

# Dispensing with the Rules of Evidence

*Mr Justice Giles considers the consequences which flow when a Tribunal is not bound by the rules of evidence.*

Writing in 1947, Maguire said -

"... a student of evidence must accustom himself to dealing as wisely and understandingly as possible with principles which impede freedom of proof. He is making a study of calculated and supposedly helpful obstructionism."<sup>1</sup>

The thrust of the chapter in which this appeared was that the rules of evidence were generally concerned with excluding relevant evidence, rather than evaluating the evidence which was let in - regarding as relevant evidence anything which had a logical tendency to establish one way or another the contested issues of fact. The description of the rules of evidence as exclusionary of probative material is generally accepted, see *Cross on Evidence* stating that by those rules "the law of evidence declares that certain matters which might well be accepted as evidence of a fact by other responsible inquirers will not be accepted by the courts".<sup>2</sup>

Why should relevant evidence, probative evidence, evidence upon which we may act in everyday life, be excluded? Thayer espoused a theory of evidence by which

"... the rules of evidence should be simplified; and should take on the general character of principles, to guide the sound judgment of the judge, rather than minute rules to guide it. The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."<sup>3</sup>

Thayer attributed the complexity of the exclusionary rules as they had in fact developed largely to the jury system, the rules being intended to withhold from the jury evidence "likely to be misused or overestimated by that body".<sup>4</sup> Morgan preferred to attribute it to the adversary system, to the perceived significance of the giving of evidence on oath and its testing by cross-examination.<sup>5</sup> Whatever their origin be, as the rules developed each must have been thought a justifiable exclusion of relevant evidence, and the justification need not have been the same in each case. Some rules are justified, at least today, on naked policy grounds: for example, the exclusion of evidence of communications made without prejudice, or of communications entitled to legal professional privilege or public interest privilege, is based on the view that it is preferable, on policy grounds, to keep those communications from the tribunal of fact even at the expense of deciding the issues of fact without what may be very significant material.

The result is that the rules of evidence control the tribunal of fact in arriving at its decision by excluding probative material from the material on which the decision is made - the "calculated and supposedly helpful obstructionism" to which Maguire refers. Some rules traditionally treated as rules of evidence go beyond this (for example, presumptions and burden of proof), depending upon one's definition of the law of evidence and where the line is drawn between the law of evidence and

substantive law.<sup>6</sup> In this paper I am primarily concerned with the exclusionary rules, but it must be remembered that there are other so-called rules of evidence which are not exclusionary rules.

## II

In changed circumstances, the justification once seen for an exclusionary rule may lose its force; with changed social perceptions a policy once seen as compelling may no longer be seen in the same way. The obvious example is the questioning of the hearsay rule - for instance, recognition of changes in the way in which business is carried on and business transactions are recorded has led to modification by statute to allow for the admission of hearsay (even multiple hearsay) via business records, and the rule has been considered by a number of law reform bodies with differing recommendations.<sup>7</sup> Conversely, an exclusionary rule may be deliberately added, such as the extension of privilege to religious confessions.<sup>8</sup>

<sup>1</sup> Maguire, *Evidence: Common Sense and Common Law*, at 10-11.

<sup>2</sup> *Cross on Evidence*, 3rd (Aust) ed, at 1.

<sup>3</sup> Thayer, *A Preliminary Treatise on Evidence at the Common Law*, at 30; for a modern treatment, see the framework of the rules of evidence formulated by McNamara. "The Canons of Evidence - Rules of Exclusion or Rules of Use?" 10 *Adel L Rev* 341.

<sup>4</sup> *Ibid* at 266.

<sup>5</sup> Morgan, *Some Problems of Proof under the Anglo-American System of Litigation*, at 106-17; "The Jury and the Exclusionary Rules of Evidence" (1937) 4 *Univ of Chicago L Rev* 247.

<sup>6</sup> See the discussion in the Australian Law Reform Commission Report on Evidence (ALRC 26) vol 1 at 13-23. The discussion includes distinguishing between the rules controlling what evidence may be received and rules controlling the manner in which evidence is received, but both result in the exclusion of evidence.

<sup>7</sup> Including the Australian Law Reform Commission (ALRC 26) and the New South Wales Law Reform Commission (LRC 29). In *Walton v R* (1989) 63 ALJR 226 at 229-30 Mason CJ seemed to reject strict application of the rule and to prefer an evaluation of the reliability of the evidence, perhaps signalling judicial modification to meet current circumstances and perceptions.

<sup>8</sup> *Evidence Act 1898* (NSW) s. 10, added by *Evidence (Religious Confessions) Amendment Act 1989* (NSW).

Alterations thus made are but tuning of the established rules of evidence in a way thought to be desirable. The recent wide-ranging examination of the law of evidence by the Australian Law Reform Commission expressly assumes the continued existence of rules of evidence.<sup>9</sup> The tribunal of fact is still controlled in arriving at its decision by rules of evidence, albeit altered rules of evidence. Sometimes the more radical step has been taken of dispensing entirely with the rules of evidence.

By this I have in mind more than the provisions in s. 82 of the *Supreme Court Act 1970* (NSW) and its equivalents elsewhere: they are subject to limitations the scope of which is still being worked out.<sup>10</sup> One provision which may come readily to the practitioner's mind is that in s. 19(3) of the *Commercial Arbitration Act 1984* (NSW), which has its counterparts in other States and Territories:

"(3) Unless otherwise agreed in writing by the parties to an arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit."<sup>11</sup>

In New South Wales the same step has been taken in curial, as distinct from arbitral, decision making. Pursuant to Pt. 72 of the rules a question or questions arising in proceedings, or even the whole of the proceedings, may be referred to a referee for enquiry and report. After consideration of the report, the court may adopt it. Part 72 r 8(2) provides that the referee may conduct the proceedings under the reference in such manner as he thinks fit, and that in conducting proceedings under the reference he is not bound by rules of evidence but may inform himself in relation to any matter in such manner as he thinks fit.

