

Before the High Court

What's in a Name? Fairness and a Reasonable Opportunity: *AB v Independent Broad-Based Anti-Corruption Commission*

Matthew Groves*

Abstract

In *AB v Independent Broad-Based Anti-Corruption Commission*, the High Court of Australia will consider the level of disclosure that the rules of fairness require an investigative body to observe when finalising a draft report. The central issue is the tension between the duty to provide adverse material (enough for an affected person to have a fair chance to respond) and the need for the investigator to withhold some material (enough for it to still be able to discharge its function). This question has arisen as a narrow one of construction under s 162(3) of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), but it raises the age-old dilemma of the rules of fairness — how to protect the interests of someone who may be adversely affected by administrative action without unduly impairing the functions of the officials responsible for that action. This column argues that the dilemma may not be able to be resolved beyond the statement of broad principles.

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* Alfred Deakin Professor, Law School, Deakin University. Email: m.groves@deakin.edu.au; ORCID iD: <https://orcid.org/0000-0001-5925-8362>.

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I Introduction

Fairness is a cornerstone of good governance. It is also easy to state as a legal principle in broad terms. When public powers are exercised, basic procedural rights must be provided to people who may be adversely affected. This right to be heard — known as the hearing rule¹ — contains some core ingredients, such as the right to receive notice of adverse material and the right to respond to it. Natural justice, or ‘procedural fairness’ as it is increasingly known,² is a right so fundamental that it is protected by the principle of legality.³ There is an immense body of doctrine about the variable content of the hearing rule,⁴ a common law rule which can be modified or removed by statute. When the requirements of fairness are modified by statute, this typically occurs within a legislative framework where the function of the relevant body or the purpose of a power is thought to be assisted by restricting the requirements of fairness.⁵ In these instances, the purpose of the power is enhanced, or able to be given appropriate effect, if the requirements of fairness attaching to its exercise are trimmed.

In *AB v Independent Broad-Based Anti-Corruption Commission* (‘the forthcoming case’),⁶ the High Court will consider what material Victoria’s Independent Broad-Based Anti-Corruption Commission (‘IBAC’) must disclose to a person it has been investigating before it can finalise a report of an investigation. Both parties agree about applicable wider principles — namely, that fairness applies but is modified by the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) (‘*IBAC Act*’) — and that the person under investigation (‘AB’) has been provided with some information. The disagreement lies in the detail. AB argues that he requires more information if the chance to be heard is to be meaningful. IBAC

¹ The hearing rule is often referred to as one of the ‘twin pillars’ of natural justice. The other pillar is the rule against bias.

² The two terms are generally treated as interchangeable: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37] (Gleeson CJ). This article uses the term ‘natural justice’ because it was preferred by the Independent Broad-Based Anti-Corruption Commission (‘IBAC’) and the Victorian courts: *AB v Independent Broad-Based Anti-Corruption Commission* [2022] VSCA 283, [55], [61] (‘*AB v IBAC (Appeal)*’).

³ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (‘*Saeed*’); *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 51 [55] (‘*BVD17*’).

⁴ The content of fairness is ‘eminently variable’: *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 232 [79] (citations omitted). See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2022) chs 8–9.

⁵ The nature of these detailed procedural frameworks serves to limit the operation of the principle, for reasons explained by Gageler and Keane JJ in *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310–11 [313]–[314]. Their Honours reasoned that the principle existed to protect ‘from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important’ but had little to add in instances ‘where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity’. In the case of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) (‘*IBAC Act*’), both the purpose and detail of the statute make clear that the legislature has turned its attention to the question of limiting the hearing rights of people who may be affected by IBAC investigations.

⁶ *AB (a pseudonym) v Independent Broad-Based Anti-Corruption Commission* (High Court of Australia, Case No M63/2023).

argues that it has provided enough material for AB to make an informed response. IBAC also argues that providing more material is not required by the *IBAC Act* and might undermine the performance of its functions. These issues have an air of artifice. AB has been under investigation for many years and gained considerable knowledge of the issues that IBAC has investigated. When IBAC tables the report of its investigation, the fact that AB has been under investigation for many years by an anti-corruption body will become public knowledge. This itself is highly likely to damage AB's reputation. The delay and complexity feared by IBAC have arguably already occurred. But important wider issues remain. How much information should an anti-corruption body provide to a person it is investigating? How much fairness can be expected within an environment that is carefully structured to limit many basic elements of fairness? Before answering those questions, we must examine the history of the case.

