* (1991) 105 ALR 107.

[195] D C Pearce (1991) 2 PLR 179, 180–1; *Jianxin* v *Minister for Immigration Local Government and Ethnic Affairs* (1991) 23 ALD 778, 795 per Neaves J:

> Clearly, it is not for the court to dictate to the parliament or the executive what resources are to be made available in order properly to carry out administrative functions under legislative provisions. Equally clearly, however, the situation cannot be accepted in which the existence of a right created by the parliament is negatived, or its value set at nought, by a failure to provide the resources necessary to make the right effective.

For recent discussion by the High Court of issues of resource allocation see: *Dietrich* v *R* (1992) 109 ALR 385, 397, 406–7, 426–7, 432, 438.

[196] I am indebted to Professor Enid Campbell for alerting me to this issue. See generally on this: E M Campbell, 'Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review' (1982) 56 ALJ 293; D J Mullan, 'Recent Developments in Nova Scotia Administrative Law' (1978) 4 *Dalhousie LR* 467; R Sadler, 'Reviewing an adjudicatory tribunal decision: the costs' (1990) 64 LIJ 938.

[197] *R* v *Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13; cf *Re Gough; Ex parte Key Meats Pty Ltd* (1982) 56 ALJR 263, 269–70 (Murphy J — dissenting), *Fagan* v *Crimes Compensation Tribunal* (1982) 150 CLR 666, 681–2 (Brennan J). Nevertheless the courts may sometimes approve and even encourage appearances by tribunals or tribunal members where breach of procedural fairness is alleged, eg: *Sordini* v *Wilcox* (1982) 42 ALR 245, 255 (Northrop J); *Kaycliff* v *ABT* (1989) 19 ALD 315; *Re Australian Conservation Foundation* (1988) 81 ALR 166.

[198] See further E Campbell 'Award of Costs on Applications for Judicial Review' (1983) 10 *Syd LR* 20; Sadler, loc cit.

maintained[199] there is at least some risk that a reviewing court will not be presented with both sides of the argument as to what fairness requires.

Thirdly, the case for a more deferential approach in determining content is supported by claims, which are sometimes made, that the principles of procedural fairness have been used on occasion to make unmeritorious tactical or technical challenges.[200] The unpredictability of procedural fairness must create the potential for greater use of litigation, whether for proper or ulterior purposes. It has also been claimed that in some areas procedural fairness has unnecessarily formalized procedures, increasing costs and delays, without actually improving decision making.[201] Such claims are difficult to assess due to lack of evidence and the difficulty of determining when an application for review is justified. The Administrative Review Council examined allegations of this kind concerning the *Administrative Decisions (Judicial Review) Act* 1977 in 1986, and concluded that, while such claims were exaggerated, a case for limited reform had been made out.[202] It appears also that the decision of the High Court in *Australian Broadcasting Tribunal* v *Bond* to adopt a narrower interpretation of the term 'decision' in the *Administrative Decisions (Judicial Review) Act* 1977 was partly prompted by concern at the potential of tactical challenges to impair the 'efficient administration of government'.[203] Ironically, the decision in *Bond* would seem likely only to increase the use of tactical challenges based on breach of procedural fairness, as such challenges will relate to reviewable 'conduct' and consequently will not be precluded by the High Court's narrower interpretation of 'decision'.[204] The adoption of a deferential approach would not actually prevent challenges on procedural fairness grounds being made for the purposes of obstructing or delaying

[199] It has been strongly criticised: see the references cited supra fn 196. However, for recent endorsement of the doctrine see: *Custom Credit Corporation Ltd* v *Lupi* [1992] 1 VR 99, 100–1, 111–2, 125–7; *BTR Plc* v *Westinghouse Brake and Signal Company (Australia) Ltd* (1992) 34 FCR 246, 265 (Lockhart and Hill JJ); *Riverina Broadcasters (Holdings) Pty Limited* v *ABT*, Federal Court, Drummond J, 29 September 1992 (unreported), 43–6.

[200] See eg *Commissioner of Police* v *Gordon* [1981] 1 NSWLR 675, 690 (Moffitt P); *Gardner* v *General Manager of Territory Insurance Office* (1991) 24 ALD 204, 208–9.

