NATURAL JUSTICE AND THE DUTY TO ACT FAIRLY

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The challenge thrown out to the courts by the growth in government bureaucracy in this century has prompted, in recent times, a protracted reassessment of the concept of natural justice. In this article, the authors survey the debate on the applicability and content of the audi alteram partem *rule and examine the contribution of the judgment of Wootten J. in* Dunlop *v.* Woollahra Municipal Council. *The authors proceed to trace the history, and assess the impact, of the notion known as "the duty to act fairly".*

Judicial attitudes and approaches to the concept of natural justice have not stood still since the decision of the House of Lords in *Ridge* v. *Baldwin*.[1] Indeed, the volume of case law in England in this particular area since 1964 can only be described as enormous. Developments have been so rapid and confusing that the student of this crucial element in the British system of administrative justice is left somewhat bewildered.

In the recent case of *Dunlop* v. *Woollahra Municipal Council*,[2] Wootten J., in the Supreme Court of New South Wales, made a valiant attempt to wade through the welter of new authority on natural justice with a view to providing some light in an area shrouded in obscurity. Whether His Honour's judgment achieves its objective is the central issue to which this commentary is directed.

As with a large proportion of cases dealing with important aspects of administrative law, *Dunlop's* case arose out of the actions of a local government authority.

Dunlop, the plaintiff, owned two of three adjoining blocks of land which he hoped to have developed. For this purpose, a development company, with the consent of Dunlop and the owner of the third property, lodged a development application with Woollahra Council, proposing the erection of two eight-storey blocks of flats and a building containing six terraced units. Under the Woollahra Planning Scheme Ordinance, the area in question was zoned in such a way as to permit the construction of residential flat buildings of up to eight storeys in height, provided the consent of the Council was obtained. However, the Council rejected the development application, primarily on the grounds that if the proposal were implemented, it would constitute a gross over-development of the site and a substantial alteration of the character of the street.

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[1] [1964] A.C. 40.

[2] [1975] 2 N.S.W.L.R. 446.

The Council's decision was upheld on appeal to the Local Government Appeals Tribunal, but the Tribunal, in dismissing the appeal, expressed the view that "some residential flat development of a reduced scale should be allowed".[3] The Council's solicitors advised that if the application were amended in accordance with the Tribunal's expressed view, a decision by the Council to refuse the application was bound to be overturned on appeal. The solicitors offered the Council two options if it wished to restrict development on the site: the Council could urgently request that the Minister re-zone the land; or the Council could exercise its powers under section 309(4) of the Local Government Act 1919 (N.S.W.) to limit the number of storeys in any residential flat building sought to be erected upon the site.

Subsequently, Dunlop and the owner of the third block of land had an informal meeting with the Mayor and the Deputy Town Clerk. From this meeting the plaintiff became aware that the Council was considering the desirability of a height restriction on any development on the subject land. But he had no idea that the Council was also considering using its power under section 308(1) to set a special building line for the properties. This power, like the power under section 309(4), was not subject to appeal to the Tribunal.

Two weeks later, the plaintiff was invited to address the meeting of the Council's Town Planning Committee. The plaintiff in his address dealt generally with the development of the properties and the question of the height of the proposed buildings. The meeting had few tangible results except that the Committee called for a report for its next meeting on regulating the height of the flats on the land by the use of section 309(4).

At its next meeting, the Committee considered the report from the Council's Town Planner and resolved that the Council, pursuant to section 309(4), should limit any residential flat building on the subject properties to three storeys. The Committee also resolved that the Council, under section 308(1), should fix a building line relating to these properties which would allow a wide strip of landscaping onto the street alignment. These resolutions were adopted by the Council at its meeting that same night. Dunlop was neither informed of, nor present at, either of those meetings.

The plaintiff then sought a declaration from the Supreme Court that both resolutions were invalid on the ground, *inter alia*, that the Council's decisions were made without according him natural justice. Wootten J. considered that this case raised fairly and squarely for assessment the impact in Australia of the flurry of developments in the law relating to natural justice since *Ridge* v. *Baldwin*. In order to comprehend fully the approach adopted by His Honour, it is necessary to survey the major trends in the field since 1964.

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[3] *Id.*, 453.

It will be remembered that in *Ridge* v. *Baldwin* the House of Lords was called upon to consider whether a statutory power vested in the Watch Committee to dismiss a man from office must be exercised subject to the rules of natural justice. The then prevailing line of reasoning, exemplified by such cases as *R.* v. *Legislative Committee of the Church Assembly; ex parte Haynes-Smith*[4] and *Nakkuda Ali* v. *Jayaratne*,[5] would have suggested that the Watch Committee's power was impliedly subject to natural justice if the statute conferring the power required the Committee to act "judicially". This approach meant that the Committee's power to interfere with something of great importance to an individual was immaterial unless the Committee also had a "super-added" duty to act "judicially". Only if the statute gave some indication of "judicial" functions residing in the tribunal (for example, by reference to a power to hear evidence or examine witnesses on oath) could that tribunal be required to afford natural justice to those subject to its edicts.

