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The stakes of procedural fairness: Reflections on the Australian position

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The justification for the rules of procedural fairness is often explained in “dignitarian” terms that prioritise the dignity of the person or “utilitarian” terms that focus on the contribution of the rules to better decision-making outcomes. This article explores what might be at stake in these different justifications for the exercise of administrative authority specifically.

1. INTRODUCTION: THE IDEA AND ITS LANDSCAPE

Since the seminal case of *Kioa v West*¹ redrew the boundaries of procedural fairness in the context of administrative decision-making in Australia, the case law has been at pains to emphasise what the thrust of the “hearing rule” is about.² This is said to lie in a fair opportunity to advance one’s case.³ Taking cues from *Kioa*, the case law confirms that unless rebutted by clear statutory language, the duty to afford procedural fairness is presumed in all cases in which an exercise of power is apt to affect the interests of a person.⁴ To establish a denial of procedural fairness, therefore, the issue for determination will be whether the aggrieved person has suffered some material encroachment on a fair opportunity to advance her or his case before the decision-maker.⁵

Because the precise contours of this evaluation will differ on a case-by-case basis, the cases are clear that no fixed rules of general application can be stated. The required content of the opportunity to be heard must necessarily be flexible and adapted to the statutory context and overall circumstances alike.⁶ But *why* is this opportunity so important? This question proves to be much more than a matter for philosophical reflection. It is precisely because the very idea of “procedural fairness” is question-begging that we see the case law and commentary often needing to turn to a consideration of the “underlying principles”, “purpose”, “value”, “rationale”, or “justification” for the relevant rules. It is somewhat less common, however, to also find discussion of what is at stake in favouring one of account of those principles or purposes over another.

My aim in this article is to reflect on this last question. Specifically, my aim is to develop the argument that there is much at stake in the *orientation* of the different justifications that might be offered for the rules of procedural fairness. This question of orientation is important, I want to suggest, because of the particular setting in which the demands of procedural fairness in administrative law

* Senior Lecturer, Melbourne Law School. I am grateful to Chris Maxwell, Jeff Goldsworthy, and Adrienne Stone for the opportunity to participate in the Judges and the Academy seminar at Melbourne Law School in September 2015 that generated the ideas here recorded. To that end, I am indebted to my fellow seminar participants and co-contributors to this symposium, James Edelman and Alan Robertson, for the opportunity to engage in such a rich discussion, and to Damien Cremean for his enthusiastic support of the symposium itself. Thanks also to Anna Saunders for her valuable research assistance.

¹ *Kioa v West* (1985) 159 CLR 550.

² The term “procedural fairness” is understood in Australian law to encompass both the “hearing rule” and the “rule against bias”. In this article however I concentrate solely on the “hearing rule”. I in turn concentrate solely on the character and implications of this rule in the context of administrative decision-making.

³ The case law offers various formulations of this fundamental idea. More recent cases however speak with general consistency of an “opportunity to advance one’s case” or a “reasonable opportunity to be heard”: see, eg *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [38] (Gleeson CJ), [122] (Hayne J); *Minister for Immigration & Border Protection v WZARH* [2015] HCA 40, [26] (Kiefel, Bell and Keane JJ), [61], [69] (Gageler and Gordon JJ).

⁴ See, most recently, *Minister for Immigration & Border Protection v WZARH* [2015] HCA 40, [30] (Kiefel, Bell and Keane JJ), [55] (Gageler and Gordon JJ).

⁵ This standard has come to be understood in terms of “practical injustice”: *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [37] (Gleeson CJ).

⁶ *Kioa v West* (1985) 159 CLR 550, 585.

arise: namely, in the context of one person being positioned to exercise administrative authority over another. At stake in different ways of explaining the value, rationale, or justification for the rules of procedural fairness, therefore, are different ways of prioritising the perspective and experience of the repository and subject of that exercise of authority.

The argument I develop below is that these differences need to be taken seriously within the practice of procedural fairness. Privileging the “dignitarian” impulse long-associated with doctrines of natural justice within justifications for the rules of procedural fairness is important, I will suggest, not only for how such prioritises respect for the dignity of the subject for its own sake. Dignitarian considerations are important also for their contribution 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. Bringing this relational context to the fore matters not just for how we understand and honour obligations of procedural fairness when tending to the experience of those subject to exercises of administrative authority. It potentially also has wider significance for how we think about conditions of authority in the contemporary administrative state more generally.