[201] See eg the criticism which followed the decision in *Finch* v *Goldstein* (1981) 36 ALR 287 concerning the requirements of natural justice in Commonwealth Public Service promotion appeals: *Public Service Board 59th Annual Report* 1982–3 (Canberra AGPS 1983) 4–6; *Review of Commonwealth Administration* ('Reid Committee') *Report* (Canberra AGPS 1983) 48–50; E Campbell *Tribunals and Inquiries Problem Material* (Faculty of Law, Monash University, 1984) 4–5; N Williams, 'The ADJR Act and Personnel Management' (1991) 20 *FL Rev* 158. For similar criticism of the effects of onerous procedural requirements see: *Australian Broadcasting Tribunal Annual Report 1984–5* (Canberra AGPS 1985) xii; L Grey, 'The Impact of Administrative Law in Communications Regulation' in McMillan, op cit 232–42; but cf J Hall 'The ADJR Act: Comments on its Workings in the Field of Broadcasting' (1991) 20 *FL Rev* 145. It has also been claimed that judicial review (not necessarily on the ground of procedural fairness) has been used for purposes of delay in the taxation area: P Bray, 'The ADJR Act: Its Effect on Taxation Administration' (1991) 20 *FL Rev* 138, 142, 143.

[202] Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act 1977 — Stage One* Report No 26 (Canberra, AGPS, 1986). The reforms suggested have not yet been implemented. See Allars, *Introduction* 106–7; Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* Report No 32 (AGPS Canberra 1989) 81–3.

[203] *Australian Broadcasting Tribunal* v *Bond* (1990) 94 ALR 11, 23 (Mason CJ).

[204] Id 27–8.

proceedings. However it might at least allow the courts to deal with such challenges more expeditiously, and allow administrators greater latitude in responding to such tactics.[205]

In counterbalance to the above arguments, it must also be recognised that there are some disadvantages of what I have called the deferential approach. The main problem is that, while the concept of deference implies that courts will intervene less often than they would otherwise, it gives no meaningful guide as to when, or to what extent, the courts should defer. Consequently the deferential approach will not increase the educative effect of procedural fairness; it will not give any greater guidance to administrators as to what procedure to adopt. In fact, it could even operate to make procedural fairness less educative. Deference may have the effect of reducing the incidence of procedural fairness review, and thereby reduce awareness of its requirements. It may also serve only to increase the unpredictability of review for breach of procedural fairness by introducing additional uncertainty as to whether (and how) the courts will show deference.

### *(ii) Giving decision makers primary responsibility for determining content*

The arguments suggested above in support of a deferential approach make a strong case for reducing the stringency with which the courts review decision makers' determinations as to how to proceed. This suggests that the courts should not simply substitute their own view of what fairness requires, but rather should adopt a more limited role. The problem with the deferential approach is that it does not define that role with sufficient clarity. However there are a number of other possible approaches.

One possibility is the approach described by Brennan J in *Kioa*[206] whereby the requirements of procedural fairness will be held to be satisfied if the procedure adopted is one which a 'reasonable and fair' decision maker could adopt. This test is analogous to that used for the ground of unreasonableness in judicial review,[207] and it is open to the criticisms made of that ground, that it is uncertain, circular and does not sufficiently distinguish merits review.[208] It is clear that a reasonableness test does not provide a precise guide to the ambit of review. However I would suggest that it does still offer some advance on the deferential approach. In effect the reasonableness test requires a judge to consider a range of views, different from the judge's own views, which

[205] Note that the English Court of Appeal has cited the likelihood of judicial review being used as a mere 'ploy' as a reason for suggesting that in certain sensitive areas it may only give 'prospective' remedies, which leave the challenged decision standing but declare the approach of the court for future cases: See eg *R* v *Monopolies and Mergers Commission; Ex parte Argyll Group Plc* [1986] 2 All ER 257; *R* v *Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815. In effect this deprives judicial review of any corrective effect, leaving only the educative function. On prospective remedies see C Lewis, 'Retrospective and Prospective Rulings in Administrative Law' [1988] *Public Law* 78.

[206] See supra fn 76.

[207] As expressed in *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s 5(1)(e) and (2)(g).

