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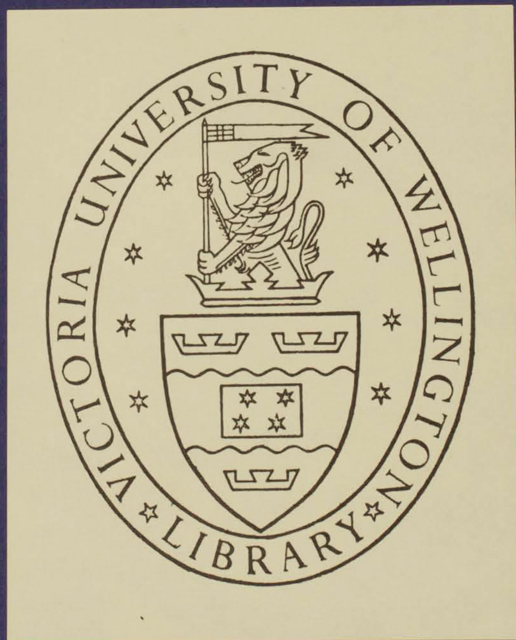
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THE DUTY OF DISCLOSURE

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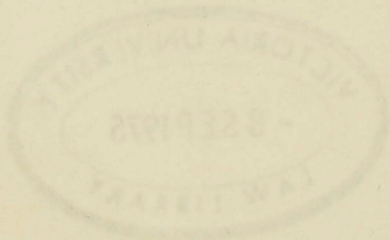

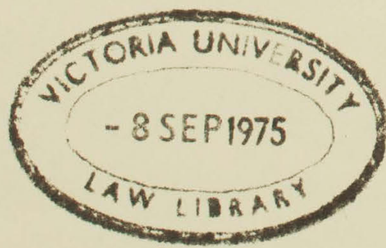
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DISCLOSURE OF INFORMATION IN THE POSSESSION

OF THE TRIBUNAL

I INTRODUCTION

This paper sets out to discuss the question of disclosure of meterial in the possession of a tribunal or other body obliged to act in accordance with natural justice (1). First, the general principle of disclosure will be discussed (Part II). Then some of the situations in which this duty has arisen will be examined (Part III). This leads on to a consideration of the scope of the principle which will have been touched upon in the previous section (Part IV). Next the exclusion of the rule will be dealt with (Part V). Finally some general conclusions about the duty of disclosure will be made (Part VI).

II THE GENERAL PRINCIPLE OF DISCLOSURE

The necessity of disclosure has always been regarded as one of the requirements of the audi alteran partem rule. In order that a hearing may be conducted fairly, a party should have sufficient knowledge (ie particulars) of the allegations against him; he must be able to contravert or answer any relevant material in the possession of the tribunal and this demands that the material is disclosed to him; lastly he must have a full opportunity of putting his own case. As will be seen later (2), the first requirements can be regarded as part of the duty of disclosure, and the third requirement may not be fulfilled because the material which was not disclosed was so central to the inquiry that the party has been prejudiced in putting his own case.

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(1) For the sake of brevity "tribunal" will be used generally as referring to a body which must act in accordance with natural justice.

(ii) See Part III A.

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Most of the judgments upon the question of disclosure draw upon the judgment of Lord Loreburn L.C. in Board of Education v Rice (3). He said:
"In such cases the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial....
They can obtain information in any way they think best always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevent statement prejudicial to their view." (4).

Before an opportunity of answering any material can arise, the material must have been disclosed. This is implicit in Lord Loreburn's formulation. Both disclosure and then an opportunity of commenting upon the material are necessary for natural justice to be satisfied in this area.

The judgment of Lord Haldane enunciated a general principle but the courts in subsequent cases have had to apply this rule to a large number of different bodies and factual situations. It has often been remarked that the common law tends to develop from the specific to the general. A principle is abstracted from a large number of cases. Here the opposite process would appear to have happened with a broad rule being the starting point for subsequent developments. Clearly, the rule could not be applied

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(3) [1911] A.C. 179.
(4) Ibid 182.cf Spackman v Plumstead Board of Works (1885) II App. as 229 per Earl Selbourne L.C.

inflexibly to every case. Lord Loreburn himself placed a limitation upon it - only relevant material need be disclosed.

The courts therefore were faced with the question whether the rule should be applied to any particular situation. There may be other factors present (5) which make the courts take a restrictive approach to the application of the rule. They also had to consider the question as to what kinds of material need be disclosed and where there was a cuty of disclosure irrespective of source. Some material is of a nature that it cannot be disclosed in a manner that is helpful to the parties (6). The courts were thus led to make distinctions as to the kind of material. Likewise as we will see, the courts have said that material from some sources need not be disclosed.

The formulation of Lord Loreburn was unhelpful in other ways, It did not lay down the time at which disclosure should occur. Nor did it take account of the fact that there may be broad overriding grounds for the exclusion of the duty of disclosure. All this had to be worked out in later cases in which decisions have been challenged on the ground of breach of the duty of disclosure.

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(5) e.g. the need for frankness between departmental officers. See Part III B (4).

(6) e.g. the tribunals members own views as to public policy.

III THE SITUATION IN WHICH THE DUTY OF DISCLOSURE ARISES

The object of this part of the paper is to examine the various situations in which the duty of disclosure has arisen and in the process to discuss some of the areas in which the courts have been unwilling to hold that a duty exists when prima facie the general rule is applicable. It is proposed to divide the subject matter up as follows:-

A Disclosure of the allegations against OR issues confronting a party;

B Disclosure of factual material and opinion in the possession of a tribunal;

C Disclosure of a change of thought by a tribunal as to some basis for their decision.

A Disclosure of the allegations against a party

A party must be given notice of the existence of allegations against him, and sufficient particulars of them, in order that he has an opportunity to prepare his answer.

This rule is normally dealt with under the separate requirement of notice (7). However, if a party does not know what allegations are made against him or alternatively adequate particulars about them, he is prejudiced in answering the case against him in much the same way as a person is in the more usual disclosure situations where specific prejudicial material is not disclosed.

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(7) De Smith. Judicial Review of Administrative Action (3rd ed.) 172 et seq.

A party is entitled to have the issues confronting him brought to his attention (8). This is essentially a matter of disclosure. Likewise the rule that a person must have particulars of the allegations given to him is based on the principle of disclosure. Moreover, in some cases the sole or main basis of allegations may be some identical material in the possession of the tribunal, but which is not disclosed to the parties. This is well illustrated by the decision of the Privy Council in Kanda v Government of Malaya (9). The decision to take disciplinary proceedings against Chief Inspector Kanda was made as a result of a report from a Board of Inquiry set up to investigate the giving of evidence falsified for use at the trial of a number of accused people. The Board's report made very prejudicial findings of fact and expression of opinion. The report was not revealed until the fourth day of the hearing of proceedings to challenge the validity of the decision which had been given against Kanda mainly upon the strength of the report. Lord Denning in delivering the advice of the Privy Council said:-
"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contradict them." (10).

Lord Denning's statement that a person must know the case against him is wide enough to cover both inadaquate knowledge of allegations and the non-disclosure of relevant

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(8) In Re HK (an infant) [1967] 2QB, 617, 630 cf Smit v Egg Marketing Authority (unreported) A decision of White J. Judgment 21/3/73.
(9) [1962] A.C. 322.
(10) Ibid 337.

Evidence. Kanda did not have adequate knowledge of the case against him because of the non-disclosure of the report which was the basis of the allegations. He only had the barest possible outline of the case against him, and he was prejudiced both because of this and the lack of opportunity to comment upon the report.

In summary, it is suggested that the requirement that notice of the existence of and adequate particulars be given to a party before a hearing, can be rationalised as part of the duty of disclosure although disclosure requirements and this part of the notice requirements are treated separately in conventional analysis of the audi alteram partem rule.

B Disclosure of factual material and opinion in the possession of the tribunal

(i) A tribunal must disclose to the parties relevant facts and opinions placed before the tribunal by an external source, including the parties (11).

This is a very common situation and the reason why such material is not disclosed vary from a desire to keep a source of information confidential (12), to a simple case of oversight (13). Thus in Douglas v Dyer (14), police reports as to the suitability of an applicant for a certificate of fitness to hold a liquor licence were placed before a magistrate but were not disclosed, and confidentiality was raised in order to justify their non-disclosure. Edwards J. rejected the view that the magistrate could decide adversly to an applicant on the strength of undisclosed report. Thus when a magistrate

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(11) See generally Errington v Minister of Health [1936] 1 KB 249; and Stafford v Minister of Health [1946] KB 621.
(12) Douglas v Dyer (1908) 27 NZLR 690 and see part V (2) post.
(13) Kanda v Government of Malaya (ante)
(14) (1908) 27 NZLR 690.

is - "informed of facts which militate against an applicant's claim for a certificate, he is certainly bound as a matter of common fairness and justice to inform the applicant fully as to the alleged facts before acting upon them to the detriment of the applicant" (15).

Edwards J. was further of the opinion that the claim for confidentiality could not justify the lack of disclosure. The magistrate could not receive a report in confidence. It should be noted that in some circumstances, which will be dealt with later, a tribunal may be justified in making only partial disclosure or even no disclosure at all (16).

Other cases have concerned a council making representations to a minister about the desirability of confirming a clearance order at a stage when a minister was acting in a quasi judicial capicity (17), and where letters were submitted to a tribunal about the competence of an architect who was seeking registration (18).

If there is a duty upon a tribunal to act in accordance with natural justice, it will not be sufficient compliance with this principle if the undisclosed material is used to ask relevant questions with a view to elucidating the truth of the material (19). Natural justice will normally demand full disclosure of the material while fairness will - at least acc-

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(15) Ibid 700.
(16) See post Part V (2)
(17) Errington v Minister of Health [1935] 1KB 249
(18) R v Architect's Registration Tribunal ex p. Jagger [1945] 2 All.E.R. 131.
(19) Ibidem.

ording to one case (20) - be satisfied by disclosing the "gist" of the material to the parties so that they can have the opportunity of commenting upon it.

(ii) A tribunal (and any other body obliged to act judicially) must disclose reports containing facts or opinion from external sources, which have been solicited by a tribunal or obtained by its officers in the cource of investigation of the matter at hand (21).

Many tribunals are not bound to take a passive role in the gathering of relevant factual material and expert opinion. They may have express power to make inspections, ask for expert reports or obtain its material in any way that it thinks fit but such statutory provisions do not exclude the necessity of disclosure (22).

Accordingly, natural justice will be breached if a rent tribunal does not disclose new factual material relevant to its decision (23), or if a compensation fixing body acts upon factual material within its official knowledge and does not disclose this until after it has reached a tentative decision (24), or where arbitrators obtained further information without disclosure to the other party (25). Likewise natural justice is breached when there is no dis-

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(20) R v Gaining Board for Great Britain [1970] 2 QB 417.
(21) For the general approach see R v Schiff ex p.Ottawa General Hospital (1969) 9. D.L.R.(3d) 434; affirmed (1970) 13. D.L.R. (3d) 304.
(22) R v Metropolitan Fair Rents Board ex.p. Canestra [1961] V.R. 89.
(23) R v Paddington Rent Tribunal [1949] 1.KB 666.
(24) R v Milk Board ex.p. Tomkins [1944] V.L.R. 184
(25) Eastcheap Dried Fruit Co v A.C.V. [1962] 1. Lloyds Rep. 283.

closure of matters of opinion such as valuers' reports (26), engineers' reports (27), the expression of opinion by referees and medical opinion (28).

(iii) Where an official or member of a tribunal obtains new factual information and makes a report including his own recommendations as to the course of action to be taken by the tribunal, then there is a duty to disclose this report.

This proposition follows from the previous one in as much as there is a duty always to disclose new factual information unknown to the parties. It is stressed that the duty applies to unknown factual material. For, if the material has been "heard" by the tribunal in the presence of all the parties, there is in fact nothing to disclose and no question of breach of the rules of natural justice can arise (29). The present situation has some of the characteristics of an internal report as discussed in the next section, but unlike an internal report, the factual information is unknown to the parties who do not have the opportunity to contravert the evidence. The present situation is of significance because of its "halfway house" nature but mainly because of a recent New Zealand case which involved the exact factual circumstances under discussion

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(26) R v Metropolitan Fair Rents Board [1961] V.R. 89.

(27) Low v Earthquake Commission [1959] NZLR 1198

(28) R v Kent Police Authority exp. Godden [1971] 2QB 662 cf R v Deputy Industrial Injuries Commissioner exp. Moore [1965] QB 456.

