Administrative Law

Neutrality, the Judicial Paradigm and Tribunal Procedure

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PART 1 — INTRODUCTION

Tribunals, which now play a central role in the legal system, are created in order to achieve a variety of goals. Two very general goals are first, the provision of non-legal expertise in dispute resolution, and second, the adoption of a procedure for resolving disputes which is markedly different from that of courts. The "different" procedure is procedure which is informal, expeditious and inexpensive. Adoption of informal procedure is regarded as a political goal in itself or, more often, as a means for achieving expedition and inexpense in dispute resolution, these being inherently valuable ultimate goals. Non-adversarial procedure also tends to be regarded as a means for achieving the goals of expedition and inexpense. This essay is concerned with the extent to which it is possible and indeed desirable to achieve a procedure different from that of courts. It is not concerned with the question as to which procedure is best designed to attain the truth. The ultimate political goals of expedition and inexpense may be undermined by a tendency of tribunal members or legal practitioners, or both, to insist upon unnecessarily formal and adversarial procedures.[1] The goals may also appear to be hampered by judicial decisions which require certain adversarial and formal procedures to be followed by reason of the implication of the common law rules of natural justice, or procedural fairness. From this perspective formal procedure and adversarial procedure appear to be forms of dispute resolution which are instrumentally undesirable in the context of a wide range of tribunals.

Because the judicial paradigm of formal and adversarial procedure is, to lawyers, a powerful and familiar model for decision-making, it tends

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[1] Institutionalised informalism has thus been alleged to breed formalism: R. L. Abel, "Introduction" and "The Contradictions of Informal Justice" in Abel (ed.) *The Politics of Informal Justice* (1982) Vol 1.

to overshadow alternative answers to procedural choices for any one of the enormous variety of tribunals with their varying statutory provisions relating to procedure. A direct legislative response to the dominance of the judicial paradigm is found in provisions making more explicit the requirement that procedure be informal, expeditious or inquisitorial. Provisions ousting judicial review appear to reinforce the intention that these procedural provisions should operate free from the imposition of judicial conceptions of fair procedure. Certain of the procedural features which may otherwise be required by procedural fairness, such as an oral hearing, may also be excluded. Exclusion of lawyers as tribunal members or as representatives of parties to tribunal proceedings is perceived as an indirect means for achieving the desired informality and non-adversarial procedure. This approach is premised upon the view that legally qualified tribunal members and legal representatives of parties are largely responsible for the formalisation of tribunal procedure where neither the empowering statute nor common law so requires. It would be difficult to devise an empirical study to test the validity of this common perception. Non-lawyers may also be responsible for formalisation of procedure of some tribunals.

As a preliminary to analysis of tribunal procedure, in Part 2 a theoretical framework is developed for analysing the procedure of courts and tribunals. The impact of procedural fairness on procedure is examined in Part 3, and the question considered whether the rationale of procedural fairness is the same as that of adversarial procedure. This analysis permits a closer consideration in Part 4 of judicial reasoning in determining to what extent tribunals are free to depart from the judicial paradigm of procedure. In Part 5—Conclusions a rationale for procedural fairness different from that of adversarial procedure is suggested, a rationale based on the argument that there may be room in Australia for a doctrine of "process values", enshrining a certain sort of fair procedure of tribunals.

PART 2 — PARADIGMS OF PROCEDURE

Tribunal procedure is usually analysed by way of comparison with the procedure of courts, which is regarded as the most formal and the most adversarial of decision-making processes. The comparison often rests upon the assumption that the full range of these two sets of procedural features—formal, and adversarial—inevitably accompany each other. The aim of this Part is to demonstrate the incorrectness of this assumption. To this end an analysis is made of the nature of the formality/informality distinction and of the adversarial/inquisitorial distinction. The analysis shows that the procedure of courts more often than not involves a departure from the judicial paradigm of formal and adversarial procedure. However, as a preliminary to description of the judicial paradigm, something must be said about the usefulness of projects of defining "adjudication" or other terms denoting types of decision-making or procedure.

Attempts are sometimes made to define "adjudication" as a particular

mode of decision-making.[2] Broad distinctions are often drawn between powers of an investigative nature and powers of an adjudicative nature. Galligan draws a typology of four "modes of adjudication" according to the degree to which discretion or "policy" is mixed with the adjudicative aspect of the decision.[3] In order of the decreasing incidence of "settled" rules and an increasing proportion of policy in the decision, the modes of adjudication are "adjudication", "modified adjudication", "specific policy issue" and "general policy issue". Galligan admits that lines cannot be drawn precisely between the four types of adjudicative decisions he describes.[4] The typology is intended both to underline the variety of administrative decisions and to operate as a tool for determining the appropriate procedure for reaching the outcome in a decision-making process. Thus, Galligan argues that if the mode of decision-making is "adjudication", "adjudicative procedure" should be followed, whilst further along the spectrum of modes of decision-making other modes of participation such as "consultation", "negotiation" and "mediation" become appropriate.

Such endeavours are worthwhile if they claim to do no more than classify certain sorts of social interaction. But if a type of interaction is defined in order to draw a conclusion as to the type of procedure which ought to be followed to "resolve" it, then the reasoning is circular. "Adjudication" itself tends to be defined by reference to its particular decision-making *procedure.*[5] The very term "adjudication" becomes obsolete. The term is not used in discussion to follow, in which administrative decision-making is described by resort to features of procedure, which occur in an unruly and immensely varied fashion in the course of social interaction. In any case of decision-making there may occur a predominance of a cluster of features of a certain variety, which reflects a distinct general type of procedure. Identification of these types of procedures is useful, as the discussion in Parts 3 and 4 aims to demonstrate, in assessing the appropriate content of procedural fairness in relation to particular instances of administrative decision-making.

Formal/Informal

Informal decision-making of institutions is characterised by the following procedural features. The use of legal professionals is minimised, public accessibility is maximised by removing bars of a financial or rule-based nature to the availability of remedies or assistance. By making procedure

[2] L. L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harv. L. Rev.* 353; M. Golding, "On the Adversary System and Justice" in R. N. Bronaugh (ed) *Philosophical Law* (1978); D. J. Galligan, *Discretionary Powers* (1986) at 114-7; M. Bayles, *Procedural Justice* (1990) at 14.

[3] Galligan *op. cit. supra* n 2 at 340-44.

[4] *Id.* at 116.

[5] It is difficult to extract from Galligan's definition of adjudication in terms of the settled nature of rules, those rules which relate to procedure: "[it] is the paradigm of adjudication which is represented best in criminal and civil trials; it is also the procedure followed by many administrative authorities and tribunals, although the more closely decisions approach this mode, the less scope there is for discretion": *ibid.*

simple and flexible, the cost and time involved in dispute resolution is dramatically reduced. Insofar as norms relating to procedure can be distinguished from norms relating to matters of substance, informality also has a substantive impact. Common sense and social norms calculated to achieve justice in the individual case are applied in preference to legal norms.[6]

Informal procedures may be followed by institutions either as a matter of legal duty or of practice. Legal norms, whether statutory or common law, governing the procedure of an institution, may indicate formal procedure whilst informal procedural features predominate in practice. Conversely, institutions whose empowering statutes and other extrinsic materials indicate a legislative intention that they dispense informal justice, may become increasingly formal in their procedure, perhaps as a result of the participation of lawyers in their decision-making.[7] In characterising the nature of the procedure of an institution, legal duty and practice must be taken into account. In this Part the analysis is chiefly concerned with statutory requirements. The impact of the common law duty of procedural fairness is considered in Part 3.

The nature of the formal/informal characterisation of a institution or its procedure can be understood by reference to the cluster concept.[8] A cluster of informal features such as those described provides the necessary and sufficient conditions for an instance of an institution dispensing informal justice. If one informal feature were removed we might continue to describe the institution as an informal one, just as we might still call a piece of fruit a lemon if it lost its yellowness. But we would be reluctant to admit that a piece of fruit lacking yellowness, acidity and a roundish shape is a lemon. Usually we know a lemon when we see one, and there are some things we would refuse to call a lemon. Similarly, an institution lacking a cluster of informal features ceases to be an informal one. However, in some cases falling within the penumbra of the concept of a lemon we may be simply not sure whether the object before us is a lemon. Just as it is difficult to specify which are the necessary and sufficient features of a lemon, so it is difficult to specify the necessary and sufficient features warranting classification of an institution or its procedure as informal.

Courts are regarded as amongst the most formal of legal institutions. Yet formality is not a feature of procedure which is always realised in every respect. The formality of courts has been reduced in response to

[6] The adjectives "formal" and "informal" are therefore applied to procedure and to institutions. The adjectives "adversarial" and "inquisitorial", on the other hand, are terms which can only be applied to procedure. For examples of informal procedure see G. Ganz, *Administrative Procedures* (1974) Ch. 2.

[7] See below at page 23.

[8] On the notion of a cluster concept see H. Putnam, "The Analytic and the Synthetic" in (eds). Feigl and Maxwell 3 *Minnesota Studies in the Philosophy of Science* 378 (1962). See also the notion of family resemblance in L. Wittgenstein, *Philosophical Investigations* (trans. Anscombe, 2nd ed, 1958) Part 1, para 66; J. A. Farmer, *Tribunals and Government* (1974) at 184, 189-92.

recognition of the need for improved accountability and efficiency. Legal aid and the liberalisation of standing rules have to some extent improved access to courts. The rules of evidence have long imposed upon a judge the duty to exclude irelevant material and to discourage repetition and ensure that cross-examination is not protracted.[9] Performance of this common law duty should serve the goal of prompt disposal of the proceedings. However, the duty is limited by the requirements of procedural fairness.[10]

The introduction of alternative methods of dispute resolution, largely as a response to the cost and delay of court procedure, in a sense replaces by more formal means the informal practice of some judges of encouraging litigants to settle where this course appears appropriate. Facilities, whether by direction of the judge or on a voluntary basis, whether by officers of the court or as an adjunct to the court, for pre-trial conferences, counselling, mediation, conciliation arbitration and other methods for facilitating settlement or a speedier resolution of the conflict, have become a common feature of court procedure.[11] Despite this dilution of the judicial paradigm in practice generally there is not such a cluster of informal features that a court itself should cease to be classified as a formal institution.

Adversarial/Inquisitorial

Often linked with the counterposition of formalism and informalism is the distinction between adversarial and inquisitorial decision-making procedure. In adversarial decision-making one party wins and the other loses. Adversarial interaction may therefore be characterised as a zero-sum game.[12] Adversarial procedure can be identified by the presence of a cluster of features of which the following are prominent.[13]

The decision-maker has no stake in the outcome of the dispute, but is in the position of an umpire. The conduct of the process prior to a hearing before the decision-maker is left to the parties. The parties may, usually without suffering any sanction, concede to each other more time to complete the process than the rules for decision-making allow. At the hearing, information available to the decision-maker is determined by what is elicited by the parties, who ask questions of witnesses in turn. The decision-maker must allow the parties to present their cases as they

[9] *Jones v. National Coal Board* [1957] 2 Q.B. 55 at 64.

[10] See below at page 23.

[11] See the collection of essays in J. Mugford (ed), *Alternative Dispute Resolution* (1986); B. J. Preston, *Environmental Litigation* (1989) Ch. 18; Attorney-General's Department, *Discussion Paper on Civil Procedure* (1989); M. J. Fulton, *Commercial Alternative Dispute Resolution* (1989); W. Faulkes, "The Modern Development of Alternative Resolution in Australia" (1990) *Aust. Dispute Resolution J.* 61.

[12] In truth the payoffs of litigation, as one game in a series of games between the parties, are likely to reduce the total payoffs which each player would have been able by rational choice to have achieved in the interaction. See R. Axelrod, *The Evolution of Cooperation* (1984) Ch. 1; M. Bayles, *Principles of Law: A Normative Analysis* (1987) at 33.