[208] See: J McLachlan, 'Substantive Fairness: Elephantine Review or a Guiding Concept?' (1991) 2 PLR 12, 18–19; Allars, *Introduction* 186–8, 191–2.

could nevertheless be held by an undefined class of reasonable people. It seems to me that this test does provide a measure of when to intervene which many judges may find meaningful and useful. Its failing, however, is that it does not ensure consistency between one judge's views of 'reasonableness' and another's. Consequently this approach, like the deferential approach, is unlikely to be much more predictable or educative for administrators than the traditional approach. Nevertheless, it may still have a role to play as an interim approach, as I will explain shortly.[209]

Yet another means of confining the courts' role in reviewing questions of content may be to do so by means of some more specific set of principles. An example is provided by the comments of Watkins LJ in the Divisional Court's decision in *Guinness* suggesting that the Panel's view of fairness was to be tested by an 'irrationality' standard.[210] This appears to involve the 'piggy backing' of principles of ultra vires or 'irrationality' on top of the test of fairness, so that the decision maker's views of fairness are themselves tested by ultra vires principles. Such an approach is rather complex and unwieldy and, in my view, was properly rejected by the Court of Appeal in *Guinness*. However, these objections do not rule out the possibility of formulating some other set of principles specifically to describe the limits of the courts' role in reviewing what fairness requires.

There is a fundamental problem to be addressed in seeking to devise principles of this kind that are sufficiently educative. The difficulty arises from the need for procedural fairness to deal with an extremely diverse range of situations and circumstances. If guiding principles are developed that are concrete and specific, and also deal with the entire range of possible circumstances, there must be a danger that such principles will be too complex for non-lawyers. If the principles are expressed at a more general and abstract level, there will be uncertainty as to how they apply in specific cases. If the principles are both simple and precise, it would seem likely that this will be at the expense of flexibility and the goal of ensuring that the required procedure is appropriate to each particular case.

The best way to respond to this problem, I suggest, is to accept that it is not possible to devise clear and educative principles to determine what procedural fairness requires in every possible situation,[211] and to seek instead to describe the *process* to be followed in making such a determination. What is required then is a set of principles to describe *how* decision makers ought to go about determining what fairness requires in a particular case. This, I believe is the approach most likely to produce educative principles which provide real guidance for decision makers. Support for this view is provided by the judgment of Webster J in *Tarrant*,[212] which provides a rare example of the kind of

[209] See text infra fn 213–14.

[210] See supra fn 50–3.

[211] To the extent that it is practicable to lay down principles which actually describe the procedure to be followed, this is arguably best done by legislative prescription. However, as argued above (at fn 172–83) there will be many cases where this is not practicable or desirable and which are best governed by the incremental approach of the courts.

[212] [1985] 1 QB 251 (see text supra beginning at fn 31).

focus on 'process' I am advocating. By adopting this approach Webster J was able to produce a very helpful set of guidelines on the issue of whether legal representation should be allowed.[213]

It is beyond the scope of this article to give a comprehensive account of the principles which might be used to define the process of determining content. Indeed, I would argue that such principles are best developed incrementally, by the courts, and that this can be facilitated by the courts adopting Brennan J's 'reasonableness' test as an interim approach. What this would mean is that the courts would only intervene on the ground of procedural fairness where the procedure adopted is shown to be unreasonable. Furthermore the courts would need to endeavour to explain how the process of the decision maker in deciding on that procedure (assuming that process is apparent) was in error. The aim of this approach would be that, over time, the test of 'reasonableness' would progressively be given greater content by the courts.[214]

Although I do not propose to provide a comprehensive account of the principles which might result from the approach I have suggested, I will at least attempt to explain how that approach might work in greater detail. To do so, I will first discuss one possible principle which might be endorsed, and then consider some illustrations of how the approach might operate in practice.

### *(iii) Providing a greater incentive for decision makers to consider what fairness requires*

One measure the courts could adopt in order to give greater guidance to administrators as to how to go about determining what procedure to follow, is to place greater emphasis on the need to consciously consider what fairness requires before acting. This would be a matter of the courts expressly encouraging decision makers, before acting or deciding, to consider whose interests may be affected (on the basis of the information available to them) and what opportunity might practicably be afforded to such persons to address the decision maker having regard to the statutory context of the power and all the circumstances. Some support for such an approach is provided by the decision in *Tarrant*.[215] In that case the English Divisional Court quashed decisions of a board of visitors because the board had not considered whether to exercise its discretion to allow legal representation. Such attention to the question of whether or not the decision makers 'turn their minds' to what fairness requires is unusual; generally the courts appear to be concerned only to see if the procedure which was adopted was fair. However the *Tarrant* approach offers the advantage of shifting the courts' focus away from the outcome (the procedure which is actually adopted) to the process (the consideration of what procedure to adopt). The notion that fairness should be

[213] Id 285–6.

