“Balancing informality with natural justice and the work of tribunals”.

The Whitmore Lecture

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In a fashion that might be thought to ape the Tokyo Olympic Games, despite outward appearances this is the 2020 Whitmore Lecture. Last year’s lecture was postponed in the optimistic expectation that by April 2021 the Covid-19 pandemic would be in the rear-view mirror and we would be holding public lectures in the old-fashioned way. In the event, the 2020 Whitmore Lecture should be accompanied by the warning that I have now reached the age constitutionally at which I am deemed to be no longer capable of carrying out the duties of a Ch III judge.

I was asked to address the topic “balancing informality with natural justice and the work of tribunals”. Implicit in the topic is the suggestion of a tension between application of the principles of natural justice and the mandate commonly found in the governing statutes of Australians tribunals to conduct proceedings with as little formality and technicality, and with as much expedition, as proper consideration of the matters before the tribunal permit. The suggestion of that tension is not new.

When she was the President of the Administrative Appeals Tribunal (“the AAT”), O’Connor J, referred s 33(1)(b) of the *Administrative Appeals Tribunal Act* 1975 (Cth) (the direction to proceed with expedition and little formality) observing that the provision did not feature heavily in the judgments of the Federal Court nor was the Federal Court inclined to identify error on the ground that the conduct of an AAT proceeding had been attended by

insufficient informality[1]. Her Honour was speaking wryly of the Court of which she was a member.

The AAT's statute requires it to pursue the objective of providing a mechanism of review that is "fair, just, economical, informal and quick"[2]. These are a suite of desirable attributes that are acknowledged to be frequently inconsistent with one another in their application[3]. They are exhortatory; their non-observance does not support a claim of jurisdictional error. Equally, the mandate to proceed with little formality and expedition does not relieve a tribunal of the obligation to afford natural justice to those who are affected by its determination[4].

"Natural justice" has been rebranded as "procedural fairness" because the latter more clearly signals that the concept is one concerned with *process* as distinct from outcome. As Deane J explained the concept, "the common law rules of natural justice or procedural fair play … reflect minimum standards of basic fairness which the common law requires to be observed in the exercise of government (and in some cases non-government) authority or power"[5].

When a statute confers a power, which is apt to affect the interests of a person, the exercise of the power is presumed under a common law principle of interpretation to be conditioned on observance of the principles of procedural fairness absent an express statement to the contrary[6]. The principles encompass the hearing rule, which requires that the person affected by the decision be given a meaningful opportunity to be heard, and the bias rule which, relevantly, requires that the decision-maker come to the

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[1] O'Connor, *Is there too much natural justice?* AIAL Forum No 1 (1994) 82 at 84.
[2] *Administrative Appeals Tribunal Act* 1975 (Cth), s 2A(b).
[3] *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [109]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [12], [52].
[4] *Annetts v McCann* (1990) 170 CLR 596 at [2].
[5] *South Australia v O'Shea* (1987) 163 CLR 378.
[6] *Plaintiff S10/2011 v Minister for Immigration and Citizenship (2012) 246 CLR 636* at [66], [97]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [75]; *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at [16].

determination with a mind that is genuinely open to persuasion. One might ask what is so burdensome about requiring a tribunal that is empowered to make decisions that affect individuals' interests to act fairly in both these respects in making its determination? The difficulty lies in ascertaining what fairness demands in particular circumstances.

In *Kioa v West*[7], Brennan J described the principles of natural justice as having a flexible quality, which chameleon-like evoke a different response from the repository of statutory power according to the circumstances in which the power is exercised. O'Connor J had no quarrel with the necessity for flexibility in giving content to the obligation of procedural fairness but her Honour made the point that flexibility can bring its own problems. The problem that she identified was not the uncertainty inherent in the application of a flexible standard. It was the tendency among some AAT members to accede to any application advanced by counsel under the rubric of procedural fairness with a view to warding-off successful judicial review challenge. Her Honour cautioned against the temptation to apply "the maximum rules of procedural fairness" without considering whether, consistently with the objectives of the AAT Act, a more tailored response would be appropriate[8].

