Ensuring Procedural Fairness – Tribunals to Courts

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Introduction

1. In *Kioa v West*,[1] the High Court said:

> … "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.[2]

2. Procedural fairness concerns fairness and transparency in decision making and administrative processes, and subsumes the procedural consequences of legitimate expectations. The High Court has given extensive guidance as to the requirements of procedural fairness.

3. In *Plaintiff S157/2002 v Commonwealth*,[3] the High Court held that, subject to any statutory provision, denial of natural justice or procedural fairness will ordinarily involve failure to comply with a condition of the exercise of decision-making power, and therefore jurisdictional error.[4]

4. The justification of the requirement for procedural fairness is stated in *Assistant Commissioner Condon v Pompano Pty Ltd*,[5] by Gageler J:

> Justifications for procedural fairness are both instrumental and intrinsic. To deny a court the ability to act fairly is not only to risk unsound conclusions and to generate justified feelings of

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1 (1985) 159 CLR 550.
2 Ibid 585.
3 (2003) 211 CLR 476.
4 Ibid 490 [25].
5 (2013) 252 CLR 38 ('*Pompano*').

> resentment in those to whom fairness is denied. The effects go further. Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice.[6]

5. Procedural fairness is of the utmost importance to the Victorian Civil and Administrative Tribunal ('VCAT'), and to all administrative tribunals, not least given the large percentage of tribunal users who are self-represented.[7] Of the 60,000 proceedings heard annually in VCAT's Residential Tenancies List, around 50,000 tenants and landlords are self-represented.

Scope of address

6. In this address, I propose to review recent cases in the High Court of Australia, the Full Federal Court of Australia and the Victorian Court of Appeal concerning procedural fairness. I will then address some specific issues affecting VCAT and administrative tribunals generally.

Litigants in person

7. A good place to start is the obligation of tribunals to provide procedural fairness to litigants in person. Self-represented litigants are often unsure of relevant issues, procedures, how to give or lead evidence, and how to present a case to best advantage. Assistance and explanation is often necessary – sometimes a lengthy discussion can ensue. There is a significant danger that the opposing party or parties (often also unrepresented) may consider that undue assistance was given during the explanation process.

8. These problems were considered by the Court of Appeal in *Zhong v Melbourne Health*.[8] This was a claim for negligent diagnosis of mental illness and the subsequent involuntary treatment of a patient.

9. The Court followed its earlier decision in *Downes v Maxwell Rhys & Co Pty Ltd*,[9] in stating:

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6 Ibid 107 [186]. Followed by the Full Court of the Federal Court in *SZWBH v Minister for Immigration and Border Protection* [2015] FCAFC 88 ('*SZWBH*').

7 Under ss 97 and 98(1)(a) of the VCAT Act, the Tribunal is required to act fairly and is bound by the rules of natural justice.

8 [2015] VSCA 165 ('*Zhong*').

> The right of an unrepresented party to be heard requires that he or she be able to understand the bases on which he or she might contest the evidence led in support of a claim against them, and the manner in which he or she might answer such claim by adducing evidence in response.
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> The judge must provide reasonable advice and assistance to the unrepresented party insofar as is necessary for a fair trial whilst recognising and respecting the rights of the opposing party …
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> > … the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent. ...At all events, the absence of legal representation on one side ought not to induce a court to deprive the other side of one jot of its lawful entitlement. ... An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent.[10]

10. The Court of Appeal was alert to the difficulties:

> > A trial Judge often faces something of a dilemma. While he or she may be bound to provide some advice and assistance to an unrepresented litigant, the authorities make it clear that the Judge should not intervene to such an extent that he or she cannot maintain a position of neutrality in the litigation. However, the boundaries of legitimate intervention are flexible and will be influenced by the need for intervention to ensure a fair and just trial.
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> Nevertheless in *Neil v Nott* the High Court recognised that a frequent consequence of self-representation is that the Court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy.
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9 [2014] VSCA 193 ('*Downes*').

10 *Zhong* [67] (citations omitted).

> Concealed in the lay rhetoric and inefficient presentation may be a just a case [sic].
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> The requirements of procedural fairness are inherently flexible and must respond to the circumstances of the particular case. It follows that the need to explain evidentiary rules and principles to a party in a particular case will depend upon the nature of that case and the course of the hearing.[11]

11. In *Tomasevic v Travaglini*,[12] Bell J insightfully said:

> Most self-represented persons lack two qualities that competent lawyers possess — legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.
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> The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.
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> The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances — it must ensure a fair trial, not afford an advantage to the self-represented litigant.[13]

12. The Court of Appeal in *Zhong* also referred to the duty of counsel where appearing against an unrepresented person to assist the Court to discharge its duties to an unrepresented litigant; namely, 'to draw attention to matters that might reasonably bear upon the Court's