While practitioners may now more frequently encounter a tribunal which is not bound by the rules of evidence, that is nothing new. There are a great many tribunals, both Commonwealth and State, with functions including the decision of contested issues of fact, the legislation for which provides that the tribunal shall not be bound by the rules of evidence. Many of the tribunals would be regarded as administrative tribunals, but others - such as consumer claims or small claims tribunals - determine disputes between adversaries and tend to adopt the procedures of an adversary hearing. Some of the tribunals exercise disciplinary jurisdiction and their decisions on issues of fact will have more than monetary or material significance. The Australian Broadcasting Tribunal, lately much in the news, is not bound by the rules of evidence and may inform itself as it thinks fit.<sup>12</sup> Particularly important is the Administrative Appeals Tribunal, which in the exercise of its significant role in reviewing decisions under Commonwealth legislation is not bound by the rules of evidence and can inform itself in such manner as it thinks fit.<sup>13</sup> Appeals to the Federal Court from the Administrative Appeals Tribunal have helped to illuminate how a tribunal not bound by the rules of evidence can conduct itself. There are far too many such tribunals to list here, but with the widening dispensation with the rules of evidence comes the need to ask what that dispensation means.<sup>14</sup>

### III

Why has the step been taken of dispensing entirely with the rules of evidence? Undoubtedly a major reason has been to avoid what is seen as the technicality of the rules of evidence and the expense, inconvenience and delay which may flow from their application.<sup>15</sup> Sometimes no more is said than that the rules of evidence require the exclusion of evidence which is highly reliable and credible<sup>16</sup>, but that is a reason for modification of the rules rather than their wholesale rejection. It does not necessarily follow that the justifications for excluding probative material which brought about the rules are no longer to be recognised. Many tribunals are either composed of non-lawyers or deal with parties who are not represented by lawyers (or both), and it is simply not practicable to insist on compliance with the rules of evidence. That, rather than the view that the rules of evidence work injustice by excluding probative material, may be the substantial reason for dispensing with the rules of evidence.<sup>17</sup> It should not be assumed that a body of rules developed over centuries and reviewed and selectively modified by legislation is an instrument of injustice. Hence a statutory direction that a tribunal is not bound by the rules of evidence does not mean that no rules excluding otherwise probative material can be or will be applied: it means that the tribunal is not required to apply them by force of the law of evidence.

<sup>9</sup> ALRC 26 at 7.

<sup>10</sup> In s. 82(1)(a), in relation to no bona fide dispute or undue expense and delay. In other jurisdictions the provisions are in rules of court: 0 40 r 5 (Victoria); 0 20 r 2 (Queensland); 0 78 r 1 (South Australia); 0 40 r 2 (Tasmania); Os 29, 30 and 36.2 (Western Australia). In the Federal Court see 0 33 r 3 and in England 0 38 r 3.

<sup>11</sup> *Commercial Arbitration Act 1984* (Victoria); 1985 (Western Australia and Northern Territory); 1986 (South Australia and Tasmania).

<sup>12</sup> *Broadcasting and Television Act 1942*, s. 25 (2).

<sup>13</sup> *Administrative Appeals Tribunal Act 1975*, s. 33(1) (c).

<sup>14</sup> Leading the discussion is the essay by Professor Campbell, "Principles of Evidence and Administrative Tribunals", in Campbell and Waller (eds), *Well and Truly Tried*, at 36-87, the particular assistance of which I gratefully acknowledge.

<sup>15</sup> But query whether that would call for a more limited remedy such as s. 82 of the *Supreme Court Act*.

<sup>16</sup> For example *R v Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 QB 456 at 484.

<sup>17</sup> This can be seen in the Law Reform Commission (NSW) Report on Commercial Arbitration (LRC 27) at 134: "It was oppressive as well as unreal to put on a conscientious arbitrator a duty which, to the knowledge of the parties, he was not equipped to perform."

#### IV

The following questions arise where the tribunal of fact is expressly not bound by the rules of evidence.

First, is the freedom from the rules of evidence complete, or must the tribunal nonetheless pay some regard to those rules as rules of evidence?

Secondly, what is meant for this purpose by the rules of evidence? Is the only test for the evidence which the tribunal may receive that of relevance, or do some of the exclusionary rules traditionally regarded as rules of evidence still control it?

Thirdly, is there some other principle controlling the tribunal of fact in arriving at its decision, such that the freedom from the rules of evidence does not leave it unfettered in its reception of relevant evidence?

I suspect that these questions shade into each other, but they provide a focus for what follows.

#### V

In *R. v War Pensions Entitlement Appeal Tribunal ex parte Bott*<sup>18</sup> the tribunal received and read a medical report on Bott's condition, and declined to permit cross-examination of the doctors. The grounds of an application for mandamus included that the evidence used against Bott (the report) was not on oath and the witnesses (the doctors) were not produced for cross-examination. The majority (Rich, Starke, Dixon and McTiernan JJ) discharged the order nisi. Evatt J dissented, and said in his reasons:

"Some stress has been laid by the present respondents upon the provision that the tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'."<sup>19</sup>

His Honour did not say what rules of evidence might have to be borne in mind, or how they should be borne in mind although they did not bind "as such", in order to administer "substantial justice". Was His Honour bringing the rules of evidence in by the back door?

In the United States there had developed a "legal residuum rule" under which a tribunal not bound by the rules of evidence could receive and act upon evidence not admissible in a court of law, but there still had to be in the evidence upon which its decision was based "at least a residuum of evidence competent under the exclusionary rules".<sup>20</sup> In the 1916 case in which the rule originated, *Carroll v Knickerbocker Ice Co*<sup>21</sup>, the only evidence of a block of ice falling on Carroll was hearsay, and he failed in his claim to compensation because the tribunal

interpreted the provision that rules of evidence were not binding as still requiring a residuum of "legal evidence"<sup>22</sup> to support the claim. Clearly enough this result could have been reached on the ground that, although admissible, the hearsay evidence was not persuasive when weighed against the other evidence (or even alone), but the error was made of saying that evidence other than "legal evidence", standing alone, could never be sufficient.

Later cases in the United States all but abolished the legal residuum rule, commencing with *Richardson v Perales* in 1971.<sup>23</sup> That rule really did not apply, of course, at the stage of reception of evidence, but rather at the stage of evaluation of evidence when making a decision. But it did require regard to the rules of evidence as rules of evidence governing admissibility. I doubt that Evatt J in *Bott's* case<sup>24</sup> had it or some similar principle in mind; as I will later suggest, his Honour was concerned with the manner in which the medical report was dealt with rather than its admissibility.

Certainly there does not seem to be any such rule in Australia. It is not consistent with the majority judgments in *Bott's* case.<sup>24</sup> In *Pochi v Minister for Immigration and Ethnic Affairs*<sup>25</sup> Brennan J, speaking as President of the Administrative Appeals Tribunal, cited the passage from the judgment of Evatt J in the course of a discussion not of the reception of evidence, but of its evaluation, and inferentially rejected the legal residuum rule:

"The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that 'this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force', as Hughes CJ said in *Consolidated Edison Co v National Labour Relations Board* (1938) 305 US 197, 229. To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J pointed out ... That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through

<sup>18</sup> (1933) 50 CLR 228.

<sup>19</sup> (1933) 50 CLR 228 at 256.

<sup>20</sup> *Young v Board of Pharmacy* 462 P 2d 139 (1969) at 142.

<sup>21</sup> 218 NY 435 (1916).