These were reflections on the conduct of the AAT in the early 1990s. In 2008, Downes J, then President of the AAT, delivered the Whitmore Lecture on the topic "the tribunal dilemma: rigorous informality". His Honour acknowledged that in its early years the AAT had adopted a judicial model. He suggested that this model with its attendant formality had been essential to recognition of the AAT's independence and authority. This was in the context of entrenched opposition to the administrative law reforms that Prof Whitmore and his colleagues on the Kerr and Bland Committees had faced from public service mandarins. Downes J considered that the constraints of the early years had been abandoned and that the AAT had attained a balance closer to

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[7] (1985) 159 CLR 550.
[8] O'Connor, *Is there too much natural justice?* AIAL Forum No 1 (1994) 82 at 83.

Professor Whitmore's ideal of informality and expedition in the conduct of its proceedings [9]. His Honour pointed to the very large number of cases dealt with by the AAT and to the central role of conferences as an informal mechanism for case management and an effective forum for alternative dispute resolution. No doubt these observations are equally applicable to the workloads of the State and Territory "super" Civil and Administrative Tribunals. We should not lose sight of the fact that the AAT and its State and Territory counterparts are responsible for the disposition of large caseload in a manner that is efficient and procedurally fair.

Nonetheless criticism that the rules of procedural fairness are in tension with the mandate to proceed informally has not gone away. It is a persistent refrain in the latest edition of Dr Forbes' monograph on the work of tribunals[10]. Dr Forbes writes of the difficulty of striking a balance between relatively simple, speedy and inexpensive decision-making and "luxurious notions of due process"[11]. He warns that the objectives of expedition and informality in the conduct of tribunal proceedings will continue to be unattainable until the "over-refinements of judicial review are moderated"[12]. Dr Forbes is particularly critical of the "wriggle room" afforded by the "well-settled generality that the content of natural justice varies according to the nature of the inquiry … and other relevant circumstances": in this "heyday of administrative law" he observes that it leaves the path open to expansion[13]. The thrust of much of this criticism is directed to the difficulties faced by domestic tribunals as they seek to divine the requirements of procedural fairness in a given case. What he asks are the members of a domestic tribunal to make of judicial advice to

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[9] Downes, *the Tribunal Dilemma: Rigorous Informality*, Whitmore Lecture, 17 September 2008.
[10] Forbes, *Justice in Tribunals* (5th ed., 2019).
[11] Forbes, *Justice in Tribunals* (5th ed., 2019) at 167 [11.29].
[12] Forbes, *Justice in Tribunals* (5th ed., 2019) at 91 [6.34] fn 196.
[13] Forbes, *Justice in Tribunals* (5th ed., 2019) at 168 [11.29] – [11.31] citing *Kioa v West* (1985) 159 CLR 550 at 584-585 per Mason J; *Re Whangerai Commission of Inquiry* [1985] NZLR 688 at 696; *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78; *WABZ v Minister for Immigration, Multicultural and Indigenous Affairs* [2003] 124 FCR 271.

take account of the "importance" and "complexity" of the issues in determining whether a person has a right to be represented by counsel?[14].

I am mindful that the Council of Australian Tribunals, which sponsors the Whitmore Lecture, is the umbrella organisation for statutory tribunals. Questions which may trouble a domestic tribunal about whether to accede to a request for an oral hearing and, if so, whether to permit legal representation at the hearing, in the case of a statutory tribunal will commonly be answered by reference to its governing Act. It remains that Dr Forbes' criticism of the lack of precision in the statement of the content of natural justice or procedural fairness is not confined to the experience of small domestic tribunals.

The charge of unacceptable uncertainty in the application and content of the doctrine is reminiscent of the view that Lord Reid rejected in *Ridge v Baldwin*[15]:

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed and measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law …. ."

And so they are. But this is not to deny that courts can set the bar too high or too low in applying either test. The former may be thought true of the trend of authority in negligence cases towards the end of the last century. Courts were inclined to favour plaintiffs by adopting a generous view of the response of the reasonable person to a foreseeable risk of injury. Perhaps the high point in this trend was a decision of the Court of Appeal of New South Wales, holding that the reasonable operator of a cinema would have foreseen

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[14] Forbes, *Justice in Tribunals* (5th ed., 2019) at 168-169 [11.32].
[15] [1964] AC 40.

a risk of injury arising from the use of standard retractable seats of the kind commonly found in cinemas. The reasonable response to this risk was found to require the placement of a sign in the foyer warning patrons to "take care … ensure your seat is down before you sit"[16].