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11 *Zhong* [67] (citations omitted), referring to *Neil v Nott* (1994) 121 ALR 148.
12 (2007) 17 VR 100.
13 Ibid 130 [140]-[142].

decision which, in a case where all the parties were represented, could be expected to be referred to by the opposing practitioners'.[14]

13. The Court concluded that the trial judge (assisted by judges who had conducted previous directions hearings) had made every effort to ensure that the self-represented party understood what he had to do to prove his case. He was told where the onus lay. He was told of his need to call witnesses; and of the high desirability to call expert witnesses. He was told that his was a civil case and not a criminal case, and that even if he could prove negligence on the part of the defendants, he would separately have to prove that he had suffered financial loss. He was also told that unless he got a certificate under the *Wrongs Act 1958* (Vic), he would be confined to economic loss. Directions were made to ensure that before the commencement of the trial, he was given every opportunity to understand the case that would be put against him.

14. The Full Court of the Federal Court of Australia has also clarified the requirements of procedural fairness in cases involving self-represented persons. In *SZWBH*, the Court noted that:

> Serious issues relating to the procedural fairness of proceedings must arise in circumstances such as the present in which an unrepresented applicant whose primary language is not English and who may be assumed to be unfamiliar with curial processes is called on, without notice, to mount arguments resisting the summary dismissal of his application.[15]

15. An excellent summary of the law relating to self-represented litigants was recently provided by Derham AsJ, who said in an application for leave to appeal from VCAT:

> A judge has a duty in relation to represented and unrepresented litigants alike to ensure that the trial is conducted fairly and in accordance with law. It is a frequent consequence of self-representation that the Court must assume the burden of endeavouring to ascertain the rights of parties which are

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14 Referring to *Jeffrey and Curnow v Giles*; *Giles v Jeffrey and Curnow* [2015] VSCA 70 [77]; and *Noone v Operation Smile (Australia) Inc (No 2)* [2011] VSC 153 [14].

15 *SZWBH* [32].

> obfuscated by their own advocacy. What a judge must do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case. The judge cannot be the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. The judge must maintain the reality and appearance of judicial neutrality at all times and to all parties. The assistance must be proportionate in circumstances – it must ensure a fair trial and ought not afford an advantage to the self-represented litigant.[16]

Role of Ch III of the Constitution

16. Federal courts consider the applicable general principles of procedural fairness central to the exercise of judicial power under Ch III of the Constitution.[17] In *SZWBH*, the Court adopted the statement of procedural fairness principles set out by the same members of the court in *Shrestha v Migration Review Tribunal*.[18] The Court states:

> It is axiomatic that the primary judge was obliged to accord procedural fairness to the appellant … Counsel for the Minister did not, of course, gainsay that proposition.
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> It is equally axiomatic that the requirements of procedural fairness include the provision of a reasonable opportunity for the appellant to present evidence and to make submissions …
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> The power of the FCC summarily to dismiss an application … is subject to that obligation … as there is no indication of a legislative intention to qualify or abrogate it.[19]

17. The Court then expanded on these principles by adopting a series of statements from other cases:

> It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case …
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16 *Weber v Deakin Univeristy* [2015] VSC 703 [24] (citations omitted).

17 Ibid [42].

18 [2015] FCAFC 87.

19 Ibid [37]-[39] (citations omitted), referring to *Taylor v Taylor* (1979) 143 CLR 1; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350; *Allesch v Maunz* (2000) 203 CLR 172, 184-185; *Cameron v Cole* (1944) 68 CLR 571, 589; *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395-396; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

> A central element in the system of justice administered by our courts is that it should be fair and this means that it must be open, impartial and even-handed.
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> …

Procedural fairness or natural justice lies at the heart of the judicial function. In the federal constitutional context, it is an incident of the judicial power exercised pursuant to Ch III of the Constitution. It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it. According to the circumstances, the content of the requirements of procedural fairness may vary.

> The rules of procedural fairness do not have immutably fixed content. As Gleeson CJ rightly observed in the context of administrative decision-making but in terms which have more general and immediate application, "[f]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice." To observe that procedural fairness is an essential attribute of a court's procedures is descriptively accurate but application of the observation requires close analysis of all aspects of those procedures and the legislation and rules governing them.
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> There should be no doubt and no room for misunderstanding. Procedural fairness is an immutable characteristic of a court. No court in Australia can be required by statute to adopt an unfair procedure. If a procedure cannot be adopted without unfairness, then it cannot be required of a court. "[A]brogation of natural justice", … is anathema to Ch III of the Constitution.
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> …

It is always necessary, … to assess whether a process meets the necessary standards of fairness by examining the particular circumstances in which that process occurs, including (but not limited to) the statutory setting, the characteristics of the parties involved, what is at stake for them, the nature of the decision to be made, and steps already taken in the process.