II Background and Procedural History

AB is a senior officer of a non-governmental body ('CD') in Victoria. Both have been under investigation by IBAC since 2019. The strict requirements of secrecy covering IBAC investigations mean little is known about the identity or work of AB or CD.⁷ AB gave evidence in a private examination conducted by IBAC in November 2020.⁸ AB was examined over two days and represented by senior counsel.⁹ AB and his agency were subject to directions from IBAC, which greatly restricted the knowledge that each received about key aspects of the investigation and the evidence IBAC received. The confidentiality notice issued to AB explained that he could not disclose evidence given to IBAC, any documents given to or seized by IBAC, the subject matter of the investigation, the existence of or information about the confidentiality notice, or any information that might identify a person subject to any compulsory process by IBAC.¹⁰

IBAC completed a draft report containing 'adverse comments and opinions' about AB and CD and sent them a redacted version of that document as required by ss 162(2) and (3) of the *IBAC Act*. Those provisions make clear that draft reports are given to affected parties to provide them an opportunity to respond to adverse comments, though a curious divergence in drafting allows 'an opportunity' to agencies and a 'reasonable opportunity' to people. IBAC is required to 'fairly set out

⁷ *AB v IBAC (Appeal)* (n 2) [3]–[4]. Those paragraphs identify AB as male, which is the only identifying information so far disclosed. The name and work of AB, the name and activity of CD and the title of IBAC's investigation remain publicly unknown. The redacted submissions published on the High Court website provide no further detail: see 'Case M63/2023', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/cases/case_m63-2023>.

⁸ Unless there are exceptional circumstances and it is in the public interest, examinations must be held in private: *IBAC Act* (n 5) s 117.

⁹ *AB v IBAC (Appeal)* (n 2) [37]. People directed to appear before IBAC have a right to representation, unless IBAC directs otherwise: *IBAC Act* (n 5) s 127.

¹⁰ The notice was issued under *IBAC Act* (n 5) s 42.

each element of the response in its [revised] report'.¹¹ People who may be the subject of adverse comment are given the further right to be provided with 'the relevant material in relation to which IBAC intends to name that person'.¹² AB's lawyers requested copies of the transcript of his and further interviews and other material relied upon by IBAC because this was 'necessary to provide context' for AB to make an adequately informed response.¹³ IBAC provided only the transcript of AB's examination, as is normally required by statute, though even this may be withheld if IBAC considers on reasonable grounds that providing witnesses with copies of their own testimony may prejudice an investigation.¹⁴

A Supreme Court of Victoria

AB sought judicial review in the Supreme Court of Victoria, claiming that IBAC had breached the requirements of natural justice by failing to provide the material he requested.¹⁵ Ginnane J held that the *IBAC Act* did not exclude the requirements of fairness but instead struck a 'compromise between confidentiality of the investigative process and natural justice'.¹⁶ That compromise did not include an entitlement of AB to seek material additional to the draft report. Even a heavily redacted version of witness statements might identify those people, which would defeat the confidentiality the *IBAC Act* strived to create and preserve.¹⁷ The ability of affected people to gather information, whether directly or otherwise, was clearly limited. Ginnane J noted there was no general right of cross-examination in administrative hearings and the implication of one for IBAC hearings did not sit easily with other procedural modifications such as restrictions on the right to be present during witness examinations.¹⁸ Ginnane J held that the tension between providing someone who might be the subject of adverse commentary in a report by IBAC with a reasonable opportunity to respond and preserving the confidential nature of the investigation could be reconciled in several ways. One was for IBAC to disclose 'the substance or gravamen of the allegations' or the 'substance of the adverse material in a draft report'.¹⁹ The subtle distinction between the two reflects

¹¹ *IBAC Act* (n 5) ss 162(2), (3). Revised reports are designated as 'special reports', a category which encompasses all reports from IBAC except its annual report. Special reports are tabled in Parliament and attract privilege when this occurs: at ss 162(1), (11), (13), (14).

¹² *Ibid* s 162(4). The same duty arises if IBAC intends to include such information in its annual report: at s 165(4).

¹³ *AB v IBAC (Appeal)* (n 2) [4].

¹⁴ *IBAC Act* (n 5) s 133(4).

¹⁵ CD, which was provided the same redacted draft report, was joined to the claim at AB's request and sought the same remedies: *AB v IBAC (Appeal)* (n 2) [8]–[9].

¹⁶ *AB (a pseudonym) v Independent Broad-Based Anti-Corruption Commission* [2022] VSC 570, [119] ('*AB v IBAC (Trial)*'). This decision, like the publicly available decision of the Court of Appeal, is a redacted version of a confidential judgment published to the parties.