[214] This may be what is in fact happening in relation to the ground of unreasonableness. See Allars' description of possible 'paradigms' of unreasonableness: Allars, *Introduction* 188–93. See also *Fares Rural Meat and Livestock Co Pty Ltd* v *Australian Meat and Livestock Corporation* (1990) 19 ALD 731, 733–4 (Gummow J).

[215] See text supra beginning at fn 31.

considered before acting is simple and is easily complied with. If widely observed it should help to prevent the kind of inadvertent procedural unfairness that occurs when decision makers simply fail to appreciate the interests which are affected by a decision. An incentive for decision makers to observe this principle could be provided by making its observance a precondition to obtaining the protection of the 'reasonableness' test described above. This would mean that where decision makers establish that they have considered what fairness requires, their views would be upheld unless shown to be unreasonable. In any other case, however, it would be open to a reviewing court simply to substitute its own view of what is fair.[216]

I suggest that the onus to establish that the requirements of fairness have been considered should be on the decision maker. The strongest evidence would be for decision makers to indicate their views of what fairness requires when notifying persons affected of any opportunity they are afforded to make submissions. If this is not appropriate a file note made before the substantive decision is made should be sufficient.[217] In some cases an explanation in the reasons for decision, or even the fact that atypical procedures have been adopted, may be enough to satisfy the court that genuine consideration has been given to the requirements of fairness in the particular case. In my view, the decision maker should be required to establish that the circumstances of the particular case have been considered, even if there are applicable rules or guidelines governing the procedure to be followed. If fairness is to be standardized, that ought to be done under the authority of the legislature.

The principle suggested here would be most effective, I suggest, if it is expressed to apply to all governmental decision making, regardless of whether there is any duty to observe procedural fairness. The effect of this would be to encourage administrators to consider the requirements of fairness before *any* decision or action is taken. This would not be an onerous requirement. It need only take a few minutes, and in many cases nothing more would be required because the decision would not affect interests of persons as individuals.[218] If a decision maker fails to consider the requirements of fairness before acting, that would not in itself provide grounds for challenge. It would simply enable a reviewing court to intervene where it considers that the procedure followed was unfair.[219] Such an approach could effectively remove the need for administrators to concern themselves with the difficult question of whether there is a duty to observe procedural fairness.[220] It would allow administrators to avoid procedural challenge by simply considering what fairness requires and adopting a reasonable approach.

[216] If the court considers the procedure to be fair the decision should be upheld even if the requirements of fairness have not been considered, as there would be no point in setting aside the decision.

[217] Such a file note may be self-serving, but that is not a concern, since the making of that file note will itself require the decision maker to consider what is fair.

[218] See *Kioa* v *West* (1985) 159 CLR 550, 584 (Mason J), 620 (Brennan J), 632 (Deane J).

[219] Ie, in such a case the court will be free to adopt the traditional approach of substituting its own view of what fairness requires, as explained above. See text supra fn 216.

[220] Eg see Allars (1987) 11 *Syd LR* 306. Of course there would be no need to consider what fairness requires if procedural fairness is actually excluded by the legislature.

If the proposal just suggested were adopted, it could also have the effect of overcoming the need for a test governing implication of the duty. To some extent this would be a case of 'sleight of hand' because the issues which currently trouble the test for implication would merely be relocated within the question as to what fairness requires in the circumstances. Nevertheless it would still achieve a certain rationalization of the conceptual structure, as there is clearly already considerable overlap between the factors relevant to the implication of procedural fairness and those which govern its content.[221] There appears to be some support in the High Court for some such rationalization. Justice Brennan's suggestion that the content of natural justice is reducible to 'nothingness'[222] would appear to have a similar effect, since it gives the principles governing content the flexibility necessary to deal with circumstances which would otherwise need to be treated as leading to 'non-implication' or exclusion of the duty. Some rationalization of this kind also appears to be implied in the suggestion of Deane J that procedural fairness may be moving toward a position of applying to all governmental decision making.[223] It is not possible here to explore fully the implications of such a radical move. However it is relevant to comment that if the problems discussed in Parts I and II are not effectively addressed by the courts, they will found a strong case against giving such a far reaching role to the test of fairness.