<sup>22</sup> 218 NY 435 (1916) at 440.

<sup>23</sup> 402 US 389 (1971); and subsequently *Califano v Boles* 443 US 282 (1979) and *Johnson v United States* 628 F 2d 187 (1985). For a more sympathetic treatment of the legal residuum rule see Schwartz, *Administrative Law*, at 338-46.

<sup>24</sup> (1933) 50 CLR 228.

<sup>25</sup> (1979) 36 FLR 482.

a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence."<sup>26</sup>

After referring to a statement of Lord Denning that tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law<sup>27</sup>, his Honour continued:

"It was thought, at one time, that the *Consolidated Edison* judgment (1938) 305 US 197 required that some legal proof had to be adduced, and that hearsay evidence alone could not support an adverse finding ... But in *Richardson v Perales* (1971) 402 US 389 the *Consolidated Edison* case was construed in this way: 'The contrast which the Chief Justice was drawing ... was not with material that would be deemed formally inadmissible in judicial proceedings but with material "without a basis in evidence having rational probative force"'. This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case.'

The majority judgments in *Bott's* case show that the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not ... There is no reason why logically probative hearsay should not be given credence. However, the logical weakness of hearsay evidence may make it too insubstantial in some cases, to persuade the Tribunal of the truth of serious allegations."<sup>28</sup>

It may be said with some confidence that where a Tribunal is not bound by the rules of evidence, it is not required to pay regard to legal admissibility - to rules excluding probative material - whether at the stage of reception of evidence or at the stage of its evaluation. At the stage of reception of evidence, the criterion is whether the evidence is relevant or probative - not, of course, whether it necessarily establishes or controverts the fact or facts in issue, but whether either alone or taken with other evidence it tends to do.<sup>29</sup>

## VI

But is that so with respect to all rules of evidence? The answer seems to be a definite no. The Tribunal is not bound by some rules of evidence but remains bound by others.

Some rules of evidence which would otherwise operate to exclude probative material are undoubtedly dispensed with. A clear case is the hearsay rule. Few would not agree that it can operate to exclude relevant material of substantial probative value. It is a rule of evidence which falls within a dispensation with the rules of evidence, and a number of the illustrations which I later give when referring to natural justice involved hearsay evidence. It cannot be stated more clearly than in *Wajnberg v Raynor*<sup>30</sup> where the Tribunal was the Town Planning Appeals Board, and McInerney J said:

"The direction that the Tribunal should not be 'bound by the rules of evidence' but that it may 'inform itself on any matter as it thinks fit' obviously frees the Tribunal from many of the restrictions imposed on ordinary courts by the rules of evidence. Some of those restrictions are

directed to the medium of proof of facts, eg the rule against hearsay evidence will be found when analysed to prohibit a certain medium of proof of the existence of some fact or facts. Plainly the Appeals Tribunal is not similarly limited."<sup>31</sup>

Other fairly clear cases can be suggested. One is what has become known as the rule in *Hollington v Hewthorn*<sup>32</sup>, whereby a conviction is inadmissible in later civil proceedings to prove the facts on which the conviction is founded. The rule has been abrogated by statute in a number of jurisdictions, and has been extensively criticised.<sup>33</sup> Only part of its rationale, that involving fairness to a party against whom the conviction is tendered but who was not involved in the earlier proceedings, would favour the retention of this rule in the face of a dispensation with the rules of evidence. In *re Habchi and Minister for Immigration and Ethnic Affairs*<sup>34</sup> and again in *re Barbaro and Minister for Immigration and Ethnic Affairs*<sup>35</sup> Davies J (as President of the Administrative Appeals Tribunal) regarded a conviction as evidence, but not conclusive evidence, of criminal conduct warranting deportation - not just the fact of conviction but the facts on which the conviction was founded. It was said that this view had been taken consistently in the Tribunal.

<sup>26</sup> (1979) 36 FLR 482 at 492.

<sup>27</sup> *T A Millar Pty Ltd v Minister of Housing and Local Government* (1968) 1 WLR 992 at 995; see also *Kavanagh v Chief Constable of Devon and Cornwall* (1974) 1 QB 624 at 633.

<sup>28</sup> (1979) 36 FLR 482 at 493.

<sup>29</sup> Relevance itself is not without difficulty, both in divergent legal statements of what constitutes relevance and in application of any given statement: see the discussion and works cited in ALRC 26, vol 1 at 44-5 and Eggleston, "The Relationship between Relevance and Admissibility in the Law of Evidence" in Glass (ed) *Seminars on Evidence*. This paper does not attempt to explore the difficulties.

<sup>30</sup> (1971) VR 665. Earlier cases to the same effect (leaving aside the United States cases which I have mentioned) included *Wilson v Esquimaux and Nanaimo Railway Co* (1922) 1 AC 202 at 213; *MacLean v The Workers' Union* (1929) 1 Ch 602 at 621; *R v Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 QB 456 at 484, 488; and *T A Millar Ltd v Minister of Housing and Local Government* (1968) 1 WLR 992 at 995.

<sup>31</sup> (1971) VR 665 at 678.

<sup>32</sup> *Hollington v F Hewthorn & Co Ltd* (1943) 1 KB 587.

<sup>33</sup> For its rationale and its critics see ALRC 26 at 44.

<sup>34</sup> (1980) 2 ALD 623.

<sup>35</sup> (1980) 3 ALD 1.

Another fairly clear case is the rule requiring proof of the contents of a document by production of the document, subject to exceptions where secondary evidence is permissible. That is commonly (though erroneously<sup>36</sup>) regarded as an aspect of the "best evidence" rule. In *Wajnberg v Raynor*<sup>37</sup> McInerney J gave the "best evidence" rule as one of the rules which a Tribunal free from the rules of evidence would be entitled to disregard.

There are cases where it is not so clear, but the position is probably the same. There is a degree of difficulty in asking whether the rules governing the reception of opinion evidence fall within a dispensation with the rules of evidence, since they are themselves obscure. What is an opinion as distinct from evidence of fact is not easy to determine.<sup>38</sup> The rules concentrate rather on when opinion evidence will be admitted (non-expert or expert) than on when it will be excluded.<sup>39</sup> For present purposes, it can be said that:

- (i) a non-expert's evidence of his opinion will be excluded if it is no more than his inference from facts of which he can give direct evidence, but may be admitted if the facts and the inferences cannot realistically be separated;
- (ii) an expert's evidence of his opinion will be excluded unless he has expertise in a recognised field of knowledge within which his evidence falls;
- (iii) maybe, neither will be permitted to give an opinion involving a legal standard or on the "ultimate issue" which the court has to decide.

