

WAIVER OF NATURAL JUSTICE

ABSTRACT

The hearing rule and the rule against bias comprise the twin pillars of natural justice. There is a detailed body of case law about waiver of the bias rule but little about waiver of the hearing rule. This article examines the few cases dealing with waiver of the hearing rule. Attention is given to two decisions of intermediate courts — one from the Victorian Court of Appeal, the other from the Court of Appeal of England and Wales — which have examined waiver of natural justice in some detail. The article argues that waiver of the hearing rule should be possible because it can be sensible and consistent with the key rationales of natural justice.

I INTRODUCTION

Natural justice comprises two pillars — the hearing rule and the rule against bias.¹ Although each rule is regularly treated as distinct, they are interrelated principles of fairness that promote the objective of a fair hearing. The bias rule requires that decision-makers be sufficiently objective and disinterested so as to enable the appearance and reality of a fair hearing. The hearing rule requires that people affected by the exercise of official power be provided with sufficient notice of a possible adverse decision and a sufficient chance to put their own case before

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¹ The title of this article refers to natural justice, though much of its substantive analysis refers to procedural fairness. Justice Mason long ago suggested that ‘procedural fairness’ was a more satisfactory term than ‘natural justice’ to convey the flexible content of the obligation of officials to provide fair procedures when exercising their powers: *Kioa v West* (1985) 159 CLR 550, 585. This assumes the two terms are essentially similar and interchangeable, though one is preferable. Robertson more recently suggested that the two terms remain distinct in part because the arguably more technical nature of ‘procedural fairness’ may reinforce the procedural conception of fairness that prevails in Australian judicial review doctrine. A term that emphasises the procedural rather than substantive nature of fairness may also serve as a useful reminder that fairness in this context does not enable courts to enter substantive notions of fairness that are more associated with merits review: Alan Robertson, ‘Natural Justice or Procedural Fairness?’ (2016) 23(3) *Australian Journal of Administrative Law* 155, 156. This article proceeds on the assumption of Mason J, which appears borne out by recent cases such as *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (*‘Hossain’*), where the phrase ‘procedural fairness’ is mentioned several times and ‘natural justice’ is not mentioned once.

any decision is made. It is now well settled that a claim of bias may be waived by a party who makes an informed, voluntary decision and decides not to raise a timely complaint of bias.² The possibility of waiver of the other pillar of natural justice — the hearing rule — has received very little attention. This article examines two decisions of appellate courts which have considered waiver of the hearing rule. It is argued that, while the hearing rule provides important procedural protections to people affected by administrative decision-making, it can be waived. People can, and should be allowed to, make an informed decision to cast aside procedural entitlements and protections.³ The article argues that the possibility of waiver of natural justice aligns with recent cases that have favoured a dignitarian justification for fairness. That dignitarian rationale places weight on the inherent value of treating people respectfully in the exercise of public power.⁴ But it is useful to first explain the various purposes of natural justice and how those purposes are not undermined by the possibility of waiver.

II THE SCOPE AND PURPOSE OF NATURAL JUSTICE

The duty to observe the rules of natural justice is extremely wide and deeply entrenched. The duty is wide because it is now well-settled that the obligation to observe the requirements of natural justice applies to virtually all decisions made under statutory powers.⁵ The scope of that principle is amplified by the increasingly

² The principles governing waiver of bias are examined in Harry Woolf et al, *de Smith's Judicial Review* (Sweet & Maxwell, 8th ed, 2018) 572–3 and Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 715–21.

³ The extent to which procedural requirements are immutable and cannot be varied is unclear. The majority in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 ('*SAAP*') adopted a fairly rigid approach to compliance with procedural requirements, which was distinguished in a fairly unconvincing manner in *SZIZO v Minister for Immigration and Citizenship* (2009) 238 CLR 627 ('*SZIZO*'). I describe the latter as unconvincing because it adopted a different and less onerous approach to the adherence of procedural requirements that was adopted in *SAAP*. The many reasons provided for this shift were not explained in detail in the brief decision of *SZIZO*. The net effect of these and other cases is to suggest it is very difficult to determine when procedural requirements are binding in a strict sense.

⁴ This has long been advocated by Allan, who has argued that respectful (and fair) treatment has value in its own right: see, eg, TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18(3) *Oxford Journal of Legal Studies* 497; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 77–87. In claims of a denial of natural justice, the dignitarian rationale shifts the focus from the effect of the alleged unfairness (and whether it may have made a difference) to how unfairly the person seeking relief was treated.

⁵ A point memorably asserted by Willes J in *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180, 190. His Lordship explained that the duty to provide a chance to be heard was a rule of 'universal application'. Those remarks were strongly endorsed in *Ridge v Baldwin* [1964] AC 40. On the deep roots of the duty: see also *Plaintiff*

wide approach the courts have taken to the rights or interests protected by the duty to observe the rules of natural justice.⁶ There are exceptions. Natural justice can be excluded or limited by statute.⁷ Courts may accept the exclusion of fairness more readily in situations where its requirements could defeat the very purpose of the power in question,⁸ such as the issue of a search warrant,⁹ or the enforcement of quarantine and other procedures intended to prevent the spread of disease.¹⁰ In other instances, the requirements of fairness may be incompatible with the administrative regime that a statute creates.¹¹ Similar considerations may lead the courts to accept a diluted or weaker version of what the rules of fairness would normally require.¹² A subset of this exception includes decisions or hearings involving issues of national

M61/2010E v Commonwealth (2010) 243 CLR 319, 352–3 [75] (*‘Offshore Processing Case’*); *S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658–9 [66] (Gummow, Hayne, Crennan and Bell JJ) (*‘S10/2011’*). Natural justice also applies to many, but not all, prerogative decisions and where it applies there may be difficult questions about remedies: see Mark Leeming, ‘Judicial Review of Vice-Regal Decisions: *South Australian v O’Shea*, Its Precursors and Its Progeny’ (2015) 36(1) *Adelaide Law Review* 1, 18–21. One remaining qualification to the scope of fairness is the requirement that those seeking remedies identify the interest that is affected. See, eg, the subtle discussion of whether the possibility of prolonged immigration detention generated an ‘interest’ to which the rules of fairness applied in *Offshore Processing Case* (n 5) 353 [76]–[77]. This short analysis by the High Court makes clear that an interest in the relevant sense may not always arise in complex administrative procedures.

⁶ *Offshore Processing Case* (n 5) 353; *S10/2011* (n 5) 658 [66] (Gummow, Hayne, Crennan and Bell JJ).

⁷ Legislation must be phrased ‘clearly and expressly’ to successfully limit or exclude any duty to act fairly: *Wiseman v Borneman* [1971] AC 297, 318 (*‘Wiseman’*). The courts approach this requirement with strictness: see generally Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39(2) *Monash University Law Review* 286. The strict doctrinal approach examined in that article continues: see, eg, *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34, [45]–[57] (Edelman J).

⁸ This was accepted in principle in *Wiseman* (n 7) 308. The authors of *de Smith* note that ‘remarkably few’ enforcement powers can be exercised without prior notice: Harry Woolf et al (n 2) 488.

⁹ *R v Peterborough Justices; Ex parte Hicks* [1977] 1 WLR 1371.

¹⁰ *R v Davey* [1899] 2 QB 301, 305–6; *Pacific Century Production Pty Ltd v Watson* (2001) 113 FCR 466, 475–8.

¹¹ See, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 558–9 [115]–[119] (Hayne and Bell JJ), 621–4 [366]–[372] (Crennan J, Gageler J agreeing on this point). In that case, the High Court found that extraordinary powers granted to maritime officers, enabling them to detain and transfer asylum seekers intercepted at sea, were not subject to the requirements of fairness. The Court was influenced by the practical difficulties that would arise if maritime officials were required to provide hearing rights during difficult journeys at sea.