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> Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way,

> and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.[20]
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> …

18. The Court observed that the self-represented party is not responsible for the business pressures on the court or tribunal:

> The pressure of high volume decision making, such as that undertaken by the FCC in the migration jurisdiction, should be recognised. … The existence and utilisation of those processes do not obviate the need to consider the material before the Tribunal (rather than simply its reasons), nor to explain in plain terms to unrepresented applicants that they must identify to the Court why the Tribunal's decision was not made lawfully and by a fair process. Insisting to an unrepresented applicant that she or he identify a "jurisdictional error" is a pointless, and unfair, exercise. Further, the processes in s 17A and Part 44 do not remove the obligation to give parties, whether represented or unrepresented, some reasonable time to regularise their materials and present their arguments.
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> It is no fault of an individual litigant in a migration judicial review that there are thousands of other migration cases, nor that there are insufficient resources to provide all impecunious applicants with legal representation. Much is at stake for an individual litigant in the migration jurisdiction in the sense of fundamental rights, including her or his liberty in Australia by reason of the mandatory detention regime in the Act. High volumes of cases should if anything give rise to extra caution to ensure no injustices are being done because of judicial workload pressures.[21]

19. The Full Court commented that where a party is legally represented, for a judge to proceed on his or her own motion, and without notice, to dismiss a judicial review proceeding summarily at the first return date, is likely to be an unfair process and inconsistent with the proper exercise of judicial power. Adopting the words of Gageler J in *Pompano*,

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[20] Ibid [40]-[50] (citations omitted), referring to *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 350; *Cameron v Cole* (1944) 68 CLR 571, 589; *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 [54]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 [37] ('*Lam*'); *Spencer v Commonwealth of Australia* (2010) 241 CLR 118 [24]; *Agar v Hyde* (2000) 201 CLR 552 [57].

[21] Ibid [53]-[54].

for a judge to proceed in that manner against an unrepresented Tamil asylum seeker is 'anathema to Ch III of the Constitution'. The case of an unrepresented litigant the power to summarily dismiss a claim by an unrepresented person must be approached by a tribunal on notice to the party and with extreme caution. Equally, self-represented litigants may need to be assisted to obtain access to documents (e.g. a transcript) where it is necessary for a case to be properly presented.

Identification of critical issues

20. In *Durani v Minister for Immigration and Border Protection*,[22] the failure of the Minister to identify a critical issue; namely, that the existence of any risk of reoffending would prevail over all countervailing considerations and thereby result in the cancellation of the appellant's visa, was considered sufficient to vitiate the Minister's decision. The level of particularisation of allegations must be such as to inform the party as to the case that had to be met. Unparticularised reference to 'national interest' is insufficient to disclose a concern that the integrity of the skilled migration program will be undermined.

21. In *Von Hartel v Macedon Ranges SC*,[23] Emerton J held that the Tribunal had failed to give natural justice to the applicants by not giving notice at the hearing of the importance of certain facts on which the Tribunal later placed significance in its reasons for deciding against the applicants. Relying on *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*,[24] Emerton J set out the following propositions:

- the rules of procedural fairness would ordinarily require the Tribunal to give a party adversely affected by its order the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material;
- this right extends to require the Tribunal to identify to the person affected by any issue critical to the decision which is not

22 [2014] FCAFC 79.
23 [2014] VSC 215.
24 (2006) 228 CLR 152.

apparent from its nature or the terms of the statute under which it is made; and

- procedural fairness does not, however, require the Tribunal to give an applicant a running commentary of what it thinks about the evidence.

22. In *MH6 v Mental Health Review Board*,[25] the court considered whether procedural fairness had been denied during a merits review by the Tribunal of a decision of the Mental Health Review Board. The applicant, who sought review of the decision of the Mental Health Review Board, was told by the Tribunal that the applicant's case was to be presented first. The applicant appealed the decision of the Tribunal on the grounds that procedural fairness had been denied by this conduct of the proceeding. The Court of Appeal stated:

> An adequate opportunity will not have been afforded unless the party knows what is alleged, knows what evidence is relied upon to substantiate the allegation, and has an opportunity to respond to the case against them and put forward their own case. Even where the process has an inquisitorial component, a party against whom adverse findings may be made, having been apprised of the issues, must be given the opportunity to put evidence and argument in response, though there be no 'case' being advanced against the party.[26]

23. Following these observations, the Court went onto hold that the applicant in this case had not been denied procedural fairness, as the applicant was aware of the case against him, having been fully agitated during the full hearing of the proceeding before the Board, and the applicant had agreed – through his legal representatives – to the conduct of the hearing proposed by the Tribunal.[27]