¹⁷ *Ibid* [120]–[124].

¹⁸ *Ibid* [119]. This right is altered by *IBAC Act* (n 5) ss 118(1)(c) and 119 which provide that people other than IBAC staff cannot be present during witness examinations unless allowed by a direction of IBAC.

¹⁹ *AB v IBAC (Trial)* (n 16) [151], [154]. This was the solution reached in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 ('*VEAL*').

an uncertainty about whether draft reports must be disclosed to affected people.²⁰ Ginnane J noted that the statutory obligation of IBAC to ‘fairly set out each element of the response in its report’²¹ provided another means for affected people to respond. Most administrative processes require decision-makers to consider a response, but not necessarily to address it directly or recount key details in any subsequent decision. The duty of IBAC to fairly set out elements of a response enables that material to become a matter of public record, even if IBAC strongly disagrees with that material. That duty could be discharged in many other ways, such as by adding, removing or amending material in a draft report, providing a revised draft to affected people for further comment, or inviting the affected people to respond orally.²² These rights will be available to AB after his case is decided.²³

B Victorian Court of Appeal

On appeal, the parties agreed that the key issues were the steps required to satisfy the hearing rule and whether IBAC had taken sufficient steps.²⁴ The Victorian Court of Appeal noted that the flexibility of the hearing rule enabled it to adapt to the circumstances of each case and avoid practical injustice. To avoid injustice, IBAC had to provide AB a reasonable opportunity to respond. The Court considered that the relevant circumstances included the scope and purpose of the relevant statute, the nature of the power exercised, the right or interest of whoever might be affected by that exercise, and the ‘severity of the consequences to that person resulting from the exercise of the power’.²⁵ Those orthodox principles led the Court to identify five issues relevant to the content of the hearing rule in this case:

- (i) A ‘key object’ of the *IBAC Act* is to identify, investigate and expose corrupt conduct. Those goals are fostered by the ‘significant coercive powers’ conferred upon IBAC.
- (ii) IBAC’s statute assumes that IBAC will receive sensitive information which, if disclosed, could ‘jeopardise the safety or reputation’ of people. The various mechanisms in the Act to protect information and the identity of people involved in investigations are intended to manage that danger.
- (iii) The Act recognises that IBAC’s work could affect the rights and interests of investigated people. Those rights are protected in many ways, such as by allowing legal representation and private hearings and for witnesses

²⁰ *AB v IBAC (Trial)* (n 16) [150] where Ginnane J held that *IBAC Act* (n 5) s 166, which imposes restrictions on recipients of proposed or draft reports, ‘appears’ to assume draft reports could be disclosed. His Honour did not suggest this created a presumption that drafts would or should always be disclosed.

²¹ *IBAC Act* (n 5) s 162(2).

²² *AB v IBAC (Trial)* (n 16) [141], [173].

²³ It was unnecessary to decide the effect of broadly similar rights under the *Crime and Corruption Act 2002* (Qld) in *Crime and Corruption Commission (Qld) v Carne* (2023) 97 ALJR 737, 750 [79] (Gordon and Edelman JJ).

²⁴ *AB v IBAC (Appeal)* (n 2) [160].

²⁵ *Ibid* [161].

to receive transcripts of their own evidence. Section 162(3) contains another key protection for people under investigation.

- (iv) When IBAC transmits reports to Parliament, the procedural protections associated with that action are intended to protect the reputation of people named in those reports.
- (v) The reputational damage caused by transmission of an IBAC report may be severe.²⁶

While the imperatives of IBAC's work and the requirements of its statute narrow aspects of the hearing rule, the Court of Appeal thought that a reasonable opportunity for AB to respond was 'obviously' not met by providing 'adverse comments and opinions in bare, conclusionary form'.²⁷ The right to respond would be made reasonable if IBAC provided 'other contents of the draft report which disclose the basis upon which IBAC formed the adverse comments and opinions or which provide necessary context for them'.²⁸ A requirement to provide *enough* of the contents *or* context of a report offers little guidance. The Court of Appeal conceded as much when it noted that a reasonable opportunity could be provided if IBAC disclosed the 'substance or gravamen' of matters adverse to a person, or the draft report itself.²⁹ The Court noted that, in the case at hand, one part of IBAC's report was 'sufficiently detailed to enable the applicants to understand, and respond to, the adverse comments and opinions concerning them'.³⁰ The Court conceded that this part did not reveal the identity of some witnesses, but noted that those redactions were intended to protect the unnamed witnesses.³¹