[13] Fuller *op. cit. supra* n 2. See also M. E. Frankel, *Partisan Justice* (1978).

think fit. The decision-maker's grasp of the truth is therefore limited by the information the parties place before him and, often, the issues to which they confine their dispute. The cost of the hearing may be increased at the discretion of either party, by unjustified procedural steps and prolix argument. Only in cases of blatant protraction of the hearing by a winning party who argues issues which he loses does the decision-maker relieve the losing party of costs thereby incurred.

Through these features runs the theme which Lon Fuller has identified as the essence of adversarial procedure, namely participation in the decision-making process by the presentation of reasoned proofs and arguments by partisans before a neutral umpire.[14] As a particular form of social interaction adversarial decision-making can be viewed from the perspective of the parties or of the umpire. But it is important to recognise that the type of participation by the parties which Fuller identifies depends upon the neutrality of the umpire. Neutrality and participation are flip sides of the adversarial coin. Modification of the neutrality of the umpire impacts upon the extent to which reasoned proofs and arguments may be presented. Modification of the way in which the parties may participate affects the neutrality of the umpire.

There is an interdependence between the notion of participation and that of neutrality in adversarial procedure because of the interdependent nature of the interaction.[15] Strategic choices of the litigants are not only dependent on the expectations each has of the other's moves, but also upon the expectations each has regarding the way in which the umpire will apply the rules of the game. Subtraction of features which make up the adversarial cluster is therefore likely to exhibit a pattern: removal of one feature may necessarily imply removal of another feature. If, for example, the umpire interferes by asking a witness a question, one party's control over the presentation of the case is to that extent diminished. This interdependence of procedural features is understandable since the "features" are simply ways of describing broad categories of human interaction.

Of the two sides of the coin, neutrality presents as a notion which is more easily defined, participation being reflected in a more untidy set of principles and rules relating to presentation of evidence and argument. Yet neutrality can be understood in several senses.[16] The idea of neutrality assumed in Fuller's analysis of adversarial procedure appears to be what Raz has described as "principled neutrality".[17] The umpire is neutral in this sense if, having the power to affect the fortunes of the

[14] Fuller *op. cit. supra* n 2; "The Adversary System" in H. J. Berman (ed) *Talks on American Law* (1961).

[15] See also P. Weiler, "Two Models of Judicial Decision-Making" (1968) 46 *Can. Bar Rev.* 406 at 412-415.

[16] See generally A. Montefiore (ed), *Neutrality and Impartiality: The University and Political Commitment* (1975) at 1-33.

[17] J. Raz, *The Morality of Freedom* (1986) at 113.

parties, he does his best to help or hinder the parties to an equal degree. He does so because he believes that there are reasons for so acting, which essentially depend on the fact that the action has an equal effect on the fortunes of the parties. Certainly the umpire hinders an offending side when he imposes a penalty and helps the other side. But had the circumstances relating to the actions of each side been reversed he would have acted accordingly and imposed the penalty on the side which deserved it. The helping or hindering occurs through the umpire's application of the rules of the game governing the interaction of the parties. An umpire who was not neutral would act so as to help one side at the expense of the other. The strength or weakness of each side does not influence the umpire's decision. While this sense of neutrality will suffice for analysis of what is meant by adversarial procedure, it will be necessary in Part 5 to distinguish from it the notion of "disinterestedness", which may provide a better basis for developing a rationale for procedural fairness.

The possibility and the coherence of political neutrality has been questioned in the context of discussion of the neutral principles which Rawls claims would be rationally chosen by individuals in the original position. Raz has argued that the notion of political neutrality is flawed because it presupposes an impossible distinction between hindering and not helping, and because it depends upon the baseline relative to which behaviour is judged. There may be cases where there is no neutral option.[18] This debate does not affect the notion of neutrality in the context of analysis of adversarial procedure. This analysis is not concerned with state neutrality between differing conceptions of the good, but rather with a conflict occurring in a situation where the baseline is already set. The task of the umpire is to apply the rules to players in a game which is distinct from others and, more often than not, will not recur between the same parties and umpire.

However, suppose the rules of the game require the umpire to take into account the relative strength or weakness of the parties? The rules may provide that the race is to be run on handicap times and the party who wins line honours wins the race. The association of neutrality with rule-application introduces complications which cannot be explored in detail here. Suffice it to say that substantive rules affecting neutrality can be dealt with as non-adversarial procedural features whose progressive addition to the set of rules applied by the umpire undermines the predominance of a cluster of adversarial features, to the point of its collapse into some other cluster, notwithstanding the neutral application of those rules.

Turning to inquisitorial procedure, the dominating theme is the decision-maker's power to determine the course of the decision-making process and to elicit information from the parties in order to form a

[18] *Id.* at 117- 124. For a critique of this idea, see W. Sadurski, *Moral Pluralism and Legal Neutrality* (1990) pp 99-111.

view as to the truth. This feature may be realised to a greater or lesser degree. An increase in such power of the decision-maker, with a corresponding decrease in the power of the parties to control the process and predict its course according to open, prospective rules, indicates an increase in the degree to which the process is inquisitorial.

The control of the decision-maker over procedure is reflected in a range of inquisitorial features. Much of the decision-making properly classified as inquisitorial allows the decision-maker to be actively involved in fact gathering from an early stage and throughout the decision-making process, this function being interspersed with oral or written hearings where the parties make submissions. An example is the procedure of an ombudsman. Because the pre-hearing and hearing stages are not clearly separated, the decision-making process is said to be discontinuous. The decision-maker may even appoint experts to investigate the facts, as do the *tribunaux administratifs* of the *Conseil d'Etat* in France.[19]

The absence of some inquisitorial features, or the presence of some adversarial features, does not compel the conclusion that the institution is not inquisitorial. Procedure may be adversarial without the umpire's being completely passive.[20] A procedure which permits a party to cause delay may not preclude classification of a tribunal as inquisitorial. The preparation of a case for eventual judgment in the *tribunaux administratifs* could, prior to the introduction of reform in 1981, be delayed for years by the administration or by the plaintiff, despite the ultimate right of the rapporteur to end the exchanges between the parties during the *instruction*.[21] Proceedings before the *tribunaux administratifs* have a muted adversarial element. They are described as "*contradictoire*" in that neither party can communicate to the tribunal any argument or information which is not open to the inspection and reply of the other. And at the *audience publique* prior to judgment, counsel are offered an opportunity (rarely utilised) to plead orally in addition to their written pleadings.[22] Similarly, discontinuity is not a feature whose absence would necessarily prompt the conclusion that decision-making is not inquisitorial. There are degrees of discontinuity. In the case of the *tribunaux administratifs* of the *Conseil D'Etat* only the involvement of the *rapporteur* in the *seance d'instruction* of the *Sous-Section*, in the subsequent *seance de jugement* and in the drafting of the judgment, can be described as discontinuous. The other members of the decision-making team enter the hearing process at distinct stages and they bring to it fresh minds.[23] A related feature, whose presence may not be fatal to classification as inquisitorial, is a clear distinction between the function of presenting evidence and argument and the function

[19] See generally L. N. Brown and J. F. Garner, *French Administrative Law* (3rd ed, 1983) at 61-2.

[20] Fuller *op. cit. supra* n 14 at 41.

[21] Brown and Garner *op. cit. supra* n 19 at 60, 62-3.

[22] Oral pleadings are more common before the *tribunaux administratifs*. *Id.* 67.

[23] Brown and Garner *op. cit. supra* n 19 at 76.

of listening. Again in the case of the *tribunaux administratifs* the presentational role is played not only by the *rapporteur*, who has the additional role of listening, but also by the parties' counsel, yet the predominant cluster of features remains inquisitorial.

The Judicial Paradigm

The judicial paradigm of adversarial procedure requires that a clear distinction be maintained between the functions of advocate and those of the judge, and between the functions of judge and those of jury.[24] It is for the parties or their advocate to present their cases. It is for the judge to act as a neutral umpire. The judge should simply hold the balance between the contending parties, rather than conduct the examination himself, in which event he would "descend[s] into the arena and [be] liable to have his vision clouded by the dust of conflict".[25] The neutrality of the judge is thus expressed in a principle of non-intervention. Statutory provisions or rules of court may override the principle in particular jurisdictions, such as provisions for the appointment of court experts.[26] Some specialist courts may not be bound by the rules of evidence at all.[27]

Yet the principle of non-intervention remains the foundation for many rules of evidence relating to pre-trial procedure as well as the conduct of the hearing itself.[28] The principle also underpins the law relating to contempt of court.[29] As will be seen in Part 3, tribunals which are not bound by the rules of evidence nevertheless respect principles on which they are based. Attention is confined here to the operation of the principle in relation to procedure at the hearing. Applied without qualification, the principle requires that only the parties may call witnesses and that the judge play no part in the interaction between advocates and witnesses in the course of examination, cross-examination and re-examination, other than to resolve disputes as to admission of evidence.[30] The many other rules of evidence which are also founded upon the principle cannot be considered here. Examination of the scope for departure from strict conformity to the principle of non-intervention in relation to the calling of witnesses and their examination provides the opportunity to analyse the core of the judicial paradigm.

[24] The distinction between the roles of judge and jury will not be explored here.

[25] *Yuill v. Yuill* [1945] 1 All E.R. 183 per Lord Greene MR.

[26] See, for example, *Minnesota Mining and Manufacturing Co v. Beiersdorf (Australia) Ltd* (1976-78) 144 C.L.R. 253 at 268-70.

[27] For a discussion of procedure in the Land and Environment Court, see Preston *op. cit. supra* n 11 at 290f.

[28] See A.L.C. Ligertwood, *Australian Evidence* (1988) Ch. 5.

[29] See *Re J.R.L.; Ex parte C.J.L.*(1986) 161 C.L.R. 342 at 350.

[30] For discussions of the rule, see R. Eggleston, "What Is Wrong With the Adversary System?" (1975) 49 *A.L.J.* 428; P. D. Connolly, "The Adversary System—Is It Any Longer Appropriate?" (1975) 49 *A.L.J.* 439; Sir Robert Megarry, "Temptations of the Bench" (1978) 16 *Alta. L. Rev.* 406 at 409; U. Gautier, "Judicial Discretion to Intervene in the Course of the Trial" (1980) 23 *Crim. L. Q.* 88 at 95-6; I. F. Sheppard, "Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System?" (1982) 56 *A.L.J.* 234.

In entering into this examination the inherent inequality lurking beneath the principle of non-intervention needs little elaboration. The advocates will differ in their skill. The capacity of a party to engage an advocate at all, and any choice of advocate, normally depend upon the financial capacity of the party. Though the umpire is to hold the balance, a persistent and significant imbalance in capacity to present a case may undermine that endeavour. But the rationale of neutrality is concerned with the help or hindrance provided by the umpire, not with ensuring equal starting positions in the game.[31]

In the classic authority on the scope of the principle, *Jones v. National Coal Board*,[32] the English Court of Appeal admitted that the principle of non-intervention does not carry absolute weight. There are other principles which may compete with it.

In relation to the calling of witnesses and the conduct of examination, the most important competing principle stems from the duty of the judge to ensure the propriety and fairness of the criminal trial in a general sense, in the interests of justice. An implication of the principle of fair trial may be that in a criminal trial in an exceptional case the judge has power to call a witness.[33] The duty to see that evidence comes out fairly and intelligibly is normally performed by maintaining principled neutrality—neither helping nor hindering either party. Whilst reinforcing the adversarial nature of the proceedings, there is nevertheless an inquisitorial element inherent in the duty—a fair trial may only be secured if a particular witness is called.[34]

The principle of fair trial will rarely require a judge to call a witness. For a variety of reasons, which cannot be explored here without delving into other aspects of the law of evidence, both parties may be reluctant to call a witness who can give evidence on a crucial issue.[35] Clearly there is nothing improper in the trial judge's questioning counsel to discover the reasons why counsel declined to call a particular person.[36] The trial judge may even properly invite counsel to reconsider such a decision.[37] However, it has been a controversial question whether the principle can ever empower the judge to call a witness of his own motion. In *R v. Damic*[38] the New South Wales Court of Criminal Appeal held that the trial judge has such a power of his own motion to call a witness regardless of the attitude of the parties, provided that in his discretion he considers

[31] This point is illustrated by the discussion of *Sullivan's* case below at pages 40-5.