The House of Lords rejected this approach. Lords Reid, Morris and Hodson took the view that whether the statutory power in issue could be categorised as "judicial" or "quasi-judicial", or as "executive" or "administrative" was irrelevant to the question of whether that power had to be exercised subject to the rules of natural justice. The Law Lords restored to full force and authority decisions such as *Cooper* v. *Wandsworth Board of Works*,[6] *Wood* v. *Woad*,[7] and *Capel* v. *Child*.[8] Lord Reid, who delivered the leading judgment in the case, emphasised that the mainstream of judicial opinion had always been that natural justice was a concept that the common law implied into a statutory power. So the proper approach was to infer from the nature and effect of the power in question (for example, its ability to affect an individual's rights in the context of a decision directed towards a particular person's case) a duty to act "judicially".[9] The idea of examining the terms of a statutory power in order that the power could be "pigeon-holed" as "judicial" or "administrative" was erroneous.

This case has been regarded, rightly it is suggested, as a rejection of a "conceptual" approach to solving administrative law problems, in favour of a "functional" approach.[10] That is, the preferred approach was to place emphasis upon a power's effect, irrespective of its classification.[11]

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[4] [1928] 1 K.B. 411.
[5] [1951] A.C. 66.
[6] (1863) 14 C.B. (N.S.) 180; 143 E.R. 414.
[7] (1874) L.R. 9 Exch. 190; [1874-1880] All E.R. Rep. 408.
[8] (1832) 2 C. & J. 558; 149 E.R. 235.
[9] [1964] A.C. 40, 75, 76, 124, 130.
[10] Brett and Hogg, *Cases and Materials on Administrative Law* (3rd ed., 1975) 337.
[11] *Id.*, 338.

The significance of *Ridge* v. *Baldwin* was confirmed by the Privy Council in *Durayappah* v. *Fernando*.[12] In that case, the Judicial Committee amplified the criteria to be applied to determine whether a tribunal was subject to the rules of natural justice. The substantial point to be gleaned from these guidelines is that there is no need to search for some elusive "duty to act judicially"; but an evaluation of relevant factors (such as the rights involved, the nature of the issues to be determined and the sanction that can be imposed) will indicate whether, and to what extent, the rules of natural justice apply to a particular power.

However, the effect of *Ridge* v. *Baldwin* upon judicial opinion appears to be contrary to that intended by the House of Lords—instead of the case settling principles, it has opened an era of new terminology and new approaches to the subject.

In *Re H.K. (An Infant)*,[13] Lord Parker C.J. introduced the concept of a "duty to act fairly". In regard to the functions and obligations of an immigration officer His Lordship said that

> . . . even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. *That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly.* Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, *only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.*[14]

There is an element of contradiction in this passage.[15] Is the Lord Chief Justice saying that immigration officers are not acting in a "judicial" capacity (and thus not subject to the rules of natural justice) but are under a separate duty to act "fairly"? Or is he saying that an administrator must obey the tenets of natural justice, albeit in a limited manner? Regardless of which interpretation is correct, the English courts subsequently latched onto the first part of the above quoted passage and developed the idea that if a tribunal or body was not exercising "judicial" or "quasi-judicial" functions it was not required to conform to natural justice but it was under a separate duty to act

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[12] [1967] 2 A.C. 337.
[13] [1967] 2 Q.B. 617.
[14] *Id.*, 630 (emphasis added).
[15] Taylor, "Natural Justice—The Modern Synthesis" (1975) 1 *Mon. L. Rev.* 258, 279.

"fairly". This approach is exemplified by the cases of *R.* v. *Gaming Board; ex parte Benaim and Khaida*,[16] *R.* v. *Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association*[17] and *Pearlberg* v. *Varty*.[18] The latter case clearly illustrates the new trend. Lord Pearson said:

> A tribunal to whom judicial or quasi-judicial functions are entrusted, is held to be required to apply those principles [*i.e.*, natural justice] in performing those functions . . . But where some person or body is entrusted by Parliament with administrative or executive functions, there is no presumption that compliance with the principles of natural justice is required, although . . . the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness.[19]

The introduction of this separate duty to act "fairly" has the advantage of extending the supervisory jurisdiction of the courts to *all* exercises of administrative power.[20] There are two alternative views of the basis of this development.

First, it is possible to rationalise cases such as *Re H.K.* and the *Gaming Board* case as instances where the *Ridge* v. *Baldwin* appreciation of natural justice was simply inapplicable. The action taken with respect to immigrants or applicants for a gaming licence did not interfere with any of their "rights", in the sense of property rights or a right to a livelihood or a right to membership of a professional association. Thus the courts felt constrained to search for a new device by which they could supervise action of officials which was clearly detrimental to individuals. However, this view seems to conflict with the current judicial trend against a narrow conception of "rights".[21]

The second view is that the demarcation between the duty to observe the principles of natural justice and "the duty to act fairly" is achieved by reintroducing the notion that a power can be classified as "judicial" or "administrative". This was the view adopted by Lord Pearson in *Pearlberg* v. *Varty*: natural justice is for bodies exercising judicial functions; "fairness" is for bodies exercising administrative functions. This represents a return to the conceptual approach in vogue before 1964. One could be forgiven for thinking that "[t]hat heresy was scotched in *Ridge* v. *Baldwin*".[22] No satisfactory definition of the