Reasonableness like fairness is a standard that does not admit of precision. Ultimately it falls to the High Court to delimit the boundaries of the application of either standard. And from time to time, the Court makes a course correction. A course correction in the law of tort with respect to the reasonable response to foreseeable risk was underway at the turn of this century before the enactment of civil liability legislation throughout the Australian jurisdictions[17]. Around the same time, a course correction was evident in the application and content of the rules of procedural fairness with respect to the concept of "legitimate expectations".

The expression "legitimate expectations" is sourced to Lord Denning in *Schmidt v the Secretary of State for Home Affairs*[18]. The doctrine has developed apace in England since then, giving "legitimate expectations" a substantive, as distinct from a procedural, operation[19]. Before that development, in *Kioa v West,* Mason J spoke of the duty of procedural fairness arising where an order is to be made that would deprive the person "of some right or interest or the legitimate expectation of a benefit". His Honour went on to make clear that the reference to "right or interest" extends beyond proprietary rights and interests to issues of personal liberty, status, livelihood and reputation. His Honour's use of the expression "legitimate expectations" was to underscore that the duty arises notwithstanding that the tribunal's order will not result in the loss of a legal right or interest[20].

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[16] *Burns v Hoyts Pty Ltd* [2002] Aust Torts Reports 81-637.
[17] Castle ed. Speeches of Chief Justice Spigelman, "*Negligence: The Last Outpost of the Welfare State*", 207 at 208-209.
[18] [1969] 2 Ch 149 at 170.
[19] *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
[20] (1985) 159 CLR 550 at 584.

In *Kioa*, Brennan J was not in doubt that that the obligation to afford procedural fairness applies to interests extending beyond legal rights. But his Honour sounded a warning about the utility of describing the interests that attract the obligation but that do not amount to not legal rights as "legitimate expectations". The expression was a seed, as his Honour put it, that had grown luxuriantly in the literature of administrative law; an expression that his Honour criticised for its uncertain connotation and capacity to mislead.

Mason J and Brennan J differed in *Kioa* with respect to the basis of the obligation of procedural fairness. Mason J sourced it to the common law[21]while Brennan J sourced it to common law principles of statutory interpretation[22]. The distinction between the two may be thought somewhat Jesuitical, but the lens through which Brennan J analysed the question prompted his Honour to ask how a person's expectation (whether described as "legitimate" or "reasonable") can bear on the determination of whether on its proper construction the statute conditions the tribunal's power on the rules of procedural fairness.

Notwithstanding Brennan J's critique, the High Court tentatively embraced the concept of "legitimate expectations" in *Minister for Immigration and Ethnic Affairs* v *Teoh*[23]. As many in this audience would be aware, it was held in that case that Australia's ratification of the United Nations Convention on the Rights of the Child gave rise to a legitimate expectation (in the absence of statutory or executive indications to the contrary) that administrative decision-makers would act conformably with the Convention.

Retreat from acceptance of the utility of the concept was evident in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[24] . Gleeson CJ's statement in *Lam,* that the concern of the law with respect to procedural

[21] (1985) 159 CLR 550 at 584.
[22] (1985) 159 CLR 550 at 609, 615.
[23] (1995) 183 CLR 273.
[24] (2003) 214 CLR 1.

fairness is “practical justice”, is frequently invoked. It is useful to remember the facts that called forth that statement.

Mr Lam’s visa was cancelled by the Minister because Mr Lam did not pass the character test under the *Migration Act* 1958 (Cth) by reason of his criminal history. Cancellation of the visa made Mr Lam liable to deportation. Mr Lam commenced proceedings seeking to quash the decision to cancel the visa and to prevent the Minister from deporting him contending that he had been procedural fairness. The circumstances giving rise to the asserted denial concerned the failure of the Department of Immigration to make an inquiry that Mr Lam had been told would be made with a view to assessing the possible effect on his two children of the cancellation of his visa and his deportation.