[32] [1957] 2 Q.B. 55.

[33] It is clear that the judge has no power to make a binding order that a witness be called by the Crown: *Whitehorn v. R* (1983) 57 A.L.J.R. 809 at 811 per Deane J; *R v. Apostilides* (1984) 53 A.L.R. 445.

[34] Qualification of the principle may also occur in relation to pre-hearing procedure. See, for example, *Traill v. Australian Broadcasting Commission* [1988] Tas. R. 1 at 8, where the court required a party to supply adequate particulars in order that "anything in the nature of trial by ambush" be avoided.

[35] See Ligertwood *op. cit. supra* n 28 para 6.28.

[36] *Ibid.*

[37] *Ibid.*

[38] [1982] 2 N.S.W.L.R. 750.

that the interests of justice make that course necessary. Both parties then have a right to cross-examine the witness called by the judge.[39] The exceptional case is most likely to arise where the accused is not represented. On the question as to how such action by a judge could be accommodated within adversarial procedure, Street C.J. said:

> [I]t is necessary to recognize that there is some inconsistency between the proposition that a judge has power to call a witness and the proposition that a judge should not descend into the adversarial arena. Those who embrace the latter proposition as an absolutism, as do Isaacs and Rich JJ [*in Titherage v. R* (1917) 24 C.L.R. 107], are thereby inevitably committed to rejecting the former. The calling of a witness by a judge involves the judge entering the adversarial arena by taking upon himself the initiative in adducing the witness's evidence.
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> Those who support the existence of such a power in the trial judge recognize its inconsistency with the rule which prohibits the judge from involving himself in the adversarial context. They regard the judge, however, as having an overriding discretion to intrude upon that prohibition where the particular interests of justice so require. Such intrusion must necessarily be kept to the bare minimum which the judge conceives to be necessary.[40]

Street C.J. pointed out that a non-adversarial element in any event intrudes into the conduct of a criminal trial in that the trial judge may have a duty at the summing-up stage to raise arguments and aspects of the evidence not raised by counsel. The judge must give an adequate direction as to the law, including perhaps a defence which has not been argued, and as to the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them base a verdict.[41]

A year later, in *Whitehorn v. R*,[42] the High Court failed to provide clear guidance on the issue. The majority found it unnecessary to consider whether a judge presiding over a criminal trial has the power to call a witness of his own motion and without the consent of either the Crown or the accused.[43] They proceeded direct to the conclusion that the accused had been denied a fair trial which constituted a miscarriage of justice, because the Crown had failed to call a child who had complained of

[39] *R v. Damic* [1982] 2 N.S.W.L.R. 750 at 756, the leading judgment being given by Street CJ, with whom Slattery and Miles JJ agreed.

[40] *Id.* 760-1. Street CJ regarded *Titherage v. R* (1917) 24 C.L.R. 107, the only High Court decision containing dicta on the point, as simply an authority that a miscarriage of justice arises if a judge calls a witness of his own motion "and thereafter descends to an excessive degree into the adversarial arena: [1982] 2 N.S.W.L.R. 750 at 759.

[41] *Id.* 761.

[42] (1983) 57 A.L.J.R. 809.

[43] Gibbs CJ, Brennan, Deane JJ: *id.* 809, 811. Murphy J may also belong to this group as he did not clearly state that the judge had power to call the witness: id. 810. See the further comments below at page 17 regarding Deane J's judgment.

indecent assault and the accused had been convicted on the basis of a confession he later denied. Only Dawson J. unequivocally denied that the trial judge has power to call a witness of his own motion.[44] In his view, only if both parties consented did the judge have such a power, but it was difficult to envisage such compelling circumstances:

> The reality is that to assert the power of a judge to call a witness himself is to raise considerations which, in our adversary system, have serious implications. That is why any assertion of the existence of such a power is invariably qualified by reference to the rarity of the occasions upon which its exercise will be justified and the extreme caution which should be observed in its use.
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> A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the trial judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. If a prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel.[45]

Dawson J. disapproved the decision in *R v. Damic*, pointing out that by calling a psychiatrist as a witness in that case the trial judge had "shifted the ground upon which the parties [had] determined to contest the issue" by raising the issue to the availability of a defence of insanity which would not otherwise have been raised, thereby exposing the accused to deprivation of liberty for an indefinite period.[46]

However, in *R v. Apostilides*[47] the High Court recognised the existence of the exception but said it would rarely arise. Only in the "most exceptional" circumstances would a trial judge be constrained to call a person to testify. The High Court warned of the need for caution, sympathising with the view expressed by Dawson J. in *Whitehorn*.

In the course of criminal proceedings then, the principle of non-intervention will rarely compete in an explicit manner with the principle of fair trial. Deane J.'s judgment in *Whitehorn* makes it clear that the principle of fair trial is not to be weighed directly against that of non-intervention in the interaction between judge and advocates in the course of the taking of evidence. Rather it is applied when the judge sums up

[44] *Id.* 819.
[45] *Ibid.*
[46] *Id.* 819-820.
[47] (1984) 53 A.L.R. 445. *Whitehorn* was also applied, in a more limited fashion, in *Ugle v. R* (1989) 167 C.L.R. 647. See also *R v. R* (1989) 18 N.S.W.L.R. 74 at 84f; *R v. Andronicus* (unreported, Court of Criminal Appeal of New South Wales, 13 November 1989).

to the jury or deals with an application for an adjournment or for discharge of the jury and at the later stage, by an appellate court when it exercises power to quash a conviction.[48] The principle of fair trial will therefore indirectly structure the non-reviewable exercise of discretion by the advocate for the prosecution in choosing whether or not to call a witness. The inquisitorial element in the principle may manifest itself in other aspects of procedure. For example, flagrant incompetence of counsel (such as forgetting to ask crucial questions in cross-examination and failing to remedy the omission later in the trial) may in an exceptional case cause a miscarriage of justice which attracts appellate intervention.[49] The principle of fair trial is a legal norm governing the interaction. Although but rarely invoked by the judge to change the course of the trial, it affects expectations and hence strategic choices of the parties because of its potential to affect the summing up or a later decision by an appellate court to quash the conviction.

There is no direct High Court authority on whether the principle of fair trial empowers a judge to call a witness in civil proceedings. The view was taken in *Enoch and Zaretsky Bock and Co's Arbitration*[50] that a judge or arbitrator has no right to call a witness except with the consent of the parties. There are supporting dicta for this, the English approach, in *Titherage*, but the decision was subjected to fundamental criticism by Street C.J. in *Damic*.[51] More recently, in *Obacelo v. Taveraft*,[52] an action for damages arising out of the sale of land, Wilcox J. took the view that consistency with the application of the principle in criminal trials, together with the judgment of Street C.J. in *Damic* indicated that such a power exists in civil proceedings. The important point is to establish that the case is indeed exceptional, in that the interests of justice require that the judge call the witness in order that evidence be given to resolve some critical issue. Counsel was unable so to persuade Wilcox J. in *Obacelo*.

A second principle to be weighed against the principle of non-intervention permits the judge to ask witnesses questions. In its most limited form the principle, which forms part of a principle that the proceedings be intelligible to all participants, is purely a norm of common sense, recognising the desirability of the umpire's understanding the proofs and arguments being presented to him. Thus, in *Jones v. National Coal Board*, Denning J said that the judge may intervene if by reason of the technical nature of the evidence he needs to put questions of his own so that he can properly follow and appreciate what the witness is saying.[53] However, this should occur as infrequently as possible during cross-examination,

[48] *Id.* 811.

[49] *R v. Birks* (1990) 19 N.S.W.L.R. 677. Note the discussion by Gleeson CJ of the tension between the principle of non-intervention of the adversary system and the duty of an appellate court to correct a miscarriage of justice: *id.* at 683-5.

[50] [1910] 1 K.B. 327.

[51] See also *R v. Evans* [1969] V.R. 717 and *R v. Lucas* [1973] V.R. 693.

[52] (1986) 66 A.L.R. 371.

[53] [1957] 2 Q.B. 55 at 65.

or else the witness will gain valuable time for thought before answering a difficult question and cross-examining counsel may be diverted from the course he had intended to pursue.[54] In *Damic*[55] as well it was emphasised that great care must be taken to avoid interference with the course of examination yet it is permissible and proper for the judge to ask questions to elucidate answers given by the witness. There is scope for interference by the judge even where such common sense concerns have not arisen. The number of questions and the content and course of the questions indicate whether interference has been undue.[56] Whether interference is undue is a question of degree. In *Galea v. Galea*,[57] Kirby A.C.J. held that it is a question to be considered in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. Vigorous interruption early in the trial or in the examination of a witness may not be excused as readily as interruption later for the purpose of the judge's better comprehending the issues and weighing the evidence. Kirby A.C.J. recognised the weight of the principle of non-intervention has diminished. It is more common now for judges to take an active part in the conduct of cases, as a response to the greater pressure of court lists, specialisation of the judiciary and legal profession, the requirements of procedural fairness (discussed below) and:

> the heightened willingness of judges to take greater control of proceedings for the avoidance of injustices that can sometimes occur from undue delay or unnecessary prolongation of trials deriving in part from new and different arrangements for legal aid.[58]

The principle of non-intervention is not applied absolutely, but may be outweighed by considerations relating to expedition and inexpense.

A third principle which must be weighed against the principle of non-intervention, is the doctrine of judicial notice.[59] The judge is not prohibited absolutely from deciding material facts on the basis of his own knowledge rather than evidence presented by the parties. The principle of judicial notice does not justify inquisitorial activities on the part of the judge beyond having resort to reference works.[60] The facts of which judicial notice may be taken must be notorious and indisputable. The principle of judicial notice is also a norm of common sense which nevertheless operates as a limit to absolute application of the principle of non-intervention.

These common law principles constitute well-established non-adversarial aspects of the procedure of courts, which must be weighed

[54] *Ibid.*
[55] [1982] 2 N.S.W.L.R. 750 at 762-3.
[56] *R v. Davies* [1984] 3 N.S.W.L.R. 572.
[57] (1990) 19 N.S.W.L.R. 263 at 281.
[58] *Id.* 282.
[59] See Ligertwood *op. cit. supra* n 28 paras 6.33 - 6.41.
[60] *Cavanett v. Chambers* (1968) S.A.S.R. 97; *Gordon M Jenkins & Associates Pty Ltd v. Coleman* (1989) 87 A.L.R.477. If not justified by the doctrine of judicial notice, reliance upon material not disclosed to the parties is likely to constitute a denial of procedural fairness, as to which see Parts 3 and 4.

against the principle of non-intervention. They are described as "principles" on the basis that clashes between them are to be resolved in terms of appropriate weight in the circumstances of the case rather than all-or-nothing inconsistency.[61] The principles can all be loosely gathered under the umbrella of the law of evidence. However, the principles of procedural fairness, or natural justice (distinct from the principle of fair trial),[62] also tend to be associated with the principle of non-intervention, but fall within the sphere of administrative law. These principles are, broadly, that a person whose interests will be affected by a decision ought to have a reasonable opportunity to present his case, that the decision-maker ought not to be biased and that the decision be based upon logically probative evidence. There are many cases, couched as claims of denial of procedural fairness, which, like the cases so far discussed, raise for consideration the question whether a judge has improperly intervened in a party's presentation of his case. When raised in the context of a criminal trial, the principle of non-intervention tends to be discussed in terms of the law of evidence. When raised in the context of civil proceedings or proceedings before a tribunal, procedural fairness tends to be invoked.[63] It will be convenient to defer discussion of the procedural fairness cases to Part 3 where the question whether the principle of non-intervention provides a rationale for procedural fairness is considered in detail.

The judicial paradigm of procedure is realised neither in practice nor in legal principle. Analysis of the formal/informal distinction and of the adversarial/inquisitorial distinction has shown that some features of court procedure are informal and some are of an inquisitorial nature. The judicial paradigm is useful only as an ideal model. Procedure which does not meet the judicial paradigm may nevertheless contain features necessary and sufficient to form a predominant cluster warranting classification as formal/adversarial procedure.