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[16] [1970] 2 Q.B. 417.
[17] [1972] 2 Q.B. 299.
[18] [1972] 2 All E.R. 6.
[19] *Id.*, 17.
[20] The duty to act fairly is not imposed upon a body exercising legislative power: *Bates* v. *Lord Hailsham* [1972] 3 All E.R. 1019.
[21] *Banks* v. *Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222, 231-234 *per* Barwick C.J.; *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170 *per* Lord Denning M.R.
[22] *R.* v. *Gaming Board for Great Britain; ex parte Benaim and Khaida* [1970] 2 Q.B. 417, 430.

concept of a "judicial" function has been found and Jackson suggests that "the reasoning of the courts seemed at times to be that this body ought to observe the rules of natural justice; therefore it is acting judicially".[23]

In a similar vein, G. D. S. Taylor stated that:

> If there is one thing that the recent history of administrative law illustrates, it is that to define rights and duties in terms of concepts is unproductive.[24]

For this reason, he suggested that what is to be regarded as "judicial" and "administrative" for present purposes is to be determined not by reference to concept but by evaluation of the *"Durayappah* factors" mentioned above.[25] Whether or not this interpretation is correct, it is clear that the use of the terms "judicial" and "administrative" is inherently dangerous and the tendency to revert to the old conceptual analysis is too close for comfort.

However, an altogether different notion to the "separate duty" approach outlined above has been recently introduced by the courts and may possess even greater dangers. An increasing number of judges are forsaking the term "natural justice", with its connotation of the right to a hearing preceded by notice of the case to be met, in favour of the term "fairness". The most obvious statement of this approach comes from Lawton L.J. in *Maxwell* v. *Department of Trade*:

> From time to time during that period [that is, the last 60 years] lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise. As a result of these efforts a word in common usage has acquired the trappings of legalism: "acting fairly" has become "acting in accordance with the rules of natural justice", and on occasion has been dressed up with Latin tags.[26]

It is submitted that the same line is taken, admittedly in a less blatant fashion, by the House of Lords in *Wiseman* v. *Borneman*[27] and the Privy Council in *Furnell* v. *Whangarei High Schools Board*.[28]

In *Wiseman* v. *Borneman*, Lord Reid said:

> [N]atural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances,

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[23] Jackson, *Natural Justice* (1973) 35.
[24] Note 15 *supra*, 279.
[25] *Ibid.*
[26] [1974] 1 Q.B. 523, 539.
[27] [1971] A.C. 297.
[28] [1973] A.C. 660.

> and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules.[29]

Lord Morris's opinion was to the same effect,[30] as was that of Lord Wilberforce.[31] In *Furnell*, the majority of the Privy Council took the view:

> Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russell* v. *Duke of Norfolk*, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.[32]

While this approach has the advantage of obviating the necessity of distinguishing between "judicial" and "administrative" functions, the danger is that "the duty to act fairly", originally the progeny of natural justice, will proceed to devour that to which it originally owed its existence. Two commentators, G. D. S. Taylor and D. H. Clark, in separate articles advance the thesis that, while natural justice has spread over a wider field of government activity since *Ridge* v. *Baldwin*, its content has become increasingly diluted.[33]

Such a theory has a good deal of evidence to support it. Traditionally the concept of natural justice has been regarded as possessing two components: *nemo debet esse judex in propria sua causa* (the rule against bias), and *audi alteram partem* (the hearing rule).[34]

But we find cases denying that which has been regarded as axiomatic. In *R.* v. *Aston University Senate; ex parte Roffey*,[35] Donaldson and Blain JJ. both said that a hearing was *not* a necessary requirement of natural justice.[36] In *Breen* v. *Amalgamated Engineering Union*[37] Megaw and Edmund Davies L.JJ. held that a man dismissed from an office in his union was entitled to natural justice but not entitled to a hearing.[38] Such cases as these could be dismissed as aberrations, if it were not for continual judicial comments on the error of laying down rules and guidelines for what is required to satisfy natural justice. We

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[29] [1971] A.C. 297, 308.
[30] *Id.*, 309.
[31] *Id.*, 320.
[32] [1973] A.C. 660, 679.
[33] Taylor, note 15 *supra*; Clark, "Natural Justice: Substance and Shadow" [1975] *Public Law* 27, 28.
[34] Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed., 1971) 133; Brett and Hogg, note 10 *supra*, 314; De Smith, *Judicial Review of Administrative Action* (3rd ed., 1973) 134.
[35] [1969] 2 Q.B. 538.
[36] *Id.*, 552, 556.
[37] [1971] 2 Q.B. 175.
[38] *Id.*, 195-196, 200, 201. (Lord Denning M.R. dissented.)

have already cited the view of Lords Reid and Morris in *Wiseman* v. *Borneman* that natural justice was not "rigid and mechanical" and should not "degenerate into hard-and-fast rules". In addition, there are suggestions in *Malloch* v. *Aberdeen Corporation*[39] to the effect that notice of the case to be met may not be a necessary ingredient of natural justice. When it is realised that the right to a hearing is utterly useless unless the individual involved is fully informed of the matters which will be considered at the hearing and has an opportunity to prepare submissions in respect to those matters, then the suggestions in *Malloch* are ominous indeed.[40]

There are thus good grounds for agreeing with the analysis of Taylor and Clark. But it is possible to go further. Rather than focusing on what the courts *are* doing, attention should be directed towards *why* they are doing it. It is suggested that the content of natural justice is being whittled away because of the inability or unwillingness of the judiciary to provide a comprehensive philosophical resolution of the tension that exists between the need to ensure justice for the individual and the necessity for government to carry on its functions in the most efficient manner possible.

