IS THERE TOO MUCH NATURAL JUSTICE? (2)

A STATE PERSPECTIVE

*The Hon Justice LT Olsson**

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Introduction

The theme of this seminar is (and, no doubt, is intended to be) provocative.

I gather that, in large measure, it stems from the suggestion made by Professor Julian Disney earlier this year that 'natural justice' will often be the enemy of real justice, when pursued with obsessive legalistic vigour.

The point then being made by the Professor arose in the course of his consideration of the chain of forms of procedure currently and typically to be found in some Federal systems of administrative review. He was particularly focusings upon the existing complexity of processes in some first-tier tribunals in Federal systems within which, as he perceived the situation, the 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. He argued that there was a danger that well-meaning lawyers could encrust the system of review at lower levels with a whole range of apparent safeguards which, in practice, are counter-productive.

However, I take my brief to range somewhat wider than that aspect and to extend to the implications of the general concept of natural justice as it is known to the common law.

Against that background, it becomes necessary to commence by sketching some contrasts between the Federal and State administrative review processes.

State review processes

It is fair to say that, in contradistinction with the Federal environment, with its present fairly extensive (and, at times, complex) processes of administrative review, the evolution of formal, tiered systems of review of administrative decisions in South Australia is still in its relatively early and embryonic stages. Apart from resort to the Ombudsman, the remedies for review of primary decision making authorities available to an aggrieved member of the public are relatively limited and, in the main, based on resort to the established common law courts.

In addition to the general activities of the various major government Departments and agencies there are, of course, a significant number of bodies or administrative boards and tribunals (many of the them of a licensing or regulatory nature) which are established by State legislation and make important decisions having the potential to affect profoundly the lives and activities of a wide variety of members of the public.

In some instances, there are formally-established review processes but, certainly so far as day-to-day public administration is concerned, there is no *general* right of access to a body of the

* *A judge in the Supreme Court of South Australia.*

nature of an Administrative Appeals Tribunal or the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977.*

Formal appellate processes are provided for in relation to decisions of regulatory-type bodies in most cases. However, these are very much the province of the lawyer and the appeal normally lies to the District or Supreme Court. It may be an appeal *stricto sensu* or an appeal by way of re-hearing. In this paper, I do not attempt to analyse or discuss these. I will concentrate solely on decision making processes in relation to which no such appeal lies.

Often the sole legal remedy available, in relation to general administrative decisions of the Departments of State and Government bodies or agencies, is by way of a formal application for judicial review to the Supreme Court - once more, very much the province of the lawyer.

It is only in a limited number of situations, such as the administration of the Workcover scheme, that a multi-level, true administrative review system has been established. There, the first-tier review is intended to be a fairly informal, internal, inquisitorial-type procedure, followed by a more traditional type of appeal to a quasi-judicial review tribunal. There is yet a further right of appeal, limited to questions of law, from the Tribunal to the Supreme Court.

It follows that the type of procedural problem specifically adverted to by Professor Disney does not tend to exist in the State sphere. Certainly in the Workcover area, it has never been suggested that the process is complex, inappropriate and generally inimical to processes of good administration or the legitimate interests of persons affected, although the drafting of the legislation leaves a good deal to be desired.

One is tempted to suggest that, on the contrary, at our present stage of development, there may well not be enough natural justice. Indeed, it may fairly be said that, in some situations at least, there are not really any effective, practical remedies for aggrieved persons affected by first instance public administration processes at the State level at all.

The concept of natural justice applied

No-one would, I think, seek to quarrel with the assertion that efficiency in public administration must clearly be one major goal of any modern community and that certainty and expedition are important aspects of efficiency.[1] Equally, it may reasonably be conceded that absolute fairness in decision making may, to some extent, be an unattainable dream in pragmatic terms. A proper balance may need to be struck between the need for practical efficiency and the notion of fairness to those affected by decisions taken.

Be that as it may, there is (and always has been) an inherent tension between, on the one hand, the public sector decision maker who desires to get on with the job without hindrance and, on the other, the long-suffering (and somewhat cynical) members of the public who, in Australian parlance, have a not unnatural desire to 'keep the bastards honest'.

In many instances, the only means of doing so in this State has been by way of a formal action in the Supreme Court, seeking the exercise of its inherent jurisdiction to conduct a judicial review of the decision sought to be impugned.

It should be said that, until relatively recent times, actions of this type were quite infrequent. However, particularly since the old prerogative writ procedure was abolished and was replaced (in the 1987 Rules of Court) with a less technical and rather more extensive remedy, the

Court has, not infrequently, been called upon to consider a fairly wide range of problems.

