10 YEARS POST *BYRNE V MARLES*: REFLECTIONS ON THE PURPOSE OF PROCEDURAL FAIRNESS IN A REGULATORY CONTEXT

Caroline Morgan*

Ten years ago the *Legal Profession Act 2004* (Vic) (LPA) was amended[1] so as to clarify that there is no requirement to seek submissions at the pre-investigation stage of the complaint-handling process about lawyers.[2] The LPA (now repealed) was enacted to regulate lawyers in Victoria[3] and created a complaints-handling scheme administered by the Legal Services Commissioner (LSC).[4] A complaint could be assessed as a civil complaint, a disciplinary complaint or a mixture of both;[5] and to the extent that a complaint involved a disciplinary complaint it required investigation and possible disciplinary action and prosecution.[6]

The specific amendments to the LPA were made in direct response to a decision of the Victorian Court of Appeal in the case of *Byrne v Marles*[7] (*Byrne*). In *Byrne* the Court unexpectedly[8] found that natural justice (procedural fairness)[9] applied when a complaint was being assessed at a stage before the complaint was classified and either referred for investigation or summarily dismissed.[10] More specifically, the right to be heard and make submissions to the LSC was found to apply at the first stage of the complaint-handling process.[11]

It is timely to reflect on *Byrne* and its aftermath. It provides an opportunity to consider the purpose of procedural fairness — which was recently noted by Professor Matthew Groves as one area of the doctrine of procedural fairness that remains unsettled[12] — and do so in a regulatory context.[13] It also provides an opportunity to reflect on a rare example of a statutory exclusion of procedural fairness and the hearing rule.[14]

This article will first define 'regulation' so that *Byrne* and this analysis is put into context. It will then outline the case of *Byrne*, along with the regulatory arguments put to the Court and the statutory exclusion that was subsequently enacted. It will consider some of the justifications offered for the purpose of procedural fairness, including a brief discussion about whether there need be a purpose and how these rationales fit with regulation. Finally, it will offer some observations about *Byrne*, the purpose of procedural fairness and whether and when to exclude it in a regulatory context.

Regulation

'Regulation' has been defined in numerous but not dissimilar ways.[15] Relevantly, the Victorian Government defines it as follows:

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* *Caroline Morgan BA/LLB(Hons) (Melb) LLM, SJD (Candidate) (Monash) is a former employee of the Victorian Legal Services Commissioner. She is currently undertaking a doctorate on procedural fairness and regulation. While the author assisted the Legal Services Commissioner with the response to the Byrne decision, the views expressed in this article are her own and do not represent the views of the Commissioner or the Legal Services Board.* *The author thanks her supervisor Dr Maria O'Sullivan for reviewing this article in draft.*

> 'regulation' means the actions and requirements of government that are intended to change the choices and actions of individuals, community organisations and businesses.[16]

While complaint handling is not necessarily regulatory in nature, the investigation and subsequent discipline of lawyers (and *Byrne*) fall within a regulatory framework because they are processes and tools which aim to improve standards and change behaviours.[17]

Consistent with the Victorian Government's definition of 'regulation', regulation is chiefly instrumental in that it exists to achieve a purpose.[18] Almost inextricably linked to the instrumental purpose of regulation are the key concepts of 'effectiveness' and 'efficiency'. In brief, effectiveness concerns achieving the regulatory purpose.[19] Efficiency is about getting the job done with the least amount of costs.[20] These more specific goals are considerations which generally feature in any regulatory context.

While regulation is mainly instrumental, there are some non-instrumental values associated with 'good regulatory design'.[21] These include administrative law requirements such as procedural fairness.[22] Yeung also identifies procedural fairness as relevant to the values that *constrain* public regulation.[23] The *Byrne* decision is an example of an instance where procedural fairness was applied as a constraint upon regulatory processes (but see Nettle JA below, at 'Utilitarian justifications'). It raises questions about whether procedural fairness should always trump regulatory and statutory objectives.