Mr Lam’s two children were living with relatives. Mr Lam had furnished a lengthy submission in response to an invitation from a departmental officer to comment on the proposed cancellation of his visa. In the submission he gave an account of the children’s circumstances and his bond with them. He advanced arguments why their best interests required that he remain in Australia. He attached to the submission letters from his fiancée and “the carers of the children”. The latter was signed by a Ms Tran and set out details of the children’s living arrangements. Ms Tran advocated that in the long term the children should be cared for by Mr Lam and his fiancée. She provided her telephone number in the letter.

A week after Mr Lam sent his submission, another departmental officer wrote to him advising that the best interests of the children was a “primary consideration” and requesting contact details for the children’s carers. The writer explained that the Department wished to contact them to assess the possible effect on the children of a decision to cancel Mr Lam’s visa.

In the event, the Minister determined to cancel Mr Lam’s visa without any departmental contact having been made with Ms Tran. The Minister had before him a lengthy submission prepared by departmental officers to assist in making the determination. This contained information about the children’s

circumstances and Mr Lam's submissions concerning their best interests. Reference was also made to additional material Mr Lam's father had provided to the Department about the children. Critical parts of Ms Tran's letter also were set out in the Minute. The authors did not cast doubt on the material concerning the children. They advised that it was open to the Minister to find that the cancellation of Mr Lam's visa, and his deportation, may have a detrimental effect on the children.

Mr Lam argued that it was procedurally unfair to cancel his visa without informing him that (i) Ms Tran would not be contacted and (ii) in assessing the possible effects on the children of a decision to cancel the visa, the Department would be relying solely on the information that Mr Lam and his father had supplied.

Gleeson CJ acknowledged that in some circumstances a decision-maker's failure to adhere to a statement about the procedure to be followed will be unfair but to so hold in every case would elevate judicial review of administrative action to a level of "high and arid technicality"[25]. His Honour observed that not every departure from a representation involves unfairness even if it defeats an expectation: the question is whether there has been unfairness, not whether the expectation has been disappointed[26].

In Gleeson CJ's analysis, the fundamental problem with Mr Lam's challenge was that it was not suggested that Mr Lam had lost an opportunity to put any information or submission about the children to the Minister[27]. It was against this background that his Honour observed that fairness is not an abstract concept and that "[w]hether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice". In his reasons, Hayne J suggested that the concept of "legitimate expectations" may

[25] (2003) 214 CLR 1 at [25].
[26] (2003) 214 CLR 1 at [34].
[27] (2003) 214 CLR 1 at [36].

have served its purpose by identifying that those persons to whom procedural fairness is owed are not confined to persons whose rights are affected[28].

Following *Lam*, in yet another of the many migration cases which have shaped Australian administrative law, in the joint reasons of four Justices the phrase "legitimate expectations" was dismissed as an "unfortunate expression"[29]. The issue in that case was whether the obligation to accord procedural fairness was engaged.

In *Minister for Immigration and Border Protection v WZARH*[30], in the Full Federal Court it was suggested in the joint reasons that the concept of "legitimate expectations" might still have a role to play in determining the content of the duty. In the High Court, this suggestion was rejected as distracting from the real question which is "taking into account the legal framework in which the decision is made, what does fairness require"[31]?

It is settled that to comply with the implied obligation of procedural fairness in the exercise of statutory power the decision-maker must adopt a procedure that is reasonable in the circumstances in order to afford an opportunity to be heard to a person who has an interest that is apt to be affected by exercise of that power. This implied condition will be breached in a manner that goes to decision-maker's authority to make the decision if the procedure adopted so constrains the opportunity of an affected person to propound his or her case for a favourable outcome as to amount to practical injustice[32].

Brennan J's analysis of the utility of the concept of "legitimate expectations" reflected the concern that its adoption might lead to a form of merits review by focussing attention on what was promised or expected as distinct from whether the process by which the decision was made was a fair

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[28] (2003) 214 CLR 1 at [121].
[29] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [65].
[30] (2015) 256 CLR 326.
[31] (2015) 256 CLR 326 at [30]; [61].
[32] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [82].

one. The subsequent acceptance of his Honour's analysis may ring fence against that risk, but this is not to accept that there has been some diminution in the content of procedural fairness. The question for a tribunal member is "what is reasonably required to give the person affected by my determination a fair opportunity to put his or her case?"

