# Procedural Fairness for Decisions Affecting the Public Generally: A Radical Step towards Public Consultation?

ANDREW EDGAR*

## Abstract

Australian courts impose procedural requirements on administrators for decisions that affect an individual's rights and interests directly but not for decisions that affect the public generally. This threshold test disables courts from supervising regulatory decision-making on process grounds when procedures have not been included in the relevant statute. An extension of Australian procedural fairness to public interest decisions has been referred to as involving a 'radical step'. In this article, I examine three options for such an extension – two that have been developed in England, and a third that is influenced by the relevant considerations ground of judicial review. I argue that the third option would involve an extension of procedural fairness by relatively small steps that are consistent with related elements of Australian administrative law.

## I INTRODUCTION

Many aspects of Australian politics are regulated by laws that are enforced by courts: elections are regulated by legislation and the *Commonwealth Constitution*,[1] political communication by the *Constitution*,[2] government-held information by freedom of information laws,[3] and participation in administrative decision-making by public participation provisions of legislation.[4] In these areas, courts have a role in supervising political communication and decision-making. There are, of course, limits to how political communication and decision-making can be supervised by courts. This article questions one such limit – the

* Senior Lecturer, Sydney Law School. Many thanks to Greg Weeks, Amanda Sapienza and the anonymous reviewers for their comments on the article in draft form. Of course, I am solely responsible for any errors and omissions.

[1] See, eg, *Commonwealth Constitution* ss 7, 24; *Commonwealth Electoral Act 1918* (Cth); *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *Sue v Hill* (1999) 199 CLR 462; Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) ch 10 'Judging Elections: The Role of the Courts in Electoral Practice'.

[2] See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[3] See, eg, *Freedom of Information Act 1982* (Cth); *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423.

[4] See, eg, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 10; *Tickner v Chapman* (1995) 57 FCR 451.

exclusion of procedural fairness for decisions that affect the public generally. I will refer to this exclusion as the 'public exception'.[5]

The public exception excludes procedural fairness for administrative actions such as regulations and by-laws, policies, and public interest-based licensing and permit decisions. The principle has its primary source in the High Court's landmark procedural fairness decision in *Kioa v West*.[6] In that case the High Court expressed what is often referred to as the 'threshold test'[7] – that procedural fairness applies to decisions that adversely affect a person's rights, interests or legitimate expectations but does not apply to decisions that affect individuals as members of the public.[8]

The consequence of the public exception that is relevant for this article is that Australian courts do not impose on decision-makers procedures that are suited to public interest decision-making. More specifically, they have not developed the content of the procedural fairness hearing rule to include public consultation requirements. Australian courts only supervise public consultation processes when such requirements are imposed by statute.[9] Sir Anthony Mason has stated that it is not easy to see how a duty to consult could be established as a matter of common law.[10] In a similar vein, Mark Aronson and Matthew Groves say that it is unlikely that consultation requirements would be developed by the High Court and that it would 'be a radical new step into executive activity'.[11] This is consistent with the traditional scope of procedural fairness in common law countries. In a recent comparative work on public

[5] The academic literature in this area often uses the term the 'legislative exception', due to courts historically saying that they do not impose procedural requirements on decisions of a 'legislative nature': GJ Craven, 'Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing' (1988) 16 *Melbourne University Law Review* 569, 572. However, the current position in Australia is not whether the decision is of a legislative character but whether it affects the public generally: *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404, 415–7 (Gibbs CJ), 432 (Mason and Wilson JJ); Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) 429.

[6] (1985) 159 CLR 550. See also *Re Gosling* [1943] SR (NSW) 313, 318; *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404, 415–7.

[7] Aronson and Groves, above n 5, 405.

[8] *Kioa v West* (1985) 159 CLR 550, 582, 584 (Mason J) and 632 (Deane J). Justice Brennan referred to an individual's 'interests' being affected by the decision but rejected the use of the concept of 'legitimate expectations': (1985) 159 CLR 550, 616–620. I will come back to the significance of legitimate expectations for public consultation in numerous parts of the article.

[9] For an examination of the case law interpreting such provisions see Andrew Edgar, 'Judicial Review of Public Consultation Processes: A Safeguard against Tokenism?'(2013) 24 *Public Law Review* 209.

[10] Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 105.

[11] *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 450.

participation, Catherine Donnelly referred to courts showing 'little enthusiasm' for imposing public participation requirements on administrators.[12] It is worthwhile examining the limitations of Australian law that stop such a development, at least to understand why they are there. It is also worthwhile going further and examining the possibilities for moving beyond the public exception because Australian law as it currently stands misses out on developments that have occurred in other jurisdictions that I think are beneficial.

We can see what Australian law misses due to the public exception by looking to developments in England where the courts have developed public consultation standards. The standards are commonly referred to as the '*Gunning* principles', after Hodgson J's decision in *R v Brent London Borough Council; Ex parte Gunning*.[13] The *Gunning* principles are as follows:

> First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, that adequate time must be given for consideration and response and finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.[14]

There is now a substantial body of case law applying and developing the *Gunning* principles over nearly 30 years.[15] In that period English courts have imposed and supervised consultation processes without statutory backing for decisions regarding infrastructure planning,[16] funding for and

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[12] Catherine Donnelly, 'Participation and Expertise: Judicial Attitudes in Comparative Perspective' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, 2010) 357, 370. See also Genevieve Cartier, 'Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?' (2003) 53 *University of Toronto Law Journal* 217, 219 'judicial abstinence'; PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) 174 'courts have been dormant'; DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) 493 'lack of interest' for procedural fairness for rule-making.

[13] (1985) 84 LGR 168.

[14] (1985) 84 LGR 168, 189. See also *R v North and East Devon Health; Ex Parte Coughlan* [2001] QB 213, 258 [108].

[15] See, eg, Clive Sheldon, 'Consultation: Revisiting the Basic Principles' [2012] *Judicial Review* 152; Richard Moules, *Environmental Judicial Review* (Hart Publishing, 2011) 243–8; Harry Woolf et al, *De Smith's Judicial Review* (Sweet and Maxwell, 7th ed, 2013) 417–22.

[16] *HS2 Action Alliance Limited v Secretary of State for Transport* [2013] EWCA Civ 920 (a high speed rail network); *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* [2007] JPL 1314, (a government policy regarding new nuclear power stations); *R (on the application of Medway Council) v Secretary of State for Transport* [2003] JPL 583, (a policy regarding expansion of existing airports and possibly a new airport).

closure of schools,[17] policies regarding the administration of licensing systems,[18] and licence or permit decisions that concern a particular licence holder and have significance for the general public.[19]

The *Gunning* principles regulate discussion between authorities and members of the public. They require information about proposed actions to be disclosed, enable the implications and impacts of the proposed action to be explained to the decision-maker, and the evidential basis for the proposal to be challenged. Consultation requirements also enable the differing values of members of the public to be expressed and taken into account by the decision-maker. Such matters may be summarised as ensuring that the government authority makes an informed decision.[20] They may also encourage the authority to modify the proposed action so as to avoid or mitigate the potential harms raised in the public consultation process. And, of course, public participation is directed not only to preventing harm to particular individual and group interests but more generally to ensuring that democratic values extend to administrative actions.[21]

The public exception restricts the courts from imposing public consultation requirements on public interest-based decision-making as a matter of procedural fairness. If it were to be removed from the procedural fairness threshold test and consultation processes were drawn on for the content of procedural fairness, Australian courts could impose and supervise consultation processes in two contexts. First, when no process has been provided for a decision-making power that affects the public generally and there is no statutory indication of procedural fairness being excluded, and second when legislation does provide a process, public consultation principles could be used as a background framework for interpreting and applying the particular provisions.

