NATURAL JUSTICE IN INVESTIGATIONS AND INQUIRIES

What are the Rules of Natural Justice?

Natural justice comprises two common law rules which have been developed largely by the courts to ensure that decisions of government and certain public bodies affecting the rights or other interests of individuals are made fairly. The first rule is that a decision maker must afford an opportunity to be heard to a person whose interests will be adversely affected by the decision.

The second rule is that a decision maker must be disinterested or unbiased in the matter to be decided. Bias is defined in the case law to include actual bias or apparent bias.

The meaning of an "Investigation" or "Inquiry"

The scope of natural justice and the point at which it comes into play depends partly on whether the relevant procedure is an investigation with or without charges, allegations or suspicions being laid against a company or person.

Investigations often do not commence with any specific charter or particular suspicion against a person. It often involves a specified topic or category of matters to be investigated. Confusion arises as to the proper procedure to adopt when an investigation is founded upon charges or suspicions of possibly illegal or improper dealings or conduct.

In the Report of the Royal Commission on Tribunals of Inquiry in 1966 under the Chairmanship of Lord Justice Salmon, a brief description of a general investigation was provided in these terms, at paragraph 30;

> "it is inherent in the inquisitorial procedure that there is no lis [or litigation]. The Tribunal directs the [investigation] and the witnesses are necessarily the Tribunal's witnesses. There is no plaintiff or defendant, no prosecutor or accused; there are no pleadings defining issues to be tried, no charges, indictments, or depositions. The [investigation] may take a fresh turn at any moment. It is therefore difficult for persons involved to know in advance of the hearing what allegations may be made against them".

In an investigation, the investigator very often commences with a blank sheet.

There is a distinction between these general investigations and inquiries based on a particular charge having been laid or a specific suspicion concerning a person's conduct. The inquiry or investigation in that case will be conducted with a view to ascertaining the truth relating to the suspicion and to assemble evidence in connection with it with a view to either prosecution or causing a prosecution to be commenced.

The distinction between the general and specific investigation was described by Orr LJ in the English Court of Appeal in **Maxwell v Department of Trade & Industry** [1974] 1 QB 523 at 538 where he said:

> "... in my judgment a clear distinction exists for the present purpose between an inquiry based on a charge or accusation and an investigation such as the present in which the inspectors are required in the public interest to find out what has happened, and in the course of so doing form certain views or conclusions. In the former case it is essential that the person against whom the accusation or charge is made should know its terms. In the latter, ..., [the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, and the subject matter that is being dealt with."

On occasions, a procedure that started out as an investigation may, at some point in time, turn into an inquiry into specific "charges" or preliminary, tentative or actual findings. In the context of most Royal Commissions in Australia, the general sequence of events is:

(i) the investigation phase;

(ii) the identification of specific instances of improper or possibly illegal conduct in relation to which the Commission contemplates making adverse findings and the affording of an opportunity to be heard by the calling of further evidence and submission in relation to those instances;

(iii) the publication of findings, including adverse findings of an instance of particular illegal or improper conduct of a person, and, possibly general policy issues such as proposed legislation or recommendations; and

(iv) the taking up in appropriate cases of civil or criminal proceedings by the appropriate bodies including the DPP, Trade Practices Commission or others, of the findings referred to above.

As to the Australian Securities Commission, you will recall that under the old Companies Code and NCSC Act, the NCSC could conduct Ordinary Investigations under section 16A of the Companies Code and Special Investigations under section 291 of the Companies Code. The Special Investigations were needed to be referred to the NCSC by the relevant Minister or Ministerial Council.

Natural justice was directed by the Act to apply in NCSC hearings in relation to Ordinary Investigations (see Section 38(1)(d) of the NCSC Act). However, natural justice was not legislatively provided for in respect of special investigations.

Under the new regime, the Australian Securities Commission acting under the ASC Law may conduct wide-ranging "Ordinary" and "Special" Investigations under Division 1 Part 3 of the ASC Law (Sections 13 & 14 of the ASC Law). There is no provision in the ASC Law for natural justice to apply in relation to these investigations.

The Commission is now entitled to conduct general hearings in relation to specific matters under sections 51 to 62 which is Division 6 Part 3 of the ASC Law. Under these hearings natural justice is expressed to be applicable (section 59(2)(c) of the ASC Law).

