

What is ‘fair’ and ‘reasonable’ depends a lot on your perspective

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Introduction

Administrative decisions affect all of us. They decide everything from if we get and keep a driver's licence, through how many storeys can be added to our houses, to how much water we are allocated to keep our crops alive. For some, they even impact on whether they can start a new life in a new country. These essential powers are provided to government and by extension public servants based on a number of core assumptions. These include that public servants will act at all times in the public interest, and that when they will make a decision, they will be fair and they will be reasonable.

I looked at the issue of the public interest in earlier papers and speechesⁱ, and this paper will not look at this term again. This article focuses on “*fair*” and “*reasonable*”, and particularly at three important perspectives on and approaches to the assessment of administrative conduct: by members of the public directly affected by conduct; by the courts; and by ombudsman.

The paper highlights some of the significant differences between the ways each assesses the standard, quality and/or acceptability of administrative conduct to determine whether it is fair/unfair or reasonable/unreasonable. While often using similar terminology, in practice each comes at the issue from a different perspective, focusing on different aspects of the conduct in question and using different assessment criteria.

There is a very clear reason why this discussion is important. The way administrative conductⁱⁱ of public sector agencies and officials is perceived, and particularly if it is seen as being fair and/or reasonable, has a direct impact on the whether the conduct is accepted. This can be acceptance by those directly affected, but also in some cases it can be acceptance by a larger group, or even an entire community. In representative democracies governments are said to govern by consent – by the consent of the governed. This means that a high level of public trust in the institutions of government is of fundamental importance to the proper functioning of a representative government. A factor that strongly influences the degree to which the public is prepared to trust their government is the public's perception as to whether they perceive the government to be acting ‘*fairly*’ and/or ‘*reasonably*’.

What do they mean?

While in the context of public administration there is a degree of overlap in the characteristics of conduct that might be seen as being ‘*fair*’ or ‘*reasonable*’ⁱⁱⁱ, there seems to be some consensus in dictionary definitions and in writings on the topic that there is also a significant difference in the nature of the assessments these terms refer to:

- conduct is seen as being ‘*fair*’ if it is perceived to be morally right, eg ethical, dictated by conscience, honest, uncorrupted and free from prejudice, favoritism or self-interest, balanced, etc (the focus is primarily **internal** and **subjective**),
- conduct is seen as being ‘*reasonable*’ if it is perceived to be administratively just, eg lawful, in accordance with accepted standards of conduct, in good faith and for legitimate reasons, unbiased, rational, consistent, what is appropriate for a particular situation, etc (the focus is primarily **external** and **objective**).

Applying the terms fair and reasonable in practice is fraught with difficulties. There is no clear exposition of, or even general consensus about, what constitutes ‘*morally right*’ conduct or ‘*accepted*’

standards of conduct. Morals (and ethics) are a very personal issue and what are considered to be acceptable standards of conduct in the public administration context have varied over time (eg the change in how the courts interpret what is 'unreasonable'). Further, fairness can be seen as one of the criteria for assessing reasonableness, and vice versa, and some of the criteria that can be used to assess fairness can also be used to assess reasonableness, for example honesty, legality, regularity, provision of a fair hearing, etc.

Complications can also arise from the fact that the degree of fairness or reasonability of conduct can range from entirely fair or reasonable at one end of a spectrum to manifestly unfair or unreasonable at the other. In some circumstances there will be a clear dividing line separating conduct that is fair and/or reasonable from conduct that is unfair or unreasonable, for example illegality, threats, abuse, rudeness, etc. In the context of public administration it can be expected that in most circumstances there will be no clear boundary dividing what can objectively be categorised as fair or reasonable from what is unfair or unreasonable^{iv}. In such cases there will be a grey area in the middle requiring an assessment as to whether something is fair and reasonable, or not, depending on such factors as the role of the person making that assessment, how well informed the person is about the relevant facts and circumstances, and quite possibly that persons perceptions, attitudes, opinions, interests and/or personal biases.

Given the generally accepted meanings of the terms, and the differences between them, it is unfortunate that there appears on occasion to be a lack of rigor in their application. For example:

- The rules embodied in the common law concept of procedural fairness focus on standards of conduct that are objectively applied to the particular circumstances of each case. I think this is reflected in references in various judgments of the High Court to procedural fairness being in effect a human 'right' and that "...the concern of the law is to avoid some practical injustice"^{vi} also note the comment by Chief Justice Robert French in a 2010 paper that the norms of procedural fairness "...are important societal values..."^{vi} The language of 'rights', 'justice' and 'societal values' seems to better reflect more the external objective focus of reasonableness on standards of conduct than the more internal subjective focus of fairness on issues related to morality, ethicality, impartiality and the like.
- The concept of the 'reasonable person' is the standard used by the courts to assess conduct in a range of contexts. However, depending to a degree on the context there are a number of variations in the formulation or description of this standard, for example: the 'reasonable person', the 'reasonable or fair minded observer', the 'fair-minded observer', the 'fair-minded and informed observer', what 'fair-minded people reasonably apprehend or suspect', a 'hypothetical fair-minded lay observer', or 'right-minded people'. It is generally agreed that this test, however expressed, focuses on what the court believes the public would be likely to think about the issue in question, not the courts own (presumably more objective) view on that question. The sense in which the test is used appears to me to be more about fairness than reasonableness.

