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

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

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

A Commentary

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

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

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

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

Thayer's Theory is based on evidence that is "logically probative". This reference to logic conceals the fact that the probative effect of evidence is derived in part from logic but in large measure from a catalogue of unstated assumptions derived from experience. Informality gives greater scope for the influence of the adjudicator's personal experience. Judges bound by the rules of evidence are usually more alert than lay adjudicators, to the importance of exposing such prejudices.

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

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

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

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

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

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

"141. (1) The court may, if the parties consent, dispense with the application of any one or more of the provisions of -
(a) Division 3 of part II; or
(b) Division 2,3,4,5,6,7 or 8 of Part III, in relation to particular evidence or generally.

(2) In a criminal proceeding, the consent of a defendant is not effective for the purposes of sub-section (1) unless -
(a) the defendant is represented by a legal practitio ner; or
(b) the court is satisfied that the defendant under stands the consequences of giving the consent.

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in

[103] (1965) 1 QB 456 at 488.

sub-section (1) do not apply in relation to evidence if -

(a) the matter to which the evidence relates is not genuinely in dispute; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) In determining whether to exercise the power conferred by sub-section (3), the matters that the court shall take into account include -

(a) the importance of the evidence in the proceed ing;

(b) the nature of the cause of action or defence and the nature of the subject-matter of the proceed ing;

(c) the probative value of the evidence; and

(d) the powers of the court, if any, to adjourn the hearing, to make some other order or to give a direction in relation to the evidence."

The provisions referred to in Cl.141(1)(a) and (b) deal with the manner of giving evidence, documents, hearsay, opinion evidence, admissions, evidence of judgments and convictions, evidence of character and prior conduct, and identification evidence.

4. Do I wish to cross-examine or oppose cross-examination? (section V, section VI and section VII).

Cross examination, in some circumstances, is the only way to expose the truth and yet tribunals, not bound by the rules of evidence, demonstrate a distaste which sometimes amounts to active discouragement of cross-examination: see *R v The Australian Broadcasting Tribunal; ex Hardiman* 144 CLR 13. The practical implications from the point of view of experienced counsel require no further elaboration.

5. Are the rules of evidence which facilitate proof and make admissible facts which might otherwise be inadmissible to be dispensed with? (section VI). Referring to the Evidence Act 1898 for example: s.6 (compellable witnesses), s.11 (communications during marriage), s.12 (persons may be examined without a subpoena) s.14CE (business records) s.15A (proof of seal signature and official character dispensed with) s.15A (proof of service of statutory notice etc) s.16 (public books and documents) ss.20-29 (judgments etc.) s.30 (birth deaths and marriage information) s.32 (companies incorporation Evidence Act 1905 [Cth.]) s.6 (proof of public books and documents) and 10A (proof of statistics).

The provisions referred to above especially those of s.14CE are of immense practical utility. For example, a statement in a document which satisfies the requirements of s.14CE is, subject to s.14CP (which deals with unfairness), admissible as a matter of right. By dispensing with the rules of evidence counsel may be watering down that right so that admissibility becomes a matter of discretion. Similarly proof of the statistics under the provisions of the Evidence Act 1905 (Cth.) is a matter of right if the statutory provisions are satisfied. One may speculate that most adjudicators, not bound by the rules of evidence, would admit such statistics but those waters are unchartered whereas s.10A of the Evidence Act 1905 provides a clear course to admissibility.

6. Do I wish to dispense with the hearsay rule in respect of the evidence of all witnesses or some only? (section VI)

This question requires no comment.

7. Is an expert likely to be called whose connection with the dispute is so close that her professional detachment may be impaired? (section VI)

"These witnesses are usually required to speak, not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them." Taylor on Evidence cited by Windeyer J. in *Clarke v Ryan* 103 CLR 486 at 509.

8. Do I wish to rely upon or ignore the rule as to the finality of answers to questions on collateral issues?

This rule, superbly debunked by the late Irving Younger, is essentially a practical rule to stop time being wasted. Judges are experienced in its practical application but inexperienced tribunals find it extremely difficult to understand. Professor Younger concluded that this is because the rule cannot be understood, and it is simply a matter of experienced judgment as to what is important. I emphasise experience because the inexperienced lay tribunal is disposed to admit rather than to reject evidence with consequent delay, confusion and cost.

9. Do I know if I am abandoning privilege? (section VI)

The learned analysis in the paper demonstrate the unsettled law in this area of fundamental importance.

10. Am I content to limit principles of appeal to the rules of natural justice? (sections VII & VIII)

The principles of appeal based upon the rules of natural justice are directed to procedural fairness. One might ask will the client be content with a fair hearing or does he want the right answer as well?

CONCLUSION

These comments are intended to do no more than highlight matters which counsel should address if placed in the position of advising on the decision to dispense with the rules of evidence. I have, in recent years, seen proceedings conducted without the rules of evidence with spectacular success: but I should add, that in those cases there was complete trust and co-operation between counsel involved. ❑