DOBBING-IN AND THE HIGH COURT – *VEAL* REFINES PROCEDURAL FAIRNESS

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I INTRODUCTION

This paper considers the significant impact of the High Court's decision in *Veal v Minister for Immigration and Multicultural and Indigenous Affairs*[1] on procedural fairness. That decision has clarified the law regarding the duty on administrative decision-makers to disclose adverse information to an applicant where the source of information is confidential.

Although there is no empirical evidence available, anecdotal evidence and practical experience suggest that confidential information is provided by individual informants on a reasonably regular basis in a wide range of areas: for example, immigration, veterans entitlements and the social welfare system. These situations often arise in such areas because they concern individuals claiming specific rights and entitlements, in circumstances where other members of the community might have information to dispute the claim to the particular entitlement.

In *Veal* the majority of the Full Federal Court held that there was no duty on a Refugee Review Tribunal ('RRT') member to disclose to the applicants an adverse confidential report, primarily because the RRT member had explicitly disavowed any reliance upon the confidential material in her decision-making.[2] That finding is, at least to some extent, superficially attractive: the decision-maker had clearly said that the confidential information did not affect her decision, and there was nothing in the content of the decision to suggest otherwise.

The High Court, on appeal, rejected the Full Court majority view. In this paper, I contend the High Court has established a clearer, more appropriate set of rules to determine how to balance the competing demands of procedural fairness for applicants with the need to protect the confidentiality of informants. In analysing that issue the High Court has also:

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1 (2005) 225 CLR 88 ('*Veal*').

2 *Minister for Immigration & Multicultural & Indigenous Affairs v Applicant Veal of 2002* (2004) 138 FCR 84 (Mansfield and Whitlam JJ; Gray J dissenting).

- strongly endorsed the view that procedural fairness is focussed on process and not the merits of decision-making;
- determined that courts must focus on what the decision-maker should have done by way of procedural fairness and then compare that with what was actually done rather than focus on the reasons given by the decision maker or the possible mental processes of the decision-maker;
- determined that decision-makers must disclose adverse information that is not evidently not credible, relevant and significant to the decision[3] – a relatively easy test to satisfy;
- dispensed with the second principle of Justice Brennan's dictum in *Kioa v West*[4] that an applicant must be given an opportunity to comment on adverse information if that information might create a real risk of prejudice in the mind of the decision-maker, whether consciously or subconsciously;
- developed the principle that if an informant has no special legal interest in a confidential matter then the requirements of confidentiality are determined by the relevant statutory framework and, where appropriate, by using the analogy of the public interest immunity.

The remainder of the paper is organised as follows. Section II places the discussion of *Veal* in the context of the general principles and objectives of procedural fairness. Section III explains the policy objectives of the duty to disclose and the impact of the leading case, *Kioa v West*. Section IV of the paper analyses the High Court's reasoning in *Veal*, particularly in relation to the correct approach to procedural fairness and the meaning and content of the law relating to the duty to disclose. However, as section V explains, there are still cases on the periphery of the principles that will cause concern for some decision-makers. This is even more apparent because of the flexibility of procedural fairness and the vast range of circumstances that can arise. Those difficult cases will inevitably require balancing of the factors involved in assessing the content of procedural fairness and the requirements of confidentiality. Section VI argues that the decision in *Veal* is desirable in policy terms because it will assist in meeting the key objectives of procedural fairness such as giving applicants a fair opportunity to deal with adverse information. In conclusion, section VII, summarises the importance of *Veal* and its consequences.

II THE PRINCIPLES AND OBJECTIVES OF PROCEDURAL FAIRNESS

At its basic level, procedural fairness is the requirement on administrative decision-makers to act fairly.[5] There are three fundamental elements of the

3 The High Court expressed this test as a double negative, ie, not evidently not credible, relevant and significant.

4 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

5 *Board of Education v Rice* [1911] AC 179, 182. See also *Kioa v West* (1985) 159 CLR 550, 582 (Mason J).

doctrine of procedural fairness: the right to know sufficient details in order to meet a case; the right of a person whose interests are affected by a decision to be heard; and the right for decision-making to be free from either bias or reasonable apprehension of bias. This paper focuses on the first right of parties challenging a decision to know the case against them.

Procedural fairness is regarded as a desirable concept for both instrumental and non-instrumental reasons. Procedural fairness can be characterised as instrumental because it improves the accuracy and logic of administrative decision-making.[6] It also can give the decision-maker access to additional or better information by requiring proper input from all parties including evidence and submissions.[7] Non-instrumental rationales focus on the doctrine's contribution to party and community participation in decision-making and the broader social value of participation and accountability. Non-instrumental rationales include the following: procedural fairness enhances formal justice and the rule of law because it assists to guarantee objectivity and impartiality;[8] it contributes to protecting human dignity, common decency and democratic values by ensuring that people are told why they are being treated in a certain way and enables parties to take part in that decision;[9] it assists parties to accept unfavourable decisions; and it enables the legitimacy of authoritative standards to be disputed and, if necessary, rejected.[10] In relation to tribunals, fair procedures enhance public confidence in tribunals, enabling them to gain public support and resources needed to perform their functions.[11]

Most commentators rely on both instrumental and non-instrumental rationales to justify and analyse procedural fairness, although it is clear that there can be conflict between the two views in certain circumstances, particularly where supporting the importance or pre-eminence of one will be at the expense of the other.

One criticism of the doctrine of procedural fairness, or at least of its central importance, is that it may act as part of a legal perspective, or even legal ideology, that diverts attention and focus away from the importance of making substantively fair and just decisions; according to that view, the focus should clearly be on outcome and not process.[12] A second criticism is that the broad flexibility of procedural fairness means that it lacks consistency, certainty and predictability.[13] Another noted weakness is that an extensive doctrine of procedural fairness increases the costs and inefficiency of administration in circumstances where there are already limited resources.[14]

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6 Paul Craig, *Administrative Law* (3rd ed, 1994) 282.

7 Mark Aronson, Bruce Dyer and Mathew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 376.

8 Craig, above n 6, 282.

9 Ibid.

10 Aronson, Dyer and Groves, above n 7, 376.

11 Council of Australasian Tribunals, *Practice Manual for Tribunals* 2006 [3.1.2].

12 See, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366 (Deane J), discussed below in this paper.

13 Aronson, Dyer & Groves, above n 7, 471.

14 Ibid 484-86 for a discussion of costs and efficiency.

The paper will later consider the advantages and potential disadvantages of procedural fairness in relation to the provision of adverse information where confidentiality is an issue.

III THE DUTY OF DISCLOSURE OF ADVERSE INFORMATION

The rationale for the duty of disclosure is readily apparent: to receive evidence without advising the parties and to act upon such evidence effectively deprives a party of a fair hearing and reduces the level of accountability, accuracy and reliability of the hearing and outcome.[15] Disclosure can also improve the efficiency and expedition of the decision-making process by directing attention to only the relevant issues and information.[16]

Arguments against disclosure, or at least liberal rules requiring it, are that it might, at least in some cases, unnecessarily prolong the decision-making process, increase the administrative burden on decision-makers and thereby consume valuable resources, and involve the consideration of irrelevant information or information that has so little relevance that it is of no probative value.