I will argue that Australian courts should move beyond the public exception and impose and supervise public consultation requirements. My primary argument is that Australian courts could do this through a relatively small step in procedural fairness doctrine that is consistent with

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[17] *R (on the application of Dudley Metropolitan Borough Council) v Secretary of State for Communities and Local Government* [2012] EWHC 1729 (Admin); *R (on the application of Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin); *R v Brent London Borough Council Ex parte Gunning* (1985) 84 LGR 168.

[18] *R (on the application of Morris) v Newport City Council* [2009] EWHC 3051.

[19] *R (on the application of the Plantagenet Alliance Limited) v Secretary of State for Justice* [2013] EWHC B13 (Admin).

[20] *R v Arkwright* (1848) 12 QB 960, 970; Jeffery Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' [1999] *Public Law* 448, 452.

[21] As Susan Rose-Ackerman and Thomas Perroud have said is characteristic of American administrative law: 'Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment' (2013) 19 *Columbia Journal of European Law* 225, 227–8.

other features of Australian administrative law, in particular the relevant considerations ground of review. The article develops in the following order. Part II examines how and why the public exception arose, its rationale and criticisms that have been made of it. Part III provides general reasons for extending procedural fairness to consultation processes. Part IV examines three options for extending procedural fairness to impose public consultation requirements on administrators. I argue that the best option extends procedural fairness to the interests that correspond with the considerations that a decision-maker is required to take into account.

## II THE PUBLIC EXCEPTION, ITS RATIONALE AND CRITICISMS

### A *Kioa v West and the Individual/Public Distinction*

How then did the public exception become part of Australian law and what is its rationale? As mentioned, the answer is in the High Court's decision in *Kioa v West*,[22] that procedural fairness is required for decisions that adversely affect an individual's rights, interests and legitimate expectations but not decisions that affect the public generally.[23] The primary reform established by *Kioa v West* was to not follow earlier High Court cases which held that procedural fairness was not required for deportation decisions.[24] However, its direct and lasting significance was to broaden and simplify the threshold test for procedural fairness.[25] The administrative law literature prior to *Kioa v West* had criticised courts for failing to assert procedural fairness vigorously enough and that reconsideration by the High Court was required.[26] *Kioa v West* laid the foundation for the strong presumption of procedural fairness and that any contrary statutory intent has to be very clear to exclude it.[27]

However, *Kioa v West* also established the limits to procedural fairness that disable Australian courts from imposing and supervising processes for political discussion prior to public interest-based decision-making. Mason J quoted Jacobs J's statement in *Salemi v Mackellar (No 2)*[28] that procedural fairness does not apply to decisions that affect an individual as a 'member of the public or a class of the public'[29] and that an

[22] (1985) 159 CLR 550.
[23] Ibid 582, 584 (Mason J), 619–20 (Brennan J), 632–3 (Deane J).
[24] Ibid 585–6 (Mason J), 600 (Wilson), 623–6 (Brennan J), 632 (Deane J).
[25] Aronson and Groves, above n 5, 408.
[26] H Whitmore, *Principles of Australian Administrative Law* (Law Book Company Ltd, 5th ed, 1980) 122; Steven Churches, 'Justice and Executive Discretion' [1980] *Public Law* 397.
[27] (1985) 159 CLR 550, 585 (Mason J); *Annetts v McCann* (1990) 170 CLR 596, 598.
[28] (1977) 137 CLR 396.
[29] (1985) 159 CLR 550, 584 (Mason J), 632 (Deane J).

administrative decision of this kind is 'truly a 'policy' or 'political' decision and is not subject to judicial review'.[30] Brennan J stated that it was unlikely for Parliament to intend that procedural fairness was required when 'interests of all members of the public are affected in the same way by the exercise of such a power' – for procedural fairness to apply the decision should 'single out' individuals in a manner that is different to the way the interests of the public are affected.[31] The boundary line for procedural fairness was therefore clearly expressed as concerning decisions that affect the public generally. While the distinction between decisions that affect individuals and decisions that affect the public generally can be difficult to apply in practice,[32] it has been highly influential in procedural fairness cases.[33]

There is little explanation in *Kioa v West* of the rationale of the public exception. There are indications however that the judges wanted to link the procedural fairness threshold test to the principles of standing and non-justiciability. For example, Brennan J[34] equated the individual/public distinction underpinning the threshold test with the kinds of interest recognised in the special interest test for standing in *Australian Conservation Foundation v Commonwealth*[35] and *Onus v Alcoa of Australia Ltd*.[36] On the other hand, the rationale for the individual/public distinction in Mason J's judgment can be traced via *Salemi v Mackellar (No 2)*[37] to a decision of the New South Wales Court of Appeal, *Mutton v Ku-ring-gai Municipal Council*.[38] In that case, Jacobs P applied the principle of non-justiciability to a decision of a local council that involved what he said were an indeterminate number of political, social, and economic considerations that could not be adequately reviewed by courts.[39]

We can take from this that the procedural fairness threshold test is conceptually linked to both standing and non-justiciability, both of which are directed to keeping the courts away from political matters and limiting their supervision to the protection of personal interests of individuals.

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[30] *Salemi v Mackellar (No 2)* (1977) 137 CLR 396, 452.
[31] (1985) 159 CLR 550, 620 (Brennan J).
[32] See *South Australia v O'Shea* (1987) 163 CLR 378, 388–9 (Mason CJ), 402 (Wilson and Toohey JJ), 411-2 (Brennan J), 418 (Deane J dissenting). See also Aronson and Groves, above n 5, 429; Mason, above n 10, 105.
[33] See, eg, *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33, 51–53 (Beazley JA); *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 66 FCR 537, 553–555.
[34] (1985) 159 CLR 550, 621.
[35] (1980) 146 CLR 493.
[36] (1981) 149 CLR 27.
[37] (1977) 137 CLR 396, 452.
[38] [1973] 1 NSWLR 233.
[39] Ibid 241–3.

This focus on individual interests is a common method of identifying matters that may be reviewed by courts.[40]

The development of legitimate expectations principles by English courts has enabled them to impose public consultation processes on administrators. An administrator's policy, practice or promise regarding consultation can raise a legitimate expectation that such a process will be carried out. [41] This is not, of course, applicable in Australia. First, Australian courts now regard legitimate expectations as relating to the content of procedural fairness rather than the threshold test. This has led to the legitimate expectations principle being regarded as redundant.[42] Secondly, even if legitimate expectations were regarded as part of the threshold test, *Kioa v West* indicates that they could not provide a gateway to public consultation as such processes are employed for decisions that affect the public generally and are excluded from procedural fairness on that basis.[43] The consequence is that applicants who challenge administrative decisions on the basis of a legitimate expectation of consultation tend to fail either because the decision affects the public generally[44] or because the court interprets the facts as meaning that any representation or undertaking made by government did not raise an expectation that was legitimate.[45]

There are other possibilities for extending procedural fairness to decisions that affect the public generally, that have been closed off by Australian courts. Given the link between the procedural fairness threshold test and standing law that was made by Brennan J in *Kioa v West*,[46] it seems arguable that the extension of standing indicates that there should be a commensurate extension of procedural fairness. The extension of standing to environmental groups in Australia, either by open or extended standing provisions of legislation[47] or by the liberalisation of the common

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[40] See, eg, Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 263.