The cluster concept is useful in demonstrating that types of procedure are not absolute. The labels of formal or informal, adversarial or inquisitorial, simply reflect the nature of the predominant cluster of features of that nature. Moreover, there is no necessary relationship between the features associated with formality and those associated with the adversarial, nor between the features associated with the informal and the inquisitorial. The procedure of a court can generally be classified as formal/adversarial,

[61] R. Dworkin *Taking Rights Seriously* (1977) at 24-8.

[62] On the distinction see the discussion of *R v. Epping and Harlow Justices; ex p Massaro* [1973] Q.B. 443 in *Re Van Beelen* (1974) 9 S.A.S.R. 163.

[63] For examples of civil cases where both *Jones v. National Coal Board* and the procedural fairness lines of authority were argued, see *Thiess Bros Pty Ltd v. Carbone* (1976) 15 A.C.T.R. 15 (a challenge to the decision of an magistrate conducting a worker's compensation arbitration of his own motion to refer a medical examination to a referee); *Stead v. State Government Insurance Commission* (1986) 67 A.L.R. 21 (failure of a judge in his judgment to honour the indication he had given counsel at the hearing of a negligence action that a particular medical witness's evidence would not be accepted); *Escobar v. Spindaleri* (1986) 7 N.S.W.L.R. 51 (peremptory dismissal of worker's compensation claim after counsel declined the judge's invitation to call further evidence); *Galea v. Galea* (1990) 19 N.S.W.L.R. 263 (intervention by judge's questions and comments during cross-examination in action conerning liability to return contents of safe).

even though the judicial paradigm is not met. Some courts, however, in certain of their jurisdictions, may proceed in a manner which is not clearly predominantly of a formal nature.

PART 3—PROCEDURAL FAIRNESS

The analysis of procedure has so far been confined to discussion of the common law principles of the law of evidence, with reference to modifications introduced by alternative dispute resolution mechanisms. It is time to consider the impact of procedural fairness upon procedure and to assess to what extent it requires procedure which is formal or adversarial. Some of the procedural fairness cases discussed in this Part concern courts, some tribunals. It would be artificial to try to discuss separately cases conerning each of these types of decision-makers, not only because of the difficulty of distinguishing a court from a tribunal, but also because the purpose of the discussion is to test the appropriateness of a particular rationale for procedural fairness. Nevertheless, a more detailed analysis of the impact of procedural fairness upon the procedure of some tribunals is reserved for Part 4. The frequently perplexing problem of reconciling procedural fairness with statutory requirements of informal and inquisitorial procedure has traditionally affected tribunals to a greater extent than courts. The argument will be pursued in Part 4 that a problem is perceived only when neutrality is falsely assumed to provide a rationale for procedural fairness.

Procedural fairness has its historical origins in the assertion by the Court of King's Bench of its power to impose procedures upon bodies subject to its control. Whether or not procedural fairness evolved from the imposition of a judicial paradigm of procedure upon administrators, the basis for the implication of procedural fairness has undergone such radical development that old rationales for interference by the courts cannot be assumed to continue to be adequate.[64]

In *Kioa v. West*[65] Mason C.J. observed that the critical question in relation to procedural fairness is no longer whether procedural fairness is implied in relation to an administrative decision but what does it require in the circumstances of the particular case. Provided an individual's interests are affected the decision-maker must observe procedural fairness. The question of implication has nevertheless remained controversial, largely because of clashes between a liberalised conception of procedural fairness and other fundamental principles in adminstrative law[66] However, for present purposes regarding the analysis of procedure, it is true to say that the critical issue is one of the content of procedural fairness, its requirements being flexible according to the circumstances

[64] R. A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: I" (1980) 25 *McGill L. J.* 520.

[65] (1985) 159 C.L.R. 550 at 585.

[66] See *State of South Australia v. O'Shea* (1987) 73 A.L.R. 1; *Haoucher v. Minister for Immigration and Ethnic Affairs* (1990) 93 A.L.R. 51; *Attorney-General (NSW) v. Quin* (1990) 93 A.L. 1.

of the particular case. The issues involved in determining content echo many of the issues associated with the formal and adversarial requirements of the rules of evidence. Related to formal procedure are issues of the strict application of legal norms, the opportunity to protract proceedings, and the use of legal representatives. Related to adversarial procedure are issues of notice that a decision will be made, openness of the hearing, prior disclosure of certain material upon which the decision will be based, an opportunity to present a case, perhaps with legal representation, including calling, examining, cross-examining and re-examining witnesses.

The impact of procedural fairness on the formality of procedure can be dealt with briefly here as it will be considered again in Part 4. In order to allow parties properly to enjoy the opportunity to present their cases a court or tribunal may be discouraged from robust application of rules of evidence relating to exclusion of irrelevant material and the reduction of repetition and prolixity. Imposition of an arbitrary time limit upon the presentation of both parties' cases may constitute a denial of procedural fairness.[67] Second, procedural fairness requires that courts afford parties the *opportunity* to be represented by lawyers. Lawyers play a useful role in presenting argument on legal issues, and indeed in identifying relevant issues and evidence which ought to form part of the presentation of the case. Whether the participation of lawyers in aggregate shortens proceedings because of the application of these skills, or on the other hand protracts proceedings because of unnecessary or lengthy argument in relation to the evidence or technical legal issues will probably never be empirically tested in a satisfactory manner. Many commentators accept it as beyond argument that lawyers increase the formalisation of procedure.[68] It is certainly probable that the participation of lawyers deters a tribunal from having resort to the application of norms of common sense or popular morality.

Turning to consider the relationship between procedural fairness and adversarial features of procedure, there is a very close similarity in the issues arising in each context. There is therefore a temptation to assimilate the responses and even to assume that the unifying theme for procedural fairness is the principle of non-intervention, which ensures the neutrality of the umpire, as it does for adversarial procedure.

An initial and telling point of distinction is that the requirements of procedural fairness may, and more often than not do, arise in interaction which is not the tripartite situation of partisans presenting proofs and arguments to an umpire. Procedural fairness must be observed in relation to the vast majority of administrative decisions in which benefits or burdens are allocated to individuals. The major exceptions are administrative decisions in response to fresh applications for benefits which have not

[67] In the *Marriage of D J and M Y Collins* (1990) 14 Fam L.R. 162; *R v. Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 29 A.L.R. 289.

[68] R. A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: II" (1980) 26 *McGill L. J.* 1 at 12.

previously been enjoyed, decisions of a "pure policy" nature and decisions of a legislative nature.[69] The borders of these categories are blurred. A legitimate expectation, or to express it in a more staightforward manner, an existing interest, may be affected by what is ostensibly a fresh application and attract the protection of procedural fairness.[70] A "pure policy" decision may for the same reasons in special cases not escape the requirements of procedural fairness.[71] Some administrative decisions may no longer be shielded from the requirements of procedural fairness by their classification as being of a legislative nature, and understandably so given the potential of these decisions to affect the interests of small groups of individuals, as do "pure policy" decisions.[72]

Primary decisions of administrators are not made in the context of a dispute.[73] Even if the decision is controversial there need not initially be a dispute between partisans resolved by an umpire. Certainly if the decision is challenged then the nature of the interaction changes. Reconsideration by a more senior administrator, by an arbitrator, a mediator, an ombudsman, some other tribunal or by a court may ensue. Each of these forms of interaction involve conflict but on analysis each may display a different cluster of procedural features. Some, such as dispute resolution by a court, may present a cluster of formal and adversarial features. But the point remains that the primary decision is not a dispute. The interaction cannot therefore be understood in terms of a predominant cluster of adversarial features of procedure.

Neutrality of the umpire, which provides the rationale for adversarial procedure, cannot therefore provide a rationale for procedural fairness. In most administrative decision-making there is no umpire who is required to act neutrally between partisans. The interaction is typically between one individual exercising legal authority and another individual whose actions have brought him within the scope of that authority. Other types of interaction also occur, each with its own cluster of procedural features. Mediation, conciliation and arbitration are types of interaction in which administrators may be involved.[74] The most common type of tripartite interaction is the review tribunal. Here the applicant and the administrator whose decision is under review are partisans and the tribunal is umpire. Even in the case of review tribunals and courts the nature of the interaction varies. If the administrator whose decision is under review is a regulatory agency or tribunal itself, it may have a legal duty to refrain from acting

[69] See generally M. Allars, *Introduction to Australian Administrative Law* (1990) [6.9-6.17, 6.34].

[70] *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 93 A.L.R. 51. Compare *McInnes v Onslow-Fane* [1978] 1 W.L.R. 1520 at 1529 and *Attorney-General (NSW) v Quin* (1990) 93 A.L.R 1.

[71] *Haoucher v. Minister for Immigration and Ethnic Affairs* (1990) 93 A.L.R. 51. Compare *State of South Australia v O'Shea* (1987) 73 A.L.R. 1.

[72] *Bread Manufacturers of New South Wales v Evans* (1981) 38 A.L.R. 93 at 102-3; *Kioa v West* (1985) 159 C.L.R. 550 at 609.

[73] See M. Bayles *op. cit. supra* n 2 at 14.

[74] L.L. Fuller, "Mediation: Its Form and Function" (1971) 44 *S. Cal. L. Rev. 305;* Macdonald *op. cit. supra* n 68.

as a protagonist.[75] If the tribunal has a function of hearing submissions from a range of interested parties in order to make recommendations as to the cause and remedies for a problem, or how the law should be reformed, or the content of new legal rules, then the interaction is said to resemble legislative activity rather than administrative decision-making.[76] It is the fact that the number of parties presenting proofs and arguments has become unwieldy rather than the fact that the umpire does not have determinative powers, which suggests that adversarial procedure appears to be inappropriate if not impossible.

However, it might be argued that neutrality can be retained as a rationale for procedural fairness in the decision-making of courts, tribunals and other dispute resolving mechanisms of a tripartite nature. The principle of non-intervention has appeal as a foundation for the rules of procedural fairness because neutrality brings with it the superficial promise of securing fairness. Judges often speak in one breath of fairness, openness, impartiality and even-handedness.[77]

Some applications of the hearing rule appear to reflect nothing more than the principle of non-intervention. After all, the hearing rule is, in a nutshell, supposed to ensure that the decision-maker "listens fairly to both sides".[78] It is the unevenness in helping or hindering which is the cause for concern where a court or tribunal member fails to afford one party an adequate opportunity to adduce evidence or present argument, or intervenes in the presentation of the case by counsel.[79] A challenge on the ground of denial of procedural fairness could equally be dealt with by application of the rules of evidence founded on the principle of non-intervention in *Jones v. National Coal Board.* The challenge is likely to be couched in terms of procedural fairness simply because the proceedings are civil or because the umpire is a tribunal or arbitrator, free to depart from the rules of evidence. Tribunals statutorily empowered to depart from the rules of evidence are not bound by the rules of evidence, but they are not obliged not to apply those rules.[80] The rules of evidence remain good guides as to what material is logically probative. The "no evidence" rule of procedural fairness provides that a failure to decide on the basis of logically probative material constitutes a denial of procedural fairness.[81] Although the no evidence rule has developed relatively recently at common law, it has support in earlier decisions on

[75] *R v. Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 C.L.R. 13; *Aldridge v. Booth* (1988) 15 A.L.D. 540.

[76] For example, a royal commission, law reform agency, parliamentary or statutory committee reviewing the making of delegated legislation.

[77] See, for example, Mason J in *Re J.R.L.; Ex parte C.J.L.* (1986) 161 C.L.R. 342 at 350.

[78] *Board of Education v. Rice* [1911] A.C. 179 at 182 per Lord Loreburn, L.C.

[79] For example, denying one party the right to cross-examine when other parties are permitted to do so will normally constitute a denial of procedural fairness: *Barrier Reef Broadcasting Pty Ltd v. Minister for Post and Telecommunications* (1978) 19 A.L.R. 425.

[80] *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 A.L.D. 33.