Australian courts have developed a considerable body of case law with the fundamental principle that an administrative decision-maker having power to affect the rights, interests, privileges or legitimate expectations of a person must ordinarily afford such a person a reasonable opportunity to be heard, which includes the right to know about adverse material and to have an opportunity to respond to it.[17]

The landmark decision in procedural fairness generally, and in relation to the duty of disclosure, was *Kioa v West*, and in particular, the judgments of Mason and Brennan JJ in that case. *Kioa v West* concerned a challenge to a decision to deport from Australia Mr and Mrs Kioa, who were not Australian citizens. The basis of the challenge was that the Kioas were not given an opportunity to respond to prejudicial statements contained in a written submission by an officer of the Department of Immigration and Ethnic Affairs to the Minister's delegate who was to make the decision. The majority of the High Court, to some extent on the basis of different reasoning, held that this constituted a breach of procedural fairness.[18]

Justice Mason in *Kioa v West* enunciated the general principle that:

> there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and

15 Ibid 433.

16 Ibid.

17 See, eg, *Kioa v West* (1985) 159 CLR 550, 582 (Mason J); *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 109; *Banks v Transport Regulation Board (VIC.)* (1968) 119 CLR 222; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 419; *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 498-99; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360, 376-77; *Sullivan v Department of Transport* (1978) 1 ALD 383; *Hercules v Jacobs* (1982) 60 FLR 82, 86.

18 Mason, Brennan, Wilson, Deane JJ. Gibbs CJ dissented, holding that there was no duty to afford procedural fairness in the circumstances, and if a contrary view was taken on that point, that there was no breach of such rules if they were applicable: *Kioa v West* (1985) 159 CLR 550, 567-68.

> legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[19]

Applying this general principle to the facts before him Mason J said that the statement of reasons for the decision by the Department did not expressly disavow the prejudicial statements and as they were extremely prejudicial, the appellant should have had an opportunity to reply to them.[20]

Justice Brennan made the following remarks that have often been quoted with approval and until the High Court's decision in *Veal* represented the general principles of law on the duty to disclose adverse material.[21] His Honour said that a person whose interests were likely to be affected by an exercise of power did not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance.[22] Justice Brennan continued:

> [N]evertheless, in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the case to be made. It is not sufficient for the repository of power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit unconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with that information. He will be neither consoled nor assured to be told that the prejudicial information was left out of account.[23]

In *Kioa v West* there was no issue of confidentiality and Brennan J did not consider further this aspect of the law. Justice Brennan was the only judge in *Kioa v West* who used the principles of disclosing relevant, credible and significant material and the real risk of prejudice, even an unconscious risk of prejudice.

Thus, *Kioa v West* left open the question of how the general principles espoused by Brennan J would be affected by confidential adverse information. As Brennan J intimated in his comments, the two principles of procedural fairness and confidentiality are likely to constitute competing demands. The main issue is how the recognition and protection of confidentiality should be balanced against the requirement of procedural fairness that applicants should ordinarily be given an adequate opportunity to answer the case against them, in particular, with respect to any adverse material.

IV THE IMPACT OF VEAL ON CONFIDENTIALITY AND PROCEDURAL FAIRNESS

A *Veal*: Background and Facts

The appellant and his partner had applied for protection visas which a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs had

19 Ibid 584.
20 Ibid 588.
21 See, eg, *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 [123] (Gaudron J).
22 *Kioa v West* (1985) 159 CLR 550, 628 (Brennan J).
23 Ibid.

refused. The appellant and his partner sought review by the RRT of the refusal of their applications. After those applications for review had been made, but before the Tribunal had completed its review, the Department of Immigration and Multicultural and Indigenous Affairs ('DIMIA') received a letter about the appellant. The letter was unsolicited but not anonymous as it gave the author's name and address.

The letter alleged that the appellant had admitted that he had been accused of killing a person prominent in the political affairs of Eritrea, the appellant's country of origin. It also was alleged that the appellant was a supporter of, and working for, the government of Eritrea. The letter concluded by advising DIMIA 'to keep [this] information secret'.[24]

DIMIA sent the letter to the Tribunal. In conducting its review, the Tribunal did not tell the appellant that it had received the letter and nor did it tell the appellant that the allegations made in the letter had been made. Further, the Tribunal did not question the appellant about the substance of any of the allegations made in the letter.

The Tribunal affirmed the decision not to grant protection visa. At the end of its reasons, the Tribunal said that in reaching its findings it 'gives no weight' to the letter sent to the Department and forwarded to the Tribunal. The Tribunal stated:

> [T]he writer of that letter makes clear that the material therein is provided confidentially. The Tribunal has been unable to test the claims made in the letter and, accordingly, gives it no weight. The Tribunal has decided this matter solely for reasons outlined above.[25]

This was the only reference that the Tribunal member made to the letter in their decision.

The appellant applied to the Federal Court of Australia for relief under s 39B of the *Judiciary Act 1903* (Cth). In his application, he alleged, amongst other things, that he had been denied procedural fairness. He succeeded at first instance before Merkel J,[26] but on appeal to the Full Federal Court the majority allowed the Minister's appeal.[27] The appellant was granted special leave to appeal to the High Court.

B The Issues

In the appeal to the High Court, the parties agreed to treat the determinative question as being only whether common law procedural fairness required the Tribunal to inform the appellant of the existence of the letter, or its contents, before the Tribunal decided to affirm the refusal to grant the appellant a

24 *Veal* (2005) 225 CLR 88, [2] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

25 *Veal* (2005) 225 CLR 88, [5]. The facts and background of the case are set out in [1]-[6].

26 *Applicant Veal of 2002 v Minister For Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741.

27 *Minister for Immigration & Multicultural & Indigenous Affairs v Applicant Veal of 2002* (2004) 138 FCR 84.

protection visa. No argument was put about the direct effect if any, of the provisions of the *Migration Act 1958* (Cth).[28]

C The High Court's Decision

In a relatively short and succinct joint judgment, the High Court held that the contents of the confidential letter could not be dismissed by the Tribunal from further consideration as not credible, not relevant or of little or no significance to the decision that was to be made.[29] Indeed, the information was clearly relevant and significant to whether the applicant had a well-founded fear of persecution.[30] Moreover, neither the alleged admission by the applicant as set out in the confidential letter or the allegation that the applicant was working for the present government of Eritrea, could be dismissed as material to which the Tribunal could not give credence.[31] Therefore, the Tribunal had to disclose such information to the applicant in some manner.

The High Court stated that procedural fairness did not require the Tribunal to provide the applicant with a copy of the confidential letter or to provide information that would reveal the identity of its author.[32] However, those common law principles did require the Tribunal to disclose the substance of the allegations contained in the letter to the applicant.[33] Therefore there had been a breach of the requirements of procedural fairness and the appeal was allowed.