[41] *R (on the application of Niazi) v Secretary of State* [2008] EWCA Civ 755, [29], [50] (Laws LJ).

[42] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 27–8 [81]–[83], 34 [105] (McHugh and Gummow JJ), 38 [121] (Hayne J); *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534, 542 [28].

[43] *Kioa v West* (1985) 159 CLR 550, 584 (Mason J), 632 (Deane J).

[44] *Geelong Community for Good Life Inc v Environment Protection Authority* (2008) 20 VR 338, 347 [22].

[45] See, eg *Save the Showground for Sydney Inc v Minister For Urban Affairs And Planning* (1997) 95 LGERA 33, 40–1 (Gleeson CJ), 49–50 (Beazley J); *Rivers SOS Inc v Minister for Planning* (2009) 178 LGERA 347, 385 [163].

[46] (1985) 159 CLR 550, 621.

[47] See, eg, *Environment Protection and Biodiversity Conservation 1999* (Cth) s 487; *Environment Planning and Assessment Act 1979* (Cth) s 123.

law special interest test,[48] would on this basis support an extension of procedural fairness. However, this option for extending the reach of procedural fairness has been rejected. The point has been made in numerous cases that standing and procedural fairness are separate legal questions with different lines of authority.[49] It is therefore accepted that standing rules may enable access to the courts for public interest actors but that procedural fairness is limited to protecting private rights and interests. The cases that make this point tend to confirm the general opposition by the courts to imposing procedural fairness obligations on administrators in relation to individuals and groups seeking to participate on public interest grounds.

There is also case law suggesting that public consultation and procedural fairness involve fundamentally different forms of participation in government decision-making. For example, Branson and Finn JJ in *Wilderness Society Inc v Turnbull* ('*Wilderness Society*')[50] refused to supplement a statutory consultation process with procedural fairness principles on the ground that public consultation processes serve the public purposes of enhancing transparency, accountability, and facilitating public comments while procedural fairness is directed to 'avoiding "practical injustice" to persons who are likely to be affected adversely by an approval decision'.[51] This reasoning led to the conclusion that since procedural fairness serves a different purpose to public consultation, the consultation provisions in the particular Act could not have 'procedural fairness notions engrafted upon them'.[52]

*Wilderness Society* indicates that Australian judges may perceive statutory public consultation to be a categorically different form of process to procedural fairness. The reasoning in that case brings to the forefront the individual/public distinction while downplaying the similarities between procedural fairness and consultation. However, both forms of process are directed towards protecting interests – the applicant in *Wilderness Society* was seeking to protect environmental interests that were consistent with the objects of the relevant Act and considerations relevant to the decision.[53] The narrow understanding of interests protected

[48] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247, 263, 267; *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70, 73–4; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 512–5; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516, 552–3.

[49] See, eg, *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537, 568; *Rivers SOS Inc v Minister for Planning* (2009) 178 LGERA 347, 385 [162]. See also *Griffith University v Tang* (2005) 221 CLR 99, 118 [45] (Gummow, Callinan and Heydon JJ).

[50] (2007) 166 FCR 154.

[51] Ibid 175–6 [81]–[82].

[52] Ibid 176 [82].

[53] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3(1)(a).

by procedural fairness in this case tends to confirm the restrictiveness of the procedural fairness threshold test. In the particular case, it seems to have led the court to overstate the differences between procedural fairness and public consultation.

There are cases that complicate this picture of the individual/public distinction being a fundamental, unyielding feature of Australian procedural fairness laws. The first is that there are administrative decisions that have an adverse effect on an individual and also affect the public generally. Courts have to determine in such cases whether procedural fairness should be given to the individual affected notwithstanding the public interest factors requiring consideration. The High Court's decision in *South Australia v O'Shea*[54] suggests that an adverse effect on an individual triggers procedural fairness requirements but with reduced content due to the public interest considerations.[55] Secondly, there are Australian procedural fairness cases that may suggest the loosening of the public exception. The cases involved decisions that affected numerous licence holders and required consideration of public interest factors.[56] While having the characteristics of decisions that affect many people or the public generally, suggesting that they were caught by the public exception at the threshold stage, the courts in these cases focused on the content of procedural fairness. The cases indicate that it can be difficult to distinguish between decisions that affect individuals in a personal manner and decisions that affect individuals and groups as members of the public. While they highlight the difficulties that may occur when applying the public exception principle, the judges did not, at least expressly, seek to undermine the public exception or raise doubts about its status in Australian administrative law.

### B *Debates Relating to the Public Exception*

Numerous reasons have been expressed for supporting the public exception and these reasons have been challenged in academic literature. It is worthwhile discussing these debates as they help to highlight the issues that will be examined in the remainder of this article. I will do so by focusing primarily on Professor Craven's challenges to the reasons for

[54] (1987) 163 CLR 378.
[55] Aronson and Groves, above n 5, 438.
[56] See, eg, *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000* (2008) 302 ALR 299, 313 [55], 315–318 [74]–[90]; *Director-General, Department of Trade & Investment, Regional Infrastructure and Services v Lewis* [2012] NSWCA 436, [31], [57]–[62] (McColl JA), [146] (Sackville AJA); *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381, 438-9 [263]–[264] (Mason P).

supporting the public exception as they are a common reference point in academic literature.[57]

There is a commonly expressed concern that the public exception is justified on the ground that procedural fairness is impractical for decisions affecting the public generally or for decisions that affect numerous people in a polycentric manner.[58] Procedural fairness is regarded as impractical in such contexts because it typically requires notification of affected persons of adverse information, issues and conclusions, and opportunities given to refute them – actions that would be very difficult to manage for decisions that affect many people. The point has been summarised by Mason P as being that procedural fairness in this context would potentially involve 'an infinite regression of counter-disputation'.[59]

Professor Craven's answer to such concerns, with which I agree, is that public consultation does not require the usual aspects of procedural fairness – notice to particular individuals of adverse information, issues and possible conclusions, and an individual opportunity to be heard.[60] It is a less detailed process where proposals are publicly notified and members of the public lodge submissions to address the proposed rule or decision. There is no requirement that issues and information arising from submissions are disclosed to other participants for their response.[61] The answer to the impracticality concern is therefore that the fact that a decision affects the public generally should not be a reason to exclude procedural fairness, but should affect the content of procedural fairness which for such decisions, should involve a form of public consultation.

