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2. Procedural Grounds

Procedural Fairness

<i>Kioa v West 1985</i>	
Facts	<ul style="list-style-type: none"> Mr and Mrs Kioa were Tongan citizens. Mr Kioa came to Australia to attend a training course in Sydney and was granted a student visa. During this time, he took a position as a machine operator in Melbourne. Mr Kioa applied to extend his visa, but 2 years after the application he received notice that his visa was refused and that the Department had ordered his deportation. Department claimed that his visa was denied on basis that he was a dishonest person for following reasons: <ul style="list-style-type: none"> Claimed that he had lied about his address (moved to Melbourne without notifying department) Claimed that he had active involvement in helping other illegal Tongan immigrants in Australia to circumvent immigration laws These concerns were not put to him – he had explanations for both issues (had to move due to cyclone, and had only spoken to people he knew about how the rules worked) Kioa sought judicial review on basis of denial of procedural fairness.
Question	Had procedural fairness been breached?
Held	<p>Held: Yes</p> <p>When is procedural fairness owed?</p> <ul style="list-style-type: none"> Procedural fairness can only be found within <u>statute itself</u>, but courts will presume that statute is intended to protect procedural fairness unless it clearly expresses otherwise. There is a presumption that where statute confers a power which impacts an <u>individual's interests</u>, the exercise of this power is conditional on observance with procedural fairness '<u>Legitimate expectation</u>' not enough – the person must have an individual interest which is to be affected in a way <u>substantially different from the way that the interests of the public at large</u> are to be affected (though this need not be a <i>legal</i> interest) <p>Hearing Rule</p> <ul style="list-style-type: none"> <i>Migration Act</i> contemplates that deportation orders can be made ex parte – does not always require notice be given to the prohibited immigrant. If order made just because someone is illegal is an undisputed fact and does not need to be responded to. However, where the reason for making the order is more than just that the person is a prohibited immigrant, and extend to personal reasons such as a person's conduct, as a matter of fairness the person affected <u>should have a chance to respond to them</u> Rule: Must bring a person's attention to the critical issues or factors on which the administrative decision is likely to turn so that they may have an opportunity to deal with it Here, paragraphs referencing his 'dishonest' conduct were extremely prejudicial, and Kioa should have had opportunity to respond to them

Project Blue Sky v ABA 1998

Facts	<ul style="list-style-type: none">• <i>Broadcasting Services Act 1992</i> (Cth):<ul style="list-style-type: none">○ S 48: Objects of Act are to ensure Australians have effective control of more influential broadcasting services, to promote broadcasting services in developing and reflecting Australian society, to encourage fair and accurate coverage of matters of public interest○ S 158: Gives the Australian Broadcasting Authority (ABA) power to make regulations for television and radio broadcasting in Australia○ S 160: ABA is to perform its functions in a manner <u>consistent</u> with the <u>object of the Act</u> and <u>Australia's obligations under international conventions</u>• ABA determined the <i>Australian Content Standard</i>:<ul style="list-style-type: none">○ Clause 9: At least 50% of all programming aired on television between 6am and 12am must be from Australian broadcasters• Project Blue Sky was a broadcaster from New Zealand who wanted to be aired on Australian television. They argued that in making Clause 9, ABA had failed to perform its functions in a manner consistent with international obligations, because Australia had a Free Trade Agreement with New Zealand
Question	Had ABA made an error? Was this error jurisdictional?
Held	<p>Held: There was an error, but this was not jurisdictional</p> <ul style="list-style-type: none">• ABA had erred in making Clause 9<ul style="list-style-type: none">○ Clause 9 was a plain breach of Australia's obligations under its Free Trade Agreement with New Zealand○ This was therefore a breach of the <u>condition in s 160</u> that the ABA perform its functions in a way consistent with international conventions• Rules for determining jurisdictional error<ul style="list-style-type: none">○ Principle: Whether a breach of a condition regulating the exercise of statutory powers will cause invalidity depends on whether there is a <u>discerned legislative purpose</u> to invalidate any acts which fails to comply with the condition○ Need to look at the <u>language of the statute, subject matter and objects</u>○ Factors to consider:<ul style="list-style-type: none">▪ Was the section an "essential preliminary" to exercising the power?▪ What are the nature of the obligations placed on the decision maker? Are they rule-like, or simply aspirational/directional?▪ What would be the consequence of invalidating the decision? Would it cause public inconvenience?• Here, factors suggested not intended to be jurisdictional<ul style="list-style-type: none">○ <u>Not preliminary:</u> S 160 was not an essential preliminary. It regulated how the functions already conferred should be performed.○ <u>Not rule like:</u> S 160 was more a goal than a strict rule – it would be difficult for ABA to know Australia's exact obligations under different treaties and trade agreements (especially due to vague/aspirational nature of international law). Would be a variety of opinions as to whether conduct was "consistent" with obligations.○ <u>Public inconvenience:</u> Invalidating the Content Standard such would cause significant inconvenience to the broadcasters who had made arrangements based on the standard• Thus, held that parliament did not intend for a breach of s 160 to invalidate the decision (thus did not intend it to be a jurisdictional error). Decision was unlawful but not invalid.