¹² See, eg, *R (on the Application of Bourgass) v Secretary of State for Justice* [2016] AC 384, 422–3 [98]–[102]. Lord Reed, with whom the other Law Lords agreed, held that prisoners facing disciplinary proceedings were entitled to receive ‘genuine and

security or allegations related to terrorism, where the courts appear more willing to accept that the duty to observe the requirements of fairness has been excluded or greatly limited.¹³

These general principles governing the exclusion of fairness are subject to some important qualifications. One is that the legislative exclusion of fairness in judicial proceedings faces significant constitutional obstacles. Procedural fairness is central to the institutional integrity of courts and their ability to exercise judicial power.¹⁴ This constitutional imperative does not entrench the whole of the judicial model or require that all of its traditional rules always be followed. They may be varied without breaching constitutional requirements, so long as the procedure as a whole is fair and avoids practical injustice.¹⁵ Another important point about the exclusion of fairness relates to flexibility, or rather a lack of it. Provisions that exclude basic procedural rights often face constitutional peril if they impose a ‘blanket and inflexible’ limit or prohibition of some sort.¹⁶ The important aspect of these constitutional considerations for present purposes is the need to preserve judicial discretion. Courts must be able to ensure that practical unfairness can be avoided in their proceedings,¹⁷ and

meaningful’ disclosure of adverse material about the charges they faced. Lord Reed accepted that entitlement was not absolute. Relevant material could be withheld if ‘other overriding interests may be placed at risk’: at 423 [103].

¹³ Division arose on this issue in *Bank Mellat v HM Treasury [No 2]* [2014] AC 700, 775. A key question in the case was whether an extraordinary power to impose restrictions on entities suspected of involvement with terrorism-related activities evidenced an intention to exclude requirements of fairness (in the form of a duty to undertake consultation). All members of the Supreme Court accepted the duty to consult could be excluded by sufficiently clear legislation or be incompatible with the nature of the power. A majority held the duty to consult remained in the legislative regime at hand: at 775–8 [31]–[37] (Lord Sumption, with whom Baroness Hale, Lords Kerr, Clarke, and Dyson agreed on this point). See also Lord Neuberger’s comments at 817–8 [180]–[183], in which he agreed with and expanded on the majority’s reasoning. The dissenting Law Lords held that the unique procedural regime necessarily excluded any common law duty of prior consultation: see especially 809–11 [143]–[153] (Lord Hope, with Lords Reed and Carnwath agreeing).

¹⁴ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 108 [87] (Gageler J) (*‘Pompano’*). See also *RCB v Justice Forrest* (2012) 247 CLR 304, 321 [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

¹⁵ *Pompano* (n 14) 100 [157] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁶ *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 27 [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671–2 [53]–[60] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354–5 [54]–[56] (French CJ), 385–6 [155]–[160] (Heydon J) (*‘International Finance’*).

¹⁷ *Pompano* (n 14) 105 [178], 115 [212] (Gageler J). The connection between fairness and the avoidance of practical injustice was made by Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 13–14 [37]–[38]

must have a level of procedural flexibility to do so. That flexibility can enable courts to apply a waiver of fairness in appropriate cases. A final important point relates to the position of tribunals and other administrative bodies, which are not subject to the constitutional requirements governing procedural rights in judicial proceedings. Administrative tribunals are typically granted considerable discretion over their procedures,¹⁸ which is amplified by statutory requirements that they conduct proceedings in an informal manner,¹⁹ and to act without regard to technicalities and legal forms.²⁰

The constitutional need to preserve procedural flexibility in the courts mirrors the requirements of fairness itself. The duty of courts and administrative decision-makers to be fair may be constant in principle, but its practical content will always depend heavily on the circumstances of any particular case.²¹ The basic elements of fairness require that people know the case against them and be given a reasonable opportunity to put their own case forward to an impartial decision-maker.²² Fairness

(‘*Ex parte Lam*’). It has been endorsed many times: see, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 607 [306] (Kiefel J); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 337 [34]–[36] (Kiefel, Bell and Keane JJ), 342 [57] (Gageler and Gordon JJ); *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599, 610 [38] (Bell, Gageler and Keane JJ), 618 [77] (Nettle and Gordon JJ).

¹⁸ See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(a); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 43(3); *State Administrative Tribunal Act 2004* (WA) s 32(5).

¹⁹ See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(b); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(d); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1)(a); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d); *State Administrative Tribunal Act 2004* (WA) s 9(b).

²⁰ See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(b); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1)(c); *State Administrative Tribunal Act 2004* (WA) s 32(2)(b). Some limits upon the extent of such powers were identified in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. That decision held that such powers must be exercised reasonably and, most importantly, adopted an expansive approach to the notion of reasonableness. That expansive approach meant that a migration tribunal which had rejected an application for an adjournment by one of the parties could not simply reply upon its power to act informally and without regard to legal technicalities or legal forms. That discretion was subject to the requirements of reasonableness and rationality which obliged the tribunal to consider the factors that weighed for and against an adjournment and, if the application was refused, provide some reasoned explanation to that effect: 368–9 [83]–[86] (Hayne, Kiefel and Bell JJ), 379–80 [122]–[124] (Gageler J).

²¹ The details of this general rule are explained in Aronson, Groves and Weeks (n 2) 500–5.

²² *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 207 [83].

requires these opportunities be provided, but not necessarily that they be exercised.²³ There are many reasons for this odd limitation. One arises from the dignitarian justification for fairness, which accepts the inherent value of the respectful treatment that the requirements of fairness foster.²⁴ Another is the practical one often arising with unrepresented people. The courts have noted the ‘clear line’ between explaining or assisting unrepresented parties about the value of procedures, or the ‘appropriateness of a suggested course’, as opposed to exercising that right on their behalf.²⁵ If courts and tribunals offer unrepresented parties the opportunity to exercise hearing rights, but leave the decision on whether and how to exercise those rights to the unrepresented party, their own impartiality is preserved. Similar considerations arise for represented parties. The tactical choices that must regularly be made during hearings are generally the province of lawyers, rather than decision-makers. Whether parties are represented or not, they possess a level of autonomy that enables them to refuse the procedural opportunities that fairness requires be provided.²⁶ The possibility of waiver of fairness, for both represented and unrepresented parties, is therefore consistent with the general principles governing natural justice.

III PRINCIPLED REASONS TO ALLOW WAIVER OF FAIRNESS

The cases in which the wider principles governing natural justice have been fashioned have not considered the possibility of waiver, but there are several reasons why waiver of natural justice can and should be possible. A key one arises from the ‘concern of the law ... to avoid practical injustice’.²⁷ It is explained below that waiver involves an informed and voluntary decision to forgo the right to object to an otherwise unfair procedure. Practical injustice is unlikely to arise if these requirements are met. It could even be argued that unfairness in such cases could occur if waiver is *not* allowed. Take the following hypothetical example. During a hearing, an unrepresented person is informed by a presiding judge or tribunal member that he or she can cross examine the witnesses of the other party. The unrepresented person replies ‘I have thought about it and decided I want things over with as soon as

²³ Keith Mason, ‘The Bounds of Flexibility in Tribunals’ (2003) 39 *AIAL Forum* 18, 24. Mason explained ‘the principles of natural justice are concerned with giving litigants a fair opportunity to make their case. The judicial officer does not have an obligation to ensure that such opportunity is availed of the nth degree’.

²⁴ A rationale noted in *R (Osborn) v Parole Board* [2014] AC 1115, 1149 [68] (Lord Reed) (*Osborn*); *Hossain* (n 1) 147–8 [72] (Edelman J, Nettle J agreeing on this point).

²⁵ *Wade v Comcare* (2002) 69 ALD 602, 607 (Drummond and Dowsett JJ).

²⁶ An exception are hearings involving national security, alleged terrorism and like issues. The hearing procedures for such cases often provide that the defendant or affected person not be given access to key evidence, or be present at some parts of the hearing: see, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 39A(9) (enabling, in limited circumstances the exclusion of both people seeking review of certain security related decisions and their lawyers).