D The Court's Reasoning

The High Court indicated that in the arguments before them the crucial issue was the utility and practical application of two fundamental principles of Australian law in relation to procedural fairness.[34] They were Justice Brennan's statements in *Kioa v West* that:

> in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made;

And, that:

> [i]nformation of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information.[35]

The Court's analysis of those principles is now discussed in detail.

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28 *Veal* (2005) 225 CLR 88, [7]-[8]. For a discussion of adverse information and the provisions of the *Migration Act 1958* (Cth) prior to the High Court decision in *Veal*, see Caron Beaton-Wells, 'Disclosure of adverse information to applicants under the Migration Act 1958' (2004) 11 *Australian Journal of Administrative Law* 61.

29 *Veal* (2005) 225 CLR 88, [20] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

30 Ibid.

31 Ibid.

32 Ibid [29].

33 Ibid.

34 Ibid [15].

35 *Kioa v West* (1985) 159 CLR 550, 629.

1 *The Correct Approach to Procedural Fairness*

The High Court set out the general approach that courts should adopt in relation to procedural fairness as follows:

> [A]s these reasons will show, it is not useful to begin the inquiry about procedural fairness by looking to what the Tribunal said in its reasons. Rather, as procedural fairness is directed to the obligation to give the appellant a fair hearing, it is necessary to begin by looking at what procedural fairness required the Tribunal to do in the course of conducting its review.[36]

The Court stated that it was a fundamental point that principles of procedural fairness 'are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise'.[37]

Thus a court must focus on what the decision-maker should have done by way of procedural fairness and then compare that with what was actually done. Although the High Court did not explicitly refer to the Full Federal Court decision below on this point, it appears that the High Court considered that the majority in the Full Federal Court had begun its inquiry by examining what the Tribunal had said in its reasons. Thus, unlike in *Kioa v West* where there was no unanimous approach, the High Court in *Veal* has clearly and unambiguously set out the general method for all Australian courts to follow in judicial review of issues of procedural fairness.

The High Court's statement of principle about how to approach procedural fairness is a welcome one. It accords with a logical and common sense definition of procedural fairness; that is, that the procedures used are fair to all parties. It also accords with the stated objectives of procedural fairness which will be discussed further below.

2 *Dealing with the Principles Generally*

The High Court in *Veal* established as a fundamental principle that a court must focus on establishing what the decision-maker had to do to meet the requirements of procedural fairness in the circumstances of the particular case. A consequence of that focus is that making relatively fine distinctions on the facts of other cases or precedents is of no great significance.

The majority judges in the Full Federal Court had attempted to distinguish the facts in *Veal* from those in *Kioa v West* on the basis that in *Kioa v West* the delegate did not mention in his reasons for decision the allegation in the departmental submission. According to Mansfield and Whitlam JJ it was this fact that led a majority of the High Court in *Kioa v West* to be unwilling to infer that the allegation played no part in the delegate's decision. In *Veal* the decision-maker had explicitly disavowed any reliance on the confidential information. Mansfield and Whitlam JJ also used similar reasoning to attempt to distinguish *NIB Health Funds Ltd v Private Health Insurance Administration Council*.[38]

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36 *Veal* (2005) 225 CLR 88, [14].

37 Ibid [16].

38 (2002) 115 FCR 561 ('*NIB Health Funds'*), *Minister for Immigration & Multicultural & Indigenous Affairs v Applicant Veal of 2002* (2004) 138 FCR 84, [68]-[70].

Whilst this reasoning by Mansfield and Whitlam JJ constitutes an ingenious and plausible argument, it has not prevailed because it would have derogated from the general principles that Brennan J proposed in *Kioa v West*. There was no suggestion in Justice Brennan's judgment in *Kioa v West* that those general principles should be limited to situations where the decision-maker does not refer to the relevant allegation. Instead, the principles were expressed generally with no such caveats. Certainly, Mason J in *Kioa v West* did appear to consider that the lack of express disavowal was highly significant,[39] but it has been Justice Brennan's general principles that have determined the law and approach after *Kioa v West* and not Justice Mason's more cautious views on this issue. Justice Brennan's more general principles have rightly prevailed because they offer courts relatively clear and simple guidance on applying the principles of procedural fairness without the need to find or impose any rigid or complex factual distinctions. The general principles provide guidance and flexibilty, not prescription.

The High Court in *Veal* did not deal with the attempted distinguishing of these authorities by Mansfield and Whitlam JJ. The High Court did comment that

> as is always the case, what is said in reasons for judgment must be understood in the context of the whole of the reasons. Examining sentences, or parts of sentences, in isolation from the context is apt to lead to error.[40]

This would seem to be particularly pertinent in cases involving procedural fairness – the flexibility of the doctrine is designed to be applied to a wide variety of factual situations. As the High Court has now made clear, the primary test involves ascertaining what procedural fairness actually required the decision maker to do in the course of conducting its review.[41] Justice Gray made the same point in *Veal* in the Full Federal Court when he said that the fundamental principle of procedural fairness as postulated by Brennan J in *Kioa v West* had been referred to and applied in a body of cases[42] and 'should not be undermined by close distinctions on the facts of particular cases'.[43]

3 *What does Credible, Relevant and Significant Information Mean?*

While Brennan J introduced in *Kioa v West* the principle that there was a need for decision-makers to disclose information that is credible, relevant and significant, he did not explore what those words meant and, in particular, what the requisite level of credibility, relevance and significance was.

In *Veal*, the majority in the Full Federal Court decided that whilst the allegations in the confidential letter were, prima facie, not fanciful, that did not

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39 *Kioa v West* (1985) 159 CLR 550, 582.

40 *Veal* (2005) 225 CLR 88, [16].

41 Ibid [14].

42 *Yousef v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 550, 552; *Roderick v Australian and Overseas Telecommunications Corporation Ltd* (1992) 39 FCR 134, 145 (Hill J); *NIB Health Funds* (2002) 115 FCR 561 ; *Hercules v Jacobs* (1982) 60 FLR 82; *Phillips v Secretary, Department of Immigration and Ethnic Affairs* (1994) 48 FCR 57; *Day v Douglas* [1999] FCA 1444, [45]; *Commonwealth of Australia v Day* [2000] FCA 474 [22]; *Bohills v Friedman* (2001) 110 FCR 338.

43 *Minister for Immigration & Multicultural & Indigenous Affairs v Applicant Veal of 2002* (2004) 138 FCR 84, [21] (Gray J).

mean they were credible. Their Honours said that the allegations were not made by a person of authority with professional expertise, such as the Director of the Enforcement Section of the Department of Immigration and Ethnic Affairs in *Kioa v West* or the CEO in *NIB Health Funds*. Their Honours did not say that only material apparently of official origin had to be disclosed as a requirement of procedural fairness. However, their Honours suggested that the concern expressed by Brennan J in *Kioa v West*, about avoiding clogging the administrative decision-making with inquiries about matters that were not credible, relevant or significant, meant that the standard to be applied should be above merely ignoring the fanciful.[44]

In my opinion, the majority view in the Full Federal Court was that the information has to be evidently credible before the decision-maker is required to further consider the matter and cannot safely disregard it.

