

10th National Investigations Forum

**Four Seasons Hotel Sydney
6th November 2014**

Procedural Fairness and the Investigator

The Hon Murray Kellam AO QC¹

When I studied Administrative Law at Law School in the late 1960s, the subject dealt with what at that time was called ‘the doctrine of natural justice’. In essence the doctrine had two themes, the right of those affected by the decision under consideration to be heard, and the right for the decision in question to be determined by an unbiased decision maker.

At that time the doctrine generally related to decisions made by bureaucratic administrative decision makers. Indeed my recollection is that most of the cases we studied were cases involving decisions by the Minister, or his or her delegate, of some government department or another or perhaps by a body such as some Board of a Railway or Electricity Commissioners.

Over a period of time the term ‘natural justice’ gave way to the term with which most of us are now familiar, being that of ‘procedural fairness’. In part the change in terminology can be seen to have been adopted because the expression ‘natural justice’ had come to be too closely associated with court procedures.

In the 1985 High Court decision of *Kioa v West*² Mason J (as he then was) observed that:

‘.. in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness. This is because the expression ‘natural justice’ has been associated, perhaps too closely associated, with procedures followed by courts of law. The developing application of the doctrine of natural justice in the field of administrative decision-making has been largely achieved by reference to the presence of characteristics that have

¹ The speaker is a former Justice of the Court of Appeal, Supreme Court of Victoria and at present the Chief Commissioner of the Tasmanian Integrity Commission.

² (1985) 159 CLR 550 at 584.

been thought to reflect important aspects of judicial decision-making. The affect of Atkin L.J.'s influential observations in *R v Electricity Commissioners* [1924] 1 KB 171 at p.205 was to focus attention on those elements in the making of administrative decisions that are analogous to judicial determination as a means of determining whether the rules of natural justice apply in a particular case. The emphasis given in subsequent decisions to the presence and the absence of these characteristics diverted attention from the need to insist on the adoption in the administrative process of fair and flexible procedures for decision-making, procedures which do not necessarily take curial procedures as their model.'

Accordingly there was a recognition by the High Court, well before the creation of either the Queensland Criminal Justice Commission following the Fitzgerald Royal Commission of 1987-9 or the Independent Commission Against Corruption in NSW in 1989 of the fact that a curial approach to procedural fairness was not necessarily determinative of fairness. Indeed that recognition came before the creation of many of the merits review tribunals now existing in Australia, although the Commonwealth Administrative Appeals Tribunal had been created a decade earlier. Interestingly, the Hon John Howard MP (as he then was), said in the course of the Parliamentary debate relating to the AAT Bill then under consideration:

'Plainly, what the aggrieved citizen is seeking is a reversal of the decision. He does not feel that the decision has given him in plain language, a fair go and he is interested in obtaining a review on the merits.'

The *Administrative Appeals Tribunal Act 1975* did not embody that idea of a 'fair go' in specific terms of procedural fairness but by section 39(1) of the Act the Tribunal is to ensure that every party to a proceeding before the Tribunal has a reasonable opportunity to present their case. Subsequently other merits review Tribunals were established throughout Australia and it became commonplace that the statutory provisions relating to those bodies require the

application of the principles of procedural fairness by them in the conduct of their proceedings.³

Since that time public sector integrity bodies have been created in every State in Australia, some of which have governing statutes which deal specifically with the principles of procedural fairness and some of which do not. For example, under the Tasmanian *Integrity Commission Act 2009* an investigator conducting an investigation is required by section 46(1)(c) to 'observe the rules of procedural fairness'. This might be contrasted with other similar agencies such as the Commonwealth Law Enforcement Integrity Commission, the New South Wales Independent Commission Against Corruption and the Corruption and Crime Commission of Western Australia and the Victorian Independent Broad-based Anti-Corruption Commission. The *Law Enforcement Integrity Commissioner Act 2006* (C'th) by section 51 provides an opportunity to be heard prior to the publication of a report making an adverse finding, but not if it will compromise the effectiveness of the investigation or the action to be taken. The *Independent Commission Against Corruption Act 1988* (NSW) by sections 30 to 39 deals with the issue of compulsory examinations and public enquiries. The Commission may, but is not required to, advise a person required to attend a compulsory examination of any findings it has made or opinions it has formed. Under section 36 of the *Corruption and Crime Commission Act 2003* (WA) a person may be advised of the outcome of an investigation, if amongst other things, the Commission considers it to be in the public interest to do so. By section 86 the Commission must, before making any adverse report to Parliament about any person or body, give that person or body a reasonable opportunity to make representations to the Commission concerning those matters.

