

# EXCLUSION OF THE RULES OF NATURAL JUSTICE

MATTHEW GROVES\*

*Natural justice is a common law doctrine that provides important procedural rights in administrative decision-making. The doctrine now has a wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers. But the courts have also accepted that natural justice can be excluded by legislation that is expressed in sufficiently clear terms. This article explains how the courts have made it increasingly difficult for parliaments to exclude natural justice and the principles that apply to its legislative exclusion. It is argued that the interpretive principles applied to legislation which purports to exclude natural justice are so strict that it is very difficult for parliaments to succeed in any attempt to exclude the doctrine.*

## I INTRODUCTION

The doctrine of natural justice has two components — the hearing rule and the bias rule. Both originated in the common law but their operation in any particular case can only be fully understood by careful reference to the statutory context in which they arise. The requirements of the hearing and bias rules depend heavily on common law interpretive principles which are applied to the statute under which questions of fairness arise. The common law is not the only source of principle for fairness. The requirements for the exercise of judicial power in the *Commonwealth Constitution* include principles of neutrality and independence that are broadly similar to the common law principles of the bias rule.<sup>1</sup> The fairness fostered by the bias and hearing rules ‘lies at the heart of the judicial process’.<sup>2</sup> Accordingly, key elements of the hearing rule, such as the right of parties to know key elements of the case against them and to present their own

\* Faculty of Law, Monash University. Thanks are due to Dan Meagher for his helpful comments.

1 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ) (*‘International Finance Trust’*). Such comparisons between common law and constitutional requirements are necessarily broad because the latter involves consideration of the functions and processes of courts. See, eg, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 411 [247] (Gummow J); *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ); *Hogan v Hinch* (2011) 243 CLR 506, 541 [45] (French CJ).

2 *South Australia v Totani* (2010) 242 CLR 1, 43 [62] (French CJ), citing *International Finance Trust* (2009) 240 CLR 319, 379–84 [139]–[150] (Heydon J).

case, are so intrinsic to the integrity of courts that they cannot be excluded or significantly limited from the courts by legislation.<sup>3</sup>

The position outside the courts is quite different. The constitutional protections extended to the hearing and bias rules in the exercise of judicial power do not apply to administrative decision-making. The courts continue to accept that legislation may exclude or greatly limit the requirements of neutrality and fairness in the exercise of discretionary powers by administrative officials.<sup>4</sup> Whether and how legislation has limited any of the requirements of fairness is a question of statutory interpretation, which depends heavily on the meaning of legislation as determined by longstanding interpretive principles.<sup>5</sup> This article considers how that process operates when legislation appears to exclude or significantly limit the hearing rule in administrative decision-making. It will be argued that the theory of legislative exclusion of the hearing rule is increasingly difficult to achieve in practice. It is useful, however, to first explain the modern debate about the foundation of the duty to observe natural justice in order to better understand why that duty has become increasingly difficult for legislatures to exclude.

## II THE ORIGIN OF THE DUTY TO OBSERVE THE RULES OF NATURAL JUSTICE

Although the hearing rule has a long history, its scope for much of this history was relatively narrow. The rules of fairness began to attach firmly to administrative decision-making only when principles limiting their application to decision-

- 3 *International Finance Trust* (2009) 240 CLR 319, 354–5 [54]–[57] (French CJ), 366–7 [97]–[98] (Gummow and Bell JJ), 379–81 [141]–[145] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181, 208–15 (French CJ and Kiefel J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 672 [117] (Heydon J) (*‘Plaintiff S10/2011’*). The extent to which such rights could be abridged rather than excluded by legislation remains unsettled. French CJ has cautioned against ‘death of the judicial function by a thousand cuts’: *International Finance Trust* (2009) 240 CLR 319, 355 [57]. That warning casts doubt on the ability of parliaments to impose even minor legislative restrictions upon hearing rights in the courts. More recently the High Court accepted that the requirements of fairness in the judicial process, as manifested in rights such as the right to know an opposing case and the conduct of hearings in open court, are not absolute: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 660 [68]–[69] (French CJ), 682 [157] (Hayne, Crennan, Kiefel and Bell JJ). Gageler J took a different view, holding that the supposedly exceptional instances where fairness appeared to be modified in judicial proceedings were actually ones in which fairness was provided when the process was viewed as a whole: at 688–90 [189]–[195]. His Honour’s remarks were prefaced by a short statement that ch III of the *Constitution* requires ‘the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia’: at 686 [177]. The reasoning of Gageler J in this short paragraph suggests that his Honour would not countenance even small legislative infringements upon the requirements of fairness in court hearings.
- 4 Recent cases where legislation was found to have excluded some or all of the hearing rule include *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (*‘Saeed’*); *Seiffert v Prisoners Review Board* [2011] WASCA 148 (8 July 2011); *Plaintiff S10/2011* (2012) 246 CLR 636. On legislative exclusion or modification of the bias rule in administrative decision-making, see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5<sup>th</sup> ed, 2013) 675–6 [9.400].
- 5 *Saeed* (2010) 241 CLR 252, 258–9 [11]–[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

makers who were obliged to act judicially were cast aside.<sup>6</sup> As the duty to observe the rules of natural justice in administrative decision-making widened, questions arose about the basis of natural justice. The problem was highlighted in the seminal decision of *Kioa v West*,<sup>7</sup> where a majority of the High Court held that an administrative official had denied natural justice to two non-citizens by failing to put to them prejudicial allegations (and also failing to provide them with a chance to respond to the allegations) before deciding to deport them as prohibited immigrants.<sup>8</sup> *Kioa* marked the adoption of a broader and simpler test for implying a duty to observe the requirements of natural justice. At the same time, however, the leading judgments of Mason and Brennan JJ raised new questions about the basis of the rules of natural justice.<sup>9</sup>

Mason J held that the duty to observe the requirements of fairness was wide-ranging because the law had reached

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.<sup>10</sup>

According to this view, the duty to observe the requirements of fairness arises from the common law. It is not an implication from the particular statutory power under which a decision might be made, or a statute as a whole, but is instead a presumption or doctrine of the common law.

Brennan J also accepted that the duty to observe the requirements of fairness was broad, but drew a close connection between that duty and the statute under which any decision was made. He held that any duty to act fairly depends on the existence of ‘the legislature’s intention that observance of the principles of natural justice is a condition of the valid exercise of the power’.<sup>11</sup> If no such intention was present, there was neither a duty upon decision-makers to observe the rules of

6 The decisive case on this issue was the Privy Council decision in *Ridge v Baldwin* [1964] AC 40, which was followed by the High Court in *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222.

7 (1985) 159 CLR 550 (*Kioa*).

8 That conclusion was all the more remarkable because the High Court had previously ruled that the ministerial deportation power did not require observance of the rules of natural justice: *Salemi v MacKellar* [No 2] (1977) 137 CLR 396; *R v MacKellar*; *Ex parte Ratu* (1977) 137 CLR 461. These decisions were distinguished in *Kioa* because of subsequent amendments to the *Migration Act 1958* (Cth) and the introduction of a duty to give reasons under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth): at 560 (Gibbs CJ).

9 Mason and Brennan JJ also differed on the reach of the duty to observe the rules of fairness. Mason J held that the duty extended to ‘the making of administrative decisions’: *Kioa* (1985) 159 CLR 550, 584. Brennan J limited his test to decisions made in the ‘exercise of a statutory power’: at 611. Brennan J would have allowed a different test for decisions made under prerogative and other non-statutory powers, but it is now clear that decisions made under such powers are subject to the rules of natural justice (so long as the decision is justiciable). See, eg, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 277–8 (Bowen CJ), 280 (Sheppard J), 304–9 (Wilcox J); *Victoria v Master Builders’ Association of Victoria* [1995] 2 VR 121, 133–40 (Tadgell J), 147–9 (Ormiston J), 152–61 (Eames J).

10 *Kioa* (1985) 159 CLR 550, 584. Deane J adopted a very similar test: at 632–3.

11 *Ibid* 609.

fairness nor any basis upon which people affected by their decisions could claim the benefit of fairness. Brennan J reasoned:

There is no freestanding common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power. There is no ‘right’ except in the sense that a person may be entitled to apply to have a decision or action taken in purported exercise of the power set aside if the principles of natural justice have not been observed or to compel the repository of a power to observe procedures which statute obliges him to follow.<sup>12</sup>

For a long time, the different approaches of Mason and Brennan JJ were viewed as alternatives. The two views could be taken to a logical extreme that would see natural justice as founded in either the common law or the particular statute under which a decision was made. The ‘Mason/common law’ view anchors natural justice within the common law, which would make the doctrine a freestanding one. It could be excluded by legislation expressed in sufficiently clear terms, but any analysis of the requirements of natural justice would commence from the assumption that — like so many other common law doctrines — it was applicable unless the court was convinced otherwise. Analysis under the ‘Brennan/statutory intent’ approach would begin with the statute in question. It would then proceed to consider whether any power granted by the statute required the observance of natural justice and, if so, what was required to discharge that obligation. The so-called ‘Brennan model’ would in theory provide the legislature with greater power over the application and content of natural justice by essentially locating the doctrine within a statute. After all, if any requirement to observe natural justice did not exist ‘independently of statute’, the application and content of the doctrine was surely the province of the legislature.

In the years after *Kioa* the High Court repeatedly confirmed that natural justice applied to a broad range of decisions,<sup>13</sup> but was divided and undecided over the ‘Mason/common law’ and ‘Brennan/statutory intent’ approaches. The view of Mason J initially attracted greater support,<sup>14</sup> but the view of Brennan J attracted

12 Ibid 610–11.

13 See, eg, *Annetts v McCann* (1990) 170 CLR 596, 598–600 (Mason CJ, Deane and McHugh JJ) (*Annetts*); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576–7 (Mason CJ, Dawson, Toohey and Gaudron JJ) (*Ainsworth*). In each case the Court held that natural justice applied to administrative actions which could affect a person’s rights, interests and legitimate expectations, unless the doctrine was excluded by clear words or necessary implication. In *Ainsworth*, Brennan J supported a similar test, subject to his longstanding doubt about the value of the legitimate expectation as a separate category of interest: at 591–2.

14 See, eg, *A-G (NSW) v Quin* (1990) 170 CLR 1, 57–8 (Dawson J); *Annetts* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). The approach of Brennan J was also criticised by many commentators of the day. See, eg, Pamela Tate, ‘The Coherence of “Legitimate Expectations” and the Foundations of Natural Justice’ (1988) 14 *Monash University Law Review* 15, 71.

more support in the High Court's migration jurisdiction.<sup>15</sup> As the weight of authority accrued around the approach of Brennan J, attention turned to the common law interpretive principles that his Honour had relied upon to determine whether legislation displayed an intention to exclude or limit natural justice. While Brennan J had stressed that the intention of the legislature was central to the existence and content of any duty to observe the rules of natural justice, his Honour also made clear that the courts should draw upon common law principles in their search for that intention. His Honour acknowledged that any judicial search for legislative intention was a fairly clear-cut exercise when a condition or requirement to observe the rules of fairness was stated expressly, but was 'seen more dimly when the condition is implied, for then the condition is attributed by judicial construction of the statute'.<sup>16</sup> Brennan J reasoned that the common law was important to determining the requirements of fairness, whether or not the issue was expressly addressed within the legislation at hand, because:

In either case, the statute determines whether the exercise of the power is conditioned on the observance of the principles of natural justice. The statute is construed, as all statutes are construed, against a background of common law notions of justice and fairness and, when the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that 'the justice of the common law will supply the omission of the legislature' ... The true intention of the legislation is thus ascertained.<sup>17</sup>

In the migration cases, the High Court regularly endorsed the notion that compliance with the rules of natural justice was an implied limitation or condition upon a statutory power that had to be observed to ensure a valid exercise of the power.<sup>18</sup> This approach was eventually endorsed by a clear majority of the High Court in *Saeed*.<sup>19</sup> In that case, French CJ, Gummow, Hayne, Crennan and Kiefel JJ quoted parts of Brennan J's remarks in the above paragraph<sup>20</sup> and concluded:

15 See, eg, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 652 (Deane J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 100–1 [39]–[40] (Gaudron and Gummow JJ) ('*Aala*'); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 69–70 [30]–[33] (Gleeson CJ and Hayne J) ('*Miah*').

16 *Kioa* (1985) 159 CLR 550, 609.