(29) South Otago Hospital Board v Nurses & Midwives Board [1972] NZLR 828 - where the material was obtained from the only party involved in the course of an "extended" hearing (i.e. the Hosking Report).

and which is important in the context of purely internal reports.

The decision of Wild C.J. in South Otago Hospital Board v Nurses and Midwives Board (30) concerned a situation where one of the reports made to the defendant Board contained new statistical information and a new opinion upon the question whether the Hospital Board's grading as a nurse training school, should be changed. This report was made by a staff member of the defendant Board (31), and inadvertently it was never communicated to the Hospital Board Wild C.J. held that the omission to disclose the report was a breach of natural justice and that the Board's decision ought to be quashed -
"I feel bound then to hold that the unfortunate omission to provide the Hospital Board with a copy of the Boyd Report resulted in a breach of natural justice. It was an unintentional breach but none the less a breach that obstructed "fair play in action" for the Hospital Board could not answer material of which it was not aware" (32).

Wild C.J. was not faced directly with the question whether there was a distinct duty to disclose the "internal" aspects of the report (i.e. the recommendations by the staff member) as no part of the report was in fact disclosed. However the general tenor of the Chief Justices judgment (33) is towards the view that he regarded both the new recommendation

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(30) [1972] NZLR 828.
(31) The "Boyd Report" ibid 835, 836.
(32) Ibid 836.
(33) esp. at 836.

and the new factual material as both highly relevant to the precise issue before the Board, and that the parties should have the opportunity of commenting upon both aspects (34).

(iv) The next area of possible application of the disclosure principle concerns internal reports.

The type of report which the writer has in mind is one which contains both factual material which is already known to the parties and recommendations either generally as to the merits of the case or upon some particular aspect of it. Alternatively it may only contain one of the categories of material mentioned. The report will have been prepared b y an official (but not a member) of a tribunal or government department.

In accordance with the general principle of disclosure enunciated in Board of Education v Rice (35), it would seem prima facie that such a report should be disclosed and the party aggrieved be given an opportunity of commenting upon the recommendations; but the House of Lords in Local Government Board v Arlidge (36) decided otherwise. It was held that an inspector's report made for the purposes of an institutional decision about a clearing order, need not be disclosed. This was despite approval of the earlier decision of the House in Board of Education v Rice (37) and the opinion of Lord Haldane L.C. that the present was an "analogous case." (38)

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(34) Idem
(35) [1911] A.C. 179.
(36) [1915] A.C. 120.
(37) [1911] A.C. 179.
(38) [1915] A.C. 120, 132.

In the judgment of Viscount Haldane, there is no clear disinction drawn between the three separate but interrelated issues that were involved. Lord Parmour dealt with each of the submissions raised by Arlidge separately (39) -

(a) That the Board had to act personally in gathering its materials;

(b) That the report of the inspector had to be disclosed;

(c) That the respondent was entitled to give oral testimony before the Board in addition to his hearing before the public local inquiry.

(a) The House of Lords rejection of <u>the first point</u> is readily accepted. A minister, or a board of which he is President cannot be expected to do everything personally (40). Even in the case of the more usual statutory boards and tribunals, there is authority for the proposition that the "hearing" part of the decision making process can be delegated (41). But in <u>Arlidge</u> the matter is not strictly one of delegation. It is an institutional decision. Formally the decision is that of the Board, and it had to be signed by the President (the minister) and the secretary, but as Lord Shaw said in <u>Arlidge</u>:-

"His.......(the Minister's) Board - that is, all the members of it together - may never meet, or they may only be convened on some question of policy; but a determination, signed and sealed and issued in correct form, stands as the deliverance of the Board as such for which determination the President becomes answerable to Parliament." (42)

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(39) Ibid 142-145.
(40) Ibid 133 per Lord Haldane L.C.
(41) <u>Jeffs v New Zealand Dairy Board</u> [1967] L.A.C. 551, 868-9.
(42) 1915 A.C. 120, 136.

The decision is in practice taken by some higher ranking official in the department who has been assigned the task. Likewise the job of hearing the evidence is also carried out by another departmental officer. This is part of the departmental process - "Being impersonal and corporate it (the department) inquires by one organ and decides by another .... No one contends that it is any part of the inspector's duty to decide anything .... this conclusion of fact, if he thinks fit to submit any, "binds no-one" they are simply stated for the information of the superior officials in the department. From beginning to end the appeal is one continuous departmental exercise of corporate functions. It nowhere involves the communication of the appellant of internal reports, any more than it involves the exposition of the deciding officers mental processes in arriving at his decision." (43).

This part of the dissenting judgment of Hamilton L.J. (Lord Sumner) can be accepted with the exception of the last sentence which raises the second issue in the case. In conclusion, it is submitted that the first objection raised by Arlidge was rightly rejected. It is in line with accepted departmental practice and constitutional theory. (44)

(b) The second issue is the one of direct concern in this paper. It has argued that the inspectors report should have been disclosed and that to withhold it resulted in the deprivation of a fair hearing.

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(43) [1914] 1 KB 160 198 per Hamilton L.J.
(44) R v Skinner [1968] 2 QB 700; see also Carltonar Ltd v Commissioners of Works [1943] 2 All E.R. 560.

The House of Lords held in reviewing the majority of the Court of Appeal that the respondent had received a fair hearing. The Board had to comply with natural justice but this did not demand disclosure of this report because it was an "internal matter" (45) Lord Haldane said -
"It might or might not have been useful to disclose this report but I do not think that the Board was bound to do so any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to." (46)

The report was "internal" in the sense that it was prepared for the use of the deciding officer in the department, in the course of an institutional decision. The inspector was part of the decision making process although he did not take the decision himself. He heard the evidence and submissions and made recommendations (47), and his position can be compared with that of a tribunal when it hears evidence before the parties. A tribunal need not disclose evidence and submissions which it has taken down in the presence of the parties or which it has obtained upon an inspection with the parties. The duty of disclosure only applies to material that one or more of the parties does not know of. The hearing officer here held a public inquiry in which evidence was given and submissions were made by the parties and consequently no duty of disclosure arose. This is the position underlying all the judgments in the House of Lords but most clearly expressed by Lord Parmour -

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(45) [1914] KB 160, 198 per Hamilton L.J.
(46) [1915] AC 120, 134.
(47) cf. Denby & Son Ltd v Minister of Health [1936] 1. KB.337, 342-3 per Swift J.

"If the report of the inspector could be regarded as in the nature of evidence tendered either by the local authority or the owner of the premises, there would be a strong reason for publicity. In my opinion it is nothering of the kind, and is simply a step in the statutory procedure for enabling an administrative body, such as the local Government Board, to hear effectively an appeal......... The obligation on the Local Government Board to hold a public inquiry in the locality is to enable the facts on either side to be ascertained by oral testimony, subjected to the test of cross examination, if either party should so require, and to ensure .... a full opportunity to the appellant to be heard before dismissing his appeal......." (48).

If in fact the function of the inspector was merely to record the facts and submissions made by the parties, it would seem that the decision in Arlidge upon the point of disclosure is correct since there is no corresponding duty placed upon an ordinary tribunal. However, the inspector's report can be assumed to have contained more than just a summary of evidence and submissions (49). It would have contained the inspector's views and recommendations based upon the evidence. This role therefore was more than one of simply "hearing" the submissions and evidence to which no duty of disclosure would attach. Since the recommendations were not disclosed, the objector did not have the opportunity of commenting upon them. They would have had a

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(48) [1915] AC 120,144 (emphasis added). See also Re Eliott and Governors of the University of Alberta (1973) 37 D.L.R. 197, 202.

(49) see [1914] 1. KB 160, 193' 1911 A.C. 120, 136 per Lord Shaw.

highly persuasive effect upon the deciding officer. The House of Lords did not direct themselves to this point but were of the opinion that, as the objector jad been given a full hearing at the public enquiry and that there was no specific factual material or submissions that had not been disclosed, natural justice did not demand any more.

At this point one is perhaps permitted to depart from the decision in Arlidge. A tribunal does not have to disclose a report containing evidence heard by one of the members at an extended hearing and containing her recommendations (50). In such a situation, the factual material is received from the party concerned and so no duty of disclosure arises. The recommendations prepared by a member fall within the general rule that a tribunal need not disclose the decision that it is proposing to reach (51).

The problem is that an inspector does not occupy the same position as a member of a tribunal who provides a report in the circumstances just mentioned. The inspector, although part of the institutional decision making process does not actually decide anything. This is done by a superior officer in the department. The House of Lords got over this by reasoning in this manner:- The decision is a departmental one taken in constitutional theory by the minister or head of the department, but in practice by officials in the department. The decision is that of the department as a whole and as the inspector's report is part of this

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(50) South Otago Hospital Board v Nurses and Midwives Board [1972] NZLR 828. - "Hosking Report".

(51) This rule is probably subject to a broad qualification if the parties have been misled as to the basis upon which the tribunal is likely to decide se Part III.......post.

internal and institutional process it need not be disclosed. The House of Lords in fact equated the position of the department with that of a tribunal for whose benefit a member produces in the same circumstances as occured in South Otago Hospital Board case (52).

This equation of the two positions may be correct in constitutional theory but the writer doubts whether substantial justice was done to the objector. Some members of the House thought that disclosure would impede frankness and departmental efficiency (53), and lead to the disclosure of anything in the file of the barest relevence (54). All of this may be doubted. The writer is of the opinion that the objector should have had an opportunity of making written submissions upon the report. The decision (55) was criticised in the Donoughmore Committee (56) and in the Franks Report (57), and was never the law in Scotland (58) (58), but apparently there is still no duty to disclose such a report in England in the context of compulsory purchase ardent planning appeals (59), until after the decision has been given.

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(52) [1972] NZLR 828
(53) See [1915] AC 120, 133 per Lord Haldane, 137 per Lord Shaw, 151 per Lord Moulton.
(54) Ibid 137 per Lord Shaw.
(55) Followed by Swift J. in Denby and Sons Ltd v Minister of Health [1936] 1 KB 337.
(56) Cmnd 4060 pp 404-6.
(57) Cmnd 218 1957 pp 71-74.
(58) See De Smith op. cit 185.
(59) Ibid pp 184-185.

Moreover in England there has been a considerable amount of statutory intervention to secure a "fair hearing" for an objector (60), and administrative practice has generally become more open.

In New Zealand, as we will see, the courts have held that internal reports should be disclosed, there, ministers rarely are given the type of function that was in issue in the Arlidge case and as a consequence the courts could not seize upon the necessity for frankness between departmental officials and ministerial responsibility as justifying non-disclosure.

(c) The third objection in Arlidge was that the Board should have heard the respondent orally, before the Board as well as the opportunity given at the local inquiry (61). The House of Lords rejection of this follows from their earlier rejection of the first objection and only Lord Parmour dealt with this issue separately. To insist upon an oral hearing before the Board was to be regarded in the words of Lord Shaw as an attempt to "individualise the Board" contrary to how a government department functions in practice.

The House of Lords were presented with this issue as if the alternatives were that either natural justice demanded an oral hearing before the Board or that it did not demand any further hearing other than that given by the public inquiry. It is submitted that they rightly rejected the view that an oral hearing was required before the Board. This left the objector with other opportunity to make representations other

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(60) See De Smith op.cit 185.
(61) [1915] AC 120, 144-5 Per Lord Parmour.

than at the local inquiry. They did not consider a third possibility, that an objector should be allowed to make written representations to the Board. This right would be of little value unless the report of the inspector was disclosed but assuming the House of Lords was wrong upon the second issue in Arlidge, an opportunity to comment on the report would naturally follow upon the duty to disclose the report.

The recent New Zealand case of South Otago Hospital Board v Nurses and Midwives Board (62) has already been mentioned in various contexts, one of the reports was made by a staff member (the Boyd Report) and contained both new facts and recommendations. This part of Wild C.J.'s judgment has been dealt with in a previous section (63). To recapitulate, although the report involved new factual material and therefore was not truly "internal" as defined at the beginning of this section, the general tenor of the judgment is consistent with the view that internal reports containing recommendations should be disclosed so that comment can be made upon the recommendations. Even if the report in this case was truly internal, it is submitted that the result should have been the same There is no question of an institutional decision here that could justify such a result that was reached in Arlidge's case.

The other report (the Hosking Report) arose out of submissions made orally at a hearing before the Board that the position at the hospital had improved, thus removing the necessity of a withdrawal of approval.

