

NATURAL JUSTICE – AN ALTERNATIVE GROUND FOR INTERVENTION IN CORPORATE DECISION MAKING?

by

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Introduction

This paper seeks to show that the existing regulation of corporate decision making fails to provide a comprehensive shield to minority shareholders. Instead of urging another addition to the plethora of statutory controls over corporations the authors suggest a more radical, but simple solution to this lacuna.

This radical and simple solution would be to apply the rules of natural justice to corporate decision making, thus providing a safety net of last resort for minority shareholders who are unable to gain the protection of a statutory or common law remedy. There is no doubt that at present the law governing the decision making powers of companies, at a board level or in the general meeting, are inadequate, at least insofar as procedural matters are concerned. As injustice may arise as a result of this inadequacy it will be submitted that the principles of natural justice should apply to company decisions.

Against this backdrop this article considers the existing regulation of corporate decisions before examining the bases for the imposition of natural justice. The grounds for denying the implication of natural justice will also be discussed. Ultimately we will conclude that there is no insurmountable barrier to the application of the rules of natural justice to corporate decision making organs.

The authors acknowledge that the solution we propose involves important policy considerations. This policy debate has been addressed in other articles.¹ Our paper is based on the premise that once it is accepted that it is possible to move or adjust the private/public boundary then important advantages could occur to minority shareholders.

(a) The Existing Regulation of Corporate Decisions

Before considering the arguments for change it is necessary to query whether the principles of natural justice would add anything to existing remedies available to a shareholder affected by a corporate decision.

There is the argument that there is no need for the principles of administrative law to enter the domain of companies, as there are already common law² and statutory remedies³ which may be available to an aggrieved shareholder affected by a particular decision of a board of directors or a general meeting. But these remedies have been hamstrung by the reluctance of judges to become

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1 For example, M. Batskos, "Applicability of Administrative Law to Government Business Enterprises: The Victorian Perspective Under the State Owned Enterprises Act 1992" (1993) No. 14 *Australian Administrative Law Newsletter*, Campbell and J. Evers, "Freedom of Information – Where to Now"? *Info One 1st National Conference on Freedom of Information*, Hindley Parkroyal, Adelaide, 22-24 September 1993; M. Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77; Rt. Hon. Sir H. Woolf, "Public Law – Private Law: Why the Divide? A Personal View", (1986) *Public Law* 220.

2 For example the doctrine of abuse of voting power. See *Allen v. Gold Reefs of West Africa* [1900] 1 Ch 656.

3 Such as ss.260, 461 and 1324 of the *Corporations Law*.

involved in corporate decision making. This understandable reluctance has been founded upon judicial acknowledgment of the mutual consent between the members upon which the corporate form is based – in becoming a member each individual accepts the decision making powers of the board of directors and of the majority of members in general meeting.

Thus, in *Wayde v. New South Wales Rugby League Ltd*⁴ a majority of the High Court was at pains to point out that the existing statutory remedies did not give the courts a licence “for an unwarranted assumption of the responsibility for the management of the company”.⁵ The decision in *Zephyr Holdings Pty Ltd v. Jack Chia (Australia) Ltd*⁶ also represents a further example of the judiciary limiting grounds for review of the merits of commercial decisions under the statutory remedies embodied in the *Corporations Law*.

It is apparent that at least some commentators are dissatisfied with the scope of remedies available to members of companies. Indeed, the Company and Securities Advisory Committee has recommended that the current statutory remedies be complemented by a statutory derivative action.⁷ This ongoing search for additional protective measures for members of corporations has usually terminated at a call for greater statutory regulation. We consider that the potential application of natural justice to at least some decisions taken by company members in general meeting or by a board of directors might be a better and easier alternative.

In the context of judicial and legislative concern that corporate decisions be just, it seems strange that little attention has been paid to the imposition of a requirement that decisions be reached in a procedurally fair manner. At present the requirements as to the actual conduct of company general meetings are not statutorily defined while the common law rules are imprecise and therefore offer little protection to minority shareholders.⁸ Until the early 1990s the literature in this area was relatively silent. Currently there is a major debate about the extent to which corporations should be subject to administrative law.⁹

Highlighting this gap in protection is the case of *Re Direct Acceptance*¹⁰ where a general meeting of the company was convened for the purpose of considering a scheme of arrangement. The meeting was conducted at a noisy venue which was too small for the number of attendees to be suitably accommodated. After just half an hour the Chairman called for a vote upon the motion, despite objections from the floor that there had been an inadequate opportunity for debate. In respect of an application for court approval of the resolution, pursuant to s.315(4) of the *Companies (New South Wales) Code*,¹¹ it was in part argued that the Court’s approval should not be granted upon the basis that the chairperson had breached his common law duty to supervise the general meeting satisfactorily. In the course of dismissing this attack upon the validity of the resolution, McLelland J noted that:

4 (1985) 61 ALR 225.

5 *Ibid* at 230.

6 (1988) 14 ACLR 30.

7 “Report on the Introduction of the Statutory Derivative Action”, July 1993. See also Discussion Paper No. 11, July 1990 of the Companies and Securities Law Review Commission which is titled “Enforcement of the Duties of Directors and Officers of a Company by means of a Statutory Derivative Action”.

8 For an outline of the existing controls see W.J. Taggart *Horsleys Meetings Procedure Law and Practice* 3rd edn. Butterworths Sydney 1989.