17 *Ibid*, quoting *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194; 143 ER 414, 420.

18 See, eg, *Aala* (2000) 204 CLR 82, 100 [39], 109 [59] (Gaudron and Gummow JJ, with whom Gleeson CJ agreed on this point); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 27–8 [81]–[83] (McHugh and Gummow JJ) ('*Lam*'); *Miah* (2001) 206 CLR 57, 68–9 [28]–[31], 74–5 [49]–[55] (Gleeson CJ and Hayne J), 94 [128]–[129], 96–8 [140]–[143] (McHugh J), 115–16 [189]–[191] (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 490 [25] (Gleeson CJ) ('*Plaintiff S157*'); *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 323 [83] (McHugh J), 354 [207] (Hayne J, with whom Kirby J agreed), quoting Gaudron and Gummow JJ in *Aala* (2000) 204 CLR 82, 109 [59]; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 93 [10] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

19 (2010) 241 CLR 252. The principle has also gained traction in England. See, eg, *Bank Mellat v Her Majesty's Treasury [No 2]* [2013] UKSC 39 (19 June 2013) [35] (Lord Sumption, with whom Lady Hale, Lord Kerr and Lord Clarke agreed, with Lord Carnwath also agreeing on this point) ('*Bank Mellat [No 2]*').

20 *Saeed* (2010) 241 CLR 252, 258 [11].

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 ...<sup>21</sup>

*Saeed* also appeared to identify a deeper common law foundation for the presumptions surrounding natural justice when it explained that natural justice was one of the ‘fundamental principles’ protected by the principle of legality.<sup>22</sup> The articulation of natural justice as a fundamental common law principle is discussed in the next section of this article, but the connection drawn between natural justice and the principle of legality is relevant to this discussion of the notion that natural justice is an implied condition or limitation on statutory powers. The principle of legality may be supported by longstanding authority, but any notion that observance of the rules of natural justice is an implied condition or requirement that is necessary for the valid exercise of statutory powers has a much more recent origin.<sup>23</sup> Justice Basten has conceded that the implication of a condition to observe the requirements of fairness as a valid precondition to the exercise of statutory powers ‘has a degree of artificiality’.<sup>24</sup> He continued:

At best, the conception depends upon a common law principle of statutory construction; more realistically, it is a principle derived from the common law, having a variable content depending on circumstances and not being beyond statutory variation.<sup>25</sup>

This acceptance of the strained or tenuous nature of any implication of a duty to observe the rules of fairness as a precondition to the valid exercise of a statutory power highlights a difficult point for the courts. The implication process used by the courts involves two competing issues. On the one hand, in this exercise the courts purport to ascertain and enforce the ‘true intention’ of Parliament.<sup>26</sup> On the other hand, they do so through a process of common law assumptions and statutory interpretation so obscure as to raise the question of whether the intention

21 Ibid 258–9 [12]. Heydon J did not directly affirm this proposition but his Honour did endorse one interpretation that flowed from it: at 280 [80].

22 Ibid 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

23 Ibid 259 [13], where the High Court cited three previous decisions for different aspects of its finding that observance of the rules of natural justice could be an implied condition or requirement for the valid exercise of a statutory power: *Kioa* (1985) 159 CLR 550, 609 (Brennan J); *FAL Insurances Ltd v Winneke* (1982) 151 CLR 342, 409 (Brennan J); *Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 401 (Barwick CJ). A close inspection of those cases reveals that only *Kioa* contains any authority cited in support of the judicial implication of a duty to observe the rules of natural justice as a requirement or precondition for the valid exercise of a statutory power. In that case, Brennan J quoted *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194; 143 ER 414, 420, though his mentioning of it appeared only to make the more general point that the common law enabled the implication of a duty to observe the rules of natural justice even if a statute was silent on the point: *Kioa* (1985) 159 CLR 550, 609.

24 Justice John Basten, ‘The Supervisory Jurisdiction of the Supreme Courts’ (2011) 85 *Australian Law Journal* 273, 288.

25 Ibid.

26 See *Kioa* (1985) 159 CLR 550, 609 (Brennan J), cited with approval in *Saeed* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

finally discovered is as much, if not more, a judicial rather than parliamentary one.

The High Court did not consider those issues in two subsequent decisions which have clarified questions about the foundation of the duty to observe the rules of natural justice. In *Plaintiff M61/2010E v Commonwealth* ('*Offshore Processing Case*'),<sup>27</sup> the Court hinted that the apparently different approaches to the foundation of the duty that arose in *Kioa* were of little consequence in light of later cases which confirmed the wide scope of that duty.<sup>28</sup> The unanimous judgment of the High Court suggested that it was 'unnecessary to consider whether identifying the root of the obligation remains an open question or whether the competing views would lead to any different result'.<sup>29</sup> The Court also confirmed that the obligation to observe the rules of natural justice could be limited or excluded 'by plain words of necessary intendment'.<sup>30</sup> According to this view, the requirements of natural justice are presumed to apply to statutory powers unless the relevant statute provides a sufficient indication of a contrary intention. If so, the important question is not the source of the duty to observe natural justice, but whether the source of the power under which decisions are made displays any intention to exclude or limit that duty.

A majority of the High Court took a slightly different approach in *Plaintiff S10/2011*.<sup>31</sup> Gummow, Hayne, Crennan and Bell JJ explained that

'the common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interest may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.<sup>32</sup>

An approach which draws upon both common law interpretive principles and legislative intent is no mere blend of the views of Mason and Brennan JJ, but a recognition of an implicit acceptance by both that common law and statutory influences cannot and should not be viewed separately. If each informs the other, the important question is not the backward looking one of which influence might

27 (2010) 243 CLR 319.

28 Ibid 352 [74], citing *Annetts* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 61 [51] (McHugh, Gummow and Hayne JJ) ('*Jarratt*').

29 *Offshore Processing Case* (2010) 243 CLR 319, 352 [74]. French CJ made a similar point in a speech delivered around the same time, in which he stated that the supposed models of the common law or statutory intention as a foundation for the duty to observe the rules of natural justice 'approaches a distinction without a real difference': Chief Justice Robert S French, 'Procedural Fairness — Indispensable to Justice?' (Speech delivered at the Sir Anthony Mason Lecture, Melbourne, 7 October 2010) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf>> 16.

30 *Offshore Processing Case* (2010) 243 CLR 319, 352 [74], citing *Annetts* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

31 (2012) 246 CLR 636.

32 Ibid 666 [97].

be the ultimate one but the forward looking one of what is their ultimate outcome. The suggestion of Gummow, Hayne, Crennan and Bell JJ that the common law would ‘usually’ imply a requirement to observe the rules of natural justice in the exercise of statutory powers makes clear that determining the outcome of the interplay between common law and legislative factors remains a difficult exercise that will depend heavily upon the context of each case. In other words, the apparent resolution of questions about the foundation of the duty to observe the requirements of natural justice provides less clarity than might be expected because the task of determining whether the duty applies and what it requires remains difficult.

The acceptance by the High Court that the duty to accord natural justice arises from both common law and legislative influences bears an uncanny parallel in English law about the wider foundations of judicial review which began not long after *Kioa*.<sup>33</sup> The English debate was essentially between two competing theories, which debated whether judicial review was ultimately founded upon common law principles or parliamentary authority. The so-called ‘common law theory’ argued that the authority for judicial review and its grounds largely rested in the common law. The statutory intent or ‘ultra vires theory’ argued that parliamentary authority, as expressed in legislation, was the true foundation for judicial review. This debate mostly bypassed Australia, largely because the emerging role of the *Constitution* saw the equivalent Australian debate framed in domestic constitutional terms, but some commentators suggested that distinctions between the views of Mason and Brennan JJ reflected different theories of judicial review like the two key English theories that emerged.<sup>34</sup>

A close inspection of each model showed that both accepted a level of both common law and legislative influences.<sup>35</sup> The debate eventually waned as most commentators accepted one of the several compromises which mixed the rival theories. The most coherent was the ‘modified ultra vires theory’, according to which Parliament had impliedly accepted the common law principles of judicial review and the legitimacy of the judicial function in devising and revising principles of review. This theory balanced common law influences and

33 It began with Dawn Oliver, ‘Is the Ultra Vires Rule the Basis of Judicial Review?’ [1987] *Public Law* 543. The English literature which then arose on the issue is too vast to list. The key arguments (and their key advocates) are collected in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000).

34 See, eg, Bruce Dyer, ‘Legitimate Expectations in Procedural Fairness after *Lam*’ in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 184, 197–200, where the author distinguishes the approaches of Mason J and Brennan J to the legitimate expectation in *Kioa* according to terms very similar to the competing English theories of judicial review. See also Stephen Gageler, ‘Legitimate Expectation: Comment on the Article by the Hon Sir Anthony Mason AC KBE’ (2005) 12 *Australian Journal of Administrative Law* 111, 114. Gageler argues that the ultra vires theory emerged ‘triumphant’ in *Lam*.

35 Advocates of the common law theory accepted that common law principles of judicial review could be amended or excluded by legislation expressed in sufficiently clear terms (though they were less clear on precisely how such legislative changes could be achieved). Advocates of the ultra vires theory accepted both the role of the courts in interpreting the purpose and scope of statutory powers and their recourse to common law principles in that exercise. A key difference between each theory was the extent to which they were willing to concede the legitimate influence of the other source of authority.



parliamentary sovereignty by assuming the latter can be (and usually is) exercised to approve the former because legislation passed with the knowledge of previous judicial decisions.<sup>36</sup> The parallels with this compromise about the foundations of judicial review in England and the one adopted by the High Court on the narrower issue of the foundation of the duty to observe the rules of natural justice are clear, though the similarities do not end there.

After the *ultra vires*/common law debate was settled in England, new questions arose about a rights-based approach to judicial review. Many judges and scholars began to draw upon deep-seated or fundamental common law values as a more coherent basis for both judicial review and the development of new principles of review.<sup>37</sup> This debate was initially framed as one about the legitimacy of the invocation and articulation of supposedly ‘fundamental’ common law principles.<sup>38</sup> The emphasis in judicial review on the rights of those affected by administrative decisions became much stronger with the growing influence of the *Human Rights Act 1998* (UK) c 42.<sup>39</sup> In the next section it will be explained that natural justice has been the subject of similar changes in Australia. The case of *Saeed*<sup>40</sup> marked the point at which the doctrine was finally explained as a ‘fundamental’ one of the common law. It also falls under the rubric of the principle of legality which, like the English lexicon of human rights, may cast further security over the doctrine.

36 That theory is explained in Christopher Forsyth and Mark Elliott, ‘The Legitimacy of Judicial Review’ [2003] *Public Law* 286.

37 The most influential early exponent of this theory was Sir John Laws, whose series of articles advocated what is now referred to as common law constitutionalism. See Sir John Laws, ‘Is the High Court the Guardian of Fundamental Constitutional Rights?’ (1992) 18 *Commonwealth Law Bulletin* 1385; Sir John Laws, ‘Judicial Remedies and the Constitution’ (1994) 57 *Modern Law Review* 213; Sir John Laws, ‘Law and Democracy’ [1995] *Public Law* 72; Sir John Laws, ‘The Constitution: Morals and Rights’ [1996] *Public Law* 622. Those articles drew a strong response in J A G Griffith, ‘The Brave New World of Sir John Laws’ (2000) 63 *Modern Law Review* 159. Griffith essentially argued that attempts to confer a higher status on certain rights, which was the essence of Laws’ argument, involved a mistaken reading of English constitutional history. Professor Craig sought to reconcile the two views in Paul Craig, ‘Constitutional Foundations, the Rule of Law and Supremacy’ [2003] *Public Law* 92.

38 The most consistent critic of the use of such common law values is Professor Poole, who subjected the doctrine to piercing criticism in: Thomas Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23 *Oxford Journal of Legal Studies* 435; Thomas Poole, ‘Questioning Common Law Constitutionalism’ (2005) 25 *Legal Studies* 142; Thomas Poole, ‘Legitimacy, Rights and Judicial Review’ (2005) 25 *Oxford Journal of Legal Studies* 697. A riposte is made in Paul Craig, ‘Political Constitutionalism and Judicial Review’ in Christopher Forsyth et al (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010) 19.