Apart from the difficulty in determining precisely what the terms mean, the way those terms are applied in practice (ie. the way such assessments are made) varies considerably depending on the perspective of the person making the assessment, for example:

- members of the public can be expected to adopt a very subjective approach to assessments of fairness whereas independent review bodies (such as the courts or ombudsman) are obliged to adopt an objective standard, and
- reasonableness (referred to in a recent decision of the UK Supreme Court as “... an external, objective standard applied to the outcome of a person’s thoughts or intentions”^{vii}) is a central issue for independent review bodies, whereas research^{viii} supports the idea that this is a secondary concern for members of the public.

Examples that highlight some of the differences in the ways members of the public, ombudsman and the courts are likely to assess whether administrative conduct is fair or reasonable include:

- While a court may well find that a procedure was unfair based on what could be categorised as a legal technicality, members of the public are likely to perceive such an outcome to be unfair. After all, conduct can be legal and at the same time reasonably perceived by the public to be morally reprehensible, such as where legally allowable strategies are used in court proceedings to prevent the admission of relevant evidence that could significantly impact on the outcome of those proceedings.
- Where the parties to proceedings have significantly different financial resources to draw on, this is likely to result in an equivalent difference in the quality of the legal representation of each. While the courts are unlikely to find this to be procedurally unfair (even where the legal issues in question are particularly complex), it is likely that any members of the general public who were aware of these circumstance would perceive the situation (and therefore quite possibly the eventual outcome of the proceedings) to be unfair.
- While a court is bound to apply the law, ombudsman are generally empowered to find conduct to be unreasonable even though it was in accordance with the law, but the ombudsman is of the view that the law is unreasonable, unjust, etc.^{ix}
- While many of the assessment criteria likely to be used by members of the public and ombudsman have significant similarities, the weight placed on each criterion in assessing fairness may well be significantly different. For example, while research^x indicates that ‘interpersonal justice’ type criteria (eg. respect, empathy, propriety, responsiveness) are likely to significantly impact on an individuals’ perception of the fairness of an unfavorable outcome, this is likely to have much less impact on how ombudsman assess outcomes.

Given these complications, it can be expected many members of the general public, possibly the vast majority, will have no clear understanding of how the terms ‘fair’ and ‘reasonable’ are applied by the courts in particular, and to a lesser extent by ombudsman. In these circumstances it is likely that most assume that the courts (and possibly ombudsman) consider these issues in the same way and from the same perspective that they do. Such unrealistic or inaccurate expectations can lead to disaffection with the system, frustration and possibly anger.

How do members of the public assess whether conduct was fair and reasonable?

Fairness

It can be assumed that individuals make decisions or form opinions about whether conduct is 'fair' based on very personal (ie subjective) assessments, strongly influenced by such things as their perceptions, attitudes, opinions, interests, personal biases, past experiences, education, other socio-demographic differences and even the personality (ie considerations largely internal to the individual).

Organisational scientists have put forward '*organisational justice theory*' or '*justice theory*' as a way to describe or explain how individuals react to decisions and the way they are made. Justice theory looks at what is important for outcomes to be perceived as acceptable and/or for the people involved in the process to be satisfied with the fairness of the process and how they were treated. Nearly 40 years ago, Thibault & Walker^{xi} put forward the proposition that disputants care as much about how their disputes are resolved as they do about the outcomes they receive. Subsequent research from around the world has supported this view.

As set out in **Annexure A** in more detail, organisational scientists argue that there are four dimensions of any decision-making process:

1. *decisions/outcomes* - focussing on the perceived fairness of decisions or outcomes of the process
2. *procedures* - focussing on the perceived fairness of the means by which decisions are made.
3. *treatment* – focussing on the perceived fairness of the treatment of the individual concerned.
4. *information* – focussing on the perceived fairness of the information provided to the person concerned about or explaining the procedures used and the decisions/outcomes.

When a person perceives that any dimension of the process was not fair, the impact can be expected to vary depending on which dimension and the degree of direct impact on the person concerned. For example, justice theory argues that where the procedures used and the treatment of the person concerned are perceived to be fair, an unfavourable decision or outcome for that person will not necessarily result in a negative perception of the decision-maker or bring into question the validity of the decision or the system in which the decision was made^{xii}. However, where an outcome is unfavourable to the individual, a perception of unfairness in relation to any dimension of the process leading up to that outcome may well result in a view that the outcome was unfair as well as unfavourable. In such circumstances the person affected may well question the integrity or validity of the outcome and have a negative perception of the decision-maker (be that an individual or organisation). This could motivate the person to take some action that will have a detrimental impact on the decision-maker, for example members of the public might make one or a series of complaints to the organisation or external review bodies, post negative comments in social media or the person might take their business elsewhere. Where the person affected is a member of the organisations staff, they might engage in counter-productive or morale damaging behavior, leaking or even active sabotage. Some staff may simply leave the organisation – a cost to the organisation that has invested time and financial resources into recruitment, training, etc.

Reasonableness

Compared to assessments as to whether conduct was fair, views or opinions about whether conduct was reasonable necessarily involve a more impersonal (ie objective) assessment, including consideration of the surrounding facts and circumstances, ie context. In the court context this is commonly referred to as the 'reasonable person' test, ie how the notionally hypothetical reasonable person would view or would have engaged in the conduct in question. In practice I think it can be strongly argued that members of the general public assess conduct differently depending on whether it affects them personally or not. If it affects them personally, such an assessment is likely to be subjective and focus heavily on their perceptions of fairness rather than whether the conduct was reasonable. If they are merely an uninvolved observer, such assessments may well be more objective and, depending on the scope and detail of the relevant information available to them, might extend to include consideration of such factors as legality, regularity, integrity, merits, justification, impartiality, and so on.