In what follows, therefore, I traverse dominant understandings of the purpose, value, and justifications for the rules of procedural fairness with a view to exploring their stakes not only for what we expect of the rules themselves, but also for our understanding and treatment of the wider authority relationship that provides their context. I then offer some reflections on how current Australian law appears to measure up in relation to these stakes, both with respect to the rules of procedural fairness specifically, as well as the larger institutional context of judicial review in which those rules are clarified and enforced.

2. IDENTIFYING THE STAKES: VALUES, PRINCIPLES, AND JUSTIFICATIONS

Though the question of why we have rules of procedural fairness has historically been answered in a number of ways, the starting point of the discussion is invariably taken from the idea of “natural justice”. Yet as James Edelman in his contribution to this symposium helpfully explains, the enduring place of this idea in our tradition does not indicate any settled agreement as to precisely what it means.⁷ In keeping with still more longstanding debates about the meaning and content of “natural law”, the exact content of “natural justice” is an open question. Nonetheless, the courts have been at pains to sideline any objections to the force of the idea arising from its apparently indeterminate content. As Brennan J put the point in *Kioa*, the notion of natural justice “is somewhat vague because of its variable content, but it is notion which is hallowed by time, entrenched in our jurisprudence and provocative of the definition of procedural rules governing the exercise of particular powers in the generality of cases”.⁸ The underlying theme, therefore, is well understood. Whether derived from religious, secular, or broader societal values, “natural justice” is associated with moral standards that demand respect for a person’s right to be heard with respect to matters affecting him or her.⁹

When *Kioa* saw the suggestion advanced that the term “procedural fairness” might be more apt than “natural justice” to capture the requirements of fair process in the specific context of *administrative* decision-making, this was not accompanied by any sense that the foundational concerns of the natural justice tradition were any less salient to the exercise of administrative authority than they had long been to exercises of judicial power. As if to demonstrate the point, the judges in *Kioa* used the terms “procedural fairness” and “natural justice” interchangeably, as have others since.¹⁰ Still, *Kioa* offered some important clarifications about why the standards required by procedural fairness might be different in the context of the exercise of administrative rather than judicial power. Here a particular point of emphasis was the extent to which the exercise of a statutory power affects an

⁷ See (published in this issue) James Edelman, “Why do we have rules of procedural fairness?” (2016) 23 AJ Admin L 144 at Part 1.

⁸ *Kioa v West* (1985) 159 CLR 550, 614 (Brennan J).

⁹ See generally, Edelman, n 7 at Part 2 (text accompanying fnn 22, 27).

¹⁰ For example, McHugh and Gummow JJ sustain the terminology of “natural justice” throughout their joint judgment in *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.

individual personally.¹¹ But what was also implied in the attention given to the need for procedural fairness to be flexible and adapted to the circumstances of the case is that the particularities of the administrative context, generally and specifically, must be closely contemplated when devising the appropriate content and reach of the relevant rules.¹²

The focused consideration in *Kioa* on how to understand these demands has surely done much to encourage a wider discussion in Australia of the purpose, value, or justification for the rules of procedural fairness in the administrative context.¹³ We have seen, eg, arguments such as that affording procedural fairness honours democratic values, insofar that the opportunity to participate in the making of a decisions that affects one's interests might be viewed as inherently democratic in spirit. The argument has also been put that the provision of an opportunity to be heard contributes to processes of public justification through how observance of the rules of procedural fairness encourages acceptance of the decisions made accordingly. But without doubt the two most dominant justifications are those which emphasise the "dignitarian" as opposed to "utilitarian" value of the relevant rules.

The idea that procedural fairness honours the *dignity* of the person is the point highlighted by Edelman: on his analysis, we might understand the "ultimate principle" of natural justice to be respect for the dignity of the person.¹⁴ This same has been emphasised by the administrative law theorist, Jerry Mashaw, who has argued that procedural fairness is important precisely because it respects "values inherent in or intrinsic to our common humanity – values such as autonomy, self-respect, or equality".¹⁵ Yet on the other side of the scale is the "utilitarian" view that sees observance of the rules of procedural fairness as valuable for their *consequences* for the effective administration of government power.¹⁶ On this account, the importance of the rules of procedural fairness might be seen to lie in their contribution to more efficient decision-making processes and better decisional outcomes.¹⁷

While the dignitarian view holds fundamental and enduring appeal as a result of its evident concern for persons, the attractiveness of the utilitarian perspective lies in its apparently more concrete and measurable orientation to results. Yet though the two justifications are often pitted against each other, the relationship between the two perspectives need not necessarily be one of clear opposition. For instance, if the opportunity to "advance one's case" is offered because it is thought that such will ultimately promote more efficient decision-making processes or better decisional outcomes – that is, if its provision is led by utilitarian considerations – the opportunity itself is still likely to secure the "side-effect" of respecting the dignity of the subject. Thus, advocates of the utilitarian view might argue, nothing in terms of dignitarian protections is necessarily lost by privileging an account of the justification, value, or purpose of the rules of procedural fairness in the image of their contribution to better decisional outcomes or more efficient decision-making processes.