39 It has even been argued that the focus in English cases upon individual rights exerts a strong influence on how courts determine the scope, purpose and proper exercise of the statutory powers over which judicial review is sought. In other words, English judicial review does not simply operate to protect rights, it also embeds consideration of rights into questions of statutory interpretation and *ultra vires*. See Thomas Poole, ‘The Reformation of English Administrative Law’ (2009) 68 *Cambridge Law Journal* 142.

40 (2010) 241 CLR 252.

### III THE RISE OF NATURAL JUSTICE AS A 'FUNDAMENTAL RIGHT'

Natural justice has a long history. The requirement that people should receive adequate notice of decisions which may affect them, for example, can be traced back to at least the start of the 17<sup>th</sup> century.<sup>41</sup> The requirement of notice also provides a useful illustration of how hearing requirements have long been regarded to be of great importance. The provision of adequate prior notice has been described by the courts as a 'cardinal' one,<sup>42</sup> of 'constitutional importance',<sup>43</sup> which is 'impossible to disregard'.<sup>44</sup> Although this and other aspects of the hearing rule were long regarded as important, the doctrine of natural justice was not itself explained as a basic or fundamental right. It may seem odd that particular requirements of natural justice were described as 'cardinal' or 'constitutional' but the wider doctrine was not, but that curious position reflects two wider threads in judicial review in Australia.

The first is the relative lack of underlying theory in judicial review. While the *Constitution* is now clearly the dominant and guiding influence upon judicial review in Australia, it assumed that role only recently.<sup>45</sup> Australian judicial review evolved without any clear or apparent overarching theory until very late in the 20<sup>th</sup> century.<sup>46</sup> It was therefore unsurprising that doctrines such as natural justice, which form the basis of particular grounds of review, were not articulated as basic rights when the status of the judicial review process which enforces those doctrines had not itself assumed a constitutionally secured status. A second and closely related issue is the procedural focus of Australian judicial review principles. The High Court has long stressed that judicial review of administrative action operates to supervise the lawfulness of the process by which decisions are made, but not the substantive merits of those decisions.<sup>47</sup> The High Court has adopted a similarly procedural conception of natural justice,<sup>48</sup> and consequently

41 *Boswel's Case* (1606) 6 Co Rep 48b; 77 ER 326; *James Bagg's Case* (1615) 11 Co Rep 93b; 77 ER 1271.

42 *R v Small Claims Tribunal; Ex parte Cameron* [1976] VR 427, 432 (Anderson J).

43 *Re Hamilton* [1981] AC 1038, 1047 (Lord Fraser).

44 *Andrews v Mitchell* [1905] AC 78, 80 (Lord Halsbury).

45 These constitutional influences were initially articulated in federal judicial review but the *Constitution* assumed a broadly similar role over judicial review at the state level with *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

46 Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 95–6.

47 See, eg, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 288 [20], where Gleeson CJ explained that '[j]udicial review is not an invitation to judges to decide what they would consider fair or reasonable'.

48 *Kioa* (1985) 159 CLR 550, 583–5 (Mason J), 622 (Brennan J); *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–7 (Brennan J); *Lam* (2003) 214 CLR 1, 21–5 [65]–[77] (McHugh and Gummow JJ), 48 [148] (Callinan J); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160 [25] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 177 [36] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

rejected the more substantive approach to fairness adopted in recent English law.<sup>49</sup> If natural justice and the wider focus of judicial review remain procedural rather than substantive, it is hardly surprising that Australian courts have generally not explained natural justice within the language of rights.

The High Court did, however, slowly harden its approach to the legislative exclusion of natural justice. That trend began with *Kioa*, where Mason J held that natural justice could only be excluded by a ‘clear manifestation’ of legislative intention.<sup>50</sup> Other decisions adopted a similarly strict approach, such as a requirement for the use of ‘plain words of necessary intendment’.<sup>51</sup> In retrospect this increasingly strict approach to the exclusion of natural justice served as a precursor to the principle of legality because the notion of legality seemed a small, logical step to the strict interpretive assumptions applied to the exclusion of natural justice. But we shall see that the principle of legality also caused an important change to the characterisation of natural justice.

The principle of legality is an interpretive one with two key components. The first is the assumption that Parliament accepts that the statutory powers it grants will be interpreted by the courts, as far as possible, in conformity with fundamental legal values.<sup>52</sup> The second component of the principle is the connection drawn to the democratic process. It is often suggested that the obligation of Parliament to abrogate fundamental legal values in very clear words reinforces democratic values by requiring governments to place their intention before Parliament with absolute clarity.<sup>53</sup>

The modern version of the principle of legality is generally traced to the judgment of Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*,<sup>54</sup> though both the name and content of the principle were established

49 The English doctrine of substantive unfairness, which blends scrutiny of both process and outcomes, was established in *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213. The doctrine is now well established in English law but was strongly doubted or disapproved by several members of the High Court in *Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ), 22–5 [68]–[77] (McHugh and Gummow JJ), 48 [148] (Callinan J).

50 *Kioa* (1985) 159 CLR 550, 584 (Mason J).

51 *Annetts* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). See also *Johns v Australian Securities Commission* (1993) 178 CLR 408, 470 (McHugh J); *Miah* (2001) 206 CLR 57, 73 [43] (Gleeson CJ and Hayne J), 93 [126] (McHugh J); *Jarratt* (2005) 224 CLR 44, 56 [24] (Gleeson CJ), 61 [51] (McHugh, Gummow and Hayne JJ), 88 [138] (Callinan J). For similar formulations of this requirement, see also *Miah* (2001) 206 CLR 57, 84 [90] (Gaudron J); *Jarratt* (2005) 224 CLR 44, 92 [150] (Heydon J).

52 I have described these values as ‘legal’ ones rather than by their more commonly used labels, which are as either common law, fundamental or rule of law values, because each of those concepts are highly contentious in this context.

53 See, eg, *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 262 [106] where Kirby J explained that the requirement of great clarity ensured that parliamentarians ‘assumed electoral accountability before the community’ for their actions.

54 [2000] 2 AC 115 (‘*Simms*’). Although Lord Hoffmann’s statement of the principle of legality is now regarded as the leading expression of the principle, it is useful to note that none of the other Lords expressed agreement with his statement of the principle, or other parts of his judgment.

earlier.<sup>55</sup> Lord Hoffmann accepted that Parliament could ‘if it chooses, legislate contrary to fundamental principles of human rights’ because the constraints upon this and other actions of Parliament are ‘ultimately political, not legal’.<sup>56</sup> At the same time, however, Lord Hoffmann squarely placed legal obstacles in the path of parliamentary attempts to overturn fundamental rights when he explained that

the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.<sup>57</sup>

This principle developed in England within the common law rather than the requirements of domestic or European human rights legislation,<sup>58</sup> but its position in Australian law has been explained as one that blends a common law origin with a constitutional function. Gleeson CJ explained that the principle of legality is

not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.<sup>59</sup>

The principle of legality occupies a curious place in Australian law. Central parts of the principle are yet to be fully explained, yet it has been steadily applied to a range of rights and freedoms such as the right of free expression<sup>60</sup> and the right to private property.<sup>61</sup> Australian courts have also accorded special status to important rights such as personal liberty<sup>62</sup> and the right of access to the courts,<sup>63</sup> without express reference to the principle of legality but using language that

55 Professor Taggart noted that the substance of the principle was ‘ages old’ but had been given its new ‘snappy name’ in 1995: Michael Taggart, ‘Administrative Law’ [2003] *New Zealand Law Review* 99, 110, citing Rupert Cross, John Bell and Sir George Engle, *Statutory Interpretation* (Butterworths, 3<sup>rd</sup> ed, 1995) 165–6. The Australian history of the principle is usefully traced in Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449, 452–6.

56 *Simms* [2000] 2 AC 115, 131.

57 *Ibid.*

58 The *Human Rights Act 1998* (UK) c 42 has since given rise to principles similar to that of legality but there are important differences between the two. See Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*’ (2009) 125 *Law Quarterly Review* 598, 607–11.

59 *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 [21].

60 *Evans v New South Wales* (2008) 168 FCR 576. Although French, Branson and Stone JJ founded this right on the implied freedom of political communication, their Honours placed express reliance upon the principle of legality in doing so: at 594–5 [72]–[73].

61 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619–20 [42]–[44] (French CJ).

62 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520–1 (Brennan J).

63 *Plaintiff S157* (2003) 211 CLR 476, 492–3 [30]–[32] (Gleeson CJ).

closely matches the principle of legality. The recognition by the courts of the important or fundamental nature of rights without direct reference to the principle of legality invites questions about the utility of the principle. Is it little more than a label? Are rights which are recognised as fundamental without recourse to the principle of legality somehow lesser or different? If the principle is so important, why is it not mentioned in cases where its pronouncement would otherwise be expected?

These and other questions indicate that many elements of the principle of legality remain unsettled.<sup>64</sup> Perhaps the most important is the uncertainty as to precisely how values are designated as fundamental and therefore within the protection of the principle of legality. Heydon J has rightly noted that the categorisation or labelling of rights did not answer the question because ‘a right does not become fundamental merely because cases call it that. And a right does not cease to be fundamental merely because cases do not call it that’.<sup>65</sup> Just as the process by which rights and freedoms are labelled as fundamental has been questioned, so has the very label itself. In *Momcilovic v The Queen*,<sup>66</sup> French CJ conceded that ‘[t]here are difficulties with that designation [of rights as fundamental]. It might be better to discard it altogether in this context’.<sup>67</sup> The Full Federal Court has suggested that the *extent* to which fundamental rights might be infringed could serve as another focus,<sup>68</sup> but that might simply shift the focus of disagreement onto different issues equally open to differing views.<sup>69</sup>

The High Court was untroubled by such issues when it cast the protection of the principle of legality over natural justice in *Saeed*.<sup>70</sup> The Court referred to earlier decisions which had made clear that natural justice was presumed to apply to the exercise of statutory powers and also that observance of that requirement was a condition to the valid exercise of such powers.<sup>71</sup> *Saeed* could have been decided by use of those established principles, but French CJ, Gummow, Hayne, Crennan and Kiefel JJ made clear that the technical interpretive presumptions that had grown around natural justice were not the doctrine’s only source of protection.

64 Meagher, above n 55.

65 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 619 [166]. Scepticism on how fundamental or basic rights are established by courts has a long history. See Donald Crump, ‘How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy’ (1996) 19 *Harvard Journal of Law and Public Policy* 795; Roscoe Pound, ‘Spurious Interpretation’ (1907) 7 *Columbia Law Review* 379, 382.

66 (2011) 245 CLR 1 (*‘Momcilovic’*).

67 *Ibid* 46 [43]. Gummow J was similarly cautious about the difficulties in designating rights as fundamental in Justice W M C Gummow, ‘The *Constitution*: Ultimate Foundation of Australian Law?’ (2005) 79 *Australian Law Journal* 167, 176–7.

68 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Marsi* (2003) 126 FCR 54, 78 [92] (Black CJ, Sundberg and Weinberg JJ). The Court suggested this approach as a way to apply the requirements of strict statutory interpretation to legislation affecting fundamental rights but there appears no necessary reason why it would require the designation of rights as fundamental.

69 Chief Justice J J Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 782. It is perhaps for this reason that Zines argued such issues were ultimately ones of personal preference rather than legal doctrine: Leslie Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 *Sydney Law Review* 166, 183–4.

70 (2010) 241 CLR 252.

71 *Ibid* 258–9 [12]–[14] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

Their Honours explained: ‘The 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, derives from the principle of legality’.<sup>72</sup>

The conclusion that natural justice is now also protected by the principle of legality offers far less clarity than might first appear. The approach of the High Court to legislative attempts to exclude natural justice in the two decades prior to *Saeed* was increasingly strict. The addition of the principle of legality to the interpretive devices that will be invoked against such legislation was arguably the next logical step but also a relatively small one. *Saeed* continued another trend apparent in recent High Court cases, which is to say surprisingly little about the content or purpose of natural justice. That trend at least means that *Saeed* provides no reason to believe that the procedural focus of natural justice has changed. If the principle of legality is not a Trojan horse containing hidden forces that might alter the content of natural justice, one can ask whether any useful end was achieved by grafting it onto natural justice. Perhaps the most important prevailing principle that *Saeed* left undisturbed was the judicial acceptance that natural justice can be limited or excluded by legislation. The next sections of this article explain how earlier cases had made that possibility an increasingly difficult one to achieve, though it is first useful to examine the constitutional question avoided in *Saeed*.