The case of *Byrne*

In 2008, the Victorian Court of Appeal in *Byrne* found that a lawyer the subject of a complaint to the office of the LSC had a right to be heard by the LSC before the complaint was classified and referred for investigation. Having failed to do so in this particular instance was a denial of 'natural justice' (and the rules of procedural fairness).[24]

The LSC was established by the LPA as an independent statutory authority whose chief objective was to receive and handle complaints against lawyers.[25] It was mandated to carry out this function in a 'timely and effective manner'.[26] The decision in *Byrne* was a clear challenge for this (then) relatively new and small office, requiring as it did for submissions to be invited from lawyers subject to a complaint at the pre-investigation stage of the complaint-handling process.[27]

Byrne arose from a complaint made to the LSC in July 2006, only a short time after the LSC was established.[28] Mr Byrne, the solicitor subject of a complaint, applied to the Supreme Court soon after he was given notice by the LSC of the complaint and its referral to the Law Institute of Victoria (LIV) for investigation.[29] He sought judicial review of the LSC's decision to treat the complaint against him as a disciplinary complaint and refer it to the LIV for investigation.[30] He was unsuccessful at first instance.

On appeal, Mr Byrne included an additional ground of review. Counsel for Mr Byrne argued that he had a right to be heard before the complaint was classified. He was successful on this ground. The Court of Appeal found that the LSC was obligated to provide a hearing (invite submissions) from Mr Byrne about whether or not the complaint made against him should be treated as a disciplinary complaint and investigated.[31] The 'preliminary decision'[32] of the LSC to deal with the relevant complaint as a disciplinary complaint was declared invalid, but the LSC was permitted to make it again in accordance with the principles of procedural fairness.[33]

The decision in *Byrne* was reached following a consideration of the authorities concerning the application of the hearing rule of procedural fairness in multi-stage decision-making

processes. While the Court acknowledged that there is a line of authority supporting the position that it is unnecessary to provide a hearing at a preliminary stage of a multi-stage process where a full hearing is to be heard at a later stage,[34] and arguments from the LSC that this line of authority should be followed,[35] the Court made its decision based on an interpretation of the structure and operation of the LPA.

Regulatory arguments

In *Byrne*, counsel for the LSC had argued that an interpretation of the law that required that procedural fairness be applied at the pre-investigation stage of the complaint-handling process should be 'resisted' because of 'the detrimental effects on the efficiency of the administrative process set up by [the LPA]'.[36] Further:

> [t]hey argued that it would lead to delays, and the possible frustration of investigations, by court proceedings alleging failure by the commissioner to hear or heed the submissions of solicitors against whom complaints have been made. In counsel's submission, it surely is not to be supposed that Parliament intended to make hostage to the vicissitudes of such judicial review proceedings a system of complaints investigation which was set up in order to make it 'accessible' and 'efficient'.[37]

The Court was not persuaded by this argument. Justice Nettle (with whom the other judges agreed) held that:

> [o]ne may also doubt that recognition of the solicitor's right to be heard at that stage would result in the sorts of *inefficiencies* which the commissioner fears. The content of natural justice is variable according to the circumstances of the case and, in the ordinary case, it should not require much more than the commissioner inviting the solicitor to respond to the complaint and specifying a relatively short period of time (perhaps no more than a week after giving notice) in which any such response should be provided. In other kinds of cases, for example in cases of real urgency, or where the giving of notice would likely lead to the destruction of evidence or something of that nature, the content of natural justice might be reduced; in some cases perhaps even to the point of effectively abrogating it altogether. All in all, there should be few cases in which there is much of a problem.[38]

It is noteworthy that the Court engaged with the arguments about efficiencies in the regulatory processes. While it confirms their relevance to procedural fairness and statutory interpretation, it nonetheless raises for consideration whether or not the judiciary is well placed to comment on the practical operations of an administrative office (see further Edelman J below, 'Utilitarian justifications').