In summary, the major changes in the "federalized" ASC Law and Corporations Law are:

1. Section 16A of the Companies Code investigations are now no longer linked to the general hearing powers. They are now lumped in with the old category of "special investigations".

2. Investigative "hearings", as were conducted by the NCSC, are essentially discontinued.

3. There is a wider range of civil remedies available to the ASC, see, particularly sections 49 and 50 of the ASC Law.

4. There is much wider scope for the ASC to initiate proceedings based on oppression or winding up. No longer does the ASC have to wait until investigation is complete and a report is done. See Sections 260 and 464 of the Corporations Law.

5. There is a separation of certain regulatory, investigative and adjucative functions of the ASC.

Testro Bros Pty Limited v Tait (1963) 109 CLR 353

This case, was for a time, the leading authority in relation to natural justice in the context of an investigation under the old uniform Companies Act. It was held by the High Court that natural justice did not apply to the investigator appointed to examine the company because:

1. The relevant Act imposed no obligation on the inspector to act judicially; and

2. A report of the inspector as a result of his investigations could not of its own force prejudicially affect the rights of the company.

The majority of the court said that natural justice did not apply and that preorogative writs would not lie against the investigator.

This decision held force for many years until the late 1970's when there occurred a fundamental change of direction in the scope of administrative law in Australia and broad principles of "fairness" came into play.

The tide started turning with the House of Lords decision [decided, in fact, before the High Court Decision in **Testro Bros**] titled **Ridge v Baldwyn** [1964] AC 40 where the House of Lords discarded the requirement that a decision maker must act judicially before natural justice is to apply. This decision was applied in Australia in 1968 [see Margaret Allars **Introduction to Australian Administrative Law**, 1990 at para 6.5]. Further, the **Testro Bros Decision** goes against the case of **NCSC v News Corporation Limited** [1984] 156 CLR 296.

In the late 1970's the High Court discarded the requirement that enforceable legal rights must be affected before natural justice came into play. This trend culminated in **Kioa v West** (1985) 159 CLR 550 [see Allars, paragraph 6.8].

The final nail in the coffin of **Testro Bros** was in the High Court Decision last year of **Annetts v McCann.** It was disapproved expressly in that case and may now be regarded as effectively overturned.

I now turn to a more detailed discussion of Annetts case and the implications of it.

Annetts v McCann (1990) 65 ALJR 167

This case concerned the application of the rules of natural justice and procedural fairness to certain powers of coroners in Western Australia. The relevant Act provided that the coroner had a discretion to decline to entertain submissions of persons who had been granted representation before the inquiry (in this case the parents of a deceased minor).

The **narrow issue** in the case was whether the rules of natural justice required that Counsel for the parents of the deceased the subject of the inquiry should be given an opportunity to address the inquiry by way of closing arguments or submissions.

The coroner had refused the parents' Counsel the right to make final submissions and an order nisi for writs of prohibition and mandamus was obtained against the coroner. The matter came before the Full Court of the Supreme Court of Western Australia which discharged the order nisi. The Full Court held that the coroner had a discretion whether or not to receive submissions from Counsel and that the parents of the deceased were not denied natural justice by that refusal. The appeal was allowed in the High Court by majority of 3 to 2.

The majority joint judgment of Mason CJ, Deane and McHugh JJ, held that the critical question in the case was not whether the rules of natural justice required an extension of the right of the parents to appear (granted by the Act) but it was in fact the question whether the terms of the relevant Act displayed a legislative intention to **exclude** the rules of natural justice and in particular the common law right of the parents to be heard in opposition to any potential finding which would prejudice their interests.

The majority held that because the coroner had granted representation to the parents (which was within his discretion), the parents had a **legitimate expectation** that the coroner would not make any finding adverse to the interests which they represented without giving them the opportunity to be heard in opposition to that finding. The Court also held that the parents had a **common law right** to be heard in opposition to any potential adverse finding. The practical result was that the majority held the coroner had 2 choices:

1. he could invite the parents' Counsel to make submissions in respect of those matters identified by the Coroner which could result in adverse findings concerning the parents or the deceased; or

2. he could inform Counsel that he did not propose to make any adverse findings against the parents or the deceased.