#### IV IS NATURAL JUSTICE CONSTITUTIONALLY ENTRENCHED?

Although *Saeed* drew a clear connection between the principle of legality and natural justice, the High Court was careful to note that alternative submissions by the applicant, which argued that natural justice was constitutionally entrenched, were not decided. That argument was summarised by French CJ, Gummow, Hayne, Crennan and Kiefel JJ as one that ‘some fundamental principles are impliedly protected by s 75(v) of the *Constitution* and a law cannot validly prevent recourse to that provision’.<sup>73</sup> The entrenchment of these fundamental principles means that legislation cannot ‘direct courts and interfere with their application of principles of statutory construction and thereby undermine their ability to exercise the judicial power granted by ch III of the *Constitution*’.<sup>74</sup>

In my view, this argument contains several flaws, though it is important to note that the protection granted to natural justice by the principle of legality does

72 Ibid 259 [15]. Heydon J delivered a separate concurring judgment, which reached a similar result without reference to the principle of legality. His Honour only went so far as to say that one principle of statutory construction was that legislation is not lightly to be construed as abolishing the natural justice hearing rule: at 282 [85]. Heydon J stated that this principle, and the one that legislation should be construed to operate within rather than outside constitutional power, would lead to the ‘authoritative’ interpretation of the legislation in issue. That reasoning makes the legislative exclusion of natural justice difficult, but does so without categorising the doctrine as a fundamental right.

73 Ibid 257 [8].

74 Ibid 257–8 [8].

not necessarily preclude the constitutional entrenchment of natural justice. French CJ has noted that the question of whether certain (as yet unidentified) fundamental common law rights may constrain the exercise of legislative power remains unsettled.<sup>75</sup> The Chief Justice also distinguished this possibility from the principle of legality in *Momcilovic*,<sup>76</sup> where his Honour noted that the principle of legality was ‘powerful’ but said that it ‘does not constrain legislative power’ and only served to protect rights ‘within constitutional limits’.<sup>77</sup> French CJ also conceded that the principle of legality ‘is of no avail’ against legislation expressed in language that allowed only an interpretation that would infringe fundamental rights.<sup>78</sup>

This reasoning does not preclude the acceptance of a constitutionally-based principle of natural justice. Nor does it necessarily preclude acceptance of natural justice as a common law right so fundamental that it cannot be excluded. There are, however, three obvious reasons why any such principle could not support some sort of fundamental right to natural justice in the administrative process. One is that the increasing acceptance by the High Court that legislation cannot exclude basic aspects of the hearing rule from the courts has been explained by reference to the essential elements of judicial power.<sup>79</sup> It has never been suggested that similar requirements attend the exercise of administrative or executive power.<sup>80</sup> The different nature of administrative or executive power draws attention to the first flaw in the argument for a constitutional basis of natural justice that was avoided in *Saaed*, which is that legislation excluding the duty to observe the rules of natural justice in administrative decision-making does not ‘direct courts and interfere’ with their judicial function of statutory construction. On the contrary, if legislation is expressed in terms so clear as to compel the conclusion that it confers statutory powers which are not conditioned upon a requirement to observe natural justice, courts which give effect to that clearly expressed intention are performing their function correctly and properly. The only ‘direction’ in such legislation, if there is one, is to the executive arm of government, but that direction can only be certain after the legislation is interpreted by the courts. The judicial arm is not ‘directed’ when it exercises its independent interpretive power to decide that legislation excludes the rules of natural justice.

75 *South Australia v Totani* (2010) 242 CLR 1, 28–30 [31]. Crennan and Kiefel JJ hinted at a similar possibility in *Momcilovic* (2011) 245 CLR 1, 215–16 [562].

76 (2011) 245 CLR 1.

77 *Ibid* 46–7 [43]. The Victorian Court of Appeal reached a slightly different conclusion in *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013). Tate JA, with whom Osborn JA agreed, suggested that s 32 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) might require a more stringent interpretive standard than the principle of legality: at [190]. Tate JA ultimately left open the precise nature and consequences of any interaction between s 32 and the principle of legality: at [191].

78 *Momcilovic* (2011) 245 CLR 1, 47 [45].

79 See, eg, the cases discussed at above nn 1–3.

80 It is useful to note the prescient article of Justice McHugh, which suggested that the principles surrounding ch III were slowly evolving to protect substantive as well as procedural rights, was directed entirely to judicial power: Justice Michael McHugh, ‘Does Chapter III of the *Constitution* Protect Substantive as well as Procedural Rights?’ (2001) 21 *Australian Bar Review* 235.

The suggestion that legislative exclusion of natural justice is somehow directly prohibited by s 75(v) of the *Constitution* involves similar fallacies. The point was examined in *Seiffert v Prisoners Review Board*,<sup>81</sup> where a prisoner claimed that the Board denied him natural justice by refusing to provide an oral hearing of his parole application. The Board and the parole regime it administered were created by the *Sentence Administration Act 2003* (WA). Section 115(c) of the Act provided that '[t]he rules known as the rules of natural justice (including any duty of procedural fairness) do not apply' to the Board for its activities under several Parts of the Act.<sup>82</sup> But for this section, the Board would clearly have been bound by the rules of natural justice in the exercise of its powers to consider Mr Seiffert's application.<sup>83</sup>

The Court of Appeal rejected several arguments designed to circumvent the effect of s 115 of the *Sentence Administration Act 2003* (WA). The first was based on the 'total failure' of the Board to comply with the rules of natural justice.<sup>84</sup> This argument implied that s 115 had a limited effect because it was expressed to exclude 'all the rules of natural justice'.<sup>85</sup> That argument was clearly untenable because the section expressly excluded 'the rules of natural justice' and also 'any duty of procedural fairness'. Martin CJ held those words were so clear that it was 'difficult to imagine a more clear and unequivocal expression of Parliamentary intention in relation to procedural fairness'.<sup>86</sup> His Honour also concluded that the clear wording of s 115 provided no intention to retain an obligation to partially comply with the rules of natural justice.<sup>87</sup> The requirement in *Saeed* for language of 'irresistible clearness' had been met.

The Court of Appeal also rejected a more subtle argument, which it saw as 'something of an analogue for the reasoning' adopted by the High Court in the landmark case of *Plaintiff S157*.<sup>88</sup> That case saw the High Court apply several somewhat artificial principles of construction to a privative clause that was expressed to cover a wide range of administrative conduct and sought to preclude judicial review of all of that behaviour.<sup>89</sup> The High Court effectively held that decisions infected with jurisdictional error (a concept it gave, and continues to give, an expansive meaning) fell outside the scope of authority granted by the

81 [2011] WASCA 148 (8 July 2011) ('*Seiffert*').

82 Other parts of s 115 *Sentence Administration Act 2003* (WA) also extended a similar exclusion from the rules of natural justice to the Governor, Minister, the CEO of the Department and any 'authorised person' in accordance with s 108(1) of the Act.

83 *Seiffert* [2011] WASCA 148 (8 July 2011) [69] (Martin CJ, with whom McLure P and Murphy JA agreed on this point).

84 *Ibid* [81]. The Board revoked Mr Seiffert's parole without providing him notice of its intention to do so, or disclosing the key material upon which its decision was based or providing Mr Seiffert a chance to put his views: at [70] (Martin CJ, with whom McLure P and Murphy JA agreed on this issue). Martin CJ also found that the Board had made numerous administrative errors and confusing statements in its consideration of Mr Seiffert's case: at [16], [37], [41]–[42], [145].

85 *Ibid* [81] (emphasis added).

86 *Ibid* [77].

87 *Ibid* [82].

88 *Ibid* [83], citing *Plaintiff S157* (2003) 211 CLR 476.

89 The privative clause was contained in s 474 of the *Migration Act 1958* (Cth). Although the clause was essentially deprived of any real force in *Plaintiff S157*, it remains in the Act and is virtually unchanged.



migration legislation in which the privative clause was located. Importantly, when administrative officials made a decision infected with jurisdictional error, they also stepped outside the scope of a privative clause that was expressed to protect decisions made validly ‘under’ that Act. In simple terms, a statute could not protect what it did not authorise.<sup>90</sup>

There were two key reasons why an adaptation of this argument was rejected in *Seiffert* when deployed against s 115. The first was its circularity. The notion that decisions made without compliance with the rules of natural justice fell outside the scope of authority conferred by the Act essentially sought to determine the scope of the Act, including s 115, by a process commencing with the assumption that s 115 did not have its stated effect.<sup>91</sup> Martin CJ noted that the argument was not only illogical, but that it would also deprive the section of its obvious and clearly stated effect.<sup>92</sup> The second, perhaps more important, reason why the Court of Appeal rejected arguments similar to those used against privative clauses was that the section was not such a clause. Martin CJ concluded that the provision sought to exclude the duty of administrative officials to observe the rules of natural justice, rather than the supervisory jurisdiction of the courts. He accepted that, while the former was constitutionally impossible, the latter was not.<sup>93</sup> According to this view, a legislative exclusion of natural justice operated to define, negatively in this instance, the duties of officials acting under statutory power.<sup>94</sup> Such a provision did not exclude the supervisory jurisdiction of the courts. It instead removed the basis for review on the ground of a denial of natural justice. This course seems inevitably to be a possible consequence of *Saeed*’s acceptance that legislative exclusion of natural justice is possible.<sup>95</sup>

The reasoning adopted in *Seiffert* suggests that provisions exempting an official or body from any duty to observe the rules of natural justice do not raise the same concerns as other novel legislative attempts to evade judicial review. Kirby J suggested that some sort of residual remedy for serious administrative justice should be available where ‘what has occurred does not truly answer to the

90 *Plaintiff S157* (2003) 211 CLR 476, 505–6 [74]–[77] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). This greatly simplifies the case and its consequences. The wider issues and later developments are explained in Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *Public Law Review* 14; Simon Young and Sarah Murray, ‘An Elegant Convergence? The Constitutional Entrenchment of “Jurisdictional Error” Review in Australia’ (2011) 11 *Oxford University Commonwealth Law Journal* 117; Aronson and Groves, above n 4, ch 17.

91 *Seiffert* [2011] WASCA 148 (8 July 2011) [84].

92 *Ibid* [85].

93 *Ibid* [86]. Martin CJ reasoned that the principles governing legislative exclusion of the supervisory jurisdiction of the High Court entrenched in s 75(v) of the *Constitution* were broadly applicable to the constitutionally protected supervisory jurisdiction of State Supreme Courts that was recognised in *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531: *Seiffert* [2011] WASCA 148 (8 July 2011) [86], [111]. That assumption is clearly correct. See, eg, Chief Justice J J Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77; Matthew Groves, ‘Federal Constitutional Influences on State Judicial Review’ (2011) 39 *Federal Law Review* 399.

94 *Seiffert* [2011] WASCA 148 (8 July 2011) [86], [109]–[115].

95 Martin CJ accepted this consequence of *Saeed*: *ibid* [87]. That conclusion necessarily rejects the suggestion of Basten that the question of ‘[w]hether there is some basic level of procedural fairness below which legislative reduction is not possible, has yet to be explored’: Basten, above n 24, 288.

description of the legal process that the parliament has laid down'.<sup>96</sup> His Honour reasoned that the issue of a remedy would be warranted in such (admittedly extreme) cases because constitutional principles would enable the courts to 'uphold the rule of law ... [and to ensure] minimum standards of decision-making'.<sup>97</sup> Will Bateman more recently urged caution about what he described as a 'plenary provision', which is one 'that excludes the substantive limits on a power. The challenge presented by plenary provisions is that they create unlimited power — that is, power without identifiable substantive limitations'.<sup>98</sup>

The common theme in these and similar cautions is a concern about the grant of statutory powers in terms so wide and vague that they indirectly preclude judicial review.<sup>99</sup> At one level, legislation that succeeds in excluding any obligation to observe natural justice does not engage these concerns because it defines, or rather limits, the duties of administrative officials.<sup>100</sup> At a deeper level, however, such provisions confer an important de facto form of power upon decision-makers — a lack of procedural restraint. Provisions that completely exclude any duty to observe natural justice are very rare.<sup>101</sup> The reasoning in *Saeed* and *Seiffert* suggests that there are no clear constitutional or other legal obstacles against further such provisions. If the only obstacles are political, the ultimate protection of natural justice may lie outside the courts.