9 See G. Airo-Farulla, “_Public_ and _Private_ in Australian Administrative Law” (1992) 3 *Public Law Review* 186; J. Barnes, “Is Administrative Law the Corporate Future?” (1993) 21 *Australian Business Law Review* 66; A. Hutchinson, “Mice Under a Chair: Democracy, Courts and the Administrative State” (1990) 40 *University of Toronto Law Journal* 374; H.W. MacLauchlan, “Reimagining the State” (1990) 40 *University of Toronto Law Journal* 405; C. Sampford, “Law, Institutions and the Public/Private Divide” (1991) 20 *Federal Law Review* 185; G.A. Smith, “Public Duty and Private Power in Administrative Law” (1990) 40 *University of Toronto Law Journal* 412.

10 (1987) 5 ACLC 1037.

11 See now s.411 of the *Corporations Law*.

“... on such a matter as this the chairman as a matter of law has a wide discretion with which the court will not interfere, unless the exercise of that discretion can be shown to be invalid, eg, on the ground that it was exercised in bad faith. ... The law recognises that in a purely procedural matter such as the control of the debate the chairman must of necessity have considerable latitude of action in making decisions which will bind those present, particularly when his decision has the support of a majority of the meeting ...”¹²

McLelland J carried on to note that the absence of an adequate opportunity to debate the proposed scheme of arrangement at the general meeting “reinforced the desirability” of the Court giving close consideration as to whether the scheme ought be approved. In the end, such approval was not granted.

It seems odd that McLelland J would on the one hand find that the chairman had fulfilled his legal duties, while at the same time reaching the conclusion that there had been an inadequate opportunity to debate the motion. The time is clearly ripe for a reconsideration of the law governing the manner in which decisions are made by corporate decision making organs. Some judges, like McLelland J, are facing the unnecessary dilemma of paying lip service to the formal state of the law while nevertheless conjuring a fair result.

We would argue that the principles of natural justice should, and can be applied to corporate decision making organs, without violating any fundamental principle of corporate or administrative law. While the imposition of the rules of natural justice would afford an alternative to that used in *Re Direct Acceptance* it would not be an avenue for the judicial reconsideration of corporate decisions on their merits. By using the principles of natural justice judges would only be ensuring that the binding decision of the majority was made upon an informed basis. Thus the courts would not be second guessing the decision making organs of companies, and therefore avoiding the temptation to review the merits of a commercial decision.

The Bases for the Imposition of Natural Justice

It is our argument that there is no real case law barrier which excludes extending the application of the rules of natural justice to the processes of corporate decision making. We maintain this argument on two grounds. First, that the post 1985 approach to the Australian High Court, commencing with *Kioa v. Minister for Immigration and Ethnic Affairs*,¹³ could easily be used to provide minority shareholders with the shield of natural justice.¹⁴ Secondly, we argue that recent judicial approaches to corporate law matters would bring many aspects of corporate decision making within the operation of natural justice principles outlined in the Privy Council decision of *Durayappah v. Fernando*.¹⁵ The decision in *Durayappah* has been subsumed by the developments in *Kioa* and *Ainsworth v. Criminal Justice Commission*¹⁶ but our argument is that, even if the holding in *Kioa* was not accepted as making a major change to the operation of the principles of natural justice, the holding in *Durayappah* could be used to support our case.

12 *Supra* n.10 at 1041-1042.

13 (1985) 159 CLR 550.

14 It is beyond the scope of this paper to outline in detail the precise formulation of minority shareholders remedies if our arguments were accepted. Of course any extension of natural justice would require further analysis of how it would practically operate. The inadequacy of the existing remedies for minority shareholders has been recognised by a number of law reform committees. For example, see Cohen Report, Cmd 6659, United Kingdom 1945; Jenkins Report, Cmnd 1749, United Kingdom 1962; Lawrence Report, “Interim Report of the Select Committee on Company Law”, Ontario 1967 and the Dickerson Report, “Proposals for a New Business Corporations Law for Canada”, Ottawa, 1971. In Australia see the comments of the Companies and Securities Advisory Committee, “Report on the Introduction of the Statutory Derivative Action”, July 1993. It is considered that should the statutory derivative action be introduced, there will still be a place for the implication of the rules of natural justice into corporate decision making. For limitations associated with the statutory derivative action see, I. Ramsay, “Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action” (1992) 15 *UNSWLJ* 149.

15 [1967] 2 AC 337.

16 (1992) 106 ALR 11.

(a) The High Court and Procedural Fairness

A series of Australian cases since 1985 have established a common law duty imposed on public decision makers to accord procedural fairness unless there is a clear statutory authority to ignore that duty.¹⁷ This new approach by the High Court has radically affected the *Durayappah* formula. Essentially the *Durayappah* formula was a qualifying test; unless a person could show that they met various criteria set out in *Durayappah* the Court or the decision maker did not have to worry about the issue of natural justice.

The new High Court approach is more like a minimal compliance approach. A decision maker or Court must always work on the basis that a person is entitled to natural justice, unless there is a clear statutory exemption, and then establish whether that person has received at least the minimal level of procedural fairness¹⁸ necessary in the light of the circumstances of that particular case. The factors mentioned in the *Durayappah* formula and its later interpretations of rights, interests and legitimate expectations, then become crucial determinants of the level of procedural fairness owed to a person affected by a particular decision or exercise of power.

For the purposes of this article this new approach to procedural fairness significantly strengthens the argument that minority shareholders can claim a right to procedural fairness. This claim is even stronger when we examine the various propositions developed by the High Court since 1985 and the range of decision making covered by a requirement of procedural fairness.