If the requirement to provide a reasonable opportunity to respond can be met by disclosing a full draft report, one part of a report, or only the gravamen of adverse comments and conclusions, the adequacy of disclosure rests on two competing issues. One is the level of detail required to provide affected people with enough insight into the basis of adverse comments and opinions to be able to respond effectively to them. The other is the potential danger disclosure might pose either to the safety of other people or to the conduct of the investigation. These imperatives will often be in tension and may not always be reconcilable. The Court of Appeal indicated one way to resolve such problems in its finding that IBAC had not provided sufficient detail or information for AB to respond to its statement that '[o]ther concerns were also raised' about witnesses giving evidence against AB or CD.³² That vague statement was 'so general and lacking in content' that it was impossible for AB to respond to it, though the Court noted that AB could make that very criticism and also request that the vague statement be amended or deleted.³³ Even if that request was denied, the right of affected people to have their response

²⁶ Ibid [162].

²⁷ Ibid [164].

²⁸ Ibid.

²⁹ Ibid [166].

³⁰ Ibid [169].

³¹ Ibid [170].

³² Ibid [177].

³³ Ibid.

reproduced in a final report was ‘significant because it ensures that anyone reading the report is able to consider not only IBAC’s findings but also the applicants’ perspective in relation to those findings’.³⁴ The Court of Appeal held that, aside from this shortcoming, IBAC had disclosed enough material to satisfy the requirements of fairness and its governing statute.

III Disclosure, Opportunity and Fairness for Both Sides

There is no doubt that the hearing rule can be excluded by statute,³⁵ but the rights contained within the hearing rule are so important that legislation to exclude them is viewed strictly. Edelman J recently explained that the ‘right to a reasonable opportunity to present a case ... is not an aspect of procedural fairness that can usually be abolished by Parliament by a nudge and a wink’.³⁶ There are, however, some administrative regimes where amendments to elemental parts of the hearing rule are so extensive they cannot be characterised as mere parliamentary winking. Those extensive amendments are individual aspects of a wider administrative structure that seeks both to limit the procedural rights of affected people and to confirm the discretionary and often coercive powers of officials.³⁷ This is the very nature of extraordinary investigative bodies such as IBAC. Hearings (and thus the hearing rule itself) are not excluded because hearings are central to IBAC’s functions. But the hearings that are contemplated are so vastly different from the normal processes of courts or administrative bodies that recourse to traditional notions of the hearing are inapt, perhaps to an extent that can obscure the novel functions of IBAC.

One novel power attending IBAC investigations is the ability of affected people to comment upon perceived deficiencies or errors in the process. As noted above, the Court of Appeal suggested such comments could be included in the final reports tabled in Parliament. In the normal course of administrative decision-making, insufficient disclosure is unfair and the resulting decision unlawful because of that breach of fairness. In IBAC investigations, applicants have a different, two-fold right: to complain about inadequate disclosure, and to have those complaints included in a final report if those objections are not given the weight an affected person has sought. The novelty of this second step turns tradition on its head. Inadequate disclosure does not compel quashing of the report, but instead enables the report to record that flaw.³⁸ An error on the face of the record, the traditional insignia of fatal legal flaw, is arguably transformed by this provision to a legislative duty which signals that the concerns of an affected person have been noted.

³⁴ Ibid [179]. Ginnane J similarly held this requirement meant IBAC’s final report must ‘demonstrate that it has properly considered’ the responses of affected people and agencies: *AB v IBAC (Trial)* (n 16) [173].

³⁵ See, eg, the cases cited in n 3.

³⁶ *BVD17* (n 3) 52 [56].

³⁷ A detailed scheme of this nature triggers the cautions quoted in n 5 above.

³⁸ The procedure exists elsewhere: see, eg, *Inquiries Act 1992* (ACT) s 26A(2)(b).

The extent to which such a novel procedure might affect disclosure requirements is unclear. The Court of Appeal acknowledged that notice of adverse material could be modified to balance the needs of an affected person and the institutional concerns of the decision-maker. In the leading case of *VEAL*,³⁹ the High Court emphasised that disclosure should not be conceived in an absolute manner to require that material from a confidential source be either released in full or withheld entirely.⁴⁰ To provide the gist or gravamen of that material would strike a balance between the imperatives of confidentiality and the need for affected people to be able to provide a sufficiently informed reply.⁴¹ There are some instances where it is wholly impractical to apply the hearing rule,⁴² but the complex investigations required by the *IBAC Act* are not inherently at odds with the implication of aspects of the hearing rule. The more difficult question is not whether disclosure, or greater disclosure, can be implied but instead the extent to which an implication to that effect can be drawn without defeating the limits clearly imposed upon the hearing rule by the Act. The strength of the implication rule is contestable in such cases because the legislature has clearly set parameters by restricting many procedural rights. Put another way, the playing field is not level and is deliberately made that way by Parliament.