## V ESTABLISHING THE CLEAR MANIFESTATION OF PARLIAMENTARY INTENTION REQUIRED TO EXCLUDE NATURAL JUSTICE

The evolution of the principles governing the implication of the duty to observe the rules of fairness has been matched by a similar evolution in their exclusion. Prior to the expansive approach to the implication of natural justice signalled by the *Kioa* case, the courts were far more willing to find evidence of the intended

96 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 96 [161].

97 *Ibid.*

98 Will Bateman, 'The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463, 467.

99 A more direct attempt to preclude review is made by clauses which provide that a decision or action taken without compliance with a statutory procedure is unaffected by that non-compliance. The High Court has made clear that such clauses do not preclude judicial review on grounds other than non-compliance with procedural requirements: *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 164–5 [53]–[57] (Gummow, Hayne, Heydon and Crennan JJ). The challenges posed by such clauses are examined in McDonald, above n 90.

100 This conclusion is accepted in Aronson and Groves, above n 4, 966 [17.920].

101 See, eg, *Children and Young Persons Act 1989* (Vic) ss 211(2), 222(2) (exempting the Victorian Youth Parole Board from the rules of natural justice); *Corrections Act 1986* (Vic) s 69(2) (extending a similar exemption to the Victorian Adult Parole Board). See also *Casino Control Act 1992* (NSW) s 141(4) (exempting the New South Wales casino regulatory authority from the rules of natural justice, except where specified by other provisions of that Act). See also *Public Services Act 2008* (Qld) s 190(2) and *Ambulance Service Act 1991* (Qld) s 18N(2), both of which state that a decision to suspend an officer is not subject to the rules of natural justice if the suspended person remains on full pay. Any substantive disciplinary conducted under other provisions of either Act is clearly subject to natural justice.

exclusion of natural justice.<sup>102</sup> An example can be taken from another deportation case. In *Salemi v McKellar [No 2]*,<sup>103</sup> a six-member bench of the High Court divided evenly on whether the discretionary power to order deportation of a non-citizen was not conditioned upon any requirement to observe natural justice. Barwick CJ accepted there was a general rule that statutory powers were intended to be exercised in accordance with natural justice but emphasised the ability of parliaments to amend that presumption.<sup>104</sup> Gibbs J, with whom Aickin J agreed, held that the conferral of an unconditional discretionary power suggested, though not conclusively, that natural justice was not intended to apply.<sup>105</sup> Murphy J gave much less weight to the unconditional nature of the power and instead asked whether natural justice would be inconsistent with the exercise of the power.<sup>106</sup> Both Stephen and Jacobs JJ began with the presumption that natural justice would apply and each held that the particular context of each statute was crucial.<sup>107</sup> The divergent judicial attitudes can be explained as occurring at the very final stages of a period when natural justice was not protected vigorously by the courts.<sup>108</sup> Just as cases during this period did not provide an expansive scope to the doctrine, they were also less reluctant to find a legislative intention to exclude the doctrine. While the modern cases discussed in earlier parts of this article began to expand the scope of natural justice, they also became increasingly reluctant to find legislative intention sufficient to exclude it. An important shift in judicial attitudes culminated in *Annetts*.<sup>109</sup> That case considered whether the *Coroners Act 1920* (WA) showed an intention to exclude the implication of common law procedural rights. The High Court accepted that the specific procedural rights granted by the statute could be explained by the very wide discretion that coroners had over procedural issues when the Act was passed. Mason CJ, Deane and McHugh JJ held that the clarification of that issue by the introduction of certain procedural rights in one section provided no real guidance about Parliament's intention on natural justice more generally.<sup>110</sup> Their Honours reasoned it was 'impossible to accept that the legislature, in enacting that section, intended to exclude the rules of natural justice' from the Act.<sup>111</sup> That was because:

It simply would not have occurred to anyone in the legal profession in 1920 that the common law rules of natural justice applied to an inquiry

102 See, eg, *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509; *Pearlberg v Varty (Inspector of Taxes)* [1972] 2 All ER 6; *Furnell v Whangarei High Schools Board* [1973] AC 660.

103 (1977) 137 CLR 396.

104 *Ibid* 400–1.

105 *Ibid* 420.

106 *Ibid* 457. Murphy J found it would not be inconsistent with the deportation power.

107 *Ibid* 432–3 (Stephen J), 451–2 (Jacobs J).

108 The decades after World War II saw English and Australian courts take a largely restrictive approach to natural justice, which Holloway has described as a 'twilight' of the doctrine: Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate Publishing, 2002) ch 3. See also H W R Wade, 'The Twilight of Natural Justice' (1951) 67 *Law Quarterly Review* 103.

109 (1990) 170 CLR 596.

110 *Ibid* 599–600.

111 *Ibid* 600.

whose findings could not alter legal rights or obligations. No doubt the legislature assumed that the rights of natural justice did not apply to coronial inquiries. But that is no ground for concluding that the legislature intended to exclude those rights if they were otherwise held to apply.<sup>112</sup>

This remarkable passage invites several comments. It makes clear that the enactment of some procedural rights provides no intention to exclude the common law implication of others. A requirement that the legislature must directly address the exclusion or limitation of natural justice is a difficult one to criticise because it demands clarity from the legislature, but later parts of this article suggest that clarity is rarely achieved. The time at which legislative intention is gauged is another difficult issue. The passage just quoted suggests that the relevant time is when legislation is passed, but other passages make clear that the High Court was mindful of the expansion of natural justice that had occurred after the enactment of the *Coroners Act 1920* (WA).<sup>113</sup> The inevitable tendency of common law interpretive principles to take account of developments in the common law does not sit easily with the more originalist approach taken to ascertaining legislative intent. The common law is inherently evolutionary. Legislative intention is not, but common law approaches to it can be. If the reasoning in *Annetts* is explicable, at least in part, by the much stricter approach to the exclusion of natural justice which developed after the statute was enacted, the judicial search for a legislative intention to exclude natural justice in older statutes is fictional.

## VI EXCLUSION OF NATURAL JUSTICE BY NECESSARY IMPLICATION

The strict requirements of *Saeed* and other cases do not necessarily prevent legislation excluding natural justice by implication but they make the possibility an unlikely one. The cases which have accepted that natural justice has been excluded or greatly limited by implication do not yield a clear general principle because they depend heavily on the purpose and content of the statute under consideration. Some cases suggest that the character of a power and the circumstances in which it must be exercised provide strong evidence of an intention to exclude natural justice. One example is a planning statute which included a power enabling the responsible Minister to exempt him or herself from the normal requirements governing notice for proposed amendments to planning schemes.<sup>114</sup> Natural justice was found to be excluded from the exercise of this power because the court accepted the counterintuitive nature of any common law right for people to receive notice about the removal of their statutory rights

112 Ibid.

113 Ibid 599–600.

114 See *Mietta's Melbourne Hotel Pty Ltd v Roper* (1988) 17 ALD 112; *Grollo Australia Pty Ltd v Minister for Planning and Urban Growth and Development* [1993] 1 VR 627; *East Melbourne Group Inc v Minister for Planning* (2005) 12 VR 448.

of notice. In other words, the implication of common law natural justice rights would defeat the purpose of the statutory power.

Another example of the exclusion of natural justice implication has arisen in prison administration. Some cases have accepted that the general statutory powers granted to manage and control prisoners enable prison officials to place a prisoner who they suspect is involved in planning a riot in isolation without notice.<sup>115</sup> These prison cases might be a specific example of a more general approach taken to powers that may have to be exercised in urgent circumstances. Such powers have long been accepted as impliedly excluding the rules of natural justice. Examples include powers to isolate people suffering from infectious diseases,<sup>116</sup> powers to arrest people<sup>117</sup> and powers to seize property.<sup>118</sup>

The need for urgent action does not necessarily preclude the operation of natural justice. In the leading case of *Marine Hull and Liability Insurance Co Ltd v Hurford*,<sup>119</sup> Wilcox J categorised such powers into two broad types. The first were ‘powers which, by their very nature, are inconsistent with an obligation to accord an opportunity to be heard’.<sup>120</sup> His Honour held that the very character of such powers normally conveyed an intention to exclude the requirements of fairness, such as hearing rights. The second type was those which would *sometimes* have to be exercised urgently. Wilcox J held that the application of natural justice to such powers was not governed by a single approach. Sometimes it was wholly excluded, sometimes it was excluded when the need for urgent action was established on the facts at hand, and sometimes the content of natural justice was simply limited but not excluded.<sup>121</sup> The different possible approaches identified by Wilcox J to powers that may be exercised in cases requiring urgent action has been applied in many other cases. It seems clear that the courts are reluctant to hold that the need for urgent action necessarily excludes all elements of natural

115 *McEvoy v Lobban* [1990] 2 Qd R 235; *Re Walker* [1993] 2 Qd R 345. These cases are consistent with others in which Queensland courts have accorded great deference to the managerial decisions of prison officials. See, eg, *Bartz v Department of Corrective Services* [2002] QSC 56 (19 March 2002); *Bartz v Chief Executive, Department of Corrective Services* [2002] 2 Qd R 114.

116 *R v Davey* [1899] 2 QB 301, 305–6.

117 *Grech v Featherstone* (1991) 33 FCR 63.

118 *Toy Centre Agencies Pty Ltd v Spencer* (1983) 46 ALR 351, 357–8. There is, of course, an important distinction between seizure and confiscation of property. Seizure is usually a temporary measure which prevails until the origin or ownership of property is settled. Confiscation is the permanent acquisition of property and, for that reason, is generally subject to natural justice requirements.

119 (1985) 10 FCR 234.

120 *Ibid* 241.

121 *Ibid*. Wilcox J held that the power in the case before him fell into this middle class: at 242. The Full Court of the Federal Court affirmed that decision, holding that natural justice was not excluded and also that it had not been breached: *Marine Hull and Liability Insurance Co Ltd v Hurford* (1986) 10 FCR 476, 477, 479 (Fox J), 487 (Davies J), 489–91 (Morling J).

justice. Instead, the courts generally hold that the need for urgent action must be established in a particular case.<sup>122</sup>

A recent example of the successful legislative exclusion of natural justice is *Plaintiff S10/2011*.<sup>123</sup> In that case the High Court held that the rules of natural justice did not apply to several exceptional discretionary powers which enabled the Minister to grant visas to people whose applications had been made and rejected through other avenues in the *Migration Act 1958* (Cth).<sup>124</sup> The Minister was essentially granted a non-delegable authority to overturn those unfavourable decisions if he believed it was in the public interest to do so.<sup>125</sup> The Minister was also required to table in Parliament the reasons for any favourable exercise of these powers.

The unique nature of these powers led the High Court to accept that fairness was excluded from their operation by necessary implication. French CJ and Kiefel J reasoned that the powers were unique and stood apart from the otherwise closely structured powers in the Act.<sup>126</sup> Heydon J similarly observed that the powers were accompanied by many unique features that made them ‘powers of an exceptional, last resort, or residual kind’.<sup>127</sup> Gummow, Hayne, Crennan and Bell JJ also accepted that the exceptional powers granted to the Minister were ‘radically’ different from others in the Act.<sup>128</sup> Their Honours were influenced by the ‘cumulative significance’ of the many special features of the exceptional powers granted to the Minister.<sup>129</sup>

*Plaintiff S10/2011* provides very little general guidance on the exclusion of natural justice because the discretionary powers examined in that case were so unusual. It could also be argued that the rules of natural justice were not truly excluded because the exceptional powers granted to the Minister could only be exercised in favour of people whose applications had been rejected through other parts of the

122 See, eg, *Nguyen v Minister for Immigration and Multicultural Affairs* (2001) 112 FCR 1, 15–17 [55]–[57] (Sackville J); *Alfabs Engineering Group Pty Ltd v Robert Regan* [2002] NSWSC 316 (16 April 2002) [45]–[52] (Palmer J); *Pavic v Magistrates Court (Vic)* (2003) 140 A Crim R 113, 119–20 [27]–[29] (Nettle J); *South Australia v Slipper* (2004) 136 FCR 259, 284–7 [113]–[130] (Finn J); *Commissioner of Police (NSW) v Ryan* (2007) 70 NSWLR 73, 80–2 [28]–[33] (Basten JA, with whom Spigelman CJ and Santow JA agreed); *Smith v Royal NSW Canine Control Council Ltd* [2010] NSWSC 1134 (8 October 2010) [64]–[67] (Harrison AsJ).