These arguments may well be sound. Nonetheless, the point I want to make here is that they miss something important. Even though there might be nothing *intrinsic* to the utilitarian view that operates

¹¹ See, eg *Kioa v West* (1985) 159 CLR 550, 584 (Mason J), 619 (Brennan J).

¹² This point is made especially strongly by Mason J in *Kioa v West* (1985) 159 CLR 550, 583-584, when he suggests that a defect in past case law on natural justice in the context of administrative decision-making was its tendency to look for factors analogous to the making of judicial decisions when identifying when and why procedural protections should apply. This tendency, he suggests, "diverted attention from the need to insist on the adoption of in the administrative process of fair and flexible procedures for decision-making, procedures which do not necessarily take curial procedures as their model".

¹³ For a helpful summary of some of the most common arguments. see (published in this issue) Alan Robertson, "Natural justice or procedural fairness" (2016) 23 AJ Admin L 155 at para accompanying fn 52.

¹⁴ Edelman, n 7 at Part 1, under the heading "Philosophical and religious traditions of natural justice".

¹⁵ Jerry Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985) 171.

¹⁶ This view is known as the "utilitarian" account of the rules of procedural fairness because it reflects the basic commitment of the Utilitarian philosophy that the good of a particular thing or activity lies in the consequences or outcomes that it produces.

¹⁷ See also the helpful discussion of different justifications for the rules of procedural fairness in terms of "instrumental" versus "intrinsic" or "non-instrumental" accounts offered in Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2nd ed, OUP, 2012) 118; Michael Barnett, "Dobbing-In and the High Court: VEAL Refines Procedural Fairness" (2007) 30 UNSWLJ 127, 129.

to *exclude* orientation to the perspective or experience of the subject of authority and the dignitarian concerns that might there be relevant, there is equally nothing intrinsic to the utilitarian view that *orients towards* that perspective or experience. Indeed, on the utilitarian view, “good government decision-making” could conceivably be thought of as fulfilled without any regard to how the processes for achieving such are experienced by those subject to them. Moreover, even though the dignitarian and utilitarian views need not be mutually exclusive, the extent to which dignitarian aims might be fulfilled within a view of the rules that privileges utilitarian considerations will strongly depend on the content given to the “opportunity to be heard”. While this is of course also true of the dignitarian account – in the sense that here, too, the fulfilment of its demands will be contingent on the opportunity to be heard that is actually afforded – the point is that there is nothing internal to the utilitarian view that *mandates* attention to dignitarian concerns in the provision of that opportunity. Precisely because its concerns lie with outcomes, not process, the gaze of the utilitarian perspective is directed to the position of the repository of authority and the wider institutional frame within which that repository operates. It is not directed to the position and experience of the subject who ultimately has no power to direct the outcome of the repository’s exercise of authority beyond the influence afforded to her or him in the process leading to it.

This is a snapshot of how we might generally understand the stakes at play between the dignitarian and utilitarian accounts of the purpose and value of the rules of procedural fairness. The point I want to explore in the next section, however, is whether there might be still deeper issues to contemplate when juxtaposing these accounts in the particular context of the exercise of administrative authority. The idea I advance in the next section, accordingly, is that the dignitarian values long associated with the idea of natural justice are foundationally important to the authority relationship that underscores an exercise of administrative power. Indeed, only a dignitarian-informed account of the value, purpose and justification for the rules of procedural fairness can ultimately support an understanding of the administration of power as a relationship that demands a particular kind of regard for the position and agency of the subject of authority in order to *be* a relationship. The dignitarian justification for the demands of procedural fairness must therefore take priority over the utilitarian justification not merely for its own sake, but because of the specific character of the context of the exercise of administrative authority to which those rules apply.