The failure to come to terms with this problem is accentuated by the fact that, as time goes on, government regulative activity is encroaching into areas of human concern that the judiciary has not customarily regarded as requiring its supervision and safeguard (for example, the desire of a migrant to enter a country, the need for a man to secure a taxi licence to preserve his livelihood, or the stigma a teacher suffers at being suspended from duties). As we think the cases illustrate, the approach adopted is to fall back on the question: "Is this government action fair in all the circumstances?" The result is, as Taylor points out,[41] a collection of individual cases of authority only on their own facts. In short, sheer chaos.

Into this mire, Wootten J. attempted to inject a framework of principles. His Honour candidly suggested, after surveying the authorities, that the courts would have to take a policy decision as to the future development of the law.[42] He preferred the following approach:

> . . . preserve the concept of natural justice, with its traditional content (in particular the right to a hearing), as a concept applicable to a certain class of function—the traditional class containing virtually all judicial functions and many administrative functions to which it is appropriate. Where a function is not one to which it is appropriate to attach the traditional concept of

[39] [1971] 1 W.L.R. 1578, 1582 *per* Lord Reid.
[40] See Clark, note 33 *supra*, 38-43.
[41] Note 15 *supra*, 258.
[42] [1975] 2 N.S.W.L.R. 446, 470.

> natural justice, the exercise of the function should, nevertheless, be treated as subject to an implied condition that it must be fairly exercised. Fair exercise, as contrasted with natural justice, would not necessarily involve a hearing, or might involve a hearing on some occasions and not on others.[43]

His Honour realised that this tended to reintroduce the conceptual distinction between "judicial" and "administrative" functions. But he felt that this problem could be assuaged by utilising the criteria enunciated in *Durayappah* v. *Fernando*, as analysed by Taylor.[44] So, if a particular power satisfied the test of the *"Durayappah* factors"[45] it was subject to natural justice, but if the power did not satisfy that test it was subject to the alternative duty of "fair" exercise.[46]

Applying this framework to the case before him, Wootten J. held that, although Dunlop had a real interest that was affected by the Council's decision pursuant to sections 308(1) and 309(4), the powers conferred by those sections did not satisfy the other requirements laid down in *Durayappah* v. *Fernando* (that is, existence of an issue requiring adjudication and sanction) so that they did not attract the principles of natural justice.

His Honour did however consider that a requirement of "substantial fairness" attached to the manner in which the Council exercised its powers under sections 308(1) and 309(4). This meant that the Council could not make decisions under these powers without first notifying the plaintiff of its intention to do so. His Honour held that as the plaintiff did not receive notice of the Council's intention to fix a building line under section 308(1), the resolution adopted pursuant to that section was invalid.[47] The plaintiff had had some notice of the Council's intention to utilise section 309(4), so the resolution passed under that power could not be invalidated because of lack of notice. The resolution was declared invalid on other grounds[48] (namely, inconsistency with the Woollahra Planning Scheme Ordinance).

It is submitted that the approach of Wootten J. warrants the closest scrutiny as it is manifestly an attempt to unravel the difficulties in this area. However, before embarking upon an analysis of the efficacy of His Honour's notion of a "duty to act fairly", some points should be made about certain facets of the judgment.

First, Wootten J. said that the concept of a separate duty incumbent upon administrative bodies and officials to act "fairly" was sanctioned by high authority. He cited the judgment of Lord Pearson in *Pearlberg*

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[43] *Id.*, 470-471.
[44] *Id.*, 473.
[45] *Ibid.*
[46] *Id.*, 478.
[47] *Id.*, 480.
[48] *Id.*, 492.

v. *Varty* and commented that that judgment had been cited with apparent approval by the Privy Council in *Furnell*.[49] It is quite true that the analysis of Wootten J. had much in common with Lord Pearson's approach, but, as pointed out earlier, the Privy Council took the view that there was no separate "duty to act fairly". Moreover, the manner in which Lord Pearson's approach was cited in *Furnell* is rather perplexing. The judgments in *Pearlberg* v. *Varty* are apparently referred to, along with a number of other cases, as examples of the truth of the statement by Tucker L.J. that natural justice varies with the circumstances of each case.[50] When that is borne in mind, there does not seem to be as much "high judicial authority" for the approach of Wootten J. as he suggested.