To the extent that there is an "ultimate issue" exclusion, there does not seem to be any good reason why a Tribunal not bound by the rules of evidence should not receive the opinion of an expert on the ultimate (factual) issue for its decision. Often the Tribunal will be composed of an expert or experts in the relevant field of knowledge, and the supposed danger of a court paying undue regard to the expert's opinion on the ultimate issue will not exist. Where the opinion is that of a non-expert, involving no more than an inference from facts of which he can give direct evidence which the Tribunal can just as readily make, there are said to be good reasons to permit the evidence to be received, namely that freeing the witness from artificial constraints lets him express his thoughts rationally and that "the expression of inferences and opinions by lay witnesses when they are in a position to contribute informed ideas not in the traditional form of facts can assist the court considerably"<sup>40</sup>. Where the opinion is that of an expert outside his expertise, or outside any recognised field of knowledge, the test of relevance may be thought to provide sufficient control.

In *re Kevin and Minister for the Capital Territory*<sup>41</sup> the applicant sought a review of the Minister's determination of the unimproved value of land. The Minister's valuer had relied on certain comparable sales. The applicant, who had no valuation expertise, analysed and relied on other sales said to be comparable. Ultimately the Administrative Appeals Tribunal (Mr R K Todd, Senior Member) felt unable to rely on the applicant's opinion, and preferred that of the Minister's valuer. The reasons are a little equivocal. At one point it was stressed that the applicant's opinion evidence, though inadmissible under the exclusionary rules, had been heard, and that "the question

... is not one of admissibility but of the weight to be accorded to such evidence."<sup>42</sup> At another point it was said that expert evidence could be given by a qualified person, but that the Tribunal could not rely on the supposition of the parties and it was "not appropriate" for an applicant to offer his non-expert opinion as a fact.<sup>43</sup>

Perhaps in the case of opinion evidence there is no simple answer. No Tribunal would welcome having unhelpful expressions of personal opinion thrust upon it; but many would welcome opinions, even of lay persons stating their inferences, or persons without clear expertise, where the opinions would help to understand and decide the disputed issues of fact. A test of relevance firmly applied may in practice suffice, and the mysteries of the rules governing the reception of opinion evidence should be put aside.

I mention at this point rules which, although in a sense procedural, nonetheless may result in the exclusion of probative material.

First, is it a rule of evidence that evidence of what a person saw, heard or did should be received by personal testimony? Is it a rule of evidence that a person whose evidence is received should be available for cross-examination? Test it this way: in curial proceedings, otherwise than by consent, could one party simply proffer a written statement of his evidence, have it received, and decline to be cross-examined? Could this happen before a Tribunal not bound by the rules of evidence?

The answer to the last question seems to be that it could: it would be open to the Tribunal to receive and act upon the material in the statement. This may be due more to the provision that the Tribunal may inform itself as it thinks fit which usually accompanies a dispensation with the rules of

<sup>36</sup> *Cross on Evidence*, 3rd (Aust) ed, at 75, 1008 et seq.

<sup>37</sup> (1971) VR 665 at 678.

<sup>38</sup> See for example *R v Perry* (1982) 28 SASR 119.

<sup>39</sup> There have recently been useful discussions in Gillies, "Opinion Evidence" (1986) 60 ALJ 597, Doyle, "Admissibility of Opinion Evidence" (1987) 61 ALJ 688 and Arnold "Expert and Lay Opinion Evidence" (1990) 6 Aust Bar Rev 219.

<sup>40</sup> ALRC 26 at 407.

<sup>41</sup> (1979) 2 ALD 238.

<sup>42</sup> (1979) 2 ALD 238 at 242.

<sup>43</sup> (1979) 2 ALD 238 at 243; cf Whitmore (1981) 12 Federal Law Review 117 at 119:

"I object very strongly to the exclusion of evidence by the expert opinion rule. Surely the qualifications of the witness go to weight and in many circumstances it is a fact that non-expert opinion might be as good or better than so called expert opinion. I might add that this is especially so in relation to matters like valuation of land and environmental issues."

evidence than to the dispensation itself. As to receipt of a written statement, see *re Hampton*<sup>44</sup>, where Crisp J in the Supreme Court of Tasmania was "re-hearing" an inquiry not bound by the rules of evidence, and considered himself free to use and act upon a magistrate's notes. His Honour said, however, that although that might be permissible he would "be slow to allow recorded material to displace the obvious advantages of following the preferable course of having the relevant matters ventilated by personal testimony".<sup>45</sup> *Bott's case*<sup>46</sup> itself illustrates a Tribunal receiving and acting upon a written statement (the medical report) without personal testimony from the doctors, and Rich, Dixon and McTiernan JJ said that it was for the Tribunal to decide when it would exercise its power of taking evidence on oath, and that it was not required to act on sworn testimony only.<sup>47</sup> Starke J said that the Tribunal was not bound to obtain the opinion in the medical report on oath and that whether cross-examination should take place upon that opinion was entirely a question for the discretion of the Tribunal.

<sup>48</sup> In *T A Millar Ltd v Minister of Housing and Local Government*<sup>49</sup> it was said that while the Tribunal had to observe the rules of natural justice, that did not mean that the evidence (there first-hand hearsay) had to be tested by cross-examination - it only meant an opportunity of commenting on it and contradicting it.<sup>50</sup>

Secondly, there are rules concerned with the order of presentation of evidence, with when evidence is permitted in re-examination, with when cases may be re-opened, and with when rebutting evidence may be called. These matters arise in the course of receipt of evidence, and can have important consequences if they result in the Tribunal proceeding to its decision on the issues of fact without evidence significant for that decision. To this extent they are exclusionary rules. These rules are distinct from rules relating to the burden of proof which arise when evaluating the evidence which has been admitted. It is proper to say that on the modern approach a liberal use of discretion generally prevents the exclusion of significant evidence, and the ability of the Tribunal to inform itself as it thinks fit will give an ample discretion.

One would expect that a Tribunal free from the rules of evidence and enjoined to inform itself as it thought fit would not be bound by these rules, although of course they may provide it with guidance. That seems to be so. In *McDonald v Director-General of Social Security*<sup>51</sup> there was discussion in the Full Federal Court of whether a legal onus of proof arose in proceedings before the Administrative Appeals Tribunal, in the course of which Woodward J said:

"The use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution. This is particularly true of an administrative Tribunal which, by its statute 'is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate'. Such a Tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical

rules relating to onus of proof developed by the courts. However, these may be of assistance in some cases where the legislation is silent."<sup>52</sup>

But there are rules of evidence - at least rules so called - which would require the exclusion of probative material by a Tribunal notwithstanding that it was not bound by the rules of evidence.