The majority noted that the scope of judicial review has widened considerably in the past 30 years and cases such as **Testro Bros Pty Limited v Tait** are no longer sustainable. The reason being is that in the landmark case of **Kioa v West** (1985) 159 CLR 550, the High Court effectively rejected the judicial/legislative/executive decision-making criterion in favour of a test based on an "administrative decision which affect rights, interests and legitimate expectations subject only to the clear manifestation of a contrary statutory intention" (**Kioa,** at page 584).

The dissenting judges, **Brennan and Toohey** JJ. held in separate judgments that the Full Court of the Supreme Court of Western Australia properly decided that the parents' Counsel could not make submissions to the coroner on **any** aspect of the inquiry. This was formally correct the appeal should be dismissed. Both judges noted that **should the coroner propose the making of a finding unfavourable to the reputation** of the parents' deceased son, the coroner should afford the parents an opportunity to address him on that **contemplated finding.**

Brennan J also noted that the scope of judicial review of decisions had expanded and that the coroner had a duty to allow the parents to make a submission only when the coroner had reached a stage of contemplating the making of an unfavourable finding. The problem with the present case, however, was that this was not what was argued by the parents to the Full Court. The parents argued then that they should be allowed to make general arguments before the coroner.

Implications of Annetts' Case

In general terms, the case does not make any substantive single contribution to administrative law. The decision is rather, a consolidation of certain administrative law principles into a convenient form. Perhaps the most important aspect of the decision is that it finally lays to rest the High Court's decision in **Testro Bros.** The Court's assertion that "it is beyond argument that the view of the majority in that case would not prevail today" should end forever any further reliance by courts in this country on the **Testro Bros.** decision.

Another significant aspect of the **Annetts' case** is that it is the first major statement by the High Court on natural justice in respect of an inquiry or investigation since 1983 in **NCSC v News Corporation.** The period 1983 to 1991 has seen a tremendous amount of activity in the development of administrative law and, specifically, the rules of procedural fairness. **Kioa v West** (1985) 159 CLR 550, was handed down in December 1985, some 17 months after the decision in **NCSC v News Corporation.**

Another important aspect of the decision is that the High Court placed the onus on the investigator to **define** or **identify issues** so that any right of legal representation could be effective. (At page 169, first column at point C to D). The court said that the Coroner has a responsibility to define the issues in respect of which there exists a **possibility** that he may make findings adverse to the appellants. By defining those issues he can effectively assist the identification of the topics on which Counsel can relevantly and usefully address and limit the scope of that address.

It is also clear from the case that the principles of natural justice now also apply to Royal Commissions and many other inquiries established by or conducted by the Executive Government.

The question whether natural justice applies to ASC investigations under section 13 of the ASC Law must be answered, in my view, in the affirmative in that:

1. Natural justice is not expressly excluded or excluded by necessary implication in Part 3 Division 1 of the ASC Law;

2. There is no right of a de novo appeal or review to the Administrative Appeals Tribunal in respect of a section 13 investigation. The only avenue of appeal is the ADJR Act or, possibly, section 38B of the Judiciary Act 1903. The original jurisdiction of the High Court under Chapter 3 (section 75(v)) of the Commonwealth Constitution may also be available.

3. Any findings or reports has the potential to affect the suspect or witnesses' reputation and any report to be made under the investigation shall be **prima facie** evidence of certain facts or matters (section 81 of the ASC Law).

What is the scope and content of natural justice?

The Context of NCSC -v- News Corporation

This case concerned an NCSC investigation, empowered by section 16(A) of the Companies Act and conducted in the form of a hearing under section 36 of the Act. Section 38(1)(d) of the NCSC Act obliged the NCSC to observe the rules of natural justice.

Notice of the hearing was published in newspapers and copies were sent to various parties. When the investigation commenced its public hearing, the Commission directed that it be conducted in private. The hearing then was a private investigation, the existence of which had been advertised.

In NSCS v News Corporation Limited [1984] 156 CLR 296 at 322, it was held by the High Court that the fact that the then NSCS was conducting a general investigation as opposed to a hearing into charges or allegations meant that the requirements of natural justice simply changed to reflect the different purpose.