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(62) [1972] NZLR 878.
(63) See Part III (4) ante.

The Board sent one of its members to the Hospital to make another inspection and report. Wild C.J. thought that this was an "eminently fair course" for the Board to take. Her visit was known to be intended to help the Board reach a decision, and she did not come as a hostile witness but as a member of the Board making a report for it -
"This was not a case of a tribunal receiving from an outside expert a report not disclosed to the party concerned or of a tribunal deciding the issue upon a new or unrevealed point or line of thinking, or taking evidence behind the party's back ...... The Hospital Board itself and its establishment was the exclusive source of the information Miss Hosking obtained. In all the circumstances..... her visit and the opportunity given the Hospital Board people to see her was really akin to an extended hearing" (64).

Wild C.J. therefore concluded that there was no duty upon the Board to disclose the report so that it could be commented upon before it was taken into consideration. This part of the decision is also in accordance with what has already been said in connection with Arlidge's case. In some circumstances, a tribunal can delegate the task of hearing the evidence and submissions. This will be especially the case where the credibility of witnesses is not involved (65). Here it is a member of the Board who has been given a limited task of hearing the evidence but she in fact does not only hear but she also makes recommendations as did the inspector. There is a legitimate distinction between the two situations that makes the judgment of the Chief Justice correct upon this point and the Arlidge decision unsatisfactory. In the South Otago Hospital Board case

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(64) [1972] NZLR 828, 836.
(65) Jeffs v N.Z. Dairy Board [1967] 1. AC 551, 568.

There is an identity between the person hearing the evidence. It is truly a matter of internal procedure. The recommendations could be discussed with the member making them in the course of deliberations prior to the actual decision. In Arlidge, leaving aside the constitutional theory which surrounded the decision there is no true identity between the person hearing and making the recommendations and the person actually deciding. The writer is of the opinion that the situation in Arlidge is more nearly analogous to the "Boyd Report" in the South Otago Hospital case, which had to be disclosed.

It is now possible to turn to the type of report which is supplied to municipal councils or their planning committees in New Zealand. Much of the litigation in England about disclosure has been in the context of planning appeals which go to the Minister. It is different here as the matter is dealt with by planning committees and the Town and Country Planning Appeal Boards. It may be said perhaps that the Arlidge situation is remote from New Zealand experience as the tendancy here has been to vest new forms of administrative decision in tribunals rather than the relevant ministers, immigration, deportation and overseas take-overs being notable exceptions (66).

In Denton v Auckland City (67), the report from the City Engineer which was in reality prepared by the Council's planning officer, was not disclosed by the planning committee of the Council. The report contained a summary of the factual material that was already known to the parties and opinion upon the various objections. Speight J. held that this report should have been disclosed and the failure to do so was a

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(66) cf the recent Takaro Properties case.
(67) [1969] NZLR 256.

breach of natural justice -
"....... The comments and criticisms of the objector's arguments were received by the committee unbeknown to the objector from a person whose expert knowledge and experience as a professional adviser would be likely to be most impressive and compelling to a committee comprised of laymen, albeit experienced and such opinions in so far as they might be adverse (as some of these were) would be devastating to the objector who had been deprived of the opportunity of answerings" (68).

Speight J. based his decision upon the fact that the report contained highly prejudicial comments (69). Keith (70) finds this emphasis odd as in his view, English cases consistent with general principle - tend to suggest that facts (or rather new facts) should be disclosed, while opinions need not be.(71).

It is submitted that this does not represent the approach of the U.K. courts. As indicated by the judgment of Speight J. himself, matters of opinion can be just as prejudicial to the case of a party as factual material (72). In many of the English authorities the reports involved were almost entirely opinion orientated but still had to be disclosed.

Speight J. in the course of his judgment also indicated that a report which was a "purely factual summary" should also be disclosed. He said that the planning field is specialised and the committee is very reliant upon expert advisers and thus if anything of a factual nature is included in a

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(68) Ibid 260, 261.
(69) Ibid 266, line 48 et seq
(70) K.J. Keith. A Code of procedure for Administrative Tribunals occasional pamphlet No. 8 Legal Research Foundation 1974. Page No. and note 79 page 56.
(71) Loc.cit note 79 Page 56.
(72) See Low v Earthquake Commission 1959 NZLR 1198. The judgment of Wild C.J. in The South Otago Hospital Board case, also supports this approach.

report, then the report should be disclosed notwithstanding that the facts are known to the parties. Errors may creep into the summary of the factual material especially because of the volume of the work:-

"The parties are the persons most likely to be intimately acquainted with the particular features of the site and should have the opportunity of examining and, if necessary, contradicting factual material which is to be put before the tribunal" (73).

Presumably in the passage cited, Speight J. is referring to the situation where errors may creep into a summary of factual material already known to the parties, and not where there is undisclosed factual material. Assuming this to be so, the writer is of the opinion that his remarks about the disclosure of summaries of known facts, are a salutory guideline for a town planning committee to follow "ex abundanti cautela" rather than a strict requirement of natural justice. Certainly if the report contains both recommendations and a summary and is not disclosed, the courts will not be concerned with fine distinctions as to whether the duty of disclosure only applies to part of the material as it will be clear that there has in any event been a breach of natural justice. Speight J.'s proposition does not find support in any earlier case. Admittedly no earlier decision quite turns upon this precise point but the tendancy of the courts has been towards the view that summaries of known factual material need not be disclosed. (74)

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(73) [1969] NZLR 256, 267.
(74) e.g. the Arlidge case (ante).

One further point arises out of Denton's case. Speight J. did not seem to regard the report of the Planning officer as purely an internal report (75). He said that the regulations concerning the procedure of the committee "does not extend to the reception ex parte of such material as was in the report" (76).

In the factual circumstances of the case, there is no doubt that Speight J. was right. The report contained the opinion of an independent valuation officer. There remains a question whether such reports should generally be regarded as internal. If anything turned on the distinction between external and internal reports as the words were used in connection with Arlidge's case, it would be necessary to conclude that they were internal. However, the view has already been expressed that internal reports should be disclosed. The only valid distinction is the one made in the South Otago Hospital Board case - a report made as a result of a hearing and summarising the evidence given at it, need not be disclosed. Nor need it be disclosed if it contains recommendations when the person making the report is a member of the tribunal.

(v) A tribunal may not hear representations and evidence behind the back of the other party.

This proposition is illustrated by a large number of cases. The rule has been applied to justices (77)

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(75) "internal" as defined in the way mentioned at the beginning of this section.
(76) [1969] NZLR 256, 266.
(77) Re Bodmin Justices ex p. McEwan [1947] KB 321.

rent tribunals (78), and other statutory bodies (79), trade unions (80) a minister (81) and cases of expulsion from clubs (82).

One particular aspect of this rule is that inspectors demonstrations should be made in the presence of both parties except where a judge makes an unaccompanied "view" of a public place by himself (83). Ex parte inspections are never allowed.

An example of the approach taken by the courts is Re an arbitration between Cregson v Armstrong (84) where the award of an arbitrator between a landlord and tenant was set aside because the farm was inspected in the absence of one of the parties. This was an ex parte "view". The word "view" has more than one meaning in the present context. Sometimes it means simply an inspection as in the case first mentioned, but it can also be used to describe a tribunal's presence at a demarkation or reconstruction of events. This was the situation that arose in Goold v Evans (85). The country court Judge in this case attended a demonstration as to how a furnace operation worked

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(78) Re V. Newmarket Assessment Committee [1945] 2 All E.R. 371.
(79) R v Milk Board ex p Tomkins [1944] V.L.R. 187.
(80) Taylor v National Union of Seamen [1967] 1 WLR. 539.
(81) Errington v Minister of Health [1935] 1 KB 249.
(82) Fisher v Keane [1879] 11. Ch.D 353.
(83) Goold v Evans [1951] 2 T.L.R. 1189, 1191.
(84) (1894) 70 L.T. 106.
(85) [1951] 2 T.L.R. 1189.

in the defendants factory. The demonstration was held in the absence of the plaintiff workman. The Court of Appeal held that the demonstration was not conducted in accordance with natural justice. Lord Denning said -

"Speaking for myself, I think that a view is part of the evidence, just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or photograph of it. But even if it is not evidence, the same principles apply. The judge must make his view in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. The only exception is when a Judge goes by himself to see some public place, such as the site of a road accident, with neither party present" (86).

Lord Denning was clearly of the view that a "view" was evidence whether it involved an inspection or a demonstration. Hodson L.J. (87) was of a different opinion. He thought that a mere view was not itself evidence, but that the demonstration in this case was "something more than a view" and thus amounted to evidence. Somervell L.J. did not express an opinion.

The other point that arises out of Goold v Evans (88) is Lord Denning's dictum that an unaccompanied view is permissable when he goes to see some public place in the absence of both parties. This situation arose in the later case of Salsbury v Woodlands (89) where all three members of the Court of Appeal

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(86) Ibid 1191.
(87) Ibid 1192.
(88) Ibid 1191.
(89) [1970] 1 QB 324

approved Lord Dennings exposition of the law. The Judge in this case made an unaccompanied inspection of the site of an accident involving a car upon a public road. This was not a case of a demonstration in the absence of the parties to which different considerations apply.

Widgery L.J. mentioned the fact that the expression "view" could be used to describe both a mere inspection and a demonstration -
"in my judgment, it would be exceedingly dangerous for a Judge to attend anything which could be described as a demonstration except in strict accordance with the principles laid down by Denning L.J. - in the presence of representatives of both sides. Different considerations apply to a "view" in the true meaning of the word, where all that is required is that a Judge should to to the place to see what it looks like ....A view of that kind is constantly held by a Judge by himself without reference to the parties at all." (90)

Widgery L.J. did however issue a caveat as to unaccompanied. He thought that it was advisable to tell the parties that he intends to make an unaccompanied view so that they can warn him of any changes in the surroundings which may mislead him (91). If in fact he is mislead by the view this may be grounds for upsetting the verdict on the grounds that it is against the weight of the evidence. Harman L.J. was of the opinion that it was a dangerous course to make an unaccompanied inspection unannounced but that there had been no change in the physical surroundings in

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(90) [1970] 1 QB 324, 343-4.
(91) Ibid 344.

this case (92). Sachs L.J. made the point (93) that sometimes a Judge cannot avoid passing the site of the accident and that the doctrine of the "judicial bunkers" is not attractive. However, he thought the Judge must take great care that circumstances have not changed.

(vi) A Judge may not privately communicate with a jury after retirement. Any question which the jury wishes to have a direction from the Judge upon, should be asked and answered in open court in the presence of the defendant and counsel. It is however, in the discretion of the Judge whether he permits counsel to address him upon the jury's communication.

In R v Green (94) the jury, after retirement sent the recorder a written note which the recorder answered in private so that its contents were never known either to the prosecutor or defendant and his counsel. When the case went on appeal, the recorder could not remember what the question was and so the Court of Criminal Appeal could not consider the effect it had. The court quashed the decision (95).

In R v Furlong (96) in which R v Green was distinguished, the Judge also made a private written answer to a question asked by a jury but the question and the answer were disclosed in open Court after the jury was discharged an d before sentencing. The question was such that it could only have one answer and not the sort that a Judge would have allowed counsel to address him

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(92) Ibid 346.
(93) Ibid 350.
(94) [1950] 1 All E.R. 38.
(95) Ibid 39.
(96) [1959] 1 All E.R. 636.

upon. Lord Goddard C.J. in delivering the judgment of the Court of Criminal Appeal said that it was not every irregularity that was a ground for quashing a decision (97). It must be an irregularity which goes to the root of the matter or which is such a "grave departure from the recognised practice and procedure of Criminal Law" that the verdict should not stand (98). R v Green was such a case as was R v Bodmin Justices (99). However the present case was different. The appellants did know what the communication was as it had been eventually disclosed to them, and the reply was such that no argument could have been made upon it. Thus the Court concluded that the present was not a case where justice was not seen to be done and that the decision should not be quashed.

This decision does not detract from the proposition in R v Green (100). Such a communication should always be disclosed and answer made in open Court, but a failure to do so will not always lead to the quashing of the decision because a court still has a discretion in the matter.

(vii) If an appellate tribunal wishes to alter its original decision after communicating with the tribunal of first instance, the parties should be informed of the fact in order that they may have the opportunity of making submissions on the matter.

