LAWS300 – ADMINISTRATIVE LAW

TABLE OF CONTENTS

Week 2 – Grounds for Review

(Natural Justice)

Overview

- Procedural fairness consists of two basic rules: the hearing rule and the bias rule. Hearing rule provides about an applicant must be given a fair hearing before a decision is made that affects them. The bias rule provides that the decision maker must not be biased. For example, the decision maker must not have a personal interest in the outcome of the decision.

Terminology

- The concept of procedural fairness was originally known as natural justice. Often, The terms used interchangeably. Procedural fairness is the more accurate term. This is because reference to justice in natural justice suggests that it applies to judicial decisions, whereas, in reality, administrative law primarily relates to decisions made by administrators and tribunals.

A common-law principle qualified by statute

- Procedural fairness in Australia is derived from the common-law. In *Kioa v West* (1985) 159 CLR 500 Mason J noted that there is a common law presumption that decision makers must observe the rules of procedural fairness, unless the statute under which the decision is being made states otherwise:
    - … there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of contrary statutory intention.

- The presumption has also been expressed as a principle of statutory interpretation. See, for example, at the judgement of Gummow, Hayne, Crennan and Bell JJ in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (at 665):
    - … one may stated that the common-law usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to show whose interests maybe and firstly affected by the exercise of that power.

- Mason J, in *Kioa v West*, further stated that the extent of procedural fairness to be afforded Will depend on the specific circumstances of the case and the statute in question (at 584-5):
    - Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute … what is appropriate in terms of natural justice depends on the circumstances of the

case and they will include, into alia, the nature of inquiry, the subject matter, and the rules under which the decision maker is acting.

- Brennan J made a similar comment in *Kioa v West* (at 614):
    - To ascertain what must be done to comply with the principles of natural justice in a particular case, the starting point is the statue creating the power. by construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require.

- Hence, it is important to look at the wording of the statute to determine the requirements and extent of procedural fairness. For example, the statute may qualify the hearing ruled by stating that an oral hearing will not be afforded to applicants, all that an applicant is entitled to have legal representation at a hearing. An example of where the rules of procedural fairness are defined by the statute can be found in Subdiv AB of Div 3 of the Migration Act 1958 (Cth), which claims to comprehensively set out a code of procedure for dealing fairly, efficiently and quickly with Visa applications. Section 51A(1) declares that the compliance with these procedures will amount to procedural fairness being complied with (specifically, the hearing rule), stating: this subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

- Sometimes, the statute will expressly exclude procedural fairness, and so the statute should always be consulted. However, the High Court has held that, for procedural fairness to be excluded, the statute would have two clearly do so by using plain words of necessary intendment (*Annetts v McCann* (1990) 170 CLR 596 at at 598 per Mason CJ and Deane and McHugh JJ, cited in the joint judgement of French CJ and Gummow, Hayne, Crennan and Kiefel JJ in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252).

- Consequently, and indirect or vague reference in the statute will not be enough to exclude the requirements of natural justice. To use the words of Dixon CJ and Webb J in *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 (also cited in *Saeed* at 259), indirect references, uncertain inferences ought equivocal considerations in the statute will not be sufficient to exclude the requirements of natural justice.

- An example of where the rules of procedural fairness are expressly included can be found in s 501(3) of the migration act, which provides that the minister may refuse to grant a Visa or may cancel and existing Visa if the applicant does not pass a character test set out in s 501(6) and if the minister thinks it is in the national interest to do so. Section 501(5) exclude the rules of natural justice from applying to the ministers decision, stating that the rules of natural justice … do not apply to a decision under subsection (3).