In the case of statutory tribunals, the obligation to give a person a fair hearing will commonly be met by following the procedures set out in the rules or practice directions made under the tribunal's statute. Nonetheless nice questions can arise about what fairness reasonably requires in the exercise of procedural discretions or where the tribunal finds it necessary to depart from its usual procedures. In *WZARH* the Court was unanimous in finding that an Independent Merits Reviewer denied the applicant procedural fairness by failing to give WZARH an opportunity to argue that he should have an oral hearing. That was so notwithstanding that WZARH did not have an entitlement to an oral hearing under the scheme for Independent Merits Review.

WZARH, a person classified as an "offshore entry person" under the Migration Act, sought to engage Australia's protection obligations as a refugee. A delegate of the Minister rejected WZARH's claim. He applied for a review of the decision. He was interviewed by an independent merits reviewer who told him that she would undertake a fresh hearing of his claims[33]. At the conclusion of the interview, the reviewer told WZARH that she would consider all the information that he had provided, and she would then make her recommendation to the Minister as to whether he met the criteria for recognition as a refugee. The first reviewer was unable to complete the review. A second reviewer assumed responsibility for the review. WZARH was not told of this development.

[33] (2015) 256 CLR 326 at [5].

The second reviewer had access to all the material that was before the first reviewer which included an audio recording of the interview with WZARH. The second reviewer did not believe WZARH's account that he feared persecution in his home country. It contained inconsistencies. The second reviewer did not consider that these could be explained by lapses of memory or confusion. The second reviewer determined that WZARH did not satisfy the criteria for recognition as a refugee.

Initially WZARH challenged the determination on the ground that the second reviewer had denied him procedural fairness by not conducting an interview with him. In the High Court, his challenge was more confined: he had been denied the opportunity to put his case orally to the person making the recommendation without being heard on the question of how the review should proceed after the withdrawal of the first reviewer[34]. The Court was unanimous in upholding the ground. The plurality observed that elementary considerations of fairness required that WZARH be told that the process that had been explained to him by the first reviewer would not be completed so that he would have the opportunity to make submissions on how the process should now proceed[35].

The second reviewer was in possession of all the written material that had been before the first reviewer and he had listened to the whole of the interview and no doubt it simply did not occur to him to inform WZARH that there had been a change in the identity of the reviewer. Accepting that there are limits to the capacity to assess credibility based on seeing the way a person gives evidence[36], it remains that often the witness' demeanour will be the only gauge the judge or tribunal member has of the truthfulness of an account[37]. It should not be thought burdensome to require that at the least

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[34] (2015) 256 CLR 326 at [26].
[35] (2015) 256 CLR 326 at [46].
[36] *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 328-329 [88](4); Bingham, *The Judge as Juror: the Judicial Determination of Factual Issues* (1985) 38 Current Legal Problems 1 at 5 – 12.
[37] *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

WZARH be given an opportunity to seek to persuade the person making the recommendation that fairness required he interview him himself.

The circumstances of *WZARH* were distinctly unusual and are unlikely to arise in the work of statutory tribunals. The lesson to take from the decision is that if the procedure by which a tribunal proposes to determine a matter is to be altered in some material way the parties should be given an opportunity to be heard on the matter.

Commonly, statutory tribunals are empowered to regulate their own proceedings. The governing statute of some tribunals states the expectation that parties will represent themselves unless the interests of justice require otherwise[38]. The legislature in such cases has made a judgment that informality and the expeditious resolution of matters before the tribunal is apt to be fostered by the absence of legal representation. It remains, subject to clear statutory provision to the contrary, the rules of procedural fairness apply to the tribunal's conduct of proceedings and that circumstances may arise which require the tribunal to depart from its usual practice and permit a person to be legally represented in order to fairly put his or her case. It is incumbent on the tribunal to give genuine consideration to such an application.

A tribunal must of course give genuine consideration to an application to adjourn proceedings. Within the bounds of reason, it is for the tribunal to determine whether to accede to the application[39]. In *Minister for Immigration and Citizenship v Li*[40] the High Court upheld a challenge to the decision of the, then, Migration Review Tribunal refusing to adjourn its review of Ms Li's application for the grant of a skills visa. It is necessary to refer in some detail to the facts in order to understand why that the Migration Review Tribunal exceeded its jurisdiction in refusing that application.