This proposition is deduced from the decision of the Court of Appeal in R v Huntingdon Confirming Authority (101). The licensing justices had made a decision grant-

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(97) Ibid 637.
(98) Ibid 638.
(99) [1947] KB 321.
(100) ante
(101) [1929] 1 KB 698.

ing a licence unconditionallly. The Confirming Authority after a further hearing of the parties confirmed the decision subject to two conditions. This decision was communicated to the justices who did not agree to one of the conditions. The confirming authority at a further meeting decided to confirm the decision subject only to one condition. No notice of this meeting was given to the parties and no opportunity of being heard upon the dropping of the condition. The Court of Appeal held that the parties should have been given an opportunity of being heard upon this proposed variation.

(viii) An appellate body or body receiving the report of an appellate body may not hold interviews or receive submissions from one party in the absence of the other and his representatives. Equally it may not receive new evidence.

This proposition may seem fairly self evident, but in more than one case, it has been argued that a body receiving the report of an appellate tribunal is only exercising "administrative" functions and does not need to act in accordance with natural justice, in deciding whether to affirm such a report.

In Palmer v Inverness Hospitals Board (102), the pursuer doctor was dismissed and he appealed to the Hospital Board which had to appoint a special committee to investigate and report back. It was accepted that the appeal committee had to act in accordance with natural justice (103). It was however, agrued that once the committee had reported back to the Board, it could deal with the matter purely as an administrative

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(102) 1963 S.C. 311.
(103) Ibid 318.

act of an employer considering the question of dismissal of an employee (104). This was rejected by the Lord Ordinary (Lord Wheatley). He held that the appeal had to be conducted in accordance with natural justice at all stages and was not divisable in the way claimed. Therefore, since submissions had been to the Board to effect the appeal committee's report, which found that there was no justification for dismissal, should not be followed and as the pursuer had no opportunity of answering these submissions it was held that a breach of natural justice had occured. (105)

A recent Canadian decision reaches the same conclusion. The situation in Lazarov v Secretary of State of Canada (106) was that the Citizenship Court determined that the applicant had fulfilled the statutory conditions for citizenship but the minister in his discretion refused to confirm the Court's decision on the strength of new undisclosed confidential material in his possession. The Federal Court of Appeal held that the applicant must have a "......fair opportunity of stating his position with respect to any matters which in the absence of reputation or explanation would lead to the rejection of his application." (107)

However, because the report was confidential there was no need to disclose the contents of the report itself but -

".......the pertinent allegations which if undenied or unresolved would lead to rejection of his application must ...... be made known to him, to an extent sufficient to enable him to respond to them and he must have a fair opportunity to dispute or explain them." (108)

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(104) Ibid 318, 319.
(105) Ibid 319.
(106) (1973) 39 D.L.R. (3d) 738.
(107) Ibid 749-50 per Thurlow J.
(108) Ibid 750 and cf R v Gaming Board [1970] 2QB 417.

C Disclosure of a change of thought by a tribunal as to some basis for decision

While a tribunal as a general rule need not disclose the decision that it is proposing to reach, it may be under a positive duty to disclose its line of thinking if a party would otherwise be mislead as to the essential issues in dispute and as to the basis on which the tribunal is likely to decide and as a result is prejudiced in putting his case.

The discussion of the situations in which the duty of disclosure arises has so been confined to two basic areas. First we have been concerned with the disclosure of the allegations or issued of a case so that the parties can properly prepare their case - Secondly and most importantly, there has been discussion of the duty to disclose specific factual material and opinion which is in the possession of the tribunal. This third area involves the disclosure of material of a much less well defined nature. It is a significant departure from traditional disclosure situations and is an area of considerable uncertainty.

Normally, there is a tacit understanding or consensus between the tribunal and the parties as to what the relevant legal and factual issues are and hence upon the basis that the court will probably decide. If a tribunal decides a case, upon a new or unrevealed issue or upon one which the parties have been mislead to believe the tribunal no longer thinks relevant or in dispute, the parties have been at least partially denied their right to a full and fair hearing. They have been deprived of the right to be heard upon this new issue.

The writer advisedly used the word "may" in putting forward the proposition above as there is considerable doubt whether it represents the law in New Zealand. Before turning to the New Zealand cases in point, there are relevant cases from other jurisdictions that should be mentioned.

Of foremost importance is the decision of the Privy Council in Shareef v Commissioner for Registration of Indian and Pakistani Residents (109). In the course of registration proceedings, a letter from the Director of Education to the effect that in certain respects the applicants certificate of education was not genuine, was not disclosed. Evidence was also given by the deputy commissioner's investigating officer to the effect that the schedule to the certificate was not genuine. The deputy commissioner then revealed at the conclusion of the hearing, a later letter from the Director of Education which said that his previous opinion was cancelled and now it was thought that as a result of inquiries that the schedules were genuine. Despite this letter, the deputy commissioner rejected the application on the ground that the schedules were not genuine.

Lord Guest in delivering the advice of the Privy Council, pointed out the impression that would have been left upon the mind of the applicant's counsel, would be that the last letter concluded the question of genuineness of the schedules in his favour. He continued -
"By the deputy commissioner's failure to point out to him that he was by no means convinced of their genuineness and that he proposed to rely on the superseded report of the investigating officer , he may well have been misled into thinking that the deputy commissioner did not require any further argument or evidence

(109) [1966] AC 47.

on this aspect of the matter" (110).

The applicant never had the opportunity of answering the case against the genuineness of the documents because the deputy commissioner's failures to point out that the later letter did not conclude the matter in favour of the applicant, and to disclose the details of the case against the genuineness of the document. The Privy Council therefore concluded that the applicant was not "fairly treated" and that the deputy commissioner had not acted in accordance with natural justice. This decision is consistent with the proposition that there will be a breach of natural justice where a party is misled as to some issue and is thereby prejudiced in putting his case (111).

Some English authorities lend support to this approach. In R v Paddington Rent Tribunal (112), the tribunal acquired new factual material in the course of an inspection of a flat, but no mention of this was made as a ground for the reduction of rent, during the hearing or before the decision was given. The use of this unrevealed factual material to decide the case took the applicants' legal advisers by surprise. It was held that "common fairness" demanded that some opportunity be given to the applicants to deal with it, if it was to be considered by the Tribunal -

"In our opinion, to take into account a matter of this kind of which no sort of intimation had been given to the applicants, brings this case exactly within the decision of the House of Lords in Board of Education v Rice.....(113)

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(110) Ibid 62.
(111) See De Smith op. cit. 182.
(112) [1949] 1 KB 666.
(113) Ibid 683.

The Kings Bench Division was thus of the opinion that the omission to point out this new ground for the decision was sufficient to quash it (114).

The first New Zealand case upon this area is the decision of the Court of Appeal in Drewitt v Price Tribunal (115). This was an action for certiorari and injunction against the Price Tribunal. An application was made for an increase in the price of beer. The hearing proceeded upon the basis that the price was to be fixed in accordance with the already existing "container method." Owing to some difficulties as to the availability of the right sized glasses, the Tribunal started to consider a "fluid ounce method", but this type of thinking was not disclosed to the representatives of the Association. On the alst day, a draft order embodying the fluid ounce method was read to the representatives but they did not appreciate that the method of price fixing had been changed. Although they were granted a price increase upon the face of the order, the change in the method of price fixing meant that in fact that their profits would be reduced.

There was, therefore, a misunderstanding on both sides. The Tribunal thought it had made it clear that they were proceeding upon a new basis while the representatives did not appreciate that the draft order had a changed method of price fixing.

All members of the Court of Appeal found it hard to believe that it was not appreciated that the draft order contained a new price fixing method (116) but the case proceeded upon the basis that the representatives had not been plainly told that a change in the method of price fixing was cont-

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(114) See also R v Newmarket Assessment Committee [1945] 2 All E.R. 371, 373 per MacKinnon L.J.
(115) [1959] NZLR 21.
(116) Ibid 37 per Gresson P; 40 per North J. 43 per Cleary J; at first instance ibid 27-28.

emplated (117). The question then was whether this failure to give the Association an opportunity of stating their objections to this new point, was contrary to natural justice.

Gresson P. (118) said that although it was not at first contemplated that the framework of the order be changed when they did in fact do so, they gave the Association "abundant opportunity" of making their representations and actually disclosed the terms of the draft order, albeit ineffectually. Furthermore they acted in good faith.

With all respect this seems somewhat unrealistic to hold that the parties had a full hearing. As Hutchinson J. in the Supreme Court pointed out (119), the method of price fixing was recognised to be of fundamental importance by the Association. The representatives may have had an adaquate opportunity of putting their case upon the basis that the "container method" would remain operative but the change in thinking to the fluid ounce method meant that the previous hearing was not directed to a significant extent to the issue now at hand and consequently the parties had been prejudiced in putting their case.

North J. also stressed that the tribunal acted in good faith (120). He thought that a misunderstanding had occured but that this did not give the right to certorari. In his opinion the fair hearing, and that in order for the appellant to succeed '
"......it would have been necessary .... to have established that the members of the tribunal deliberately witheld from the appellant the fact that a change in the measurement was in contemplation." (121)

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(117) Ibid 43, per Cleary J.
(118) Ibid 38
(119) Ibid 29
(120) Ibid 39
(121) Ibid 40

This judgment shows a slightly different approach. Admittedly he partly bases his decision upon the fact that in his view the method of price fixing was only "incidental" to the question of the price rise. This seems to have been what Gresson P. in his judgment was alluding to and the same criticism that was made against his judgment applies equally to that of North J. However the main factor influencing North J. was his view that the new proposed method should have been obvious to the representatives. This was not a case where the tribunal had deliverately witheld information. It was rather one in which it was not fully appreciated what was being communicated. North J's judgment does at least recognise that in some circumstances here would be a duty of disclosure.

Cleary J. also concluded that the Association had been given an adaquate hearing and that the precise method by which it might chose to make a price increase could not be "elevated into an issue which, in itself, required the Association to be heard before an order could be properly made." (122) He thought that even if their case were looked at in its most favourable light, he still did not think that the unintentional failure to make clear that a change in the price fixing method was contemplated, was a denial of natural justice. (123)

If one can place reliance upon the word "unintentional" as used in Cleary J's judgment, then his approach would support the distinction made by North J. between unintentional and deliverate witholding of a change of thinking upon some issue.

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(122) Ibid 43.
(123) Ibid 44.

More broadly, these judgments with their emphasis upon the fact that the tribunal acted in good faith and did not deliberately withhold information, take a subjective approach, while Shareef and other cases which will later be discussed take an essentially objective approach -
was the party misled as to some basis for the decision and as a result prejudiced in the putting of his case. This approach is in line with the way in which the courts view other breaches of audi alteram partem rule. The question is always whether the party in fact had in fact a fair opportunity of putting his case. It is not relevant that the tribunal acted unintentionally in breach of natural justice. One may surmise that the Court of Appeal was unwilling to quash a decision when an attempt (although unsucessful) was made to communicate the change of basis for the decision. This however cannot justify the result reached by the Court of Appeal. The question in any particular case is not whether the tribunal has been in any way culpable but the party had had a full hearing.

Drewitt v Price Tribunal was followed in Modern Theatres v Peryman (124). Here three applications were made for an exhibitors licence to erect picture theatres in an Auckland Suburb. Each applicant assumed that only one licence would be given and the Department of Internal Affairs did nothing to remove this impression. The defendant licensing officer obtained department reports and the minister referred the matter to a Judge of the Arbitration Court. Up to this stage, the application had proceeded upon the supposition of the parties that one licence should be granted, and in fact the departmental reports favoured the grant of a licence to the plaintiff in preference to all others. Then the

(124) [1960] NZLR 191.

Arbitration Court Judge recommended that two licences be granted. This was approved by the Minister and the defendant made his decision in accordance with the recommendation, without a further hearing.

McCarthy J. (inter alia) held that no breach of natural justice had resulted from failing to make it clear that more than one licence was a possibility and to give a further opportunity of hearing upon this point. McCarthy J. (125) found that the defendant did not do anything material to create or advance this impression. He said that the regulations allowed the issue of as many licences as the licensing officer found necessary and that was or should have been known to the plaintiff. He therefore concluded that -
"....... the mere fact that there was a misjudgment on the part of the plaintiff, even a misjudgment which might have been apparent to the defendant does not of itself entitle the plaintiff to certiorari: Drewitt v Price Tribunal ...." (126)

The factual situation in this case seems quite removed from the usual situation where there has been a duty to disclose a change in a line of thinking about the number of licences that should be issued. Despite this, McCarthy J. found as a matter of fact that the misapprehension did not stem from this change of thinking but was self-induced as the regulations allowed as many licences as the licensing officer thought desirable. McCarthy J. further found that the officer had done nothing to contribute to this misapprehension. This is clearly right but the point should be made that there was misapprehension to correct in fact at the initial stages. While more than one licence was a legal poss-

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(125) Ibid 200.
(126) Ibid 200.

ibility, the deciding officer himself thought initially along the line of only one licence himself. Up till the time of the Arbitration Court Judge's recommendation, there was agreement about the essential issue -
who was to get the one licence?