Justice Gray in the Full Federal Court took a very different approach. He stated that:

> [A]s to the word 'credible', I am of the view that all that is required is that the information should not lack credibility either on its face, or by reason of the circumstances in which it came to the notice of the decision-maker. I am far from convinced that a rule should be developed that regards as credible only those documents emanating from official sources. Still less would I favour a rule that treats all documents emanating from official sources as automatically credible. The threshold of credibility intended is a low one. It is intended to exclude only those kinds of information that would necessarily be dismissed out of hand.[45]

The High Court adopted the approach of Gray J. The High Court readily conceded, as Brennan J had done in *Kioa v West,* that there could be information that is not credible, relevant and significant to the decision made and the decision-maker could legitimately put that information aside from further consideration.[46] However, the High Court emphasised that decisions about disclosing information could not be made as an apparent afterthought when for all intents and purposes the decision-making process had ended.[47] Evidently, this is what the High Court decided had happened when the RRT member in *Veal* made a passing reference to not giving any weight to the confidential letter at the end of her decision. The High Court again focused on the fundamental point that procedural fairness is concerned with procedures rather than outcomes. According to the High Court this meant that the decision-maker must make at least a preliminary assessment of evidence as to its credibility, relevance and significance *in the course of deciding* how his/her decision-making power is to be exercised.[48]

The High Court continued:

> '[C]redible, relevant and significant' must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss

44 Ibid [77].
45 Ibid [21].
46 *Veal* (2005) 225 CLR 88, [17].
47 Ibid [16]-[17].
48 Ibid [16] (emphasis in original).

> information from further consideration unless the information is evidently not credible, not relevant, or of little or no significance to the decision that is to be made. References to information that is 'credible, relevant and significant' are not to be understood as depending upon whatever characterisation of the information the decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached.[49]

Thus the High Court held that information could only be properly put aside if it is evidently not credible, relevant and significant. This is likely to mean that decision-makers taking into account the decision in *Veal* will err on the side of further considering information, and how it can be best put to the applicant, if at all, where they have doubts about its credibility, relevance or significance, unless they are comfortably satisfied that the information does not meet that standard.

4 *Removing the Application of Prejudice or Subconscious Effects*

Justice Brennan in his dictum in *Kioa v West* did not explicitly state that there were two central principles or tests, namely whether the information was credible, relevant and significant and secondly, whether it could be said that it created a real risk of prejudice. Indeed, on one interpretation, when the content and structure of the passage is examined, he may have referred to the risk of prejudice as one rationale for having a general duty to disclose credible, relevant and significant information. That is, the real test was one of the nature and quality of the information and not the risk of prejudice.

However, the courts in subsequent cases have tended to regard Justice Brennan's dictum as constituting two separate but related propositions or tests. Thus, for example, Allsop J in *NIB Health Funds* said that the court first had to consider whether there is a real risk of prejudice (a theoretical possibility of prejudice is not sufficient) and secondly, whether the risk arose due to the material being credible, relevant and significant.[50] In *Veal* at first instance, Merkel J, approving Justice Allsop's principles (but perhaps reversing their order), first found that the confidential material was credible, relevant and significant and then found that the material constituted a real risk of prejudice to the applicant in that it could have subconsciously influenced the mind of the tribunal member, or at least given rise to an appearance of a real risk of prejudice.[51]

In *Veal*, the High Court has jettisoned any reliance upon the issue of whether it could be said that the court should consider any subconscious effect of the information upon the decision-maker:

> As has later been rightly said [in *NIB Health Funds Ltd*], 'the necessity to disclose such material in order to accord procedural fairness is not based on answering a causal question as to whether the material did in fact play a part in influencing the decision'. It follows that asking whether, despite what was said in its reasons, the Tribunal may have been subconsciously affected by the information distracts

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49 Ibid [17].

50 *NIB Health Funds* (2002) 115 FCR 561, 585-6. See also *Roderick v Australian and Overseas Telecommunications Corp Ltd* (1992) 39 FCR 134, 145 (Hill J); *Johns v Release on Licence Board* (1987) 9 NSWLR 103.

51 *Applicant Veal of 2002 v Minister For Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741, [25]-[28].

> attention from the relevant inquiry. The relevant inquiry is: what procedures should have been followed? The relevant inquiry is neither what decision should the decision-maker have made, nor what reasons did the decision-maker give for the conclusion reached.[52]

In the Full Federal Court decision both the majority and Gray J took into account the possibility of subconscious effects on the decision-maker. In addition to the High Court's point that procedural fairness should be about the process that should have been adopted, there are a number of other reasons to discard the principle of unconscious or subconscious effects. First, the notion of the subconscious or unconscious is not one that courts would normally use or feel comfortable using. Courts are traditionally concerned with the conduct of people and their conscious thoughts and beliefs, which can be derived from their actions, conduct and words. A second difficulty is that the operation of the subconscious or unconscious and its interaction with the conscious mind is itself a relatively controversial and speculative field in psychiatry and neuroscience.[53] There is no general answer as to how the conscious and unconscious areas of the mind will affect decision-making. A third problem is that investigating the potential subconscious effects of decision-makers has led to uncomfortable and disconcerting assessments of the relative capacities of decision-makers.

Thus Gray J, at first instance, in effect made an assessment that RRT Members were more likely to be affected by subconscious factors than judges for the following reasons: the Tribunal normally consists of only one member; although some Members of the Tribunal are lawyers, most are not; there is no requirement for Members to have had experience in sifting relevant from irrelevant material and having regard only to the former in making decisions; the Tribunal is not bound by the rules of evidence; and its Members do not have the opportunity to do what judges do frequently, to look at the content of evidence for the purpose of ruling on its admissibility and then to disregard it for all purposes if it is inadmissible.[54] Therefore, according to Gray J, some caution is required when considering decisions emanating from bodies like the RRT to ensure that systems of administrative decision-making are fair.[55]

Justices Whitlam and Mansfield, on the other hand, considered that the Tribunal member had good cause to make an assessment that the contents of the letter were not credible and moreover said:

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52 *Veal* (2005) 225 CLR 88, [19].

53 See, eg, Jeffret D Scall, 'Neural basis of deciding, choosing and acting' (2001) 2(1) *Nature Reviews Neuroscience* 33; Pawel Lewicki, Thomas Hill & Maria Czyzewska, 'Nonconscious acquisition of information' (1992) 47(6) *American Psychologist* 796.

54 *Minister for Immigration & Multicultural & Indigenous Affairs v Applicant Veal of 2002* (2004) 138 FCR 84, [20].