3. RETURNING TO FUNDAMENTALS: PROCEDURAL FAIRNESS AND THE AUTHORITY RELATIONSHIP

In western legal philosophy the idea of authority is understood, at its essence, as the capacity of one person to change the normative position of another.¹⁸ To possess authority is to have the ability to alter the circumstances of another person. This is true of public and private authority alike. Yet in both cases it presents a puzzle. The phenomenon of authority appears, on its face, to run against the respect for the autonomy of individuals, and specifically the objective of freedom from the domination of others, which lies at the heart of the liberal tradition. Yet if for different and contested reasons, that tradition accepts that authority is necessary to sustain the political and legal conditions to which it aspires. The existence and exercise of public authority, we might say, effects a necessary compromise within the liberal project.

This position can only be arrived at, however, if the status of the subject of authority as an autonomous individual continues to be honoured. It is this insistence on preserving autonomy in the face of authority – or, we might even say, despite it – that produces an understanding of authority as necessarily involving a *relationship* between those who possess it and those who are subject to it. To conceive of the phenomenon other than in these relational terms would be to diminish or even to negate the status of the subject of authority as an autonomous agent. She or he would, in effect, be rendered into something merely to be acted upon. A legitimate exercise of authority thus requires a meaningful and enfranchising interaction with the subject whose position stands to be changed

¹⁸ See Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP, 2013), Ch 2, for an excellent survey of debates about the idea of authority the conditions for its legitimacy.

through its exercise. The demands of justification that we see honoured in requirements of reason-giving, and still further the associated demand that such reasoning be intelligible and defensible, clearly speak to this point.¹⁹

There is little doubt that philosophers who think about the nature of authority and the conditions for its legitimacy tend to focus much more on the question of what it means to possess authority than what it means to experience it. The inherently relational character of the phenomenon can therefore readily be downplayed. But the phenomenon of administrative authority specifically brings this relational context squarely into view, even while that phenomenon presents its own challenges. In particular, the fact that administrative authority is situated somewhere in the middle of the “classic” authority relationship between the legislature and the citizen raises a number of thorny questions for theorists. These include concerns about precisely how the key demand that the liberal tradition makes upon the exercise of public authority – that it be subject to the “rule of law” – can be ensured given that legislation in the administrative context is directed primarily to empowering officials to exercise discretion over the circumstances of subjects, rather than to the subjects themselves.²⁰

These and other questions that confront the task of theorising the character and demands of administrative authority specifically are and will always be the subject of debate. But they are far from merely theoretical. For example, we can readily see how the requirements of our rules of procedural fairness in administrative law express the overarching demand that an exercise of public authority should be rendered in a manner that is respectful of, intelligible, and answerable to its subjects. This, indeed, is precisely the point made by Alan Robertson in his contribution to this symposium when he suggests that affording procedural fairness requires that “the perspective of the decision-maker must be altered” to accommodate the perspective of the person affected by that decision in a manner consistent with the notion “that those governing are answerable to and should be responsive to those affected by that exercise of power”.²¹

This is an intrinsically relational view of the purpose, value or justification for the rules of procedural fairness. It is a view that may well exist alongside other possible accounts of those purposes or justifications, including the dignitarian view taken alone.²² Still, the point being emphasised here – and, I would suggest, in Robertson’s comment – is that there is something separably significant about this relational context when setting the parameters for the lawful exercise of administrative authority specifically.²³ This suggests that before any utilitarian concern for the effect of observance of procedural fairness on more efficient decision-making processes or better decisional outcomes is contemplated, there is a need as a foundational matter to attend to the conditions necessary to convene and sustain the authority relationship itself. This demand arises, crucially, not just because the longer term implications of the relevant exercise of administrative

¹⁹ Further development of these ideas might benefit from consideration of Rod Macdonald’s argument that, irrespective of context, the demands of procedural fairness must see to an appropriate balance between conditions of “enfranchisement” and conditions of “justification”: see Roderick A Macdonald, “A Theory of Procedural Fairness” (1981) 1 *Windsor Year Book of Access to Justice* 3, 5. Recent developments in Australian law on the ground of “unreasonableness” might advance these demands still further, insofar as the possibility that a decision that “lacks an evident and intelligible justification” might be considered legally “unreasonable” might be read as a demand on the standards of reason-giving: see *Minister for Immigration & Citizenship v Xiujuan Li* (2013) 249 CLR 332, [76] (Hayne, Kiefel and Bell JJ). See also, on this point, Leighton McDonald, “Reasons, Reasonableness and Intelligible Justification in Judicial Review” (2015) 37 *Syd LR* 467.

²⁰ Questions to this effect were famously raised in Ed Rubin, “Law and Legislation in the Administrative State” (1989) 89 *Columbia L Rev* 369.

²¹ Robertson, n 13.

²² Robertson, n 13.