Although it is traditionally treated as an exclusionary rule of evidence, the presently perceived rationale for the rule whereby a witness can not be compelled to answer any question if it would tend to expose him to conviction for a crime would apply in the case of a Tribunal not bound by the rules of evidence to much the same extent as in curial proceedings. Sometimes the relevant legislation itself preserves the privilege against self-incrimination.<sup>53</sup> In the absence of legislative direction, it seems that the privilege against self-incrimination is not a rule of evidence within a dispensation with the rules of evidence. The privilege was described in the High Court in *Pyneboard Pty Ltd v Trade Practices Commission*<sup>54</sup> as "too fundamental a bulwark of liberty to be categorised simply as a rule of evidence applicable to judicial and quasi-judicial proceedings"<sup>55</sup>, and was treated as a common law right which will not be taken away "unless the legislative intent to do so clearly

<sup>44</sup> (1965) 7 FLR 353.

<sup>45</sup> (1965) 7 FLR 353 at 356-7.

<sup>46</sup> (1933) 50 CLR 228.

<sup>47</sup> (1933) 50 CLR 228 at 244; see also *ex parte Smith re Russo* (1971) 1 NSWLR 184 at 187 where Jacobs JA, with whom Manning and Moffitt JJA agreed, regarded the Tribunal as free from the rules of evidence and held that there was no obligation to take evidence on oath.

<sup>48</sup> (1933) 50 CLR 228 at 250.

<sup>49</sup> (1968) 1 WLR 992.

<sup>50</sup> (1968) 1 WLR 992 at 995 per Lord Denning MR, Danckwerts and Edmund Davies LJ agreeing at 996; in *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 589 Brennan J seems to have accepted this position.

<sup>51</sup> (1983) 6 ALD 6.

<sup>52</sup> (1983) 6 ALD 6 at 9.

<sup>53</sup> For example, the Trade Practices Tribunal is not bound by the rules of evidence (*Trade Practices Act 1974*, s. 103 (1)(b)), but it is a reasonable excuse for a witness before it to refuse to answer a question that it may tend to incriminate him (*ibid* s. 161(2)).

<sup>54</sup> (1983) 152 CLR 328.

<sup>55</sup> (1983) 152 CLR 328 at 340 per Mason ACJ, Wilson and Dawson JJ; from their Honour's decision, they preferred this description to the alternative view of the privilege as but a rule of evidence regulating the admissibility of evidence in judicial and quasi-judicial proceedings.

emerges whether by express words or by necessary implication".<sup>56</sup> In *R v Australian Broadcasting Tribunal ex parte Hardiman*<sup>57</sup> the court was concerned with the course of proceedings before a Tribunal which "is not bound by legal rules of evidence and may inform itself on any matter as it thinks fit"<sup>58</sup>, but in the joint judgment of Gibbs, Stephen, Mason, Aickin and Wilson JJ it was said that "in an appropriate situation" a witness before the Tribunal "should be advised of his privilege against self-incrimination and he may exercise that privilege".<sup>59</sup>

Legal professional privilege is also traditionally treated as an exclusionary rule of evidence, but again the rationale given for it can be seen as equally applicable in the case of a Tribunal not bound by the rules of evidence as in curial proceedings. The majority in the High Court must have so seen it in *Baker v Campbell*.<sup>60</sup> At least two of the minority regarded the privilege as part of the rules relating to the giving of evidence<sup>61</sup>, and thus as confined to judicial and quasi-judicial proceedings. The majority view was otherwise, and Dawson J stated explicitly -

"To view legal professional privilege as no more than a rule of evidence would, in my view, be to inhibit the policy which supports the doctrine. Indeed, now that there appears to be a tendency to compel the disclosure of evidence as an adjunct to modern administrative procedures ... it may well be necessary to emphasise the policy lest it be effectively undermined."<sup>62</sup>

Hence it seems that legal professional privilege can be claimed before a Tribunal notwithstanding that the Tribunal is not bound by the rules of evidence. Claims to such privilege have been upheld in the Administrative Appeals Tribunal in *re Peric and Commonwealth Banking Corporation*<sup>63</sup> (query as a matter of discretion rather than obligation) and *re Greenbank and Secretary, Department of Social Security*<sup>64</sup> (apparently as a matter of obligation).

Public interest privilege will commonly arise in the course of production of documents rather than at the stage of admissibility of evidence. Its rationale involves balancing the public interest in protecting the State from prejudicial disclosures and the public interest in the free availability of information to enable justice to be done.<sup>65</sup> If the former is to prevail, it should prevail before a Tribunal not bound by the rules of evidence just as before a court. Accordingly, it is suggested that public interest privilege also is not one of the rules of evidence falling within a dispensation with the rules of evidence.

Some other so-called rules of evidence can be seen to be not truly rules of evidence at all. They will continue to apply notwithstanding that the Tribunal is not bound by the rules of evidence. I take two examples.

First, the materials to which regard may be had in the interpretation of statutes or instruments are sometimes spoken of as regulated by rules of evidence, and texts on evidence commonly deal with such so-called rules. They are really substantive rules. A Tribunal free from the rules of evidence is not thereby free from the constraints otherwise governing reference to extraneous materials for the purposes of interpretation. Certainly the Administrative Appeals Tribunal takes

this view: see *re Bayley and Commissioner for Superannuation*<sup>66</sup> -

"As a matter of principle, there must be one approach to the interpretation of statutes. Whether one agrees or disagrees with the rules that have been evolved, they have in fact been evolved and it is simply not open, in our opinion, to administrators (which includes the Tribunal) to adopt an approach in relation to statutory interpretation that departs from the rules of law laid down for the interpretation of statutes by the courts. The Tribunal's position in this regard is unaffected by the provisions of s. 33(1) of the Administrative Appeals Tribunal Act 1975 (Cth)."<sup>67</sup>

As was said by Mason J in *South Australian Commissioner for Prices and Consumer Affairs v Charles More (Aust) Ltd*<sup>68</sup>, speaking of a provision that the Credit Tribunal was not bound by the rules of evidence:

"However, here we are concerned with a problem of statutory interpretation, not with a question of evidence. It cannot be rationally supposed that by this provision Parliament intended to authorise the Tribunal to place an interpretation upon statutes which differs from that placed upon them by courts."<sup>69</sup>

<sup>56</sup> (1983) 152 CLR 328 at 341.

<sup>57</sup> (1980) 144 CLR 13.

<sup>58</sup> *Broadcasting and Television Act* 1942, s. 25(2).

<sup>59</sup> 1980 144 CLR 13 at 34.

<sup>60</sup> (1983) 153 CLR 52 per Murphy, Wilson, Deane and Dawson JJ.

<sup>61</sup> (1983) 153 CLR 52 at 68 (Gibbs CJ); 76 and 80 (Mason J); Brennan J at 101 regarded it more as a rule regulating production of documents than admissibility.