Aftermath

The Byrne decision had a significant impact on the operations of the LSC.[39] The new procedural fairness step increased the time taken to deal with complaints.[40] This was 'largely due to the LSC receiving detailed submissions from lawyers outlining reasons why the complaints should be dismissed. This resulted in significant follow up activity by the LSC'.[41] These outcomes were contrary to the statutory objective of the LSC to deal with complaints effectively and efficiently.[42]

Two amendments were subsequently made by the Victorian Parliament to the LPA to clarify that procedural fairness did not apply to the pre-investigation stage of the complaint-handling process: one amendment concerned the classification of a complaint; the other amendment addressed the summary dismissal of a complaint. Section 23 of the *Professional Standards and Legal Profession Acts Amendment Act 2008* provided as follows:

> **23 Complaints**
>
> (1) After section 4.2.8(2) of the *Legal Profession Act 2004* insert —
>
> '(3) Nothing in this section requires the Commissioner to give the law practice or Australian legal practitioner an opportunity to be heard or make a submission to the Commissioner before the Commissioner determines how the complaint is to be dealt with.'.
>
> (2) After section 4.2.10(2) of the *Legal Profession Act 2004* insert —
>
> '(3) The Commissioner is not required to give a complainant, a law practice or an Australian legal practitioner an opportunity to be heard or make a submission to the Commissioner.'

This statutory exclusion to procedural fairness is somewhat exceptional (the *Byrne* exception). It is noted that generally it is hard to exclude procedural fairness,[43] and it might be expected that it would be harder where there is a human rights charter containing a due process right as there is in Victoria.[44] On this occasion, the amendments were proposed by the Attorney-General because the *Byrne* decision 'is not consistent with the policy intent of the *Legal Profession Act 2004* which was to create a consumer-friendly, efficient and cost effective complaint-handling system'.[45]

The Attorney-General submitted that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the right to a fair hearing were not engaged because 'the complaint-handling system is not a civil proceeding'.[46]

In 2015, new legislation was introduced regulating the legal profession in Victoria and New South Wales (NSW) — namely, the *Legal Profession Uniform Law Application Act 2014* (Vic) (Application Act). Within this large piece of legislation is the *Legal Profession Uniform Law* (Vic)[47] (Uniform Law), which sets out the LSC's[48] current complaints-handling process. It does this in three clear and separate stages: preliminary assessment; investigation or dispute resolution; and determination. The Uniform Law specifies when submissions are to be invited — notably, not at the preliminary assessment stage of complaint handling but at the latter two stages.[49]

The Uniform Law, then, has maintained the *Byrne* exception.[50] But the exception may be considered unjustified by those unfamiliar with the history of the legislation and the *Byrne* decision and in a context where there are multiple express references to procedural fairness.[51] So what is the purpose of procedural fairness? And is that purpose of such import to trump all other objectives of a regulator? Should the *Byrne* exception inserted into the LPA (and now in the Uniform Law) stand forevermore?

The purpose of procedural fairness

Is a purpose necessary?

There is no clear or set purpose for procedural fairness in Australian law. As noted by Groves, this is not necessarily a problem because other administrative law doctrines operate without a clear purpose.[52] Indeed, when and where procedural fairness applies is determined not by the purpose for procedural fairness but, rather, by whether the relevant decision directly affects an individual's interests. That said, in the context of regulation, where there are multiple objectives and considerations at play in decision-making, understanding the rationale for procedural fairness is valuable for at least three reasons.

First, regulatory decision-makers are not necessarily lawyers and an understanding of why procedural fairness applies will assist them in deciding whether and how to apply it.[53]

Secondly, regulation and regulatory power may be spread across and within organisations. Thus, it is hoped that improved clarity and understanding will promote consistency in decision-making. Consistency, like fairness, is also an important public law value.[54] Thirdly, a clear purpose for procedural fairness could help to explain when and why individual rights to fairness should trump other regulatory considerations and objectives, such as effectiveness and efficiency.

Case law

The purpose of the doctrine of procedural fairness is 'unsettled' in Australian administrative law.[55] While various rationales have been offered within the case law, there has been no set or accepted justification for the doctrine.[56] Indeed, as noted by Groves in his recent article about the unfolding purpose of fairness, the '[c]ourts have traditionally shied away from open discussions of the possible functions of fairness and fair procedures'.[57] That said, some judges have commented on the justifications for procedural fairness. The following dicta from Gageler J of the High Court is notable:

> 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 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.[58]

Other justifications have been offered by judges that, like Gageler J, also recognise a mixture of purposes for procedural fairness.[59]