123 (2012) 246 CLR 636.

124 *Migration Act 1958* (Cth) ss 48B(4)–(6), 195A(6)–(8), 351(4)–(6), 417(4)–(6).

125 In *Plaintiff S10/2011* (2012) 246 CLR 636, 673–4 [121], Heydon J relied upon the requirement that these powers could only be exercised after an application had been made and rejected by other avenues to distinguish the different approach to a similar discretionary power in the *Offshore Processing Case* (2010) 243 CLR 319. Heydon J noted that the discretionary power in this latter case, which was concerned with s 46A of the *Migration Act 1958* (Cth), enabled the Minister to waive a prohibition against offshore visa applications. His Honour concluded that no analogy could be drawn between an exceptional power to enable an application to be made where one was otherwise impossible and an exceptional power to grant visas where an application had been fully considered but rejected.

126 *Plaintiff S10/2011* (2012) 246 CLR 636, 648 [30].

127 *Ibid* 671 [111].

128 *Ibid* 664 [86].

129 *Ibid* 668 [100].

Act.<sup>130</sup> The requirements of natural justice applied to those earlier applications. The reasoning of the High Court only operated to exclude a *second* round of natural justice and did nothing to displace its operation in the first round.<sup>131</sup> On that view, *Plaintiff S10/2011* perhaps only confirms the ironic point that natural justice can be excluded after it has been provided.

## VII DOES EXPRESS MENTION OF SOME PROCEDURAL RIGHT IMPLIEDLY EXCLUDE OTHERS?

Many statutes contain procedural rights that might also be implied by the common law requirements of natural justice, such as the right of people to know the case against them and to make their own submissions before a decision is made,<sup>132</sup> and the right to be represented in a hearing.<sup>133</sup> Statutes that include such procedural rights rarely provide a clear indication on the effect that the legislative affirmation of some procedural rights is intended to have on the implication of further rights at common law.<sup>134</sup> Some older cases accepted that the express mention of some procedural rights impliedly excluded others.<sup>135</sup> That possibility became increasingly at odds with the more strict approach taken to the exclusion of natural justice.

The watershed case was *Annetts*.<sup>136</sup> The Annetts challenged a coroner's refusal to allow them to make closing submissions at the inquiry into their son's death. The coroner was acting under legislation which granted people considered by the coroner to have a 'sufficient interest' in an inquiry to be represented at the hearing, and also to examine and cross-examine witnesses.<sup>137</sup> The legislation mentioned no other procedural rights. The High Court held that the lack of express reference

130 Ibid 668 [100] (Gummow, Hayne, Crennan and Bell JJ), 669 [106] (Heydon J).

131 French CJ and Kiefel J noted that each of the applicants also had their case considered by the Minister personally on at least one previous occasion: *ibid* 655 [53].

132 See, eg, *Correctional Services Act 1982* (SA) s 45(a) (providing that prisoners charged with disciplinary offences have a right to view the evidence in support of the charge, must be given a reasonable opportunity to make submissions about the charge and also to call, examine and cross-examine witnesses).

133 See, eg, *Coroners Act 2008* (Vic) s 66(3) (providing that interested parties in a witness are entitled to be legally represented).

134 Even if such indication is expressly provided, the meaning of such a provision is ultimately a matter of interpretation for the courts.

135 See, eg, *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509, 524, where the High Court held that provisions granting people rights to put their views at certain parts of a planning process were exhaustive. Barwick CJ, with whom Menzies and Windeyer JJ agreed, reasoned that the court should not imply further hearing rights in other parts of the process because '[t]he legislature has addressed itself to the very question and it is not for the Court to amend the statute by engrafting upon it some provision which the Court might think more consonant with a complete opportunity for an aggrieved person to present his views': at 524. His Honour also appeared to accept that the rights granted by statute met the requirements of fairness when he added that the implication of others 'would ... do more than natural justice requires'.

136 (1990) 170 CLR 596.

137 *Coroners Act 1920* (WA) s 24. This Act was replaced by one that includes an equivalent provision which also mentions rights of representation and examination of witnesses, but is silent on closing submissions: see *Coroners Act 1996* (WA) s 44.

to other procedural rights was insufficient to exclude natural justice because the clear intention required to do so could not be implied simply ‘from the presence in the statute of rights which are commensurate with some of the rules of natural justice’.<sup>138</sup> According to that reasoning, the High Court found that the lack of any legislative right of interested parties to make closing submissions did not prevent the *Annetts* from relying upon natural justice at common law to do so.

The reasoning in *Annetts* can be explained in part by the difficulties that arise from any attempt to discern a parliamentary intention from apparent silence. What, if anything, might the failure of legislatures to address unmentioned procedural rights mean? The courts sometimes resolve such questions by use of longstanding interpretive maxims, such as *expressio unius est exclusio alterius* (express mention of one thing excludes another) and *expressum facit cessare tacitum* (express mention of certain things excludes anything not mentioned). The value of such presumptions is limited because the apparent silence of the legislature, which is a crude way to describe the mention of some procedural rights but not others, is arguably itself often ambiguous. It can just as easily indicate an acceptance that further common law rights can be implied by the courts.<sup>139</sup>

The difficulty in attributing a clear meaning to such legislative silences led the High Court to subsequently declare that the interpretive maxims often invoked for such issues ‘are to be applied with caution’ in natural justice cases.<sup>140</sup> The High Court has never clearly explained just how cautious courts should be, which may explain the differing results of cases on this issue. Some cases have held that very detailed statutory procedural rights can provide strong evidence of a legislative intention to exclude the implication of additional rights from natural justice at common law.<sup>141</sup> Other cases have reached the opposite result and held that the enactment of very detailed legislative requirements on issues, such as the right of notice, can still be supplemented by further common law rights.<sup>142</sup> One final approach has been to decide the issue by a greater focus on the purpose of the wider legislative regime rather than simply the detail of the procedural

138 *Annetts* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). The Court at first instance posed the question in different terms, asking whether the statutory rights should be essentially extended by the common law implication of further rights: *Annetts v McCann* [1990] WAR 161, 172 (Wallace, Kennedy and Franklyn JJ). This approach, which was rejected by the High Court, is similar to that adopted in *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509.

139 *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338, 347 (Mahoney JA), 349 (McHugh JA); *Miah* (2001) 206 CLR 57, 93 [125]–[126], 96–7 [139]–[140] (McHugh J), 115 [189]–[190] (Kirby J).

140 *Ainsworth* (1992) 175 CLR 564, 575 (Mason CJ, Dawson, Toohey and Gaudron JJ). The United Kingdom Supreme Court made a similar point in *Bank Mellat [No 2]* [2013] UKSC 39 (19 June 2013) [35] (Lord Sumption, with whom Lady Hale, Lord Kerr and Lord Clarke agreed, with Lord Carnwath also agreeing on this point), citing *R (West) v Parole Board* [2005] 1 WLR 350, 360 [29] (Lord Bingham).

141 See, eg, *Upham v Grand Hotel (SA) Pty Ltd* (1999) 74 SASR 557, 566–8 [62]–[69], 568–70 [72]–[77] (Doyle CJ and Bleby J). See also *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, where the Federal Court held that the detailed procedural rights contained in an Act drew such clear distinctions between the different types of rights to receive notice and to provide material in response, that the Act showed a clear intention to exclude further such rights: at 67–8 [29] (Heerey, Drummond and Emmett JJ).

142 See, eg, *Telstra Corporation Ltd v Australian Competition and Consumer Commission [No 2]* (2007) 240 ALR 135, 177–83 [221]–[250] (Bennett J).



rights granted, and to conclude that further common law procedural rights were intended to be excluded.<sup>143</sup> The differing approaches taken in such cases suggest that the effect of the enactment of some procedural rights will depend heavily on their content and context.

## VIII STATUTORY PROCEDURAL CODES AS AN IMPLIED EXCLUSION OF NATURAL JUSTICE

If the central principle of *Annetts* is taken to a logical extreme, the enactment of a procedural code would not alone demonstrate a sufficiently clear legislative intention to exclude the implication of further hearing rights at common law. After all, if the enactment of *some* hearing rights does not prevent the courts from implying others, as happened in *Annetts*, surely the enactment of *many* hearing rights might also not prevent the implication of *some* further hearing rights. The crucial point in any legislative code is whether it reveals an additional intention (express or implied) to exclude any further requirements of the hearing rule. The discovery of that intention depends on the separate but closely related question of whether the courts accept that the code is intended to be exhaustive.

Some older cases appeared to readily find that a legislative code was exhaustive and therefore excluded further common law hearing rights. These cases appeared to place great weight on the detail of the code in question.<sup>144</sup> The reasoning in these cases was not entirely clear because they did not rely upon a clear general principle to determine when or why a code was effective to exclude the common law hearing rule. They might be explicable on the basis that the courts had accepted that the code in question was, on balance, sufficiently fair that further recourse to the common law was not required for a fair hearing. That explanation is consistent with other early cases in which conclusions that a legislative code did not exclude recourse to the common law were heavily dependent on a finding that the code was somehow unfair.<sup>145</sup> Still other cases stressed the importance of legislative intent and focused on whether Parliament had clearly addressed the

143 See, eg, *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, where it was decided that there was no room to supplement deliberately structured differences between carefully graded rights to be notified and to respond. See also *Riverside Nursing Care Pty Ltd v Bishop* (2000) 100 FCR 519, 521–2 [5]–[13] (Ryan, Marshall and Emmett JJ), which examined legislation enabling a Departmental Secretary to impose penalties on the managers of nursing homes. Some of the legislative provisions included requirements for the nursing home managers to receive notice of their right to put their case before final decisions were made or penalties imposed. Other provisions allowed penalties to be imposed where the Secretary concluded there was an immediate risk to the safety, health or wellbeing of nursing home patients. This second category of provisions included no express procedures to notify nursing home managers or to provide them with a chance to put their views. The Full Court of the Federal Court held that the clear purpose of the powers to impose penalties in cases where an immediate risk was identified would be defeated if managers could invoke common law hearing rights.

144 See, eg, *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509; *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338.

145 See, eg, *Wiseman v Borneman* [1971] AC 297, 308 (Lord Reid), 309 (Lord Morris), 312 (Lord Guest), 317, 320 (Lord Wilberforce). See also *Huntley v A-G (Jamaica)* [1995] 2 AC 1 (PC).

question of whether the code was intended to exclude recourse to the common law hearing rule.<sup>146</sup>

The weight of more recent cases suggests the courts are very reluctant to accept that a legislative code is exhaustive and therefore intended to exclude the implication of further common law hearing rights.<sup>147</sup> There are exceptions, some of which can be explained by reference to the subject matter of the area regulated by the code. The most common example is planning codes. Many cases have accepted that statutory planning schemes provide an exhaustive statement of the hearing rights of those affected by planning decisions.<sup>148</sup> These cases may have a pragmatic basis. Planning decisions are notoriously complex and can involve a vast range of commercial and individual interests.<sup>149</sup> The courts may be more willing to accept the exhaustive nature of codes governing planning decisions for the pragmatic reason that they do not wish to further complicate an already difficult area of decision-making.<sup>150</sup>

There are other cases in which the courts have accepted that a legislative code excludes common law hearing rights because of the overall structure for decision-making within which the code operates. If an administrative process has several discernible stages, the courts may accept that legislation is effective to deny or limit procedural rights at one stage of the process but not others.<sup>151</sup> These cases suggest that the courts are more willing to find that natural justice has

146 The most influential example of this was the judgment of Barwick CJ in *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 109–10. Lord Donovan also stressed the importance of legislative intent in *Wiseman v Borneman* [1971] AC 297, 315–16.

147 See, eg, *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338; *R v Chairman of Parole Board (NT)*; *Ex parte Patterson* (1986) 43 NTR 13; *J v Lieschke* (1987) 162 CLR 447, 460–1; *Queensland v Litz* [1993] 1 Qd R 343, 349, 352; *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37 ALD 633; *Upham v Grand Hotel (SA) Pty Ltd* (1999) 74 SASR 557; *Hill v Green* (1999) 48 NSWLR 161; *Miah* (2001) 206 CLR 57; *Victims Compensation Fund Corp v Nguyen* (2001) 52 NSWLR 213, 219; *South Australia v Slipper* (2004) 136 FCR 259.