The following propositions can be extracted from Australian administrative law cases since 1985:

1. A common law duty to accord procedural fairness unless a clear contrary statutory exemption.
2. The presumption of procedural fairness applies to the exercise of any statutory power.
3. The presumption will also apply to non-statutory powers including prerogative powers.
4. It is the nature of the power and the interest affected by that exercise which is crucial and not the formal character of the power.

The idea of a common law duty was put forward by Mason J in *Kioa* and has been endorsed by the other members of the High Court in subsequent cases.¹⁹ Brennan J argued in *Kioa* that the presumption for a duty to observe natural justice applies when:

“... the exercise of [any statutory power] 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. Of course, the presumption may be displaced by the text of the statute, the nature of the power and the administrative framework created by the statute within which the power is to be exercised”.²⁰

The High Court and various State Supreme Courts have now applied the rules of procedural fairness to a wide range of decision makers exercising both statutory and prerogative powers. These have included the Governor in Council, Royal Commissioners, Ministers and investigations conducted by an inspector under the companies legislation.²¹ Since the early 1980s Australian courts have been extending the coverage of the principles of natural justice or in modern parlance procedural fairness. The extent of this coverage has reached the stage where

¹⁷ Commencing with *Kioa v. Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 at 584-585, 600-601, 632.

¹⁸ On the content of procedural fairness see B. Dyer, “Determining the Content of Procedural Fairness” (1993) 19 *Monash U.L.R.* 165.

¹⁹ See *Annetts v. McCann* (1990) 170 CLR 596. See also *Ainsworth v. Criminal Justice Commission* (1992) 106 ALR 11.

²⁰ (1985) 159 CLR 550 at 619.

²¹ The High Court in *Annetts* (1990) 170 CLR 596 and *Ainsworth* (1992) 106 ALR 11 have clearly indicated that the ruling in *Testro Bros v. Tait* (1963) 109 CLR 353 would no longer apply in Australia.

judicial supervision of the fairness of the decision making procedures of a corporate body on behalf of minority shareholders may only be a relatively minor step.

The recent decisions of the High Court in *Ainsworth v. Criminal Justice Commission* and in *Annetts v. McCann* make it clear that not only is there a common law duty to accord procedural fairness but the duty arises as a result of the type of power being exercised and the interests being affected. In *Ainsworth* four members of the High Court wrote:

“It is now clear that a duty of procedural fairness arises, if at all, because the power involved is one which may destroy, defeat or prejudice a person’s rights, interests or legitimate expectations. Thus, what is decisive is the nature of the power, not the character of the proceeding which attends its exercise”.²²

The High Court’s approach to procedural fairness could easily tolerate the concept applying to corporate decision making. The power exercised by the board of directors or the general meeting of a company certainly is able to prejudice a person’s legitimate expectations or interests. The nature of corporate decision making power is certainly of the type which demands that procedural fairness at some level should be accorded to shareholders.

In the next section we will establish that in some instances, minority shareholders could meet the requirements of the stricter and more exclusive *Durayappah* formula: the High Court’s post 1985 approach to procedural fairness only further strengthens the submission that shareholders be accorded natural justice.

(b) The Traditional Approach

If it cannot be accepted that the developments in *Kioa* have led to a major change in the law of natural justice so that its principles can be deductively extended into the area of protecting minority shareholders per se we would maintain that developments in the law from *Ridge v. Baldwin*²³ to *Durayappah* could be used to justify this change. The decision of *Ridge v. Baldwin* removed restrictions upon the operation of natural justice which had developed in a line of authority²⁴ from Lord Atkin’s statement in *R. v. Electricity Commissioners: Ex parte London Electricity Joint Committee Co. Ltd.*²⁵ In the leading judgment in *Ridge v. Baldwin* Lord Reid rejected the nature of the decision making body as the determinative factor in the implication of natural justice, adopting instead the decision in *Wood v. Woad*²⁶ which simply looked to the existence of the power in a body to decide matters as attracting the rules of natural justice:

“This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals”.²⁷

Ridge v. Baldwin is therefore important as the case which triggered the subsequent expansion in the application of natural justice. But Lord Reid provided little positive guidance for defining the parameters of natural justice in the future, merely noting that natural justice is amenable to further development²⁸ and that previous decisions indicated that it would be inapplicable in some restricted circumstances.²⁹

22 (1992) 106 ALR 11 at 18 (per Mason CJ; Dawson, Toohey and Gaudron JJ).

23 [1964] AC 40.

24 *Testro Bros. v. Tait* (1963) 109 CLR 353; *Franklin v. Minister of Town and Country Planning* [1948] AC 87; *Nakkuda Ali v. Jayaratne* [1951] AC 66. These decisions considered that the nature of the decision making authority was the crucial factor in deciding whether the principles of natural justice would apply to the organisation in question.

25 [1924] KB 171 at 205.

26 (1874) 9 LR (Ex) 190.

27 *Ibid* at 196.

28 *Supra* n.23 at 72-73.

29 Such as particular categories of dismissal from employment, (offices held at pleasure and master/servant, at 65-66) and also where decisions of government are made upon grounds of wider social policy (at 72).

