

Exam Notes

Procedural Fairness

Aquafish answer

Introduction –

1. What has happened – what is it that the decision-maker has done to affect the applicant i.e. a decision made to revoke a licence
2. Who did it – who was the decision-maker i.e. Minister, board, tribunal, committee
3. How did they do it – what is the source of their power – i.e. what section of what legislation incl. jurisdiction
4. What does the client want e.g. they want a licence

A decision was made by the Minister to deny Aquafish's licence conversion application pursuant to s 12 of the *Aquaculture Management Act* (2012) WA. Our client, Aquafish, opposes to the decision as he wants his licence to be converted and claims that he has been denied procedural fairness by the Minister and the Assessment Committee.

Since *Kioa v West* it is presumed that procedural fairness will apply to most administrative decision making. But procedural fairness does not necessarily apply 'to every decision which disadvantages individuals' (*Minister for Arts Heritage and Environment v Peko Wallsend*). In order to establish whether procedural fairness applies to Aquafish we must consider:

1. Whether he was owed a duty of procedural fairness (implication)
 2. Whether there is any reason to modify or exclude the duty to afford procedural fairness (scope and content)
 3. Has there been a breach of the content of the duty to afford procedural fairness?
-
1. First, we must look at whether they had an express and/or implied right of procedural fairness. Here there does not appear to be an express right of procedural fairness, so we must look whether there is an implied right – *Kioa*.

Legitimate expectation

Aquafish is making an application for a licence conversion. The provisional licence came with no guarantee that it would be converted to a production licence, but they have a legitimate expectation that the Minister would adopt the correct process in considering their application as set out in the Act (*So the expectation here is not that the licence will be granted, but Aquafish has a legitimate expectation that the application will be considered*)

Forfeiture of right or existing interest

Although no existing legal right will be forfeited, Aquafish will not be able to operate their existing and established farm without a licence which would lead to the loss of livelihood and farm infrastructure. So Aquafish would have a reasonable expectation founded on the conditions of licences set out in the Act that their provisional licence will be converted if the operation is viable. Aquafish has met the conditions of the provisional licence, they have adopted industry best practise, the Assessment Committee approved the Environmental Management Plan and recommended that the licence be converted. However, it can be distinguished on its facts from *FAI Insurances* as in this case they had the licence for 20 years whereas Aquafish has only has a provisional licence for one year.

Practical unfairness