How do ombudsman assess whether administrative conduct was fair and reasonable?

Ombudsman have traditionally adopted an expansive view of the scope of what constitutes '*fair*' and '*reasonable*' administrative conduct. Ombudsman review administrative conduct primarily from the perspective of whether or not the framework of policies, procedures and processes supporting decision-making were fair and reasonable, within that framework that the conduct itself was reasonable, and the decisions/outcomes were reasonable in the circumstances (a list of the criteria ombudsman use to assess whether administrative conduct is fair and reasonable is set out in **Annexure B**). In practice the focus of such reviews is on the negative – on whether the conduct under review was unfair or unreasonable (relatively broadly defined)^{xiii}. If the conduct in question is not considered to be unfair or unreasonable (and using the NSW Ombudsman as an example, no other criteria set out in s26 of the *Ombudsman Act 1974* apply), then it will not be found to constitute misconduct or maladministration^{xiv}

Fairness

When conducting reviews into administrative conduct, one factor ombudsman will look at is whether the conduct in question was unfair/inequitable. This would include assessing whether the conduct was or involved:

- decisions that are unfair/inequitable,
- conduct that was unfair/inequitable,
- failures to provide procedural fairness, including inadequate: notice of proposed actions or decisions; opportunity to have views heard/considered; advice as to rights; or reasons for decisions or actions,
- unfair or inequitable applications of the law.

Reasonableness

While there are a number of criterion on which ombudsman are empowered to base their assessments of the administrative conduct of public sector agencies and officials, in practice probably the primary criteria used by an ombudsman is '*reasonableness*'. The focus of an ombudsman in making such assessments can be expected to include whether the conduct was unreasonable, unjust, oppressive or improperly discriminatory, or based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations, contrary to law (amongst other things). In practice, most of these criteria can be categorised as aspects of conduct that is '*unreasonable*'.

When assessing whether conduct meets a reasonable standard, the focus of an ombudsman is likely to be on such considerations as:

- legality/regularity/integrity – including that the conduct was made or done in good faith (ie honestly, for the proper purpose, on relevant grounds and within power)
- merits - the merits of the case
- justification - whether conduct has an evident and intelligible justification (was justified on the facts)
- logic – whether the reasoning that led to the conduct was valid, logical and rational
- balance – whether the response was proportionate and appropriate weight given to relevant factors
- impartiality – whether a decision-maker was impartial or influenced by a conflict of interests
- consistency – compared to decisions or actions in similar circumstances
- timeliness – whether there has been any undue delay.

There are few constraints on the capacity of ombudsman to review administrative conduct of persons and bodies within their jurisdictions (other than the availability of resources). They can consider all of the criteria that can be considered by a court as well as:

- *conduct* - the conduct and approach of the person or body whose conduct is the subject of review in their interactions with interested parties,
- *information* - the content and timing of the information provided to interested parties by the person or body whose conduct is the subject of review,
- *procedures* – whether the policies, procedures and practices used were clear and accessible to those affected by them, and were implemented in a timely manner, and
- *outcomes* – whether the outcome/decision was fair, consistent and proportional, the relevant issues were considered competently and whether the decision-maker had any conflict of interests.

How do the courts assess whether administrative conduct was fair and reasonable?

Introduction

While members of the general public adopt an expansive view of the scope of what constitutes 'fair' in the decision-making process, in determining legal rights and obligations the courts apply the concepts of fairness and reasonability more narrowly, and to different aspects of that process. Generally speaking it can be said that the courts assess the legality of the exercise of discretionary powers from the perspective of whether or not:

- the *process* by which decisions were made was fair (ie. not procedurally unfair), and
- the *outcome* of the process (eg discretionary decisions) were reasonable (ie. not unreasonable).

In practice the focus of such reviews is also on the negative – on whether the process or outcome under review was unfair or unreasonable (relatively narrowly defined). If on this assessment the conduct is not found to be unfair or unreasonable, then it is taken to have been fair and reasonable and therefore lawful. It is of course possible for a court to find that the process was fair but the decision unreasonable, and vice versa.

Fairness

There is a presumption in statutory interpretation (a requirement of the common law) that the rules or principles of procedural fairness (ie. natural justice) must be observed by public officials when exercising statutory powers which could affect the rights, interests or legitimate expectations of individuals. The courts argue that the policy reasons for procedural fairness are to increase the chances that the decision-maker will make a fair and unbiased decision, and to ensure that justice is not only done but is seen to be done. Procedural fairness is about giving a 'fair go' to people who may be affected by a decision. It isn't enough that a decision might be 'right' – it is not fair if made without the decision-maker first hearing from the person affected by it.

While the courts have gradually broadened the scope of the rules of procedural fairness over time, and their application has been interpreted quite flexibly, by the early 1980's the basic principles of procedural fairness had been clarified by the High Court^{xv}. These were further clarified by the Court in a series of decisions including: *South Australia v O'Shea* in 1987^{xvi}; *Annetts v McCann* in 1990^{xvii}; and *Ainsworth v Criminal Justice Commission* in 1991^{xviii}. The common law rules of procedural fairness can be summarised as:

- *hearing rule* – that any person likely to be affected by a decision or action is given a reasonable hearing, ie, an opportunity to respond to adverse material, such as proposed adverse comment and/or recommendations,
- *notice rule* – (sometimes referred to as part of the *hearing rule*) that any person likely to be affected by a decision is given notice of the issues in sufficient detail for the person to be able to respond meaningfully, and
- *bias rule* – also known as '*the rule against bias*' – the persons investigating an allegation, preparing a case or making a decision must act impartially in considering the matter^{xix}.