There is a related concern that the imposition of procedural fairness requirements for decisions that affect the public generally would have resource and institutional implications for administrators.[62] Public consultation processes inevitably delay administrative decision-making due to the time taken to give notice, provide a period for making submissions and for the submissions to be considered. There will also be administrative costs involved. Courts are usually wary about taking steps that involve such consequences and it will be difficult for courts to make

[57] Craven, above n 5. As referred to by Cartier, above n 12; Galligan, above n 12, 491; Aronson and Groves, above n 5, 429; Peter Cane, 'Participation and Constitutionalism' (2010) 38 *Federal Law Review* 319, 327; Harry Woolf et al, above n 15, 389.
[58] Craven, above n 5, 580.
[59] *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381, 439 [267]. See also *Pharmacy Restructuring Authority v Martin* (1994) 53 FCR 589, 597.
[60] Craven, above n 5, 592–4.
[61] *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 259 [112].
[62] Craven, above n 5, 580. See also RA Macdonald, 'Judicial Review and Procedural Fairness in Administrative Law: II' (1980) 26 *McGill Law Journal* 1, 5.

an accurate assessment of them.[63] This would be a reason for the courts to not extend the procedural fairness threshold and leave the matter to parliaments to include public consultation requirements in legislation. This is undoubtedly an important question. In my view, it is finely balanced but in the end, I agree with Professor Craig that the additional time and resources of public consultation are costs worth bearing in a democracy.[64] Moreover, it must be recognised that such an extension of the threshold test would not necessarily be the last word on the matter. Such judicial developments would prompt parliaments to think more about establishing broad discretionary powers without procedural requirements to inform the decision-making process.

There is another argument against extending procedural fairness to public interest decisions that is based on such decisions being commonly allocated to ministers, or are supervised by ministers who are accountable to parliaments by way of the principles of ministerial responsibility. The political nature of such decisions suggests that these accountability mechanisms are more suitable than judicial review. There are a number of responses to this. The first is that over a long period of time, judges[65] and academics[66] have expressed doubts as to the effectiveness of ministerial responsibility. If such doubts are accepted then ministerial responsibility should not be a strong reason to exclude procedural fairness for such decisions. On the contrary, an extension of procedural fairness would support public discussion of such decisions in order to mitigate the recognised weakness of parliamentary accountability.[67] The second response is that the role of the courts in review of decision-making on process grounds is recognised to be more legitimate than intervention on substantive grounds which may draw courts into social and economic considerations and questions of the public good.[68] There is no doubt, of course, that courts review ministerial decisions, and decisions in which

[63] Aronson and Groves, above n 5, 505-8.
[64] Paul Craig, *Administrative Law* (Sweet and Maxwell, 7th ed, 2012) 453–4.
[65] *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 192 (Gibbs CJ), 222 (Mason J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37 (Brennan J); Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, 1986) 18, 19.
[66] Craven, above n 5, 594; Matthew Groves, 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed) *Law and Government in Australia* (Federation Press, 2005) 82, 86–90; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, 2003) 57–63. Similar views have been expressed in the United Kingdom: Craig, *above n 12*, 166-73; AV Dicey, *An Introduction to the Study of the Law of the Law of the Constitution* (McMillan Press, 10th ed, 1959) 498. For Canada see Cartier, above n 12, 242–3.
[67] See Susan Rose-Ackerman, 'Policymaking Accountability: Parliamentary Versus Presidential Systems' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 171, 178.
[68] Jowell, above n 20, 451.

ministers advise governors, concerning matters that affect the public generally according to the more substantive grounds of review – for example improper purposes,[69] unreasonableness[70] and proportionality.[71] It is difficult to see why these more substantive forms of judicial review of ministerial decisions involving matters of public interest are legitimate while procedural review is not.

It has also been said that an extension of the threshold test to decisions that affect the public would require courts to review government policy decisions, which would be a large step into review of executive activity.[72] Professor Craven has argued that this concern is not convincing as this form of judicial review relates to procedural matters not the substance of the decision. There are reasons to think however that the point cannot be dismissed so easily. The first is that while consultation processes should generally be regarded as procedural requirements, process can at times be difficult to distinguish from substance. The *Gunning* factors could stretch the procedural nature of consultation into a form of substantive review[73] at the point of submissions having to be 'conscientiously' taken into account.[74] While conscientious consideration of submissions may be regarded as a beneficial aspect of the *Gunning* principles, it opens up the concern that has been expressed about the courts reviewing decisions for whether there has been 'proper, genuine and realistic consideration' of a particular matter – that it is vague and can facilitate intrusion into the merits of the administrative decision.[75] Secondly, removal of the public exception does have the potential for courts to be required to supervise policy decisions in a way that is a considerable step from the administrative decisions traditionally reviewed by Australian courts. This can be seen in the English case law on public consultation, to be examined in Part IV below.

I therefore agree with the point about removing the public exception being potentially a large step for Australian administrative law. The

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[69] See, eg, *R v Toohey; Ex parte Northern Land Council* (1980) 151 CLR 170 (challenge to town planning regulations).

[70] See, eg, *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 112 ALR 211 (challenge to a fisheries management plan).

[71] See, eg, *South Australia v Tanner* (1989) 166 CLR 161 (challenge to regulations that restricted development in a water catchment area).

[72] Craven, above n 5, 590; Aronson and Groves, above n 5, 450.

[73] Mark Aronson, 'Process, Quality and Variable Standards: Responding to an Agent Provocateur' in Michael Taggart et al, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5, 16–17.

[74] *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168, 189; *R (on the application of Buckinghamshire County Council) v Secretary of State for Transport* [2013] EWHC 481 (Admin), [835]–[843].

[75] *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 175–6 [29]–[30]; *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426, 435–42 [36]–[66].

question is whether adjusting the threshold test to enable the courts to impose public consultation requirements can be designed so as not to require courts to impose public consultation on policy decisions. On the other hand, the development of consultation factors that are specifically designed for public interest decision-making should mitigate the impracticality concerns regarding imposing process requirements on these kinds of decisions.

## III BETWEEN PROCESS WRIT LARGE AND PROCESS WRIT SMALL

Before examining the options for extending procedural fairness to decisions that affect the public generally, it is worthwhile highlighting the contexts in which courts impose and supervise processes for participation in government decision-making.[76] In particular, it is useful to situate administrative decision-making that affects the public generally as being in between general political discussion which is regulated by the courts according to constitutional principles (which has been characterised by Professor Ely as 'process writ large')[77] and administrative decisions that affect individuals to which procedural fairness applies ('process writ small'). The purposes for doing so are first, to highlight that administrative decisions that affect the public fall into a gap between these two forms of process and secondly, to briefly set out reasons why that gap should be filled by an extension of procedural fairness.

The freedom of political communication is the most relevant constitutional principle in relation to participation in electoral politics. To be clear, I am not suggesting that the implied freedom of political communication can be used to develop principles of public participation in administrative decision-making. It cannot do so because it operates as a restriction on federal and state laws that limit political communication[78] rather than as a means of imposing procedural requirements on the exercise of decision-making powers. Moreover, the implied freedom is directed to a fundamentally different purpose: protecting representative and responsible government as established by ss 7, 24, and 64 of the *Commonwealth Constitution*,[79] focusing particularly on electoral

[76] For a more developed explanation of this see Peter Cane, 'Participation and Constitutionalism' (2010) 38 *Federal Law Review* 319.

[77] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 87.

[78] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *Unions NSW v New South Wales* (2013) 88 ALJR 227, 236 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 246 [109] (Keane J).