²⁷ *Ex parte Lam* (n 17) 14 [38] (Gleeson CJ).

possible'. At the end of the hearing, the unrepresented person has a change of heart and requests that all the witnesses called by the other party be recalled for cross examination. Granting that request would cause delay, expense and inconvenience.²⁸ These same issues weighed on Griffiths J in *Twentyman v Secretary, Department of Social Security*.²⁹ The applicant in that case left the tribunal hearing after he was examined by his barrister, which deprived the respondent agency of any chance to cross-examine him. On appeal, the applicant claimed a denial of natural justice because adverse issues were not fairly put to him. Justice Griffiths rejected the claim, holding that the applicant caused this problem 'by his own conduct'.³⁰ To allow a claim of unfairness in such cases would run counter to the sensible warning that Lord Mance issued in the *Al Rawi*³¹ case: that fundamental rules like fairness and open justice 'ought to be regarded as sacrosanct, as long as they themselves do not lead to a denial of justice'.³²

The qualification made by Lord Mance may itself be subject to further qualification, which can arise when there has been very grave unfairness. Some cases have suggested that an especially serious instance of unfairness may warrant relief by the very reason of the gravity of the unfairness. Justice Edelman noted a similar possibility in criminal appeals, when he suggested that defects in a trial could sometimes be so fundamental 'that it can be said, without more, that a substantial miscarriage of justice has occurred'.³³ His Honour thought there was 'no rigid or predefined formula to determine what amounts to a fundamental error' of that nature, but he accepted that some 'serious denials of procedural fairness' could qualify.³⁴ This reasoning is at odds with several recent cases, in which a majority of the High Court held that the 'materiality' of an error is important to determining whether the error is jurisdictional in character.³⁵ Many aspects of this conception of materiality remain unsettled,³⁶ but it certainly requires a court to be satisfied that legal error, including a denial of fairness, might have made a difference before relief will be issued.

²⁸ It could arguably also confer unrepresented parties with a procedural right not available to represented parties, which itself could be unfair.

²⁹ [2019] FCA 586 ('*Twentyman*').

³⁰ *Ibid* [41].

³¹ *Al Rawi v Security Services* [2012] 1 AC 531.

³² *Ibid* 597 [115].

³³ *OKS v Western Australia* (2019) 364 ALR 573, 582 [36].

³⁴ *Ibid*. Justice Edelman drew support from the adoption of such reasoning by a unanimous High Court in *Weiss v The Queen* (2005) 224 CLR 300, 317 [45].

³⁵ See, eg, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 341 [56] (Gageler and Gordon JJ); *Hossain* (n 1) 134–5 [29]–[31] (Kiefel CJ, Gageler and Keane JJ); *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34, [65]–[67] (Edelman J).

³⁶ A key issue is whether the materiality of an error that is established is an element of jurisdictional error, or instead goes only to remedial discretion. The High Court divided sharply on this issue in the two key cases of *Hossain* (n 1) and *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599. An assessment

One issue that remains unclear is whether the requirement of materiality does not apply in cases involving some sort of fundamental error.³⁷

Whether a requirement of materiality should not apply in cases of fundamental unfairness could depend on why Edelman J thought some especially grave errors might essentially speak for themselves. The explanation given for this possibility in the early English case of *Mayes v Mayes* was one of jurisdiction.³⁸ The Court in that case reasoned that ‘a rule of natural justice which goes to the very basis of judicature ... cannot be waived.’ The Court explained that ‘[y]ou cannot by waiver convert a nullity into a validity’.³⁹ This reasoning was expressly doubted by the New South Wales Court of Appeal in *Escobar v Spindaleri*,⁴⁰ when Samuels JA suggested that lawyers could ‘always ... waive in the sense of not wishing to exercise some procedural or other forensic right’.⁴¹ His Honour reasoned that a party who made an informed and voluntary choice of this nature ‘has not been deprived of any right or privilege and hence has not been denied natural justice’.⁴² That reasoning points to a paradox in many possible claims of waiver of fairness. The rules of fairness are arguably not waived in cases when a party declines to take advantage of one or more procedural benefits. In such cases, the opportunity that the rules of fairness require be provided has been given. In these instances, the requirements of fairness are discharged by the *offer* of a procedural opportunity or benefit, not its exercise. Any refusal of that benefit or opportunity does not amount to a waiver of fairness. It is better described as acquiescence — agreement to a course of procedure — which itself can lead to a finding that fairness was not denied.

Another reason why serious unfairness might constitute a self-evident justification for a finding of unfairness was mentioned without detailed explanation in *Hossain*.⁴³ Justice Edelman, with whom Nettle J agreed on this point, held that the requirement

across both cases suggests Kiefel CJ, Bell, Gageler and Keane JJ considered that the materiality of an error was an ingredient of jurisdictional error, whereas Justices Nettle, Gordon and Edelman considered that materiality went to remedial discretion.

³⁷ This possibility is a live one because of suggestions, noted below, that notions of materiality *generally* require that an error deprives a party of the possibility of a successful outcome: *Hossain* (n 1) 147–8 [72] (Edelman J, Nettle J agreeing at 137 [40]). If the requirement is a general one, it surely has exceptions.

³⁸ *Mayes v Mayes* [1971] 1 WLR 679.

³⁹ *Ibid* 684.

⁴⁰ (1986) 7 NSWLR 51.

⁴¹ *Ibid* 62.

⁴² *Ibid*. President Kirby, with whom Glass JA agreed, held that the lawyer of one party was effectively precluded from making a closing address after a testy exchange with the trial judge. That finding meant his Honour did not need to consider waiver in any detail.

⁴³ *Hossain* (n 1) 123.

of materiality ‘will generally require the error to deprive a person of the possibility of a successful outcome’.⁴⁴ But his Honour added that

[t]here may be unusual circumstances where an error is so fundamental that it will be material whether or not the person is deprived of the possibility of a successful outcome. One circumstance, for reasons that could include respect for the dignity of the individual, may be an extreme case of a denial of procedural fairness.⁴⁵

It was notable on several counts that Edelman J relied on the English decision of *Osborn*. The first was that *Osborn* was concerned solely with an alleged denial of natural justice. Justice Edelman drew support from *Osborn* when suggesting that gross unfairness might sweep aside requirements of materiality, though just as materiality has wider application, one might wonder whether the same applies to the Court’s emphasis on dignity. Perhaps notions of respect could be extended to requirements of procedure and reasonableness.⁴⁶ Secondly, *Osborn* drew a connection between dignitarian notions of fairness and respect. Lord Reed explained in *Osborn* that observance of the rules of natural justice led to fair and respectful conduct by administrative officials. That respectful treatment acknowledged the dignity of those affected by the exercise of official power.⁴⁷ But Lord Reed appeared mindful of the practical limits of this possibility when he reasoned that

natural justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of judicial or administrative functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, *provided they have something to say which is relevant to the decision to be taken*.⁴⁸

Justice Edelman cited this very paragraph for its emphasis upon dignity but did not consider the limits that Lord Reed seemed to envisage in his suggestion that affected people must have ‘something relevant to say’. Lord Reed’s dictum should not be taken literally, so as to accept that people without relevant material can be treated badly. His Lordship surely instead meant that showing respect for the dignity of affected people is important, but the legal consequences of a failure to do so become apparent when it is clear an affected person wanted to participate in a hearing and

⁴⁴ Ibid 147 [72]. See 137 [40] for Nettle J’s agreement on this point.

⁴⁵ Ibid 147–8 [72].

⁴⁶ Chief Justice Allsop did so in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 5 [9] (*‘Stretton’*).

⁴⁷ This was one of several rationales that Lord Reed identified as supporting the duty to act fairly. Others included the possibility that fair procedures could lead to more informed and thus better quality decisions. Another factor was that observing the rules of fairness could lessen the feelings of injustice of affected people and their families: *Osborn* (n 24) 1149–50 [67]–[70].

⁴⁸ [2014] AC 1115, 1149 [68] (emphasis added).

had something relevant to say. If that reasoning is applied to the notion of materiality, one could ask how a breach of fairness could be material if the person denied a procedural right did not have something relevant to say.

