

# **LAWS 2201 ADMINISTRATIVE LAW**

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## 2. Procedural Fairness

- Section 5(1)(a) of the ADJR Act contains a ground of review for a 'breach of the rules of natural justice' (but does not change the common law principles): *Kioa v West*

### 2.1 The Fair Hearing Rule

- Requires that a person who may be adversely affected by a decision be given an opportunity to put their case prior to the decision being made

#### *Kioa v West (1985)*

FACTS: an order to deport Mr Kioa to Tonga was made. In arriving at that decision, the delegate took into account information that Mr Kioa had been involved in a group of people working to circumvent Australia's immigration laws. Application was made under s5(1) of the ADJR Act.

- Two step analysis to whether rules of procedural fairness apply;
  - (1) THRESHOLD QUESTION: do the rules of procedural fairness bind this decision-maker?
    - Mason J held that **the rules of procedural fairness will apply if the decision if an individual's 'rights, interests or legitimate expectations' were affected unless subject to a contrary statutory intention. The effect of the decision must be direct and immediate.**
    - Mason J held that the duty to accord procedural fairness arises at common law.
    - Brennan J took a different approach to the threshold question and argued that procedural fairness arises as a matter of legislative intention. He held further, that it is not the **kind** of interest (**should affect more than merely legal interests**) which matters but that the individual's interests are 'apt to be affected' that is important. **If the individual is apt to be affected in a manner substantially different from the public at large then the individual should be entitled to a fair hearing.**
      - In determining whether there is a legislative intention that the rules of procedural fairness should apply; TEST: 'one must have regard to the text of a statute creating the power, the subject matter of the statute, the interests which exercise of the power is apt to affect and the administrative framework created by the statute.'
      - If the statute is silent then the rules of procedural fairness presumptively apply although these may be diminished in the circumstances.
  - (2) CONTENT QUESTION: what do the rules of procedural fairness require in the circumstances?
    - The majority held that the failure to disclose the adverse allegations against Mr Kioa and allow him the opportunity to respond amounted to a denial of natural justice.

- Mason J held that **‘the expression procedural fairness more aptly covers the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.’**
  - He held that a legitimate expectation arises if the government decision-maker has promised or represented to act in a certain way based on a prior course of conduct. However, Brennan J criticised the doctrine of legitimate expectation
  - Brennan J elaborated on this flexible quality and added that procedural fairness is **‘chameleon-like’ as it ‘evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.’**
  - Even if procedural fairness is required, **its content may be reduced to ‘nothingness’ if the circumstances require it.**
- Both Brennan and Mason JJ held that the information should have been disclosed and that Mr Kioa that the decision-maker should have brought to his attention ‘the critical issue or factor’ on which the administrative decision is likely to turn.
  - This opportunity should be given to disclose information that is **‘credible, relevant and significant’** to the decision to be made.

### *Ex Parte Miah (2001)*

FACTS: Miah was an asylum seeker from Bangladesh who applied for refugee protection in Australia. After coming to Australia, there was a change in the Bangladeshi government and the delegate believed Miah it would now be safe for him to return. The delegate denied his application for a protection visa. He applied to the High Court under s75(v) alleging a denial of natural justice.

- It was held by McHugh J that;
  - There is a strong starting presumption that the rules of procedural fairness apply unless excluded by ‘plain words of necessary intendment.’ He held that as there were no express exclusions and the language of the ‘Code’ incorporated the language of ‘fairness’ then this suggested the Act complimented the common law rules of procedural fairness.
  - McHugh J expanded on the requirements for disclosure stated in *Kioa*: regarded examples of material which would not need to be disclosed including ‘non-adverse country information, favourable or corroborative information in the public domain and information based on the circumstances described in the application.’ However, the delegate would be required to disclose **new information of which the applicant may be unaware and which could be decisive in the final claim.**
    - This disclosure requirement is stronger **where the material concerns circumstances which have changed since the date of application.**