55 Ibid.

> [T]he bona fides of the decision-maker may be called into question, or a case may be made of subconscious influence where some use of other information from the same source has occurred. No such case was made in the present case. In those circumstances to overturn the decision of the Tribunal usurps the role diligently and honestly discharged by the holder of an important statutory office to whom Parliament has committed the function of selecting the material on which findings of fact are to be based.[56]

The difficulty of applying either the view of Gray J or that of Mansfield and Whitlam JJ is that they both apply untested generalisations about members and judges to particular decision-makers in determining particular cases. Arguably, at least on some occasions, some judges might be more prone to be affected by subconscious elements than some other decision-makers. A further problem with this type of analysis is that by definition the decision-maker will not be aware of his/her unconscious thoughts or feelings so that it is not possible for that person, or indeed any review court, to identify these influences and to put them to one side. In addition, there is the problem of what relevant evidence could be put about the risk of being subject to unconscious prejudices. The use of broad generalisations about unconscious or subconscious effects is also fraught with difficulty as an evidentiary matter. It could mean, for example, that courts might consider the fact of whether the decision-maker was a lawyer or not and exactly what forensic experience they had, including sifting evidence for relevance and putting to one side any prejudices. This would be a complex, highly speculative, and inefficient process.

5 *Balancing the Requirements of Confidentiality with Procedural Fairness: Using the Analogy of Public Interest Immunity*

The High Court held that the mere fact that the author of the confidential letter had requested that the Department keep its contents secret did not mean that the equitable principles of confidential information were engaged.[57] This view is consistent with the distinction drawn by Mason J in *Commonwealth v John Fairfax & Sons Ltd*[58] between the equitable principle of confidentiality which is to protect personal interests and the principles of confidentiality which are to protect the public interest:

> The equitable principle [of confidentiality] has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.[59]

Thus, in *Veal*, where the information had been provided 'gratuitously'[60] and with no explanation given as to why it should remain confidential,[61] the duty to

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56 Ibid [78].

57 *Veal* (2005) 225 CLR 88, [22].

58 (1980) 147 CLR 39.

59 Ibid 51-52 (Mason J).

60 *Applicant Veal of 2002 v Minister For Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741, [51] (Merkel J).

protect confidentiality was to be derived from the statutory construction of the *Migration Act 1958* (Cth) (‘*Migration Act’)* that created the decision-making rights and process.[62]

Moreover, the High Court in *Veal* decided that the nature and content of the Tribunal’s obligation to disclose the information was only regulated by the *Migration* Act and its obligation to accord procedural fairness.[63] The nature of the obligation to accord procedural fairness was to be determined not only by reference to the particular provisions of the Act that regulated the Tribunal’s work but also by reference to the scope and objects of the Act as a whole.[64] The High Court found that the scope and objects of the Act as applicable to the instant case were relatively straightforward (the granting and refusal of visas), and secondly that the Tribunal in reviewing the Minister’s decisions was exercising executive and not judicial power. [65]

Therefore, the High Court established that where individuals with no private or special interest in the matter provide information, confidentiality is likely to be determined within the context of the requirements of procedural fairness in the particular case. In particular, statutory purpose and construction will play a crucial role in determining the operation and content of both procedural fairness and confidentiality.

The High Court in *Veal* used the analogy of how courts apply the public interest immunity to assist in determining how tribunals should deal with the competing demands of procedural fairness and confidentiality. The public interest immunity is a common law evidentiary rule that prevents the giving of particular evidence if the public interest in preventing the disclosure of the information relating to matters of state or to a governmental function outweighs the public interest in giving that evidence. This generally involves balancing the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, against the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.[66]

Typical examples of information that is protected by public interest immunity include: national security and top level government communications such as cabinet deliberations;[67] confidential police methods;[68] information provided to

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61 *Minister for Immigration & Multicultural & Indigenous Affairs v Applicant Veal of 2002* (2004) 138 FCR 84, [24] (Gray J).

62 *Veal* (2005) 225 CLR 88, [24]. See also *Department of Health v Jephcott* (1985) 62 ALR 421, 425; *Hayes v Secretary of Social Security* (1996) 43 ALD 783, for a discussion of confidentiality and informants

63 (2005) 225 CLR 88, [22].

64 Ibid. See also s 4 of the *Migration Act 1958* (Cth) for the stated general objectives of the Act.

65 *Veal* (2005) 225 CLR 88, [23]. For the general provisions in the *Migration Act* on visas see pt 2 div 3 Visas for non citizens and subdiv AA Applications for visas; and see s 65 for decisions to grant or refuse a visa.

66 *Sankey v Whitlam* (1978) 142 CLR 1, 38-39 (Gibbs ACJ). See also *Conway v Rimmer* [1968] AC 910, 940 (Lord Reid).

67 *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ); *The Commonwealth v Northern Land Council* (1993) 176 CLR 604; *Lanyon Pty Ltd v The Commonwealth* (1974) 129 CLR 650.

68 *Young v Quin* (1985) 4 FCR 483.

professional disciplinary organizations;[69] and the identity of informers who assist in law enforcement.[70]

The High Court emphasised in *Veal* that the positions of the public interest immunity and tribunals exercising executive power were analogous in that the same considerations may apply but they could not be regarded as exactly the same.[71] The High Court said that the public interest immunity was conducted in the context of adversarial litigation, often concerning criminal activity and informants, whereas in administrative decision-making, as conducted here by the RRT, it was inquisitorial decision-making by the Executive and there was no allegation of criminal activity.

Nonetheless, in identifying what the RRT had to do in order to give the appellant procedural fairness, it was necessary to recognise that there was a public interest in ensuring that information supplied by an informer is not denied to the Executive when making its decisions.

6 *Applying the Test to the Particular Case*

In determining that the Tribunal should have disclosed the substance of the allegations but not the detail, the High Court's reasoning was consistent with previous lines of precedent.[72] This option can often be regarded as the fairest and most effective compromise between the competing public interests. While not having to quote 'chapter and verse', it may be possible to give the person affected a general idea of what it is he or she has to answer.[73]

A further option is to consider disclosure merely to the party's professional advisers and not to the party. The courts have in some circumstances seen this as an available and appropriate course of action.[74] However, it is generally not a desirable or appropriate alternative for the following reasons. First, it is clearly irrelevant for unrepresented parties. Secondly, parties may be represented not merely by lawyers but by a variety of other professional or non-professional persons – for example, migration agents in immigration proceedings. The requirements of confidentiality may not apply or be readily understood or

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69 *Borg v Barnes* (1987) 10 NSWLR 734; *Law Institute (Vic) v Irving* [1990] VR 429; *Finch v Grieve* (1991) 22 NSWLR 578; *Goldberg v Ng* (1994) 33 NSWLR 639.

70 *Cain v Glass (No 2)* (1985) 3 NSWLR 230; *Attorney General v Kaddour* [2001] NSWCCA 456; *R v Fandakis* [2002] NSWCCA 5.

71 (2005) 225 CLR 88, [24].