²³ Indeed, it is worth considering whether the “participation” justification for the rules of procedural fairness might also be seen as an implication of conceptualising the demands of decision-making in the circumstances of an authority relationship. That is, “participation” in the decision affecting the subject of authority becomes the most basic demand of the relevant authority relationship *as a relationship*.

authority might be serious.²⁴ It is, put simply, because the demands promoted by the dignitarian view are *sui generis* to the demands of the authority relationship itself.

4. PROCEDURAL FAIRNESS AND THE AUTHORITY RELATIONSHIP: REFLECTIONS ON THE CASE LAW

How might we appraise the achievement of the Australian law on procedural fairness with respect to these concerns? On balance, the report card would appear to be a favourable one. There is much to support the view that our rules of procedural fairness give clear priority not just to dignitarian considerations for their own sake, but to the dignitarian demands of the authority relationships specifically. We might note, eg, the steady confirmation in the cases of how breach of procedural fairness will at common law constitute a jurisdictional error and thus generally be amenable to appropriate remedies to redress such breach.²⁵ This is of itself an important acknowledgment of the value given to the opportunity to be heard in the face of an exercise of authority apt to affect one's interests. But it is the emphasis of the case law on how the key question in each instance will be the matter of *content* – what the demands of procedural fairness require in the given case – that supplies perhaps the most important indication of an orientation to the position of the subject in the face of an exercise of administrative power.²⁶ While this question of appropriate content will also be shaped by the statutory context and other issues going to the nature of the relevant power (a point to which I return momentarily), the view that the demands of procedural fairness must necessarily be tailored to the context in which they arise indicates much about the concern of the law for the fair treatment of the subject within the particular authority relationship within which she or he is participating.²⁷

We might also detect a nod in the dignitarian direction in how the Australian courts have tightly policed the scope of attempts at legislative modification or override of the common law of procedural fairness.²⁸ This has been seen especially in the context of statutory efforts to provide a “codified” statement of the applicable rules, where the “principle of legality” is often cited in support of restricting any such limitations to the scope of their express formulation and no more.²⁹ The same might also be said for the cautiousness with which the Australian courts – at least in the administrative law context³⁰ – have turned to the distinctly utilitarian consideration of whether affording procedural fairness would have made a difference to the outcome of a decision. Though language suggestive of this overtly consequentialist evaluative prism can at times be detected, its influence at this stage seems

²⁴ This point was captured especially forcefully by Deane J's comment in *Kioa v West* (1985) 159 CLR 550, 632, referring to the specific power at issue in that case: “[t]he making of a deportation order against a prohibited immigrant drastically and adversely changes his rights and, to some extent, dehumanises his status”.

²⁵ See, eg *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

²⁶ Mason J's formulation in *Kioa v West* (1985) 159 CLR 550, 585 is often quoted: “The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?”.

²⁷ Here we might note Mason J's prescriptions in *Kioa v West* (1985) 159 CLR 550, 585, that this “flexible obligation” means that the relevant statutory power “in accordance with procedures that are fair to the individual in light of the statutory requirements, the interests of the individual, and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations”. A helpful list of established general principles of the content of procedural fairness is provided in Robertson, n 13 at para accompanying fn 55.

²⁸ See, eg Matthew Groves, “Exclusion of the Rules of Natural Justice” (2013) 39 Mon LR 285.

²⁹ See *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252.

³⁰ To this end we might contextualise the explicitly utilitarian reasoning of *Stead v State Government Insurance Commission* (1986) 161 CLR 141 as shaped by concerns specific to a judicial proceeding. Perhaps more importantly, however, the High Court in that case suggested a more cautious approach to the appropriateness of consequentialist evaluations of whether the alleged breach of natural justice would have made any difference to the outcome of the case is appropriate when the alleged denial of natural justice affects the entitlement to make submissions on a question of fact rather than a question of law. With respect to the former – which, we might assume, is most likely to arise in the context of administrative decision-making – the judgment notes that “it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference” (at 145). See also, Edelman, n 7 at Pt 3(1) (discussion of the case).

to be limited to the question of the discretion to refuse relief rather than the application of the rules themselves.³¹ Indeed on this point it is worth clarifying that the consequentialist-sounding requirement, accepted since *Lam*, that a person who seeks to establish a breach of the rules of procedural fairness must demonstrate “practical injustice” speaks not to the *outcome* of the decision, but to the unfair impairment of the opportunity to be heard *before* such a decision is made.³²