[81] *Id.* 33; *Minister for Immigration and Ethnic Affairs v. Pochi* (1980) 4 A.L.D. 139; *Mahon v. Air New Zealand Ltd* (1983) 50 A.L.R. 193; *Australian Broadcasting Tribunal v. Bond* (1990) 94 A.L.R. 11.

the requirements of the hearing rule in the particular circumstances of the case.[82] But these points of overlap cannot support a conclusion that neutrality provides a rationale with regard to all procedural issues raised in the context of procedural fairness.

A full examination of the principle of non-intervention in relation to the hearing rule, and in the light of the analysis of the judicial paradigm of procedure, must be deferred at this point. By first considering cases which raise the bias rule and cases which raise the bias rule and the hearing rule together, it will emerge that the principle does not reflect a rationale for procedural fairness. Once neutrality is rejected, it is possible in Part 4 to utilise the cluster concept to appreciate the richness of combinations of procedural features compatible with procedural fairness. It will also be seen that, at least in the case of the Administrative Appeals Tribunal, the judicial paradigm of procedure, expressed in the principle of non-intervention, has unduly influenced determination of the content of procedural fairness.

Turning to the bias rule, a reluctance to jettison the principle of non-intervention as a foundation for procedural fairness is felt more keenly. According to the bias rule a denial of procedural fairness occurs where the parties or the public might reasonably suspect that the umpire was not unprejudiced or impartial.[83] Prejudice or impartiality is defined by the courts by reference to "preconceived views".[84] An umpire may have preconceived views because he is in the position of accuser, having initiated the complaint or action, or because he has prior to the hearing formed a view about the credit of a witness whose evidence is significant on a question of fact which is a live and significant issue.[85] At first glance the rule appears to owe much to the principle of non-intervention which underlies the rules of evidence considered earlier. If the umpire has formed views about the case, because of interaction which has occurred outside the context of the hearing, then the parties have lost control over the presentation of proofs and arguments. One party will be helped or hindered in comparison with the other, on account of the view which the umpire brings to the hearing.

In one of the leading cases on the bias rule, *R v. Watson; Ex parte Armstrong*,[86] a Family Court judge was held to have denied procedural fairness in stating in the course of the proceedings for an order for the settlement of property that he rejected the credit of both parties in the

[82] *R v. War Pensions Entitlement Appeals Tribunal; Ex parte Bott* (1933) 50 C.L.R. 228 at 256 per Evatt J, who regarded procedures departing from the rules of evidence as likely to "advantage one party and disadvantage the opposing party".

[83] *R v. Watson; Ex parte Armstrong* (1976) 136 C.L.R. 248.

[84] What is meant by an absence of "preconceived" views is best understood by reference to the way that the terms "objectivity", "impartiality" and "open-mindedness" are used. But, as Montefiore points out, an umpire cannot be expected to have access to some realm of pure and evaluatively neutral facts: Montefiore *op. cit. supra* n 16 at 17-30.

[85] *Stollery v. Greyhound Racing Control Board* (1972) 128 C.L.R. 509; *Livesey v. New South Wales Bar Association* (1983) 151 C.L.R. 288.

[86] *Ibid.*

absence of corroboration. The evenhandedness of the disbelief did not remove the appearance of prejudgment (although in fact it would not infringe Raz's "principled neutrality"). The judge's remark that the proceedings were not strictly adversary proceedings but were in the nature of an inquisition followed by an arbitration was described by the High Court as a basic misconception of the position of the Family Court in such proceedings.[87] However, ten years later, in *Re J.R.L; Ex parte C.J.L.*,[88] in holding that the making of *ex parte* communications by a court counsellor to a judge resulted in a denial of procedural fairness, the High Court took more care to recognise that procedural fairness could accommodate departures from strict adversarial procedure. It was by a narrow majority that the court concluded that a denial of procedural fairness had occurred. Wilson J., in the minority, acknowledged that procedural fairness required that only where there was good reason should any discussion with a court counsellor not take place in open court. However, these were custody proceedings rather than property proceedings and the court's statutory duty to give paramount consideration to the welfare of the child introduced inquisitorial features into its procedure:

> It is in the pursuit of this objective that the court is empowered, on its own initiative, to create or gather material by directing the preparation of a report by a court counsellor on those matters which, being relevant, the court thinks desirable, and may then decide whether that material is to be received in evidence. It is plain that a judge may receive information from a court counsellor which is then not received in evidence without his or her impartiality thereby being called into question. That is precisely what the Act and Rules contemplate.[89]

Also in the minority, Dawson J. referred to the fact that the counsellor was a witness of the court rather than the parties and that because the jurisdiction of the court was not entirely *inter partes* some modification of the ordinary rules of evidence and procedure was required.

Some cases, particularly those where *ex parte* communications are received by the decision-maker or the decision-maker takes into account personal knowledge, highlight the relationship between the hearing rule and the bias rule.[90] These cases suggest that the principle of non-intervention, reflecting "principled neutrality", cannot reflect the rationale for procedural fairness. It is not uncommon for one action to constitute infringement of both the hearing rule and the bias rule. Thus, in *Re Macquarie University; Ex parte Ong*[91] a Vice-Chancellor's circulation of

[87] *Id.* at 257.
[88] (1986) 161 C.L.R. 342.
[89] *Id.* 363.
[90] Both rules were raised in *Re J.R.L; Ex parte C.J.L.* (1986) 161 C.L.R. 342 but because the court counsellor's report was quickly disclosed to the parties after the ex parte communication had been made, breach of the bias rule remained the only arguable issue.
[91] (1989) 17 N.S.W.L.R. 113. Note that this is a decision of Hope JA acting as assessor on behalf of the Visitor of Macquarie University, the Governor of New South Wales.

a letter in the agenda papers of members of a University Council, criticising a head of school whose office was to be considered at the Council's meeting, infringed both the hearing rule and the bias rule. The hearing rule was infringed because the adverse allegations were new and had not been disclosed to the head of school so that he could have an opportunity to answer them if he wished. The bias rule was infringed because the Vice-Chancellor, who had initially brought complaints against the head of school, was in the position of accuser, and the letter put the matters before the council as effectively as if she was present in person at its meeting where the decision to declare the office vacant was made.[92]

By contrast, situations may arise where it is difficult for an umpire to comply with both the hearing rule and the bias rule at the same time, or at least the umpire must tread a narrow and dangerous path between infringing either rule. The hearing rule favours disclosure, at particular appropriate stages in the course of a hearing, of the provisional views of the umpire.[93] If the umpire does not disclose a provisional view the losing party may be justified in feeling resentment in not having been made aware of the direction of the thinking of the umpire on a particular issue and thus not having the opportunity to persuade the umpire to take another view.[94] The High Court has confirmed that judicial "silence", apart from making necessary rulings, is not a "counsel of perfection", particularly in a non-jury trial.[95] Yet in expressing a "provisional" view the umpire risks being challenged for holding a "preconceived" view and therefore infringing the bias rule.[96] Contrary to much of the rhetoric of Fuller, judges are capable, as a bench of the Full Federal Court in *Kaycliff Pty Ltd v. Australian Broadcasting Tribunal*[97] admitted, of forming conclusions in complex cases well before the conclusion of the hearing, subject always to the possibility of changing those conclusions as further evidence or argument is presented. Umpires do have "developing opinions". The bias rule ought not to force umpires to keep those opinions

[92] The Vice-Chancellor normally presided at meeting of the council. On this occasion because of her anticipated absence overseas it was arranged in advance that the Chancellor would chair the meeting. Hope JA held that in spite of her absence the principle in *Stollery v. Greyhound Racing Control Board* (1972) 128 C.L.R. 309, regarding the appearance of bias where an accuser participates in a hearing, applied.

[93] *Brassington v. Brassington* [1962] P. 276; *Mayes v. Mayes* [1971] 1 W.L.R. 679; *Bassett v. Host* [1982] 1 N.S.W.L.R. 206; *Escobar v. Spindaleri* (1986) 7 N.S.W.L.R. 51 at 55-6; *Kaycliff Pty Ltd v. Australian Broadcasting Tribunal* (1989) 90 A.L.R. 310.

[94] *Kaycliff Pty Ltd v. Australian Broadcasting Tribunal* (1989) 90 A.L.R. 310 at 319. Note that the hearing rule may also be infringed where the judge discloses a provisional view but then moves too quickly to dismiss the application. Thus, in *Escobar v. Spindaleri* (1986) 7 N.S.W.L.R. 51 counsel, insisting absolutely upon the principle of non-intervention by the umpire, declined the invitation of the judge to call further evidence. Despite the judge's warning that the case would be dismissed and counsel's "truculent and intemperate" response "you can do what you like", the judge's prompt dismissal of the action constituted a breach of the hearing rule, no opportunity having been given to counsel to make a closing address.

[95] *Vakauta v. Kelly* (1989) 87 A.L.R. 633 at 635. See also *Galea v Galea* (1990) 19 N.S.W.L.R. 263 at 279, 283.

[96] See the distinction drawn by Kirby A-CJ in *Galea v. Galea* (1990) 19 N.S.W.L.R. 263 at 281 between "intervention which suggests that an opinion has been finally reached which could not be altered by further evidence or argument and one which is provisional, put forward to test the evidence and to invite further persuasion".

[97] *Id.* at 317.

secret when their disclosure may enhance the meaningfulness of the participation of the parties in hearings. But opinions brought to the hearing from separate interaction may be "preconceived". Thus, in *Vakauta v. Kelly*[98] the High Court held that the trial judge's description of medical witnesses, gleaned from his experiences in other trials, as "that unholy trinity", and as the "usual panel of doctors who think you can do a full week's work without any arms or legs" whose views were "almost inevitably slanted in favour of the [Government Insurance Office] by whom they have been retained, consciously or unconsciously" gave the appearance of bias.

The situation where it is impossible to comply with both rules occurred in *Koppen v. Commissioner for Community Relations.*[99] A member of a local Aboriginal community was acting as conciliator in a compulsory conciliation conference of a complaint by Aboriginal persons who had been refused admission to a club, of unlawful racial discrimination against them. The holding of a conference in an effort to settle the complaint was a precondition to the exposure of the proprietors to civil proceedings for unlawful racial discrimination. The proprietors of the club claimed that there was no general racial ban, to which the conciliator replied that her daughters had been refused entry. Spender J. held that the conciliator, in failing to maintain "evenhandedness" had given the appearance of bias. But should the conciliator have remained silent, consistently with a principle of non-intervention? Surely procedural fairness would not require such "not helping". The answer is provided by the hearing rule itself. Members of tribunals appointed on account of their expertise are entitled to draw upon their own general expert knowledge which forms part of the equipment of the tribunal. However, they must disclose to the parties *particular* facts they take into account so that the parties have an opportunity to rebut them.[100] The particular facts known by the conciliator had to be disclosed in this case. In this way the hearing rule provides a buttress to the bias rule, by forcing into the open matters which may give the appearance of bias. Spender J recognised that the very policy of appointing conciliators having this sort of expertise carries the risk that conciliators "will actively enter the controversy between the parties, rather than conciliate it".[101] However, it is not the business of procedural fairness to place restrictions upon the kind of expertise which is inherently of value in particular areas of administrative decision-making. In the course of gaining their expertise experts internalise professional and social norms, to which they have resort when exercising discretion. It is precisely for this reason that experts are appointed as administrators. In *Koppen* the conciliator acted properly in disclosing her knowledge. In order to comply with the hearing rule she

[98] (1989) 87 A.L.R. 633.
[99] (1986) 67 A.L.R. 215.
[100] *R v. Milk Board; Ex parte Tomkins* [1944] V.R. 187; *R v. Industrial Appeals Court; Ex parte Maher* [1978] V.R. 126; *Minister for Health v. Thomson* (1985) 8 F.C.R. 213.
[101] (1986) 67 A.L.R. 215 at 229.

infringed the bias rule. A principle of non-intervention based on the notion of neutrality cannot account for what fairness requires in such interaction. The rationale for the hearing rule must be less formal than neutrality, with its equal amounts of hindering or helping.