Chief Justice Allsop of the Federal Court has taken a slightly different approach in a series of cases and speeches, in which his Honour has drawn connections between fairness and the dignity of those over whom public power is exercised.⁴⁹ His Honour has suggested that statutory hearing requirements involve a recognition of the dignity of affected people.⁵⁰ His Honour expanded on that possibility in a recent speech, arguing that the connection between dignitarian imperatives and the exercise of public authority was as much societal as it was legal.⁵¹ The difficult question of whether and how arguably vague notions about human dignity, or other potentially wide normative notions, can qualify the exercise of public or statutory power in a coherent manner can be put aside for present purposes. It can, however, be suggested that notions of dignity do not necessarily stand against waiver. There are two reasons. First, waiver provides people with autonomy and choice. It would be wrong and arguably also an abuse of power to force people to attend hearings if they do not wish to. If people can spurn an entire hearing, surely they can decline particular procedures within a hearing. Waiver enables them to do so. Secondly, waiver essentially requires people to be held to their own conduct, if it is informed and voluntary. To require such consistency does not offend the dignity of people. A potential third and closely related point is that enforcing waiver can arguably protect the dignity of the other party. Hearings usually involve more than one party. Those who rely on waiver are entitled to expect some level of consistency from other parties.⁵²

IV WAIVER OF THE BIAS RULE

The courts have long accepted that the bias rule can be waived. Before consideration of the key features of waiver of bias, it is useful to note the assumptions upon which waiver operates. An important presumption is that the bias rule applies to the exercise of judicial and administrative power. Any finding of waiver is an exception

⁴⁹ Justice Heydon invoked similar considerations in *International Finance* (n 16) 380–1 [143]–[145].

⁵⁰ *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, [5]. His Honour drew a connection between dignity and requirements of fairness and reasonableness in *Stretton* (n 46) 5 [9].

⁵¹ James Allsop, ‘The Foundations of Administrative Law’ (Speech, 12th Annual Whitmore Lecture, Federal Court of Australia, 4 April 2019). Allsop also stressed the importance of human dignity in the exercise of public power in James Allsop, ‘Values in Public Law’ (2017) 91(2) *Australian Law Journal* 118.

⁵² This statement may hint at a parallel with estoppel, but the interaction between public law and estoppel principles — particularly the extent to which the former can draw from the latter — was said to have largely ended by the House of Lords in *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2003] 1 WLR 348, 351 [6], 358 [35].

to the general application of the rule. The possibility of waiver does not mean that hearings and administrative processes can or should be biased.⁵³ It simply means that people affected by the exercise of judicial or administrative power can forgo their right to raise a complaint of bias. The bias rule arguably still applies to such hearings and processes because waiver only serves to preclude enforcement of the rule by the waiving party.

The key requirement for waiver of the bias rule is that any waiver must be fully informed and clear. The requirement to be informed is not absolute. Parties must have ‘full knowledge of all the facts *relevant* to the decision whether to waive or not’,⁵⁴ or the ‘nature of the case rather than the detail’.⁵⁵ The point at which this level of knowledge is reached may be difficult to gauge because the detail in support of a bias claim may accrue slowly during the course of a hearing.⁵⁶ Sometimes that tipping point may be difficult, almost impossible, to identify.⁵⁷

The bias rule can be waived expressly but waiver is most commonly found to arise by implication, typically in the form of a failure to object. Findings of waiver by implication present a practical difficulty. When is it fair and reasonable to deem conduct that may be open to different interpretations, as silence or a failure to object often is, as sufficiently clear to support a finding of waiver?⁵⁸ The willingness of courts to draw such conclusions can depend greatly on whether a party is represented. Represented parties are generally bound by the conduct of their advocate, including any judgment of the representative on whether to raise or remain silent on a possible complaint

⁵³ That presumption would be strong, perhaps beyond rebuttal, in criminal proceedings because fairness is the very essence of criminal trials. The different considerations applicable to criminal proceedings may explain why the cases discussing waiver make clear its application to civil proceedings: see, eg, *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 449 [76] (Gummow ACJ, Hayne, Crennan and Bell JJ).

⁵⁴ *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 475 [15] (emphasis added) (*‘Locabail’*).

⁵⁵ *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071, [36].

⁵⁶ *Johnson v Johnson* (2001) 201 CLR 488, 516–17 [79] (Callinan J) (*‘Johnson v Johnson’*).

⁵⁷ Justice Basten discussed these issues in *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88, [34]. His Honour described a claim of waiver of bias as ‘a false issue’, because the unfolding problems of the conduct of the trial meant there was no ‘inescapable point’ at which counsel had to request the judge to either cease his excessive interventions or abort the trial.

⁵⁸ The High Court has noted that this difficulty arises in claims of waiver more generally: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, 315–16 [33] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

of bias.⁵⁹ Courts are naturally more inclined to deem the silence of an experienced lawyer as clear and unequivocal for the purposes of waiver because making difficult forensic decisions is the very reason people engage lawyers. Things are necessarily different for unrepresented parties, which may explain why the courts have refused to find waiver in apparently clear cases such as when an unrepresented party walks out of a hearing.⁶⁰ A court must be satisfied that unrepresented parties realise and accept the consequences of their behaviour, including a refusal to complain about possible bias.⁶¹

The final component of waiver relates to timing. Parties aware of the key issues that could support a claim of bias can be deemed to have waived the right to complain if they fail to raise the point promptly. The meaning of this requirement to act in a timely way has variously been described as allowing parties a ‘sufficient time’,⁶² which can enable even the most experienced counsel to wait a day or so to consider their options.⁶³ The leeway available for even experienced counsel to pause and consider whether or not to raise an objection⁶⁴ is consistent with other cases which make clear that unrepresented parties should be given much greater licence when faced with this decision;⁶⁵ though even an unrepresented party may be expected to take immediate issue with conduct if it is ‘so obviously objectionable’ that an appeal court could reasonably say the party was ‘bound to object then and there’.⁶⁶

⁵⁹ In *Smits v Roach* (2006) 227 CLR 423, 441 [46], Gleeson CJ, Heydon and Crennan JJ noted that the assumption in adversarial litigation was that parties were ‘generally bound by the conduct of counsel’ (emphasis added), suggesting there exists room for the presumption to be displaced. Justice Kirby identified several practical reasons why imputing knowledge of the lawyer to the client presented difficulties: at 468 [133]. One difficult question is when lawyers can reasonably be expected to consider complex procedural issues, such as bias claims, without conferring with clients.

⁶⁰ See, eg, *Mond v Berger* (2004) 10 VR 534, 579 [248].

⁶¹ Though Flick J suggested such differences might fall away when unrepresented parties have had the consequences of abandoning a possible bias claim clearly explained to them: *Kennedy v Secretary, Department of Industry [No 2]* [2016] FCA 746, [38] (‘Kennedy’).

⁶² *Vakauta v Kelly* (1989) 167 CLR 568, 579 (Dawson J) (‘Vakauta’).

⁶³ This period could also allow the party to obtain a copy of the hearing transcript, which can greatly assist any decision: *John Fairfax Publications Pty Ltd v Maurice Kriss* [2007] NSWCA 79, [26]–[27].

⁶⁴ The reason, Callinan J suggested, is that even experienced counsel may struggle with the ‘almost impossible’ choice between raising the issue (and thus offending the decision maker) or risking waiver (and thus surrendering the right to object): *Johnson v Johnson* (2001) (n 56) 517–18.

⁶⁵ This in turn can vary, depending on whether the unrepresented party is very experienced (as some are) or new to legal proceedings. This may not be the case when an unrepresented party receives a clear explanation of the consequences of not pursuing a course of action: *Kennedy* (n 61), [38] (Flick J).

⁶⁶ *Huang v University of New South Wales* (2006) 154 FCR 16, 26 [39] (Rares J).

The justifications for the possibility of waiver of bias are pragmatic ones of fairness. In *Vakauta v Kelly*,⁶⁷ a majority of the High Court accepted that it would be ‘unfair and wrong’ if a party who knew the facts of a possible complaint of bias could keep that claim in abeyance for future use, such as when the substantive decision was delivered. To allow parties to keep a possible bias claim ‘up their sleeve’ for future use could cause needless appeals that would waste judicial time and court resources. It would also be unfair to other parties and undercut the principle of finality in proceedings.