On occasion reference is made to the *no evidence* ground of judicial review as a possible fourth rule of procedural fairness.

Reasonableness

In a series of cases the High Court has re-iterated the presumption in statutory interpretation that the Legislature is taken to intend that a statutory discretionary power will be exercised reasonably^{xx}. When assessing whether a discretionary power has been exercised reasonably, in practice the focus of the courts is on determining whether the power was exercised unreasonably (on the assumption that if the exercise was not unreasonable then it must be taken to be reasonable).

In the administrative law context the applicable standard against which the reasonability of conduct is measured has long been the concept referred to as *Wednesbury*^{xxi} unreasonableness, ie irrationality (a decision so unreasonable that no reasonable person could have arrived at it). However, in a recent High Court decision^{xxii} the majority argued that the “... *legal standard of reasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision...*”^{xxiii}. After referring to the fact that even in the *Wednesbury* decision Lord Green MR had noted “[b]ad faith, dishonesty ... extraneous circumstances, disregard of public policy” were all relevant factors in considering whether a statutory discretion was exercised reasonably (not just irrationality), they identified the following factors as also founding a conclusion of unreasonableness:

- an obviously disproportionate response
- giving disproportionate weight to some factor
- a particular error of reasoning
- reasoning illogically or irrationally
- decisions lacking an evident and intelligible justification.

This broadening of the scope of what constitutes ‘unreasonable’ in the context of the judicial review of administrative conduct brings the courts more into line with the broad approach to this issue that is a hallmark of Ombudsman legislation.

What are some of the main differences in the ways assessments are made as to whether administrative conduct was fair and reasonable?

There are several key differences in the ways members of the public, the courts and ombudsman assess whether administrative conduct is fair and reasonable, as well as their ability or capacity to arrive at a view that accurately reflects the reality of a particular situation. These differences include:

Focus

Each entity focuses on different aspects of, or gives different weight to, various aspects of the decision-making process:

- *Public* - Research^{xxiv} indicates that when assessing the fairness of a decision-making process, the primary focus of members of the public is on all aspects of that process^{xxv}. Views as to the fairness of the process are likely to be based on perceptions, which in turn are based on largely subjective appraisals of the (often limited) information available to the person concerned (see also Annexure A).
- *Ombudsman* - The focus of ombudsman is on whether conduct (including outcomes, procedures, behavior and the provision of information) is considered to be fair and reasonable.^{xxvi} Ombudsman make these assessments based on an objective appraisal of all relevant evidence obtained in the course of their inquiries.
- *Courts* - The focus of the courts is on whether decisions/outcomes are considered to be reasonable and the procedures used are considered to be fair. Courts make these assessments based on an objective appraisal of the admissible evidence put before them by the parties.

Another difference between members of the public, the courts (including the judiciary and the members of the legal profession who practice in the courts) and ombudsman is the general lack of knowledge or understanding of each about the focus, perspective and priorities of the others in the assessment of whether administrative conduct is fair and reasonable.

Capacity

A key difference between assessments made by individuals, the courts and ombudsman is the nature, scope and reliability of the investigatory powers or other options available to them to get access to relevant information. The ability to access relevant information significantly impacts on the accuracy and relevance of such assessments. In relation to the powers or ability to access relevant information:

- *Public* - Assessments by members of the public as to whether conduct is fair and reasonable will in practice be heavily influenced by the amount and quality of the information available to the individual about the conduct in question given that they do not have either the powers or resources of the courts, tribunals or ombudsman. Members of the public have no specific powers to investigate (other than by use of statutory rights to access information), and the information they are likely to have access to will be what they have personally seen or heard, or what they have been told by the agency in question or its staff, or by the courts or ombudsman if either has had cause to review that conduct.
- *Ombudsman* – The rules of evidence do not bind ombudsman, who may inform themselves in such manner as they think appropriate and are entitled to take into consideration their corporate knowledge about an issue or any party to it. In this regard ombudsman have the right to obtain and consider almost any evidence held or known to persons or bodies within their jurisdiction that they deem to be relevant. In particular, the powers of ombudsman to compel disclosure of information are generally not subject to what in a court context would be the substantive legal rights of defendants/respondents and witnesses. Looking at the NSW Ombudsman as an example, legal/client professional privilege and the privilege against self-incrimination are specifically abrogated by the *Ombudsman Act 1974*^{xxvii} in relation to public officials.
- *Courts* - The courts have certain powers to obtain relevant information, but these powers are significantly constrained by the highly technical (and often artificial) rules of evidence that apply in such proceedings. Further, they are reliant on the information put before them by the

parties. The powers of courts to compel disclosure of information are subject to such substantive legal rights as legal professional privilege and the privilege against self-incrimination.

Scope

In relation to the scope of potential involvement or interest, the ability to undertake an assessment or review of administrative conduct varies considerably:

- *Public* - Members of the public can of course exercise their constitutionally guaranteed rights to freedom of expression on virtually any topic (although to be taken seriously they are generally expected to have some form of valid interest in the conduct in question).
- *Ombudsman* – The jurisdiction of ombudsman is particularly wide compared to the courts (ie ‘matters of administration’) and can initiate action either in response to a complaint or on their ‘own motion’.
- *Courts* – The courts are limited to legally recognized causes of action, and then only if an action is initiated by a party with an interest recognized by the court.