72 See, eg, *R v Gaming Board of Great Britain; Ex parte Benaim and Khaida* [1970] 2QB 417; *Re Pergamon Press Ltd* [1971] Ch 388; *Hamblin v Duffy (No 2)* (1981) 37 ALR 297; *Ansell v Wells* (1982) 43 ALR 41; *NCSC v News Corp Ltd* (1984) 156 CLR 296; *Marine Power Australia Pty Ltd v Comptroller General of Customs* (1989) 89 ALR 561, 574 (Lockhart J); *Chu v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 540; *Johns v Australian Securities Commission* (1993) 178 CLR 408, 472 (McHugh J); *Re Solomon* [1994] 2 Qd R 97; *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40; *Arcadia Amusements and Vending Pty Ltd v Gaming Cmr (WA)* [1999] WASC 4 (Steytler J).

73 Aronson, Dyer and Groves, above n 7, 416.

74 *R v Kent Police Authority; Ex parte Godden* [1971] 2 QB 662; *Re Egglestone and Mousseau and Advisory review Board* (1983) 150 DLR (3rd) 86; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 195-6 (Neaves J) and 223 (Gummow J); *News Corp Ltd v NCS* (1984) 5 FCR 88, 96 (Fox and Woodward JJ).

enforced in relation to non-lawyers. The third problem is that it could place enormous strain on the adviser-client relationship with the danger of the adviser deliberately or inadvertently providing information that will identify the source to the party. Finally, and perhaps most importantly, it also means that the party who is not privy to the information loses knowledge and control of the relevant evidence in the proceedings. Thus the party becomes in this instance the subordinate participant in the proceedings.

V SOME DIFFICULT QUESTIONS REMAIN

While *Veal* has sensibly refined the parameters and elements of procedural fairness, there are still some uncharted waters. It could not be expected that the High Court in *Veal* could have, or should have, dealt with the vast range of circumstances that could arise in relation to confidentiality and procedural fairness. Nevertheless, a real and practical concern for decision-makers will be a concern for the safety, security, reputation and general well being of the informant rather than with balancing the interests of procedural fairness with that of encouraging informants at a systemic level.

Potentially the hardest case for an administrative decision-maker is where merely divulging the substance of the confidential information will almost inevitably lead the party challenging the decision to know or discover the identity of the informant, or at least significantly narrow the field of people who may have been the informant. This can arise, for example, where the information could really only emanate from one source. That situation becomes even more difficult where there is some concern about the security and safety of the informant, for example, where there has been a history of violence or threats. Decision-makers are then faced with the concern that in meeting the demands of procedural fairness they might be placing the informant at risk. The potential risk need not only be physical. Meeting the demands of procedural fairness in relation to confidential information might jeopardise close personal or professional relationships, such as the therapeutic alliance between medical practitioners and their patients.

As indicated above, the particular circumstances of a case might mean that the demands of procedural fairness are substantially reduced, even to nothingness. The receipt of highly confidential information, or where the disclosure of confidential information may have very serious consequences, could mean that it cannot be put to those affected by the particular administrative decision, and therefore little or no weight can be attached to it.[75] Thus, concerns about the safety or well-being of the informant might in some circumstances operate to reduce procedural fairness to zero. As Johnson puts it, 'the contents of natural justice range from a full blown trial into nothingness'.[76]

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75 Aronson, Dyer and Groves, above n 7, 416. See also *Chu v Minister for Immigration & Ethnic Affairs* (1997) 78 FCR 314 (Carr, Kiefel and Sundberg JJ); *Maritime Union of Australia v Geraldton Port Authority* [1999] FCA 151 (Nicholson J).

76 Graeme Johnson, 'Natural justice and legitimate expectation in Australia' (1985) 15 *Federal Law Review* 39, 71, quoted with approval by Brennan J in *Kioa v West* (1985) 159 CLR 550, 614.

The courts have given some general indications as to what types of factors may mean that procedural fairness can be virtually eliminated as a relevant consideration.

Justice Deane in *Kioa v West* suggested that in some circumstances it might simply be impracticable to afford procedural fairness in relation to a hearing, for example, where a deportation order has been made and the prohibited immigrant has gone into hiding.[77] Justice Deane also stated that overriding necessity may substantially reduce the requirements of procedural fairness.[78]

Justice Brennan said in *Kioa v West* that the breadth and precise requirements of procedural fairness could be affected by the need for secrecy or speed in making the decision.[79] If the purpose for which the power was conferred would be frustrated by providing a fuller version of procedural fairness then the procedure can be modified as necessary in the circumstances, for example, by removing the need for giving notice to affected parties of the intention to exercise the power.[80]

A further factor that can significantly reduce the input of procedural fairness is imperilling the informant. In *R v Gaming Board for Great Britain: Ex parte Benaim and Khaida*, Lord Denning MR said:

> [M]uch of [the information provided to the Gaming Board] will be confidential. But that does not mean that the applicants are not to be given a chance of answering it. They must be given the chance, subject to this qualification: I do not think they need to tell the applicant the source of their information if that would put their informant in peril or be otherwise contrary to public interest.[81]

Clearly, endangering an informant is a significant factor for a decision-maker to consider before disclosing information either in substance or in detail. Also, one would assume that the greater the likelihood of the risk and the gravity of its consequences, the greater its influence as a factor in decisions about procedural fairness. Moreover, the concerns for the well being of the informant might need to be assessed against the importance of the decision to the applicant. Decisions which could affect the safety of the applicant or his or her livelihood would weigh more strongly than those decisions which could not be reasonably described as of great import. Another issue is whether the decision-maker should take any investigative measures to assess the real level of risk to the informant or take action to prevent any harm or threat to the informant, for example, by contacting law enforcement authorities.

If a decision-maker takes investigative steps to determine the credibility, significance and relevance of the confidential information and then comes to a decision that it is evidently not credible, relevant, or significant, it is more likely that the investigative process itself will be subject to a claim for denial of procedural fairness. That is, the claim will be that the decision-maker should

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77 *Kioa v West* (1985) 159 CLR 550, 633.

78 Ibid. Under s 253 of the *Migration Act*, a deportee may also be detained.

79 Ibid 629 (Brennan J).

80 *The Commissioner of Police v Tanos* (1958) 98 CLR 383, 396; *De Verteuil v Knaggs* (1918) AC 557, 560-61.

81 [1970] 2 QB 417, 431.

have given the applicant the opportunity to comment on and if necessary, rebut, the investigative process as it was conducted, or at least later on in the hearing.

Difficult cases will involve finely balancing the relevant factors, including the importance of the decision to the parties, the degree of relevance of the confidential information and whether the parties could do without the information.[82] Authoritative court decisions or views by higher courts on these complex matters will assist decision-makers in balancing and reconciling the competing demands of procedural fairness and confidentiality.

VI ASSESSING *VEAL* ACCORDING TO POLICY OBJECTIVES

This section will consider the criticisms made of procedural fairness, as applied to the High Court's reasoning in *Veal*.

A Is the Doctrine too Process Orientated?

There are two main elements involved in reviewing administrative decision-making: reviewing the process of the decision-making and reviewing the substance of the decision itself.