Secondly, His Honour may have been somewhat hasty in deciding that natural justice did not attach to sections 308(1) and 309(4) of the Local Government Act. It will be recalled that Wootten J. utilised the so-called "*Durayappah* factors" to determine whether these powers had to be exercised subject to natural justice. Drawing assistance from Taylor's analysis of the guidelines set down in *Durayappah* v. *Fernando*,[51] His Honour determined that he had to apply four considerations to the facts and the statutory provisions: each of these would more or less indicate the necessity or otherwise for a hearing, the final decision on whether there should be a natural justice requirement read into these powers being dependent upon "a global appreciation of the relative strength of all four elements".[52]

As to the first consideration, namely, the presence in the statutory power of an "express court analogy", His Honour received no assistance. The sections in question gave no indication either way on the requirement for a hearing.[53]

In regard to the second consideration, namely interference with some real interest of the plaintiff, some problems arose. It was argued that the rules of natural justice applied only when a legal right was at stake and the plaintiff had no right to use his land as he pleased, only a "liberty". Under the governing legislation the plaintiff could not build on his land without the consent of the responsible local authority. Thus it was argued that the resolutions made under sections 308(1) and 309(4) did not interfere with any right the plaintiff possessed. Wootten J. rejected this argument, preferring a pragmatic, rather than a conceptual approach to the distinction between a "right" and a "privilege". He said:

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[49] *Id.*, 471.
[50] [1973] A.C. 660, 679-681.
[51] [1975] 2 N.S.W.L.R. 446, 473.
[52] *Ibid.*
[53] *Id.*, 474.

> After those resolutions, he could not build on certain portions of his land at all, no matter what consents he obtained. This was a significant diminution in the benefits he derived from being a landholder, which no amount of conceptual analysis can alter.[54]

This approach to the plethora of regulations concerning the use of land can only be commended, as talking in terms of "rights" and "privileges" seems singularly inappropriate in this context.

His Honour then proceeded to consider simultaneously the third and fourth *"Durayappah* factors", that is, the circumstances in which the Council could utilise its powers and the sanction the Council could wield under those powers. This was the point at which Wootten J. considered that the plaintiff's argument that he was entitled to natural justice failed. His Honour likened the powers under sections 308(1) and 309(4) to legislative action directed towards the general welfare of all the residents.[55] Although Council decisions under these powers could have detrimental effects upon the properties of individuals, that detriment would be suffered equally by a large class of persons. This meant there was no "issue" between the Council and individual ratepayers when these powers were exercised. Consequently the requirements of natural justice were not attracted.[56]

Such a conclusion was not unusual, as Lord Reid in *Ridge* v. *Baldwin* envisaged that a statutory power with a high policy content and an application without discrimination to a large class of people was not so likely to be subject to natural justice.[57] However, the complicating factor in *Dunlop's* case was that the powers used by the Council could also be exercised to deal with a particular property or a small group of properties, and the powers were in fact used in that way.

A line of authority derived from *De Verteuil* v. *Knaggs*[58] and embodied in the New Zealand cases of *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd*[59] and *New Zealand United Licensed Victuallers Association* v. *Price Tribunal*[60] strongly suggested that, under the same power, in some circumstances there is an obligation to afford natural justice, but in other circumstances there is no such obligation. But Wootten J. regarded *Durayappah* v. *Fernando* as binding authority for the view that the power conferred by a section must be considered as a whole and cannot be fragmented into different occasions of its exercise.[61] This, it is submitted, is not a satisfactory

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[54] *Id.*, 476.
[55] *Id.*, 476-477.
[56] *Id.*, 477.
[57] [1964] A.C. 40, 72.
[58] [1918] A.C. 557.
[59] (1953) 72 N.Z.L.R. 366, 404, 418.
[60] (1957) 76 N.Z.L.R. 167, 203, 210.
[61] [1975] 2 N.S.W.L.R. 446, 478.

conclusion to be extracted from the *Durayappah* case. In that case, counsel argued that since, in a single section of the Act, two out of three potential grounds for the dismissal of a council were expressed in such a way as to import a requirement of natural justice in their exercise whilst the third was not so couched, the implication was that a council could be dismissed on this third ground without affording council members natural justice. The Privy Council rejected this argument because in its view the construction of the section as a whole indicated that it was not possible to single out for different treatment the third ground for dismissal.[62] The Privy Council was examining the Minister's particular power of dismissal and determining whether, as a matter of statutory construction, all the grounds upon which this power could be exercised were subject to the rules of natural justice. This, it is submitted, is far removed from saying that every statutory power can only be examined as a whole and cannot be broken up into different occasions of its exercise.

On the merits, it is at least arguable that the principle embodied in the *Licensed Victuallers* case would have been appropriate to sections 308(1) and 309(4). Those sections could have been applied to a large class of properties or to individual blocks of land, so it would not seem objectionable to require that when the Council used these powers to deal with an individual property or a small group of properties it had to abide by the rules of natural justice and grant the landholders a proper hearing.[63] Of course, there are problems of degree involved in deciding when the powers are being exercised over such a large group of properties that natural justice becomes inapplicable. However, it is submitted that such problems do not alter the usefulness of the principle itself.