<sup>62</sup> (1983) 153 CLR 52 at 132. Compare McInerney J in *Wajnberg v Raynor* (1971) VR 665 at 678, suggesting that insofar as the rules of evidence "embody restriction based on some policy of the law, such as common law privileges of witnesses from disclosing certain facts", the Tribunal would be free to disregard those restrictions.

<sup>63</sup> (1984) 7 ALN N2.

<sup>64</sup> (1986) 9 ALD 338.

<sup>65</sup> *Sankey v Whitlam* (1978) 142 CLR 1, *passim*.

<sup>66</sup> (1979) 2 ALD 307.

<sup>67</sup> (1979) 2 ALD 307 at 315.

<sup>68</sup> (1977) 14 ALR 485.

<sup>69</sup> (1977) 14 ALR 485 at 507; see also Gibbs J at 493-4.



This would seem obvious, but the contrary was argued in the High Court, and even in the judgment of Barwick CJ the language used was that of "introducing into evidence" the extraneous materials.<sup>70</sup> The position must be the same for the interpretation of instruments. At bottom, it is a question of relevance: if regard can not be had to extraneous materials, they are legally irrelevant.

Secondly, a number of cases refer to issue estoppel as a rule of evidence<sup>71</sup>, while in other cases it is referred to as a rule of law.<sup>72</sup> Both *res judicata* and issue estoppel are treated (together with other estoppels) in texts on evidence: thus in *Cross* it is said that an estoppel prevents a party from placing reliance on or denying the existence of certain facts and that "This justifies the treatment of estoppel as an exclusionary rule of evidence".<sup>73</sup> In *Commonwealth of Australia v Sciacca*<sup>74</sup>, referred to below, it was said in a joint judgment of Bowen CJ, Sheppard and Morling JJ that issue estoppel "operates to prevent evidence being tendered".<sup>75</sup>

Treating estoppel (of any kind) as an exclusionary rule of evidence is a dangerous illusion. In *Minister for Immigration and Ethnic Affairs v Daniele*<sup>76</sup> the Minister had contended that the Administrative Appeals Tribunal was bound to accept a conviction and the facts underlying it; the Tribunal had held that it was entitled to examine for itself all facts including those necessarily found by the jury. After pointing out that issue estoppel was not applicable to criminal proceedings<sup>77</sup> Fisher and Lockhart JJ went on to say -

"Issue estoppel, generally but not universally seen as a rule of evidence, can not have any place in proceedings of the Tribunal, and is, to the extent that it is a rule of evidence, expressly excluded by the provisions of s. 33 of the Administrative Appeals Tribunal Act."<sup>78</sup>

With the greatest of respect to their Honours, this was having a bet each way. In *Commonwealth of Australia v Sciacca*<sup>79</sup> the Administrative Appeals Tribunal had held that an application for compensation was not barred by issue estoppel or *res judicata* arising from earlier proceedings. The Full Court referred to the passage from the judgment of Fisher and Lockhart JJ and said:

"If the view is taken that issue estoppel is a rule of law (which may now be the more acceptable view), that would not conclude the matter, as it is apparent from what was said by their Honours, because of the administrative nature of the Tribunal and the provisions of s. 33(1)(b) of the Administrative Appeals Tribunal Act which directs the Tribunal to conduct its proceedings, so far as possible, without formality and technicality. A finding by an administrative Tribunal will not give rise to an issue estoppel."<sup>80</sup>

There may be some confusion here: there was no question of an earlier finding of an administrative Tribunal. Their Honours thought that even if it be a rule of law the doctrine of issue estoppel may not apply, but it was unnecessary to decide the matter. Whether or not this be so, it is suggested that issue estoppel was certainly not excluded by the provision that the

Tribunal was not bound by the rules of evidence. The policy behind *res judicata* and issue estoppel - finality of litigation<sup>81</sup> - would call for the application of the doctrines of *res judicata* or issue estoppel if the matter before a Tribunal was, or included, re-opening a claim or issue previously determined. This should be so regardless of whether or not at times effect has been given to that policy in the name of a rule of evidence, and neither *res judicata* nor issue estoppel should be regarded as a rule of evidence for the purpose of dispensation with the rules of evidence.<sup>82</sup>

<sup>70</sup> (1977) 14 ALR 485 at 490.

<sup>71</sup> *Humphries v Humphries* (1910) 2 KB 531 at 536; *Marginson v Blackburn Borough Council* (1939) 2 KB 426 at 437; *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR 598 at 603.

<sup>72</sup> *Mills v Cooper* (1967) 2 QB 459 at 468-9; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 614-5.

<sup>73</sup> *Cross on Evidence*, 3rd (Aust) ed at 119.

<sup>74</sup> (1988) 78 ALR 279.

<sup>75</sup> (1988) 78 ALR 279 at 283.

<sup>76</sup> (1981) 39 ALR 649.

<sup>77</sup> See *R v Storey* (1978) 140 CLR 364.

<sup>78</sup> (1981) 39 ALR 649 at 654.

<sup>79</sup> (1988) 78 ALR 279.

<sup>80</sup> (1988) 78 ALR 279 at 283.

<sup>81</sup> *Jackson v Goldsmith* (1950) 81 CLR 446 at 446; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 507-8.

<sup>82</sup> Common law estoppel - estoppel in pais or estoppel by conduct - has been described as a rule of evidence (*Low v Bouverie* (1891) 3 Ch 82 at 105; *Dawson's Bank Ltd v Nippon Menkwa Kabushiki Kaisha* (1935) LR 62 Ind App 100 at 108; *Maritime Electric Co v General Dairies Ltd* (1937) AC 610 at 620; *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR 598 at 603; *Hood v Commonwealth of Australia* (1968) VR 619). In *Queensland v The Commonwealth* (1977) 139 CLR 585 at 615 Aickin J disagreed with this view, and it has also been described as a rule of substantive law (*Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* (1947) AC 46 at 56). In *Moorgate Ltd v Twitchings* (1976) 1 QB 225 at 241 Lord Denning MR described it as not a rule of evidence, not a cause of action, but "a principle of justice and equity". For present purposes it must be a rule of substantive law and not a rule of evidence. It can not be the case that a defence of estoppel would be available if the claim were brought in a court but not if it were brought in an arbitration.



To attempt a summary, the exclusionary rules regarded as rules of evidence fall into three classes. Some which operate to exclude probative material fall within a dispensation with the rules of evidence, and the material will be open to be received by the Tribunal. Others which so operate will not fall within the dispensation, and the Tribunal will remain bound by them. Others again are truly not exclusionary rules of evidence, and the Tribunal will remain bound by them. There are many, many so-called rules of evidence additional to the few I have mentioned. It is necessary to look beyond the label to determine the class into which any so-called rule of evidence falls. The few words by which the rules of evidence are typically dispensed with are deceptively simple.