If legislative amendments disturb the hearing rule without clearly excluding the possibility of the implication of further aspects of the rule, the balancing task faced by the courts is the perpetual one faced in cases of fairness — what is the right balance and how can it be struck? It is well settled that there is no ‘package of procedural rules which must always be observed’,⁴³ which means that lists derived from earlier cases may provide helpful rather than exhaustive guidance.⁴⁴ Within these vague parameters, two issues have particular relevance to this case. The first is that the requirements of disclosure are inevitably limited. The requirement of disclosure and the associated right to comment on what is disclosed cannot become an ‘endless game of tennis’ where every point must be returned over the net.⁴⁵ If the courts have accepted that the common law rules of implication may impose such limits, they should accept that the legislature is also able to impose limits. The second caution relevant to the balancing exercise required to determine the content

³⁹ *VEAL* (n 19) 99–100 [28]–[29].

⁴⁰ The UK Supreme Court adopted a similar position when it held that fairness required that a prisoner transferred to a highly restrictive regime be told ‘the substance of the case being advanced in sufficient detail to enable him to respond’: *R (Bourgass) v Secretary of State for Justice* [2016] AC 384, 422 [100]. That approach meant the identity of confidential informants and aspects of prison security could be preserved, while providing the prisoner with the key reasons why he was placed in more restrictive custody.

⁴¹ See also *Coutts v Close* [2014] FCA 19, [118]–[127].

⁴² See, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 541 [51] (French CJ), 622–3 [368]–[369] (Gageler J, Crennan J agreeing) where it was held that trappings of the hearing rule were not compatible with powers exercised on the high seas in difficult circumstances.

⁴³ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 388 [85] (Allsop CJ, Middleton and Foster JJ).

⁴⁴ *Canada (A-G) v Mavi* [2011] 2 SCR 504, [42]. See also *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504 (Kitto J).

⁴⁵ *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50, [180].

of the hearing rule is what Beatson LJ described as the ‘nightmare of a Tennysonian “wilderness of single instances”’,⁴⁶ which occurs if appellate courts focus too much on the particular context of a case at the expense of workable general principles. Beatson LJ thought the solution lay in courts providing ‘simplified guidance which is practical and does not constitute either a procedural straitjacket, or “safe harbour” for longstanding ways of doing things in a particular context’.⁴⁷ The very prescriptive legislative regime governing IBAC arguably presents the danger identified by Beatson LJ. We should not presume that dilemma is capable of satisfactory judicial resolution.

A different approach is to accept that a process contains a level of unfairness that cannot be cured. A variant of this problem arose in *R (Begum) v Secretary of State for the Home Department* (*‘Begum’*),⁴⁸ where the applicant could not gain leave to enter the United Kingdom (*‘UK’*) to instruct her lawyers and attend her appeal in the Special Immigration Assessment Commission that challenged the removal of her British citizenship. Ms Begum argued that refusing her leave to enter meant the Commission hearing could not proceed fairly, so her appeal should be allowed. The Supreme Court invoked Eleanor Roosevelt’s statement that ‘justice cannot be for one side alone, but must be for both’.⁴⁹ On this view, the flaw of allowing the appeal because of the unfairness faced by Ms Begum was the unfairness it would visit upon the respondent. Lord Reed suggested that the substantive claim be stayed until Ms Begum was better able to participate, but conceded there was ‘no perfect solution to a dilemma of the present kind’.⁵⁰ Lord Reed also conceded there were

many situations in which a party to legal proceedings may be unable to present her case effectively: for example, because of the unavailability of evidence as a result of the death, illness or incapacity of a witness. If the problem is liable to be temporary, the court may stay or adjourn the proceedings until the disadvantage can be overcome. If the problem cannot be overcome, however, then the court will usually proceed with the case. The consequence is not that the disadvantaged party automatically wins her case: on the contrary, the consequence is liable to be that she loses her case, if the forensic disadvantage is sufficiently serious.⁵¹

This reasoning marks a distinct shift from recent cases in which UK courts have reviewed policies and practices on a holistic basis, under an overarching notion of systemic or structural unfairness.⁵² The UK Supreme Court recently made clear that any freestanding principle of systemic unfairness was overly vague, so the appropriate guiding principle was one of lawfulness more generally.⁵³ While

⁴⁶ *R (L) v West London Mental Health NHS Trust* [2014] 1 WLR 3101, 3125 [69].