Thirdly, the requirements of both natural justice and "fairness" are merely procedural. Thus, the Council in *Dunlop's* case, its resolution under section 308 having been invalidated for lack of "fairness", was quite free to reconsider the matter and, after giving a fair hearing on this latter occasion, reach the same conclusion as previously. In some quarters, this result has been seen as unsatisfactory. Lord Wilberforce said in *Malloch* v. *Aberdeen Corporation*[64] that the appellant, who had been dismissed without a hearing, had to

> . . . show that if admitted to state his case he had *a case of substance* to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is

[62] [1967] 2 A.C. 337, 351.

[63] This accords with the view of Professor Davis in the United States: Davis, *Administrative Law Treatise* (1958) I, Ch. 7.

[64] [1971] 1 W.L.R. 1578.

> something of substance which has been lost by the failure. *The court does not act in vain.*[65]

Lord Reid said in that case (without deciding the point) that it might be a good answer to a claim based on the absence of a hearing if it could be clearly demonstrated that a hearing would have made no difference.[66] This notion has been described as a most formidable erosion of the concept of natural justice.[67]

However, Wootten J. in *Dunlop* was quick to reject Lord Wilberforce's approach, reaffirming the principle set down by Lord Wright in *General Medical Council* v. *Spackman*:

> If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice.[68]

This approach was held to be applicable to administrative decisions vitiated by lack of "fairness" as well as to those decisions subject to the natural justice requirements.[69] In reply to Lord Wilberforce, Wootten J. stated:

> The court does not act in vain if it requires a body which has proceeded in an unfair manner to reconsider the matter in a fair manner, even if in the end it reaches the same decision. On the contrary the court has remedied a just grievance of a litigant, and provided a sanction against like acts of unfairness in the future.[70]

As stated earlier, the extension of the duty to observe the principles of natural justice to an increasing range of decision-making bodies has been accompanied by a steady erosion of the content of those principles and the protection they afford. The purpose of Wootten J. in making the distinction between natural justice and "fairness" was to halt that erosion by giving some fixed minimum content to the former concept. The minimum postulated was that, wherever the rules of natural justice are applicable, the party to be affected by a proposed decision must be given a "hearing".[71]

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[65] *Id.*, 1595 (emphasis added).

[66] *Id.*, 1582.There have been a number of authorities to this effect. See *e.g.*, *Byrne* v. *Kinematograph Renters Society Ltd* [1958] 1 W.L.R. 762, 785; *Glynn* v. *Keele University* [1971] 1 W.L.R. 487, 496. Both these cases were distinguished by Wootten J. in *Dunlop*, but it is submitted that this was on rather tenuous grounds: [1975] 2 N.S.W.L.R. 446, 480.

[67] Clark, note 33 *supra*, 45.

[68] [1943] A.C. 627, 644-645.

[69] [1975] 2 N.S.W.L.R. 446, 481.

[70] *Ibid.*

[71] *Id.*, 469.

What did Wootten J. mean by a hearing? A hearing is an extremely variable concept.[72] It means no more than that "the person concerned should have a reasonable opportunity of presenting his case".[73] This may range from a mere opportunity to make written submissions[74] to the right to have a full court-like "trial" with legal representation and cross-examination of witnesses.

Wootten J. mentioned two elements of a hearing required by natural justice and it seems that the content of such a hearing is to be distinguished from that of any hearing which a "fair" procedure may require. First, it was said that:

> . . . in strict natural justice situations *notice of the specific action contemplated*, as distinct from a general hearing on the relevant facts, may be an essential element of a proper hearing.[75]

A hearing without adequate notice is of little benefit to an individual and notice is only "adequate" if it clearly affords the person to be affected by a proposed decision the opportunity to prepare an answer.[76] Thus, as a general rule, the requirement that notice be specific has in our submission much to recommend it.

However, it can only be regarded as a general presumption, rebuttable by particular circumstances. To this extent the requirement of specific notice can never be "fixed". For example, in the *Gaming Board* case[77] the Board was held not to be bound to specify the ground on which it objected to the suitability of an applicant for a gaming licence. A requirement of detailed disclosure would have been against the public interest in preserving the confidentiality of the sources of the Board's information.[78] As Jackson evaluates it:

> . . . the actual decision may be regarded as a reasonable attempt at justice where there is an acute conflict of private interest and public policy.[79]

Such a pragmatic result can only be reached where the requirement of specific notice is flexible enough to cater for exceptional circumstances. It is submitted that no notion of "fixed content" should deny this.

The second element of a hearing mentioned by Wootten J. as being required by natural justice concerned the fact that representations

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[72] *Mobil Oil Australia Pty Ltd* v. *Commissioner of Taxation* (1963) 113 C.L.R. 475, 503-504 *per* Kitto J.

[73] *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, 118 *per* Tucker L.J.

[74] A hearing need not always be oral: *Local Government Board* v. *Arlidge* [1915] A.C. 120, 134.

[75] [1975] 2 N.S.W.L.R. 446, 479 (emphasis added).

[76] De Smith, note 34 *supra*, 172-173.

[77] *R.* v. *Gaming Board for Great Britain; ex parte Benaim and Khaida* [1970] 2 Q.B. 417.

[78] *Id.*, 431.