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[38] See s 43(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).
[39] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40]; *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332 at [19], [21],[48].
[40] (2013)249 CLR 332.

Ms Li had applied for a category of visa which required satisfaction that an assessing authority had assessed her as suitable for her nominated occupation. In support of her application, Ms Li submitted a skills assessment by Trades Recognition Australia ("TRA") which was found to be based on false information submitted by Ms Li's former migration agent. Ms Li applied to the MRT for a review of the decision through a new migration agent. The migration agent also applied to the TRA for a fresh skills assessment. The MRT wrote to Ms Li's migration agent inviting comment on allegedly untruthful statements made by Ms Li at the time of her initial application. It required a response by a nominated date but advised that the agent could seek an extension of time.

On the nominated date, the migration agent informed the MRT that Ms Li's second skills assessment had been unsuccessful. The agent identified two fundamental errors in the TRA's second assessment and advised that Ms Li had applied for it to be reviewed. The migration agent asked that the MRT forbear from making a decision on its review until the outcome of Ms Li's skills assessment was finalised. He undertook to keep the MRT apprised of the progress of the TRA's review of the assessment. A week after receipt of this request the tribunal affirmed the delegate's decision. It acknowledged the agent's request for deferment and stated[41]:

> "The Tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further …."

At each level in the judicial hierarchy there was agreement that the MRT's conduct in refusing the application for the reasons that it gave amounted to jurisdictional error. There were differences in the analysis of the character of the error. French CJ considered the refusal amounted to a denial of procedural fairness[42]. The migration agent had shown the existence of a proper basis for expecting a favourable outcome of the TRA review. His

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[41] *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332 at [3].
[42] *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332 at [18] -21].

Honour was critical of the bald statement that Ms Li had been given enough opportunities to present her case without adverting to the probability that within a reasonable time the TRA's assessment would have been available. And the MRT did not identify countervailing consideration supporting its refusal to defer its decision.

In the alternative, French CJ in common with the other members of the Court[43], found that the MRT's exercise of the statutory discretion to adjourn a review was legally unreasonable[44]. The plurality acknowledged in an appropriate case it was open to the MRT to decide that "enough is enough". But it was not apparent how the MRT had reached that conclusion in this case. Under the statutory scheme as it then stood, it was the MRT's duty to provide an applicant with an opportunity to present evidence and arguments relating to the decision under review. The issue in Ms Li's review was whether at the date of the MRT's decision she satisfied the skills assessment criterion. There was no evident and intelligible justification for the MRT's decision to bring the review to an end in circumstances in which the TRA's revised assessment was expected to be to hand within the near future[45]. Or as Gageler J put it, "[n]o reasonable tribunal, seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case, would have refused the adjournment"[46].

Li was an exceptional case in which the MRT may be thought to have lost sight of the purpose of providing a mechanism for review in its desire to dispose of the matters on its docket efficiently. This is not to say that consideration of the timely disposal of proceedings in the context of the tribunal's overall caseload is not a relevant factor in determining applications to adjourn proceedings. Not uncommonly, particularly in migration matters, the applicant may have no interest in seeing the review concluded timeously, if at

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[43] *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332 at [85],[124].
[44] *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332 at [31].
[45] *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332 at [76],[83]-[85].
[46] *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332 at [124].

all. The tribunal is entitled to require good reason to be shown before acceding to an application to adjourn a proceeding**.**

Of course, there can be a denial of procedural fairness in circumstances in which there is no opportunity for the person affected by the decision or his or her lawyer to bring the matter to the tribunal's attention. A tribunal may be authorised to "inform itself in any way it thinks fit". Such a provision does not relieve the tribunal of the obligation to draw material on which it proposes to rely to the attention of a person who stands to be affected by its decision. The need to give an applicant for review an opportunity to respond to material which the tribunal has in mind to take into account in manner adverse to the applicant's interest can hardly be thought burdensome.