The focus of the traditional view of procedural fairness is on the conduct of the decision-maker and the steps taken in arriving at the decision. The substance of the decision is concerned with the mental processes of the decision-maker in determining the case and the content of the decision, with particular emphasis on whether the parties' interests were properly taken into account. Procedural fairness and substantive justice are conceptually distinct,[83] yet making a clear distinction between the two, and whether a particular issue fits better under one classification or the other, will often be difficult. There is a level of interaction between the two areas; for example, decisions about conduct will be affected by the nature and substance of the decision to be made. Nevertheless, arguments about the demarcation between process and substance are plausible.

One problem of procedural fairness as it has been developed by the courts, is that it may divert proper attention from a review of the substantive merits of the decision. This view was expressed by Deane J in *Australian Broadcasting Tribunal v Bond*[84] where he commented

> [I]t would be both surprising and illogical if [the duty to accord procedural fairness] involved mere surface formalities and left the decision-maker free to make a completely arbitrary decision. If the actual decision could be based on considerations which were irrelevant or irrational or on findings or inferences of fact which were not supported by some probative material or logical grounds, the common law's insistence upon the observance of such a duty would represent a guarantee of little more than a potentially futile and misleading façade.[85]

82 See *Conway v Rimmer* [1968] AC 910 for an early discussion of this balancing of factors.

83 Michael Bayles, *Procedural Justice: Allocating to Individuals* (1990) 3.

84 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366.

85 Ibid 366.

As Head points out, in more recent times some Australian judges, including Deane J in *Bond*, have suggested that in addition to the right to a fair hearing and the right to an unbiased decision, there are procedural fairness rights to have a decision based upon logically probative material, and rights to receive reasons for a decision.[86] However, overall the courts have not followed the approach that following probative evidence or a duty to give reasons are accepted elements of the doctrine.[87]

In this writer's view, it is preferable that procedural fairness be limited to concerns surrounding the process of decision-making, rather than the substantive outcome.

The comment cited above by Deane J that procedural fairness might involve 'mere surface formalities' underestimates the significance of procedural fairness and its capacity to supervise the diverse range of administrative decision-making and ensure fair hearings. The decision in *Veal* itself demonstrates how powerful the doctrine can be in supervising the decision-making process, even covering matters where the decision-maker has explicitly disavowed reliance upon prejudicial information.

Moreover, concerns about effectively and properly reviewing the substance or merits of decisions can and should be addressed directly, for example, by considering those matters in the context of whether irrelevant considerations were taken into account or whether the decision was illogical or not supported by sufficient probative evidence. Expanding procedural fairness to cover some aspects of reviewing the merits of decisions and not merely the hearing process would stretch and distort the common sense and logical meaning of procedural fairness that has been developed and accepted by the courts over a long period of time.

While making conceptual extensions to procedural fairness is unlikely to bring any significant benefits, it can be expected to generate additional arguments and complexities to an area where, following *Veal,* there is a reasonably settled body of opinion which associates procedural fairness with process.[88] For example, as Aronson et al note, extending procedural fairness to include the requirement of logically probative material would result in the need to use the term 'natural justice' instead of procedural fairness.[89]

Extending procedural fairness to cover matters that are not apparently matters of process is only likely to make the task of distinguishing between process and substance even more difficult and time consuming – expanding the doctrine in that way would thus further 'muddy the waters'.[90] Further, the distinction between process and merits as it has been developed emphasises the importance of process without necessarily diminishing the importance of reviewing the substantive merits of a decision.

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86 Michael Head, *Administrative Law Context and Critique* (2005) 131.

87 Ibid 173.

88 See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502.

89 Aronson, Dyer and Groves, above n 7, 374.

90 Ibid 302.

The current distinction also helps to improve the understanding of decision-makers of what the law requires of them and assists in the enforcement of those requirements.[91] The necessity for fair processes is not only well understood and accepted by lawyers but also is likely to have a resonance for the community generally.[92] The adage that justice must not only be done but be seen to be done is both accessible and influential.

Thus the approach by the High Court in *Veal* in emphasising the focus on process accords with and further reinforces the general approach of Australian courts, which, as demonstrated, is the preferable course. The tests and approaches developed by the High Court in *Veal* will clarify the duties of decision-makers, removing from procedural fairness considerations the necessity for bodies reviewing administrative decision-making to attempt the difficult task of assessing, or even 'second guessing', what mental processes were undertaken by the decision-maker.

B The Administrative Burden on Decision-makers

As suggested by Mansfield and Whitlam JJ in the Full Federal Court decision, one major concern with having a relatively low threshold for the test of 'credible, significant and relevant' information is that it may clog the administrative system. Concerns about the administrative burdens of procedural fairness are legitimate concerns as those costs are likely to be borne by the general community and should be addressed as one factor in considering the scope and content of procedural fairness.[93] There is authority for the proposition that such concerns about efficiency are legitimate and significant.[94] Courts generally will not be able to have satisfactory evidence before them to make an informed cost-benefit analysis.[95]

However, the High Court's definition of the phrase 'credible, relevant and significant' is a welcome development because it will be highly useful in achieving the key policy objectives behind disclosure, namely improving the accuracy and accountability of decision-making. Such concerns should, on balance, outweigh concerns that disclosure will clog the system.

While there is no empirical evidence available, considering such confidential material is perhaps unlikely to increase administrative burdens significantly. For example, in *Veal*, it is reasonable to assume that putting the allegations from the confidential letter to the applicants would not have taken an inordinate amount of time or resources. It is also important to bear in mind that the test will still screen out fanciful, baseless or trivial pieces of information. Moreover, having a low threshold test could also reduce the number and complexity of appeals or reviews on the point, which in itself will reduce administrative burdens.

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91 Ibid.

92 Ibid.

93 Craig, above n 6, 299.

94 See, eg, *Toy Centre Agencies Pty Ltd v Spencer* (1983) 46 ALR 351, 359 (Lockhart J). See also *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591, 602; *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 410-11.

95 *Johns v Release on Licence Board* (1987) 9 NSWLR 103, 109 (CA) (Kirby P).

C Certainty and Predictability

One criticism of procedural fairness is that does not allow for sufficient certainty and predictability in the law. It seems undeniable that the flexibility required for procedural fairness to meet the myriad decision-making circumstances means that there must be some reduction in the level of predictability and certainty that the law could possess. However, this criticism has to be put in its proper context. Justice Brennan in *Kioa v West* quoted Lord Reid who stated:

> [I]n modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist … It appears to me that one reason why the authorities on natural justice have been found difficult to reconcile is that insufficient attention has been paid to the great difference between various kinds of cases in which it is sought to apply the principle. What a minister ought to do in considering objections to a scheme may be very different from what a watch committee ought to do in considering whether to dismiss a chief constable.[96]

It should also be borne in mind that 'fairness' and 'reasonableness' are not unusual words in the common law and using them to assess hearing procedures is not on its face a task that seems at odds with many other areas of the common law. As Brennan J put it in *Kioa v West*, the basic test is whether the decision-maker has conformed with procedures which a fair and reasonable decision-maker would adopt in the circumstances of the case.[97] While there is no empirical data available, the concept of reasonableness is perhaps the most frequently applied concept in the common law. There is no reason to conclude, at least prima facie, that assessing a decision-maker's conduct of process as being fair or reasonable is by its nature a more vague, abstract, or intrinsically difficult task than assessing fairness or reasonableness in many other areas of law, such as criminal law, contract or torts, in relation to a range of factual circumstances