Outcomes

The potential outcomes vary between each approach to the review of administrative conduct:

- *Public* – If members of the public perceive that administrative conduct is unfair (and wish to take issue with that conduct or its impact on them), they can complain to the agency or official concerned, complain to the ombudsman, or in certain circumstances they may be able to seek judicial review (at least in theory).
- *Ombudsman* – Ombudsman only make suggestions and recommendations for action by persons and bodies within jurisdiction to address individual problems identified in a complaint, or more systemic issues identified through one or more complaints or investigations.
- *Courts* – In relation to the limited causes of action available to members of the public who wish to question the legality of administrative conduct, the courts can determine the legal rights and/or obligations of the parties to the proceedings (but only in relation to the issues the subject of those proceedings).

Constraints

As is illustrated by the table at **Annexure C**, the nature and scope of the criteria available to individuals, the courts and ombudsman to consider in assessing whether administrative conduct was fair and reasonable vary significantly:

- *Public* - The ability of members of the public to assess administrative conduct is seriously constrained by their ability to access the information required to make meaningful assessments, in particular information about the applicable law and about the inputs or matters considered in the decision making process.
- *Ombudsman* – The primary constraint on the ability of ombudsman to review the administrative conduct of persons or bodies within their jurisdictions is the standard practice

of governments to seriously restrict the resources made available to them to perform this role. The authorising legislation in each jurisdiction might contain jurisdiction specific constraints, eg the NSW Ombudsman is precluded from requiring production of/access to Cabinet documents. A significant difference between ombudsman and courts is that ombudsmen are not limited to only considering the issues brought before them by the parties to litigation - they can institute inquiries into issues of their 'own motion'.

- *Courts* - The ability of the courts to review administrative conduct is constrained by limits on their jurisdiction, applicable common law precedents and the limits on their ability to consider all information that might be relevant imposed by the requirement to rigidly comply with the rules of evidence and various privileges against disclosure that apply. The courts are limited to considering only the issues brought before them by the parties to the litigation.

So what is the meaning of 'fair' and 'reasonable'?

There are a number of related terms that are often used in the context of assessments as to whether administrative conduct is fair or reasonable, such as just, equitable, unreasonable, unfair, unjust and inequitable. Some of these terms are sometimes used interchangeably (for example the words 'fair', 'just' or 'equitable'), and sometimes in ways that reflect the fact some have different meanings (for example the phrase "fair and reasonable", although there is one Act in NSW that contains the term 'fair or reasonable'^{xxviii}). As noted earlier, there also appears to be a certain lack of rigor in the use of the terms in certain administrative law contexts where it appears they are being used in ways that do not accurately reflect the differences in their meanings.

In a previous article on the meaning of the '*public interest*'^{xxix} I concluded that the meaning of that term, or the objective of or approach indicated by its use, is to direct consideration towards matters of broad public concern and away from private, personal, parochial or partisan type interests. It seems to me that the objective of or approach indicated by the use of either or both of the terms '*fair*' and '*reasonable*', at least in the public administration context, could be described as aspirational, directing consideration towards approaches or outcomes that are perceived to be morally right and in accordance with accepted standards of conduct, and away from approaches and outcomes that are unfair/unjust, unreasonable, improper, inappropriate, unacceptable and the like. As with the meaning of the '*public interest*', the answer to the question whether administrative conduct was fair and/or reasonable will depend almost entirely on the circumstances in which the question arises and the role and/or interests of the person making the assessment.

In summary, when used in the context of the review of administrative conduct, the terms '*fair*' and '*reasonable*' are imprecise and their application in practice varies considerably depending on the interests, role or perspective of the person making the assessment. That said, as mentioned in the introduction to this paper, the way administrative conduct of public sector agencies and officials is perceived by affected members of the public has a direct impact on whether the conduct is perceived to be acceptable and the authorities and officials perceived to be trustworthy. A high level of public trust in the institutions of government is of fundamental importance to the proper functioning of a representative government. A factor that strongly influences the degree to which the public is prepared to trust their government is the public's perception as to whether they perceive the government to be acting '*fairly*' and/or '*reasonably*'.

How do individuals assess the fairness of decisions and how they were made?

Justice theory

Organisational scientists have put forward '*organisational justice theory*' or '*justice theory*' as a way to describe or explain how individuals react to decisions and the way they are made. Nearly 40 years ago, Thibault & Walker^{xxx} put forward the proposition that disputants care as much about how their disputes are resolved as they do about the outcomes they receive. Subsequent research from around the world has supported this view.

Justice theory looks at what is important for outcomes to be perceived to be acceptable and/or for the people involved in the process to be satisfied with the fairness of the process and how they were treated. Justice theory argues that where the procedures followed and the interactions with the person concerned are perceived to be fair, reasonable and appropriate, then a negative outcome for the complainant will not necessarily mean a negative perception of the decision-maker. However, where issues the subject of the decision-making process relate to very important personal issues, eg personal comfort, health or safety, research indicates that the final outcome is likely to be the more important factor^{xxxi}.

Organisational scientists argue that there are four dimensions of any decision-making process:

- 1) *decisions* – focussing on the perceived fairness of the outcomes of the decision-making process (referred to as "*distributive justice*")
- 2) *procedures* – focussing on the perceived fairness of processes/procedures used to make decisions, resolve conflicts and/or reach outcomes, ie the means by which decisions are made (referred to as "*procedural justice*")
- 3) *treatment* – focussing on the perceived fairness of the treatment of the individual concerned (referred to as "*interpersonal justice*")
- 4) *information* – focussing on the perceived fairness of the information provided to the person concerned about or explaining the procedures used and the decisions/outcomes (referred to as "*informational justice*").