## VII

There remains a powerful control over the reception of evidence by a Tribunal which is not bound by the rules of evidence. That is that the Tribunal must not in its reception of evidence deny natural justice to the parties. This seems to be what Evatt J had in mind in the passage from *Bott's case*<sup>83</sup> which I set out much earlier - the manner in which the Tribunal received the medical report and acted upon it without permitting cross-examination did not, in his Honour's view, afford "substantial justice".

What natural justice (or as it is now called, procedural fairness) requires depends upon the particular circumstances. Since the circumstances can be so various, it is not particularly profitable to go to particular instances, but some illustrations can be given and some comments can be made. It is, of course, necessary also to pay regard to any particular direction given by statute or delegated legislation as to the procedure of the Tribunal.

Obviously enough natural justice will require that the Tribunal hear both sides, at least where it is appropriate to have a hearing, or give both sides the opportunity of commenting on the material before the Tribunal.<sup>84</sup> If the Tribunal informs itself in the absence of the parties, at least as a general rule it must give the information so obtained to the parties to permit them to express their views upon it.<sup>85</sup>

Commonly, natural justice will require that the opposing party be allowed to test the evidence by some form of cross-examination.<sup>86</sup> But natural justice does not necessarily require testing by cross-examination (see *Bott's case*)<sup>87</sup>, and fairness may be met by an opportunity to contradict and comment.<sup>88</sup> Even to the contrary: in *Bushell v Secretary of State for the Environment*<sup>89</sup> Lord Diplock suggested that cross-examination might be unfair as "over-judicialising" an administrative enquiry.<sup>90</sup>

Natural justice may go so far as to require that evidence which is relevant nonetheless be excluded because it would be unfair to admit it. For example, in *re Pacific Film Laboratories Pty Ltd and Collector of Customs*<sup>91</sup> the Administrative Appeals Tribunal rejected the tender of the transcript of a tariff enquiry because it would be unfair to have regard to it when the applicant had had no opportunity to cross-examine those who appeared before the enquiry. With this may be compared *re Barbaro and Minister of Immigration and Ethnic Affairs*<sup>92</sup>,

where Davids J admitted the Woodward Report (the Royal Commission into Drug Trafficking) for its findings in relation to the applicant although the applicant had not appeared before the Commission. Another example comes from *R v Hull Visitors ex parte St Germain (No 2)*<sup>93</sup> where it was said by the Divisional Court that although the Tribunal could receive hearsay evidence, the overriding obligation to provide a fair hearing could mean that if the original source of the evidence was not available for cross-examination the Tribunal might have to exclude it.<sup>94</sup>

Hence the point made earlier that a statutory direction that a Tribunal is not bound by the rules of evidence does not mean that no rules excluding otherwise probative material can be or will be applied. The Tribunal does not have to receive all probative material proffered to it (although of course affording

<sup>83</sup> (1933) 58 CLR 228.

<sup>84</sup> *R v Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 QB 456 at 476, 490.

<sup>85</sup> *Xuereb v Viola* (1989) 18 NSWLR 453 at 464 (a case of a reference under Pt 72 of the rules); *Wajnberg v Raynor* (1971) VR 665 at 678.

<sup>86</sup> *R v Australian Broadcasting Tribunal ex parte Hardiman* (1980) 144 CLR 13, esp at 34-5, although in part put on the ground that the Tribunal had failed to fulfil its statutory duty by precluding itself from enquiry rather than on grounds of natural justice; *Barrier Reef Broadcasting Pty Ltd v Minister for Posts and Telecommunications* (1978) 19 ALR 425.

<sup>87</sup> (1933) 50 CLR 228.

<sup>88</sup> *R v Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 QB 456; *T A Millar Ltd v Minister of Housing and Local Government* (1968) 1 WLR 992; *Kavanagh v Chief Constable of Devon and Cornwall* (1974) 1 QB 624.

<sup>89</sup> (1981) AC 75.

<sup>90</sup> (1981) AC 75 at 95.

<sup>91</sup> (1979) 2 ALD 144.

<sup>92</sup> (1980) 3 ALD 1. In *Gardiner v Land Agents Board* (1976) 12 SASR 458 at 474 Walters J suggested that hearsay evidence should not have been received to prove serious allegations; query whether this is a confusion between admissibility and weight, and his Honour later seems to have adverted more to weight in questioning (at 475) whether the evidence had sufficient probative value to found the tribunal's decision.

<sup>93</sup> (1979) 1 WLR 1401.

<sup>94</sup> (1979) 1 WLR 1401 at 1409-10; cf. *R v Commission for Racial Equality ex parte Cottrell* (1980) 1 WLR 1580 at 1588.

natural justice will not necessarily mean refusal to receive evidence - the unfairness may be met by adjournment or in some other way). But any exclusion will be by force of the general principle of natural justice rather than the detailed rules of evidence. I throw up for discussion the position where a statute is cast in inclusory terms, such as s. 14B of the *Evidence Act 1898* (NSW) whereby a statement in a document "shall ... be admissible ..." if certain conditions are satisfied. Can the Tribunal refuse to receive the statement if it considers natural justice so requires? I suggest that it can, because the statutory provision is just as much a rule of evidence as an exclusionary rule, and if that be so a Tribunal not bound by the rules of evidence is in a quite different position from a court. It is to be hoped that this is only a hypothetical question.

Has there been achieved something like Thayer's ideal, whereby everything logically probative is received unless excluded by particular exclusions based on sound policy (eg the privileges) or the general principle of natural justice? The rules of evidence may provide guidance upon when particular attention to fairness in the tribunal's fact-finding is required, but the task of the Tribunal will not always be easy. Opinions can differ on what procedural fairness requires, and the scope and content of natural justice is certainly not static. However, where a decision has been entrusted to a Tribunal not bound by the rules of evidence and (usually) empowered to inform itself as it thinks fit, it would be wrong to let exclusionary rules analogous to rules of evidence creep back in under the guise of rules of procedural fairness.

## VIII

Although beyond the immediate scope of this paper, it is appropriate to note an emphasis in what natural justice may require at the stage of evaluation of the evidence rather than its reception. The emphasis is that the decision of the Tribunal may be open to challenge for denial of natural justice if the decision is not based on evidence. Dispensation with the rules of evidence does not mean liberty to decide the issues of fact on a whim, and natural justice may be the way to a remedy if that is thought to have occurred.