For example, in relation to contract law, Johan Steyn, a Lord of Appeal in Ordinary, has argued that a thread of contract law is that 'effect must be given to the reasonable expectations of honest men'.[98] Sometimes this is done explicitly by judges but more often it is the implied basis of the court's decision. The growing concept of good faith in contract law is further evidence of fairness as being a core standard to assess conduct and contractual relations.[99]

The courts can make a test of fairness or reasonableness more principled and rational by articulating the way in which they have applied such concepts. As Dyer argues, two very useful things courts can do in relation to procedural fairness is to consider fairness and reasonableness from the viewpoint of the particular decision-maker and from the facts that were known by that decision-

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96 *Ridge v Baldwin* (1964) AC 40, 64-65 (Lord Reid), quoted by Brennan J in *Kioa v West* (1985) 159 CLR 550, 614.

97 *Kioa v West* (1985) 159 CLR 550, 627 (Brennan J).

98 Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433, 433.

99 Ibid.

maker in those circumstances.[100] In other words, the courts should pay some deference to the position of the decision-maker rather than merely assessing the facts from the position of the court with the benefit of hindsight. The High Court in *Veal* while not always making it explicit, did appear to consider the content of procedural fairness from the perspective of the decision-maker. It would have been fair and reasonable to expect that the RRT member in *Veal*, given that the confidential information was clearly relevant and significant and that there were no apparent reasons to determine that it was not credible, should have determined to put the matters to the applicants. That would have been a reasonable obligation upon the decision-maker. Moreover, it would have been fair in all the circumstances for the RRT to put the adverse allegations to the applicants to test their case and their credibility. Further, the High Court in deciding *Veal* was assessing the facts as they were available to the decision-maker with no additional facts or suppositions.

The courts have also developed basic criteria to use as guidelines in determining the scope and content of procedural fairness which do provide a measure of consistency and predictability. Those factors, as noted above, include: giving reasonable notice of a hearing and what is in issue; giving parties adequate time to prepare; deciding what form of hearing to give (oral and/or written); disclosing material obtained from another party or source (including the principles for assessing that duty as established in *Veal*); and giving parties a reasonable opportunity to answer the case against them.[101] The content of procedural fairness certainly does not remain at large with no accepted indicia.

Furthermore, it is necessary to consider the alternatives. How could procedural fairness be maintained as a fair and workable doctrine without this flexible approach? It would be extremely difficult (or in Sir Gerard Brennan's words, a 'formidable task'),[102] and perhaps impossible, to devise a more detailed or precise system of guidelines or principles that would not produce injustice, or overly rigid and complex classifications, particularly when the vast array of variables at play are considered. It is also likely that such a process would be too prescriptive and make the law too complex for non-lawyers.[103] That the courts have not attempted this task is good evidence of its likely futility.

Moreover, certainty and predictability, while important criteria, should not dwarf the pursuit of fair process in the particular case. Fairness, as problematic as it may be, should be a core criterion in any aspect of the justice system. Even in an area such as contract law, where certainty and predictability have traditionally been seen as paramount factors, it has been said that there is no point in achieving those goals if the results are unfair.[104]

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100 Bruce Dyer, 'Determining the content of procedural fairness' (1993) 19 *Monash Law Review* 165, 177-94.

101 Council of Australasian Tribunals, above n 10, [3.2.3].

102 Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review' in Michael Taggart (ed) *Judicial review of Administrative Action in the 1980s; Problems and Prospects* (1986) 28.

103 Dyer, above n 100, 198.

104 Andrew Phang, 'Security of Contract and the Pursuit of Fairness' (2000) 16 *Journal of Contract Law* 158, 158-59.

In any event, the High Court in *Veal* has made the governing principles about disclosure in many ways as predictable and certain as they can be, without jeopardising their inherent flexibility. After *Veal*, it is clear that procedural fairness is process orientated and that this permeates all aspects of the doctrine. The tests are concerned with finding the appropriate decision-making process in the circumstances and then evaluating what was done against that standard. This is a much more objective and predictable method of assessment than trying to work backwards from the actual decision and attempting to discern what was in the mind of the decision-maker or whether there may have been a risk or a real risk of unconscious influences. Moreover, the Court has clarified what 'credible, significant and relevant' means and the decision should end any confusion or debate on that issue.

D Educative Function

Another important factor to consider in assessing the content of procedural fairness is the extent to which a decision serves an educative function by providing appropriate guidance to decision-makers for future deliberations.[105] *Veal* serves this useful purpose. It makes it clear that decision-makers must carefully consider any adverse material during the course of the hearing process, assessing it by the basic test of whether it can be excluded because it is evidently not credible, relevant or significant. If the decision-maker cannot exclude such information, which also happens to be confidential, then the next step is to consider how, if at all, that information can be disclosed. In many cases, the answer to that question will be by merely putting the substance of the allegations to the party without identifying the source. Those cases where that course of action appears risky because the chance of identifying the informant remains will require careful scrutiny and balancing of factors, including the relevant statutory purpose and framework, the nature of the decision, its consequences for the applicant, and the likely consequences for the informant and for the administration and enforcement of the laws in question.

VII CONCLUSION

While *Veal* is not a landmark decision in same the sense as *Kioa v West*, it nonetheless constitutes a notable development in procedural fairness. It provides clear guidance on two important issues that were left open in *Kioa v West*, namely what is the impact of confidentiality on the duty to disclose, and what credible, relevant and significant information means in the context of the duty to disclose. Furthermore, it effectively removes the second proposition of Justice Brennan's dictum in *Kioa v West*. This change is a most welcome development that will prevent the ultimately unnecessary and ill-advised task of considering whether there might have been present some risk of prejudice or an unconscious effect upon the decision-maker.

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105 Dyer, above n 100, 183.

Veal will also help to achieve the primary objectives of administrative law: protecting the individual rights of parties who are subject to adverse administrative decisions, ensuring that government agencies effectively perform their functions, ensuring governmental accountability, fostering participation by the parties and also helping to reassure them that they have been treated fairly by the administrative process.[106]

In addition, *Veal* will improve the predictability and certainty of the application of the doctrine by making the law simpler and clearer. It will also serve an effective educative function for decision-makers.

Veal is instructive in three more general ways. First, it confirms and consolidates the High Court's view on the primacy of process when considering procedural fairness. After *Veal* it would appear a much more difficult task to argue in an Australian court that procedural fairness can properly encompass substantive issues. Secondly, *Veal* states that procedural fairness is an objective standard to be primarily determined by a comparison between what the decision-maker should have done by way of procedural fairness and what was actually done. Finally, *Veal* demonstrates very well just how useful and compelling a unanimous decision by the Court can be in establishing what the law is and how it is to be applied. The Court should be commended in this instance.

106 Craig, above n 6, 3.