[79] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560–2; *Unions NSW v New South Wales* [2013] HCA 58, [17]–[19]; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 565–6; Haig Patapan, *Judging Democracy:*

processes,[80] rather than the direct participation in particular governmental decisions according to procedural fairness requirements.

However, there are values that underpin the implied freedom of communication and are expressed by the judges in the cases that help to highlight the importance of public discussion about matters of governmental significance – the same concern that underlies public consultation requirements for administrative decisions. For example in *Lange v Australian Broadcasting Corporation*,[81] the High Court stated:

> [T]his Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters.[82]

The Court has stated in other cases that the implied freedom of political communication is directed to ensuring openness, participation and accountability of government to the people.[83] Interestingly, the same values are referred to as underpinning administrative law – openness, participation, accountability, fairness, rationality, accessibility of grievance procedures, legality and impartiality.[84]

We therefore have a constitutional commitment to public discussion relating to electoral politics and a legal commitment by way of procedural fairness for individual participation in decision-making that harms personal interests. What then of what Professor Mashaw has referred to as the 'micro-politics' of citizen participation in administrative decision-making?[85] Why should we extend judicially imposed procedural requirements to decisions that affect the public generally?

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*The New Politics of the High Court of Australia* (Cambridge University Press, 2000) 59–60, 189–91.

[80] Leslie Zines, The High Court and the Constitution (Federation Press, 5th ed, 2008) 565–6; Haig Patapan, *Judging Democracy: The New Politics of the High Court of* Australia (Cambridge University Press, 2000) 59–60, 189–91.

[81] (1997) 189 CLR 520.

[82] Ibid 571.

[83] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138–9 (Mason CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47–8 (Brennan J); *Unions NSW v New South Wales* (2013) 88 ALJR 227, 234 [28]–[29] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 245 [104] (Keane J).

[84] Aronson and Groves, above n 5, 1.

[85] Jerry L Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (Yale University Press, 2012) 288.

The answer that I would give in general terms and which is developed in detail in Part IVC below, is that there should be a commitment to informed decision-making by administrative decision-makers. Public consultation enables the views of individuals and groups to inform the consideration of the factors that the decision-maker is required to take into account.[86] Without the processes that enables dialogue between government officials and members of the public for the exercise of such statutory powers, doubts should be raised as to whether the resulting decision meets the interests and needs of the community[87] – the decision could be based on merely the personal view of the official. Such doubts raise questions of arbitrariness and concerns about the overall rationality of decisions. By linking procedural fairness and rationality in this way, the courts can play a role in enforcing processes that support consideration of the substantive aspects of the decision.

## IV MOVING BEYOND THE PUBLIC EXCEPTION

If it is accepted for the reasons set out in Part III that court-imposed public consultation processes would be a beneficial addition to Australian public law and that the public exception explained in Part II is an overly broad restriction on its implementation, the next question is how could we move beyond it? That is, is there a way of enabling the courts to impose and supervise public consultation provisions that is not a large step and does not require courts to become closely engaged in policy development? In this Part, I will examine two methods that have been developed by English courts and argue that both have problems that make them unsuited to the Australian administrative law landscape. However, I will also suggest a third method, one that has its roots in the relevant considerations ground of review, which would involve a smaller step towards consultation that is consistent with related elements of Australian administrative law.

### A *The 'When Embarked Upon' Principle*

The method developed by English courts to be dealt with first is seemingly the least controversial. It is the principle expressed by Lord Woolf in *Coughlan*[88] that 'whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon, it must be carried out properly'.[89] Although this was conceded by the

[86] See Sheldon, above n 15, 159; David Dyzenhaus, 'Dicey's Shadow' (1993) 43 *University of Toronto Law Journal* 127, 142. See also *Tickner v Chapman* (1995) 57 FCR 451, 456, 462 (Black CJ).
[87] TRS Allan, 'Common Law Reason and the Limits of Judicial Deference' in David Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing, 2004) 289, 292.
[88] *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
[89] Ibid 258 [108].

parties in *Coughlan* it has been accepted in later cases.[90] It has a common sense ring to it and has been referred to as 'axiomatic'.[91] This approach to consultation could be regarded as relatively uncontroversial because it has little resource or institutional consequences. The administrator decides to undertake consultation, suggesting that they have resources and institutional capabilities to carry it out – the court's role is merely to ensure compliance with the *Gunning* factors regarding consultation. However, the 'when embarked upon' principle is also problematic. It may have the unintended consequence of discouraging administrators to carry out consultation for public interest decisions in order to avoid the risk of litigation. It also has characteristics that make it too narrow and has consequences that indicate it would be a radical extension for Australian procedural fairness.

The 'when embarked upon' principle is too narrow as a standalone threshold for public consultation for the simple reason that while it enables courts to supervise such processes when they have been undertaken by administrators, it does not enable courts to impose such processes on administrators. It therefore does not carry out one of the primary functions of procedural fairness – the common law supplying the omission of the legislature.[92] The 'when embarked upon' principle may therefore supplement other threshold requirements that enable judicial review of consultation processes, and that seems to be how it has developed in the English courts, but it is too narrow on its own.

On the other hand, when the cases in which the 'when embarked upon' principle has been applied are examined, it can be regarded as having, at least to Australian eyes, radical consequences. This is because English courts have used the principle to review the consultation employed for decisions that are not made under statute and relate to large scale infrastructure planning and government policies. Such decisions are likely to be regarded in Australia as involving 'high policy' and their supervision via the principles of consultation would be regarded as a radical step.

This can be seen in two of the 'when embarked upon' cases. In *R (on the application of Medway Council) v Secretary of State for Transport*,[93] the Administrative Court reviewed a consultation that had been carried out

[90] *R (on the application of Easyjet Airline Company Limited) v Civil Aviation Authority* [2009] EWCA Civ 1361, [46]; *R (on the application of Eisai Limited) v National Institute for Health and Clinical Excellence* [2008] EWCA (Civ) 438, [24].
[91] *R (on the application of Medway Council) v Secretary of State for Transport* [2003] JPL 583, 594 [28].
[92] *Cooper v Board of Works for the Wandsworth District* (1863) 143 ER 414, 420; 14 CB (NS) 180, 194.
[93] [2003] JPL 583.

for an airports policy.[94] The policy was directed to managing the projected increase in passengers for airports in South-Eastern England in the period from 2000 to 2030 by expanding existing airports and possibly establishing a new airport. The decisions that were to be made had characteristics of 'pure policy' as they were for planning purposes and separated from decisions concerning permits for a new airport or expansion of existing airports.[95] Similarly, in *R (on the application of Buckinghamshire County Council) v Secretary of State for Transport*[96] the Administrative Court and, on appeal, the Court of Appeal reviewed consultation processes that led to decisions regarding planning for a high speed railway in England. The administrative decisions under review in the *Buckinghamshire* case had no statutory support and seemingly did not involve a prerogative power but were preliminary to decisions to be made by Parliament to determine whether development permission should be granted.[97] The interesting aspect of this case is that while the consultation processes were reviewed in great detail there was no explanation of why the consultation was reviewable. The focus was on whether consultation standards were breached. Both of these cases therefore involved policy decisions concerning infrastructure planning prior to and separate from decisions with legal effectiveness.