[79] Jackson, note 23 *supra*, 44.

made by the plaintiff to the Town Planning Committee were not conveyed to the full Council which made the decisions. Wootten J. suggested that:

> If this were a natural justice situation in the strict sense, and the council was subject to duties analogous to those of judicial bodies, the latter point might well be fatal.[80]

This view that "he who decides must hear" was based on *Jeffs* v. *New Zealand Dairy Production and Marketing Board*.[81] However, since the judgment of Wootten J., the High Court has confined the authority of the *Jeffs* principle to cases where a decision-making body has no power to delegate its power to conduct an inquiry. Where there is such a power of delegation, the decision-making body can simply adopt the report of the subordinate body without itself considering the submissions of the parties.[82]

Apart from this consideration, the view of Wootten J. on this matter is indicative of his preoccupation with "fixed content". Having suggested that what had occurred would have been fatal in a strict natural justice context, he added:

> I do not think that there was anything unfair about the procedure on the facts of this case, because the very great majority of the aldermen who made the decisions had been present and heard the plaintiff at the Town Planning Committee.[83]

This implies that natural justice would have required something which no reasonable man would have insisted upon. It is a classic example of the fundamental general principle degenerating into arbitrary hard-and-fast rules.[84] Wootten J. began by saying that natural justice always requires a hearing. Then His Honour inexplicably jumped to saying the *content* of that hearing should be fixed. Clearly, there is a world of difference between these two propositions.

It is now possible to draw some conclusions as to the various aspects of the notion of "fixed content". The rule that natural justice must always require that a hearing be given is, and in our opinion should be, axiomatic and without exception. Suggestions in *Roffey* and *Breen* to the contrary should be dismissed as anomalous.[85] The rule that a hearing always requires prior notice of the case to be met is in our opinion a welcome rebuttal of the contrary suggestions in *Malloch*. As a general rule, notice should be sufficiently specific to enable the person who may be affected by the ultimate decision to adequately prepare

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[80] [1975] 2 N.S.W.L.R. 446, 479.
[81] [1967] 1 A.C. 551.
[82] *Taylor* v. *Public Service Board* (1976) 10 A.L.R. 211, 222 *per* Mason J.
[83] [1975] 2 N.S.W.L.R. 446, 479.
[84] *Wiseman* v. *Borneman* [1971] A.C. 297, 308 *per* Lord Reid.
[85] Clark, note 33 *supra*, 29-33.

his case. There is no reason why specific guidelines could not be provided as to the degree of specification required for each particular type of decision-making body. Such guidelines could extend to what type of hearing is to be required. For example, where a person's credibility is at issue, he should be given an oral hearing with perhaps a right to representation and cross-examination. But the requirements in these guidelines should not be completely inflexible. It should always be possible for a decision-making body to show that exceptional circumstances of a particular case made a lower standard of hearing "fair". Without this "safety valve" the suggested scheme of guidelines would prove unworkable. Such a safeguard would provide in our opinion the basis for striking a balance between the need for certainty and "fairness".

In general terms it is submitted that the scheme developed in the *Dunlop* case attempts to patch over the cracks in an area that is long overdue for a complete overhaul. As was indicated earlier, the judiciary has baulked at adopting any firm philosophical attitude to its function *vis-à-vis* burgeoning government bureaucracy. In *Dunlop*, Wootten J. goes some way towards laying down rules in respect to the application of natural justice but the emphasis placed on the flexibility of "the duty to act fairly" indicates that His Honour's approach is still within the mainstream of judicial timidity. Of course, there is a very real limit to that which a judge can achieve in one isolated case. So perhaps our criticism of the approach adopted by Wootten J. is really a criticism of prevailing judicial attitudes.

Quite apart from issues of principle, it is suggested that the usefulness of the "fairness" concept may well be very limited, and indeed, might have the opposite effect to that which is intended.

As stated earlier, the categorisation of decision-making bodies and their powers as "judicial" or "administrative" is far too close to the pre-*Ridge* v. *Baldwin* authorities. Wootten J. did point out that the introduction of a separate "duty to act fairly" did not re-introduce the evils of the old conceptual approach, as the *"Durayappah* factors" were specific guidelines for determining whether natural justice or fairness was required.

But, it is submitted, this does not overcome the dangers of the conceptual approach. With the spread of government bureaucracy and regulation into more and more fields of human activity, the courts can, by utilising the "judicial/administrative" dichotomy, classify as "administrative" such newer functions as the provision to governments of preliminary reports and recommendations. The courts can then proceed to consider whether particular investigative procedures are "fair". The problem with this process is that the judiciary has no prior experience of regulating such governmental activities, so it is left to fumble in the dark in search of a definition of "fair" procedure. Examples of this

phenomenon, it is suggested, are cases such as *Maxwell* v. *Department of Trade*[86] and *Re Pergamon Press Ltd.*[87] In those cases, the judges were confronted with what was to them the novel notion that investigations by government departments could be subject to judicial review. The result has been that the concept of natural justice has been forsaken (too hastily in our view) in favour of the concept of "fairness".

So, as the approach of Wootten J. in *Dunlop* provides the judiciary with a convenient escape from having to subject newer forms of government regulation to the rigours of natural justice, it is crucial to determine whether the content of the "fairness" duty is sufficient to protect the interests of the citizen.