The Privy Council decision in *Durayappah v. Fernando*³⁰ attempted to answer doubts arising from the decision in *Ridge v. Baldwin* by suggesting that the otherwise unlimited scope of natural justice might be confined if three factors were considered:

1. the nature of the individual's interest affected by the decision;
2. the circumstances in which the challenged decision may be made; and
3. the nature of the sanctions which may be imposed.³¹

In subsequent decisions a fourth factor has been added:

4. the nature of the tribunal exercising the decision making power.³²

These factors may at first sight indicate the triumph of objectively ascertainable parameters over the otherwise broad notion of fairness which underlies natural justice, but the tension between notions of fairness and attempts to delimit its application by objective standards remains. This tension may be illustrated by considering the application of the *Durayappah* factors to company decision makers. It is our contention that in many cases a minority shareholder would be able to demonstrate that their case came within the parameters where natural justice could be applied.

(i) *The Nature of the Individual's Interest Affected by the Decision*

The interest of a member in a company, (be it a company limited by shares, a company limited by guarantee, a no liability company or an unlimited liability company) represents a bundle of proprietary rights which may be affected by a corporate decision.³³ The first element is satisfied.

(ii) *The Circumstances in which the Challenged Decision may be made*

At one time it may have been said that the board of directors or the general meeting had an unfettered discretion to decide matters within their jurisdiction; only confined by the requirement that decisions be in the interests of the company as a whole.³⁴ However, recent commentators suggest³⁵ that this broad discretion is not necessarily a bar to the implication of natural justice as the courts may view this requirement on a subjective basis, by examining the actual grounds upon which a decision is made.³⁶ Alternatively, the existence of an absolute discretion will not exclude the rules of natural justice provided that the other *Durayappah* factors favour their implication.³⁷ Thus, in *Heatley v. Tasmanian Racing and Gaming Commission*³⁸ a wide discretion was nevertheless held subject to natural justice because the Court appears to have concentrated upon the subjective nature of the serious consequences for the appellant arising from the decision of the Racing Commission.³⁹ Nevertheless there is contrary authority to suggest that the existence

30 [1967] 2 AC 337.

31 *Ibid* at 349.

32 *Salemi v. MacKellar (No. 2)* (1977) 137 CLR 396 at 420 per Gibbs J; noted in S.D. Hotop, *Principles of Australian Administrative Law* 6th edn. Law Book Co. Sydney 1985 at 177.

33 *Pender v. Lushington* (1887) 6 Ch D 70; *Northwest Transportation v. Beatty* (1887) 12 AC 589. See also s.1085 of the *Corporations Law*.

34 *Allen v. Gold Reefs of West Africa* [1900] 1 Ch 656 at 671 per Lindley MR; *Peters American Delicacy v. Heath* (1939) 61 CLR 457.

35 M. Aronson and N. Franklin *Review of Administrative Action* Law Book Co. Sydney 1987 at 105; Hotop, *op. cit.* at 185.

36 *Trivett v. Nivison* [1976] 1 NSWLR 312. It may therefore be the case that the objectivity of the *Durayappah* factors is succumbing to the subjective demands of "justice"; thereby allowing a broader category of decision makers to be bound by the rules of natural justice.

37 *Salemi v. MacKellar (No. 2)* (1977) 137 CLR 396 at 420-421.

38 (1977) 51 ALJR 703.

39 *Ibid* at 706, Murphy J noted that a warning off notice "will probably have an adverse effect on the person and his reputation and possibly his livelihood. It will seriously alter his legal position". Jacobs J also considered the adverse consequences to the appellant, see his comments at 712.

of a broad discretion may operate to exclude natural justice.⁴⁰ Thus, in *Salemi v. MacKellar (No. 2)*⁴¹ a majority held that natural justice would not be implied in the case of a Minister's unfettered discretion, a decision which was only overruled in *Kioa v. Minister for Immigration and Ethnic Affairs*⁴² as a result of statutory provisions making decisions under s.18 of the *Migration Act* subject to judicial review and also requiring the Minister to give reasons for his decision upon request.⁴³ In other cases where natural justice was implied there may have been a broad discretion but the decision maker is nevertheless directed to consider some particular fact.⁴⁴

Another line of authority suggests that the discretion of the board of directors may not be as unfettered as originally thought. While there is no doubt that the directors owe a fiduciary duty to the company,⁴⁵ in some circumstances they will also owe a fiduciary duty to shareholders as well as creditors. In *Walker v. Wimborne*,⁴⁶ Mason J considered that the trial judge was in error because:

"... the emphasis given by the primary judge to the circumstances that the group derived a benefit from the transaction tended to obscure the fundamental principles that each of the companies was a separate and independent legal entity, and that it was the duty of the directors of Asiatic to consult its interests and its interests alone in deciding whether payments should be made to other companies. In this respect it should be emphasised that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them".⁴⁷

Recently the House of Lords has reiterated that the director's fiduciary duty is not solely owed to the company. In *Winkworth v. Edward Barron Development Co. Ltd.*,⁴⁸ Lord Templeman commented that:

"[A] company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred and the company is not obliged to avoid all ventures which involve an element of risk, but the company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts. The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated

40 See *Ex parte R; (ex rel. Warringah Shire Council); Re Barnett* (1967) 70 SR (NSW) 69.

41 (1977) 137 CLR 396.

42 (1985) 62 ALR 321.

43 *Ibid* at 342-343 per Mason J; 359 per Wilson J; 378 per Brennan J and 381 per Deane J.

44 *FAI Insurances Ltd v. Winneke* (1982) 151 CLR 342. (Governor was required to consider the financial position of the applicant.)