If review of non-statutory, policy-based, decision-making is the consequence of the 'when embarked upon' principle then it would be a radical step in Australian procedural fairness law. Procedural fairness is usually understood in Australia as an implied condition of statutory powers.[98] There seems to be no clear case determined by the High Court that procedural fairness can be applied to non-statutory powers[99] but there are cases of lower courts that indicate that procedural fairness can be applied to such decisions if the relevant administrative decision is

[94] Ibid 586 [1]–[3].
[95] Ibid 586 [3].
[96] [2013] EWHC 481 (Admin). Note that this case was subject to appeals to the Court of Appeal (*HS2 Action Alliance Limited v Secretary of State for Transport* [2013] EWCA Civ 920) and the Supreme Court. The appeal to the Supreme Court did not deal with the issues regarding consultation: *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport* [2014] UKSC 3, [14]–[15].
[97] [2013] EWHC 481 (Admin), [2]–[7]. The Administrative Court also reviewed the consultation process for a non-statutory compensation scheme: [2013] EWHC 481 (Admin) [6], [681].
[98] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 100–101 [39]–[41].
[99] The question was raised in *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 336 [15] but the High Court did not need to resolve it as it determined that the relevant powers exercised by a non-government institution were connected to statutory powers: (2010) 243 CLR 319, 349–51 [66]–[73].

justiciable.[100] The question then relates to non-justiciability and it is sufficient to note in this regard that there would be serious concerns in Australian law about the justiciability of non-statutory policy decisions regarding infrastructure planning. They would likely be understood as essentially political decisions raising separation of powers concerns.[101]

While in my view public consultation on policy issues is an important feature of modern government,[102] and I also think that judicial review is necessary to help to ensure that public consultation processes are carried out according to standards such as the *Gunning* principles, it should also be recognised that the consequences of the 'when embarked upon' principle discussed above would involve a radical extension of procedural fairness. Moreover, the 'when embarked upon' principle is under-inclusive due to establishing the courts as mere supervisors of consultation – it is not a method for imposing consultation requirements. It is therefore an unsatisfactory option for moving beyond the public exception.

### B *Legitimate Expectations and Public Consultation*

We saw in Part IIA that in Australian law the doctrine of legitimate expectations has run its course in relation to the procedural fairness threshold test. It therefore cannot be used to enable procedural fairness to reach decisions in which the applicant is affected as a member of the public. Such limitations play little part in the legitimate expectations case law in England. One of the consequences of this is that legitimate expectations principles have provided a pathway in England to requiring consultation processes to be held.[103] In my view however it is an unsatisfactory method of imposing consultation requirements on

[100] See, eg, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 304–8 (Wilcox J); *Blyth District Hospital Incorporated v South Australian Health Commission* (1988) 49 SASR 501, 509–10 (King CJ); *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, 140 (Tadgell J), 160–1, 168 (Eames J).

[101] Aronson and Groves, above n 5, 118. See also *South Australia v O'Shea* (1987) 163 CLR 378, 389 (Mason CJ), 411 (Brennan J).

[102] For a developed argument on this point see, Peter Cane, 'The Constitutional and Legal Framework of Policy-Making' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Clarendon Press, 1998) 39.

[103] The English courts have also famously extended the legitimate expectations principle to enforcement of substantive expectations: *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213. This is a different aspect of legitimate expectations to that which is examined in this article and one which is clearly beyond the scope of Australian administrative law: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 22–3 (Mason CJ); 39–40 (Brennan J), 61 (Dawson J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23–25 [68]–[77] (McHugh and Gummow JJ).

administrators.[104] Similar to the 'when embarked upon' principle, this is because it is under-inclusive and catches pure policy decisions. Moreover, it has a different rationale to public consultation.

In English law, a legitimate expectation can be a basis for providing consultation when there is a policy, promise, or practice that consultation will occur.[105] There needs to be evidence of the policy, practice, or promise[106] and the expectation cannot conflict with the relevant Act[107] or conflict with a countervailing public interest.[108] The case law has evolved through the merging of the legitimate expectations principles that developed in the 1960s and 1970s with case law regarding the meaning of 'consultation' when used in legislation.[109] The *Gunning* case[110] is commonly referred to as the starting point for court-imposed consultation based on the legitimate expectations principle.[111] Even though there was no requirement for consultation in the particular legislation in the *Gunning* case, Hodgson J accepted that consultation was required due to statutory indications, prior consultations indicating a practice, and Ministerial guidelines regarding consultation.[112] The *Gunning* case represents the broadening of the procedural fairness threshold test sufficient to enable the courts to impose public consultation requirements without any statutory basis. There are restrictions, there must be a policy, promise or practice of public consultation, but the case law nevertheless broadens the procedural fairness threshold test beyond the public exception established by *Kioa v West*.

The question is whether the legitimate expectations principle is an appropriate method for imposing consultation requirements. In its favour, it could be said that it should not impose unexpected resource or institutional consequences on administrators. For the legitimate expectations principle to apply in relation to consultation, the administrator must have a policy or practice of holding consultation

[104] I put to the side concerns about the vagueness of the legitimate expectations principle. While such criticisms have been made in the United Kingdom, they have also been challenged: Adam Perry and Farrah Ahmed, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 *Cambridge Law Journal* 61; Paul Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] *Public Law* 330.
[105] *R (on the application of Niazi) v Secretary of State* [2008] EWCA Civ 755, [29], [50].
[106] *R (on the application of BAPIO Action Limited v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [39]–[40].
[107] *R (on the application of Albert Court Residents' Association) v Westminster City Council* [2012] PTSR 604, 614 [35].
[108] *R (on the application of Niazi) v Secretary of State* [2008] EWCA Civ 755, [30].
[109] *Port Louis Corporation v Attorney General of Mauritius* [1965] AC 1111, 1124; *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13, 17.
[110] *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168.
[111] Sheldon, above n 15, 366; Harry Woolf et al, above n 15, 418.
[112] (1985) 84 LGR 167, 187.

processes, or have made a representation that it would provide a consultation process. The court merely enforces the policy, practice or representation. On the other hand, the legitimate expectations principle also has problematic features. Like the 'when embarked upon' principle it is arguably both too narrow and too wide.

The legitimate expectations principle can be regarded as being too narrow due to its dependence on prior actions by government – a policy, practice, or representation. Its rationale is now commonly understood to be based on the government having made a commitment to members of the public about its actions.[113] These may be good reasons to support the legitimate expectation basis for procedural fairness generally but it is too narrow a basis for providing for consultation. If consultation is regarded as necessary to support political discussion and the rationality of public interest-based decision-making then a broader basis should be sought for enforceable consultation requirements, a basis in which consultation is required due to the characteristics of the decision[114] rather than the prior actions of government officials. According to this rationality-based understanding of consultation, it would be expected that public consultation should be utilised even where there is no policy, practice or promise that it would occur because public interest-based decisions without being informed by the views and criticisms of interested members of the public would be regarded as being potentially arbitrary.