Each element of justice theory focuses on the 'perception' of fairness by the person concerned. As in practice a person's perception is their reality, this theory emphasises the importance of transparency in the implementation of processes that can impact on the rights of interests of individuals.

In evaluating the fairness (or 'justice') of a decision-making process, 'justice' research indicates that the criteria likely to be considered by people when evaluating the fairness of **decisions/outcomes** include:

- *fairness* - based on: *needs* - where the objective is to foster personal welfare; *equity* - where the objective is to preserve social harmony; *integrity* - where the objective is to ensure the process, decision and outcomes are 'just', legal, ethical and honest; *reasonability* - that in the particular circumstances of the case, the decision or outcome appeared to be reasonable;

and/or *efficiency* - where the objective is to maximise productivity and performance; and/or

- *rightness* - based on an assessment of such factors as consistency, accuracy, clarity and procedural thoroughness, and/or
- *comparability* - with someone, some group, or something else.

In relation to the procedures used in the decision-making process, the criteria likely to be considered by people when evaluating fairness are likely to include:

- *ethicality* – the policies and procedures that guide implementation are perceived to be fair and ethical, and the perceived intentions of the people involved are seen to meet acceptable ethical and moral standards;
- *fairness* – whether the rights and interests of all parties are properly respected, represented and considered;
- *correctability* – there are adequate avenues and procedures for review of decisions and conduct;
- *consistency* – the policies and procedures that guide implementation are seen to contain objective criteria that are consistently applied;
- *impartiality* – decision-making is seen to be unbiased and ‘neutral’, and there are reliable safeguards in place to avoid bias;
- *control* – the people affected had a perception of some control over the process, eg they had an opportunity to put their views and their input was treated with consideration and respect;
- *clarity* – the requirements or procedural steps are clear and transparent; and
- *speed* – how long it took to address their concerns was reasonable.

The interactions with the individual involved (referred to in justice theory as ‘*interactional justice*’) comprise the two elements of treatment and information. Perceptions of fairness in relation to **treatment** of the individual (referred to in justice theory as “*interpersonal justice*”) are likely to be based on assessments people make of such things as:

- *consideration/respect* - whether they and their views were treated politely and respectfully, including for example whether they perceived attentive listening and/or an attempt to understand their perspective;
- *empathy/concern* - they perceived that there was an attempt to understand the impact on them of the decision or conduct;
- *propriety* - whether improper questions were asked and prejudicial statements made; and
- *responsiveness* - that staff appear to have ‘put themselves out’ to solve a service problem.

Perceptions of fairness in relation to the provision of **information** to the person concerned (referred to in justice theory as “*informational justice*”) focus on the perceived fairness of the provision of information about or explanations of decisions/outcomes, and are likely to be based on assessments people make about such things as the degree of: *transparency* - the adequacy of explanations given for a decision/ outcome; and *honesty* and *candidness* - whether realistic and accurate information was provided about a decision/outcome and how it was reached.

Fairness theory

A related theory (referred to as “*fairness theory*”^{xxxii}) argues that judgements about the fairness of an outcome or decision are driven primarily by the need to assign blame (accountability/responsibility). People determine whether there has been an injustice by thinking about an alternative reality that might have happened had events occurred differently (referred to in writings on the theory as a ‘*counterfactual*’). The theory proposes that there are three necessary elements for an outcome to be considered unfair:

- *injury, harm or injustice* (actual or threatened) – the assessment being whether the decision-maker ‘would’ have acted differently if events had played out differently
- *discretionary conduct* – the assessment being whether the decision-maker ‘could’ have acted differently, ie, the person/organisation responsible had control over his/her/its actions, and
- *moral transgression* – the assessment being whether the decision-maker ‘should’ have acted differently because the actions violated a moral/ethical standard.

Fairness theory suggests that where at least one of these conditions is not met the outcome will be perceived to be fair. Where an outcome is perceived to be unfair (because it meets all of the above mentioned elements), justice theory would suggest that whether this will lead to a negative response is likely to be strongly influenced by the other three dimensions of justice theory, ie. procedural justice, interpersonal justice and informational justice.

How do ombudsman assess whether conduct is fair and reasonable?

The range of criteria that can be used by ombudsman to assess whether administrative conduct (including decisions, actions, policies or procedures) is fair and reasonable can be categorized into one or more of the four dimensions identified in justice theory, ie: decisions/outcomes (including inputs/considerations); procedures/processes; conduct/approach; and information/communication.