24. In *Guastalegname v Chevros Pty Ltd*,[28] Lansdowne AsJ held that the Tribunal had denied procedural fairness in the context of an application for reconstitution. The applicant in the proceeding before the Tribunal expressed confusion as to whether a hearing, which had

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25 (2009) 25 VR 382.
26 Ibid [28].
27 Ibid [48]; Pizer [97.40].
28 [2015] VSC 408.

been described in the notice of hearing sent to the applicant as a 'directions hearing', was going to involve the full hearing of an application for reconstitution, or whether the listing was a directions hearing regarding the application for reconstitution. Lansdowne AsJ held that the ambiguity between the notice of hearing containing the phrase 'directions hearing' and the information contained on the Tribunal's website, in conjunction with the subsequent treatment of the listing as a full hearing of the application for reconstitution was a breach of procedural fairness and therefore an error of law.

Changes in procedure

25. The High Court reviewed the requirements of procedural fairness in *Minister for Immigration and Border Protection v WZARH*.[29] The respondent was a national of Sri Lanka with Tamil ancestry who had arrived by boat on Christmas Island in 2010. A delegate of the Minister interviewed the respondent concerning his claim to be a refugee. The delegate formed an adverse view of the claim for refugee status. In 2012, an independent merits reviewer interviewed the respondent, advising that there would be a fresh re-hearing of his claims. The first reviewer became unavailable, and a second reviewer undertook the review. The second reviewer did not interview the respondent but based his decision on written materials, including the application, a transcript of the interview with the delegate on Christmas Island, submissions made by advisors on behalf of the respondent, country information and a recording and transcript of his interview with the first reviewer. The second reviewer formed an adverse view of the credibility of the respondent, and found that there was no real chance that the respondent would be persecuted now or in the foreseeable future. The respondent was not advised on the change of reviewer.

[29] [2015] HCA 40 (*WZARH*').

26. The High Court confirmed its previous rejection of the concept of 'legitimate expectations' in *Lam*, and *Plaintiff S10/2011 v Minister for Immigration and Citizenship*.[30]

27. The Court referred to a passage in the judgment of Gleeson CJ in *Lam*, where the Chief Justice said:

> when a public authority promises that a particular procedure will be followed in making a decision, fairness may require that the public authority be held to its promise … Expectations created by a decision-maker may affect the practical content of the requirements of fairness in the individual case. [31]

Use of expert articles and texts

28. In *Jagroop v Minister for Immigration and Border Control*,[32] the procedural fairness problem was the use by the Administrative Appeals Tribunal of medical articles and texts which were not referred to during the hearing, the senior member having referred to these materials on his own initiative after reserving his decision.

Credibility issues

29. The plurality of the court in *WZARH* agreed with the statement by Nicholas J below,[33] that the one situation in which oral hearings are most often thought to be desirable is where questions arise as to a witness's credibility. They considered that an oral hearing will often assist in the resolution of credibility issues by allowing the decision-maker to interact directly with the witness, by asking the witness questions, considering his or her answers, and having regard to the witness's demeanour. The opportunity for a decision-maker to clarify areas of confusion or misunderstanding, and to form an impression based on personal observation as to whether an applicant is genuinely confused or seeking deliberately to mislead, may be especially important to a fair assessment of a claim to refugee status when

30 (2012) 246 CLR 636, 658.
31 *Lam* 12 [33].
32 [2014] FCAFC 123.
33 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130, 148 [54].

English is not the applicant's mother tongue and he or she is obliged to communicate through an interpreter.[34]

30. The plurality concluded that the respondent in *WZARH* was deprived of the opportunity to apply for an oral hearing before the second reviewer, an application which the Minister would have been hard pressed to resist.[35] They quoted from the judgment of Gleeson CJ in *Lam* that there are undoubtedly circumstances in which the failure of an administrative decision-maker to adhere to a statement of intention as to the procedure to be followed will result in unfairness and will justify judicial intervention to quash the decision.[36] Gageler and Gordon JJ went further and considered that the procedure adopted by the second reviewer did not give the respondent a reasonable opportunity to be heard. Fairness required that the second reviewer give the respondent notice of the changed procedure, an opportunity to supplement the written submissions previously made on his behalf, and an opportunity to request further supplementation of the record of interview by further oral evidence.[37] The issue of credit potentially arose in relation to the evidence given by the respondent as to past events. To undertake the assessment necessary, consideration of the subjective state of mind of the respondent as a person fearing persecution for a Convention reason is required.[38]

The rule in *Browne v Dunn*

31. In *Sullivan v Civil Aviation Safety Authority*,[39] the Full Court considered whether the Tribunal had complied with the rule in *Browne v Dunn*,[40] in relation to the evidence of a witness. The "rule" in *Browne v Dunn* was founded in basic common sense and fairness. If a submission is to be made that a person's account of events is not to be accepted, it is not

34 *WZARH* [41].
35 Ibid [45] .
36 *Lam* 9 [25].
37 *WZARH* [62]-[64].
38 Ibid [65].
39 [2014] FCAFC 93 ('*Sullivan*').
40 (1893) 6 R 67.