Like it or not, under our constitutional arrangements, all tribunals are subject to judicial review to ensure that they act within their powers. The concern that supervision by judges steeped in the common law adversarial tradition is a drag on the capacity of tribunals to proceed expeditiously and with a minimum of formality should perhaps take account of how courts themselves are changing. When O'Connor J railed against decisions of the Federal Court for failing to have regard to the AAT's mandate to proceed with as much expedition as the requirement of its Act permits, the *Federal Court of Australia Act* 1976 (Cth) did not contain a statement of overarching purpose[47].

Her Honour's comments were made in the heyday of what the Hon Murray Gleeson has described as "individualised justice"[48]. In the conduct of civil litigation courts adhered to the classical theory, holding that the principles of case management were not to be permitted to supplant the attainment of justice. No matter how dilatory the conduct of a party's case may have been the party was not to be shut out from litigating any fairly arguable claim or defence[49]. Civil litigation in Australian courts was conducted conformably with

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[47] *Federal Court of Australia Act* 1976 (Cth), s37M(1).
[48] Gleeson, *Individualised Justice – the Holy Grail,* in Dillon (Ed) Advocacy and Judging, Selected Papers of Murray Gleeson (2017) Federation Press at 210.
[49] *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 154.

the principles articulated in the late 19th Century by Bowen LJ in *Cropper v Smith*[50]:

> "Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. … I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

Added to this, the decision of the House of Lords in *Birkett v James* worked to effectively preclude dismissal of proceedings for want of prosecution in any case in which the limitation period had not expired[51]. As an English commentator has observed, the principles articulated in these two cases effectively rendered compliance with the rules of court optional[52]. Against this background, Lord Woolf proposed fundamental changes to the system of civil justice in England and Wales starting with the enactment of a statement of overriding purpose embodying the goal of proportionality. Courts were enjoined to deal with each case in a manner proportionate to the sum involved, the importance of the case, complexity of the issues and the financial position of the parties[53]. They were also enjoined when allocating court resources to a matter to take into account the need to allocate resources to other cases[54].

The Australian jurisdictions largely followed suit; enacting statements of overarching/overriding purpose drawn from the English model. Section 37M of the *Federal Court of Australia Act* 1976 (Cth) (the "FCA Act") is representative. The overarching purpose of the civil practice and procedure provisions of the FCA Act is to facilitate the just resolution of disputes

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[50] (1884) 26 Ch D 700 at 710.
[51] [1978] AC 297.
[52] Sorabji, *Civil Justice after the Woolf and Jackson Reforms* (2014) at 69-70.
[53] Civil Procedure Rules 1998 (UK), r1.1(2)(c).
[54] Civil Procedure Rules 1998 (UK), r1.1(2)(e).

according to law and as quickly, inexpensively and efficiently as possible[55]. The overarching purpose includes the objectives of the efficient use of the judicial and administrative resources available, the efficient disposal of the Court's overall caseload and the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute[56].

It is undeniable that the effect of the enactment of statements of overarching/overriding purpose has been to change the landscape of the conduct of civil litigation in Australia. The High Court has acknowledged recognition throughout the common law world of the need to adopt a new approach to tackle the problems of delay and cost in civil litigation[57]. In Australian courts it is no longer acceptable for a party to be permitted to raise any arguable claim or defence at any stage in proceedings on payment of costs. Courts are required to be astute to restrain parties from engaging in opportunistic satellite litigation[58]. The concept of abuse of process has been developed in line with the overriding purpose: in *UBS AG v Tyne*, dismissing an appeal from an order permanently staying proceedings, the joint reasons approved the primary judge's statement that to permit the Federal Court to lend its procedures to the resolution of the dispute was likely to give rise to the perception that the administration of justice is inefficient, careless of the costs and profligate in its application of public moneys[59]. These have been seismic changes to the way courts resolve civil disputes. They are changes that have brought the courts somewhat closer to the mandate of tribunals with respect to the expeditious conduct of proceedings.

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[55] *Federal Court of Australia Act* 1976 (Cth), s 37M (1).
[56] *Federal Court of Australia Act* 1976 (Cth), s 37M (2)(b), (c), (e).
[57] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [94]-[95].
[58] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.
[59] (2018) 265 CLR 77 at [59].