The retreat since *Kioa* from the doctrine of “legitimate expectations” might, however, be thought to signal a lamentable departure from this relational orientation.³³ The idea of “legitimate expectations”, after all, directs attention to the subjective experience of a person in the context of an exercise authority apt to affect her or him. Yet this would, I think, be a premature conclusion. The position presently taken on the fate of the doctrine of legitimate expectations might suggest its likely irrelevance to the question of the *duty* to afford procedural fairness – the class of “interests” to which that duty is thought to apply now being so wide as to incorporate any work that might previously have been thought to be done by the notion of a legitimate expectations³⁴ – but its potential relevance to the question of the *content* of that duty has arguably not been entirely dismissed.³⁵ Irrespective of the fate of the doctrine of legitimate expectations, however, there are strong suggestions that the law on procedural fairness in Australia remains unimpaired in its commitment to a wide view of the range of subjective experiences of the exercise of administrative authority that might need to be addressed when determining the content of a fair opportunity to be heard in the given instance.³⁶

5. SITUATING THE “LIMIT” CASES: PROCEDURAL FAIRNESS AND ITS INSTITUTIONAL CONTEXT

But what to make of those cases that see the courts uphold a statutory direction that *does* operate to effectively oust common law procedural protections?³⁷ Or those that accept that the required content of procedural fairness might, in the context of the exercise of certain kinds of powers, be reduced to “nothingness”?³⁸ The suggestion I want to advance is that we might regard each of these cases as a kind of “limit” case that runs against the logic otherwise upheld by the rules of procedural fairness. That is, these instances likely indicate less about weakness or internal incoherence within those rules than they do the character of the surrounding legal and institutional context in which those rules otherwise presumptively apply.

³¹ See eg. the reasoning of McHugh J in *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 102 that “once a breach of natural justice is proved, a court should refuse relief only when it is confident that the breach could not have affected the outcome”. See also *Minister for Immigration & Border Protection v WZARH* [2015] HCA 40, [60] (Gageler and Gordon JJ).

³² *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [37] (Gleeson CJ). This reading is supported by the clarification advanced in *Minister for Immigration & Border Protection v WZARH* [2015] HCA 40, [58] (Gageler and Gordon JJ): “*Lam* is not authority for the proposition that it is incumbent on a person who seeks to establish a denial of procedural fairness always to demonstrate what would have occurred if procedural fairness had been observed”.

³³ See especially the reasoning reflected in *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, reiterated most recently in *Minister for Immigration & Border Protection v WZARH* [2015] HCA 40, [30] (Kiefel, Bell, and Keane JJ), [61] (Gageler and Gordon JJ).

³⁴ Thus following the formulation presented by Brennan J in *Kioa v West* (1985) 159 CLR 550, 619, that a “presumption” in favour of the duty to afford natural justice applies to any statutory power “the exercise of which is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public”.

³⁵ See *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [34] (Gleeson CJ); cf *Minister for Immigration & Border Protection v WZARH* [2015] HCA 40, [30] (Kiefel, Bell and Keane JJ), [61] (Gageler and Gordon JJ).

³⁶ See further the comments in Melissa Perry and Kristen Zornada, “Administrative law: Procedural Fairness and Cultural Diversity: Recent Decisions in Migration: Part 2” (2014) 88 ALJ 863, on the Full Federal Court decision in *SZRUR v Minister for Immigration & Border Protection* (2013) 216 FCR 445 with respect to the Court’s refusal to allow difficulties involved in ensuring an unrepresented litigant takes full advantage of the opportunity to advance his or her case to encroach upon the obligation to provide that opportunity.

³⁷ See *Seiffert v Prisoners Review Board* [2011] WASCA 148.

³⁸ *Kioa v West* (1985) 159 CLR 550, 615 (Brennan J).

For instance, judicial acceptance of a clear legislative displacement of the common law rules of procedural fairness might be seen as driven by a particular view of the source of the obligation to afford procedural fairness (the relevant statute rather than the common law), as accompanied by a compatible conception of the court's supervisory role in judicial review (to enforce parliamentary intent).³⁹ Unequivocal statutory language that purports to oust the requirements of procedural fairness thus must, on this view, be taken on its own terms. As for the reduction of the content of procedural fairness potentially to "nothingness" in some instances, this might equally be seen as expressing an institutional or indeed constitutional reluctance, on the part of the courts, to have the final say on competing public interest considerations generated by the nature of the power being exercised. This too would be informed by a process of statutory construction.⁴⁰ Again, therefore, this seems to indicate much less about problems internal to the law of procedural fairness than it does about wider contests relating to the appropriate reach of judicial review.⁴¹