The assessment criteria can be categorised into these four dimensions as follows:

1) a) *Decisions/outcomes:*

- Merits – the decision is based on the merits of the case
- Legality and regularity – the decision is not arbitrary, vague or fanciful
- Consistency – a consistent approach to decision-making
- Proportionality – the response is not obviously disproportionate

b) *Inputs/considerations:*

- Legality – compliance with the law, including no misdirection as to a question of law
- Evidence – compliance with the evidence rule of procedural fairness
- Impartiality – compliance with the bias rule of procedural fairness
- Conflict of interests – conflicts of interests either avoided or appropriately managed
- Justification – decisions have an evident and intelligible justification
- Reasoning – no illogical or irrational reasoning impacts on a relevant decision
- Relevance – only relevant considerations taken into account
- Weight – adequate weight given to important considerations
- Purpose – powers used for a proper purpose
- Competence – obviously relevant evidence identified and considered

2) *Procedures/processes:*

- Notice – compliance with the notice rule of procedural fairness
- Hearing – compliance with the hearing rule of procedural fairness
- Legality & regularity – compliance with the law and good practice
- Timeliness – no unreasonable delay

3) *Conduct/approach:*

- Respect – respect shown in all interactions and communications
- Empathy – attempts are made to understand and appropriately respond concerns

- Propriety – behavior is above reproach
 - Responsiveness – public officials and organisations appropriately respond the needs of the public
- 4) Information/communication:
- Reasons – reasons given to adequately explain decisions
 - Transparency – organizations and individuals are open about their actions and the reasons for them
 - Honesty – public officials are honest in their dealings with each other and the public
 - Candor – public officials give candid advice to their superiors and the government of the day
 - Timeliness – relevant information provided or available at relevant times in the process

Criteria potentially used to assess whether administrative conduct is fair &/or reasonable

Dimensions	General public ^{xxxiii}	Courts	Ombudsman
1) (a) Outcomes/ decisions	Focus: distributive justice <ul style="list-style-type: none"> • - • Fair/ just/equitable • ? • Right • Comparable/consistent • - 	Focus: reasonability <ul style="list-style-type: none"> • Unreasonable • - • Illegal • Irregular • - • Disproportionate response 	Focus: reasonability & fairness <ul style="list-style-type: none"> • Unreasonable • Unfair/unjust/inequitable • Illegal • Irregular • Inconsistent • Disproportionate response
(b) Inputs/ considerations	Focus: distributive justice <ul style="list-style-type: none"> • ? • Control • • Impartial • - • Right/accurate • - • - • - • - • - • Competence 	Focus: reasonability & procedural fairness <ul style="list-style-type: none"> • Illegal • No logical/probative evidence (evidence rule) • Bias (bias rule) • - • Lack of justification • Illogical reasoning • Irrational • Irrelevant considerations • Disproportionate weight • Improper purpose • - 	Focus: reasonability & fairness <ul style="list-style-type: none"> • Illegal • No logical/probative evidence (evidence rule) • Bias (bias rule) • Conflict of interests • Lack of justification • Illogical reasoning • Irrational • Irrelevant considerations • Disproportionate weight • Improper purpose • Competence
2) Procedures /processes	Focus: procedural justice <ul style="list-style-type: none"> • Fair • Control/correctable • Ethical • Consistent • Clear/transparent • Timely/speedy 	Focus: procedural fairness <ul style="list-style-type: none"> • Lack of notice (notice rule) • Denial of fair hearing (hearing rule) • Illegal • Irregular • - • - 	Focus: fairness <ul style="list-style-type: none"> • Lack of notice (notice rule) • Denial of fair hearing (hearing rule) • Illegal &/or unethical • Irregular &/or inconsistent • Unclear & unavailable • Unreasonable delay
3) Conduct / approach	Focus: interpersonal justice <ul style="list-style-type: none"> • Respect/consideration • Empathy/concern • Propriety • Responsive 	Focus: NA <ul style="list-style-type: none"> • - • - • - • - 	Focus: reasonability & fairness <ul style="list-style-type: none"> • Disrespectful • Unsympathetic • Inappropriate • Unresponsive

4) Information/ communication	Focus: informational justice <ul style="list-style-type: none"> • Transparent • Honest • Candid • Timely 	Focus: reasonability <ul style="list-style-type: none"> • - • Dishonest • - • - 	Focus: reasonability & fairness <ul style="list-style-type: none"> • Secretive/closed • Dishonest • Evasive • Unreasonable delay
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Endnotes:

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- i *The public interest revisited - 'We know it's important, but do we know what it means?'*, (2013) 72 AIAL Forum
- ii The term 'conduct' is used in the paper to refer to all aspects of the decision-making process, including the decision or outcome, the inputs to that decision or outcome, the procedures used, the treatment of the individuals concerned and the provision of information to those people.
- iii For example issues relating to honesty, equity, impartiality, etc.
- iv The same can be said about the concepts of good faith and bad faith. As French J said in *Applicant WAFV of 2002 v Refugee Review Tribunal* [2003] FCA 16 at p 52, good faith requires 'more than an absence of bad faith. It requires a conscientious approach to the exercise of power'.
- v See for example Gleeson CJ in *Re: Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, at para 37
- vi Robert French CJ, *Procedural fairness – Indispensable to Justice*, Sir Anthony Mason lecture, The University of Melbourne Law School Law Students Society, 7 October 2010.
- vii *Hayes (FC) (Respondent) v Willoughby (Appellant)* [2013] UKSC 17, at para 14
- viii Research into 'justice theory'. See for example: Colquitt, J.A., Conlon, D.E., Wesson, M.J., Porter, C., and Ng, K.Y. (2001). Justice at the millennium: A meta-analytic review of 25 years of organizational justice research. *Journal of Applied Psychology*, 86(3), 425-445; Sparks, B.A., McColl-Kennedy, J.R. (1998), The Application of Procedural Justice Principles to Service Recovery Attempts: Outcomes for Customer Satisfaction, *Advances in Consumer Research* Vol 25, 156; Greenberg, J. (1990). Organizational Justice: Yesterday, Today, and Tomorrow. *Journal of Management*, 16(2), 399; Tyler, T.R. (1990). Why people obey the law: Procedural justice, legitimacy and compliance, Newhaven, C.T.: Yale University Press; Leventhal, G.S. (1980). What should be done with equity theory? In K.J. Gergen, M.S. Greenberg and R.H. Willis (Eds), *Social Exchange: Advances in Theory and Research* (pp. 27-55). New York: Plenum; Blader, S.L., Tyler, T.R., (2003). A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process. *Personality and Social Psychology Bulletin*, Vol 29 No 6, 747; Nabatchi, T, Bingham, LB, & Good, D (2007). Organisational Justice and Workplace Mediation: A six-factor model. *International Journal of Conflict Management*, vol 18, 148-174; Jepson, D., Rodwell, J., (2009) A New Dimension of Organisational Justice: Procedural Voice. *Psychological Reports* 2009, 105, 1-16.
- ix See for example s.26 (1)(c), *Ombudsman Act 1974* (NSW)
- x See Endnote viii
- xi Thibault, J, & Walker, L (1975), *Procedural Justice*, Hillsdale, NJ: Lawrence Erlbaum.
- xii However, where issues the subject of the decision-making process relate to very important personal issues, eg personal comfort, health or safety, research indicates that the final outcome is the more important factor – see: "*Encouraging Employee Reporting Through Procedural Justice*", Ethics Resource Centre, 30 May 2013
- xiii Conduct that would generally be considered by an Ombudsman to be unfair or unreasonable includes:
- decisions that are:
 - inconsistent with adopted guidelines or policy where that inconsistency cannot be adequately explained
 - inconsistent with other decisions which involve similar facts or circumstances
 - made or taken without obvious relationship to the facts or circumstances of the case
 - not justified or adequately explained by any evidence, eg arbitrary
 - partial,
 - made or taken by a person with a conflict of interests
 - so unreasonable that no reasonable person could so decide (i.e. irrational)
 - unconscionable
 - based on information that is factually in error or misinterpreted
 - unreasonably delayed
 - failure to adequately take relevant considerations into account and vice versa
 - policies applied inflexibly without regard to the merits of individual cases
 - failure to give notice of rights, where it was reasonable to do so

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- failure to properly apply an Act, regulation or the common law
 - wrong, inaccurate or misleading advice leading to detriment (whether inadvertent or deliberate)
 - lack of proportionality, eg between the means used and the ends to be achieved,
 - abuse of power, e.g. use of power for an unauthorised purpose
 - failure to rectify identified mistakes, errors, oversights or improprieties
 - giving undue weight to an agency's or the decision-makers convenience or interests
 - breach of trust or public duty
 - failure to properly investigate
 - negligence or the absence of proper care and attention
 - refusal of otherwise valid claims based on minor procedural defects
- xiv However, even where no misconduct or maladministration is identified, Ombudsman may still make suggestions about ways to improve any identified problems in policies, procedures or practices.
- xv *FAL Insurances Ltd v Winneke* (1982) 151 CLR 342; *Kioa v West* (1985) 195 CLR 550.
- xvi *South Australia v O'Shea* (1987) 163 CLR 378.
- xvii *Annetts v McCann* (1990) 170 CLR 596.
- xviii *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564.
- xix In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FACFC 83, the Full Court of the Federal Court of Australia looked in some detail at the application of the “no-evidence” rule as part of natural justice, noting that, unlike the position in certain other common law countries (e.g. the UK and NZ following the views expressed by Diplock LJ in *R v Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 QB 456), in Australia there has been no authoritative recognition of the “no-evidence rule” as part of the rules of natural justice [at para.149]. The court did not dispute the availability, in appropriate circumstances, of a “no-evidence ground” of judicial review of administrative decisions. It was noted that a distinction needs to be drawn between **no** probative evidence at all and a lack of probative evidence: “There is no doubt that at common law it is an error of law to make a finding of fact for which there is no probative evidence...”, followed by the statement that: “Once there is some evidence that could support a finding; any error can be seen as factual, not legal ...” [at para.82].
- xx For example *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; *Minister For Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [15]
- xxi *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229
- xxii *Minister For Immigration and Citizenship v Xivjuan Li & Anor* [2013] HCA 18, at paras 72 & 76 (see also the NSW Court of Appeal decision in *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187, at 85-91).
- xxiii At para. 68
- xxiv See Endnote viii.
- xxv The dimensions are: the decisions/outcomes arising out of the process; the procedures and used to make those decisions or arrive at those outcomes; the treatment of the person concerned; and the information given to the person concerned
- xxvi For example, under the Ombudsman Act 1974 the NSW Ombudsman is authorised to investigate conduct that might be “...unreasonable, unjust, oppressive or improperly discriminatory” (amongst other things) - s13 & s.26 (1) (c).
- xxvii See s 21, *Ombudsman Act 1974* (NSW)
- xxviii *The Legal Profession Act 2004*, at s.328
- xxix See Endnote i
- xxx Thibault, J, & Walker, L (1975), *Procedural Justice*, Hillsdale, NJ: Lawrence Erlbaum.
- xxxi See for example: “*Encouraging Employee Reporting Through Procedural Justice*”, Ethics Resource Centre, 30 May 2013

xxxii See for example Folger, R. & Cropanzano, R. (2001) Fairness theory: justice as accountability.
In J. Greenberg & R Cropanzano (Eds), *Advances in organisational justice* (pp. 89-118). Stanford,
CA: Stanford University Press

xxxiii Based on criteria identified to-date in justice theory related research – see Endnote vii