V WAIVER OF THE HEARING RULE

Most of the cases that have considered claims of waiver of natural justice have not analysed the issue in any detail.⁶⁸ Different cases have accepted that waiver of fairness is ‘possible’,⁶⁹ or ‘conceivable’,⁷⁰ or have suggested that waiver would have been found if the case at hand had not failed for other reasons.⁷¹ Others have accepted the possibility of waiver in principle but found it unnecessary to consider at length.⁷² In the one instance where the issue arose clearly in arguments before the High Court,⁷³ the oral arguments heard by the Court did not feature in the resulting decision.⁷⁴ Justice Weinberg drew attention to the ‘relative paucity of authority

⁶⁷ *Vakauta* (n 62) 572 (Brennan, Deane and Gaudron JJ).

⁶⁸ See, eg, *Twentyman* (n 29) [40] where Griffiths J held, without detailed explanation, that the applicant had waived part of his hearing rights by walking out during part of the hearing. See also *Caliguiri v Attorney-General (on behalf of the State of Victoria) & others [No 2]* [2019] VSC 365, [189]–[197] where Garde J noted detailed submissions from the parties about possible waiver of natural justice, held no waiver had occurred but did not directly rule on whether waiver of fairness was possible. Kiefel CJ, Bell and Keane JJ recently mentioned the possibility of waiver of the requirements of fairness in a closed criminal trial. Their Honours expressed no view in the issue and noted it was not pressed before the High Court: *Hunt v The Queen* [2019] HCA 40, [50] quoting Aronson, Groves and Weeks (n 2) 492–6.

⁶⁹ See, eg, *Thompson v Ludwig* (1991) 37 IR 437, 453 where Gray J stated ‘there is no reason in principle why waiver should not be possible’. This finding was overturned by the Full Court of the Federal Court on other grounds, but without any adverse comments on Gray J’s remarks on waiver: *Thompson v Ludwig* [1992] FCA 285 (Black CJ, Northrop and Lee JJ).

⁷⁰ *Attia v Health Care Complaints Commission* [2017] NSWSC 1066, [225].

⁷¹ *Fato v Regione Calabria Pty Ltd* [2014] VSC 435, [148]–[149], where Kyrou JA held that if he was wrong to hold that a magistrate had not breached the rules of fairness, the failure of the appellant’s counsel to object to the conduct complained of would have constituted waiver.

⁷² *Lawrie v Lawlor* (2016) 168 NTR 1, [419] (Heenan AJ, Doyle and Duggan AJA agreeing at [245]).

⁷³ Transcript of Proceedings, *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCATrans 046.

⁷⁴ That case was *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486.

dealing with the question of waiver in relation to the operation of the rules of natural justice.⁷⁵ His Honour noted that some cases had accepted that compliance with particular aspects of the hearing rule, such as notice requirements, could be waived. ‘These cases’, Weinberg J reasoned, ‘suggest that minor aspects of the [hearing] rule may be impliedly waived’.⁷⁶ His Honour also acknowledged that other cases had resolved such issues by the discretionary refusal of relief for a possible denial of natural justice.

In two recent instances where waiver of fairness was accepted in principle, there was little substantive reasoning about that finding, though each case is instructive. In *Byrne v Rail Corporation of NSW*,⁷⁷ the New South Wales Industrial Relations Commission examined the many passing and inclusive references in case law to waiver and concluded it was ‘well established’ that people can waive hearing requirements.⁷⁸ The Commission thought it equally clear that ‘each case involving waiver turns on its own facts’.⁷⁹ Waiver was argued to have occurred in that case when one party was excluded from the hearing at the request of the other, so that he could not adjust his evidence in light of a potentially conflicting account of events. The Commission held that waiver was not established because the lawyer of the excluded party was clearly ambivalent about the exclusion and only sought to object once the consequences of that course became apparent.⁸⁰ But the Commission suggested that ‘it would be necessary for there to be clear and express waiver by counsel’ to abrogate basic requirements, such as the right of a party to be present during a hearing, which implies that it thought even the most basic right could be waived if done so clearly enough.⁸¹

Two years later, in *New Price Retail Services Pty Ltd v Hanna*,⁸² the New South Wales Supreme Court concluded that there ‘is no reason in principle’ why there could not be waiver of a breach of natural justice.⁸³ That case involved the adoption of reports of a referee who was determining a franchise dispute. One party claimed the conduct of the referee created an apprehension of bias, in part because many of

⁷⁵ *Percerep v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 483, 503 (Weinberg J).

⁷⁶ *Ibid.*

⁷⁷ [2012] NSWIRComm 117 (*‘Byrne’*).

⁷⁸ *Ibid* [148].

⁷⁹ *Ibid.*

⁸⁰ *Ibid* [151].

⁸¹ *Ibid* [150]. Even the right to be present is not absolute. If people behave in an extremely disruptive or disrespectful way, they can be removed from the hearing without any breach of the rules of fairness. A variation of this can occur in criminal proceedings when a defendant absconds during the trial. The law governing this issue, in which many cases refers to such defendants having waived their right to be present during trial, is detailed in *R v Gee* (2012) 113 SASR 372.

⁸² [2014] NSWSC 553 (*‘New Price Retail’*).

⁸³ *Ibid* [81] (Sackar J).

his communications were with one rather than both parties. The court noted that the parties had contacted each other and the referee many times. Over this lengthy period, the party claiming a denial of natural justice had become ‘well aware’ of both the preliminary views of the referee and the process by which he was gathering and considering material. The issues had become so clear during these many communications, the Court concluded, that any breach of fairness that might have occurred ‘was well and truly waived’ because the process had continued without objection.⁸⁴

Each of these two cases sheds some useful light on how waiver can operate. *Byrne* makes clear that determining whether natural justice has been waived depends on the same contextual approach used to determine what fairness requires. That case also suggested that the more basic the procedural right, perhaps the clearer waiver needs to be. *New Price Retail* arguably illustrates how waiver does not necessarily require parties to make difficult decisions on the spot. Many cases are long, drawn out and conducted mostly in offices rather than in courts, where there are many chances for parties to easily raise concerns about procedural issues. It is difficult to regard the enforcement of waiver in such circumstances as unreasonable or unfair.

Two cases from appellate courts in Victoria and England show in more detail how these issues may operate.

VI WAIVER AND THE VICTORIAN COURT OF APPEAL: *MH6 v MENTAL HEALTH REVIEW BOARD*

The possibility of waiver of the hearing rule was considered in detail by the Victorian Court of Appeal in *MH6 v Mental Health Review Board*.⁸⁵ The applicant (MH6) had been detained for more than six years in a psychiatric institution under authority of a compulsory treatment order. He exercised a statutory right of administrative reconsideration of his continued detention by the Victorian Mental Health Review Board.⁸⁶ When the Board decided to continue MH6’s involuntary detention, he sought review of its decision in the Victorian Civil and Administrative Tribunal (‘VCAT’).⁸⁷ VCAT conducted an oral hearing, in which it received statements and evidence from several people, but questions arose about the order that the proceedings should follow.⁸⁸ Counsel for MH6 suggested that the respondent agency should present its case first. The presiding tribunal member explained that, as a general rule, applicants in proceedings before VCAT normally presented their case first and that the hearing at hand should follow that practice. Counsel for MH6 explained that registry staff of VCAT

⁸⁴ Ibid [193].

⁸⁵ (2009) 25 VR 382.

⁸⁶ Contained in *Mental Health Act 1986* (Vic) ss 29(1)–(2).

⁸⁷ A right provided by *Mental Health Act 1986* (Vic) s 120.

⁸⁸ The confusion about these matters reflects longstanding uncertainty in Australian law about evidence and proof in administrative hearings. Practice Directions governing Australian merits review tribunals rarely address the order of proceedings. The prevailing Direction for VCAT was no exception.

had advised him that the respondent would open proceedings, so he had organised his case and witnesses accordingly. After discussion between the bench and bar table, counsel for MH6 called those of his witnesses who were present at the time.⁸⁹ The previously filed statements of other witnesses were accepted without objection and the Tribunal gave the parties leave to file further submissions. The respondent filed its submissions first, followed by the applicant. VCAT reserved the matter and later decided that MH6 should remain under involuntary detention.⁹⁰ MH6 sought judicial review of that decision, claiming that VCAT had erred by requiring that he present his case before the respondent.