The argument so far has been that neutrality does not secure fairness. The principle of non-intervention which reflects the notion of neutrality was seen in Part 2 to provide a consistent theme in the rules of evidence applied in criminal trials. The principle is extended in some cases to civil proceedings. A more powerful focus for judicial intervention on account of unacceptable procedure is procedural fairness, which applies to hearings of tribunals as well as courts. It has been the aim of this Part to demonstrate that neutrality does not provide a rationale for procedural fairness. It will be suggested in Part 5 that the rationale of procedural fairness revolves around the *interests* of individuals. In the case of the hearing rule and the no evidence rule the concern is with the interests of the individual to whom the administrator allocates a benefit or burden. In the case of the bias rule the concern widens to take into account the interests of the umpire and of the public.[102] But before outlining an argument for such a rationale, it will be useful to examine more closely some examples of judicial reasoning in determining to what extent tribunals are free to depart from the judicial paradigm of procedure. The preceding analysis provides the foundation for that examination.

PART 4 — TRIBUNALS AND THE JUDICIAL PARADIGM

The procedure of courts departs from the judicial paradigm, it was argued in Part 2, either because of the introduction of alternative dispute resolution mechanisms associated with courts, or because of well-established exceptions to the application of the principle of non-intervention. In Part 3 it was argued that procedural fairness does not rest upon a principle of non-intervention and examples were given of how procedural fairness may require a judge to intervene in the presentation by the parties of their cases by indicating provisional views of the court which would suggest that the presentation of a case ought to be adjusted. Conversely, the cases did not suggest that procedural fairness imposes upon the court a positive duty not to intervene. Even if in the circumstances of the particular case the full content of procedural fairness is appropriate for a tribunal, it does not follow that the tribunal has a duty to observe all the formal and adversarial features of the judicial paradigm.

A simple reason why the requirements of procedural fairness in hearing a particular matter ought be less exacting in the case of a tribunal than in the case of a court lies in the statutory source of the tribunal's

[102] The public interest is also taken into account at other points in the context of procedural fairness, when a court has resort to overriding policy considerations such as national security or denies relief on the ground of futility: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 A.C. 374; *Coutts v. Commonwealth* (1985) 59 A.L.R. 699; *Kioa v. West* (1985) 159 C.L.R. 550 at 633.

power. The statute normally confers power on the tribunal to proceed in a manner different from courts. The tribunal is ussually expressed to be master of its own procedure. A common provision is that the tribunal is not bound by the rules of evidence and may inform itself as it thinks fit.[103] The statute may stress the different nature of the procedure in strong language, as procedure which is "without regard to legal forms and solemnities" or which is "fair, just, economical, informal and quick".[104] In construing these empowering statutes the courts are entitled to have recourse to extrinsic materials which sketch in the broader political context in which tribunals are created, including the intention to achieve political goals of informal, inexpensive, non-technical and common sense dispute resolution.[105]

Investigative Tribunals

The predominant cluster of procedural features of an investigative tribunal is likely to include inquisitorial powers to enter premises and seize documents, to compel parties to attend and produce relevant documents and give evidence. Some powers are less dramatic, affecting features of procedure at a hearing, yet inconsistent with rules of evidence of the judicial paradigm. What is the impact of procedural fairness on the exercise of such statutory powers?

Procedural fairness has no impact when the statute clearly excludes its implication.[106] A tribunal may have an express duty to exclude lawyers, or a duty to decide "on the papers". But Australian courts are increasingly becoming reluctant to conclude that a statute has excluded procedural fairness.[107]

The flexible content of procedural fairness should be adapted to accommodate the diversity of tribunals, or even different jurisdictions within one tribunal, with sensitivity to the varying clusters of informal and inquisitorial features of procedure, yet consistently with the rationale of procedural fairness suggested in Part 5, namely with regard to the interests affected by the tribunal's decision-making. Procedural fairness may be secured without imposition of formal and adversarial features out of sympathy with the statutory provisions defining the tribunal's procedure.[108] Procedural fairness will supplement the features of procedure found in the statute, but usually need not upset the continued predominance of a particular sort of procedural cluster. Procedure which does not meet the full complement of formal and adversarial features of the judicial paradigm may nevertheless meet the requirements of procedural fairness.

[103] On the effect of this provision see n 80-82 above.

[104] Procedure of the Australian Broadcasting Tribunal (*Broadcasting Act* 1942 (Cth) s 25(1)) and the Immigration Review Tribunal (*Migration Act* 1958 (Cth) s 123(1)) respectively.

[105] For example, *Acts Interpretation Act* 1901 (Cth) s 15AB. See D. C. Pearce and R. S. Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) Ch. 3.

[106] *Twist v. Randwick Municipal Council* (1976) 136 C.L.R. 106.

[107] See Allars *op. cit. supra* n 69 [6.21-6.30, 7.53-7.54].

[108] *Cf.* Ganz *op. cit. supra* n 6 at 26.

This is, on the whole, how courts now approach the difficult question of the content of procedural fairness for investigative tribunals. For example, in *Bond v. Australian Broadcasting Tribunal (No 2)*,[109] the Federal Court rejected the argument that an inquiry by the Australian Broadcasting Tribunal under s. 17C(1) of the *Broadcasting Act* 1942 (Cth) starts as an inquisitorial proceeding but becomes adversarial when witnesses of a party whose interests will potentially be adversely affected give their evidence. Wilcox J held that the rule that each party may determine the order in which witnesses for that party are to be called, a rule of evidence founded on the principle of non-intervention, does not apply to such an inquiry. Witnesses are called by counsel assisting and should not be regarded as witnesses of a particular camp, except in the limited situation where a party puts a positive case to the inquiry to cover an issue or evidence which has not been elicited.[110] The decision gives further support to the argument that the principle of non-intervention does not provide a foundation for procedural fairness. Procedural fairness also appears to tolerate a higher degree of intervention in counsel's examination of witnesses than do the rules of evidence.[111]

Disclosure of provisional views has been the subject of more litigation in relation to tribunals than in relation to courts. Raised in relation to courts the argument is usually that the provisional view stated indicates bias. Raised in relation to tribunals the argument is that failure to disclose a tentative adverse view, or enough details of it, indicates breach of the hearing rule. The benchmarks regarding the appropriate content of procedural fairness for a tribunal whose procedure is predominantly inquisitorial, are the Privy Council decision in *Mahon v. Air New Zealand Ltd*[112] and the High Court decision in *News Corporation v. National Companies and Securities Commission.*[113] *Mahon's* case is authority that a royal commissioner ought not to leave a party "in the dark" as to the risk of a finding adverse to him being made on a particular subject. The *News Corporation* case makes it clear that although the formal procedure of a hearing may be required by statute at certain points in the decision-making of an investigative tribunal, the tribunal is not compelled by procedural fairness to conform to the judicial paradigm of procedure. Gibbs C.J. held that procedural fairness did not require the Commission to treat the hearing as though it were a trial in a court of law. But if at the conclusion of the hearing the Commission proposed to publish any matter adverse to or critical of any person it should afford that person an opportunity to be heard and call evidence on that matter before proceeding further. Some approximation to this content of procedural fairness is consistently required of other tribunals exercising

[109] (1988) 84 A.L.R. 646.
[110] *Id.* 667.
[111] See *Glynn v. Independent Commission Against Corruption* (1990) 20 A.L.D. 214 at 224.
[112] [1984] 1 A.C. 805.
[113] (1984) 156 C.L.R. 296.

a jurisdiction with a formal/inquisitorial cluster of procedural features, such as royal commissions, the Australian Broadcasting Tribunal, the Independent Commission Against Corruption and medical services committees of inquiry.[114]

The next question is when and how much detail must the tribunal give of potential adverse findings. The judicial paradigm of procedure requires that each party give the other particulars prior to the hearing. Procedural fairness commonly requires that a person whose interests may be adversely affected by a decision be given notice of the charge or allegations in advance with adequate time to prepare and present a case. However, as Mason, Wilson and Dawson J.J. said in the *News Corporation* case, it would frustrate an inquisitorial decision-making process if the suspect could "look over [the tribunal's] shoulder all the time to see how the inquiry is going" and force the tribunal "to disclose [its] hand prematurely".[115] Similarly, in *Bond v. Australian Broadcasting Tribunal (No 2)*[116] Wilcox J. said that in a general inquiry into a particular topic without precise allegations as to conduct, it would be impractical and potentially embarrassing to the proper conduct of the inquiry to insist upon the furnishing of particulars as in *inter partes* litigation, or a draft copy of the report. The presence of a predominant cluster of inquisitorial features in the statutory provisions governing a hearing indicates that many of the features of procedural fairness which match those of the judicial paradigm are to be stripped away. The bare minimum is that the person potentially affected understands the nature of the inquiry and the issues being investigated. At the same time the requirements of procedural fairness may, because of the important nature of the interests affected, be strengthened by the absence of certain adversarial features, namely a public hearing and entitlement to legal representation.[117]

The Administrative Appeals Tribunal

Unlike tribunals having an obvious predominance of inquisitorial features, some tribunals, particularly those which review administrative action (apart from ombudsmen) or which exercise jurisdiction formerly belonging to a court, tend to be assumed to belong at the opposite extreme of the spectrum. Their procedure is assumed to consist of a cluster of formal and adversarial features. Analysis of a tribunal of central importance in the federal scheme of review, the Administrative Appeals Tribunal (AAT) serves to illustrate how this assumption may be attributed to the influence

[114] *Mahon v. Air New Zealand Ltd* [1984] 1 A.C. 805 at 808; *Bond v. Australian Broadcasting Tribunal (No 2)* (1988) 84 A.L.R. 646; *Glynn v. Independent Commission Against Corruption* (1990) 20 A.L.D. 214 at 217-9; *Romeo v. Fisher* (1990) 20 A.L.D. 756 at 761. For an illustration of how this approach may be translated into statutory provisions, see *Ombudsman Act* 1976 (Cth) ss 8(5), 35A(3).

[115] (1984) 156 C.L.R. 296 at 323.

[116] (1988) 84 A.L.R. 646 at 663; *Dainford Ltd v. Independent Commission Against Corruption* (1990) 20 A.L.D. 207, aff'd (1990) 20 A.L.D. 233; *Romeo v. Asher* (1990) 20 A.L.D. 756 at 759-60.

[117] (1988) 84 A.L.R. 646 at 665.

of the judicial paradigm upon judicial reasoning in determining the content of procedural fairness for such tribunals.

The undisputed emphasis in practice, and in judicial interpretation of the *Administrative Appeals Tribunal Act* 1975 (Cth) (*AAT Act*), is upon formal and adversarial procedure. There is nothing new in criticism of AAT procedure as too much akin to that of a court or in the argument that it would be desirable for the AAT to follow a more informal and inquisitorial procedure.[118] Other commentators have defended the approach taken by the AAT, either pointing out the informal trappings of its procedure, or arguing that formal/adversarial procedure is appropriate for a tribunal which often forms the second tier of review following review by a more informal tribunal.[119] A preliminary point of contention is whether the AAT is entitled to function in an informal and inquisitorial manner in the context of its powers and duties under the *AAT Act* and the requirements of procedural fairness. The Kerr Committee[120] and the Bland Committee,[121] whose recommendations led to the establishment of the AAT, regarded the creation of a general administrative tribunal conducting review of the merits of administrative decisions as a necessary component of a comprehensive system of review of administrative action. Whilst the Committees did not expressly recognise a need for a less formal alternative to traditional adjudication by a court, they did envisage that the tribunal would be an expert one, and that it would proceed in an inquisitorial manner. The Bland Committee said that:

> Presidental members must not be addicted to the adversary process and desirably they need wide experience of administration or of administrative law.[122]

The proposed freedom to depart from the rules of evidence is an inquisitiorial procedural feature whose corollory is informality: legal norms relating to procedure are relaxed. The Bland Committee also proposed, albeit cryptically, that the application of legal norms of a substantive nature should be relaxed. Tribunal members should decide:

> in a context of a broad government response to its interpretation of socio-economic values acceptable to the community.[123]

[118] H. Whitmore, "Commentary" (1981) 12 *Fed L Rev* 117; G Osborne, "Inquisitorial Procedure in the Administrative Appeals Tribunal - A Comparative Perspective" [1982] 13 *Fed. L. Rev.* 150; D. Gill, "Formality and Informality in the Administrative Appeals Tribunal" in *Administrative Law: Retrospect and Prospect* (1989) 58 *Canb. Bull. Pub. Admin.* 33.