The emphasis began in the judgment of Diplock LJ in *R v Deputy Industrial Injuries Commissioner*<sup>95</sup>, where his Lordship said:

"Where, as in the present case, a personal bias or mala fides on the part of the deputy commissioner is not in question, the rules of natural justice which he must observe can, in my view, be reduced to two. First, he must base his decision on evidence, whether a hearing is requested or not ...

In the context of the first rule, 'evidence' is not restricted to evidence which would be admissible in a court of law ... The requirement that a person exercising a quasi-judicial function must base his decision on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would

be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above."<sup>96</sup>

In *Minister for Immigration and Ethnic Affairs v Pochi*<sup>97</sup> (the appeal from Brennan J sitting as President of the Administrative Appeals Tribunal) Dean J said:

"... the Tribunal was bound, as a matter of law, to act on the basis that any conduct alleged against Pochi which was relied upon as a basis for sustaining the deportation order should be established, on the balance of probability, to its satisfaction by some rationally probative evidence and not merely raised before it as a matter of suspicion or speculation or left, on the material before it, in the situation where the Tribunal considered that, while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had."<sup>98</sup>

Deane J joined with Diplock LJ in regarding this as an aspect of natural justice, and said that it would be surprising and illogical if the rules of natural justice were restricted to the procedural steps leading up to the making of the decision and were completely silent as to the basis on which the decision itself might be made:

"There would be little point in the requirements of natural justice aimed at ensuring a fair hearing by such a Tribunal if, in the outcome, the decision maker remained free to make an arbitrary decision."<sup>99</sup>

His Honour took this up in *Australian Broadcasting Tribunal v Bond*<sup>100</sup>, saying that a duty to afford natural justice extends to the actual decision-making procedure or process and the steps by which the decision is made, and that it is breached if the findings of fact on which the decision is based are unsupported by probative material.<sup>101</sup> But Mason CJ (with whom Brennan J agreed) said of a number of cases postulating a "no sufficient evidence" test that it remained to be seen whether they conveyed more than a "no probative evidence" test, and in relation to whether natural justice required that the decision be based upon material tending to show facts consistent with the finding noted that the approach "has not so far been accepted by this Court".<sup>102</sup>

<sup>95</sup> (1965) 1 QB 456.

<sup>96</sup> (1965) 1 QB 456 at 487-8.

<sup>97</sup> (1980) 31 ALR 666.

<sup>98</sup> (1980) 31 ALR 666 at 685.

<sup>99</sup> (1980) 31 ALR 666 at 689.

<sup>100</sup> (1990) 64 ALJR 462.

<sup>101</sup> (1990) 64 ALJR 462 at 482.

<sup>102</sup> (1990) 64 ALJR 462 at 477-8.

Whether these aspects of natural justice will come to be accepted, and what they may lead to, are certainly beyond the scope of this paper. Lord Diplock's judgment would not justify any more than that there be some evidence (which may or may not be admissible according to the rules of evidence) supporting the decision of the Tribunal: his Lordship continued in the passage which I set out above:

"If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue."<sup>103</sup>

Natural justice would require that the decision be based on evidence even if the Tribunal were bound by the rules of evidence. Although insistence on natural justice is not confined to a Tribunal which is not bound by the rules of evidence, perhaps the future will see a widening of natural justice as an alternative control over the Tribunal of fact in arriving at its decisions, in part a substitute for the control once worked by exclusionary rules of evidence. □

## A Commentary

*P.M. Donohoe QC comments upon Mr Justice Giles' paper*

These comments refer to the paper of His Honour Mr. Justice Giles delivered to the New South Wales Bar Association on 8 October 1990. There is, however, a difference in emphasis. His Honour's paper examines the law in circumstances where the rules of evidence have been dispensed with, for example, by the provisions of a statute. Drawing upon His Honour's analysis, these comments focus upon the dynamics affecting the judgment which, in modern practice, counsel is frequently called upon to make as to whether or not to dispense with the rules of evidence.

Common occasions include on an application for a direction under Part 72 Rule 8 of the Supreme Court Rules (which deals with conduct of proceedings by a referee) and s.19(3) of the Commercial Arbitration Act 1984 (which deals with evidence before an arbitrator or umpire). In pursuit of seductive simplicity I have posed ten questions and added some of my own comments.

1. *What (if anything) do I know of the tribunal's capacity and disposition to assess what is logically probative? (sections I & II, section V, section VIII).*

Thayer's Theory is based on evidence that is "logically probative". This reference to logic conceals the fact that the probative effect of evidence is derived in part from logic but in large measure from a catalogue of unstated assumptions derived from experience. Informality gives greater scope for the influence of the adjudicator's personal experience. Judges

bound by the rules of evidence are usually more alert than lay adjudicators, to the importance of exposing such prejudices.

Once the rules of evidence are dispensed with counsel, in my view, must be especially sensitive to the duty to the Tribunal and exercise more than usual restraint: the liberty the relative informality is a temptation to depart from principle and proper conduct.

2. *What is my assessment of the tribunal's capacity*  
*(i) to assess what is irrelevant; and*  
*(ii) to contain my opponent?*  
*(section II, section IV and section VI).*

The formal rules of evidence require constant reference to the issues and the rejection of the irrelevant. With less formality more material tends to be admitted with the paradoxical consequence that the less experienced adjudicator is burdened with the greater bulk of evidence.

A garrulous opponent (assuming oneself to be the embodiment of brevity) can confuse the Tribunal and prolong the proceedings. Furthermore, the rule as to the finality of answers to collateral questions and the provisions of s.56 of the Evidence Act 1898 (limiting cross examination) provide important restraints which one may wish to invoke against certain opponents.

3. *Do I know what I am dispensing with if I agree to dispense with all of the rules of evidence?*

It is significant that Wigmore's Treatise on Evidence contains 2,597 paragraphs! I refer to this simply to illustrate the vast body of law which may be dispensed with. Suppose counsel were asked to consent to dispensing with the rules of equity or the statutory duty of employers, how would one react? I suspect that most counsel would be reluctant to consent to a wholesale dispensation with a vast body of law developed over a number of centuries. The Law Reform Commission, in its interim report No. 26 on Evidence, adopted an ad hoc approach in its Draft Evidence Bill. Clause 141 is in the following terms:-

- "141. (1) The court may, if the parties consent, dispense with the application of any one or more of the provisions of -
- (a) Division 3 of part II; or
  - (b) Division 2,3,4,5,6, 7 or 8 of Part III, in relation to particular evidence or generally.
- (2) In a criminal proceeding, the consent of a defendant is not effective for the purposes of sub-section (1) unless -
- (a) the defendant is represented by a legal practitioner; or
  - (b) the court is satisfied that the defendant understands the consequences of giving the consent.
- (3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in

<sup>103</sup> (1965) 1 QB 456 at 488.