The reference to instrumental and intrinsic justifications for procedural fairness by Gageler J alludes to the debate about the basis for procedural fairness.[60] These justifications were expressly discussed in the English case of *R (Osborn) v Parole Board*[61] (*Osborn*), which concerned whether or not the Parole Board should hold an oral hearing. The Court of Appeal found that the purpose concerned the utility of the procedure for better decision-making and decided that an oral hearing was not required.[62] However, on appeal to the Supreme Court, Lord Reed acknowledged that, while utility is an important virtue of procedural fairness, there are two other important values that justified an oral hearing: first, the avoidance of a sense of injustice and the dignitarian ideal (see below at 'Dignitarian approach');[63] and, secondly, the rule of law and the 'importance of promoting a sense of congruence between the decision-maker and the affected person in the decision-making process'.[64]

It is clear, then, that the courts and judges are able to articulate a purpose for procedural fairness, but these are mixed and somewhat contested. What is also clear is that purpose can and does drive results, as it did in *Osborn*, where, ultimately, an oral hearing was required by the law. The purpose of procedural fairness is part of the reason for its application; there are good arguments as to why providing reasons for procedural fairness is also required by fairness.[65]

Philosophical justifications

There are, as identified by Holloway, 'at least five different' justifications for procedural fairness.[66] Chief Justice French (as he then was) claims that these rationales are compatible with all contexts — courts and administrators alike.[67] Two of these seem to dominate the current thinking of scholars and judges — namely, the dignitarian approach and the utilitarian justification.[68] As noted above, the English case of *Osborn* explicitly dealt with these two justifications and it was the values-based approach that seemed to tip the balance.[69] These two justifications will be considered next.

Dignitarian approach

One of the main and early advocates of the dignitarian approach is Jerry Mashaw from Yale Law School. He argues about the importance of a dignitarian rationale for due process in the context of the US Constitution.[70] His analysis is therefore within a rights-based context and discourse — a context that may differ from regulation and regulatory schemes. He writes:

> Although we cannot avoid consulting our feelings or intuitions as a source of ideas about procedural values, in the end our effort is to discover (or to construct) the process ideals that define a particular liberal-democratic constitutional culture.[71]

This is an important point. It situates the debate within the legal framework within which the doctrine applies as well as reflecting ideals and values. But what is required in a regulatory context? At base, these are effectiveness, efficiency and values that include fairness, justice and accountability.[72] Dignity fits within a regulatory context, but it is one consideration (albeit an important consideration) among many.

Another advocate of the dignitarian approach is TRS Allan. He argues that fair procedures have more than instrumental value and have some independent and intrinsic values.[73] He demonstrates this with the example of providing reasons, arguing that this does not necessarily affect a decision but allows people to understand their treatment and decide how to respond as a 'conscientious citizen'.[74] This is similar to how Jeremy Waldron approaches this matter.[75] He explains dignity as a 'status-concept'.[76] In his view, procedures that recognise an individual as 'capable of self-control, with a good sense of their own interests, and an ability to respond intelligently to its demands respects the dignity of the individual'.[77]

Rundle takes this further and argues that the dignitarian foundation for natural justice and the rules of procedural fairness should take precedence over any utilitarian justification.[78] This is because dignitarian approaches 'contribut[e] to an understanding of the exercise of administrative authority as a *relationship* between those who possess government power and those who are subject to it'.[79] This is important because, in her view, it has significance for how we 'think about conditions of authority in the contemporary administrative state more generally'.[80] Utilitarianism, by contrast, is concerned with outcomes and not relationships — it is not 'oriented towards' the experience of the subject who has 'no power to direct the outcome of the repository's exercise of authority'.[81]

There are at least two responses that can be made from the regulatory literature about Rundle's argument that the dignitarian approach should take precedence. First, it is hard to reconcile with a regulatory context where regulatory power can be dispersed and exercised through a number of agents who may or may not be recognised as part of the government.[82] Secondly, there are occasions when regulators are 'captured' by the very persons they are attempting to regulate.[83] When this occurs, it is not the case that the subject has 'no power' to direct the outcome of a decision. Indeed, it may be the regulator and decision-maker that has little or no power.[84]

Dignity and respect *are* important in the regulatory context. As noted by Freiberg:

> *How* people are treated *can change* their attitudes, or motivational postures, towards authorities. Where regulatees are treated in a procedurally fair manner they are more likely to *comply*.[85]

Similarly, as noted by Groves, studies have shown that when a person *perceives* that they have been treated fairly they are more likely to change their behaviour.[86] He calls this the 'fairness effect' and posits that the rationale for fairness may well be in its purpose.[87]

Couched this way, there is a clear link between dignity and respect and also utilitarian and regulatory purposes.