- Also, the circumstances of the case and a type of decision maker can determine the requirements of procedural fairness in a given case. In *Re Minister for immigration and multicultural affairs; ex parte Miah* (2001) 206 CLR 57, the ministers delegate refuse the applicants protection Visa under the migration act because there had been a change in government in his country, which meant that the applicants no longer had a well founded fear of persecution. Unfortunately, the applicant was not advised of this consideration and was not given the opportunity to respond to it. Majority of the high court held that this amounted to a denial of natural justice. In their dissenting judgements Glesson CJ and Hayne J noted that in considering the scheme of legislation relating to the exercise of a particular kind of power, it is necessary to pay regard to the practical context in which the decision maker must consider whether to exercise the power. They also noted that the requirements of procedural fairness may vary depending on the decision maker. For example, judicial decision maker must apply standards of procedural fairness to the fullest extent, where as administrative decisions are made in a far less formal context where the applicant will often have no interaction or correspondence from the decision maker until the decision is made.

- However, there have been other situations where the circumstances of the case to indicate that it is not necessary or appropriate for a decision maker to afford procedural fairness to a person two is adversely affected by a decision.

Statutory provisions

- Section 5(1)(a) of the ADJRA provides that a person who is aggrieved by a decision to which this act applies may apply to the federal court or the federal circuit court to review the decision on the ground that a breach of the rules of natural justice occurred in connection with the making of the decision. The equivalent provision relating to contact for the purpose of making a decision is s 6(1)(a), which states that a breach of the rules of natural justice has occurred, is it occurring, or is likely to occur, in connection with the conduct. Natural justice is not defined in the act so the common-law definition of procedural fairness/natural justice applies.

Requirement to afford procedural fairness

- Occasionally, a statute may set out of to the extent to which the rules of procedural fairness must be observed. However, a statute may generally state only that the rules of procedural fairness must be observed, or it may be silent about procedural fairness altogether. In these latter two instances, the question will arise as to whether procedural fairness should be afforded and to what extent.

- Originally, procedural fairness had to be afforded by judicial or quasi-judicial decision-making body only if it was making a decision that would affect a person's legal rights, such as property rights.

- Over the years, there has been a gradual broadening of the circumstances in which procedural fairness must be afforded. Now it is no longer necessary for a person's fundamental rights to be affected before the duty to afford procedural fairness will

arise. In fact, due to a concept known as a legitimate expectation, the duty to afford procedural fairness will arise in the majority of circumstances, unless it is expressly excluded by statute.

Legitimate expectation of procedural fairness

- A person who will be adversely affected by a decision is deemed to have a legitimate expectation that they will be afforded procedural fairness by the decision maker. For example, an applicant may have a legitimate expectation that they will be given the opportunity to respond to allegations made against them before a renewal is denied, as in the case of *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

- In the case of *Kioa v West*, the applicant was held to have a legitimate expectation that they would be able to respond to allegations made against them before the Visa was revoked and deportation order made.

- The following case of *Minister for immigration and ethnic affairs v Teoh* (1995) 183 CLR 273, suggests that the concept of a legitimate expectation has expanded to such an extent that administrators would be wise to afford it in every circumstance where it is not expressly excluded by statute. For example, in *Teoh*, an international convention that have been ratified by Australia gave rise to a legitimate expectation that the convention would be complied with when an administrator was making a decision detrimental to the applicant and his family. In failing to comply with the convention the decision maker was held to have tonight the applicant procedural fairness by not giving him the opportunity to present a case against the decision-makers failure to comply with the convention.

- The High Court was able to reconsider the legitimate expectation concept in the subsequent case of *Re minister for immigration and multicultural and indigenous affairs; ex parte Lam* (2003) 214 CLR 1. The case is an interesting contrast to *Teoh* because it's facts are similar in some respects. However, the issue before the court was significantly narrower. Some members of the High Court also indicated willingness to reconsider some aspects of the *Teoh* decision.

The no evidence rule

- An additional rule has developed as part of the concept of procedural fairness, Called the no evidence rule. This rule provides that a decision maker must make a decision based on actual evidence as opposed to making it on the basis of a whim or speculation. The concept was recognised by Deane J in *Minister for immigration and ethnic affairs v Pochi* (1980) 44 FLR 41 at 62, who said that a tribunal was required to base a decision to deportee applicant on … some rationally probative evidence and not merely [on material] raised before it is a matter of suspicion or speculation …. In other words, the decision maker must base their decision on facts that are proven and relevant to the issue to be determined.