"fair" for an opponent to allow that account to go unchallenged in cross-examination and to deny the person concerned the opportunity to give an explanation of his account.

32. The submission was rejected. The Full Court had held that the rule in *Browne v Dunn* does not apply to the Refugee Review Tribunal where proceedings are not adversarial, but inquisitorial. The Tribunal member conducting the inquiry is not an adverse cross-examiner but an inquisitor obliged to be fair. While these observations applied to the Refugee Review Tribunal, the plurality considered that they applied also to the Administrative Appeals Tribunal.[41] The plurality accepted a statement by Robertson J in *Calvista Australia Pty Ltd v Administrative Appeals Tribunal*,[42] that it was apt to mislead and give proceedings in the Tribunal an unwarranted curial gloss to refer to principles of procedural fairness as they operate in the Tribunal by reference to *Browne v Dunn*.[43]

33. The plurality also rejected an alternative submission that procedural fairness demanded that it be put to the witness concerned when giving her evidence that her evidence was conflicted with the evidence of others and was faulty. Procedural fairness did not require that cross-examination be permitted in all circumstances. There was no general requirement that a witness be cross-examined in such a manner as to permit an opportunity to answer particular submissions or findings which may later be advanced or made.[44]

34. In *Wei v Yu*,[45] Daly AsJ examined an appeal from the Tribunal regarding a failure by the presiding Tribunal member to warn an unrepresented party as to the consequences of not calling a particular witness to give evidence (i.e. *Jones v Dunkel* inference). Daly AsJ held

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41 *Sullivan* [149].
42 [2013] FCA 860 .
43 Ibid [118].
44 Ibid [157]; relying on *O'Rourke v Miller* (1985) 156 CLR 342; *Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26 [73].
45 [2015] VSC 726.

that in the circumstances where the plaintiffs were unrepresented, had poor English and were emotionally invested in their claim (which was against their former daughter in law), the Tribunal member was under an obligation to explain in plain terms to the plaintiffs the possible/likely consequences of failing to call a particular witness to give evidence. Daly AsJ referred to Croft J's decision in *Comaz (Aust) Pty Ltd v Commissioner of State Revenue*,[46] and noted that in that case, Croft J considered that the failure of a tribunal member to give an express *Jones v Dunkel* warning was a procedural defect almost incapable of cure.

***Metricon* case: proactive duty on the Tribunal**

35. Under s 97 of the VCAT Act, the Tribunal must act fairly. As I have already stated, under s 98 of the VCAT Act, the Tribunal is bound by the rules of natural justice. This has, on occasion, led to the question of whether the need to act fairly places the Tribunal under an active duty to assist the parties to obtain relevant information that may be required by one or both parties to a proceeding.

36. I examined this question in *Metricon Homes Pty Ltd v Sawyer*,[47] which was an appeal to the Trial Division of the Supreme Court from the decision of a Tribunal member in 2013. This proceeding involved settlement offer procedures under the VCAT Act. The issue under appeal was whether the Tribunal should have done more to determine whether the award of an amount plus party-party costs was more favourable to the owner than an all-in offer which had been rejected. In particular, the issues was whether the Tribunal should have ordered the owners to produce their accounts for their legal costs as at the date of the offer.

37. In this decision, I held that:

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46 [2015] VSC 294 ('*Comaz*').
47 [2013] VSC 518.

> Whilst the Tribunal could not be certain as to the extent of the assistance that it would have derived from the discovery of the accounts, this was not a reason for not directing them to be produced, as the builder sought. The accounts contained centrally relevant information, and afforded assistance to the Tribunal in forming the opinion it was required to form under s 112(1)(d) of the VCAT Act. There was good reason to have them produced and to ensure that the information contained in them was taken into account. The failure to do so was unreasonable, and was a failure to take into account material facts and relevant information.[48]

38. In my view, the Tribunal is procedurally bound to facilitate the production of documents and the calling of evidence when sought by a party when it is satisfied that the documents or evidence will contribute towards the resolution of the substantial merits of the case.[49]

Effective use of opportunities

39. Another important principle is repeated in *United Voice v Restaurant and Catering Association of Victoria*,[50] a challenge to the validity of a determination of the Full Bench of the Fair Work Commission. The Full Bench referred to Gaudron J in *Re Coldham; ex parte Municipal Officers Association of Australia*,[51] with whom Dawson J agreed:

> There is a further question: was the Commission required, as a matter of procedural fairness, to afford the parties an opportunity to be heard upon the issues directed by s 142 in the light of the construction adopted by it? Ordinarily, when a decision on a question of law will affect the nature and range of the factual matters by reference to which the matter in issue may be decided, considerations of fairness require that the parties be given an opportunity to lead evidence and make submissions by reference to the principles of law to be applied. This must be so even if the existence of the question is not apparent until the hearing has concluded. Although, of course, the fact that a hearing has taken place may have particular significance in determining whether or not the opportunity was given. As was pointed out by Deane J in *Sullivan v Department of Transport*,

48 Ibid [52].
49 Ibid [48]; Pizer [97.40].
50 [2014] FCAFC 121.
51 (1989) 84 ALR 208.

> procedural fairness requires only that a party be given "a reasonable opportunity to present his case" and not that the tribunal ensure "that a party takes the best advantage of the opportunity to which he is entitled". And it is always relevant to inquire whether the party or his legal representative should reasonably have apprehended that the issue was or might become a live issue.[52]

40. As the Full Court said:

> In *Assistant Commissioner Condon v Pompano Pty Ltd*, Hayne, Crennan, Kiefel and Bell JJ observed that the rules of procedural fairness do not have immutably fixed content and, as Gleeson CJ had said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*:
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> > "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."[53]

41. United Voice failed to establish that it had been denied procedural fairness, as there had been no practical injustice or procedural unfairness. United Voice simply had not used the opportunities provided to it to best advantage.

42. In *Chiropractic Board of Australia v Hooper*,[54] I held that there is no denial of natural justice if a party does not make full effective use of the opportunity to prepare or does not do as well as the party hoped to do or might have done at the hearing. While it was a consideration that the respondent was a self-represented party (although he was assisted by a former legal practitioner), the Tribunal had made clear and precise orders relating to the date by which expert material was to be filed. The Tribunal had published on its website a Practice Note on Expert Evidence, which was readily accessible to the respondent. The hearing had been underway for 60 days, and had already been the subject of several applications for reconstitution.

Collateral attacks on Tribunal decisions

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52 Ibid 219-220.
53 Ibid [30] (citations omitted).
54 [2013] VCAT 417.

43. In *Mercier Rouse Street Pty Ltd v Burness*,[55] the Court of Appeal made a number of observations about the fairness with which a Tribunal member had conducted a proceeding:

> Notwithstanding the injunction that VCAT 'conduct each proceeding with as little formality and technicality', it must act fairly. Far from being delivered from the obligation to give natural justice, it is expressly bound to do so. It did not act fairly in this case. While the member seems plainly to have been motivated by a desire to act expeditiously, pragmatically and without formality, he was asked to do only one thing: order that Zinc perform its obligations under the contract. He was not asked to order that Zinc pay damages. True, Mrs O'Bryan did not protest when the member turned what was, in effect, an application for the specific performance of the sale of land into an application for return of the purchase price, but even a lawyer might have been mystified by what took place.[56]

44. The observations made by the Court of Appeal in *Mercier Rouse* arose in an appeal from a judgment in the Trial Division. The Tribunal had no opportunity to state any reasons in relation to the issue addressed by the Court of Appeal in its decision, despite the fact that the process of the Tribunal was under challenge.

45. This raises the question of whether the Court should have the power to ask the Tribunal to state the facts and give reasons concerning the procedural issue of concern to the Court. The matters of concern in this case were not the subject of any direct review, and were not raised before the Tribunal or addressed in the Tribunal's decision.

Recusal

46. The Tribunal is bound by the rules of natural justice, and as such must be, and be seen to be, impartial and unbiased. As was set out by the High Court in the case of *Ebner v Official Trustee in Bankruptcy*,[57] the test of apprehended bias is: whether a fair minded lay observer, having knowledge of the material objective facts, might reasonably apprehend

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55 [2015] VSCA 8 ('*Mercier Rouse*').
56 Ibid [199].
57 (2000) 205 CLR 337.

that the Tribunal might not bring an impartial and unprejudiced mind to determining the application before it.

47. The decision whether or not to recuse oneself is made by the Tribunal member hearing the proceeding in which the application for recusal is made. The Tribunal member must decide whether a proper basis for recusal has been established. The Court of Appeal, in *AJH Lawyers Pty Ltd v Careri*,[58] set out eight guiding principles:

    1) actual or apprehended bias should be dealt with first;
    2) members should not accept recusal simply because a party has asked for it;
    3) where the proceeding has been decided, the test is one which requires no conclusion about what factors actually influenced the outcome;
    4) apprehension refers to a member not deciding a case impartially, as opposed to apprehension that a case will be decided adversely to one party;
    5) identification of what might lead a member to decide a case other than on its legal and factual merits, and an articulation of the logical connection between the matter and the feared deviation;
    6) the perception of a lay observer will not be as informed as the perception of a lawyer, particularly a litigation lawyer;
    7) a line is drawn between robust indications of a member's tentative views on a point of importance in a [proceeding], and an impermissible indication of prejudgment; and
    8) members do not have to devote unlimited time to listening to unmeritorious arguments.