Utilitarian justifications

DJ Galligan mounts a powerful critique of the dignitarian approach in his book on due process and fair procedures.[88] In brief, Galligan asserts that:

> [p]rocedures are instruments for fair treatment; they are inherently neither fair nor unfair, but take on a quality of fairness to the degree that they are conducive to a person being treated properly according to authoritative standards and the values which ground such standards.[89]

He considers that any account of procedural fairness which emphasises the inherent value of procedural rules to the 'neglect of their instrumental role' is erroneous.[90] Indeed, he claims that whatever non-instrumental value they have is subsidiary to their instrumental role.[91]

Justice Edelman notes that the utilitarian rationale is 'perhaps the most commonly advanced' alternative philosophical basis for the rules of procedural fairness.[92] His Honour explains that this rationale for procedural fairness 'is that better procedure will be more likely to lead to a better result'.[93] He also notes that 'a utilitarian calculus is something about which Parliament is well suited to engage, but that a court should only ever deal with principle'.[94] This insight is relevant to regulation and regulatory schemes created by legislation. Where regulatory schemes are created by Parliament, it may be that the utilitarian rationale for procedural fairness is more suited.[95]

Indeed, Nettle JA in *Byrne* found 'practical merit' in providing lawyers with an opportunity to be heard at the pre-investigation stage of the complaint-handling process. His Honour explained it as follows:

> there is practical merit in providing the solicitor with an opportunity to make a submission or adduce facts to the commissioner before the commissioner determines that the complaint is a disciplinary complaint which needs to be investigated. The right to be heard at that stage affords the solicitor the opportunity to head off the complaint *in limine*, by persuading the commissioner not to treat it as a disciplinary complaint or to dismiss it or not proceed with it under [the LPA].[96]

Put this way, the *Byrne* procedural fairness step had instrumental and utilitarian purposes. It could have assisted in the effective and efficient processing of complaints. Accordingly, at least on paper, procedural fairness and regulatory objectives were consistent.

Exclusion of procedural fairness

Generally, procedural fairness is difficult for parliaments to exclude.[97] The courts require clear and express words of exclusion in a statute before they will accept that Parliament intended to exclude procedural fairness.[98] Parliament too is often reluctant to exclude procedural fairness — for obvious reasons.[99] However, as suggested by Groves, when procedural fairness is excluded these instances may 'shed light' on the purpose of procedural fairness.[100]

In *Byrne*, the Victorian Government moved an amendment to the LPA for the following reasons:

> [The *Byrne* decision] has an adverse impact including that:
>
> the commissioner may be perceived as *biased* in favour of practitioners by providing practitioners (and not complainants) with the right to make submissions on complaints and in making a decision whether to accept a complaint or dismiss it without reference to the complainant;
>
> practitioners may make *full submissions* on the content of the complaint rather than the preliminary issue of how the commissioner should deal with it, in effect *rehearsing* their arguments for later;
>
> the complaints-handling *process will take longer*, have an adverse impact on *efficiency* and will be more *costly*;
>
> the process will not *add value* to the system, as practitioners are *already given the right* to make full submissions as part of the investigation of a complaint.[101]

There are numerous reasons identified here for excluding procedural fairness. They mostly concern the utility, or lack thereof, of the *Byrne* procedural fairness step. This is contra the views of Nettle JA and the potential he saw for procedural fairness to assist in the efficient and effective handling of complaints. It demonstrates how utility is very much in the 'eye of the beholder'. But, given that utility concerns practical and instrumental values, it is surely more appropriately adjudged by those who administer it?

Justice Edelman has argued that Parliament is more suited to assessing the utility of a procedural fairness step. Indeed, the reasoning above could be described as an example of Parliament engaging in a 'utilitarian calculus'.[102] That is not to say that the arguments for the *Byrne* exclusion were without values. The first consideration above concerns bias towards lawyers to the exclusion of consumers — this concerns equality between the affected parties (and even rule of law considerations such as those put in *Osborn* about creating a sense of congruence between the decision-maker and the affected parties).