45 *Percival v. Wright* [1902] 2 Ch 421; Contrast the decision of *Coleman v. Myers* [1977] 2 NZLR 225 at 324 where Woodhouse J stated: "As I have indicated it is my opinion that the standard of conduct required from a director in relation to dealings with a shareholder will differ depending upon all the surrounding circumstances and the nature of the responsibility which in a real and practical sense the director has assumed towards the shareholder ... They include, I think, dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course, the extent of any positive action taken by or on behalf of the director or directors to promote it. In the present case each one of those matters had more than ordinary significance and when they are taken together they leave me in no doubt that each of the two directors did owe a fiduciary duty to the individual shareholders". Australian support for this view can be found in *Hurley v. BGH Nominess* (1984) 10 ACLR 197 at 206 and *Hooker Investments v. Email* (1986) 10 ACLR 443.

46 (1976) 137 CLR 1.

47 *Ibid* at 6-7.

48 [1987] 1 All ER 114.

or exploited for the benefit of the directors themselves to the prejudice of the creditors”.⁴⁹

This extension of the fiduciary duty reflects that the discretion of directors is increasingly being constrained and that it is no longer correct to deny natural justice on the basis that the decision making organs of a company have an unfettered discretion. Furthermore, the enactment of statutory remedies for minority shareholders such as ss.260, 461 and 1324 of the *Corporations Law* all point to the directors’ discretion being restricted.

Therefore the second *Durayappah* factor, while not clearly being supportive of the application of natural justice to the decisions of a board of directors, or the general meeting, is not necessarily contrary to its implication. A directors’ discretion is not unfettered and there is the strong likelihood of directors’ duties being owed to shareholders.

(iii) *The Nature of the Sanctions which may be Imposed*

As to the third factor, decisions of companies may have the effect of destroying property rights or affecting a person’s reputation,⁵⁰ both of which have been held sufficient to require the observance of natural justice.⁵¹ This factor supports the implication of natural justice.

(iv) *The Nature of the Tribunal Exercising the Decision Making Power*

As the decisions of a board of directors or the general meeting are not of a judicial character, this factor will militate against the application of natural justice. However, what must be remembered is that natural justice has been applied to non-commercial organisations in non-judicial, or at best, quasi-judicial circumstances,⁵² and with the increasing interventionist approach of the judiciary in the administrative law area, this factor does not carry great weight.⁵³

From the above outline it may be seen that only the first and third factors support the implication of natural justice to corporate decision makers, while the other two factors may militate against this conclusion. This points to a fundamental deficiency of the *Durayappah* formula in that no solution is offered to the situation where consideration of the factors points to contrary conclusions. It is arguable that in such situations the Courts will consider the *Durayappah* factors initially, but ultimately resolve the apparent conflict by resorting to an assessment of the relative merits of “justice” and “fairness” to the individual as against the perceived social costs in determining whether natural justice ought apply in “frontier” cases. Given the judicial and legislative concern to implement minimum requirements of justice in company decisions⁵⁴ it may be suggested that in particular circumstances the requirements of natural justice ought to be considered as ancillary to existing common law and statutory protections for minority shareholders.

49 *Ibid* at 118; the other lawlords agreed with Lord Templeman. In Australia *Winkworth v. Edward Barron Development Co. Ltd* was quoted with approval in *Jeffrey v. National Companies and Securities Commission* (1989) 15 ACLR 217 at 228. *Winkworth v. Edward Barron Development Co. Ltd* has been criticised in a number of articles; see J. Farrar, “The Responsibility of Directors and Shareholders for a Company’s Debts” (1989) 4 *Canta LR* 12; L.S. Sealy, “Directors Duties – An Unnecessary Gloss” (1988) *CLJ* 175 99 and R. Grantham, “The Judicial Extension of Directors Duties to Creditors” [1991] *JBL* 1.

50 Section 195(13) of the *Corporations Law* recognises that a member may hold proprietary interests in company property; it is submitted that a broad range of company decisions may have the effect of damaging a person’s standing in the community – a censure motion being just one example.

51 As to the destruction of property rights there can be no dispute – see *Cooper v. Wandsworth Board of Works* (1863) 14 CB (NS) 180; as to reputation see *McInnes v. Onslow – Fane* [1978] 1 WLR 1520.

52 For example, *Navarro v. Spanish Australian Club of Canberra Act Inc.* (1986-1987) 87 FLR 390.

53 See the comments by J. Barnes, “Natural Justice enters _The Political Field_” (1990) 18 *ABLR* 48 at 51.

54 In the *Corporations Law* an example of a section which imports natural justice is s.227(4). This section entitles a director to be heard upon a motion calling for his/her dismissal. There are also provisions entrenching a minimum of justice in corporate decision making; see ss.190, 195, 198, 199, 247, 260, 461 and 1094. There are also substantial equitable and common law controls on corporate decision making for which see P. Redmond *Companies and Securities Law* Law Book Co. Sydney 1992 at chapter 7; P. Lipton and A. Herzberg *Understanding Company Law* 5th edn. Law Book Sydney 1993 at chapter 17.

The *Durayappah* formula was developed at a time when the judiciary were still exercising caution with the application of the principles of natural justice. Yet despite this design feature we have demonstrated that in a number of areas a minority shareholder could mount a strong case for the application of the principles of natural justice. This case is further strengthened when we consider the current approach of the High Court of Australia to the question of natural justice or procedural fairness.