[119] A. N. Hall, "Administrative Review Before the Administrative Appeals Tribunal: A Fresh Approach to Dispute Resolution? - Part I" (1981) 12 *Fed. L. Rev.* 71; L. Curtis, "Crossing the Frontier Between Law and Administration" in *Administrative Law: Retrospect and Prospect* (1989) 58 *Canb Bull. Pub. Admin.* 55.

[120] Commonwealth Administrative Review Committee *Report*, August 1971 (PP No 144 of 1971).

[121] Committee on Administrative Discretions *Final Report* (PP No 316 of 1973).

[122] *Id.* para 136.

[123] *Id.* para 172.

This informality was intended to allow the tribunal to be located within the executive, rather than to operate as a substitute for a court.

Although the vision of the Committees was implemented by inclusion in the *AAT Act* of inquisitorial and informal procedural features, the Act also contains features which are formal and adversarial. But the Act does not present a cluster of formal and adversarial features which compels classification of the AAT's procedure as formal/adversarial, still less as that of the judicial paradigm.

The central provisions governing AAT procedure at the hearing are ss. 33 and 39 of the *AAT Act*.[124] Section 33(1) provides:

> (1) In a proceeding before the Tribunal—
> (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal; and
> (b) the proceeding shall be conducted with as little formality and technicality and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and
> (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

Section 33(1)(a) and (b) are features of informal procedure. Informality is also found in provisions designed to facilitate access to the AAT, both with regard to standing and limited exemptions from the application fee.[125] Section 33(1)(c) seems to confirm that procedure is to be inquisitorial, and, in a secondary sense, informal. Yet s. 33(1)(c) is a provision found in many empowering statutes of tribunals, even where, according to Campbell, the legislature intends that the tribunal's procedure be on the whole adversarial.[126] The remaining subsections of s. 33 provide wide powers to give, vary and revoke directions, for the purposes of subsection (1).

Section 39 of the *AAT Act* provides:

> Subject to sections 35 and 36, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.

[124] Sections 34, 37 and 38 of the *AAT Act* are equally important provisions, but concern pre-hearing procedure which is not the focus of this essay. They are discussed below at pages 45-6.

[125] *AAT Act* s. 27(2),(3), 69: Administrative Appeals Tribunal Regulations reg 19, Schedule 3.

[126] E. Campbell, "Principles of Evidence and Administrative Tribunals" in E. Campbell and L. Waller (eds) *Well and Truly Tried: Essays in Honour of Sir Richard Eggleston* (1982) at 36-7.

Through an analysis of *Sullivan v. Department of Transport*,[127] the leading authority on the procedure of the AAT, the argument will be developed that these and other provisions in the Act form a cluster of procedural features which need not correspond completely with the features of the judicial paradigm, even with the addition of any common law requirements of procedural fairness.

Sullivan, an acting major in the Australian Air Force applied for renewal of his commercial pilot's licence and radiotelephone operator's licence. The application was refused on medical grounds. Sullivan applied to the AAT for review of this decision of the Secretary of the Department of Transport. During the proceedings before the AAT, Sullivan asked to call a Dr Evans as witness. Although Sullivan had expected the doctor to be present, he was not. Without Dr Evans' evidence, Sullivan was not able to proceed with his argument about the medical standard which had been applied to him. But Sullivan did not ask for an adjournment. Nor did the AAT advise him he was entitled to apply for an adjournment, or that under s. 40(1A) of the Act the President of the AAT has power to summons a witness. It was established before the AAT that Sullivan had a history of psychosis. The AAT affirmed the decision and did not consider whether a conditional licence should have been granted to Sullivan.

On Sullivan's appeal to the Full Federal Court, it was held that the AAT ought, under the Air Navigation Regulations, to have considered whether a conditional licence should have been granted to Sullivan. So the matter was remitted to the AAT for rehearing. But on the question of adjournment, the Federal Court held that the AAT had not denied Sullivan procedural fairness nor had it denied Sullivan a reasonable opportunity to present his case as required by s. 39.

According to Deane J (with whom Fisher J agreed), both s. 39 and procedural fairness applied. Section 39 constituted a statutory recognition of an obligation of the AAT which the common law would in any event imply. Being given a reasonable opportunity to present one's case is the heart of the rules of natural justice, which the AAT has to observe.[128] But neither s. 39 nor procedural fairness had been infringed.[129]

The assumption appears to have been made in *Sullivan* that the requirements of procedural fairness included conformity to the principle of non-intervention. Deane J agreed that a refusal to grant an adjournment on request can constitute a failure to give a party a reasonable opportunity to present his case. But where a party does not expressly seek an adjournment, the AAT's failure to adjourn amounts to a denial of

[127] (1978) 20 A.L.R. 323.

[128] *Id.* 342.

[129] It is arguable that the *AAT Act* evinced an intention of Parliament to deal with the question of a hearing, in s 39 (hearing rule), s 14 (bias rule) and s 43(2) (no evidence rule), thereby excluding the common law requirements of procedural fairness. But see p 34 above.

procedural fairness only where the party had requested guidance or the issue is a jurisdictional one, which must be dealt with by the AAT if it is to perform its review function properly. Beyond these limited exceptions, the principle of non-intervention was paramount:

> Ordinarily, however, in the absence of a request for assistance or guidance by a party who is appearing in person, a tribunal under a duty to act judicially should be conscious of the fact that undue interference in the manner in which a party conducts his case may, no matter how well-intentioned, be counter-productive and, indeed, even overawe and distract a party appearing in person to the extent that it leads to a failure to extend to him an adequate opportunity of presenting his case.
>
> . . . [I]t is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable opportunity to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled.[130]

Smithers J.'s description of the facts indicates that Sullivan was not competent to handle his own case properly, and seemed to be under the impression that if Dr Evans was not available then and there he could not call him.[131] Whilst Smithers J did not conclude there was a breach of s. 39, his view of the requirements of procedural fairness differed markedly from that of Deane and Fisher J.J. Because of the way in which Sullivan presented his case his reliance upon the issue of eligibility for a conditional licence was obscured. It would not therefore have been obvious to the AAT that presentation of evidence on that issue was necessary in order that the applicant have a reasonable opportunity to present his case. Had eligibility for a conditional licence been clearly in issue before the AAT, it appears that Smithers J. would have concluded that the AAT's failure to take the initiative of offering Sullivan an adjournment was a denial of procedural fairness and a breach of s. 39. In this Smithers J. would have been clearly in dissent from the majority view that procedural fairness did not require the AAT to intervene.

Generally in administrative decision-making a person in the position of applicant bears a common sense onus of presenting material to the administrator in support of the application. Any legal onus of proof must be found in the statutory provisions governing the administrator's power or duty to allocate benefits or burdens.[132] Nevertheless administrators have a limited common law duty to make further inquiry.[133] Although there is therefore a common sense onus of proof resting upon an applicant in AAT review, the task of the AAT is to reach the correct or preferable

[130] (1978) 20 A.L.R. 323 at 343.
[131] *Id.* 331, 332-3.
[132] *McDonald v Director-General of Social Security* (1984) 6 A.L.D. 6.
[133] *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 A.L.R. 549.

decision on the material before it.[134] Whilst the parties to AAT proceedings may concede to each other some issues, they cannot bargain away any issue which is of a jurisdictional nature and therefore essential to the performance of the AAT's task. The AAT has taken a flexible approach to the issues which may be raised at an AAT hearing. The parties are not restricted to issues which were before the original decision-maker or which were mentioned in the application for review.[135] This approach is consonent with informal justice. To reach the correct or preferable decision, the AAT must ensure the existence of any preliminary state of affairs on which the original decision-maker's, and the AAT's, jurisdiction depends. Thus, in *Sullivan*, all three judges of the Federal Court agreed that the AAT erred in failing to consider the issue whether a conditional licence should have been granted to the applicant. Even if the point is not taken before the AAT, a failure by the AAT to address such an issue amounts to an error of law. The requirement that the AAT address jurisdictional issues was also made in *Kuswardana v. Minister for Immigration and Ethnic Affairs*[136], where Fox J. described this aspect of the AAT's task as of an inquisitorial nature:

> There is not, . . . any requirement that 'the point be taken' before the Tribunal, and we should be cautious in trying to apply to procedures and practices operating in an administrative setting those which apply in a judicial setting. This is not to say that an administrative tribunal may not, subject to the regulations governing it, find it convenient or helpful to follow in some respects procedures which over the span of many years have been found by courts of law to be most conducive to the interests of justice. They plainly must be able to accept concessions of fact, but so to express the matter is to confuse their function, which is one of administrative inquiry, without rules of evidence.[137]

The suggestion is that it is this very kind of administrative failure—the failure to address matters of crucial relevance to reaching the correct or preferable decision—that the AAT must take care to inquire into itself. The inquisitorial in the very function of the AAT cannot be ignored. In *Sullivan*, Deane J. recognised the existence of a jurisdictional issue as the second exceptional situation where the AAT has an obligation to raise an issue, and therefore possibly to adjourn the proceedings. However, whilst Dr Evans' evidence was critical to the overlooked issue of the conditional licence, the AAT had left the choice of pursuing the secondary issue of the right to adduce evidence relevant to that issue

[134] *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 2 A.L.D. 60; *Kuswardana v. Minister for Immigration And Ethnic Affairs* (1981) 35 A.L.R. 186.

[135] *Re Metherall and Minister for Capital Territory* (1979) 2 A.L.D. 246.

[136] (1981) 35 A.L.R. 186. See also *Re Witheford and Department of Foreign Affairs* (1983) 5 A.L.D. 534 at 541; *Adamou v. Director-General of Social Security* (1985) 7 A.L.N. No 203; *Re Kiazim and Commonwealth of Australia* (1986) 9 A.L.N. No 218.

[137] *Id.* 199.

to an unrepresented applicant who was unaware of his entitlement to do so. It surely was open to the Federal Court, with the benefit of hindsight, to treat the issue of denial of procedural fairness as inextricable from the issue of jurisdiction. Had the AAT taken the initiative of assisting the applicant, evidence would have been adduced regarding the extent of Sullivan's capacity and the overlooked issue may well have emerged as a distinct one demanding consideration.

Whilst procedural fairness requires the opportunity to present a case to be offered positively, there is no authority that the offer must include an explanation of the content and effect of individual rules governing the tribunal's procedure, as they become relevant to issues during the course of the decision-making process, or advice as to how to utilise the relevant rules to advantage. Nevertheless, the general discussion in Part 3 and the discussion of investigative tribunals in this Part indicate that procedural fairness may require a tribunal to disclose its provisional views in the course of the hearing. A "provisional view" may well be that under the rules of the game a party will lose unless he makes a certain strategic move. Cases have already been mentioned where judges have invited parties to call further evidence. It is a short step from this to include a further invitation to request an adjournment.