Justice Hansen at first instance held that there had been no denial of natural justice because the respondent had filed witness statements well before the hearing.⁹¹ The applicant therefore ‘knew the case to be met’ and suffered no disadvantage by the order of the hearing.⁹² The judge drew support for this conclusion by noting that the applicant’s lawyer did not recall any of his witnesses or provide any supplementary evidence.⁹³ The mention of those issues suggested that the judge believed the applicant could not point to any disadvantage or practical unfairness caused by the order of proceedings.

⁸⁹ This aspect of the VCAT proceeding is extracted at: *MH6 v Mental Health Review Board* (2009) 25 VR 382, 385–6 [12].

⁹⁰ The Tribunal had a *de novo* review power and could exercise the same determinative powers as the Board: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 51.

⁹¹ There was no doubt that VCAT was subject to the requirements of natural justice because several provisions of its governing statute required the Tribunal to act fairly. Most notably *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 97 (expressly requiring VCAT to act fairly), s 98(1)(a) (expressly stating that VCAT is bound by the rules of natural justice) and s 102(1) (requiring VCAT to provide a party with a ‘reasonable opportunity’ to call or give evidence, examine and cross-examine witnesses and make submissions). The common law requirements of fairness were also applicable and could supplement these particular statutory requirements.

⁹² *MH6 v Mental Health Review Board* [2008] VSC 345, [68]. The judge considered the order of proceedings as an issue of fairness rather than as part of the rules of evidence. It is unlikely that recourse to evidentiary principles would have been helpful. In theory, evidentiary rules could have required the public authority to make its case first in order to discharge a burden of proof required for the continued detention of MH6 (this assumes the initial burden was upon the applicant to establish a case for his release, rather upon the hospital to establish a case for continued detention). That issue was not raised in part because evidentiary notions central to judicial hearings, such as a burden or onus of proof, do not normally apply to administrative hearings: See, eg, *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220. That case made clear that administrative tribunals and other like bodies can only act on rationally probative material. This finding edges towards a burden or onus of proof because parties will inevitably wish to lead material that enables the tribunal to make findings each party seeks.

⁹³ *MH6 v Mental Health Review Board* (n 92).

The Court of Appeal found that the respondent should have opened the VCAT proceedings because this course would enable those resisting compulsory detention to hear and respond to the case against their release.⁹⁴ But the Court of Appeal held that use of a different procedure did not cause unfairness in this instance because the applicant was ‘well aware of the case against him and had a full and fair opportunity to be heard in respect of that case’.⁹⁵ That finding was sufficient to dispose of the appeal but the Court also considered the possibility of waiver in some detail. The Court of Appeal reasoned that, as a general rule, there was ‘no reason of principle and no authority to doubt that full observance of the hearing rule may be waived’.⁹⁶ Their honours also concluded that waiver would have defeated any finding that the applicant had been denied natural justice in the case at hand.⁹⁷

The reasoning of the Court of Appeal had two notable strands. One was the holistic view taken of fairness. The conduct said to give rise to waiver was viewed in the wider context of the case. The Court of Appeal noted that the content of the rules of fairness depended on the wider legislative framework within which the decision under review was made, the procedural rules governing the hearing before VCAT and also ‘the conduct of the parties prior to or during the hearing’.⁹⁸ An important part of the procedure of this case was that all material considered in the VCAT hearing was lodged well in advance and could not be departed from without leave of the Tribunal.⁹⁹ The applicant lodged his material in advance of the hearing before the respondent agency, called his witnesses in the hearing before the respondent agency and, for each procedure, did so without objection. The order of the hearing neither surprised the applicant, nor denied him a chance to know and test the case against him.¹⁰⁰

The reasoning in *MH6* was also notable for its extensive reference to bias cases, which is surprising because most earlier cases that have mentioned possible waiver of the hearing rule have taken little or no account of the very detailed principles arising from bias cases. The Court of Appeal adopted the orthodox position established in bias cases, which is that waiver can be founded on either positive conduct or deliberate silence, and that in each instance any decision to waive a claim of bias

⁹⁴ *MH6 v Mental Health Review Board* (n 89) 390 [26]–[28]. There is no express requirement to this effect in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), or any of the other Australian statutes that create merits review tribunals of general jurisdiction.

⁹⁵ *Ibid* 392 [33].

⁹⁶ *Ibid* 396 [53].

⁹⁷ *Ibid*.

⁹⁸ *Ibid* 391 [30].

⁹⁹ *Ibid* 392 [33].

¹⁰⁰ *Ibid* 392 [34], in which the Court of Appeal noted that the applicant ‘did not attempt to identify any potential disadvantage that arose as a consequence of the course followed’.

must be informed and voluntary.¹⁰¹ This approach precludes waiver where parties are given no chance at all to be heard.¹⁰² People who receive no notice or chance to put their case would not normally have sufficient knowledge of the case, or key issues, to be capable of waiver. There seems no reason why the principles developed to govern waiver of the bias rule should not inform any possible waiver of the hearing rule and the reasoning in *MH6* illustrates why. The applicant was represented by experienced counsel who raised many procedural queries, including one about the order of the hearing, but did not press any of those queries after they were discussed during the hearing. The Court of Appeal accepted that tactical decisions by counsel, which in that case was a failure to make a timely objection, could amount to waiver by conduct.¹⁰³ The Court reasoned that parties could in ‘ordinary circumstances’ expect to be bound to the consequences of the decisions made by their lawyers and other agents.¹⁰⁴

The instances where this presumption might not apply are limited by the strict approach taken by the High Court to imputing the consequences of the fault of an agent to the party who engaged that agent in *SZFDE*.¹⁰⁵ But outside the sort of glaring fraud of that case, where a migration agent completely deceived his client about the need to lodge any appeal documents, the decisions and errors of an agent will bind the client.¹⁰⁶ This reasoning surely includes the actions of a lawyer or other agent that could support a finding of waiver according to the normal rules of that doctrine.

¹⁰¹ That approach is consistent with the small number of other cases governing waiver of the hearing rule. See, eg, *Escobar v Spindaleri* (n 40) 62 (Samuels JA in dissent); and *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389, 411–13 (Mahoney JA) (*‘Burwood’*). However, Kirby P stated that ‘a point would be reached where the default was so large, and the departure from orthodox conduct so substantial, that notions of waiver have no application’: at 404–5.

¹⁰² Such a problem was noted in *DWN042 v Republic of Nauru* (2017) 350 ALR 582, 588 [21] where Keane, Nettle and Edelman JJ noted that the parties had received no hearing at all. Justice Edelman referred to this example as ‘an extreme case of denial of procedural fairness’ in *Hossain* (n 1) 148 [72].

¹⁰³ *MH6 v Mental Health Review Board* (n 89) 394–5.

¹⁰⁴ *Ibid* 395. This reasoning is consistent with other cases where the party claiming waiver has been required to establish a conscious decision not to pursue a point. See, eg, *Escobar v Spindaleri* (n 40); *In the Marriage of DJ and MY Collins* (1990) 14 FamLR 162, 179; *Thai v Deputy Commissioner of Taxation* (1994) 53 FCR 252, 272; *Burwood* (n 101).

¹⁰⁵ *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 207 (*‘SZFDE’*).

¹⁰⁶ Clients cannot simply evade the mistakes of a negligent, lacklustre or even deceitful lawyer. The key factor is deceit that somehow frustrates the proper operation of the tribunal or other decision maker. See, eg, *SZHVM v Minister for Immigration and Citizenship* (2008) 170 FCR 211 (client bound by migration agent’s unwise advice that he remain home and mind his child rather than attend a tribunal hearing); *Minister for Immigration and Citizenship v SZLIX* (2008) 245 ALR 1 (simple negligence by agent not enough for client to escape the consequences of the agent’s actions); *SZSXT*

VII WAIVER AND THE ENGLISH COURT OF APPEAL: THE *HILL* CASE

The applicant in *R (Hill) v Institute of Chartered Accountants in England and Wales* ('*Hill*') was an accountant facing professional disciplinary charges brought by the Institute of Chartered Accountants in England and Wales.¹⁰⁷ The disciplinary Tribunal was not a court but conducted its hearings in a relatively formal manner, using many of the trappings of curial hearings.¹⁰⁸ The parties were each represented by counsel, who led oral evidence and made detailed submissions. The applicant gave evidence in chief and was cross-examined. One member of the tribunal briefly left the hearing during that cross-examination but did so with the agreement of the applicant's counsel. That member read the transcript of the parts of the hearing he was absent from, then participated in the rest of the hearing. This occurred at the early stage of the applicant's cross-examination, which was interrupted by several adjournments over a six week period.¹⁰⁹ The Tribunal found the charges proved and ordered the applicant be excluded from the Institute. The applicant sought judicial review of the Tribunal's decision on the ground that the Tribunal had breached the rules of natural justice by allowing one of its members to leave part of the hearing but preside in the remainder of the case.