Some Reasons for Denying the Implication of Natural Justice

Where the requirements of natural justice conflict with a common law principle of greater weight, the cause of "justice" is set aside.⁵⁵ What must therefore be considered is whether the principles of private property and the privity of contract, which form an essential part of company law, should overrule the application of natural justice to companies.

The objection that judicial intervention in the corporate domain would amount to an interference with the contract embodied in the articles of incorporation⁵⁶ may be founded upon outmoded notions of contract law.

Recent decisions in areas such as the doctrine of frustration⁵⁷ and promissory estoppel⁵⁸ point to an interventionist judiciary seeking to ameliorate perceived injustices arising from laissez-faire tenets which underlie much of contract law.⁵⁹ The decision in *Forbes v. NSW Trotting Club*,⁶⁰ when considering the implication of natural justice into contractual powers, is of little authority on this point as the case was decided in the context of counsel for the respondent's concession, that the power to issue a warning off notice necessarily attracted the rules of natural justice.⁶¹ The central argument of the case was whether the Club had exercised its proprietary or its contractual powers. The concession by the respondent's counsel was no doubt in deference to *Heatley's*

55 See for example the decline of the view that Acts of Parliament were subject to judicial review despite the express provision to the contrary in an ouster clause (*Dr Bonham's Case* [1610] 8 Co. Rep. 113b at 118a; 77 ER 646 at 652; *Day v. Savadge* [1614] Hob 85 at 87; 80 ER 235 at 236-237); as the common law doctrine of the supremacy of parliament gained the ascendancy (see Lord Reid in *British Railways Board v. Pickin* [1974] AC 765 at 782). See also T. Allan, "The Limits of Parliamentary Sovereignty" (1985) *Public Law* 614; T. Allan, "Legislative Supremacy and the Rule of Law; Democracy and Constitutionalism" (1985) *Cambridge Law Journal* 111.

56 See s.180 of the *Corporations Law*. It may be argued that Tables A and B of the *Corporations Law* might be amended to provide for natural justice and thus gain the benefit of s.180. The difficulty with this approach is that Tables A and B of the *Corporations Law* can be excluded or modified (see s.176). Furthermore, "the extent of the contractual effect of the memorandum and articles is difficult to determine in the light of inconsistent court decisions and is the subject of academic debate": P. Lipton and A. Herzberg *Understanding Company Law* 5th edition Law Book Co. Sydney 1993 at 96. In addition as there is an established body of law dealing with the implication of natural justice principles into established statutory regimes it is submitted that it is preferable to import common law notions of natural justice than to increase the body of legislation. This is particularly so in light of the desire of the Federal Government to simplify the *Corporations Law*. It should be noted that on 7 October 1993, the Attorney-General, Mr Michael Lavarch announced four appointments to a Task Force to simplify the *Corporations Law* to achieve a comprehensive user-friendly law. It is also submitted that little would be achieved by amending the ASX Listing Rules to provide for natural justice. The Listing Rules will be restricted to a small category of corporations and "just how far the Listing Rules will impose obligations on the companies which seek listing on the ASX remain a matter of some doubt": R. Baxt, HAJ Ford and AJ Black *Securities Industry Law* 4th edition Butterworths Sydney 1993 at 168. The Lavarch Committee also considered that "the Listing Rules of the Australian Stock Exchange be re-drafted by those versed in statutory drafting so as to have the Rules expressed in a language and style which both facilitates clear interpretation and increases the ability to enforce such Rules in the courts". House of Representatives Committee on Legal and Constitutional Affairs, *Corporate Practices and Rights of Shareholders*, AGPS, 1991 at Recommendation 13.

57 See *Davis Contractors v. Fareham UDC* [1956] AC 696.

58 *Walton Stores v. Maher* (1988) 62 ALJR 110.

59 For a discussion of this view see P. Atiyah *An Introduction to the Law of Contract* 3rd edn. Clarendon Press Oxford London 1981 at 1-27.

60 (1979) 53 ALJR 536.

61 *Ibid* at 544 (per Gibbs J); 547 (per Stephen J); 548 (per Murphy J) and 550 (per Aickin J).

Case,⁶² despite the fact that in *Heatley* the exercise of a statutory power was in issue rather than powers vested in a company by its memorandum and articles. As such, the decision in *Forbes* should not be considered as authority for the implication of natural justice in contractual dealings.

However, in the earlier decision of *John v. Rees*⁶³ Megarry J considered the issue and made the following comment:

“Membership of a club or association is doubtless founded upon a basis of contract; but in many cases it is not merely a contract. Membership often gives the member valuable proprietary and social rights ...”⁶⁴

His Honour held that in the circumstances of that case, the privity of the contract was no bar to the implication of natural justice. In addition several decisions⁶⁵ have impliedly rejected arguments based upon the privity of contract in holding smaller companies and associations bound by natural justice. Such intervention promoting procedural fairness in company affairs⁶⁶ suggests that the principle of privity of contract is insufficient to refute the implication of natural justice in company dealings. Nevertheless, this does not resolve the matter of whether a company may exclude the principles of natural justice by a privative clause. One view is that such clauses are contrary to public policy and so void⁶⁷ while the alternative is that the contractual intention of the parties ought to prevail.⁶⁸ In the context of the High Court decision in *Walton Stores v. Maher*⁶⁹ it may be argued that the strength of the privity of contract principle, founded upon the sanctity of the parties’ intentions, has been severely eroded. If the courts may now effectively make a contract for the parties in spite of their express intentions,⁷⁰ there would appear to be no sound reason in principle why the parties contractual intentions should exclude the authority of the courts to imply natural justice.