148 See, eg, *Brooks v Minister for Planning and Environment* (1988) 68 LGR 91, 99–100; *Grollo Australia Pty Ltd v Minister for Planning and Urban Growth and Development* [1993] 1 VR 627; *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, 113–14 (Meagher JA), 114–15 (Powell JA), though Spigelman CJ dissented strongly on this issue: at 91–100; *Hannay v Brisbane City Council* [1999] 2 Qd R 54; *Hillpalm Pty Ltd v Tweed Shire Council* (2002) 119 LGERA 86, 111–13 [115]–[128] (Lloyd J); *Re Minister for the Environment*; *Ex parte Ehwood* (2007) 154 LGERA 366, 413 [198]–[199] (Buss JA).

149 For a list of different interests common in such cases, see Andrew Edgar, ‘Participation and Responsiveness in Merits Review of Polycentric Decisions: A Comparison of Development Assessment Appeals’ (2010) 27 *Environmental and Planning Law Journal* 36, 41.

150 O’Mara argues that the quality of planning processes could be improved by greater consultation by decision-makers rather than continued adjudicative/adversarial decision-making in the review of planning decisions: Alexandra O’Mara, ‘Procedural Fairness and Public Participation in Planning’ (2004) 21 *Environmental and Planning Law Journal* 62. If so, reliance upon natural justice to imply additional hearing rights in planning review processes might offer few benefits.

151 See, eg, *Edelsten v Health Insurance Commission* (1990) 96 ALR 673, 686, 688 (investigation of alleged Medicare overbilling by doctors); *Pica v Local Government Association* (1992) 58 SASR 460 (consideration of workers’ compensation claim by review tribunal); *Huntley v A-G (Jamaica)* [1995] 2 AC 1 (PC) (two-stage process to determine sentence for people convicted of capital murder); *Buonopane v Secretary, Department of Employment, Education and Youth Affairs* (1998) 87 FCR 173 (public sector disciplinary proceedings); *Cornall v AB (a Solicitor)* [1995] 1 VR 372 (disciplinary regulation of lawyers). On this last point, a subsequent statutory code regulating lawyers was held not to be exhaustive in the case of *Byrne v Marles* (2008) 19 VR 612.

been excluded from one part of a process because it is available in other parts. Such cases may also suggest the courts accept that enforcing the requirements of natural justice at every stage of an administrative process could impose greater burdens than benefits.<sup>152</sup>

The High Court has adopted a much stricter approach to the codification of procedures governing immigration decision-making, which sought to reduce the potential for judicial review by defining the duties of immigration officials in greater detail.<sup>153</sup> The first significant decision of the High Court to examine the effect of the legislative code of duties applicable to migration tribunals was the case of *Miah*.<sup>154</sup> The procedures were described in the Explanatory Memorandum which accompanied their enactment as a ‘procedural code’ that was intended to ‘replace the uncodified principles of natural justice with clear and fixed procedures’.<sup>155</sup> Those procedures were extremely detailed and often specified procedures for often minor administrative issues.

A majority of the High Court found two reasons why neither these statements nor the great detail of the code manifested a sufficient intention to exclude the implication of further common law rights of fairness.<sup>156</sup> The first arose from the text of the legislation. The majority noted that the procedures included words and phrases that suggested an ambivalent rather than clear indication of an intention to exclude natural justice.<sup>157</sup> The procedures were, for example, located under a subheading which stated that they created a ‘[c]ode of procedure for dealing fairly, efficiently and quickly’ with applications.<sup>158</sup> McHugh J saw a paradox in the government’s submissions, which argued that fairness was intended to be excluded from procedures that were stated to deal ‘fairly’ with applications.<sup>159</sup> His Honour also held that ‘use of the word “code” is too weak a reason to conclude that Parliament intended to limit the requirements of natural justice’.<sup>160</sup> Gaudron J also doubted the relevance of the description of the procedures as a ‘code’. Her Honour reasoned that the effect of the statutory scheme was far more important than the

152 See, eg, *Pica v Local Government Association* (1992) 58 SASR 460. Legoe J noted that the evidence a party wished to call at a different part of an administrative process was ‘repetitious’ of reports received at an earlier stage: at 472.

153 This statement simplifies a complex series of amendments to the *Migration Act 1958* (Cth). Gageler usefully categorised these amendments as successive stages of legislative prescription (upon the duties of migration officials) and limitation (on the scope of judicial review): Gageler, ‘Impact of Migration Law’, above n 46, 96–101.

154 (2001) 206 CLR 57.

155 Ibid 95 [132] (McHugh J), quoting Explanatory Memorandum, Migration Reform Bill 1992 (Cth) 10 [51]. His Honour was also referring directly to the respondents’ submissions in *Miah*.

156 *Miah* (2001) 206 CLR 57, 84–5 (Gaudron J), 95–8 (McHugh J), 111–15 (Kirby J).

157 Gleeson CJ and Hayne J dissented, holding that the code provided an exhaustive statement of the tribunal’s duty to invite submissions from applicants on unfavourable material: *ibid* 73–5. It followed that the code excluded any recourse to common law hearing rights on this particular procedure in the tribunal but not others.

158 Ibid 95 [131] (McHugh J) (emphasis altered), quoting the heading of *Migration Act 1958* (Cth) sub-div AB. The subheading is deemed to be part of the Act by the *Acts Interpretation Act 1901* (Cth) s 13(1): see *Miah* (2001) 206 CLR 57, 95 n 74 (McHugh J).

159 *Miah* (2001) 206 CLR 57, 95 [131].

160 *Ibid*. Kirby J reached a similar conclusion about the effect of the word ‘code’: at 113 [183].

label it was given. According to this view, the important question was whether the legislation manifested a suitably clear intention to exclude the common law rules of natural justice.<sup>161</sup> Gaudron J found that the procedures did not manifest such an intention because they largely imposed inclusive rather than exclusive duties.<sup>162</sup> That inclusive character made it difficult to conclude that Parliament had clearly intended to preclude the implication of further procedures at common law.

The second reason the code was found not to exclude natural justice arose from its focus on the legislation alone. This approach is consistent with many other cases in which the High Court has stressed that parliamentary intention is best discovered by examining the intention manifested in legislation itself rather than the materials surrounding it.<sup>163</sup> In *Miah's* case that approach meant that the court placed no real weight on the Explanatory Memorandum and related statements of the Minister when introducing the Bill to enact the code, all of which made strong statements about the exclusive nature of the code.

The High Court considered a revised version of the code in *Saeed*.<sup>164</sup> The procedures had been amended to omit their description as a 'code' but largely similar procedures remained in several parts of the *Migration Act 1958* (Cth).<sup>165</sup> Each of those parts now included a provision stating that the various procedures they contained should be 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'.<sup>166</sup> Ms Saeed applied for a visa from outside Australia (an 'offshore visa'), which was subject to quite different requirements than an 'onshore visa' (one sought by people while in Australia). A delegate of the Minister refused Ms Saeed's application and her subsequent request to know why. The Act provided that various information used by decision-makers, which included what Saeed wanted to know, did not need to be disclosed. The Minister argued that this provision ended any obligation to disclose information because it was one of several procedures 'taken to be an exhaustive statement of ... natural justice'.<sup>167</sup> The High Court accepted this argument but also found a flaw within it. The Court found that the applicable procedures covered onshore applications but not offshore ones. Offshore applications were therefore not one of the 'matters' that these provisions 'dealt with'.<sup>168</sup> Accordingly, natural justice was not excluded from *Saeed's* case.

161 Ibid 83–4 [90]. Kirby J also held that the words used in the procedures were not sufficiently strong to exclude natural justice: at 112–13 [181].

162 Ibid 84–5 [91]–[96].

163 See, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (Gummow J); *Plaintiff S157* (2003) 211 CLR 476, 499 [55] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

164 (2010) 241 CLR 252.

165 Different procedures applied to various powers to grant and cancel visas. Other procedures applied to the Migration and Refugee Review Tribunals.

166 *Migration Act 1958* (Cth) ss 51A(1), 97A(1), 118A(1), 127A(1), 357A(1), 422B(1).

167 The relevant provision in *Saeed* was s 51A(1) of the *Migration Act 1958* (Cth).

168 *Saeed* (2010) 241 CLR 252, 266–7 [35]–[42] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). Heydon J reached a similar conclusion: at 281 [83].

The common law requirements of fairness meant that she should know the information upon which the Minister's delegate had acted.<sup>169</sup>

*Saeed* also affirmed that interpretive questions can often be decided by analysis of the Act and without the need to examine extraneous material. That point had particular irony in *Saeed* because the High Court accepted that the code was amended in response to its reasoning in *Miah*,<sup>170</sup> but concluded that extrinsic statements about that 'objective cannot be equated with the statutory intention as revealed by the terms of the subdivision'.<sup>171</sup> In other words, the hopes expressed in materials extrinsic to legislation were different to what had actually been expressed in the legislation itself.

*Saeed* confirms that the possibility of legislative exclusion can be realised but the value of that outcome to governments can arguably be undone by principles established in other migration cases decided between *Miah* and *Saeed*. In these cases the High Court increasingly stressed the importance of the procedures governing migration decision-making. These cases made it clear that statutory procedures governing key issues, such as rights of notice and appearance at a hearing, were so central to the proper conduct of hearings that any breach would normally constitute jurisdictional error.<sup>172</sup>

The difference between the two was illustrated in *SZBYR v Minister for Immigration and Citizenship*,<sup>173</sup> where the High Court examined procedures which required applicants for refugee status be given written notice of certain information. Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ held that the Refugee Review Tribunal would normally fall into jurisdictional error if it provided such information orally, such as during a hearing, because the imperative nature of the provision allowed for only one form of compliance.<sup>174</sup> Their Honours also held that providing oral rather than written notice would have caused no problem under common law requirements of fairness.<sup>175</sup> Such outcomes led Gummow J to note that the common law requirements of natural justice were often more flexible than the statutory procedures that replaced them.<sup>176</sup> Such cases highlight the potential problems of statutory codes. If codes are interpreted strictly, even the most technical breach of their requirements can lead to a finding of jurisdictional error. At common law, however, relief for similar errors might

169 Ibid 271 [59] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

170 Ibid 265 [34] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), 276–7 [71]–[72] (Heydon J).

171 Ibid 265 [34] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

172 See, eg, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 321–2 (McHugh J), 345–6 (Kirby J), 353–4 (Hayne J) ('*SAAP*'); *SZFE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 201, 205–7 [48]–[53] (per curiam). There are exceptions. See, eg, *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, 639 [34], where French CJ, Gummow, Hayne, Crennan and Bell JJ explained that a detailed scheme for giving notice to applicants for refugee status was 'not an end in itself'. The Court held no jurisdictional error occurred when the provisions were not followed to the letter if the applicant still received all required information.

173 (2007) 81 ALJR 1190 ('*SZBYR*').

174 Ibid 1195 [14]. Such an error was not found in *SZBYR* because the High Court held that the procedure was not engaged in that instance: at 1196 [21].

175 Ibid 1195 [14].

176 *SAAP* (2005) 228 CLR 294, 337 [137].

be refused on discretionary grounds.<sup>177</sup> Those different possible results beg the question of whether statutory codes can be more trouble than they are worth. Such doubts about the ultimate value of codes that seek to exclude natural justice are heightened by the possibility that a code might be interpreted strictly but might also be found not to exclude natural justice.

## IX EXCLUSION OF NATURAL JUSTICE BY DELEGATED LEGISLATION

The possibility that natural justice can be excluded by legislation expressed in suitably clear language presents several difficulties when applied to delegated legislation.<sup>178</sup> One difficulty arises from the very nature of delegated legislation, which is essentially a sub-category of legislation ‘made by a non-parliamentary body, acting pursuant to an Act of Parliament’.<sup>179</sup> This simple definition encompasses an almost infinite variety of instruments which have wide or general effect, much like statutes, but are not directly enacted by Parliament.<sup>180</sup> If Lord Hoffmann’s insistence that Parliament must ‘squarely confront what it is doing’<sup>181</sup> when it seeks to remove fundamental rights, delegated legislation might be incapable of achieving that objective because instruments created under a delegated parliamentary authority do not meet the directness that Lord Hoffmann implicitly required. That possibility is at odds with the longstanding acceptance

177 The discretionary refusal of relief for a denial of natural justice does not depend on whether the breach was trivial or serious but whether the court is satisfied that observance of natural justice could not have made any difference to the final result. See Aronson and Groves, above n 4, 477–81 [7.380].

