

## TOPIC 6: NATURAL JUSTICE ('NJ') / PROCEDURAL FAIRNESS

[A] will argue that [DM] breached the rules of natural justice (the duty to act fairly when making administrative decision) and therefore the [decision/conduct] illegal and hence invalid (s 5(1)(a); s 6(1)(a)).

Although NJ is a common-law ground of review which only applies under statute if common law requires its observance (**Kioa**), there is a presumption that NJ applies (**Cooper**).

### (1) The hearing rule – s 5(1)(a), s 6(1)(a)

#### 1.1 When does hearing rule apply?

[A] will argue they were entitled to be given a hearing and as [DM] did not provide this, [DM] breached the rules of natural justice (s 5(1)(a); s 6(1)(a) ADJR; **Kioa**) – see ss 44, 59, 72, 89, 179, 180, 181, 183 GTA

- Under CL, an applicant ought to have been given a fair hearing before a decision affecting them is made if the decision affects their rights or interests and legitimate expectations (overruled) (**Kioa**, Mason J).
  - Must affect them in a direct and immediate way, substantially different to the public at large
  - Can be excluded by clear statutory intent.
  - If Applicant is public interest group, unlikely to affect their rights and interests
  - Look to express words in statute or subject matter, scope and purpose
- The hearing rule designed to improve the accuracy and quality of the decision (extra evidence and arguments) and give person confidence in the decision given they've been consulted.

#### Rights

- Rights = legal rights (**Mason J**, **Kioa**; **Cooper**) including property rights (**Cooper**), right to pension (**Baldwin**) and right to liberty (**Plaintiff M61**)
- E.g., cancelling, revoking, or suspending licence

**Cooper**: W decided to pull down C's house under statute. C sought JR successfully on grounds that he hadn't been given a hearing and decision to knock down house would interfere with legal property rights.

**Kioa**: Tongan citizens deportation order. Findings on order were not disclosed, not given opportunity to respond.

#### Interests

'Interests' was expanded in **Kioa** where **Brennan J** defined interests as "any interest possessed by an individual" whether legal, proprietary or financial and **Mason J** found it to include personal liberty, status, preservation of livelihood, and reputation.

#### Examples:

- **Annetts v McCann**: interest extended to the protection of dead son's reputation.
- **Ainsworth**: commercial and business reputation/goodwill an interest, not just personal.
- **Plaintiff M61**: matters affecting refugee status or application for visas will involve refugee's interests.

## (2) The rule against bias

*Principles of natural justice require decision-makers to remain independent and impartial as these are fundamental pillars of the Australian judicial and governmental system (Ebner). See s 30, 118(5), (6) GTA*

### 2.1 Breach of bias rule

#### Step One: Identify source of bias

##### Actual Bias

*[A] will argue [DM] had actual bias by looking to the [DM's] subjective state of mind and arguing [DM's] mind was closed and not open to persuasion (Jia) as seen by \_\_\_\_\_.*

➤ This requires cogent evidence (*R v Australian Stevedoring*).

##### Apprehended Bias

*To establish a breach of the bias rule, [A] must first determine there is a potential source of bias to [DM] by looking to the following main categories of bias.*

#### 1. Possession of an interest in the proceedings, whether pecuniary (or not) or direct (or indirect).

*[A] will argue [DM] stands to benefit from the outcome of the decision as \_\_\_\_\_, and thus has an interest that may give rise to a reasonable apprehension of bias (Ebner).*

- **If financial interest:** Note that the interest is pecuniary (like in *Ebner*) as \_\_\_\_\_, but the court won't apply the strict UK approach in *Dimes* of automatic disqualification (will apply RAB test per *Ebner*)
- **Kirby J:** Australia should support *Dimes*

*Ebner:* pecuniary interest of judge did not cause RAB given no/negligible gain for judge. Interest in shares.

#### 2. Conduct in course of or outside proceedings.

*[A] will argue that [DM's] conduct of \_\_\_\_\_ in the course of, or outside, the proceedings, gives rise to a RAB (Ebner), as it suggests that \_\_\_\_\_ (e.g. the DM had already made up her mind/ was not going to look at the merits of the case).*

- X may argue the DM's conduct is so prejudiced in favour of \_\_\_\_\_ (one conclusion) that no amount of evidence/ persuasion could change their mind (*Jia*). *Does the DM have an open mind?*
- **Who is the DM?**  
X may argue per Gleeson and Gummow JJ in *Jia*; that as the **Minister** is a political official who has general accountability to the electorate and to Parliament, a fair-minded lay observer would be **SLOW to ascertain bias** in comments the M made to the electorate. [e.g. Minister talking on radio]
- Not held to the same high standard as Judges (Kelly, c.f. *Jia*).