Section 130 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) provides that before a witness summonsed to give evidence at an examination is asked any questions the witness is to be advised of the matters in respect of which the witness is to be asked questions except to the extent to which the IBAC forms the opinion on reasonable grounds that this

³ For example section 97 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that 'the Tribunal must act fairly and according to the substantial merits of the case in all proceedings.'

would prejudice the investigation or would be contrary to the public interest. Section 162 of the same Act provides that if the IBAC is to report to Parliament any adverse findings about a public body or is to include a comment or opinion which is adverse to any person, IBAC must first provide a reasonable opportunity to respond to the adverse material and fairly set out fairly each element of the response in its report.

Does the absence of any clear requirement for the application of the principles of procedural fairness in legislation governing the operation of integrity entities mean that such bodies are not required to comply with such principles? I would contend that it is now clear and beyond argument that all such entities are so required.

First, it is inconceivable that an Australian superior court would hold that the second limb of the two principal rules of procedural fairness, that is that the decision-maker must be impartial and have no personal stake or interest in the matter under consideration, is not applicable to integrity bodies, whether at the investigation or hearing or determination stage.

Secondly, I consider that the thrust of decisions handed down by the High Court since *Kioa v West* leads to the conclusion that Australian courts examine legislation with a strong presumption that the principles of procedural fairness are intended to apply and conversely that the exclusion of such principles must be clearly stated in the legislation.

As stated above, the case of *Kioa v West* heralded a shift in the approach of the High Court to the duty to observe the requirements of procedural fairness. The Court (by a majority) held that an official had denied procedural fairness to two non-citizens by failing to put prejudicial allegations to them and by failing them the opportunity of a response. Mason J stated that the law had reached:⁴

‘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.’

⁴ Ibid 584.

It is appropriate to observe that Brennan J took a different and narrower approach, holding that any duty to act fairly depended upon the intention of the legislature 'that observance of the principles of natural justice is a condition of the valid exercise of the power'.

Kioa v West was followed by *Annetts and Another v McCann and Others*⁵ which involved the narrow issue of whether the rules of natural justice required the Coroners Court of Western Australia to permit counsel for the parents of a deceased person the subject of an inquest, to have an opportunity to address the inquiry by way of closing arguments or submission. The joint judgment of the majority, Mason CJ, Deane and McHugh JJ, held that the critical question was not whether the rules of natural justice required the right of the parents to make submissions, but whether the terms of the relevant Act displayed a legislative intention to exclude the rules of natural justice and in particular the common law right of the parents to be heard in opposition to any potential finding which could prejudice their interests. This is not the place for a detailed examination of the journey taken by the High Court from *Kioa v West* in 1985, to *Annetts v McCann* in 1990 and finally to *Saeed v Minister for Immigration*⁶ in 2010⁷. However, that latter decision establishes, at least for the time being, that there is a '... presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness ...'.⁸

In *Saeed* the High Court said further that:⁹

'The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power....'

⁵ (1990) 65 ALJR 167

⁶ (2010) 241 CLR 252

⁷ See Groves, Matthew, 'Exclusion of the Rules of Natural Justice', Monash University Law Review 39.2 (2013) : 285

⁸ Ibid 259 [15]

⁹ Ibid 258-9 [12]

The statutory position in Tasmania is clear that Integrity Commission investigators are to comply with the principles of procedural fairness, although precisely how that is to be applied and at what point in the investigation is not the subject of legislative assistance. However, in other states the position is arguably more opaque. Nevertheless, it appears to me to be clear that unless the governing statute excludes the application of the principles of procedural fairness, or specifically moderates the affect of such principles, then integrity bodies in Australia are generally bound to comply with such principles at both the investigation and the hearing (whether public or private) stage, recognizing of course that hearings can be, and usually are part of the investigative process of such bodies and further recognizing that 'what constitutes procedural fairness varies according to the relevant statutory framework and, within that framework, according to the circumstances of the particular case...'¹⁰

Cases can be found whereby the courts have concluded that an integrity body has not accorded procedural fairness at the hearing stage. One such example is *Queensland Advocacy Inc v Criminal Justice Commission*¹¹ where White J held that a decision of the Commission to refuse to hear from an organization representing people with disabilities while conducting a hearing into official misconduct in a residential home for people with disabilities was a breach of natural justice.

Nevertheless, I do not intend to dwell in any detail upon the hearing stage, as it appears to me that the principles relating to that are clear enough. In that regard, the succinct formula adopted by the Privy Council in *University of Ceylon v Fernando*¹² appears applicable. That is:

'First, I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case, and thirdly of course that the tribunal should act in good faith. I do not think there is really anything more.'