It is submitted that this is the preferable way of looking at the case. McCarthy J. overly emphasises what the legal possibilities were, but does not take account of the exact basis upon which the whole hearing proceeded. The question of misapprehension did not arise in reality until the change of basis for the decision. It is quite irrelevant if the parties were under the misapprehension as to the legal position what was of importance was the fact that there was a change of thinking which rendered useless much of the parties' previous opportunities to put their case. Once this position is reached the case can be seen to fall within a recognisable situation where a duty of disclosure has been held to exist (127). Given a change of thinking upon the part of the officer, surely it is no answer to his breach of duty to disclose, that he is legally entitled to come to this decision when it was previously neither in his or in the parties' contemplation.

So far, this aspect of the principle of disclosure has been looked at from the point of view of whether the parties have had a fair hearing having regard to the fact that there has been an undisclosed change of thinking by the tribunal as to the basis for the decision. If we look at the situation from the point of view of tribunal, it can also be seen to be to

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(127) e.g. Shareef ante.

their advantage that the parties are adequately informed as to what the real issues are. The parties can then address the presentation of their cases to these relevant issues to the exclusion of the irrelevant. Where this occurs and both the tribunal and the parties are in agreement as to issues really in dispute, then a better quality of hearing should result. It is therefore not perhaps surprising that since the decisions in Drewitt v Price Tribunal (128) and Modern Theatres v Peryman (129), the courts in New Zealand have adopted a more expansive approach.

Firstly, there is the obiter statement of Wild C.J. in the South Otago Hospital Board case (130). In holding that the Hosking Report need not be disclosed, he said -

"This was not a case of .... a tribunal deciding the issue upon a new or unrevealed point"....(131).

Wild C.J. is clearly of the opinion that there would have been a breach of natural justice if an issue was decided upon a new or unrevealed point without giving the parties the opportunity of being heard upon the matter.

Then in another case decided in the same year, Richmond J. also accepted the general proposition that a tribunal should disclose any significant changes in thought. In Hamilton City v Electricity Distribution Commission (132) there was a proposal that all the power boards in the Waikato be amalgamated into a regional authority. The actual proposal formulated by the defendant commission dealt with many matters in much greater detail than the draft proposal supplied to the

(128) [1959] NZLR 21.
(129) [1960] NZLR 191.
(130) [1972] NZLR 828.
(131) Ibid 836.
(132) [1972] NZLR 605.

city. The city did not know of these "tendencies of mind" that led to the changes and had no opportunity of addressing themselves to them before the modified scheme was announced.

Richmond J. had alread y held that the rules of natural justice did not apply to proceedings before the commission but he dealt with the issue of whether there would have been a breach of his first finding was wrong, and there was an appeal. He was of the opinion that the silence on the part of the commission was such as would give rise to a breach of natural justice (133). One of the matters upon which the commission changed its mind, was the method of fixing compensation and its quantum. Richmond J. expressly singles this out as a matter that should be disclosed. This is in conflict with what the members of the Court of Appeal in Drewitt v Price Tribunal said about the method of price fixing not being an issue which could be elevated to demand a hearing.

The role of the E.D.C. in the present case is considerably different from that of a typical tribunal which starts a hearing with a number of fairly well defined issues before it. The Commission was responsible for producing a draft scheme, then an actual proposal and finally it may have to put it into effect. Thus the issues which a party may wish to be heard upon, are formulated in the course of the Commission's proceedings. Consequently, assuming that natural justice is to apply and that a party is to be given an effective right of hearing he must know of the original issues (i.e. the draft proposal (134))and any change of thinking subsequent

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(133) Ibid 629, following an argument put forward by Counsel and mentioned in the judgment of Barwick C.J. in Brettingham-Moore v St.Leonards Corp 1969 121 L.L.R. - 509, 521.

(134) See part III A. ante.

to this and before an actual proposal is announced. The duty of disclosure here is just as, if not more important than the more usual case of tribunal which commences a hearing with defined issues.

Finally in Smit v Egg Marketing Authority (135) White J. in a judgment that raises a number of disclosure issues, held that there had been unfairness as the Authority had not corrected a misapprehension that it had caused. This was not simply a case where a party had not pursued a particular issue, but here the conduct of the authority had caused her inaction. The situation was therefore similar to that which occured in the Shareef case (136).

"Miss van der Brink's further ground of complaint was that she was willed into a false sense of security by the letter,....... which led her to believe that she would be granted an entitlement licence for 71,478 birds. In my opinion it was likely that she would have been misled by what occured and I consider that when the Authority resolved not to accept the recommendation but decided on a somewhat different approach there was unfairness in not bringing these matters to her attention to enable her to make submissions to meet them if she could."

White J's judgment gives clear support for the proposition set out at the beginning of this section of the paper. The other more recent cases had not referred to Drewitt v Price Tribunal or Modern Theatres v Peryman but White J. did refer to Drewitt, although in connection with another disclosure issue. He had already held that there had been a breach

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(135) unreported. Judgment 21.3.73
(136) [1966] A.C. 47.

of fairness because of the failure to bring essential issues to the attention of the plaintiffs before submissions and a decision were made. This failure resulted from a difference between what was contained in a circular and the regulations subsequently promulgated. He said -

"This was not a case of misunderstanding the terms of the regulations of a failure on the part of the plaintiffs to ascertain the true facts which North J. pointed out in Drewitt v Price Tribunal .... would provide no ground for certiorari."

Here White J. seems to be endorsing the approach taken in Drewitt v Price Tribunal in a context where the question is whether the issues must be disclosed and not whether a change in a line of approach must be disclosed. Drewitt v Price Tribunal is not relevant to the first situation, but is upon the further point of disclosure of this change of basis where, as we have seen, White J. held that fairness demanded disclosure. The writer is drawn to the conclusion firstly that Drewitt has been misapplied to a situation which has been earlier dealt with (137) and secondly, on the question whether a change of thinking should be disclosed, that the judgment of White J. is inconsistent with Drewitt.

The law thus remains in a highly unsatisfactory state. On the one hand we have a judgment of the New Zealand Court of Appeal supported by a later judgment of the Supreme Court. On the other, we have the decision of the courts of other jurisdictions and support from the judgments of the Supreme Court in three recent cases. Perhaps it can be said however, the courts are progressing towards the approach put forward in this paper.

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(137) See Part III A.

IV THE SCOPE OF THE DUTY OF DISCLOSURE

This part of the paper sets out to explore the scope of the principle of disclosure. Inevitably this question has been touched upon in Part III. Thus in Part IIIA it was seen that the allegations or issues originally formulated and confronting the parties should be disclosed. In Part IIIB the situations in which factual material and opinion need be disclosed were discussed. Finally, in Part IIIC the disclosure of a change of thinking as to the relevant issues was dealt with. Here the emphasis will be upon the wider considerations as to the scope of the principle.

(1) What kinds of material need to be disclosed?

Distinctions about the kind of material in the possession of a tribunal are important as the courts have never rigidly applied the rule of disclosure to all kinds of material. Not even a judge is bound to disclose all types of material in his possession. For instance, he may research his own law and decide a case upon an authority not cited by the parties. Likewise, while a court is bound by the strict rules of evidence, it is allowed to take judicial notice of matters of common knowledge and there is no need to put such facts to the parties. (138)

This concept has considerably widened application in the case of tribunals which are often created so that its members may bring their specialist knowledge, expertise, experience and views as to public policy to bear upon cases before the tribunal. The courts have consistently said that this kind of material is "part of its equipment for determining the case" and need not be disclosed. Parties must take these matters as they find them. (139)

In Denton v Auckland City (140) Speight J. acted upon this distinction. As has already been seen, the material that was not disclosed in this case was a summary of the facts and opinions expressed upon it. Speight J. rejected the view that these matters need not be disclosed. He distinguished this kind of material from general knowledge, experience and considerations of

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(138) see De Smith op cit 180
(139) Denton v Auckland City (1969) N.Z.L.R. 256, 263 and R v Milk Board ex parte Tomkins (ante)
(140) (1969) N.Z.L.R. 256

public policy :-

"Knowledge and experience of the field in which decisions are made are highly desirable but this must be general knowledge and the distillation of a mass of experience and it is proper that these matters should be taken into account, but to do so is far removed from receiving and acting on confidential information in relation to an issue given by a person whose face is not seen and whose voice is not heard by the parties whose rights are affected." (141)

Lowe J also dealt with this topic in R v Milk Board ex parte Tomkins.(142) He said that people are appointed to a tribunal because of their special knowledge. In such cases their specialised knowledge cannot be separated from it and is "part of the equipment for deciding the case". However, he accepted that the position was different in the case of particular facts and documents which must be disclosed and an opportunity of answering the material. (143)

The position is, therefore, that while a tribunal may act upon its specialised knowledge and experience and views as to policy without disclosing these it must be emphasised that this is general (144) knowledge and experience. A tribunal cannot use its expert opinion in substitution for evidence where it is required to act upon evidence. (145) In other circumstances it may be quite correct to rely upon its own opinion solely for a basis to its decision where no evidence is adduced, but such situations will be rare. A tribunal can, however, use its knowledge and experience to reject evidence and submissions. (146) De Smith (147) sees this extended concept of judicial notice as supplementing evidence. (148)

Knowledge, expertise and policy views are part of the decision making equipment of a tribunal in much the same way as law and statute and judicial notice are in the case of the courts.

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(141) ibid 263. See also R v City of Westminster Assessment Committee (1941) 1 K.B. 53 and R. v Brighton Rent Tribunal (1950) 2 K.B. 410, 420 per Lord Goddard C.J.

(142) (1944) V.L.R. 187

(143) ibid 197

(144) Reynolds v Llanelly Associated Tinplate Co. (1948) 1 All E.R. 140, 143, per Lord Greene M.R.

(145) Moxon v Minister of Pensions (1945) K.B. 490

(146) R. v Milk Board ex parte Tomkins (1944) V.L.R. 187, 197

(147) op cit 181

(148) see Learmouth Property Investment Co. v Aitken

P.T.O.

As already mentioned the courts have never considered themselves bound to the law cited by the parties. A tribunal may have to deal with strict matters of law from time to time but it is more likely to rely upon these other matters in coming to a decision. Even if a tribunal is enjoined by the statute setting it up to take a number of different factors into account, an examination of the reported decisions of some tribunals often leads one to the conclusion that they have relied mainly upon their own impressions.(149)

Another important kind of material that need not be disclosed remains to be dealt with. When a tribunal has been formed, it will often formulate a policy in accordance with the Act by which it was created. This policy will be applied and developed by a series of cases before the tribunal and a particular decision may almost be completely predetermined because of what has been decided previously. The earlier cases must inevitably influence the result in later cases.(150) This kind of predetermination is not bias (151) nor is it amenable to the ordinary rules of disclosure. The parties must take this policy element as they find it. The policy will in fact become known and the parties will be able to conduct their cases in accordance with it.(152)

Although natural justice does not normally demand disclosure of this type of material,(153) if a tribunal decides to change its policy then it is arguable that this fact should be disclosed. Support is lent to this approach by the decision of the Court of Appeal in R. v Liverpool Corporation ex parte Taxi Fleet.(154)

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(148) cont. (1971) S.L.T. 349, 356; Craik's Ltd. v Assessor for Forfar (1909) S.C. 658; and Reynolds v Llanelly Associated Tinplate (1948) 1 All E.R. 140, 143
(149) e.g. The Indecent Publications Tribunal
(150) Turner v Allison (1971) N.Z.L.R. 833, 843 per Wild C.J.; 849 per Turner J.
(151) ibid 849, 850 per Turner J.
(152) Section 16 of the Ontario Statutory Powers Procedure Act (1971 Chap. 47) covers both judicial notice and specialised knowledge and experience but the wording is not wide enough to cover the element of policy in a tribunal's decision. The courts, therefore, would have to turn to the Common Law
(153) cf. De Smith op. cit. 182 note 32
(154) (1972) 2 Q.B. 299

Here the city corporation gave an undertaking not to increase the number of taxi licences until some new legislation had been enacted. The taxi fleet had been accorded a hearing prior to the original formulation of the policy not to increase the number of licences [155] and when the undertaking mentioned above was given the Taxi Fleet representatives let things rest. They thought that if there was to be any further change of policy they would first have the opportunity of making representations. [156] However, the corporation in breach of this undertaking and without notice decided to change its policy and immediately start issuing new taxi lecences.