Final observations

The *Byrne* decision had a significant impact on the office of the LSC.[103] This was arguably out of proportion to the issue at hand — the first step in the complaint-handling process about lawyers. It raised for consideration the purpose of procedural fairness and whether and how that fits with the objectives of regulation. While the objectives of regulation are somewhat settled and concern effectiveness and efficiency, the rationales offered for procedural fairness are numerous and variable. They are nonetheless important considerations because they can determine outcomes and assist in explaining those outcomes.

The most fitting justification for procedural fairness in a regulatory context concerns utility and how procedural fairness assists the regulatory regime meet its objectives. The Victorian Court of Appeal in *Byrne* decided that the LPA imposed a requirement that procedural fairness is required at the pre-investigation stage of the complaint-handling process about lawyers. Justice Nettle thought that this had 'practical merit' and therefore utility. It was part of the Court's reasons for deciding that procedural fairness was implied by the LPA. Viewed this way, the purpose of procedural fairness is not necessarily incompatible with regulatory objectives.

Whether or not the purpose of procedural fairness is compatible with regulation and regulatory objectives also depends on perspective. The LSC found that the *Byrne* additional procedural fairness step 'elongated' the complaint-handling process.[104] This detrimentally affected the efficient and effective processing of complaints[105] — a key objective of the LSC.[106] The regulator's perspective is particularly relevant when the

underlying purpose of procedural fairness concerns utility and practical considerations for better decision-making. The lens through which procedural fairness and its rationales are appraised therefore has implications for the purpose and role of procedural fairness.

The *Byrne* exception and the exclusion of procedural fairness at the pre-investigation stage of the complaint-handling process about lawyers stands for now. Whether utility requires the *Byrne* exception to stand forevermore depends on the utility that procedural fairness may or may not serve the legislative scheme and regulatory framework. It also depends on the perspective from which it is assessed. Accordingly, further reflection (and consultation with the relevant stakeholders) on this issue in the future may justify an amendment to the *Byrne* exception.

Endnotes

1 *Professional Standards and Legal Profession Acts Amendment Act 2008* (Vic) s 23. This Act was assented to on 11 December 2008 and commenced the day after it was assented.
2 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2008, 4308 (Rob Hulls, Attorney-General). The second reading speech details the reasons for the amendments.
3 *Legal Profession Act 2004* (Vic) s 1.1.1.
4 Ibid Ch 4.
5 Ibid s 4.2.1 (2).
6 Ibid Pt 4.4.
7 (2008) 19 VR 612.
8 I say 'unexpectedly' because procedural fairness was only raised as a ground on appeal: *Byrne* (2008) 19 VR 612, 633 [73].
9 The terms 'natural justice' and 'procedural fairness' are generally used interchangeably: see *Kioa v West* (1985) 159 CLR 550, 585 (Mason J). There are good arguments as to why the term 'procedural fairness' fits better with bureaucracy and regulation and is the preferred term here: see Westlaw AU, *The Laws of Australia*, 2 Administrative Law, [2.5] Judicial Review of Administrative Action: Procedural Fairness, [2.5.10] (1 March 2014).
10 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2008, 4307–9 (Rob Hulls, Attorney-General).
11 The case of *Byrne* and this article concern the hearing rule of procedural fairness and do not touch on the bias rule.
12 Matthew Groves 'The Unfolding Purpose of Fairness' (2017) 45 *Federal Law Review* 653.
13 While there is a lot of case law and analysis of the doctrine of procedural fairness in the context of commercial regulation and migration law, there is a dearth of material in the specific context of the regulation of lawyers. See, for example, Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 129 (2015); Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003); Joanna Bird, 'Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 *Melbourne University Law Review* 739; Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92. Yeung also notes that there is not much discussion in the regulatory literature about procedural fairness: Karen Yeung, *Securing Compliance — A Principled Approach* (Hart Publishing, 2004) 46.
14 See generally Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2012–2013) 39 *Monash University Law Review* 285.
15 See, for example, Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) 1; Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 2.
16 Commissioner for Better Regulation, *Victorian Guide to Regulation: A Hand-Book for Policy Makers in Victoria* (2016) 1 (emphasis added).
17 Section 4.1.1 of the LPA set out the objectives of the complaints (and discipline) chapter. This included to promote and enforce the competence, honesty and professional standards of the legal profession: s 4.1.1(b).
18 This is something with which most regulatory scholars agree: See, for example, Baldwin, Cave and Lodge, above n 15, 2–4; Freiberg, above n 15, 2–4; Yeung, above n 13, 30.
19 Arie Freiberg, *The Tools of Regulation* (The Federation Press, 2010) 283–5.
20 Ibid 286.
21 Freiberg, above n 15, 482.
22 Ibid 157–69.
23 Yeung, above n 13, 36.
24 *Byrne* (2008) 19 VR 612, 638 [90].