The potential to expand judicial review to cover private bodies exercising public functions has been recognised by courts in other jurisdictions. The English Court of Appeal’s decision in *R. v. Panel on Take-Overs and Mergers; Ex parte Datafin*,⁷¹ is the most well known case in this area. The facts of this case involved the London Take-Over Panel which was responsible for administering the city of London’s code on take-overs and mergers. The Panel itself was unincorporated, with no statutory, prerogative or common law powers, and was not in contractual relations with the financial market. The Panel literally had no “visible means of legal support”,⁷² yet it regulated a large part of the UK financial market.

The Court of Appeal considered that the Panel was exercising a public duty, and was accordingly subject to judicial review. The judges of the court chose to look not at the *source* of

62 (1977) 51 ALJR 703.

63 [1970] 1 Ch 345.

64 *Ibid* at 397.

65 *Navarro v. Spanish Australian Club of Canberra Act Inc.* (1986-1987) 87 FLR 390; *McNab v. Auburn Soccer Sports Club Ltd* [1975] 1 NSWLR 54.

66 This conflicting juridical basis for the applicability of natural justice assumes importance in considering whether privative clauses may be overridden by the Courts.

67 *Edwards v. SOGAT* [1071] Ch 354; *Enderby Town Football Club v. Football Association* [1971] Ch 591 at 606-607; *Daekins v. Antrobus* (1879) 17 Ch D 615 held that the rules of a club would be invalid if contrary to natural justice; see also G. Treitel *The Law of Contract* 6th edn. Butterworths London 1983 at 161-162.

68 *Dickason v. Edwards* (1910) 10 CLR 243 at 255; *Australian Workers Union v. Bowen (No. 2)* (1948) 77 CLR 601 at 631; *Maloney v. NSW National Coursing Association Ltd* [1978] 1 NSWLR 161 at 171.

69 (1988) 62 ALJR 110.

70 In *Walton Stores v. Maher* (1988) 62 ALJR 110 it was the clear intention of Waltons not to enter into a contract but the High Court nevertheless held that the doctrine of promissory estoppel ought operate as a sword and so create contractual relations between the parties.

71 [1987] QB 815.

72 *Ibid* per Donaldson MR at 824.

the power but the *nature* of the power, specifically, whether the public were significantly affected by the power exercised,⁷³ or if the private body exercised public functions.⁷⁴ The decision identifies that the boundaries of judicial review are not restricted to statutory or government controlled public bodies. Judicial review can be applied to private bodies yielding public power.⁷⁵

A second reason for denying the implication of the principles of natural justice to trading corporations is that many writers restrict their definitions of public law (and thus the boundaries of natural justice) to the law of government powers.⁷⁶ Such definitions are fundamentally wrong in that they fail to account for the consistent implication of natural justice in private law matters arising from clubs, unincorporated associations and other domestic bodies.

On the surface the decided Australian authority on natural justice and its application to clubs, unincorporated associations and other domestic bodies seems conclusively opposed to the arguments in this paper.⁷⁷ For Australian lawyers, judges and academics the 1934 High Court decision in *Cameron v. Hogan* has been the stumbling block towards any expansion of administrative law into this area.⁷⁸ Forbes prefers to label the case as a “strong inhibitor”.⁷⁹

In *Paton v. The Lenah Valley Sub-Branch RSL*⁸⁰ Slicer J stated that despite the decision in *Cameron v. Hogan* being subjected to judicial criticism⁸¹ or distinguished⁸² his Honour considered that the case remained “binding authority and this case must be determined in accordance with any principles enunciated in that decision”.⁸³ Despite this reasoning his Honour was able to hold that the sub-branch of the RSL had not accorded natural justice to one of its members. Similarly in *Australian Securities Commission v. Multiple Sclerosis Society of Tasmania*⁸⁴ Zeeman J held that a voluntary charitable organisation had failed to accord natural justice when dealing with the expulsion of one of its members.

Cameron v. Hogan has managed to hold its position as binding and prevailing authority despite the fact it seems to be avoided by one means or another far more times than it is directly applied. Forbes indicates that there are three major reasons why *Cameron v. Hogan* has remained largely unchallenged.⁸⁵ First, trade union cases in Australia are dealt with in a well established system of industrial courts who have the statutory power to hear such cases. Therefore its most contentious application has been avoided. Second, the High Court in *Buckley v. Tutty* expanded

73 *Ibid* per Donaldson MR at 838.

74 *Ibid* per Lloyd L.J. at 847. Lloyd did point out that the fact that the panel was totally self regulated made it more appropriate that it should be subject to judicial review.

75 Other cases which encompass the same principle as *Datafin* include; *R. v. Committee of Lloyds; Ex parte Pasgate*, 12 January 1983 [1983] CLY 2001; *R. v. Financial Intermediaries Mergers and Brokers Regulatory Association, Ex parte Cochrane*, *The Times*, 23 June 1989; *R. v. Advertising Standards Authority Ltd; Ex parte Insurance Service plc*, *The Times*, 14 July 1989; *Finnigan v. New Zealand Rugby Football Union* [1985] 2 NZLR 159, where it was held that the Rugby Union even though a private sporting body was subject to judicial review because of the importance of the decision; *Nagle v. Fielden* [1966] 2 QB 633, where a jockey club was made accountable because it exercised a monopoly in an important field of sport and recreation. See also H. Wade, “Procedure and Prerogative in Public Law” (1985) 101 *Law Quarterly Review* 180.