The Court of Appeal held that the corporation should not be permitted to break its undertaking without first giving notice to all those interested and giving them an opportunity of being heard. [157] Only then could it decide to change its policy.

(2) Information from what sources should be disclosed?

It has already been noted that a judge may act upon legal materials found by his own research without disclosure to the parties. This lack of duty to disclose can also be regarded as based upon a distinction as to source. It is quite proper for a judge to consult his own law but it would be a breach of natural justice to hear the submissions of one party in the absence of the other. In the case of a tribunal, a distinction as to source can equally be made. A tribunal can act upon its own experience and knowledge but it would be quite improper for it to receive the expert advice of an outsider without disclosure. [158]

(3) Only material relevant to a decision need be disclosed

The duty of disclosure is said to apply only to material which is relevant to the matter before the tribunal. This is of special importance when a body has a number of differing functions (e.g. a

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(155) ibid 306
(156) ibid 312 per Wilmer J.
(157) ibid 308-309 per Lord Denning M.R.; 311 per Roskill L.J.
(158) R. v Westminster Assessment Committee (1941) 1 K.B. 53

city council) and it may have a vast volume of material in its possession. It has never been held that a body such as a council must open its files to those individuals who happen to be parties in proceedings before it, but where does one draw the line?

Despite the logic of the general rule that only relevant material need be disclosed there are circumstances where material may be prejudicial and should be disclosed although strictly irrelevant to the inquiry before the tribunal. Thus, in Taylor v National Union of Seamen[159] highly prejudicial evidence was given in the absence of the plaintiff. The evidence was quite irrelevant to the question whether any of the allegations against the plaintiff were valid,[160] but Ungoed-Thomas J. held that the material which consisted of allegations of communist sympathies should have been disclosed so that the plaintiff could have an opportunity of commenting upon it and correcting it. The material would have influenced the members' minds and prejudiced the right to a fair hearing although strictly irrelevant.

The courts have also reached varying conclusions as to what material is actually 'relevant' to a case before a tribunal. In Connolly v Palmerston North City [161] the council wished to put a drain through the plaintiff's property. At the council hearing the plaintiff raised various objections to this course and suggested some alternatives to this proposal. After the hearing, the council received a written and verbal report from the City Engineer who was present at the hearing. It is not clear from the law report exactly what was covered in the Engineer's report except that he traversed the matters raised at the hearing. [162] It was thought by Fair J. that the report covered both the objections and possibly the alternative proposals.

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(159) (1967) 1 W.L.R. 532

(160) ibid 551

(161) (1953) N.Z.L.R. 115

(162) see the discussion of the case in Denton v Auckland City (1969) N.Z.L.R. 256, 261

It was sufficient to dispose of the case that no hearing had been given on that part of the report covered by the objections themselves. Fair J. went further. He was of the opinion that a provision in the Municipal Corporation Act then in force contemplated that the council should hear evidence upon any alterations or alternatives suggested by the objectors. While it would be inappropriate to hear evidence of "elaborate" alternative schemes which involved highly technical considerations the provisions in the Act did contemplate that an owner could suggest a simple alternative that might avoid using his property or a method of using his property that would cause less damage.(163) He continued :-

..."(The Council) ... is bound ... to give judicial consideration to any reasonable objections and any reasonable alternative proposals, at least of a simple nature, offered by the objectors." (164)

Fair J. held that there had been a denial of natural justice in that the plaintiff had not been given the opportunity of commenting upon the report both on the question of objections and on the viability of alternative proposals, assuming that this subject was covered in the report. It is submitted that this is the correct approach. One of the main methods of objection to such schemes is to put up an alternative or modified proposal. The approach of Fair J. allows the parties a right of hearing upon alternative schemes but not upon the details of complicated proposals, which, if considered in full, would amount to a completely new hearing upon the alternatives as if they were the substantive issue for the court's consideration.

A different approach was taken by Henry J. in Perpetual Trustees v D.C.C.(165) Here it was clear that the council had given the plaintiff a full hearing upon the objections themselves. But the objectors, as in Connolly v Palmerston North City raised an alternative proposal which would substantially

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(163) (1953) N.Z.L.R. 116, 118-9
(164) ibid 119
(165) (1968) N.Z.L.R. 19

modify the scheme put forward by the council. A city engineer's report upon this alternative proposal was made but the objectors were denied a hearing upon the report. It is not clear whether the contents of the report were ever disclosed but this is not important as natural justice demands a right of hearing upon material that must be disclosed and this was never given.

Henry J. took the view that the report dealing with the new proposal was a collateral matter which the council might take into account as a matter of policy in determining whether it was "expedient" to execute the proposed works. The decision of Henry J. is thus based upon two separate factors although they are not clearly distinguished in his judgement.

First, there is the view of Henry J. that when the council was hearing evidence upon the new proposal, it had ceased determining the validity of an objection which required the council to act judicially, but had moved into the wider "administrative" task of deciding the expediency of the original proposals.(166) It is submitted that this splitting of the council's decision making process is contrary to established authority. It is certainly contrary to Fair J's judgement in Connolly's case. Moreover, in Denton v Auckland City no such distinction as suggested by Henry J. was made. The implication to be drawn from this and other cases is that while the council does have other wide ranging administrative functions, it must act judicially throughout the whole hearing process. The fact that policy matters may be taken into account in determining whether it is "expedient" to execute the works is quite irrelevant. The council must still act in accordance with natural justice although it need not disclose policy considerations.

The second ground was Henry J's view that to allow the objectors a hearing upon the report would be tantamount to allowing them a right to be heard as if the new matter raised by them was the subject matter of the inquiry itself. (167) The

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(166) ibid 26
(167) ibid 25

implication to be drawn is that Henry J. based his decision upon the fact that the report dealt with a collateral matter not directly relevant to the decision. The finding is difficult to accept both upon the facts and in the light of Fair J.'s decision in Connolly v Palmerston North City. urthermore, at one point Henry J. says that the report contained relevant issues but is still of the opinion that no hearing need be given upon the report :-

"That (i.e. the council's original proposal) remained the issue and it did not change merely because the plaintiffs raised a new, although relevant issue as a reason why the original scheme should not proceed." (168)

The writer is of the opinion that Henry J.'s decision upon this point is incorrect. At the least it may be said that it is unrealistic as the raising of alternative proposals is a common method of objecting to a compulsory purchase order and some planning decisions. It is submitted that the approach of Fair J. in Connolly is preferable even although what was said there may have been obiter. (169) Fair J. expressly had in mind the situation where an alternative proposal is raised, the hearing of which would take the form of a hearing of the alternative as if it were the council's actual proposal.

Henry J.'s solution is to say that under no circumstances is a surther hearing demanded upon a report which is made as a result of new proposals put to the council. Fair J.'s approach is more flexible and subtly different. He would say that the hearing upon the alternative proposals need not be conducted as if it were the substantive proposal and in particular there is no need to consider complicated technical evidence concerning the new proposal. However, Fair J. does contemplate that such a report should be disclosed and a hearing given upon it, but that natural justice does not demand a hearing upon complicated details that would be required if the new proposal was the substantive one.

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(168) ibid 25

(169) It would be obiter if the report in that case did not consider the new proposals.

(4) Is there a duty to disclose material acquired before the duty to act judicially arose?

This problem does not arise in the case of many tribunals which carry out only one function in the course of which they must act in accordance with natural justice. A tribunal in this situation must disclose relevant material whenever it was acquired.(170) In the case of other decision making bodies, such as city councils and ministers, a wide range of functions will be exercised. Some of these will require compliance with natural justice while others will not.

Most of the large volume of case law in this area has been concerned with ministerial confirmation of compulsory purchase orders and the determination of planning appeals. It has been held that prior to objections being made to a council's order, a minister or his department could, without disclosure, express an opinion as to whether properties were prima facie of the class to be included in the clearance orders,(171) be approached by a local authority seeking advice (172) or informing the ministry of future plans, correspond with the local authority upon aspects of a proposed order,(173) or communicate with other governmental departments as to whether they had any objections to a proposal.(174)

In none of the situations above was any real injustice done by the strict application of the rule formulated in these cases that there was no duty to disclose material received before the duty to act in accordance with natural justice arose. In some cases the minister had a statutory right to communicate with the council upon certain matters(175) and this was thought to be some indication that there should be no duty to disclose such material.

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(170) R. v Westminster Assessment Committee (1941) 1 K.B. 53, 69 distinguished in Johnson & Co. Ltd. v Minister of Health (1947) 2 All E.R. 395, 405
(171) Offer v Minister of Health (1936) 1 K.B. 40
(172) Frost v Minister of Health (1935) 1 K.B. 286
(173) Price v Minister of Health (1947) 1 All E.R. 47; Summers v Minister of Health (1947) 1 All E.R. 184
(174) Miller v Minister of Health (1946) 1 K.B. 626; also Summers v Minister of Health (1947) 1 All E.R. 184
(175) Offer v Minister of Health (1936) 1 K.B. 40

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In other cases the material was only of marginal relevance [176] and would have been of little use to the objectors. [177] Much of the material in these cases was concerned with the broad desirability of the various projects proposed by local authorities, rather than anything specifically prejudicial to the objector's case.

One case that casts considerable doubts upon the rigidity of the rule formulated in earlier cases is Johnson & Co. Ltd. v Minister of Health. [178] The Court of Appeal held that the minister was not under a duty to disclose highly derogatory and prejudicial matters which had been obtained before the necessity to act judicially arose. The result in this case logically followed from the large number of earlier authorities to the effect that there was no duty of disclosure in such circumstances. Lord Greene M.R. thought that if such a duty existed, it would be impossible to determine what material was relevant and it would lead to the disclosure of any material that could possibly have a bearing upon the general policy view of the minister. [179] This may be doubted or, alternatively, it may be argued that it is desirable that a minister disclose a departmental statement of policy in these circumstances. [180]

As far as other information is concerned, Lord Greene M.R. said that disclosure would also lead to a "chaotic and unacceptable result with regard to information in Ministerial files." [181] No case :-

> " goes beyond an obligation to see that matter which has come into existence for the purpose of the quasi-lis, is made available to both sides, and I am not going to extend the obligation beyond that point." [182]

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(176) Horn v Minister of Health (1937) 1 K.B. 164
(177) Summers v Minister of Health (1947) 1 All E.R. 184, 189 per Morris J.
(178) (1947) 2 All E.R. 395
(179) ibid 402
(180) De Smith op. cit. 184
(181) (1947) 2 All E.R. 395, 404
(182) idem

By way of criticism of Johnson's case, it may be said that the Court of Appeal overemphasised the difficulties of determining what is relevant material and were misguided in thinking that the courts would demand disclosure of material which had only the most tenuous relevance to the inquiry.

Natural justice is a flexible concept and it is submitted that the duty of disclosure should apply to the present situation.(183) The courts would take a realistic view of what should be disclosed while insisting that materials clearly prejudicial to a party, as in Johnson & Co. Ltd. v Minister of Health, should be made available for comment. Thus the writer contemplates that there would be no need to disclose the departmental communications of the type described in Summers v Minister of Health,(184) or the giving of advice by a department unless it was such as to fetter the discretion of the minister when the necessity to act judicially arose.(185) The English cases proceed upon a strictly analytical approach which has been increasingly called into question by recent decisions. In particular, the advent of fairness may lead to a more realistic appraisal as to what procedural safeguards should be applied in this field.

5) When does the material in the possession of the tribunal have to be disclosed?

In most cases the actual time of disclosure is not directly at issue because the complaint is a more general one that there has not been any disclosure contrary to the rules of natural justice. It is intended to discuss first the decision in Denton v Auckland City.(186)

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(183) See Tucker L.J. in Russell v Duke of Norfolk (1949) 1 All E.R. 109, 118

(184) (1947) 1 All E.R. 184

(185) for a discussion of this see Offer v Minister of Health (1936) 1 K.B. 40

(186) (1969) N.Z.L.R. 256

Speight J. said that all planning reports should be disclosed before the hearing. He based his conclusion upon the fact that the conduct of the party in preparing his case or even deciding whether he should attend the hearing, may be governed by the material available to him.(187) Such a report may also influence the type of material that is put forward in evidence. Speight J. thus thought that the parties would get a better quality of hearing if the material is available before the hearing. Speight J. offered his comments as "practice guidance" and they are plainly inapplicable to the situation where the material only comes to hand after the hearing has commenced.