Indicative of these have been applications to review:

- decisions of correctional services authorities concerning the treatment of prisoners;
- decisions of public sector authorities related to discipline and dismissal of employees;
- decisions of the health authority concerning rationalisation and projected closure of country hospitals;
- a decision of a Minister concerning the exercise of a discretion as to a scheme related to the rationalisation of a prawn fishery; and
- decisions of a licensing authority bearing on the grant or refusal of fuel re-selling licences;

to identify but a few.

These clearly reflect an increasing consciousness within the community that public sector decision makers are by no means infallible or immune from a proper questioning of the validity of their processes.

It may fairly be commented that, since the landmark decision of the House of Lords in *Ridge v Baldwin & Ors*,[2] the Australian courts have adopted a reasonably robust attitude towards the nature and scope of the remedy of judicial review. They have conceded the applicability of such a remedy to a wide range of executive, ministerial and administrative functions on an open-class basis, where it has been considered that the relevant decision making must, in the absence of statutory provision to the contrary, be carried out in what has been termed a spirit of judicial fairness[3] or, to otherwise express it, in discharge of a duty to act fairly.

It is trite to say that the courts have consistently held that the judicial review process is limited in its scope. The Court is not concerned with the merit or otherwise of the substance of the decision making but only to ensure that there is procedural fairness in the decision making process.

So it is that Dawson J recently commented in *Attorney-General (NSW) v Quin*[4] that:

> In recent years the trend has been to speak of procedural fairness rather than natural justice in order to give greater flexibility to the extent of the duty than is possible merely by reference to a curial model.

He went on to express the warning that, in the context of judicial review, care must be exercised to ensure that the duty to act fairly is identified only with procedural obligations. There is some danger that the duty formulated in such a way may prove elastic.

What has given rise to some difficulty is the formulation of the nature of the duty, when it arises, and who may seek to enforce it. The law has by no means been static in these areas and the courts have deliberately kept their options open to meet new and changing situations as they arise.[5]

So it is that one logically commences with the dictum of Mason J (as he then was) in *Kioa & Ors v West & Anor*,[6] to the effect that:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the

clear manifestation of a contrary statutory intention.

In *Quin's* case the High Court accepted the general ambit of the remedy of judicial review, as expressed by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[7] in these terms:

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
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> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
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> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

In *Quin*, Dawson J commented that such a definition was now to be preferred to the earlier summation of Lord Upjohn, in *Durayappah v Fernando*,[8] where he said:

> In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.

He made the point that this passage:

> ... may no longer be wholly apt to describe the considerations which give rise to a duty to observe the principles of natural justice or procedural fairness. It is now clear that the first of the matters mentioned must be taken to include something less than a right - a legitimate expectation. What the passage does make plain is that, if a legitimate expectation is the basis of the duty to observe a fair procedure, it is because that legitimate expectation is of an ultimate benefit which is, in all the circumstances, entitled to the protection of that procedure and not because the procedure itself is legitimately expected.

As Mason CJ stressed in *Quin* (at p 13) the list of circumstances in which a legitimate expectation may arise is by no means closed.

From the point of view of the decision making authority, the critical practical problem is to be able to discern who may have *locus standi* to seek judicial review and, thus, to whom due notice ought to be given and from whom appropriate representations ought to be entertained and considered. As has been said, 'notice is truly at the very heart of natural justice'.

This is a topic which I had occasion to canvass in my recent judgment in *Walsh & Others v Motor Fuel Licensing Board.*[9] As I there pointed out, the published authorities render it clear that the law is far from definitive as to when *locus standi* will be accorded.

The decided cases render it clear that, *prima facie*, a person whose rights, interests or legitimate personal expectations are affected in a direct or immediate way will normally be entitled to invoke the remedy of judicial review. Conversely, the Court will be slow to entertain an application by a person who is only affected by a decision in an indirect and consequential manner.

Although that may be an accurate general summation of the situation, there can be no doubt that, at the end of the day, there nevertheless remains a residual discretion in the Court to accord *locus* where it is satisfied that the particular circumstances fairly warrant it doing so. (See, for example, the discussion of this question in *The Queen v The Corporation of the City of Burnside; ex parte Ipswich Properties Pty Ltd and Another*[10]). The concept of possession of a 'real' or 'substantial' interest as a basis for *locus standi* has found favour in some cases (see *Forster v Jododex Australia Pty Ltd & Anor,*[11] *Phillips & Anor v New South Wales Fish Authority,*[12] *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation*[13] and *Green v Daniels & Ors*[14]) but these are only non-definitive statements in relation to specific, anecdotal circumstances in which a discretion has *in fact* been exercised.