### *(iv) Illustration of the suggested approach*

The approach suggested above has been described in quite abstract terms. It may be helpful if I provide some illustrations of how it would actually operate in practice. To do so I will take the facts of two well known High Court decisions in which the content of procedural fairness has been considered: *Kioa* v *West*[224] and *Annetts* v *McCann*[225] (*'Annetts'*). I do not propose to analyse these cases in detail, but rather, merely to use their facts to illustrate the implications of the approach proposed above.

In *Kioa* a majority of the High Court[226] held that a decision to deport the Kioas and other related decisions were made in breach of procedural fairness because certain prejudicial statements in the departmental submission relied on by the decision maker had not been put to the Kioas. The allegation which all majority judges considered should have been put to Mr Kioa was a comment in paragraph 22 of the submission that Mr Kioa's 'active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern'. There was nothing in the material provided

[221] Eg the statutory context, and the manner in which individuals may be affected, are clearly relevant to both.
[222] *Kioa* v *West* (1985) 159 CLR 550, 615.
[223] *Haoucher* v *Minister of State for Immigration and Ethnic Affairs* (1990) 93 ALR 51, 53.
[224] (1985) 159 CLR 550.
[225] (1990) 170 CLR 596.
[226] Mason, Wilson, Brennan and Deane JJ, Gibbs CJ dissenting.

by the Kioas to support this statement.[227] Mr Kioa was interviewed by an officer other than the decision maker, so the hearing function was effectively delegated. There is nothing in the judgments to suggest that the decision maker or any other officer had expressly considered what fairness required, although the fact that Mr Kioa was interviewed may imply some such consideration.

The approach I have proposed would make no difference to the outcome of the case on these facts. There is no satisfactory evidence referred to in the judgments of a positive exercise of 'discretion' to determine what procedure was fair in the circumstances. Consequently the court would be free to impose its own view as to what was fair. Where the proposed approach would differ, however, is in what the decision maker needed to have done to avoid this outcome. Had the decision maker consciously adopted a view as to what fairness required in the circumstances, the court would not be able to intervene unless that view was shown to be unreasonable. It would have been quite reasonable, I suggest, for the decision maker to conclude that the prejudicial statements were not credible,[228] or did not need to be relied on, and so could simply be discounted without being put to Mr Kioa. It appears that Brennan J, at least, would not have accepted this as satisfying the current requirements of procedural fairness.[229]

Although this proposed approach would have allowed greater latitude to the decision maker in *Kioa*, he would not have had a 'free rein'. Had he concluded that prejudicial allegations from other sources could be used without being put to the Kioas, that would clearly be an unreasonable view of what fairness requires. It would be unreasonable because a reasonable decision maker could not have reached that conclusion by properly following the process required to determine what fairness requires. That process, arguably, should require consideration of the source of any information or material to be relied on in order to allow persons with interests affected the opportunity to respond to prejudicial material obtained from other sources.

The test of reasonableness is clearly not a precise or objective test, as the above example demonstrates. Thus, for example, Brennan J might well take the view that it would be unreasonable to discount and ignore potentially prejudicial information without putting it to the person concerned.[230] I have suggested that this would not be unreasonable, as I think that the most that can be expected of decision makers is that they recognise that any potentially prejudicial information must be put to the person concerned before it is relied on. To some extent the test of reasonableness will need to reflect community

[227] (1985) 159 CLR 550, 602.

[228] The allegation in para 22 has the appearance of a misinterpretation of the accepted fact (which was accurately stated in the decision maker's reasons for the decision) that Mr Kioa was on the executive council of the Tongan Christian Fellowship: *Kioa* v *Minister for Immigration and Ethnic Affairs* (1984) 53 ALR 658, 662–3 (Keely J — first instance). The decision maker could well have recognised this and discounted the allegation.

[229] (1985) 159 CLR 550, 629. The position of the other majority judges is not clear.

[230] Id 628–9.

values and attitudes. This is why, in my view, the test needs to be developed incrementally.