The very recent case of Spearman v Bay of Islands County Council (188) suggests that it is not a strict necessity of natural justice that material is disclosed before a hearing, although it may be desirable that this should be done. In this case the town planning officer's report was disclosed at the hearing and the parties did, in fact, have an opportunity of cross-examining its author and of answering anything prejudicial. Furthermore, nobody had objected or asked for an adjournment.(189)

Wild C.J. said that in these respects Denton v Auckland City was distinguishable and that the time of disclosure was not directly at issue in that case. He did not finally decide that there had not been a breach of natural justice here as he went on to hold that the natural justice question need not be considered and he definitely tended towards that view.

The further implication can be drawn from the judgement of the Chief Justice, that if an adjournment was requested it should be granted so as to give the parties an opportunity to answer the material. Whether, in fact, it would be a breach of natural justice to refuse an adjournment must depend, it is submitted, upon the type of material in the report. It may be of such a

(187) ibid 266

(188) (1974) 1 N.Z.L.R. 360

(189) ibid 362

nature that it can be adequately dealt with in the course of the hearing without prejudice to the putting of the plaintiff's case. But if the report contained highly detailed and technical matter it would be contrary to natural justice to deny an adjournment so that a party could assess its contents and answer any prejudicial material.

At this stage it may be wondered whether anything remains of the approach put forward by Speight J. in Denton v Auckland City. It remains to be seen what approach prevails in the courts. It may be that the courts will take a flexible approach to the matter and say that some materials are of such fandamental importance that natural justice demands their disclosure before the hearing. In other circumstances, it will be sufficient that the report is disclosed at the hearing and an adjournment granted to give the parties an adequate opportunity to answer the material.(190) Yet again, the material may be of such a nature that it can be adequately answered without an adjournment and it will not result in a breach of natural justice to refuse one. Finally it will be too late to disclose information and ask for comments after the hearing has been concluded and a tentative decision has been arrived at.(191)

This approach receives support from De Smith.(192) Moreover, in Ontario Section 8 of the Statutory Powers Procedure Act 1971 provides that where the good character, propriety of conduct or competence of a party is an issue factual information must be given as to allegations with respect to these things. This statutory provision recognises that at least in some circumstances that material in the possession of the tribunal must be disclosed before the hearing.

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(190) cf. Saskatchewan Teachers Federation v De Moissic (1973) 38 D.L.R. (3d) 296

(191) R. v Milk Board ex parte Tomkins (1942) V.L.R. 187

(192) op. cit.

V. EXCLUSION OF THE DUTY OF DISCLOSURE

It is not intended to deal exhaustively with all the possible ways in which the duty of disclosure can be excluded as this is beyond the scope of this paper. (193) As in the case of other breaches of natural justice it may be that minor breaches of the duty of disclosure may be impliedly waived. (194) In this section of the paper it is intended to concentrate on a number of areas of special interest.

(1) Statutory Exclusion

The requirements of disclosure may be excluded by statutory provision or necessary implication as in the cases of other breaches of natural justice. It is also conceivable that the duty could be negated if the legislature enacted a code which does not leave room for any further duty of disclosure to be supplied, but this would require very clear language. Thus in Rich v Christchurch Girls High School (195) although the principal had a statutory right to be present during deliberations despite her role as accuser and in apparent violation of bias rules, it would have been a denial of natural justice if she had introduced new prejudicial matter without the Board giving the girls counsel an opportunity of being heard upon it. (196) Here the nemo judex rule was excluded but not the audi alteram partem rule.

While no doubt in a suitable case an arguement that the duty of disclosure has been excluded would succeed, there does not appear to have been a case where the statutory language has been such to warrant that conclusion. In a series of cases the courts have rejected the arguement that because a tribunal has power to make inquiries and inspections, solicit reports or generally use any means it thinks fit to obtain evidence, it does not need to disclose this material which it has obtained.

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(193) De Smith op. cit. 161 et seq.
(194) Cunningham Drug Stores Ltd. v British Columbia L.R.B. (1972) 31 D.L.R. (3d.) 459, 464
(195) (1974) 1 N.Z.L.R. 1
(196) ibid 9 per McCarthy P.

In R v Metropolitan Fair Rents Board ex parte Canestra (196) the Board was empowered to make any inquiries and obtain any reports that it considered necessary. (197) It was further provided that it was not bound by "legal forms and solemnities" or by any rule of evidence, and could inform itself in any manner that it thought fit. Finally, it was allowed to make an inspection of any premises. It was argued that these provisions were inconsistent with a duty of disclosure but the Full Court of the Supreme Court of Victoria rejected this. They were of the opinion that the legislation did not expressly negative such a duty and -

> "It further appears in our opinion that the fact that the tribunal may obtain from any source any information it thinks fit does not carry with it the result that such information need not be disclosed to the parties." (198)

Speight J. also came to the same conclusion in Denton v Auckland City (199) Here the statutory language relied on was that the court was empowered "to employ or permit any reasonable means of ascertaining the merits of any objection." (200) Speight J. held that it could not be a reasonable means to depart from the principles of natural justice. (201) Independently of this, an examination of the authorities gave support to his view that the statutory language in that case could not override the obligation to act in accordance with natural justice. (202)

2) Where Disclosure would be harmful to the Public Interest

Material will not have to be disclosed where to do so would be prejudicial to the public interest. Many of the cases in this area involve traditional "crown privilege" situations (203) but the principle, it is submitted, is of general application.

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(196) (1961) V.R. 89 cf. R. v War Pensions Entitlement Appeal Tribunal (1933) 50 C.L.R. 228, 249-250 per Starke J.
(197) (1961) V.R. 89, 91
(198) ibid 92 cf. R. v Westminster Assessment Committee (1941) 1 K.B. 53, 68
(199) (1969) N.Z.L.R. 256
(200) ibid 263
(201) ibid 264
(202) ibid 266
(203) e.g. Conway v Rimmer (1968) A.C. 910

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This proposition finds support in the recent House of Lords decision in R. v Lewes Justices ex parte Home Secretary.(204) Here a letter was sent by a deputy chief constable to the Gaming Board. It dealt with the fitness of an applicant for a certificate of approval. The application was refused. The applicant received a copy of the letter and he started proceedings for criminal libel and witness summonses were issued against the chief constable and the secretary of the Gaming Board in order that they would give evidence and produce certain documents including the original letter. Both the Home Secretary and the Gaming Board sought an order quoshing the summons on the grounds that the information had been given in confidence to the Board in order that it could perform its functions and that it would be contrary to the public interest to produce them.

It is noteworthy that the question of the public interest was raised by both the Home Secretary and the Gaming Board. The application by the Home Secretary fell clearly within the bounds of a traditional crown privilege situation and the case could have been disposed of on this basis, as it was in the Queens Bench Division. It was an example of a class of documents that should not be disclosed in the public interest. (205)

However, the House of Lords enunciated the law relating to documents which it is not in the public interest to disclose in general terms. They saw what had been hitherto regarded as "crown privilege" as but one aspect of a broader principle. Lord Reid said that the expression "crown privilege" :-

... " is wrong and may be misleading. There is no question of privilege in the ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence." (206)

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(204) (1972) 3 W.L.R. 279
(205) ibid 282-3 per Lord Reid; 288 per Lord Morris; 291 per Lord Simon; 294/5 per Lord Salmon.
(206) ibid 282

Lord Reid went on to say that a minister of the crown was often the appropriate person to assert this public interest but that it was open to anyone interested to raise the question and that there even may be cases where the trial judge should raise the question. Thus, he was of the opinion that both the Home Secretary and the Gaming Board were entitled to raise the matter.(207)

Lord Morris said that the Gaming Board would receive documents which no-one would contemplate that they should disclose, and that these belonged to a class that were to be protected from disclosure in the public interest. Consequently, he agreed that the Gaming Board could also raise the matter.(208)

Lord Pearson and Lord Simon both criticised the expression "crown privilege" as being a misnomer and misleading.(209) Lord Simon said :-

> "Where the crown comes into the picture in that some of the matters of public interest which demand that evidence be witheld are peculiarly within the knowledge of servants of the Crown. The evidence, for example, may be of acts of state ... or have a bearing on national security. Any litigant or witness may draw attention to the nature of the evidence with a view to its being excluded."(210)

Lord Simon also contemplated that just as documents may belong to a recognised class that should not be disclosed in the public interest,(211) so also a document falling outside these recognised classes may still be an individual item that should be excluded in the public interest.

So far what has been dealt with are those situations in which any revelation of documents would be contrary to the public interest.(212) On the other hand there are many situations where there is nothing inherently prejudicial to the public interest in the

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(207) ibid 284
(208) ibid 288
(209) ibid 289 cf. Lord Salmon 294
(210) ibid 289
(211) see A.G. v Briant (1846) 15 M & W 169; Marks v Beyfus (1890) 25 Q.B.D. 494
(212) e.g. Hutton v A.G. (1927) 1 Ch. 427, 439; Re Prata and the Minister of Manpower and Immigration (1972) 31 D.L.R. (3d) 465.

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disclosure of the material itself but it is thought necessary to keep the source of the material from disclosure. It would seem that the proper course for a tribunal or court would be to repress the name and disclose the contents. Sometimes it may not be sufficient simply to keep the name of an informer secret as the details of a report would give him away. In this type of situation a tribunal may disclose only the gist of the information without there being a breach of natural justice. In R. v Gaming Board (213)
Lord Denning said :-

"If the Gaming Board were bound to disclose their sources of information, no-one would 'tell' on those clubs for fear of reprisals. Likewise with the details of the information. If the board were bound to disclose every detail that might itself give the informer away and put him in peril. But without disclosing every detail I should have thought that the board ought in every case to be able to give to the applicant sufficient indication of the objections raised against him such as to enable him to answer them. That is only fair. And the Board must at all costs be fair." (214)

Lord Denning, therefore, concludes that "fairness" and the need for confidentiality are both satisfied by revealing the gist of the information so that the applicants could comment upon it. The decision is interesting as it was clearly the opinion of Lord Denning that even if no issues of confidentiality were involved fairness would still only have required that the gist of the information be disclosed. (215) He found support for his proposition in the judgement of Lord Parker C.J. in Re H.K. (an infant) (216) which as has already been mentioned, is a case concerning disclosure of issues rather than specific factual material. However, Lord Denning's approach finds support in other "fairness" cases. (217)

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(213) (1970) 2 Q.B. 417
(214) ibid 431
(215) ibid 430
(216) (1967) 2 Q.B. 617, 630
(217) Re Pergamon Press (1971) Ch. 388; Maxwell v Board of Trade (1974) 2 All E.R. 122

Lord Denning, therefore, seems to have reached the required result by two different paths. In the normal natural justice situation any departure from full disclosure is seen as a derogation from the audi alteram partem rule in the public interest. In the context of the duty to act fairly, the judgement of Lord Denning in the Gaming Board case suggests that the duty of disclosure is the same whether or not there is this super-added element of confidentiality involved.

However, this was not simply a fairness case and it did have a separate alternative basis . Thus there does not appear to be any reason why this intermediate approach should not be applied to strictly natural justice situations. Some support for this view may be obtained from the decision of the Canadian Federal Court of Appeal in Lazarov v Secretary of State for Canada [218] The applicant had satisfied the citizenship court that he was a fit and proper person for citizenship. The minister refused in his discretion to grant a certificate of citizenship because of a confidential police report in his possession. The leading judgement of Thurlow J. dealt with the question of the applicability of natural justice in terms of the three tests laid down by Durayappah v Fernando [219] and concluded that the audi alteram partem rule applied. The applicant had to be given :-

> "a fair opportunity of stating his position with respect to any matters which in the absence of refutation or explanation would lead to the rejection of his application ... That is not to say that a confidential report or its contents need be disclosed to him but the pertinent allegations which if denied or unresolved would lead to the rejection of his application must ... be made known to him to an extent sufficient to enable him to respond to them and he must have a fair opportunity to dispute or explain them." [220]

Thurlow J. is clearly applying the intermediate approach that was taken in the Gaming Board case. [221] At one stage of his judgement he cited the Gaming Board case [222] although in a

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(218) (1974 39 D.L.R. (3rd) 738
(219) (1967) 2 A.C. 337, 348-9
(220) (1974) 39 D.L.R. (3d) 738, 750
(221) ante
(222) (1974) 39 D.L.R. (3d) 738, 744-746

different connection, and in other places he mentioned 'fairness' as if it were the applicable standard. Moreover, he thought that the reasons for compliance with "natural justice" were "just as strong" as in the Gaming Board case.(223)

But despite these indications that Thurlow J. was thinking in terms of fairness, there is a distinction made at the end of his judgement between the extent to which confidential information need be disclosed and the normal situation in which the duty of disclosure applies. This tends to suggest that he was thinking of fairness which would demand the same standard whether confidential material was present or not, but such a conclusion can only be tentative because of the uncertain basis upon which the decision proceeded.