[25] The LSC had two other key functions under the LPA — namely, education of the community; and education of the legal profession: LPA ss 6.3.2(b)–(c).
[26] LPA s 6.3.2(a).
[27] See below, 'Exclusion of procedural fairness'.
[28] While the LPA was enacted in 2004, most of the LPA did not commence operation until December 2005: LPA s 1.1.2.
[29] Under s 4.4.9 of the LPA, the LSC could refer disciplinary complaints to the LIV for investigation.
[30] *Byrne v Marles and Law Institute of Victoria Limited* [2007] VSC 63.
[31] *Byrne* (2008) 19 VR 612, 638 [90].
[32] Ibid 638 [87].
[33] Ibid 639 [93].
[34] Ibid 634 [78]. The Court also referred to the other line of authorities supporting the application of procedural fairness to preliminary decisions in a multi-stage process: at 634 [77].
[35] Ibid.
[36] *Byrne* (2008) 19 VR 612, 638 [88].
[37] Ibid.
[38] Ibid 638 [89] (citations omitted; emphasis added).
[39] See LSC, *Annual Report* (2008) 35, 39; LSC, *Annual Report* (2009) 16–17, 19, 54, 109, 112.
[40] LSC, *Newsletter*, Ed 1 (April 2009).
[41] Ibid.
[42] LPA s 6.3.2(a).
[43] See generally Groves, above n 14, 285.
[44] The *Charter of Human Rights and Responsibilities Act 2006* (Vic) commenced operation on 1 January 2008.
[45] Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2008, 4308–9 (Rob Hulls, Attorney-General).
[46] Ibid 4307. But see subsequent discussions about breadth of the 'fair hearing' right in Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Hart Publishing, 2017) 117. Note also that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) has no application to the Uniform Law: Application Act s 6.
[47] The Uniform Law is Schedule 1 to the Application Act. Section 4 of the Application Act provides that the Uniform Law applies as if it were an Act and may be referred to as the *Legal Profession Uniform Law* (Vic).
[48] The LSC was renamed the Victorian Legal Services Commissioner or Victorian Commissioner by the Application Act but for ease of reference will be continued to be called the LSC here. See s 3(1) of the Application Act.
[49] Section 277(4) of the Uniform Law provides that there is no right to be heard before a decision to close a complaint following preliminary assessment. Section 279(1)(a) provides that the designated local authority may (but not must) after receiving a complaint notify a respondent. It is only after a decision is made to investigate a complaint and/or make a determination that the right to make submissions is enlivened: at ss 279(b)–(c).
[50] This is in accordance with the LSC's submission on the draft Uniform Law: Legal Services Commissioner, *National Legal Profession Reform — Response to Taskforce Discussion Paper*, National Legal Services Ombudsman, January 2010, 7. I also assisted with this submission.
[51] See, for example, ss 279, 299(2), 319.
[52] Groves, above n 12, 667. Groves refers to Stephen Gageler's paper on jurisdictional error in support of the view that doctrines can competently operate without a clear purpose: see Gageler, above n 13.
[53] Similarly, an understanding of the doctrine's purpose can help to explain court decisions. See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 408.
[54] Freiberg, above n 19, 286–91.
[55] Groves, above n 12, 653.
[56] See, generally, Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate Publishing, 2002). Holloway, writing in 2001, noted that the doctrine has suffered from under-theorisation: at 294.
[57] Groves, above n 12, 668.
[58] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 107 [186] (citations omitted).
[59] See, for example, *International Finance Trust Co Ltd v Crime Commission (NSW)* (2009) 240 CLR 319 (Heydon J), where Heydon J describes four justifications for hearings: 1. adversarial system requires it; 2. risks unsound conclusions (injustice and inefficiency); 3. respects dignity; 4. argument from political liberty. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 95 [154]–[155], where Heydon J refers to effectiveness, efficiency and economy as well as a restatement of Megarry J's quote in *John v Rees* [1970] Ch 345, 42, about the resentment a person may feel if they are not given an opportunity to participate in decision-making about them.
[60] See Paul Craig, *Administrative Law* (Sweet & Maxwell, 7th ed, 2012) 340. While Craig separates these two concepts, he does so for explanatory reasons.
[61] *Osborn* [2014] AC 1115.
[62] Ibid 1148 [66].
[63] Ibid 1149 [68].