⁴⁷ *Ibid.*

⁴⁸ *R (Begum) v Secretary of State for the Home Department* [2021] AC 765.

⁴⁹ *Ibid* 801 [90].

⁵⁰ *Ibid* 814 [135].

⁵¹ *Ibid* 801 [90].

⁵² See, eg, *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219, [10]; *R (Detention Action) v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341, [45]; *R (BF (Eritrea)) v Secretary of State for the Home Department* [2020] 4 WLR 38, [63].

⁵³ *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931.

constitutional differences may limit the extent to which much English administrative law doctrine can be usefully applied in Australia, the acceptance in *Begum* that some forensic problems simply cannot be overcome is instructive. *Begum* also aligns with the curbing of systemic unfairness by making clear that notions of fairness cannot somehow provide a vehicle that trumps all other issues.⁵⁴

IV The Pendulum of Fairness

Most recent cases about natural justice have focused on the narrow question of materiality. Whether a breach of fairness was material reflects the High Court's acceptance that legislation usually contains an implied requirement that a decision or exercise of power is not invalid if any legal error is not material.⁵⁵ That implication has generated significant commentary, not all of it favourable.⁵⁶ In *Nathanson v Minister for Home Affairs* ('*Nathanson*'),⁵⁷ Edelman J despaired that recent High Court decisions about materiality have 'eroded the bedrock of natural justice that is ordinarily implied in statute as a reflection of reasonable and widespread expectations'.⁵⁸ His Honour was especially concerned by the 'regrettable premise' in *MZAPC v Minister for Immigration and Border Protection* that the onus for proving materiality rested with those who challenged a decision.⁵⁹ Edelman J identified a practical solution, which was to accept that 'almost nothing' should be sufficient to satisfy that onus,⁶⁰ but his Honour's deeper concern about the practical effect materiality may have upon the operation of fairness bears upon the forthcoming case.

Edelman J acknowledged that materiality, like so many interpretive implications, reflects values widely accepted to underpin administrative law such as efficiency or 'good administration'. The connection is obvious. To overturn a decision for an immaterial error causes expense and delay, with little if any benefit to good government. His Honour cautioned that this instrumental focus saw 'weaker values' such as efficiency prevail over 'stronger values concerned with natural justice and respect for human dignity'.⁶¹ This recourse to dignitarian values reflects another recent trend in natural justice cases: emphasising the innate benefit of

⁵⁴ There is something of a loose parallel with the application of unreasonableness in Australian law in a way that allows that ground to require procedures effectively the same as might otherwise occur by use of the hearing rules: see, eg, *BVD17* (n 3) 44 [33]–[34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 53 [61] (Edelman J).

⁵⁵ The decisive turn occurred in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 ('*Hossain*').

⁵⁶ In *CCU21 v Minister for Home Affairs* (2023) 297 FCR 503, Perram, Halley and Goodman JJ lamented that the recent cases left the principles of materiality 'unclear': at 524 [86].

⁵⁷ *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 ('*Nathanson*').

⁵⁸ *Ibid* 424 [88], citing *BVD17* (n 3) and *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417.

⁵⁹ *Nathanson* (n 57) 425 [93], citing *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506.

⁶⁰ *Nathanson* (n 57) 425 [93].

⁶¹ *Ibid* 424 [89].

treating people affected by the exercise of official power in a respectful manner.⁶² Edelman J has previously suggested that a greater focus on the philosophical foundations of fairness can help inform more practical questions about fairness, such as exclusion of the hearing rule, or how the institutional imperatives and individual interests should be balanced.⁶³ These questions transcend the interpretation of individual statutes, though we should not assume that fairness has an inherent virtue which has always prevailed.

Natural justice may be elemental and longstanding, but it has a chequered past. The doctrine lay almost dormant for a long period until its revival in Victorian England as part of the judicial toolbox the courts fashioned to respond to the industrial revolution and centralised bureaucratic government.⁶⁴ Another ‘setback’ occurred after World War II, when English and Australian courts adopted a more restrictive approach to natural justice.⁶⁵ The reversal of that trend by the landmark case of *Ridge v Baldwin*⁶⁶ signalled the birth of expansive procedural protections cast by the courts over the many decisions made by the welfare state in areas such as social security and migration.⁶⁷ If the cautions expressed by Edelman J are located within these historical ebbs and flows, the concern moves beyond an immediate one of the mechanics of materiality to the longer term danger that we may be at the cusp of another era in which the rigour of fairness is blunted. The ministerial powers at the centre of *Nathanson* have a common quality with the investigative powers exercised by IBAC: they are often referred to as exceptional but have become so common as to make this descriptor inapt. Extraordinary ministerial powers have proliferated in migration decision-making.⁶⁸ Anti-corruption agencies also wield exceptional powers, but these bodies have become so embedded in Australian government that those exceptional powers are perhaps becoming an accepted and unremarkable part of public law.