The influence of the judicial paradigm accounts for the failure in *Sullivan* to gauge the delicately balanced cluster of procedural features required by the empowering Act, practice and procedural fairness. This occurred for three reasons. First, Deane J. located procedural fairness and the duty under s. 39 within an overarching "duty [of the AAT] to act judicially". The use of the latter expression is unhelpful, because it harks back to the pre-*Ridge v. Baldwin*[138] era when natural justice could not be implied in relation to an administrator in the absence of an express duty of the administrator to act judicially. Deane J. has since recognised that the expression is misleading and ought to be avoided.[139]

The second reason for Deane J.'s leaning towards the adversarial and formal was his interpretation of s. 33(1)(b) of the *AAT Act*, which requires AAT proceedings to be conducted with as little formality and technicality and with as much expedition as the Act and other relevant enactments and a proper consideration of matters permit. Deane J said that these were ultimate objectives which were most readily achieved by allowing the parties to identify the issues, an endorsement of the principle of non-intervention. This approach placed the emphasis upon expedition and failed to address the requirement of informality in s. 33(1)(b). In any event if both parties were unrepresented it could take a great deal of time for issues to be identified without some assistance from Tribunal members. In a case where the applicant is unrepresented and the respondent administrator is represented, as is usually the case, by a legal officer,

[138] [1964] A.C. 40.
[139] *Australian Broadcasting Tribunal v. Bond* (1990) 94 A.L.R. 11 at 45-6.

the respondent plays the major role in identification of issues. If there is an issue to be raised which could assist the applicant's case and of which the applicant is unaware, then it will probably not be raised unless the AAT takes the initiative of raising it. That is what happened in *Sullivan.*

The judicial paradigm dominates in *Sullivan* for a third reason. Little attention is given to the construction of the *AAT Act* as a whole, although its provisions do not indicate a cluster which is unequivocally formal/ adversarial. It is possible to identify features which are adversarial, inquisitorial, formal and informal. Of an adversarial nature are the requirement for hearings in public (s. 35(1)), a party's right to a reasonable opportunity to present his case and make submissions (s. 39), a party's right to the opportunity to be legally represented in proceedings (s. 32), the AAT's power to take evidence on oath or affirmation (s. 40(1)(a)), to proceed in the absence of a party who has had reasonable notice and to adjourn proceedings (s. 40(1)(b) and (c)), the AAT's duty to give its reasons in writing including findings on material questions of fact and a reference to the evidence or other material on which the findings were based (s. 43(2),(2B)). Of these adversarial features, ss. 35(1), 32, 40(1)(a) and 43(2) are also features of formal procedure.

The most important feature of an inquisitorial nature, hardly evident from the language of the Act, is s. 43(1) which confers power on the AAT to decide on the merits, reaching the correct or preferable decision on the material before it.[140] Another feature of an inquisitorial nature is the discretionary power of the President of the AAT under s. 34 to control the decision-making process by directing parties to participate in private preliminary conferences.[141] Further features are the AAT's discretion in relation to its own procedure (s. 33(1)(a)), its duty to proceed with little formality and technicality and with expedition (s. 33(1)(b)), its power to depart from the rules of evidence and to inform itself on any matter in such manner as it thinks appropriate (s. 33(1)(c)), its power to require relevant documents to be lodged (s. 37(2)), power to obtain additional statements of reasons and evidence (s. 38) and power to summons witnesses itself (s. 40(1A)). Of these inquisitorial features, ss. 34 and 33(1)(a), (b) and (c) are also features of informal procedure.

The *AAT Act* gives little express guidance on how a clash of formal/ informal or adversarial/inquisitorial in the application of these provisions is to be resolved. Section 39 is expressed to be subject to ss. 35 and 36. The Full Federal Court has confirmed that this means the AAT may make a confidentiality order under s. 35(2) of the Act without infringing s. 39.[142] It can be argued that since s. 39 is, in contrast to the mentioned

[140] See pages 42-3 above.

[141] Some elements of procedural fairness in relation to the conference are statutorily secured by two provisions. First, if the application proceeds to a hearing, evidence is not to be given at the hearing about what occurred at the conference. Second, a party may object to a member who was present at the conference participating at the hearing: *AAT Act* s 34(3),(4).

[142] *News Corporation Ltd v. National Companies and Securities Commission* (1984) 57 A.L.R. 550.

sections, not expressed to be subject to s. 33(1)(b), that the right to a reasonable opportunity to present one's case has priority over the demands of informality, non-technicality and expedition. On the other hand, s. 33(1)(a) is expressed to be subject to other provisions in the Act, whilst s. 33(1)(b) is not expressed to be subject to any other provision. That suggests that s. 39 competes on equal terms with s. 33(1)(b), and indeed with provisions suggesting inquisitorial procedure, such as ss. 33(1)(c) and 40(1A).[143]

The task of achieving the correct balance in particular cases between the formal and the informal, between the adversarial and the inquisitorial must be achieved by the AAT in each case. In most cases the applicant is represented and the balance lies in favour of an emphasis upon formal and adversarial features. A more recent application of *Sullivan* has underlined the principle of non-intervention associated with the judicial paradigm.[144] Although principled neutrality requires an umpire to help partisans in equal degree, these are cases where help in explaining the rules will only be of benefit to one party because of that party's relative weakness as an advocate. Resort need not be had to the principle of non-intervention to achieve the appropriate balance in procedure. In practice, despite *Sullivan*, assistance is given to unrepresented applicants.[145] In some social security and compensation cases AAT members have suggested non-adversarial roles for departmental advocates and have criticised counsel who adopt unnecessarily adversarial attitudes at hearings.[146] Advocates as well as AAT members play a role in achieving the appropriate balance consistent with the cluster of features characterising AAT procedure. The absence of statutory requirements specifically directed at procedure at the stage of the preliminary conference opens the way for the AAT to develop a procedure less formal and less adversarial than that at the hearing. The preliminary conference might then serve more effectively as a mechanism for informal settlement of applications, comprising a cluster of features which could qualify as conciliation or mediation.[147]

[143] The AAT used the power in s. 40(1A) in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 A.L.D. 634 but was reluctant to do so in *Re AK and Commissioner for Superannuation* (1986) 11 A.L.N. N106 at N108 and *Re D J Moran Managements Pty Ltd and Minister for Community Services* (1986) 11 A.L.N. N181. The relationship between s 37 and other provisions is also important but is not considered here. See *Australian Postal Commission v. Hayes* (1989) 87 A.L.R. 283.

[144] *Australian Postal Commission v. Hayes* (1989) 87 A.L.R. 283. For a discussion of this case, as a perpetuation of the *Sullivan* approach, see M. Allars, "The Australian Administrative Appeals Tribunal: Procedure and Review" (1990) *P.L.* 172.

[145] Hall *op. cit. supra* n 119.

[146] *McDonald v Director-General of Social Security* (1984) 6 A.L.D. 6 at 18-9; *Re Cimino and Director-General of Social Services* (1982) 4 A.L.N. No 63; *Re Lockley and Commonwealth* (1986) 11 A.L.N. N139; *Re Ermolaeff and Commonwealth* (unreported, A.A.T. Deputy President McMahon, 22 August 1989). See also *Re Wertheim and Department of Health* (1984) 7 A.L.D. 121 at 154, quoting from *Re Mann and Capital Territory Health Commission (No 2)* (1983) 5 A.L.N. No 261.

[147] See Gill *op. cit. supra* n 118.

PART 5 — CONCLUSIONS

Neutrality is not necessarily inherently valuable, nor is acting neutrally in a conflict situation always a right or fair course of action. In the face of a conflict between a weak party and a strong party, remaining neutral means providing the parties with help or hindrance to an equal degree. This normally means not intervening, but even in the event of intervention in equal measure, the stronger party wins. Ranging beyond neutrality, other moral arguments may indicate that in view of the relative strengths of the parties and their claims to win, and the decision-maker's relationship to the parties, the decision-maker ought not to act neutrally.[148]

A concept which comes closer to the concerns of procedural fairness is that of disinterestedness. Where administrative decision-making occurs in tripartite interaction, the umpire must not have an interest in the conduct of the proceedings or their outcome.[149] In tripartite decision-making of tribunals and administrative decision-making generally, it is the existence of an interest which generates a concern that procedural fairness be accorded. An interest-based approach has been adopted by the High Court in liberalising the test for implying procedural fairness.[150] The right to a hearing, to an absence of bias in the decision-maker and to a decision based on logically probative evidence reflects that interest.[151] An interest-based rationale for procedural fairness deflects attention from the familiar judicial paradigm of procedure. The combination of procedural features of a particular tribunal exercising a particular jurisdiction need not be transformed into a formal/adversarial cluster on account of the requirements of procedural fairness. Many features of the procedure of courts (some being alternative dispute resolution mechanisms, some traditional exceptions to the principle of non-intervention underlying many rules of evidence) depart from the absolute realisation of those features in the judicial paradigm.

It is not enough to suggest that interests are the rationale for procedural fairness without justifying the role of the courts in recognising that certain interests give rise to rights to procedural fairness. In the context of American constitutional law it has been argued by Ely that the role of the courts in upholding values protected by the bill of rights is to reinforce and uphold the democratic process rather than to make choices between substantive values.[152] The idea of the function of courts as reinforcement

[148] Montefiore *op. cit. supra* n 16 at 6-9; Raz *op. cit. supra* n 17 at 113-4.

[149] This need not rule out the umpire's having preferences which are affected by the outcome of the interaction. The umpire may have a preference in applying a precedent or in achieving a sense of satisfaction in having handled the matter in an appropriate manner. See the distinction drawn by Montefiore between preferences and interests in defining "disinterestedness": *op. cit. supra* n 16 at 30-3.

[150] See the decisions listed at n 63, 66 above.

[151] Raz *op. cit. supra* n 17 at 180-192.

[152] J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1981). Criticism directed at the inadequacy of Ely's theory to reflect the content of the protections contained in the American bill of rights need not therefore affect the general project of constructing such a theory of the role of the courts in judicial review in Australia: see M. Tushnet, "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory" (1980) 89 *Yale L. J.* 1037.

of "process values", if valid, ought to be extendable from the very broad constitutional context to that of control by the judiciary of the exercise of discretion by the executive branch of government. The notion of "process" may explain and justify the role of the courts in judicial review in enforcing requirements of procedural fairness upon tribunals and other administrators.[153]

The immediate hurdle to an extension of Ely's theory to procedural fairness in Australia is establishing that procedural fairness represents a fundamental constitutional right to a certain sort of "process" in the functioning of a liberal state, in the absence of any constitutional entrenchment of the value of "due process".[154] Beyond the limited protections in the Commonwealth Constitution, Parliament has power by an ordinary statute to override individual rights directly or to empower an administrator to do so. However, the High Court has an original jurisdiction under the Constitution to review administrative action.[155] In performing this constitutional role of checking the executive branch of government, the High Court has developed common law principles which give it a role in reinforcing the democratic process consistently with a recognition of parliamentary supremacy. Of central importance in the articulation of the judicial conception of the role of the court is the principle of statutory interpretation that Parliament is presumed not to intend to abrogate certain fundamental common law rights unless clear and unambiguous legislative language is used.[156]

The core of an argument for procedural fairness as a "process" value has been outlined. Its validity depends upon a number of other complex issues. One is whether procedural fairness belongs with the group of rights which have enjoyed the protection of the principle of statutory interpretation. Second, can these rights can be called "constitutional" in that Parliament implictly condones their enforcement by not exercising its capacity to override their operation. A third question is whether the values protected by fundamental rights recognised at common law are indeed process values rather than substantive values.[157] Translated to the quest for a rationale for procedural fairness, the question is whether the courts in defining the requirements of procedural fairness in particular cases are enforcing a democratic process or are enforcing substantive values of their own choosing.

[153] See J. Mashaw, *Due Process in the Administrative State* (1985); D. Resnick, " *"Due Process and Procedural Justice"* in J. R. Pennock and J. W. Chapman (eds) *Due Process* Nomos XVIII (1977).

[154] Galligan *op. cit. supra* n 2 at 237.

[155] Commonwealth Constitution s 75(v).

[156] Sir Anthony Mason, "Future Directions in Australian Law" (1987) 13 *Mon. L. Rev.* 149 at 162-3. These fundamental rights include the privilege against self-incrimination, legal professional privilege, and no taxation in the absence of statutory authority. The leading cases are *Baker v. Campbell* (1983) 153 C.L.R. 52; *Re Bolton; Ex parte Beane* (1987) 162 C.L.R. 514.

[157] Critics of Ely have argued that a "process values" model of judicial review cannot avoid substantive value choices by courts: L. H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 *Yale L J* 106; P. Brest, "The Substance of Process" (1981) 42 *Ohio St L J* 131; J. D. Grano, "Ely's Theory of Judicial Review: Preserving the Significance of the Political Process" (1981) 42 *Ohio St L J* 167; Galligan *op. cit. supra* n 2 at 97-8, 237-8.