Batemans Bay Aboriginal Land Council v Aboriginal Community Benefit 1998

Facts	<ul style="list-style-type: none">• Community Benefit Fund was a company who operated a contributory funeral fund for members of the NSW Aboriginal Community – members would pay a subscription fee, fees were held in trust and used them to assist in covering funeral costs upon a person's death• Aboriginal Land Council was granted permission by the Minister for Fair Trading to conduct its own funeral contribution fund – offered a lower subscription rate.• Community Benefit Fund sought to challenge the decision by the Minister.
Question	Did the Company (Community Benefit Fund) have standing?
Held	<p>Held: Yes</p> <ul style="list-style-type: none">• Widened Application of Special Criteria<ul style="list-style-type: none">○ Principle: Criteria of special interest should be construed as an enabling, not a restrictive procedural requirement○ The traditional idea that only the Attorney-General can enforce public duties has a limited relevance in Australia○ Should not determine standing based on technical rules alone, but also questions of justiciability, fairness etc• Here, company had special interest<ul style="list-style-type: none">○ Company had a special interest in the subject matter of the decision○ Practically, the company had a real, immediate and significant interest in the observance of statutory limitations, which had a 'peculiar' effect on them (different from general public)○ Because the parties would be operating in the same limited market, it was highly probable that if the Land Council was not properly constrained, the Company would suffer <u>severe detriment</u> to their business – this is sufficient to be a special interest

US Tobacco v Minister for Consumer Affairs 1988

Facts	<ul style="list-style-type: none">• Minister for Consumer Affairs proposed to exercise powers under the <i>Trade Practices Act</i> to declare certain tobacco products to be “unsafe.” Had power to invite parties to be involved in conference before decision was made.• US Tobacco imported tobacco into Australia. The company requested to conference with the Minister on the proposal.• Minister held the conference and made a decision to invite the Federal Consumer Organisation (AFCO) to also make submissions in the conference. AFCO made submissions re safety concerns, leading the Minister to form a preliminary view that the products were unsafe.• US Tobacco challenged the Minister’s decision to invite AFCO to conference on the basis that they were not afforded procedural fairness. AFCO sought to participate in the proceedings as a party with a special interest in the outcome.
Question	Did AFCO have standing?
Held	<p>Held: Yes</p> <ul style="list-style-type: none">• Participation in public consultation not enough<ul style="list-style-type: none">○ The fact that the AFCO initially wrote to the Minister seeking a ban on the tobacco products was not itself enough – this was something which any member of the public could have done○ However, the conference itself was not public – required permission from the Minister to participate in• However, the decision to call the conference benefited AFCO in a <u>special way</u><ul style="list-style-type: none">○ Gave them entitlement to make submissions, challenge views of US Tobacco, require minister to consider their recommendations etc○ Attending the conference thus saw AFCO acquire a ‘special position’. If the validity of the decision to call the conference is being challenged, so is the special position of AFCO.○ Thus have a special interest which elevated them above normal members of the public.