The claim was dismissed by Lang J at first instance, who held that the disciplinary tribunal had the power to authorise a temporary absence of one of its members.¹¹⁰ Justice Lang relied on a distinction previously drawn by Sedley LJ between adjudicative and constitutive jurisdiction. Lord Justice Sedley explained constitutive jurisdiction as 'the power given to a judicial body to decide certain classes of issue', while adjudicative jurisdiction the entitlement of such a body to 'reach a decision within its constitutive jurisdiction'.¹¹¹ Justice Lang held that any possible error by

v Minister for Immigration and Border Protection (2014) 222 FCR 73 (applicant not bound by dishonest statements and actions about crucial procedures by friend who assisted him).

¹⁰⁷ *R (Hill) v Institute of Chartered Accountants in England and Wales* [2014] 1 WLR 86 ('*Hill*').

¹⁰⁸ As administrative officials and bodies generally have a discretion over the procedure they adopt, it is usually permissible for their hearings to vary in the level of formality and the extent to which they utilise inquisitorial or adversarial procedures.

¹⁰⁹ This strangely extended period of cross-examination was due to the other professional commitments of the tribunal members and the applicant, which made it impossible to conduct the hearing over a single unbroken period.

¹¹⁰ *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* [2012] EWHC 1731 (QB), [41]–[55] (holding that, while the governing rules did not make express provision for a member to be absent, the inherent power of the tribunal to regulate its proceedings provided sufficient authority). Any consideration of waiver could have been avoided by a contrary finding on this issue because the tribunal's substantive decision would have been vitiated by a lack of power, which would remain unaffected by any waiver.

¹¹¹ *Carter v Ahsan* [2005] ICR 1817, [16]. The dissenting view of Sedley LJ was affirmed by the House of Lords in *Watt (formerly Carter) v Ashan* [2008] 1 AC 696.

the disciplinary tribunal had not affected its constitutive jurisdiction, or any other description of the power required to enter and conduct the inquiry that it had.

Although Lang J accepted that the Tribunal had the power to allow the temporary absence of one of its members, her Honour held that it was unfair for the member to leave during most of the cross-examination of the applicant whose credibility was a central issue.¹¹² It followed, Lang J reasoned, that fairness required the member to observe and assess the applicant's demeanour in person, in order to make a proper judgment of his credibility, rather than reach a judgment on that issue by reading a transcript of what had occurred while the member was absent.¹¹³ But Lang J identified several reasons why that breach had been waived. One was that the applicant was represented by an extremely able lawyer who specialised in professional disciplinary hearings, acted in accordance with the applicant's instructions and made an informed decision not to object to the absence of one tribunal member.¹¹⁴ Justice Lang rejected arguments that the lawyer had erred in this decision and noted that, even if such an error had been established, longstanding authority meant that the applicant would be bound by the mistake of his lawyer.¹¹⁵

There were two other notable features of Lang J's findings on waiver. First, her Honour relied upon cases of waiver of the bias rule in support of the more general proposition that a breach of fairness could be waived.¹¹⁶ Justice Lang found that the key requirements for waiver of the bias rule — that any waiver be clear and unequivocal, voluntary and made with full knowledge of key relevant facts — were met in the case at hand. The second notable feature of Lang J's findings on bias was that her Honour drew attention to authority suggesting that the rights protected by art 6(1) of the *European Convention on Human Rights* ('ECHR') were capable of waiver so

¹¹² But Lang J also noted that the inherent flexibility of the requirements of fairness meant there was no rigid rule that decision-makers must always personally observe all evidence: *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* (n 110) [82]–[87].

¹¹³ *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* (n 110) [72]–[81]. This finding is consistent with *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, where the High Court found that a decision delivered several years after a hearing was unfair because it was unlikely, perhaps even impossible, that the decision maker could recall and assess evidence from many years ago fairly and accurately.

¹¹⁴ *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* (n 110) [93]–[95].

¹¹⁵ *Ibid* [97]–[98]. The case cited for this proposition was *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876, 898 (Lord Bridge) ('*Al-Mehdawi*'). Justice Lang noted that *Al-Mehdawi's* notion of liability for the actions of one's lawyers had been found to be unaffected by the incorporation of the ECHR into UK law: *R (Sinha) v General Medical Council* [2008] EWHC 1732 (Admin), [50]–[56]. The High Court of Australia has accepted the rationale of *Al-Mehdawi* but held that it does not extend to cases where the lawyer or agent acting in legal proceedings has engaged in fraud on the tribunal: *SZFDE* (n 105).

¹¹⁶ The key bias case cited by Lang J was *Locabail* (n 54).

long as any waiver ‘does not run counter to any important public interest’.¹¹⁷ This reasoning is consistent with that of Edelman J noted above, which suggested that relief for the most extreme breaches of fairness may be required in part to protect the integrity of the legal system.

The Court of Appeal upheld that decision of Lang J but did so on different grounds, finding unanimously that there had been no breach of natural justice. Only Longmore LJ considered the issue of waiver, which his Lordship found would have operated if a breach of natural justice had occurred in the case at hand. Lord Justice Beatson, with whom Underhill LJ agreed, held that the claim was best resolved without consideration of waiver though his reasoning appears to leave open the possibility of waiver of natural justice. Lord Justice Beatson approached the problem at hand by use of what can be described as a distinction of ‘before and after’. His Honour distinguished between these different cases. The first type of case is where a breach of the requirements of fairness had occurred and the question was whether that breach ‘has subsequently been waived by the person affected’.¹¹⁸ Lord Justice Beatson provided the example of *Locabail*,¹¹⁹ where the judge disclosed a potentially disqualifying interest on the seventh day of a 16-day hearing. No objection was taken at the time of disclosure or during the nine further hearing days. It was instead made after judgment was delivered. The Court held that the right to complain about bias had been waived because the affected party had failed to make a timely objection after gaining full knowledge of the basis to do so.

The other type of case identified by Beatson LJ were those

where at a stage in the process before there has been any breach of express procedural requirements or the requirements of natural justice, the decision-maker and others involved have discussed a proposed procedure and have freely and in full knowledge of the facts consented to that procedure when it is followed.¹²⁰

Lord Justice Beatson agreed with the judge at first instance, that such cases should be characterised as ones where no unfairness had occurred, rather than as instances of waiver of fairness.¹²¹ His Honour founded this view on some longstanding assumptions about natural justice. One was the description of the requirements of fairness as ‘fair play in action’.¹²² Another was the inherent flexibility of fairness, which the courts worked to preserve in part by refusing to lay down detailed or prescriptive

¹¹⁷ *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* (n 110) [105], citing *Pfeifer and Plankl v Austria* [1992] 14 EHRR 692, [37]–[39]; *Bulut v Austria* (1997) 24 EHRR 84, [34]; *Young v United Kingdom* (2007) 45 EHRR 29, [40].

¹¹⁸ *Hill* (n 107) [43].

¹¹⁹ *Locabail* (n 54).

¹²⁰ *Hill* (n 107) [44].

¹²¹ *Ibid* [44]–[46].