Notwithstanding these winds of change, as he approached the end of his term as President of the Queensland Civil and Administrative Tribunal ("QCAT"), Alan Wilson J reflected[60]:

> "Despite statutory exaltations that tribunals are not bound to imitate [the adversary system], their practices and procedures, in truth, are regularly reviewed by Judges who have spent their professional lives in that environment and have, it might be said, both a suspicion and a degree of unfamiliarity with the way Tribunals are intended to operate."

Wilson J's frustration was not with the courts' rigour in applying the principles of procedural fairness to statutory tribunals like QCAT, but rather with the caution with which courts they have approached the question of whether tribunals are subject to a duty to inquire. His Honour pointed to QCAT's statute which exhorts it to not only to proceed informally and expeditiously but to inform itself in any way considered appropriate[61] and to ensure as far as practicable that all relevant material is disclosed to it[62].

In *Minister for Immigration v SZIAI,* the High Court allowed that in some circumstances the failure to make an obvious inquiry about a critical, easily ascertainable fact may amount to a constructive failure to exercise the tribunal's review jurisdiction[63]. Wilson J considered that the Court should go beyond the cautious statement in *SZIAI* and acknowledge a limited duty to inquire in review proceedings couched in flexible terms. His Honour observed that in a tribunal like QCAT, in which self-representation is the norm, it is common for applicants to supply incomplete or imperfect information. He proposed that recognition of a duty to inquire would serve the function of requiring tribunal members to pause and consider whether they have before

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[60] Wilson, *Tribunal Proceedings and Natural Justice: a Duty to Inquire*, (2013) UQLJ Vol 32(1) 23 at 29.
[61] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(3)(c).
[62] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(3)(d).
[63] (2009) 259 ALR 249 at [25].

them all the obviously relevant material and, if not, whether further material could fairly be obtained[64].

The statement in *SZIAI* did not amount to the imposition of a duty to inquire. It was an acknowledgment of the possibility that in some circumstances a tribunal might fail to carry out its statutory review function were it to proceed to a determination in the absence of material about a critical fact which could have been readily obtained[65]. The limited, flexible duty to inquire that Wilson J proposed is a different animal. As his Honour acknowledged, it is not easy to identify the foundation for such a duty [66]. The High Court has rejected that the obligation of procedural fairness embraces a duty to inquire[67]. And if another source be identified for it, there might remain a tension between the tribunal's duty to inquire and the applicant's right to put the case that he or she chooses to put.

The articulation of a limited, flexible duty to consider whether all obviously relevant material has been obtained and, if not, whether consistently with fairness to the person affected by the review, the tribunal might obtain it, is a duty of decidedly uncertain application. One might confidently predict that it would provide fertile grounds for "luxurious" judicial review challenge.

Some years ago, French CJ commented on the tendency in some quarters to regard procedural fairness as a moral luxury that serves as a drag on efficient decision-making[68]. That tendency may be found among some individuals charged with public administration. I doubt, however, that it reflects a widespread view among those who sit in statutory tribunals. I expect that most tribunal members, like most judges, would wish to ensure that the parties

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[64] Wilson, *Tribunal Proceedings and Natural Justice: a Duty to Inquire*, (2013) UQLJ Vol 32(1) 23 at 29.
[65] *Minister for Immigration v SZIAI* (2009) 259 ALR 249 at [25].
[66] Wilson, *Tribunal Proceedings and Natural Justice: a Duty to Inquire*, (2013) UQLJ Vol 32(1) 23 at 27.
[67] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290, 305; *Minister for Immigration v SZIAI* (2009) 259 ALR 249 at [18].
[68] French, *Procedural Fairness – Indispensable to Justice?* Sir Anthony Mason Lecture, 7 October 2010.

have a fair opportunity to put their case. O'Connor J's criticism of members of the AAT was not that they chaffed at the requirement to accord procedural fairness but that they were apt to accede to any request made in its name. In cases at the margins, the determination of what is reasonably required to give a person the opportunity to put his or her case is a matter of judgment about which minds may differ. Her Honour was rightly concerned to emphasise the need for tribunal members to bring their own judgment to bear on such occasions and not to seek to second guess the outcome should the decision be challenged on judicial review.

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