64 Ibid 1150 [71].
65 See, for example, Carol Harlow and Richard Rawlings, *Law and Administration* (Butterworths, 3rd ed, 2009) 630–5.
66 Holloway, above n 56, 286–94. The five are in his order as follows: 1. instrumental (utilitarian); 2. rule of law; 3. libertarian or rhetorical; 4. dignitarian; 5. participatory or republican purpose.
67 Robert S French, 'Procedural Fairness — Indispensable to Justice?' (Sir Anthony Mason Lecture, The University of Melbourne Law School, 7 October 2010) 3.
68 See, for example, James Edelman, 'Why Do We Have Rules of Procedural Fairness?' (2016) 23 *Australian Journal of Administrative Law* 144; Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position' (2016) 23 *Australian Journal of Administrative Law* 164; *Osborn* [2014] AC 1115.
69 Aronson, Groves and Weeks, above n 53, 407 [7.45].
70 See, generally, Jerry L Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985).
71 Ibid 171.
72 Freiberg, above n 15, 482.
73 TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497, 498.
74 Ibid 499.
75 See *Osborn* [2014] AC 1115, 1149 [68], where Lord Reed refers to an unpublished paper by Waldron with approval.
76 Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) *The Cambridge Law Journal* 200, 201.
77 Ibid 200.
78 Rundle, above n 68, 167.
79 Ibid 165.
80 Ibid.
81 Ibid 167.
82 See concept of 'regulatory space' in Freiberg, above n 15, 99–101. But see Rundle, above n 68, 173. Rundle does acknowledge that new conditions for the exercise of government power may lead to different debates than those entertained by her.
83 See Baldwin, Cave and Lodge, above n 15, 43–5. See also Freiberg, above n 15, 492.
84 Freiberg, above n 15, 492–3. I acknowledge, however, that regulatory capture is complex and is not suggested to apply here.
85 Ibid 492 (emphasis added).
86 Groves, above n 12, 675–9. See also Toni Makkai and John Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20 *Law and Human Behaviour* 83.
87 Groves, above n 12, 675–9.
88 DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996).
89 Ibid xviii.
90 Ibid 93.
91 Ibid.
92 Edelman, above n 68, 148.
93 Ibid.
94 Ibid 152. Edelman says this in the context of discussing an area of administrative law where 'legal doctrine would not fit a conception of principle based on natural justice', which concerns where an appeal would not be allowed because the ultimate decision would be no different.
95 It is notable that following the case of *R v Osborn* the English legislature reinstated the utilitarian rationale. See Rundle, above n 68, 172 n 48.
96 *Byrne* (2008) 19 VR 612, 637 [86].
97 See, generally, Groves, above n 14, 285.
98 See *Kioa v West* (1985) 159 CLR 550, 584 (Mason J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
99 Groves, above n 14, 318.
100 Groves, above n 12, 659–62.
101 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2008, 4307–9 (Rob Hulls, Attorney-General) 4309 (emphasis added).
102 Edelman, above n 68, 152.
103 See LSC, *Annual Report* (2008) 35, 39; LSC, *Annual Report* (2009) 16–17, 19, 54, 109, 112.
104 LSC, *Annual Report* (2009) 16–17, 19.
105 Ibid.
106 LPA s 6.3.2(a).