But the fact that these examples do arise, and then tend to be resolved in the manner in which they are, does much to call our attention to the conditions within which any account of the purpose, value or justification for the rules of procedural fairness will be situated. To say that the common law of procedural fairness in Australia is not of itself in need of reform, therefore, is not to say that the security of its orientation to the dignitarian demands implicit in the authority relationships at issue is assured.⁴² The examples just traversed need to be placed not only in the context of a commitment to one or other view of the source of the principles of judicial review and the inherent orientation away from or towards the position of the individual that these competing "statutory" and "common law" accounts appear to entail.⁴³ They need also to be considered in light of the specific *methods* through which the enterprise of judicial review is conducted.

Here we might consider how there is nothing intrinsic to the statutory interpretation prescriptions for determining the consequences of breach of requirements attaching to statutory powers set out in the oft-cited case of *Project Blue Sky*⁴⁴ that demands consideration of such questions as what is at stake, in the alleged breach, for the person affected. The *Project Blue Sky* method instead determines the lawful parameters of the exercise of administrative authority wholly by reference to the intentions of the "top" of the authority relationship with little or no regard for its experience at the "bottom". Some of the complaints which have met the now ascendant *Project Blue Sky* approach,⁴⁵ such as the apparent neglect of the approach towards the "seriousness" of the breach, or its effects on "fundamental rights and freedoms", could well be fruitfully (re)articulated in the terms of the present analysis.

The immediate point, however, is that all concerns of administrative law doctrine will clearly be shaped, however subtly, by prevailing views on such issues as the source of the principles of judicial

³⁹ This now ascendant position, consolidated by the logic of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (discussed below), squarely endorses the view taken by Brennan J in *Kioa v West* (1985) 159 CLR 550, 610-611, that the source of the obligation to afford procedural fairness is statutory rather than imposed by the common law.

⁴⁰ As seen in the context of national security: see eg, Caroline Bush, "National Security and Natural Justice" (2008) 57 *AIAL Forum* 78.

⁴¹ Indeed, both examples would appear to fit within the received view of why the content of procedural fairness must be flexible, and which among other things involves regard to questions of statutory context and considerations of public interest: see *Kioa v West* (1985) 159 CLR 550, 585 (Mason J), as reproduced above, n 26.

⁴² Concerns analogous to this are articulated forcefully in Chantal Bostock, "Procedural Fairness and the AAT's Review of Visa Cancellation Decisions on Character Grounds" (2010) 17 *AJ Admin L* 77, 85, Bostock canvasses the "dignitarian" and "instrumentalist" accounts of the "value" of the rules of procedural fairness.

⁴³ This debate famously played out in Australian law through the divisions between Mason J and Brennan J in *Kioa v West* (1985) 159 CLR 550 on the question of the source of the duty to afford procedural fairness. The specific question of perspective or orientation raised here is touched upon in Stephen Gageler, "Legitimate Expectation: Comment on the Article by the Hon Sir Anthony Mason AC KBE" (2005) 12 *AJ Admin L* 111, 113, in the context of a discussion of the common law doctrine of "legitimate expectations".

⁴⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

⁴⁵ See eg, the strident critique of this method articulated in Nye Perram, "Project Blue Sky: Invalidity and the evolution of consequences for unlawful administrative action" (2014) 21 *AJ Admin L* 62.

review or the preferred methods through which its questions are resolved. But for the orientation of the rules of procedural fairness, these stakes might be especially high. The rules of procedural fairness arguably do a better job than any other direction or principle of administrative law at recognising what the exercise of authority can mean to people. They concern themselves squarely with the *experience* of that exercise and the possibilities for the expression of agency within it.⁴⁶ It is thus precisely because the rules of procedural fairness occupy a special place and perform a special kind of function on this score that compatible overarching conditions for their security are likely to be especially important to their capacity to fulfil those demands.

But we might here pause to consider a different, and perhaps more optimistic, point that can be stated through the following question. Rather than representing some kind of “outlier” status, might the orientation towards the subject’s experience of the exercise of administrative authority that is reflected in our rules of procedural fairness be taken as an indication of a more general commitment to how conditions of authority in the administrative state should be convened? This appears to be the suggestion contained in Robertson’s observation that the demands of answerability and responsiveness that he regards as captured in the rules of procedural fairness demonstrate that we no longer subscribe to a “command model of government” in Australia.⁴⁷ More than the present analysis is needed to explore that suggestion fully. But what I hope is now clear is that there *is* something important to be taken from the rules of procedural fairness when thinking about how we convene and manage conditions of authority in the Australian administrative state. It is precisely because those rules focus on the point at which that authority actually touches the circumstances of the subject that they remind us of what, at bottom, is at stake in *all* exercises of authority: the capacity of one person to change the position of another. This awareness, however, should not be taken as given. Much is and will always be at stake in competing justifications for the rules of procedural fairness for whether we can insist that the exercises of authority to which those rules apply are convened *as* a relationship between repository and subject, rather than a mere exercise of power by the former over the latter.

