

Procedural unfairness (natural justice)

Origins and Theoretical Underpinnings?

- Under English law, the duty to act fairly was a court's duty. Applicable only to the courts until the mid-19th century then it was extended to administrative decision making. Initially, only for administrative decision making which could be qualified as 'quasi-judicial' & in receipt of decisions that only affected legal rights [typically Property] (*Cooper*).
- *Twist v Randwick* - the common law rule that a statutory authority with the ability to affect the rights of a person is bound to hear him before exercising the power is universal.
- *Ex Parte Lam* – denial of natural justice or procedural fairness will ordinarily involve a jurisdictional error → natural justice is so fundamental that a breach means its legally void.
- *Osborn v Parole Board* –
Issue: When is the parole board required to hold an oral hearing before deciding whether a prisoner should be released on license or transferred to an open prison – where no legislative guidance – alleged breach.
Held: common law is the solution; not statutory human rights mechanisms. PF ensures better decision are made, but he **emphasised the inherent dignity** of the individual > instrumental value. J Reed citing Jeremy Waldron,
 - “applying a norm to a human individual is not like deciding what to do with a rabid animal”
 - “A dignitarian idea...respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves”

Prisoners should make an active contribution to the decision that were affecting them.

Cited Fuller & Bingham → “Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions (ROL Justification)”

- **Saeed - fair hearing is a fundamental right and one that can only be excluded by legislation when it's worded in the clearest possible terms. [PRINCIPLE OF LEGALITY]**
- International Finance – **promoted the instrumental and dignity approaches together**. By hearing both sides of the case, prevents unfair conclusions & respects dignity.

ADJR Roots

s5(1) provides the 'breach of the rules of natural justice occurred in connection with the making of the decision' as a ground of review, subject to Act requirements. *Kioa v West* – Mason J: ss5&6 reflect grounds on which administrative decisions that are susceptible to challenge at common law.

HOW MUCH PROCEDURAL FAIRNESS?

[Early English Case] *Cooper* - Statutory body demolished someone's house because they had not been given notice and approval to build – P alleged trespass – was statutory power a shield against tortious action? Held: No because it did not afford P a fair hearing before demolition occurred – its powers were implicitly qualified – fair hearing before (**property**) rights affected.

- Eerie J – ‘no man should be deprived of his property without an opportunity of being heard’ was not limited to judicial proceedings.

Ridge – nature and functions of the body are significant. When it's of quasi-judicial character, the rules of natural justice can apply. Here, body had penalty powers. There are occasions where functions are not quasi-judicial and therefore principles may not apply in the same way. (i.e. decisions which affect the community → fair hearing to all?)

CCSU and *CPCF* cases – **non-statutory powers** are **subject to the same constraints** as powers derived from statute. It doesn't matter where it is sourced; both forms of power need supervision by Judicial Review.

In *Kioa*, Mason J points to a common law duty to act fairly in matters affecting the rights and interests of individuals in a 'direct and immediate way'. The common law duty only applies subject to and until Parliament signifies an intention to abrogate those principles. [GAMECHANGER]

Kioa v West

Facts: K was subject to deportation powers under the Migration Act who had a temporary residency. Minister cancelled his visa after he stayed past duration + worked illegally.

- K argued the deportation decision had breached natural justice principles in ADJRA s5(1)(a), claiming could not respond to adverse material used for the decision. Earlier authority suggested deportation decisions NOT subject to natural justice requirements

Held: WAS entitled to natural justice; fairness. Although K had no legal right to remain in Australia → interests was affected when applying for a new permit.

- K was not given opportunity to respond to prejudicial information supplied by a 3rd party

[TEST] Mason J: "when an order is made that will deprive a person of some right, interest, legitimate expectation of a benefit, they are entitled to know the case to be made against them & to be given an opportunity to reply. The reference to right or interest must be understood as relating to personal liberty, status, preservation of livelihood and reputation as well as proprietary rights & interests."