"Fairness", as described by Wootten J., is an open-ended concept but a number of points are clear enough for some conclusions to be drawn.

According to Wootten J., "fairness" may or may not require a hearing.[88] Where a hearing is required, it was said that it might be possible to take a "less stringent view" of the right of notice of the case to be met.[89] There is danger in this view, since there is little point in a person having an opportunity to rebut the case against him unless he has been given adequate prior notice of that case. Where a hearing is not required, all that could remain within this new concept is that those subject to a "duty to act fairly" must be unbiased. But, under the concept of "fairness" is there any need for the decision-maker to be unbiased in the sense in which a judge is required to be unbiased? The types of bodies to which one imagines Wootten J. considered the "fairness" obligation to be applicable will be those which are commonly entrusted with a policy making power, or have as part of their charter a requirement to consider the general welfare of large groups of people who have a particular activity in common. Local councils are an obvious example. Such bodies are never required by the courts to divorce themselves from personal points of view on policy, even when these points of view may be adverse to the interests of an individual whose case is being considered. An example of this phenomenon is *R.* v. *Milk Board; ex parte Tomkins.*[90]

Further, as a matter of sheer practicality, where "the duty to act fairly" does not import a requirement of a hearing, it would seem to be impossible for an aggrieved individual to show that the decision makers were biased against his case in such a way as to make their decision "unfair". The "duty to act fairly" then may sometimes be a mere sham and could even operate in a manner which is unfair (in the ordinary sense of the word).[91]

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[86] [1974] 1 Q.B. 523.
[87] [1971] Ch. 388.
[88] [1975] 2 N.S.W.L.R. 446, 478.
[89] *Id.*, 479.
[90] [1944] V.L.R. 187.
[91] See *e.g.*, *Selvarajan* v. *Race Relations Board* [1976] 1 All E.R. 12.

We suggest that this is unsatisfactoy. It is the result of an unwillingness on the part of the judiciary to "grasp the nettle" and set down clear guidelines for bureaucrats on how their powers ought to be exercised. It would be a real step forward for the courts to solidly reaffirm the principle, laid down as long ago as *Cooper* v. *Wandsworth Board of Works*,[92] that the courts imply into the grant of statutory powers to a board or tribunal a requirement that they be exercised in accordance with the tenets of natural justice, unless the empowering statute by express statement or necessary intendment excludes those principles. The courts could then approach a statutory power upon the basis that it can only be exercised against an individual in accordance with the procedure required by natural justice, as that procedure is generally understood (an unbiased tribunal and a fair hearing preceded by notice of the case to be met). Though compliance with each of the requirements, as pointed out in *Durayappah* v. *Fernando*,[93] can never be dispensed with once they are found to be applicable, the *content* of each of them would, as Tucker L.J. indicated in *Russell* v. *Duke of Norfolk*, depend upon the circumstances of each case.[94] It is submitted that this approach constitutes a "middle way" between the pre-*Ridge* v. *Baldwin* conceptual problems and the post-*Ridge* v. *Baldwin* unwillingness to place specific obligations upon those functions that can interfere with the interests of individual citizens.

One reason why the courts do not adopt such an approach is the belief that the administration would be crippled by requiring a hearing. Indeed, the rules of natural justice have been described as "legal straitjackets".[95] The authors doubt whether this rationale is correct. Experience in the United States regarding the Administrative Procedure Act[96] seems to show that such fears are groundless.

The judgment of Wootten J. in *Dunlop's* case attempts to provide a comprehensive framework for judicial review of the manner in which regulatory bodies and agencies exercise their powers. Only time will tell whether the framework proposed by His Honour gains support among other members of the judiciary.[97]

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[92] (1863) 14 C.B. (N.S.) 180; 143 E.R. 414. The principle of this case has recently been adopted: *Twist* v. *Randwick Municipal Council* (1976) 12 A.L.R. 379, 382 *per* Barwick C.J., 384-385 *per* Mason J.

[93] [1967] 2 A.C. 337, 345-346.

[94] [1949] 1 All E.R. 109, 118.

[95] *Maxwell* v. *Department of Trade* [1974] Q.B. 523, 539 *per* Lawton L.J.; see also *Twist* v. *Randwick Municipal Council* (1976) 12 A.L.R. 379, 387-388 *per* Mason J.

[96] Administrative Procedure Act 1946 Ch. 324, s. 5; now 5 United States Code s. 554.

[97] It is interesting to note that the Administrative Decisions (Judicial Review) Act 1977 (Cth) s. 5(1)(a), includes "natural justice" as a ground for review but no mention is made of "fairness". Of course, this Act only applies to federal jurisdiction.

One must agree with Wootten J. when he says that the courts need to take a policy decision in this area. But it is submitted that His Honour's approach, whilst possessing attractive elements, suffers from the same malaise that affects this entire aspect of judicial review of administrative action.

Judges still seek an accommodation between the rights of the government and the rights of the individual by refusing to lay down precise guidelines and rules that bureaucrats must abide by when exercising their powers. The result has been, and still is, confusion for public servants anxious to avoid the ire of the courts, and exasperation for the citizen who desires some clear indication of what he is entitled to expect from those in authority.