<u>Presence of serious harm to one party directly concerned</u>

A tribunal may not be required to disclose information if it could seriously harm some person directly concerned.(224) The leading case is the House of Lords decision of <u>In Re K (infants)</u>.(225) The facts are complicated but basically it was a custody dispute in the course of which the official solicitor had submitted a report for the guidance of the court. Both the official solicitor and counsel considered that disclosure of the report to the parties would seriously harm the interests of the children. The judge was willing to let the parties' legal representatives see it, but the mother took the view that she was entitled as of right to see the report and refused to let her legal representatives see the report unless she also had a right to do so.

Ungoed-Thomas at first instance while willing to let the respective legal advisers see the reports, refused to let the mother see them. The Court of Appeal reversed the decision and the House of Lords restored the original decision. All of their Lordships were influenced by the fact that the Chancery Division in the case of wards is exercising a special jurisdiction which issues from the

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(223) ibid 749

(224) De Smith op cit 180

(225) (1965) A.C. 201 otherwise reported as <u>Official Solicitor v K</u>

crown as parens patriae.[226] The welfare of the child was the paramount consideration [227] and as a result there was no absolute right to see a confidential report. The judge had a discretion in this matter and he must weigh up all the factors in order to determine whether it was in the child's best interests that such a report should be disclosed. Lord Evershed [228] said that as a party may leave the court with a sense of grievance that could be disadvantageous to the child, a judge must be satisfied that real harm would ensue if disclosure was allowed.

The House of Lords approved the practice of disclosure to legal advisers where the court is of the opinion that disclosure to the parties would cause serious harm to the child.[229]

Another case that reached a similiar conclusion although by a different route is R. v Kent Police Authority ex parte Godden.[230] Here the Court of Appeal held that prejudicial reports about a police inspector's mental health should be disclosed to his medical adviser as they were going to be placed in the possession of a medical practitioner who had the quasi official duty of determining whether the inspector should be compulsorily retired. The case was decided upon the ground that fairness demanded that prejudicial statements should be made available to the applicant's medical consultant. It was not argued that non-disclosure was justified by the possibility of harm to some party concerned. Lord Denning M.R. [231] simply held that the medical advisers should see the material but he didn't think that justice required that the inspector should see the report as he could possibly use it to base a libel action on. The other members of the Court of Appeal did not specifically deal with this point. In the result, partial disclosure was ordered as the House of Lords in In Re K (infants) [232] considered to be a satisfactory approach. However, the same element of harm to some party concerned was not present.

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(226) ibid 237 per Lord Devlin
(227) cf. 218, 220 (Lord Evershed); 232 (Lord Jenkins)
(228) ibid 219
(229) e.g. Lord Evershed 221; Lord Devlin 243-244
(230) (1971) 2 Q.B. 662
(231) ibid 670
(232) (1965) A.C. 201

CONCLUSIONS

Since the leading case of Board of Education v Rice (233) the duty of disclosure has been applied in a large number of specific instances so that its content has become fairly well defined, although in some areas the exact extent of the duty has yet to be settled. (234)

The courts' attitude to the duty of disclosure can be seen to have followed the same path as De Smith outlines for the audi alteram partem rule generally. (235) He sees Local Government Board v Arlidge (236) which has already received detailed attention in this paper (237) as being the beginning of a partial retreat from their earlier position. The duty of disclosure suffered from the use of analytical labels as is exemplified by the large body of case law concerning the ministerial confirmation of compulsory purchase orders which grew up between 1930 and 1950.

More recently, the courts have adopted a new expansive approach to the duty of disclosure (238) which is paralleled by increased judicial activism generally in the field of judicial review. (239) In particular, the courts have taken a more realistic and flexible approach to the question of what disclosure is necessary in order to secure a full and fair hearing for a party. If a party is either denied particulars of prejudicial allegations or access to specific relevant material in the possession of the tribunal or not informed as to a change of thinking by the tribunal, he may have been actually denied an effective hearing. (240)

One factor that should be considered in relation to this change of judicial attitude is the advent of the duty to act fairly. It is not proposed to consider the relationship of natural justice with fairness. A much more limited objective is sought to be achieved. This is the question whether fairness has contributed anything to the development of the duty of disclosure.

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(233) (1911) A.C. 179
(234) e.g. Part III c. ante
(235) op cit 141 - 151
(236) (1915) A.C. 120
(237) Part III B ante
(238) The change in the New Zealand courts' attitude to the question whether a change of thinking should be disclosed is a good example - see Part III C ante
(239) See De Smith op cit 155
(240) See generally Part III ante

At the outset it should be said that the fairness cases cannot be neatly compartmentalised. Some have involved traditional natural justice situations,[241] and consequently there was no need to invoke the concept of fairness to provide procedural protection. The only difference was the label. In other situations it has been used to impose a duty upon an immigration officer to give an immigrant an opportunity of satisfying him of the matters within an Act he must comply with.[242] It has also been applied to impose a limited duty upon company inspectors to disclose prejudicial allegations and consider any reply before making a report.[243]

In New Zealand fairness has been applied in the case of Smit v Egg Marketing Authority.[244] In Lower Hutt City Council v Bank[245] the Court of Appeal also discussed the question of the duty to act fairly. McCarthy P. said :-

"Furthermore, we believe that the clear cut distinctions once favoured by the courts between administrative functions on the one hand and judicial functions on the other as a result of which it was proper to require the observance of the rules of natural justice in the latter but not in the former is not these days to be accepted as supplying the answer in a case such as we have before us. Former clear cut distinctions have been blurred of recent years by directions from highest authority to apply the requirements of fairness in administrative actions as well if the interests of justice make it apparent that the quality of fairness is required in those actions ... Lord Hailsham of St. Marylebone L.C. in Pearlberg v Varty (1972) 1 W.L.R. 534 ... referred to it by saying that the frontiers of the doctrine of natural justice have been advanced considerably in recent years, though he added that the courts now take an increasingly sophisticated view of what is required by that doctrine in particular cases."[246]

The words of Lord Hailsham pose two appropriate questions that can be asked in connection with fairness. First, has it

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(241) e.g. R. v Birmingham Justices (1970) 1 W.L.R. 1428
(242) Re H.K. (an infant) (1967) 2 Q.B. 617
(243) Re Pergamon Press Ltd. (1971) Ch. 388 cf. Maxwell v Board of Trade (1974) 2 All E.R. 122
(244) unreported judgement; 21st March 1973 per White J.
(245) (1974) 1 N.Z.L.R. 545
(246) ibid 548

imposed a new duty of disclosure in areas where the duty never existed before? Second, has it helped the courts in taking a more flexible and realistic approach to what disclosure demands?

1. When one examines the circumstances in which the duty of fairness has been held to apply it is possible to suggest that almost all of them could have been decided the same way before the duty to act fairly was evolved. The problem is that we have the benefit of hindsight. It is impossible to be at all certain upon this point but it may perhaps be said that fairness has helped to widen the frontiers because of the previously prevalent thinking that natural justice was only to be imputed into analytically 'judicial' functions. However, it should be emphasised that this was a tendency only and the New Zealand courts were, for instance, sometimes willing to impose a duty to conform with natural justice upon a body with essentially 'administrative' functions. (247)

2. It is perhaps in this second area that fairness has made its main contribution, but it should be remembered that Lord Tucker in Russell v Duke of Norfolk (248) in 1949 had put forward the view that natural justice was a flexible concept:-

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth." (249)

In Wiseman v Borneman (250) the House of Lords reaffirmed the view that natural justice is essentially a flexible concept. Lord Reid said:-

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental principle degenerate into a series of hard and fast rules." (251)

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(247) e.g. N.Z. Dairy Board v Okitu Co-op Dairy Co. (1953) N.Z.L.R. 366
(248) (1949) 1 All E.R. 109
(249) ibid 118
(250) (1971) A.C. 297
(251) ibid 308

Lord Guest (252) and Lord Donovan (253) expressly adopted the Tucker dictum. The case is interesting in that natural justice was discussed in terms of what is fair in the circumstances, (254) as would seem to be the approach taken in Lower Hutt City Council v Bank. (255) If these two cases are put alongside the Tucker dictum one may be excused in expressing doubts as to the extent which fairness has advanced the cause of a more flexible approach. Despite these doubts, fairness has aided the courts in adopting an approach which was already open to them. The tendency of the courts was to apply the same standards of natural justice to all bodies and persons exercising statutory powers while it is not appropriate to demand the same standard of a company inspector or of an immigration officer as it is of a court. Moreover, because of this tendency on the part of the courts, sometimes the courts refused all procedural protection because the full standards of natural justice were completely inappropriate and they were unwilling to impose a lesser standard.

Another recent development affecting the law of disclosure has been the move to codification of the procedural rules in some jurisdictions. The object of such codification is, firstly, to make clear what the rules are and secondly, to determine when they are to apply. (256) The Ontario Statutory Powers Procedure Act 1971 has a number of sections concerning the duty of disclosure :-

Section 6(1) The parties to any proceedings shall be given reasonable notice of the hearing by the tribunal.

(2) A notice of a hearing shall include
(a) a statement of the time, place and purpose of the hearing; .....

Section 8 Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

Section 16 A tribunal may, in making its decision in any proceedings:
(a) take notice of facts that may be judicially noticed;
(b) take notice of any generally recognised scientific or technical facts, information or opinions within its scientific or specialised knowledge.

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(252) ibid 311
(253) ibid 314
(254) see Lord Reid 308; Lord Morris 309; Lord Guest 311; Lord Donovan 315; Lord Wilberforce 317, 319/320
(255) (1974) 1 N.Z.L.R. 545
(256) see Keith op cit 172 et seq.

Sections six and eight can be considered together as they both raise notice issues. (257) Section 6 mainly concerns strict notice requirements which are beyond the scope of the present paper. It does, however, mention that the 'purpose' of the hearing must be disclosed. Does this include both knowledge of the existence of allegations and adequate details of them or only the former? Section 8 would suggest that Section 6 is only dealing with the necessity of informing a party of the existence of allegations. Section 8 provides that only where the good character, propriety of conduct or competence of a party is at issue does the tribunal have to furnish reasonable details of the allegations. It may be concluded that Section 6 does not help in determining what the rules are which is one of the objects of codification in the first place.

Section 8 also does not provide a very satisfactory solution to the problem of determining what the rules are. Even assuming that it will not be difficult to always determine when Section 8 should apply and not just simply Section 6, it is open to criticism that its application is not wide enough. It is not hard to contemplate situations where a party should have details of the issues to be considered by the tribunal although his good character is not at issue. His economic issues could be seriously affected but he would not be entitled to the same protection. To this extent, Section 8 derogates from the Common Law. Furthermore, Section 8 does not mention anything about disclosure of specific information. When, if at all does this have to be disclosed? Admittedly the Act only lays down minimum rules and a court can turn to the Common Law in order to answer these questions, but it is hard to see why the rules mentioned are more basic than others which are not.

Section 16 has already been mentioned. (258) As was pointed out previously, Section 16 (b) states only part of the position at Common Law and does not mention that a tribunal need not disclose its policy which it has formulated in accordance with the act setting it up. Once again there is the problem why one part of the Common Law position should be included and the other not. Furthermore, Section 16 (b) does not make the legal rules or their application any more certain.

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(257) cf. De Smith op cit 172 et seq.
(258) See Part IV(1) ante

In summary, the writer has considerable doubts whether the Ontario codification has achieved the purposes outlined earlier. It cannot be said to have the advantages of certainty over the Common Law rules relating to disclosure. The legislation raises more questions than it solves. Moreover, it may be said that in the desire to achieve certainty by enacted rules, the Common Law's new found flexibility in the area of disclosure has been sacrificed. Leaving aside the specific inadequacies of the Ontario legislation, the time may not be ripe for codification when the courts are still expanding the duty of disclosure to cover new situations.

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