76 For example, H.C. Black *Black's Law Dictionary* 5th edn. West Publishing Co. St Paul 1979 at 1106-1107; D.M. Walker *Oxford Companion to Law* Clarendon Press Oxford London 1980 at 1013.

77 See the following books on this topic, G.A. Flick *Natural Justice: Principles and Practical Application* Butterworths Melbourne 1984 and G.M. Kelly *Sport and the Law* Law Book Co. Sydney 1987.

78 (1934) 51 CLR 358.

79 JRS Forbes *Disciplinary Tribunals* Law Book Co. Sydney 1990 at 25.

80 Unreported No. 11/1992 (Tas).

81 *McKinnon v. Grogan* [1974] 1 NSWLR 295.

82 *Plenty v. Seventh-Day Adventist Church of Port Pirie* (1986) 43 SASR 121.

83 *Supra* n.80 at 4.

84 (1993) 10 ACSR 489.

85 JRS Forbes, *Disciplinary Tribunals, op. cit.* at 27.

the area of restraint of trade. This expansion has removed a large number of professional and sporting cases out of the orbit of *Cameron v. Hogan*. The increasing trend towards incorporation of voluntary associations has brought such bodies into the contractual exemption category that the Courts have developed to the holding in *Cameron v. Hogan*.⁸⁶

The confusion as to the applicability of *Cameron v. Hogan* lends strength to the argument that administrative law should be applied to both incorporated and unincorporated associations. Judges in cases like *Paton* and *McKinnon* have by the end of each case, exercised judicial reasoning until the same result is achieved as would have occurred with an application of administrative law principles.

Natural justice has never been restricted by arbitrary notions of “public” law. From this observation it follows either that the categorisation of natural justice as exclusively a public law principle is erroneous, or that the definition of public law is too narrow. Any objection to the use of natural justice in company dealings then becomes based on the merits of the idea rather than on the basis that this proposal would mix public with private law.

Conclusion

The writers see no fundamental impediment to the application of the rules of natural justice to decisions made by a board of directors or a general meeting. The result would be to protect the minority shareholder by ensuring that procedural fairness of the decision making process which may affect their interest. We would see the judiciary, not reviewing a commercial decision made on the merits, but ensuring that business decisions are made in an environment of equity towards all those directly or indirectly affected.

The application of the rules of natural justice to corporate decision making might at first appear contradictory. After all, some texts on administrative law indicate that public law is confined to the exercise of public power.⁸⁷ This would seem to suggest that the corporate form, based as it is upon the private law of contract, cannot attract the requirements of natural justice. But it is not true to say that associations founded upon contract have eluded the requirements of natural justice. In any case, to deny the application of natural justice to corporate decision making merely because such decision making is countenanced by a contract, is to fly in the face of the broad notions of equity which underpin the development of the principles of natural justice. If the application of the principles of natural justice to corporate decision making engenders better-informed decisions, without imposing undue burdens upon the decision making organs, can the employment of the principles of natural justice be said to be inimical to the Australian corporate community?

The trend towards commercialisation, corporatisation and privatisation of public authorities could strengthen the case that administrative law, especially the rules of natural justice, should not be confined to a narrow definition of public law. A debate over whether Government Business Enterprises (GBEs) should be subject to administrative law is currently underway.⁸⁸ In association with this trend towards privatisation has been the increasing growth of bureaucracy in corporations.⁸⁹ It is clear that what is meant by public power in the 1990s is undergoing a rapid

⁸⁶ *Ibid* at 28.

⁸⁷ *Hotop, op. cit.* at 1-4. See also *Monash University v. Berg* [1984] VR 383 where the need to maintain a public/private distinction in administrative law was upheld.

⁸⁸ See Administrative Review Council Discussion Paper, *Administrative Review of Government Business Enterprises* (1993). See also Commonwealth Parliament Joint Committee of Public Accounts, *Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises* (1992) Report No. 315, AGPS.

⁸⁹ See generally Airo-Farulla, *op. cit.* and Hutchinson, *op. cit.*

and uncertain redefinition. Cogent arguments are being put both for the extension of administrative law (eg, industry ombudsman and extending access to information laws)⁹⁰ and arguments seeking to remove public bodies from the public law arena.⁹¹

The authors maintain that the existing case law authorities do not present an insurmountable obstacle to applying, or extending, the principles of natural justice into this area. Trends in judicial decisions involving minority shareholders, the requirements set out in the *Durayappah* formula and recent comments by the High Court on procedural fairness are all highly supportive of allowing the minority shareholder the right to be heard by an unimpeachable tribunal. It may be that a commercially realistic view would require that the rules of natural justice ought not apply in every case. However, the foregoing discussion demonstrates that there is no legal principle excluding the operation of the rules of natural justice in company decision making processes, even if the exact scope of those controls must be left to be determined upon a case by case basis.

⁹⁰ See R.W. Hodgkin, "Ombudsmen and Other Complaints Procedures in the Financial Services Sector in the United Kingdom" (1992) 21 *Anglo-American Law Review* 1; M. Oborn, "Procedures Adopted by Australian Banks for the Resolution of Customer Complaints and the Role of the Australian Banking Industry Ombudsman (1992) 3 *Journal of Banking and Finance Law and Practice*, 268. Also see Campbell and Eyres, *op. cit.*, for a discussion of extending information access rights into the private sector.

⁹¹ See Batskos, *op. cit.* and the Administrative Review Council Discussion Paper, *op. cit.*