This trend is not limited to Australia. The use of closed hearings in the UK, which are a striking exception to the common law tradition of open justice, are a useful example. Those hearings allow for the exclusion of the public and sometimes an affected person. This controversial procedure has become well established in the

⁶² See, eg, *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, [2] (Allsop CJ); *R (Osborn) v Parole Board* [2014] AC 1115, 1149 [68] (Lord Reed); *Hossain* (n 55) 147–8 [72] (Edelman J, Nettle J agreeing).

⁶³ Justice James Edelman, ‘Why Do We Have Rules of Procedural Fairness?’ (2016) 23(3) *Australian Journal of Administrative Law* 144, 148–9.

⁶⁴ Key cases of the Victorian era were *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180; 143 ER 414 and *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759; 10 ER 301.

⁶⁵ CF Forsyth and IJ Ghosh, *Wade & Forsyth’s Administrative Law* (Oxford University Press, 12th ed, 2023) 359.

⁶⁶ *Ridge v Baldwin* [1964] AC 40.

⁶⁷ A change foreshadowed by the influential article Charles Reich, ‘The New Property’ (1964) 73(5) *Yale Law Journal* 733.

⁶⁸ An example is the discretionary powers enabling migration officials to vary or bypass legislative restrictions, which are typically expressed as non-compellable and exempt from the requirements of fairness: Emily Hammond, ‘Procedural Fairness in Application Cases: Is Compellability of Consideration a Critical Safeguard?’ (2016) 25(2) *Australian Journal of Administrative Law* 122.

UK legal system, though one study⁶⁹ argued that the very institutional acceptance distracted attention from the unprincipled approach taken to the role of fairness in closed hearings. The immediate problem was that the courts often failed to provide coherent principles for closed hearings. The deeper problem was that a clearly unfair procedure had become ‘normalised’, in part because of an unwitting lack of attention to the impact of the procedure on the foundational principles of fairness.⁷⁰ An arguably similar danger arises if the extraordinary powers of bodies such as IBAC are considered as isolated interpretive questions, rather than indicative of the increasingly unequal nature of many administrative regimes. Some courts have conceived this as an ‘inequality of arms’.⁷¹ The knowledge and resources of public agencies and decision-makers are so vastly superior to those of most people over whom official power is exercised that many, perhaps even most, instances in which people seek to challenge official decisions cannot comprise a level playing field. Whether and how public law may deal with that inequality is unclear.⁷² The forensic disadvantage caused by disparity in expertise and resources is different to the disadvantage caused by the restrictions of anti-corruption and other novel bodies such as IBAC, but the consequences are strikingly similar. The disadvantages that exist in the processes of bodies such as IBAC differ in that they are the deliberate creation of parliaments. If the courts seek to wind back the extent of the procedural disadvantages within these regimes, the basis upon which they do so must be clearly identified. The normal principles of the implication rule, to imply further procedures in the guise of the justice of the common law,⁷³ cannot be invoked uncritically to regimes so abnormal such as the *IBAC Act*.

The extent to which we can glean guidance from the High Court’s examination of similar issues in different decision-making environments is unclear. An arguably similar regime was examined in *SDCV v Director-General of Security* (‘*SCDV*’).⁷⁴ The central question was whether a legislative restriction imposed on the disclosure of information in an appeal heard by the Federal Court about a case heard in the security division of the Administrative Appeals Tribunal contravened ch III of the *Constitution*. The restriction prevented a court from disclosing

⁶⁹ Eva Nanopoulos, ‘Human Rights and the Normalisation of the “Closed Material Procedure”: Limit or Source?’ (2015) 78(6) *Modern Law Review* 913.

⁷⁰ *Ibid.* A recent analysis of closed hearings in UK courts argued that their ongoing use will continue to encounter more difficulties from human rights principles and should be supplemented with a scheme enabling compensation in cases where full disclosure and a fair hearing are not possible: Maxwell Davie, ‘Striking at Shadows: Disclosure in the Closed Material Procedure’ (2023) 42(4) *Civil Justice Quarterly* 364.