48. A very interesting case is that of *LA15 v Minister for Immigration and Border Protection*.[59] In this case, there was affidavit evidence by the editor of the Federal Court Reports and Federal Law Reports that a circuit court judge, who heard the review of the appellants claim for protection had heard 286 decisions since his appointment. 254 (or 88.81%) were in the area of immigration law. All 254 decisions appeared to have been given ex tempore. In 252 of 254 decisions, the

58 [2011] VSCA 425.
59 [2016] FCAFC 30.

primary judge had found for the Minister for Immigration and Border Protection. In only two judgments had the judge found for the applicants. At least 163 of the 254 immigration judgments were given at the first return date. Over this time, the remaining eight judges of the Federal Circuit at Sydney delivered 309 immigration judgments, or 54.89% of the immigration judgments in the Sydney registry of the Federal Circuit Court of Australia.

49. The Full Court of the Federal Court rejected an appeal against a failure to recuse. The reasons given included that raw statistical data was unhelpful unless accompanied by a relevant analysis of the individual immigration judgments delivered by the primary judge in order that the statistics be placed in a proper context. Absent such analysis, the hypothetical observer could not make an informed assessment. Many or all of the decisions might have been made on a reasonable and plausible basis. As Gleeson CJ and Gummow J observed in *Minister for Immigration v Jia Legeng*,[60] the fact that it is easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias.[61]

50. In *Luck v CEO of Centrelink (No 2)*,[62] allegations of a wide ranging nature were made concerning a division of the Administrative Appeals Tribunal, including actual bias, procedural errors going against the appellant's right to receive documents, and discrimination. All claims failed. The court accepted submissions that the tribunal had power to refuse to grant an enlargement of the time to appeal, and in so doing, consider the merits of the proposed proceeding in determining whether or not to grant the enlargement sought.[63]

51. A third recent Full Court case is *Automotive, Food, Metals, Engineering, Printing and Kindred Industries*,[64] where the Court raised the issue

60 [2001] HCA 17.
61 Ibid [71].
62 [2015] FCAFC 112.
63 Ibid [30].
64 [2015] FCAFC 123 .

whether the obligation to afford procedural fairness is derived from statute rather than the common law. After referring to a number of authorities, the Court did not find it necessary to resolve the issue.[65]

52. There have been a number of recent appeals from the Tribunal on the basis of perceived bias.

Perceived bias

53. In *Comaz*, Croft J considered an appeal from the Tribunal relating to comments made by the member, which suggested pre-judgment of the credibility of the main witness for the applicant. Croft J discussed the different standards which might apply to a Tribunal as opposed to a court, examining the reasons of the High Court in *Re Refugee Tribunal: Ex parte H*.[66] Croft J held:

> … the fact that proceeding at VCAT are conducted in public – as opposed to more administrative-type forums which may be conducted in private and not subject to such high standards of conduct – dictates the application of the requirement that justice must be seen to be done.[67]
>
> …
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> Judges and tribunal members … are not expected to sit back placidly and listen to argument and evidence without forming opinions about the issues for determination or, indeed, asking questions and seeking clarification. Nor is the expression of tentative views during the course of argument … to be considered as indicating bias.[68]

Mosque case: procedural fairness

54. An application for recusal was made against myself as the presiding member in the Tribunal proceeding of the Bendigo mosque case.[69] I heard submissions from both parties on the question of whether there was apprehended bias or actual bias.

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65 Ibid [68]-[69].
66 (2001) 179 ALR 245.
67 *Comaz* [26].
68 Ibid [28].
69 *Hoskin v Greater Bendigo CC* [2015] VCAT 1125.

55. The group objectors made an application for recusal on the grounds that the VGSO had been instructed by the Principal Registrar of the Tribunal to contact the objectors regarding posts on the Rights for Bendigo Residents Facebook page, due to possible contempt of VCAT. The objectors contended that the correspondence from the VGSO was intended to intimidate and meant that I could not bring an impartial mind to the matters I was required to decide in the substantive proceeding.

56. The group objectors were unable to point to anything that might have caused me to decide the proceeding other than on its legal and factual merits. The objectors were also unable to point to a connection between the feared deviation and the giving of instructions to the VGSO. The application for recusal was dismissed.