¹⁰ Per French and Lee JJ in *Appellant WABZ v Minister for Immigration and Indigenous Affairs* [2004] FCAFC 30.

¹¹ Unreported Supreme Court (Qld), White J, No 211/94, 27 April 1994.

¹² [1960] 1 WLR 223 at 232

Nevertheless, the application of principles of procedural fairness is not without difficulty in the context of the investigation phase of matters being considered by integrity bodies. However, the courts have recognized that there may be circumstances whereby the integrity of the investigative function requires precedence over what might normally be required for procedural fairness. For example, procedural fairness would ordinarily require that all material available to a decision maker that reflects adversely upon an individual should be provided to that individual so as to permit them to make a response. The issue does not arise when commissions conduct their proceedings in public, since all evidence is on the public record but it may well arise in circumstances whereby commissions take evidence in private. In *NCSC v News Corporation Ltd*¹³ Mason, Wilson and Dawson JJ said:¹⁴

‘It is the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the enquiry is going. For the investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of enquiry.’

Numerous cases can be found to support the proposition that although the powers of integrity bodies are often analogous to those exercised by courts, such bodies are ‘possessed of an investigative role with fewer constraints than ordinarily attend the conduct of court proceedings.’¹⁵ That is because curial proceedings are usually based upon a charge or accusation that has been laid after an investigation, usually by police. In an investigation the investigator very often commences with a ‘blank sheet’ supported perhaps by a credible allegation, possibly by a ‘whistleblower’ or even by an anonymous report. As Orr LJ said in the English Court of Appeal in *Maxwell v Department of Trade and Industry*¹⁶:

¹³ (1984) 156 CLR 296

¹⁴ At 323-4

¹⁵ “*Kazal v Independent Commission Against Corruption* [2013] NSWSC 53 per Harrison J at [25]. See also “*A v Independent Commission against Corruption* [2014] NSWSC 1167 per Harrison J at [60] to [70.]

¹⁶ [1974] 1 QB 523 at 538

‘.... In my judgment a clear distinction exists for the present purpose between an inquiry based on a charge or accusation and an investigation such as the present in which investigators are required in the public interest to find out what happened, and in the course of doing so form certain views or conclusions. In the former case it is essential that the person against whom the accusation is made should know its terms. In the latter... 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, and the subject matter that is being dealt with.’

Another case that recognized the investigative process is *Bond v Sulan*¹⁷, a Federal Court case in which Gummow J (as he then was) determined that the National Companies and Security Commission was not required to accord procedural fairness to the applicant, who was seeking certain rights be assured, before the investigation was actually under way. He said that the course adopted by the investigator of proposing to give the applicant an opportunity to make submissions at a time when the investigator was in a position himself to make tentative findings fulfilled the requirements of procedural fairness.

According, where does this leave the investigator in terms of the provision of procedural fairness to persons who are subject to an investigation by an integrity body?

First, unless the governing statute excludes the application of the principles of procedural fairness in the clearest terms, then it must be assumed that those principles, in general apply to the investigation. Secondly, the governing statute is likely to have provisions relating to notice of examination or other matters relating to the examination with which, of course there should be strict compliance. Those procedures are usually expressed in mandatory terms. If that is so investigators must have a thorough understanding of such procedures as a failure to comply with mandatory rules of procedure is a reviewable error of law.¹⁸

¹⁷ [1990] 8 ACLC 1,273

¹⁸ *Clayton v Heffron* (1960) 105 CLR 214

Thirdly, and again in the absence of clear direction from the governing statute, when an investigator has gathered sufficient evidence to enable prima facie conclusions as to the factual findings which may be reached, the application of procedural fairness requires the investigator to give consideration to whether or not those findings are adverse to a party to the extent that the party should be afforded an opportunity to make representations to the investigator or to adduce further material. The party should have an opportunity to be heard in respect of material, which is adverse to that party, and that opportunity should be afforded prior to the publication of a final report.