In *Annetts* all members of the High Court were agreed that procedural fairness required a Coroner conducting an inquiry into the deaths of two boys to receive submissions from the parents of one of the boys in relation to any proposed findings which would be adverse to them or the deceased.[231] Counsel for the parents had asserted an unqualified right to make a closing address, but this was unanimously rejected.[232] The minority judges, Brennan and Toohey JJ would have dismissed the appeal on the grounds that the Full Court of the Western Australian Supreme Court was not wrong to refuse an order given the basis upon which the case had been argued.[233]

The approach proposed above is, I think, quite consistent with the decision in *Annetts*. This was a case in which the Coroner had expressly considered what fairness required in the circumstances and had concluded that it did not require him to hear closing submissions. Under the proposed approach this view would be upheld unless unreasonable. There are two ways in which the reasonableness of the Coroner's views might be questioned. First, it was not clear that the Coroner accepted that the parents' interest in the reputation of their deceased son was a sufficient interest to attract the protection of procedural fairness. The Coroner accepted that the parents had an 'interest' in the matter and that this entitled them to be represented and to cross-examine as provided in s 24(1) *Coroners Act* 1920 (WA). However his comments appear to imply that natural justice would only apply to impose additional requirements where a person was in jeopardy of being committed for trial.[234] If so, this constituted a failure to consider properly the interests which were affected, since the Coroner failed to appreciate that the parents' interest in the reputation of their deceased son would be protected by procedural fairness.[235] Secondly the Coroner appeared to consider that he had an unfettered discretion to decide whether to hear submissions, and in doing so failed to recognise that the parents should be given an opportunity to respond to any proposed findings which would be adverse to their interests. These two defects, in my opinion, justify the conclusion that the Coroner's view as to what fairness required was unreasonable. It was unreasonable because of errors in the process by which it was reached, in that the Coroner apparently failed to consider properly what interests were affected, and failed to apply the fundamental principle illustrated by *Kioa*.

It should also be noted that the judgments in *Annetts* all appear to leave a significant area of discretion to the Coroner in determining what fairness requires. All judges accepted that the Coroner was not required to hear

[231] (1990) 170 CLR 596, 601, 603–4 (Mason CJ, Deane & McHugh JJ), 612 (Brennan J), 620 (Toohey J).
[232] Id 601 (Mason CJ, Deane & McHugh JJ), 610 (Brennan J), 620–1 (Toohey J).
[233] Id 611–2 (Brennan J), 620–1 (Toohey J).
[234] See the passage quoted by Toohey J: Id 617.
[235] The same error appears to have been made by Kennedy J in the Supreme Court, but not, I suggest, by Wallace J. See *Annetts* v *McCann* [1990] WAR 161, 165–7 (Wallace J), 172–3 (Franklyn J); (1990) 170 CLR 596, 603 (Mason CJ, Deane & McHugh JJ).

submissions on behalf of the parents if no findings adverse to their interests were proposed.[236] Toohey J also suggested that the opportunity to respond to adverse findings could be restricted to an opportunity to make written submissions.[237] In this respect also, the decision is consistent with the proposed approach.

It should be evident from the above discussion that the approach I have proposed is not radically different from the existing approach of the courts, not in terms of the decisions it produces, at least. Rather, the proposed approach attempts to reinterpret existing authority and achieve a change in emphasis. It seeks to give decision makers a more significant role in determining what fairness requires by restricting the courts to reviewing, rather than deciding, the content of procedural fairness. It seeks to 'reward' decision makers who can establish that they have given consideration to the requirements of procedural fairness before deciding. And finally, it exhorts the courts to increase the educative effect of their decisions by attempting to describe the process decision makers must follow in determining what is fair.

## CONCLUSION

In this article I have sought to examine and evaluate the approach of the courts in determining the content of procedural fairness. The fundamental problem which confronts the courts in this task is how to deal with the variety of circumstances to which procedural fairness applies. The courts' traditional approach, of relying on the flexibility of the concept of fairness, is unsatisfactory because it undermines the extent to which the principles guide and educate administrators. One solution may be to structure and confine flexibility through the legislative prescription of procedures. However, I have argued that this will not be appropriate in all cases, and what is needed in addition is for the common law principles governing content to be placed on a new and firmer footing. The approach I have advocated is essentially a combination of existing judicial approaches which have not yet been authoritatively endorsed. I cannot claim that this approach will achieve a reconciliation of the conflicting goals of flexibility and predictability. But it may at least facilitate a more effective compromise.

[236] (1990) 170 CLR 596, 601 (Mason CJ, Deane & McHugh JJ), 610, 612 (Brennan J), 620–1 (Toohey J).
[237] Id 621.