The English legitimate expectations case law also indicates that it would be too broad for Australian administrative law by potentially enabling review of public consultation for policy decisions. This would involve a radical step for Australian courts. This is best seen by *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* ('*Greenpeace*'),[115] a case in which Sullivan J determined that there was procedural unfairness in relation to policy decisions concerning new nuclear power plants. In this case, the Secretary of State for Trade and Industry had issued a White Paper that stated that the 'fullest public consultation' would be carried out.[116] This statement was regarded as a promise that consultation would occur.[117] It was also apparent that the particular decisions in *Greenpeace* were of the highest order. They were

[113] *R (on the application of Niazi) v Secretary of State* [2008] EWCA Civ 755, [30] 'where a public authority has given a plain assurance, it should be held to it', [42]; Perry and Ahmed, above n 104, 74. Another recent expression of the rationale is from the individual's point of view – that the courts protect the trust that a member of the public has put in the administrator based on the relevant promise, policy or representation: Christopher Forsyth, 'Legitimate Expectations Revisited' [2011] JR 429, 430, 438.
[114] MacDonald, above n 62, 19.
[115] *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* [2007] JPL 1314.
[116] [2007] JPL 1314, 1332 [42].
[117] Ibid 1335 [54].

not based on statute and were referred to as being 'high-level, strategic decisions' involving 'high policy'.[118] Yet, the decisions were regarded as justiciable due to the legitimate expectation based on the statements made in the White Paper. Moreover, Sullivan J accepted that there was little or no practical unfairness to Greenpeace as it had made submissions on the general issue relating to nuclear power despite the inadequacy of the consultation documentation provided by the Secretary. Yet this had no impact on the result of the case. Sullivan J stated that '[t]he promise of "the fullest public consultation" was extended to the adult population of the United Kingdom'[119] and even though Greenpeace may have been able to comment adequately on the ultimate issue, other individuals or groups may not.[120]

*Greenpeace* highlights how far the English courts have moved beyond the parameters that are recognised in Australia. The legitimate expectations principle has enabled the courts to impose procedural fairness requirements for decisions that affect the public generally, which of course would not be the case in Australia due to the public exception. *Greenpeace* highlights that, like the 'when embarked upon' principle examined above, the legitimate expectations principle can lead courts into review of policy decisions on public consultation grounds.[121] From an Australian perspective, review of such decisions would be a large and highly unlikely step.

On the other hand, the legitimate expectations principle should be understood to be directed towards keeping government authorities to their commitments and for this purpose, it turns out to be too narrow a basis for imposing and supervising public consultation principles. If consultation processes are recognised to be a process designed to facilitate rational decision-making, we would seek a threshold test that requires procedural fairness even when there is no policy, practice or promise made by government officials that it would undertake a consultation process.

### C *Relevant Considerations and Corresponding Interests*

While the 'when embarked upon' and legitimate expectations principles are both problematic as methods for moving to procedural fairness-based public consultation in Australia, they do help to highlight the issues raised by extending procedural fairness to public interest decisions. There is a third option that I think provides a better solution to the issues raised in

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[118] Ibid.
[119] Ibid 1346 [88].
[120] Ibid 1346 [89].
[121] As acknowledged in Harry Woolf et al, above n 15, 21. See also, *R v Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 and *Bates v Lord Hailsham* [1972] 1 WLR 1373, 1377–8.

these cases. This is that rather than the threshold question concerning whether the decision affects the public generally, it would be whether the applicant's interests have a connection with the considerations that are expressed or implied by the power granted to the administrator.[122] As an extension of the procedural fairness threshold test that is influenced by the relevant considerations case law, I will refer to it as the 'relevant interests extension'. Such an approach has been suggested by Professor Galligan[123] but without tying it to procedural fairness principles or, in particular, with Australian procedural fairness doctrine. It is consistent with the normative considerations set out in Part III above as it would enable discussion between government and members of the public relating to public interest decision-making. It would do so by enabling individuals and groups whose interests match the scope and purpose of the Act to inform the consideration of the factors that the decision-maker is required to take into account. In this way, it would help to mitigate the risks of arbitrariness when the decision-maker merely informs themself in relation to such considerations.

The relevant interests extension offers solutions to the two problems identified in the English public consultation case law, the triggers being too narrow and also catching policy-based decision-making. It is broader than the 'when embarked upon' principle and the legitimate expectations principle because it is based on an understanding of interests that engage procedural fairness requirements rather than particular actions and commitments of governments. The express considerations and the considerations implied by the subject matter, scope and purpose of an Act have a corresponding 'zone of interests', as is sometimes referred to in relation to standing.[124] According to the relevant interests extension, when an individual or interest group has an interest corresponding to the relevant considerations for the decision, that interest would satisfy the procedural fairness threshold test and the decision-maker would be required to provide procedural fairness in the form of a public consultation process. To be clear, this would not require the administrator to give notice individually to those with the relevant interests – such a requirement would raise the impracticality concerns referred to in Part IIB. Public consultation should require public notice.[125]

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[122] Making links between procedural fairness and the considerations grounds of review is not new. Brennan J did so in *Kioa v West* (1985) 159 CLR 550, 619 in a manner that has been developed by Aronson and Groves, above n 5, 431–36. It is however clearly apparent that Brennan J's reasoning in *Kioa v West* is heavily reliant on the individual/public distinction and is wholly supportive of the public exception.

[123] Galligan, above n 12, 491. See also Craig, above n 12, 162.

[124] *Alphapharm Pty Limited v Smithkline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250, 259–60.

[125] Craven, above n 5, 592.

### D *Statutory and Non-Statutory Decisions*

The relevant interests extension would also enable the courts to avoid becoming too closely engaged with policy decision-making, as can be seen in the English cases and would be a radical step for Australian law. Both the relevant considerations ground of review and procedural fairness are directed primarily towards administration of *statutory* decision-making powers. Procedural fairness in Australia is usually understood as a condition on the exercise of statutory powers[126] and the relevant considerations ground is commonly referred to as relating to considerations that are expressed or implied in the legislation that grants the decision-making power.[127] Consultation facilitates the decision-maker being informed by members of the community with regard to the factors the legislation requires to be considered. Linking consultation to the exercise of statutory powers connects it to a different form of politics than is apparent in pure policy decisions. It relates to the exercise of statutory powers that result in legally effective decisions.

Limiting procedural fairness and public consultation to the exercise of statutory powers would be an effective method of excluding review on consultation grounds for the kinds of policy decisions that can be seen in the English cases. However, procedural fairness and the relevant considerations ground are not limited to statutory powers. Both find their primary homes there but neither are actually restricted in this way. This raises a question of whether procedural fairness for decisions that affect the public generally can be applied only to statutory decisions and non-statutory decisions that are not based on pure policy.