That should be a real opportunity to respond to the adverse findings. Early this year IBAC produced a report relating to an earlier investigation by the former Office of Police Integrity (OPI) into allegations that a senior police officer had leaked confidential material to the media.¹⁹ On the face of it the police officer concerned had been provided with procedural fairness in that, as required by the relevant legislation, he had been given the opportunity to respond to adverse reflections upon his conduct contained in the draft report, sections of which had been provided to him. I conducted the review of that report on behalf of IBAC and as set out in detail I concluded that there were deficiencies in the report. First and foremost amongst those deficiencies was the fact that much of the raw evidence, which was available to OPI, was not contained in the report, but conclusions based upon such evidence were contained. There had been telephone interceptions used in the course of the investigation and many of the conclusions of OPI were based upon those intercepts. In many cases the substance of the telephone intercepts was the subject of summary rather than detail as to what was said by the subject officer. Such summaries are really the subjective view of the investigator as to what was said and it would have been better for the report to contain the actual substance of the words used if such a conversation was relevant to the final adverse conclusions. There were other aspects of the report which if not directly in breach of the requirement for procedural fairness, appeared to me to be in breach of the spirit of procedural fairness. One of those was the

¹⁹ *Special Report concerning allegations about Sir Ken Jones QPM in relation to his dealings with certain confidential Victoria Police information.* February 2014.

extremely limited amount of time given to the officer in question to respond to the adverse commentary in the report.

I recognize that these issues are difficult issues, particularly for the investigator who has the obligation to both investigate and to prepare the final report. It is often a question of balance and of course time and resources are relevant in respect of the preparation of lengthy reports. The courts 'affirm and reaffirm that the demands of natural justice depend on the nature of the process, its likely consequences, the resources available to the decision-maker, the urgency of the matter and any other relevant consequences'.²⁰

However, I will discuss how this issue is approached in the context of Tasmania, where as I have said, the governing legislation contains a specific requirement that an investigator is required to observe the rules of procedural fairness during an investigation. I will refer to an actual investigation completed in the course of this year, which gave rise to some commentary in the media.

On 27 May 2014 the Integrity Commission tabled Report No 1 of 2014 *An investigation into allegations of nepotism and conflict of interest by senior health managers*. Unlike previous Commission investigations, this matter saw the involvement of a number of Tasmanian lawyers representing both subject officers and witnesses.

There were varying approaches adopted by different legal representatives. It became clear that the role of anti-corruption commissions generally, and the Tasmanian Commission in particular, is not necessarily well understood in Tasmania. As the work of the Commission increases, it is hoped that an exploration of the interaction between the legal community, procedural fairness processes in anti-corruption commissions, and the Commission will assist practitioners working in this area.

As has been widely articulated in the media – the Commission is not a court of law. Furthermore, until such time as a matter is before an Integrity Tribunal, the Commission is required to conduct its investigations in private. However, an investigator is able to make any investigations he or she considers

²⁰ J.S.R. Forbes *Justice in Tribunals* The Federation Press – 4th Edition 2014

appropriate, conduct the investigation in any lawful manner he or she considers appropriate and may obtain information from any persons in any lawful manner he or she considers appropriate. Those obligations are consistent with the nature of investigations being conducted by the Commission as inquisitorial.

As stated above the *Integrity Commission Act 2009* specifically requires an investigator to observe the rules of procedural fairness during an investigation. A consistent issue raised by legal representatives in the aforementioned investigation was the application of procedural fairness.

It is important to note, that an investigator will make findings only of a factual nature. An investigator will make findings that certain things happened or that it is open to conclude on consideration of all of the evidence that certain things happened. In accordance with the Act, investigators will not make findings that misconduct or serious misconduct has occurred. It is only an Integrity Tribunal that has the power to make a finding that misconduct or serious misconduct has occurred. Furthermore, the Commission does not itself discipline employees, impose penalties or prosecute matters.

During an investigation, an investigator will give the subject officer an opportunity to give evidence or information about the allegations. It is a matter for the individual subject officer whether a legal practitioner or other officer represents them.

Generally the formal stage of procedural fairness will apply towards the end of an investigation after the investigator has considered all of the available evidence carefully, including the evidence or information provided by the subject officer to the allegations. The investigator will prepare a draft report of the investigation, including draft findings of fact. By that stage relevant evidence will have been gathered, most usually pursuant to a coercive notice, and interviews, again pursuant to a coercive notice, will have been conducted with relevant witnesses in addition to the subject officer.

Procedural fairness will provide the persons concerned with a right to:

- Reply to parts of an investigator's draft report, in a way that is appropriate for the circumstances. Generally an investigator will ask for written comments or submissions;

- Have time to give their reply and have it considered before the investigator finalises any findings in the report of the investigation.