6. CONCLUSION

We are yet in the Australian cases on procedural fairness to see the kind of overt clash between “dignitarian” and “utilitarian” justifications recorded in the recent United Kingdom case of *Osborn* and the legislative response to it.⁴⁸ So far, our engagement with those underlying philosophical questions has been much more implicit. But, one might argue, they have nonetheless still been present. Quite apart from seminal cases such as *Kioa* and the line of authority generated from it, the impulse of the 1970s reforms of Australian administrative law very arguably emphasised one side of the “dignitarian versus utilitarian” contest over the other. Undoubtedly, the goal of good and more efficient government decision-making was there in view. But in its concern for a fair and simplified experience of the making of administrative decisions on the part of the person subject to those decisions, the introduction of the merits review system in particular says much about the priority of dignitarian

⁴⁶ For a philosophical discussion of the importance of procedure to human agency and dignity see especially Jeremy Waldron, “The Rule of Law and the Importance of Procedure” in James E Fleming (ed), *Getting to the Rule of Law* (NYU Press, Nomos Series 1, 2011); Jeremy Waldron, “How Law Protects Dignity” (2012) 71 *Camb LJ* 200, 208-210. See also Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012) 41-42.

⁴⁷ Also speaking directly to the matter of the orientation of the rules of procedural fairness that has been the focus of the foregoing discussion, a further interesting point made by Robertson is his suggestion that there has been “a shift in focus from the nature of the power in the hands of the decision-maker to the effect on the individual of an exercise of governmental power and thus, in deciding whether or not procedural fairness is required, to decisions that affect the status of the person affected”. Robertson, n 13 at text following fn 45.

⁴⁸ *Osborn v Parole Board* [2013] UKSC 61 addressed the right to an oral hearing in the context of parole hearings. As discussed at length in Edelman’s contribution to this symposium, the judgment saw the UK Supreme Court overturn the Court of Appeal’s explicitly utilitarian reasoning on the right to an oral hearing in favour of an emphasis on the dignitarian significance of such an opportunity: *Osborn*, [64]-[96], esp [68], [76], [81] (Lord Reed; the rest of the Court agreeing). The Supreme Court’s approach has however effectively been reversed by the enactment of legislation which reinstates a utilitarian evaluation of the consequences of an alleged breach of procedural fairness in the form of a direction that relief must not be granted if it appears highly likely that the outcome would not have been affected by the alleged failure to afford an opportunity to be heard. See discussion in Edelman, n 7 at Part 2.

considerations in the formulation of those reforms. Indeed, it is hard to imagine that the resilience and success of that system has been secured purely as a result of its contribution to more efficient government decision-making. The more plausible message would seem to be that merits review has sustained its place and appeal because of its contribution to the intelligibility and acceptance of exercises of administrative authority to and by those whose position stands to be affected by them.

Thinking about the rules of procedural fairness as not just valuable in their own right but as attaching to the particular features of the authority relationship within which an exercise of administrative power occurs might also prepare us to think more deeply about how this cardinal demand of administrative law can be met across the range of new forms through which the exercise of public authority operates to change the position of persons. Keeping the distinctly relational demands of administrative authority in view might especially help us to think about how an appropriate state-subject relationship can be maintained in contexts such as contracted-out government activity.⁴⁹ It might be that consideration of the ultimate purpose of procedural fairness in such settings will lead to very different debates than those we have entertained so far. But even if so, the thread that will join those debates to ones traversed so far will be the need to understand what is at stake in the different perspectives advanced, and the need to accept that if one view of those stakes is to be promoted over another, it will be necessary to argue the case for why that should be so.

⁴⁹ For a brief consideration of the fate of procedural fairness in the context of the newer institutional designs of the contemporary administrative state, especially contracting-out, see Kristen Rundle, "From the Perspective of Personhood: Thoughts on Rod Macdonald's Conception of Procedural Fairness" in Richard Janda, Rosalie Jukier and Daniel Jutras (eds), *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (McGill University Press, 2015).