There are limiting factors that would restrict the courts from reviewing non-statutory policy decisions in this way. The first is that the Australian procedural fairness case law for non-statutory decisions includes boundaries that restrict the courts from imposing procedural fairness requirements on pure policy decisions. The principle is that a non-statutory decision that affects an individual or organisation directly will require procedural fairness, but a decision that involves policy and political considerations will not.[128] The same distinction tends to be made for non-justiciability in the cases[129] and in the academic literature where

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[126] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 100–101 [39]–[41].
[127] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J), 55–6 (Brennan J).
[128] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 306–7 (Wilcox J); *Blyth District Hospital Incorporated v South Australian Health Commission* (1988) 49 SASR 501, 509–10 (King CJ); *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, 139–140 (Tadgell J), 160–1, 164–8 (Eames J).
[129] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 279 (Bowen CJ), 302–4 (Wilcox J).

decisions that are non-justiciable are referred to as being 'essentially political'[130] or 'purely political'[131] and decisions that are justiciable are referred to as being determinative of rights or interests[132] or 'operational'.[133] The important point is to distinguish non-statutory, policy decisions regarding a government's position on an issue or plan for future actions from the crystallisation of such policies and plans in legally effective decisions and rules.[134] Only the latter would require procedural fairness or be justiciable. The result is that the boundaries of procedural fairness and non-justiciability for non-statutory decisions in Australia would prevent the courts from reviewing the kinds of policy decisions reviewed in the English public consultation cases.

Secondly, if procedural fairness based on public consultation was extended to non-statutory decisions it would be limited to interests that correspond to the mandatory considerations drawn from the scope, subject-matter and purpose of the non-statutory power. This is likely to result in a relatively restrained form of review, as there are likely to be practical difficulties identifying mandatory considerations for non-statutory powers.[135]

Therefore, while for reasons of clarity and simplicity it would be beneficial to restrict procedural fairness for public interest decisions to statutory decision-making, the limits that apply in Australian law for review of non-statutory decisions would in any case ensure that courts avoid review of policy-based decision-making. The extension of the procedural fairness threshold test influenced by the relevant considerations ground of review would therefore involve a relatively small step.

### E *Additional Questions*

Other questions of course arise with this suggested extension of procedural fairness. One such question is how would courts recognise which individuals and groups have interests that reflect the considerations expressed or implied in the relevant statute?[136] The problem may not be

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[130] Mason, above n 10, 124.
[131] Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 131.
[132] Mason, above n 10, 124.
[133] Enid Campbell and Matthew Groves, 'Polycentricity in Administrative Decision-Making' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 213, 239–240.
[134] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 305–6 (Wilcox J).
[135] *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 219 (Mason J); Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239, 260–1.
[136] Aronson and Groves, above n 5, 450–1.

as difficult as it first seems. The English consultation cases indicate that it interest groups very commonly seek consultation processes to be applied for particular decisions.[137] It is much easier for courts to see how an association's objects relate to statutory considerations than it is to make such assessments for individuals as it should be apparent from their constitutive documentation. For similar reasons it would be easy to see how professionals and academics have expertise in areas relevant to a particular decision.[138] Accordingly, an environmental group or a scientist would have interests that could engage procedural fairness in the form of consultation processes for environmental decisions, consumer organisations or an academic for decisions involving potential health risks to consumers, and professional associations for governmental actions that affect the association's members.

Secondly, would this extension of procedural fairness be ineffective due to standing laws restricting access to the courts to applicants with a private interest in the decision? If so it would create the unhelpful situation in which a public interest-based applicant with interests that are consistent with the scope and purpose of the Act, and thus satisfying the procedural fairness threshold test, is prevented from accessing the courts to challenge a decision made without a public consultation process or made in breach of public consultation principles. The answer is that the relevant interests extension would require acceptance of a more liberal form of standing than the special interest test expressed in *Australian Conservation Foundation v Commonwealth*.[139] Standing would need to be determined according to whether the applicant's interests are within the zone of interests reflected in the Act. There is a line of Australian case law in which judges have used a form of zone of interests reasoning to determine standing.[140] Adoption of this line of case law would align standing and procedural fairness so that if a person has standing they would also be recognised to have interests that trigger procedural fairness

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[137] See, eg, *R (on the application of Buckinghamshire County Council) v Secretary of State for Transport* [2013] EWHC 481 (Admin), [8] proceedings brought by an affiliation of interest groups opposed to the project, the 'High Speed 2 Action Alliance Ltd'; *R (on the application of BAPIO Action Limited) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [6] an association of Indian physicians; *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* [2007] JPL 1314. See also Sheldon, above n 15, 157.

[138] *Booth v Bosworth* [2000] FCA 1878, [5].

[139] (1980) 146 CLR 493; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247, 263, 267.

[140] *Alphapharm Pty Limited v Smithkline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250, 259–60; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 514–5; *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238, 254–5; *Pharmacy Guild of Australia v Australian Community Pharmacy Authority* (1996) 70 FCR 462, 473–4. See also *Onus v Alcoa of Australia Ltd* (1981) 147 CLR 27, 73–4 (Brennan J).

in the form of consultation, unless of course there is a contrary intention in the relevant legislation. The practical consequence of this is that the test for standing would do most of the work in any particular case regarding who is entitled to procedural fairness. The issue regarding procedural fairness in the cases would likely concern its content rather than the threshold test.

Thirdly, how would the relevant interests extension be applied to statutes that merely require consideration of the public interest without going into any further detail as to what must be considered? The answer is that references to the public interest in legislation are understood by the courts to be confined to matters within the 'subject matter, scope and purpose' of the Act.[141] Therefore, even public interest-based decisions will require consideration of some more particular matters. For example, decisions under environmental legislation requiring consideration of the public interest will require consideration of social, economic, and environmental matters, and interested groups and persons could inform the consideration of such matters.[142] The same is likely to be true of other legislation.

Fourthly, there would be a question of whether the procedural fairness threshold test would be engaged for the making of subordinate legislation. If it did extend in this way it could be regarded as a large step since 'legislative' decisions have traditionally been excluded from the requirements of procedural fairness.[143] In practice however the step would not be so large. As Mark Aronson and Matthew Groves point out, legislative provisions that regulate the making of subordinate legislation now often provide for public consultation.[144] Such provisions could override any procedural fairness requirement for consultation or be interpreted in the light of the procedural fairness consultation standards. And of course, if procedural fairness-based consultation was to be regarded as entirely impractical, parliaments have power to exclude it by clear provisions.

In my view therefore, the relevant interests extension of the threshold test would support the development of public consultation as an enforceable procedure for public interest decisions. It would provide a relatively short step towards enforcement of public consultation processes rather than the radical step indicated by Sir Anthony Mason, Mark Aronson and Matthew Groves. It is a step that responds to the non-justiciability concerns in *Kioa v West* by avoiding the application of procedural fairness to pure policy decisions, as seen in the English cases. It is also

[141] *O'Sullivan v Farrer* (1989) 168 CLR 210, 216.
[142] See, eg, *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70, 73–4.
[143] *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373, 1378; *Kioa v West* (1985) 159 CLR 550, 620 (Brennan J).
[144] Aronson and Groves, above n 5, 450.

consistent with other aspects of Australian law, in particular the relevant considerations ground of review and one strand of standing case law.

## V CONCLUSION

I have argued in this article that excluding decisions that affect the public generally from the requirements of procedural fairness, the 'public exception', has also excluded the development of public consultation as a form of procedural fairness. Public consultation enables a form of political communication by which members of the public inform the decision-maker regarding matters that the decision-maker is bound to consider for the exercise of the particular power. I have also argued that the solutions developed by English courts for imposing and supervising consultation process are not suited to Australian administrative law. My suggested extension of the procedural fairness threshold test, which is influenced by aspects of the relevant considerations ground of review, would provide a more feasible pathway to move beyond the public exception in a way that enables courts to impose and supervise public consultation processes.