- The no evidence rule is referred to in s 5(1)(h) of the ADJRA, which provides the following ground of review: that there was no evidence or other material to justify the making of the decision.

- Once it has been established that procedural fairness must be afforded, the applicants must be given an adequate opportunity to present the case to the decision maker (the hearing rule), and the decision made must be objective and unbiased (the bias rule).

The Hearing Rule – Overview

- At a basic level, the hearing rule provides that if the applicants rights, interests or legitimate expectations will be affected by a decision, they must, at the very least be:
    - Informed that a decision is going to be made;
    - given a summary of the case against them; and
    - given the opportunity of making submissions in order to enter the case against them.

Informed that decision is going to be made

- In *Cooper v Board of Works for the Wandsworth Distrcit* (1863) 143 ER 414,the Board of Works was held to have denied Cooper natural justice by demolishing his house without giving him any notice that such a decision was likely to be made, or any opportunity of responding to adverse findings made against him.

- The situation was similar in the case of *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487. In *Heatley*, the High Court hell is that there had been a denial of natural justice because Heatley was given a warning off notice to exclude him from racecourses indefinitely without being given any prior noticed that the decision may be made.

- Advising a person that a decision will be made is a fundamental aspect of procedural fairness that goes to the heart of hearing rule. It is fundamental because if a person does not have prior knowledge that a decision will be made, they also will not know the factors that the decision maker is considering, and will not have the opportunity to make submissions to enter the case against them.

- This was certainly true to the persons affected by the decisions in Cooper and Heatley. Because the board did not inform Cooper that it was considering demolishing his house, Cooper had no idea of the grounds that the board would take into account and did not have an opportunity to enter them before his house was demolished. Similarly, the commission's failure to advise Heatley that it was considering banning him from racecourses indefinitely meant that Heatley was unable to respond to the case against him before receiving the warning off notice.

Given a summary of the case against them

- In order to respond to adverse allegations, and the applicant will not only need to know that a decision is going to be made but also must be given a summary of the case against them. This requirement is fundamental because, as it is noted above, being given a summary of the case against them will allow the applicant to put the case forward before a final decision is made. So how extensive must the summary of the case against the applicant be?

- As a basic level, the general rule is that a person must be informed of that general scope and purpose of the hearing (*Dainford Ltd v Independent Commission Against Corruption* (1990) 20 ALD 207 at 208 per Young J).

- Whether more detail particulars are required to be given to the applicant will depend on the statute in question, the facts and circumstances of the individual case and the nature of the proceedings. This was noted by the court in *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 19 FCR 494.

- As the above case provides, a more general, as opposed to adversarial, inquiry may require only a basic outline of the issues to be considered to be provided to the applicant. However, if specific allegations are made against the applicant, they have the right to be informed of them so they can respond to each specific allegation: *Re Maquarie University; ex parte Ong* (1989) 17 NSWLR 113.

- It is evident from Bond and Ong that at the degree to which the decision maker must give the applicant notice of the allegations made against them is one of proportionality depending on the facts and circumstances of each case. In Bond, the inquisitorial nature of the inquiry made it unreasonable to require the Australian broadcasting Tribunal to give specific details of the issues that it would be considering, when these details would not emerge until the proceedings progressed and witnesses gave evidence.

- However, in Ong, specific allegations were made against Dr. Ong concerning his competence, so it was reasonable for the decision maker to be required to give him notice of those allegations so he could respond to them.

- These decisions can be contrast it with the case of *Commission for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576. *Alphaone* is an example of where it would have been unreasonable to expect decision maker to give further notice on the ground that was ultimately relied upon to do neither licensed because it had already been brought to the attention of the applicant.

Given the opportunity of making submissions in order to enter the case against them

- It has been noted that the fundamental aspects of procedural fairness are, first, the applicant must be notified at a decision will be made; second, the applicant must be given a summary of the case against them; and, third, the applicant must be given the