It follows that, on the State scene, public sector decision makers need to be vigilant, to ensure that procedures leading to decisions having the potential to affect adversely the legitimate interests of members of the community accord those persons what the North Americans like to term 'due process', before decisions are made. But I see none of the complexity adverted to by Professor Disney. Nor have I seen any substantial indications that the present situation is reacting oppressively and adversely in relation to public sector decision making.

If there are defects in current processes, they rebound mainly against those persons who would like to seek judicial review. They arise by reason of the fairly restricted remedy available in most areas and the very considerable cost of seeking that remedy by an action in the Supreme Court. Even given a far better awareness by the community of what litigious remedies are available, there are, in fact, relatively few actions for judicial review commenced.

My researches indicate that, in 1991, only 31 such actions were commenced. Certainly it is my anecdotal experience that, where such cases have been run, they have had a significant impact on improving the decision making processes involved rather than impeding such processes in an undesirable manner. My main concern is that the range of remedies within the State area of jurisdiction is simply far too restricted, with the result that persons who have a legitimate grievance do not take action, because they have neither the desire nor the financial capacity to engage in major litigation to test the situation. No doubt public sector decision makers are not unaware of that situation.

From my perspective, the question posed by the theme of the seminar must be answered in the negative. We have yet to experience any of the difficulties associated with the scenarios referred to by Professor Disney. Hopefully, our legislators will learn from the Federal experience.

At the moment, it is difficult to judge what developments are likely to take place in South Australia concerning review of public sector decision making and when. In general, this State has, for example, been slow to embrace the concept of

erecting a general administrative appeals tribunal. Instead, it has adopted something of a band-aid approach of creating some specialist first instance appeal bodies related to specific areas. Often, these are primarily constituted by lay persons, although some have a legally-qualified presiding officer.

With the long-awaited advent of freedom of information legislation, there may be some upsurge in activity directed towards review of decision making, not only as to process but also as to merit.

I would have thought that the present piecemeal approach to this area is both inefficient and expensive and that there is much to be said for some simple, cohesive structure of the nature of a single, general administrative appeals tribunal. Quite apart from the economy and efficiency of such a structure, it would provide members of the public with a relatively inexpensive, simple and well-understood means of seeking redress as to both substance and process. The present legalistic approach falls far short of that description.

Finally, I should mention that, in the course of this discussion, I have primarily focused upon natural justice as related to primary decision making. It is stating the obvious to say that it also has an important part to play in relation to the review processes themselves, and aspects such as bias, and the requirement to disclose to parties material proposed to be taken into account and afford an opportunity to respond to it. Indeed, these aspects are no less relevant to primary decision making, particularly (but not exclusively) by tribunals or bodies to which the normal rules of evidence are not applicable. (*Sobey v Commercial and Private Agents Board*,[15] *Mahon v Air New Zealand*,[16] *R v Deputy Industrial Injuries Commissioner; ex parte Moore*.[17]) Given the obvious public policy exceptions adverted to in authorities such as *Minister for Immigration and Ethnic Affairs v Pochi*[18] and *R v Secker; ex parte Alvaro*,[19] these are fundamental and well-understood. This is a major topic which is well traversed in the essay of TJH Jackson reproduced in Harris and Waye, *Administrative Law*.[20]

I merely make the point that this is, on any view, such a basic requirement to fair decision making that it can, in my view, scarcely be suggested that its due observance can properly be said to contribute to the existence of too much natural justice. Without an insistence upon it the prospect of potential injustice is simply too acute to ignore.

Endnotes

1 H Whitmore and M Aronson *Review of Administrative Action* (1978).

2 [1946] AC 40.

3 *Perre Brothers v Citrus Organisation Committee* (1975) 10 SASR 555.

4 (1990) 93 ALR 1 at 38.

5 *Gaiman & Ors v National Association for Mental Health* [1970] 2 All ER 362.

6 (1985) 159 CLR 550 at 584.

7 [1985] AC 374 at 408.

8 [1967] 2 AC 337 at 349.

9 (1992) 162 LSJS 337.

10 (1987) 46 SASR 81.

11 (1972) 127 CLR 421 at 438.

12 (1969) 72 SR (NSW) 297.

13 [1977] 1 NSWLR 43.

14 (1977) 13 ALR 1.

15 (1979) 22 SASR 70.

16 [1984] AC 808.

17 [1965] 1 QB 81.

18 (1980) 31 ALR 666.

19 (1986) 44 SASR 60.

20 'Administrative tribunals and the doctrine of official notice: "Wrestling with the angel"', in M C Harris and V Waye (eds), *Administrative Law* (1991).