178 There is a distinction between decisions made under delegated legislation and the making of delegated legislation. Australian courts have generally not accepted that the requirement of natural justice applies to the making of delegated legislation: Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2012) 185–6 [13.1]–[13.4]. However, the authors noted some cases where the delegated legislation in question was ‘so confined in its operation that natural justice was applicable to its making’: at 186–7 [13.4]. This approach arguably reflects the focus of natural justice on protecting the interests of individuals as opposed to society at large: see Aronson and Groves, above n 4, 429–36 [7.170]–[7.180]. A striking exception occurred in *Bank Mellat [No 2]* [2013] UKSC 39 (19 June 2013), where the UK Supreme Court held that a bank should have been notified of, and consulted about, a legislative instrument before it was made. This requirement of consultation was explained as one required by fairness: at [29]–[37], [43]–[44]. The *Mellat* case was unusual because the instrument was directed at one bank, with ruinous consequences. The instrument was also exempted from normal requirements by which most non-legislative instruments are placed before the House of Lords in draft form: at [48]. The decision of the Supreme Court gave little indication as to whether the requirements of fairness would apply to the making of delegated legislation outside such an exceptional case.

179 Pearce and Argument, above n 178, 1 [1.2].

180 The use in this section of the term ‘delegated legislation’ is not intended to suggest that there is a single or simple definition to the legislative instruments other than statutes. That is illustrated by ss 5–7 of the *Legislative Instruments Act 2003* (Cth). Section 5(1) defines a ‘legislative instrument’ in a broad sense that can encompass many forms of quasi-legislation. Section 6 expressly provides that five particular classes of instruments are legislative instruments. Section 7 expressly provides that 25 types of instruments are not legislative instruments. The scope of ss 5–7 shows that delegated legislation is just one example of quasi-legislation.

181 *Simms* [2000] 2 AC 115, 131 (emphasis added).

by the courts of the possibility that natural justice and other basic rights can be narrowed or removed by delegated legislation.<sup>182</sup>

A further difficulty in any attempt to remove natural justice or other basic rights by delegated legislation lies in the process to make such legislation, at least in some jurisdictions. The statutes governing the making of delegated legislation in Queensland and Victoria include a requirement for the Office of Parliamentary Counsel to certify various aspects of proposed regulations. In Queensland certification is required that proposed delegated legislation ‘is consistent with principles of natural justice’.<sup>183</sup> The Victorian equivalent requires a certificate specifying whether the proposed delegated legislation ‘appears to be inconsistent with principles of justice and fairness’.<sup>184</sup> Several other Australian jurisdictions provide general criteria governing the content of delegated legislation which imply a similar presumption. The relevant statutes of New South Wales and Tasmania provide that delegated legislation should meet many objectives, including that it be ‘reasonable and appropriate’.<sup>185</sup> The exclusion or modification of fairness is also an issue required to be considered by the parliamentary scrutiny committees of Victoria and Western Australia.<sup>186</sup> The inclusion of that issue within the remit of parliamentary scrutiny committees implies that the exclusion of fairness in delegated legislation is an exceptional matter that should be guarded against.

Such requirements presume that delegated legislation should not, perhaps even cannot, seek to exclude natural justice. That conclusion is supported by one of the key principles contained in the terms of reference of almost every Australian parliamentary committee that reviews delegated legislation. That principle requires parliamentary committees to consider and report on whether delegated legislation contains matters that are more appropriately dealt with by statute.<sup>187</sup> A similar principle is adopted in many government manuals or guidelines on

182 The willingness of the courts to accept this possibility is now arguably supported by the very extensive processes of parliamentary review, and possible parliamentary disallowance, to which delegated legislation is subject. The law and practice of all Australian jurisdictions is comprehensively explained in Pearce and Argument, above n 178, 59–169 [3.1]–[11.15]. The growth of this parliamentary oversight, and the many opportunities it provides for public comment, makes it increasingly difficult to suggest that parliaments do not ‘confront’ and take political responsibility for the cost of delegated legislation which affects basic rights. But those same scrutiny processes also make it very unlikely that basic rights would be significantly infringed by delegated legislation.

183 *Legislative Standards Act 1992* (Qld) s 4(3)(b).

184 *Subordinate Legislation Act 1994* (Vic) s 13(1)(e).

185 *Subordinate Legislation Act 1989* (NSW) sch 1 s (2)(b); *Subordinate Legislation Act 1992* (Tas) s 3A(2)(a)(i).

186 *Subordinate Legislation Act 1994* (Vic) s 21(1)(h); *Legislative Council Standing Orders 2011* (WA) sch 1 cl 3.6(c).

187 See, eg, *Senate Standing Orders 2009* (Cth) O 23(3)(d). An equivalent legislative requirement exists in *Legislative Standards Act 1992* (Qld) s 4(5)(c); *Subordinate Legislation Act 1994* (Vic) s 21(e). The courts have also affirmed this notion. See, eg, *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534, 653 [143] (Lord Phillips).

legislative drafting.<sup>188</sup> The exclusion or significant limitation of natural justice is such a matter because it reverses a strong common law presumption that natural justice will apply and can greatly diminish the rights of people to challenge administrative action which affects them.

Despite these various statutory and other presumptions against the use of delegated legislation to exclude or significantly affect natural justice, delegated legislation is sometimes used to infringe basic rights. The courts have deployed a range of interpretive principles to declare such delegated legislation unlawful. In some cases they simply apply the principle of legality to delegated legislation, or simply take a restrictive interpretation of delegated legislation and limit its scope. *Simms* is an example. The case involved prison rules which limited visits to prisoners by journalists.<sup>189</sup> The Home Secretary applied those regulations to impose a blanket ban on journalists from using information gained from visiting prisoners in media reports. Lord Hoffmann held that the principle of legality applied to the interpretation of both statutes and delegated legislation. His Lordship followed that approach and found that the rules were expressed in general terms which, according to the principle of legality, could not support the drastic limits in free speech.<sup>190</sup>

A more common principle used by the courts is the one of simple ultra vires, by which the courts hold that delegated legislation exceeds the scope of the legislative power under which it was made. A recent notable example of this was *Ahmed v Her Majesty's Treasury*,<sup>191</sup> where an Order in Council was challenged. The order was made under s 1(1) of the *United Nations Act 1946* (UK) 9 & 10 Geo 6, c 45, which provided the Executive Council of England power to make orders that appeared 'necessary or expedient' to give effect to decisions of the UN Security Council. That power was exercised in 2006 to make orders to freeze the assets of people or organisations suspected of involvement in terrorism. The order contained no real procedural rights for those against whom the order was invoked.<sup>192</sup> The UK Supreme Court held that the order was beyond power because the general language of s 1(1) was insufficient to make instruments that

188 See, eg, Department of Prime Minister and Cabinet, Commonwealth of Australia, *Legislation Handbook* (1999) <[http://www.dpnc.gov.au/guidelines/docs/legislation\\_handbook.pdf](http://www.dpnc.gov.au/guidelines/docs/legislation_handbook.pdf)> 3 [1.12(c)]. The Victorian equivalent is issued under s 26 of the *Subordinate Legislation Act 1994* (Vic), known as 'the Premier's Guidelines'. These contain a clause very similar to the federal one just noted: 'Subordinate Legislation Act 1994 Guidelines' in Victoria, *Victorian Government Gazette*, No 31, 4 August 2011, 1795 [43].

189 *Prison Regulations 1964* (UK) regs 37, 37A. These now repealed regulations are reproduced in *Simms* [2000] 2 AC 115, 121.

190 *Simms* [2000] 2 AC 115, 132.

191 [2010] 2 AC 534.

192 The orders were made to give effect to several resolutions of the UN Security Council: SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) and SC Res 1452, UN SCOR, 4678th mtg, UN Doc S/RES/1452 (20 December 2002), quoted in *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534, 615–7.



overrode basic procedural rights of fairness.<sup>193</sup> Lord Hope also noted that the history of the Act provided no support for the idea that Parliament conceived such draconian orders might be made when the 1946 Act was passed. It followed that Parliament had not ‘squarely confronted’ the possibility of such severe orders, as the principle of legality required.<sup>194</sup> That reasoning has shades of *Annetts* because it views legislative intention through a contemporary eye, and like *Annetts*, makes the exclusion of fairness much more difficult.

The solution was hinted at by the New South Wales Court of Appeal in *Hill v Green*.<sup>195</sup> Fitzgerald JA, with whom Beazley JA agreed, held that delegated legislation could only exclude natural justice if it was made under a power that clearly authorised such a rule.<sup>196</sup> This possibility would first require a regulation-making power to clearly authorise the making of delegated legislation that either excluded basic rights in general or natural justice in particular. The second requirement is that any delegated legislation made in exercise of such a power would itself need to be expressed with the unmistakable clarity required to exclude natural justice. These two-fold requirements present such difficult obstacles that they arguably make the exclusion of natural justice by delegated legislation almost impossible. The exclusion of natural justice remains possible. It must simply be done by primary rather than delegated legislation.

## X CONCLUDING OBSERVATIONS

The modern evolution of the duty to observe the rules of natural justice has seen the scope of the doctrine broaden enormously. The duty now applies to virtually all public or official decisions affecting rights as defined in a broad sense. The expansion of that duty has been amplified by the increasing reluctance of the courts to sanction the legislative exclusion of natural justice. There is an obvious symmetry between these two trends. They operate to simultaneously expand and secure the duty to observe the rules of natural justice. That protection is especially valuable because natural justice is not constitutionally entrenched outside the courts. Although the *Constitution* may not prevent the legislative exclusion of natural justice from the processes of tribunals, administrative officials and other non-judicial bodies, the common law appears to be developing increasingly strict presumptions which make the possibility of legislative exclusion difficult.

193 *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534, 625–7 [44]–[48] (Lord Hope), 656 [154]–[155] (Lord Phillips), 662–3 [185] (Lord Rodger, with whom Baroness Hale agreed), 686–7 [248]–[249] (Lord Mance). The Supreme Court also found that the use of a test of ‘reasonable suspicion’ in the order was ultra vires because it was at odds with the stricter standards suggested in the UN Security Council resolutions: at 626–7 [47]–[48], 631 [61] (Lord Hope), 653 [143] (Lord Phillips), 665 [197] (Lord Brown), 677 [230]–[231] (Lord Mance).

194 *Ibid* 631 [61].

195 (1999) 48 NSWLR 161.

196 *Ibid* 192 [142]–[143]. Spigelman CJ clearly seemed sympathetic to that reasoning but decided the case on the assumption that the regulations were valid (the parties argued the case based upon that assumption): at 166 [9]–[10]. Mason P and Sheller JA did not consider this issue.

These strict presumptions against the exclusion of natural justice are manifested in many ways. The courts approach legislation with a strong presumption that natural justice is intended to apply and with an equally strong presumption against its exclusion. It is clear that legislation which is expressed in general terms, or addresses some procedural rights but not others, does not provide sufficient evidence of a legislative intention to exclude natural justice. The enactment of more comprehensive statutory procedural codes will generally suffer the same fate. The cases which have accepted that natural justice has been excluded by implication suggest that the courts may accept the doctrine has been excluded even if the legislature has not adopted express words to that effect but those cases appear to depend so heavily on their particular circumstances that they do not yield a clear general principle. They are arguably also explicable as instances where the courts have concluded that natural justice was not necessary, either because it had already been provided or because it was antithetical to the power in question, rather than because of any clear legislative intention.

The judicial designation of natural justice as a fundamental right in cases such as *Saeed* is arguably both a cause and effect of this process. It is a cause because that designation confirms that legislation seeking to exclude natural justice will be interpreted with particular strictness. It is an effect because it marks the logical consequence of the expansion of the widened duty to observe the rules of natural justice.

Perhaps the only sure way to exclude the rules of natural justice is by use of a clause that directly states that 'the rules of natural justice do not apply' to a specified decision-maker or type of decision. Such a clause gained acceptance in *Seiffert*, but one can understand why parliaments would generally shy away from such legislation. The very reason that natural justice was declared a fundamental right is also the reason that parliaments are reluctant to exclude the doctrine in the clear terms required. In my view, the reluctance of parliaments to 'squarely confront' that issue vindicates the increasingly strict approach of the courts.