Information provided by the investigator during procedural fairness will generally be a summary of information held by the Commission as it relates to the person involved. It is clear that the law generally only requires the disclosure of evidence that is credible, relevant and significant.²¹ It is in general only necessary to disclose the nature and substance of adverse material, rather than the actual text or the precise details of all matters upon which the decision-maker intends to rely.²² Depending on the circumstances of each matter, the identity of confidential sources of information may not be disclosed. Furthermore the requirement that information is confidential may reduce the content of the duty. For example, where questions of national security collide with obligations of procedural fairness.²³ Likewise if the information would disclose highly confidential information about police investigative procedures, or the identity of an informer.²⁴ That said however it must be acknowledged that there is no firm rule as to what must be disclosed, other than that the decision-maker must act fairly in the circumstances of the case, as the rules of procedural fairness are flexible. As Allsop CJ recently stated²⁵ 'the assessment of fairness is sometimes imprecise in calculation and open to debate'. That acknowledgement perhaps does not make the job of an investigator any easier.

Nevertheless procedural fairness is an essential part of the investigation process. It is an opportunity for a person to reply to the case to be met, including providing further evidence or information that has not been obtained during the investigation, or to provide an explanation of why things happened and any special circumstances that should be taken into account by the investigator, if not already provided at interview.

Procedural fairness is not an opportunity for the person involved to test all of the evidence, or to be provided with information not directly relevant to them.

²¹ *Kiao v West* at 615

²² *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162

²³ *Minister for Immigration v Maman* (2012) 200 FCR 30, Flick and Foster JJ at 40.

²⁴ In *Applicant VEAL of 1992 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88

²⁵ *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142 at [9].

In rare cases, such as where there is a serious risk to personal safety or to substantial amounts of public funds, procedural fairness may need to be circumvented due to overriding public interest.

An investigator will genuinely consider all responses provided. A response may raise further issues that require investigation. The draft investigator's report, including draft findings, may be amended after receiving all responses, to take account of any new evidence or explanations.

The investigator will then proceed to finalise his or her report for submission to the Chief Executive Officer, in accordance with the Act. I am entirely satisfied that this process ensures that the Integrity Commission in Tasmania accords those persons who are the subject of investigation procedural fairness in accordance with the Act and the principles of procedural fairness established by decisions of the Superior Australian Courts. The approach taken in Tasmania is a cautious one which recognises that the concern of the law is to avoid practical injustice. I am of the view that a cautious approach such as disclosing as much as may be reasonably disclosed of an adverse document is consistent with that concern and is the best way of avoiding successful challenges by way of administrative review. Certainly in Tasmania, despite complaint in the media by one or two persons who have been the subject of investigation, no legal challenge has been made in the courts in relation to the investigative approach adopted by the Integrity Commission.

Finally, it is appropriate to consider the question of publicity relating to the findings of an investigation by an integrity body. There are different approaches in different states of Australia. In South Australia and Tasmania the relevant integrity bodies are required to conduct their investigations in private. The NSW Independent Commission against Corruption does much of its work in public hearing. I do not intend to enter the debate as to which is preferable, there being both positive and negative aspects to both modes of operation. Those bodies that conduct their investigations in private are often subject to criticism that they are 'secretive and unaccountable and ineffective in changing the culture of the public sector towards one of openness, honesty

and integrity'.²⁶ On the other hand those that operate in public are often criticized on the basis that those the subject of investigation can suffer unfairness by reason of the publicity attending the public exposure of their misconduct. It is occasionally suggested by an uninformed media, or worse still uninformed politicians and bureaucrats that publicity about the wrong doing of those in the public sector is a breach of the rules of procedural fairness. It is beyond argument that procedural fairness does not require everything done by integrity bodies to be done in secret.²⁷ Indeed there is a powerful argument that, provided procedural fairness is accorded in the investigation and hearing stage, there are occasions when the public interest far outweighs any private interest in not having misconduct publicly exposed. For example when senior politicians or public sector officials engage in reprehensible conduct the public interest in all the circumstances, including the public interest in having such misconduct exposed and dealt with and the public interest in knowing that such misconduct will not be 'swept under the table' may well be paramount.

As Mahoney JA said in *ICAC v Chaffey*.²⁸

'Where a proceeding is heard in public, a party to it may suffer harm from the publicity of it. That harm may range from mere embarrassment to grave damage to reputation. However, the fact that harm will result if the discretion were exercised in favour of a public hearing does not mean that the party has not been dealt with procedural fairness. In some cases, the public interest or other ends to be served by the discretion may outweigh the rights of the individual not to be harmed by the proceedings.'

Whilst it is true that Mahoney JA was referring specifically to the public hearing processes of the NSW Independent Commission against Corruption, those words are equally applicable to other integrity bodies who may conduct their investigations in private but report to Parliament about their investigations.

²⁶ Parliament of NSW Committee on the ICAC review stage III published November 2001.

²⁷ See *ICAC v Chaffey* (1993) 30 NSW 21

²⁸ Ibid at 60