- progression from *Cooper*, *Kioa* expands PF to broader rights **AND** interests.

Plaintiff M61

Facts: Awaiting processing, asylums were to be held in detention on Christmas island. Under the Migration Act, they were barred by refugee protection. But under a non-statutory scheme where the government had a 'discretionary' power, officials could assess their claims and make a recommendation to the Minister who could lift the bar.

- Asylum seeker argued breach of procedural fairness & errors of law made when their claims were assessed.
- Govt argued PF was not owed because it was non-statutory discretionary process. And the powers they were exercising didn't affect any right.

Held: rejected Govt's argument. WAS owed PF! The informal process did affect their fundamental rights & interests because it went to deprivation of liberty the longer they were held in detention.

Significance → PF rights/interests affected includes citizens, and non-citizens. [Broad Now]!

CAN I ARGUE PF WAS NOT DUE? Statutory Language? Context?

STATUTORY LANGUAGE

WZARH - 'rebuttable presumption' that administrative decision makers must accord procedural fairness to those affected by their decision! IF by construing a statute, it is clear Parliament has sought to exclude or modify these principles → presumption falls.

- WHY COURTS ARE HESITANT? Goes against the RoL, SoP, intrinsic justice doctrines.
- “unless...excluded by plain words of necessary intendment” – *Ex Parte Miah*

CONTEXT

CPCF - Before the decision to take the asylum seekers back to India, were maritime officers entitled to a fair hearing? DID natural justice principles condition the exercise of that power? Held: No – statutory powers were exercisable in circumstances where there is **no appropriate administrative framework to afford persons a meaningful opportunity to be heard**. (i.e. maritime officers need to exercise their powers swiftly)

Ex Parte Miah – nature of the decision maker/type of inquiry is relevant. Statute can also modify duty (i.e. to achieve the statute's goals).

SUBSTANTIVE REQUIREMENTS

Practical Injustice	<p><i>Ex Parte Lam</i> – Official represented something – it didn't follow that representation – P argued unfair.</p> <p>Held: [Test] – has the departure from a given representation left the person without an opportunity to put forward their case?</p> <ol style="list-style-type: none"> P could not show detrimental reliance (i.e. acting on the representation & altering conduct accordingly). <p><i>SZSSJ</i> – Person not informed of the case they have to meet/material not disclosed? = practical injustice.</p>
Notice Requirements	<p>Adequate prior notice = temporal + substantive.</p> <p>BUT <i>Kioa</i> – some powers, by their nature, may be inconsistent with an obligation to accord a prior opportunity to be heard.</p> <p><i>SZSSJ</i> – a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry requires notice of:</p> <ol style="list-style-type: none"> Nature and purpose of the inquiry; and The issues to be considered in conducting the inquiry.
Disclosure Requirements	<p><i>Alphaone</i> – the party pending the exercise of a power on them should be given:</p> <ol style="list-style-type: none"> the opportunity to ascertain relevant issues; & informed of the nature and content of adverse material.
Oral Hearing Requirement?	<p><i>WZARH</i> – whether an oral hearing is required turns on the circumstances of the case.</p>
Representation	<p><i>Li Shi Ping</i> – no universal requirement for representation in administrative adjudication but a refusal to permit representation may result in PF, given complexity & person's capabilities to present their own case.</p>
Interpreter?	<p><i>NAUV</i> – no right to an interpreter, but parties should understand each other.</p>

(BIAS)

Why is independent and impartial decision-making important?

- Rule of law: Without an independent tribunal, government power is unchecked which threatens the rule of law and Australia's democratic system
- Enhances democracy
- Public confidence in the system: improve the administrative system and legitimises decisions.

Was there procedure bias?

RULES AGAINST BIAS

Actual bias: bias in the decision-making process, which impairs fairness for both parties.

Apprehended bias: when a judge has a peculiar interest in the outcome of the particular matter before them.