¹²² This widely cited description was made by Lord Morris in *Wiseman* (n 7) 309.

requirements.¹²³ He explained that where ‘a person is offered the opportunity to be heard by a procedure which is fair but declines the offer, it is a distortion of language’ to describe the resulting decision as one containing a breach of fairness that was waived.¹²⁴ Lord Justice Beatson was mindful to avoid a descent into technical detail that might serve only to obscure the issues, which he reasoned would be at odds with the absence of details or rigid rules applicable to the tribunal at hand and the flexible approach to questions of fairness which that regime was designed to foster. A related reason was that avoidance of waiver in such cases could relieve courts of the need to consider an ‘arid discussion’ of whether bodies had the power to allow waiver of the hearing rule.¹²⁵

Lord Justice Longmore doubted whether a party who had agreed to a particular procedure, only to complain about it afterwards, could be said to have suffered a denial of natural justice. His Lordship thought that any agreement should bind the parties, so long as the agreement was voluntary, informed and unequivocal. If such an agreement was made, Longmore LJ suggested there was ‘something peculiarly unattractive’ in a party agreeing to the procedure, participating in the hearing and then ‘alleging that the decision has been reached in breach of the rules of natural justice’.¹²⁶ Lord Justice Longmore also considered whether any waiver might depend on jurisdictional issues, notably whether any agreement or like conduct that might support waiver could be rendered void because it also took the tribunal beyond its jurisdiction.¹²⁷ His Lordship accepted that some errors could take this particular disciplinary tribunal, and presumably any other one, beyond its power to commit an error that could not be overcome by waiver.¹²⁸ Lord Justice Longmore held that the claimed error in the case at hand was not of that character because the tribunal’s procedures had to be agreed to and therefore could also be waived.¹²⁹

¹²³ The authorities cited by Beatson LJ for this proposition were *R v Monopolies and Mergers Commission; Ex parte Matthew Brown plc* [1987] 1 WLR 1235 and *Lloyd v McMahon* [1987] AC 625, 702. Beatson LJ explained the flexible nature of fairness in more detail in the subsequent case of *R(L) v West London Health NHS Trust* [2014] 1 WLR 3103, [69]–[74]. The flexibility of the requirements of fairness was also affirmed recently by the Privy Council in *Trinidad and Tobago v The Law Association of Trinidad and Tobago (Trinidad and Tobago)* [2018] All ER (D) 95, [39].

¹²⁴ *Hill* (n 107) [45].

¹²⁵ *Ibid* [50].

¹²⁶ *Ibid* [23].

¹²⁷ Lord Justice Longmore did not use the terminology of jurisdictional and non-jurisdictional error but instead drew from the distinction Sedley LJ drew between constitutive and adjudicative jurisdiction in *Watt (formerly Carter) v Ashan* [2005] ICR 1817, [16] which appeared like jurisdictional and non-jurisdictional error in all but name.

¹²⁸ This reasoning echoes that of Nettle J in *Hossain* (n 1) 137 [40].

¹²⁹ *Hill* (n 107) [25].

Lord Justice Longmore also held that an advocate's agreement to such a variation of procedure could 'usually' be relied on by a tribunal or other decision-maker.¹³⁰ His Lordship also appeared to accept that waiver of parts of the hearing rule could occur if the circumstances met the requirements governing waiver of the bias rule.¹³¹ When this reasoning was applied to the case at hand, Longmore LJ noted that the questions surrounding the Tribunal's procedure were fairly clear and the applicant's lawyers had been given sufficient time to consider their position during both a short adjournment, when questions first arose, and again during the several weeks over which the truncated cross-examination of the applicant was conducted.¹³² Those facts bear some similarity to the *New Price Retail* case discussed above, where the conduct said to give rise to waiver occurred over several weeks, which was held to be a long enough time to allow reflection and decision for the purposes of waiver.

VIII WHAT IF SUCH CONDUCT IS NOT CATEGORISED AS A DENIAL OF NATURAL JUSTICE?

The chief consequence of waiver of the hearing rule, or one of its elements, is that an affected person cannot complain of conduct that would otherwise vitiate a decision. Could and should that possibility extend to other categories of legal error in public law proceedings? This question was considered briefly by the Full Court of the Federal Court of Australia in *MZZMG v Minister for Immigration and Border Protection*.¹³³ The main question in that case was whether the Refugee Review Tribunal ('RRT') had erred in the conduct of a joint hearing of the asylum claims of two brothers by taking the evidence of each brother in the absence of the other. The procedure was notified to each brother well in advance of the hearing, agreed to by their migration agent before the hearing and not subject to any objection by the brothers or their agent during the hearing.¹³⁴ The Full Court dismissed the brothers' appeals, holding that the procedure adopted was within the scope of the discretionary power granted to the RRT to gather evidence. Although the Full Court held that the RRT had not fallen into jurisdictional error, it concluded its reasons with a brief consideration of the discretionary factors governing relief if jurisdictional error had been established. The Minister submitted that relief could be refused because of 'the appellant's acquiescence in the procedure by which the Tribunal held a joint review hearing and foreshadowed that it would exclude each of the brothers at some stage'.¹³⁵ That submission sounds like waiver by another name — though, as is typical of claims of acquiescence, the consent of the affected party was given in advance.

¹³⁰ Ibid [50].

¹³¹ Ibid [34]–[37].

¹³² Ibid [36].

¹³³ (2015) 234 FCR 180.

¹³⁴ Ibid 183–4 [9]–[15].

¹³⁵ Ibid 196 [68].

The finding of the Full Court that no jurisdictional error had occurred meant that it did not strictly need to determine any question of acquiescence but the Court nonetheless suggested that

at the level of general principle, it will be a rare case where a decision of an administrative tribunal found to be without, or in excess, of that tribunal's jurisdiction is allowed to stand, and to affect the rights of a person, for reasons based on discretionary considerations such as delay or 'acquiescence' in a process before the tribunal which the Court has found to be unlawful.¹³⁶

The position of the Full Court reflects a wider reluctance in Australian cases to refuse relief on discretionary grounds when jurisdictional error is established.¹³⁷ In my view, however, that reasoning can be said to elevate form over substance. If parties have waived a procedural right or benefit, and done so willingly, there is surely a strong case to refuse relief on discretionary grounds for reasons of common sense and also to ensure that, in rare cases where waiver is clear, the procedures of courts and tribunals are not cynically misused. That said, the cautions of the Full Court reflect those expressed by Longmore LJ on whether any operation of waiver might depend upon (or be limited by) questions of whether the legal error that arose from the relevant conduct caused the tribunal or other body to go beyond its jurisdiction. Even if that possibility applies, conduct amounting to waiver can surely weigh heavily in the exercise of the discretion, if any is available, to refuse relief.

IX CONCLUDING OBSERVATIONS

The possibility of waiver of the hearing rule has a counterintuitive quality. How can a hearing be fair if basic aspects of fairness are not observed? This article has answered that question with a two-fold argument.

One reflects the dignitarian approach that gained favour with the Supreme Court in *Osborn*. If we accept that fairness requires that 'due respect' be paid to people affected by administrative processes, respectful treatment must surely include the ability of people to say no. Put another way, dignitarian values are not fostered if people are forced to endure an entire hearing, or procedures within a hearing, that they have either expressly rejected or impliedly refused by their conduct.

This dignitarian rationale aligns with the emphasis Australian courts place on opportunity in natural justice, which draws attention to the second and practical argument

¹³⁶ Ibid 196–7 [69].

¹³⁷ The authority cited for this proposition was *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 107–10 [55]–[62] (Gaudron and Gummow JJ). The Australian approach to the refusal of judicial review remedies on discretionary grounds is explained in Aronson, Groves and Weeks (n 2) ch 17. See also Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis, 2019) 155–8.

in favour of the possibility of waiver of the hearing rule. Natural justice requires that affected people be given a fair chance or opportunity to put forward their claims. This chance or opportunity need not actually be used and one can understand why. A hearing does not become unfair if people affected by the administrative process choose not to avail themselves of one, or even all, of the rights that may flow from the duty to observe the rules of natural justice. The requirements of fairness are satisfied if people receive a real and meaningful chance to know the case against them and to put their own case. Fairness does not and should not require that people be forced to attend a hearing, make submissions or exercise any other basic procedural rights if they do not want to. This position preserves the autonomy of affected people. It also ensures that the procedural obligations imposed upon decision-makers have reasonable limits. Waiver of natural justice should surely be possible in such cases.