⁷¹ *MZAIB v Minister for Immigration and Border Protection* (2015) 238 FCR 158, 186 [124] (Mortimer J) (‘*MZAIB*’); *DOB18 v Ng* [2019] FCA 1575, [46] (Stewart J); *CMC18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1358, [42] (Mortimer J).

⁷² Mortimer J suggested the requirements of ch III of the *Australian Constitution* might provide an organising principle: *MZAIB* (n 71) 186 [124]. See also Matthew Groves, ‘Equality of Arms in Administrative Review’ (2023) 46(3) *Melbourne University Law Review* 726.

⁷³ The so-called implication rule is a common law interpretive rule that enables aspects of the hearing rule to be implied as procedural requirements where there otherwise appears a legislative gap to this effect. This approach assumes that legislatures are aware of this presumption, so its application enables the true legislative intention about the hearing rule to be ascertained: *Saeed* (n 3) 258–9 [12].

⁷⁴ *SDCV v Director-General of Security* (2022) 405 ALR 209 (‘*SDCV*’).

information to anyone other than the judges comprising an appellate court.⁷⁵ A narrow majority of the High Court held the provision was constitutionally valid, mainly because other less restrictive avenues of review remained available.⁷⁶ *SDCV* could be distinguished on the basis that it involved restrictions in judicial proceedings, which occupy a more clearly constitutional position than administrative inquiries such as a hearing by IBAC.⁷⁷ The strong dissent of Gordon J emphasised the ‘rigidity’ of the prohibition preventing any disclosure of the restricted information beyond members of the relevant court.⁷⁸ IBAC is granted some level of discretion to adjust the level of disclosure of information to affected people,⁷⁹ which shifts focus to a key finding of the majority in *SDCV*. Kiefel CJ and Keane and Gleeson JJ rejected suggestions that there was some sort of ‘constitutional imperative that the balance of competing public interests in litigation must always be left to be struck on a case-by-case basis by a court’.⁸⁰ If IBAC is not subject to the rigidity that troubled Gordon J, the difficult question which may then fall into sharp focus in the forthcoming case is the extent to which the High Court may be prepared to enable IBAC to strike the balance of competing interests to determine the appropriate level of disclosure.

V Conclusion

If the adoption of materiality is seen as another instance of the fading rigours of fairness, the concerns expressed by Edelman J arguably extend beyond the detail and difficulties of materiality to a deeper concern: of an unwitting judicial acquiescence in a new period of slumber for natural justice. Interpretations of legislative restrictions on elements of the hearing rule pose a similar danger. It is one thing to accept that anti-corruption agencies are an important part of effective government. It is a very different thing to accept that those bodies can only operate effectively if their governing legislation empowers them to curb the most elementary parts of the hearing rule. The difficult question for the courts is how they may strike the balance between the competing interests of an investigative agency such as IBAC and the people who are affected by its investigations. Balancing those interests is what can be called the Goldilocks aspect of fairness — if the balance reflects too much of one concern or too little of another, it will be unpalatable to many. Striking the right balance is an intuitive exercise that is not easy to express in anything other than

⁷⁵ *Administrative Appeals Tribunal Act 1975* (Cth) s 46(2), which provides that material must not be disclosed if certification has been issued under certain other statutes to declare that release of the material is contrary to the public interest.

⁷⁶ This finding is strongly criticised in John Lidbetter, ‘Rationalising National Security, Closed Hearings and Procedural Fairness: *SDCV v Director-General of Security* [2022] HCA 32’ (2023) 42(3) *Civil Justice Quarterly* 213.

⁷⁷ See, eg, *SDCV* (n 74) 252–3 [174] where Gageler J acknowledged that ‘no court in Australia can be required by statute to adopt an unfair procedure’, citing *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 110 [194]. The constitutional principles that compel this conclusion for courts cannot be automatically transposed to administrative bodies such as IBAC.

⁷⁸ *SDCV* (n 74) 247 [152]–[153].

⁷⁹ See, eg, the text accompanying n 14 above.

⁸⁰ *SDCV* (n 74) 232 [85].

general terms. The principles governing disclosure of adverse material are no different to any other part of the hearing rule. Rules expressed in highly prescriptive terms can be counterproductive because they invite decision-makers to approach the requirements of fairness as an exercise in compliance with those rules, which distracts attention from the facts of the case at hand. At the same time, however, those decision-makers need a level of guidance that goes beyond the judicial settlement of individual cases or statutes.

ADVANCE