57. The objectors raised a number of alleged breaches of procedural fairness in the six days of hearing before myself and a senior member of the Tribunal. Each of the arguments pursued by the objectors was examined at length by the Tribunal in reaching its final decision, noting that the Tribunal is bound by, and takes very seriously its procedural fairness obligations.

58. The objectors stated that they were aggrieved by certain aspects relating to the conduct of the hearing, for example: the fact that the conditions application and the objections application were heard concurrently, in order to minimise costs for the parties, as well as prevent repetition of evidence and submissions. The objectors made frequent submissions that they were disadvantaged by such decisions, and yet were unable to provide any evidence as to how this disadvantage had occurred. As was acknowledged by counsel for the permit applicant, the objectors were given considerable latitude by the Tribunal, including lengthy adjournments to procure further expert reports.

59. This was a difficult case to manage from a procedural fairness perspective, as care had to be taken to ensure that the objectors were afforded procedural fairness, but that the latitude afforded to the group applicants did not disadvantage either the council or the permit applicant as a result of lengthy delays.

Incompatibility of roles

60. *Isbester v Knox City Council*[70] is a case which illustrates how opinions can differ as to perceptions of bias and the need to recuse. The appellant pleaded guilty to a charge that on 4 August 2012 her Staffordshire terrier called 'Izzy' had attacked a person and caused serious injury. The Domestic Animals Act Committee of the Knox City Council later decided that the dog should be put down. A legal practitioner employed by the Council was a member of that committee. She had been involved in the prosecution before the Magistrates' Court. It was not suggested that she had acted improperly at any stage. Rather, the complaint was about her presence on the committee.

61. Emerton J and the Court of Appeal, of which I was a member, all considered that there was no conflict of interest, as a different kind of analysis was required to that conducted in the Magistrates' Court, and because it was an assumed fact by the stage of the committee's deliberations that Izzy had been involved in an attack on a person. The hearing was not of a quasi-judicial type, and the ultimate decision was made by a more senior person who held the necessary delegation.

62. The High Court was of a different view. It considered that it was not realistic to view the legal practitioner's role as prosecutor as having come to an end when the prosecution concluded. A line could not be drawn as to when her role ended. While it was true, that the solicitor had no personal interest, once an incompatibility of roles had been identified, the connection between the interest and the possibility of deviation from proper decision-making was obvious. Natural justice

70 [2015] HCA 20.

required that the solicitor not participate in the decision making process.

Reconstitution

63. The statutory process of reconstitution is governed by s 108 of the VCAT Act: at any time before the conclusion of the hearing of a proceeding, a party may apply to the Tribunal for reconstitution.[71]

64. The VCAT Act was amended in 2014 to make changes to the process of applying for reconstitution. The ability to first make an application for reconstitution to the member hearing the proceeding was removed; applications for reconstitution are now made directly to a presidential member of the Tribunal. A presidential member hears submissions from all parties, and then decides whether the Tribunal should be reconstituted. If the presidential member decides that the Tribunal should be reconstituted, the President must reconstitute the Tribunal.

65. The requirement that an application for reconstitution be heard by a presidential member can create listing delays, as the Tribunal has a limited number of presidential members, and applications for reconstitution can be made, not only at our King St venue, but also at all suburban and regional venues.

66. In *Ikosidekas v Karkanis*,[72] the Court of Appeal considered VCAT to have erred on a question of law when it failed to order reconstitution. While the court considered that statements that there was a crusade on the part of the applicant, the court considered that statements that the claim was really a fishing exercise, and that it all looked completely

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71 (1) At any time before the conclusion of the hearing of a proceeding — (a) a party may apply to the Tribunal for the reconstitution of the Tribunal for the purposes of the proceeding; or (b) the President or a member of the Tribunal as presently constituted may give notice to the parties that the President or member seeks the reconstitution of the Tribunal for the purposes of the proceeding. (2) If an application is made under subsection (1)(a) or notice is given under subsection (1)(b)— (a) a presidential member, after allowing the parties to make submissions, may decide that the Tribunal should be reconstituted; and (b) if so, the President must reconstitute the Tribunal. (3) If the Tribunal is reconstituted for the purposes of a proceeding, the reconstituted Tribunal may have regard to any record of the proceeding in the Tribunal as previously constituted, including a record of any evidence taken in the proceeding.

72 [2015] VSCA 121.

innocuous, was an apparent pre-judgment or tendency to prejudge the issues.[73]

Conclusion

67. Procedural fairness is an important assurance for all parties to proceedings before tribunals. As a flexible concept, there are often issues about its content in any given case particularly in the context of litigants in person.

68. As I have illustrated, it is often appeals from tribunals, which provide important guidance as to procedural fairness for courts and tribunals generally. My invariable experience is that tribunal members have natural justice and procedural fairness are at the forefront of their minds in every hearing they conduct.

[73] Ibid [61]-[66].