General Principles

MAMA v Jia Legeng – rules of bias must be applied flexibly depending on the **identity** of the decision-maker & **context** which the decision is reached.

Jia Legeng case → the **standard of detachment is applied differently** between Ministers, Courts & Tribunals.

- Whether the minister's decision was apprehended bias, and vitiated particular to his radio comments... by:
 - o Indicating to citizens that serving a prison sentence would be of bad-character.
 - o Minister showed pre-judgment, meaning, the minister had an alterable view.
- Held: no apprehended bias, rather they attached particular importance to their political responsibilities.
 - o "The nature of the decision-making process and the character of the person upon whom parliament has conferred decision making capacity may be of critical importance."
 - o Elected official + accountable to parliament (and the electorate by extension).
 - o Court recognizes the application of apprehended bias has a difference between 1) executive 2) inferior courts 3) tribunals
 - o Ministers have significant consequences for rights and interests of individuals. We don't hold them to the same standard of neutrality that we do to courts

Indications of bias ... (*Ebner*)

1. Conduct (*Heydon's Case*)
2. Interest (*Isbester v Knox*)
3. Association (*Royal Commissioner Heydon*)

Isbester v Knox City Council (2015)

- Officer charges against dog owner. Dog owner pleads guilty.
- After the owner pleads guilty, officer becomes involved in a panel to determine if it should be destroyed.
- Were the roles incompatible due to involvement as accuser and as part of a quasi-judge?

Held: breached procedural fairness – Conflict of interest by being involved in the prosecution of the trial and also as a council delegate.

- The officer had an interest in decisions, and was considered a 'moving force' in the delegates' decisions

Test for the Rule against Apprehended Bias on all public-officials

Ebner case Gleeson CJ, McHugh, Gummow and Hayne JJ: "if a fair-minded lay observer **MIGHT** reasonably apprehend that the judge **MIGHT** not bring an impartial mind to the resolution of the question the judge was required to decide."

- *Isbester* satisfied the fair-minded test.
- *Johnson v Johnson*: Meaning of 'fair-minded lay observer' = many qualities, they don't make snap judgements, they are reasonable, they know commonplace things and are neither complacent nor unduly sensitive or suspicious, and they are informed

Gaegeler J added third limb (*Isbester v Knox*): The apprehension of bias principle requires 3 steps.

1. **WHAT IS THE NATURE OF CONDUCT? WHAT IS THE FACTOR?** What is said might lead a [decision-maker] to decide a case other than on its legal and factual merits (relevant factor)?
2. **WHERE'S THE CONNECTION OF THE RELEVANT FACTOR AND THE APPREHENDED DEVIATION?** Must be an articulation of the logical connection between the matter + the feared deviation from the course of deciding a case on its merits [how does that factor cause deviation from neutrality].
 - Show how it would depart from neutrality.
3. **IS THE APPREHENSION REASONABLE?** is apprehended deviation from neutrality be virtue of that factor reasonable?

The Royal Commission into TU Governance and Corruption v Heydon – application of fair minded test

Alleged Heydon appeared to be biased due to his appearance with the Liberal Party and requested he disqualify himself from the Commission

Issue: Heydon had agreed to give a lecture to Liberals and Heydon might give prejudice to the party.

- By reason of his conduct to (1) agree to give lecture - given his association with liberal party → he is unable to be a commissioner to preside over trade union (consisting of the labour party) matters with sufficient detachment and objectivity.
- Heydon argued: he didn't realise it was a fundraiser, until the eleventh hour, he agreed to withdraw.

Held: No bias

- Applied fair minded test to himself →
 - Speech was non-political, and no evidence to conclude bias;
 - No connection between the event and matters the commission is assessing;
 - Heydon doesn't use emails and was not aware of the nature of the party event.

Even accepting the commission's inquiry was politically controversial, it didn't follow that Heydon could not deal with the issues before in a neutral way.