The Court decided that it would be a denial of natural justice if the Commission received evidence adverse to the company the subject of the investigation without providing an opportunity for that company to be heard (page 324). The Court held that the minimum content of natural justice in investigations is that:

1. the substance of adverse information that is received during the investigation be disclosed to the person being investigated (the Court did not indicate **when** this should be disclosed);

2. legal representation is permitted to witnesses appearing at an investigation;

3. legal representatives have the opportunity to further examine witnesses and for submissions to be made touching on matters covered by the examination;

4. further witnesses could, possibly, be called by the person being investigated;

5. at the conclusion of the investigation, if the publication of any matter adverse to a person is likely, the Commission shall afford that person an opportunity to be heard and call evidence on such matters before proceeding further;

6. a transcript of a witnesses' evidence should be provided to that witness.

All of these duties and obligations under the rules of natural justice arise during the course of and towards the conclusion of an investigation.

The Court said there was considerable force in the Commission's view that:

> "It is of the very nature of an investigation that the investigation proceeds to gather relevant information from a wide range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry." (at pp323-324).

Gibbs CJ (with Brennan J agreeing) stated that the Commission is entitled to consider that an investigation may be frustrated if all the information at the Commission's disposal is prematurely disclosed (at 316).

Is there a requirement for Notice to be given at the Commencement of an Investigation?

There is no right to be heard in relation to a decision to initiate an investigation or an inquiry. See, **Karounos v CAC** (1989) 15 ACLR 363; **News Corporation v NCSC** (3) (1983) 8 ACLR 338 at 331; and, **Norwest Holst v Department of Trade & Industry** (1978) Ch 201, or 3 ALL ER 280.

In general terms, many of the older cases refer to or rely on a formulation of the applicability and scope of natural justice that is no longer applied in Australia. Most of these cases depended on the requirement that, for natural justice to apply, there must be:

1. a judicial as opposed to an administrative proceeding; or,

2. the report must adversely affect the complainant's proprietary or legal rights, before natural justice is to apply.

Nowadays, the rules of natural justice will apply **unless** there are express words in the legislation or plain words of necessary intendment in the legislation. (**Annetts v McCann** [1990] 65 ALJR 167 at 167)

Once the suspect or person being investigated is aware that it is being investigated, should the investigator explain or provide evidence of the matters which caused it to have reason to suspect that an offence had been committed under the relevant legislation? There is a fairly strong line of authority in Australia that adopts the decision in **Norwest Holst Limited -v- Secretary of State for Trade** [1978] Ch 201. These decisions hold that the investigator is under no such duty. [applied by Bowen CJ, Fisher and Sheppard JJ, in the full Court of the Federal Court in **News Corporation Limited -v- NCSC** (1983) 49 ALR 719 at page 734 where it was held that News Corp was not entitled to be given a statement of the matters which caused the NCSC to have reason to suspect. This issue was not considered by the High Court in refusing the Appeal from this decision. Norwest Holst was also considered and applied by Pincus J in **Allen Allen & Hemsley -v- Deputy Commissioner of Taxation (New South Wales)** 1988 81 ALR 617 (at first instance) at page 632 in the context of whether the decision by the Tax Commissioner to seek access to books and records was reasonable; see also **WA Pines Pty Limited -v- Bannerman** (1980) 41 FLR 175, a decision of Bowen CJ, Brennan and Lockhart JJ relating to a section 155 Notice under the Trade Practices Act, especially at pages 180-181, and page 191. **Norwest** was to distinguished by Keely J in the Federal Court in Melbourne Home of **Ford Pty Limited -v- TPC and Bannerman** (1979) 36 FLR 450 especially at page 461, 462 and 479 **Magner -v- Fowler** (1979) 26 ALR 671 at 695].

Generally speaking the burden of showing the the Minister or decision maker establishing the inquiry was not acting bona fide in accordance with proper powers lies with the person who asserts it. The decision maker is not obliged to disclose the grounds upon which reason to believe is founded unless bias is reasonably contended. It is only then that the Court will examine the decision to establish an inquiry.

Recent Cases

In the Western Australian Supreme Court case of **Bond Corporation Holdings Limited v Sulan** [1990] 8 ACLC 562 before Ipp J, it was decided that in the context of an NCSC special investigation under section 291 of the Companies Code, that, **inter alia:**

> "The requirements of fairness ... require a company being investigated to be given particulars of the facts and circumstances being investigated only when there is a prospect of the inspector making an adverse finding. It is only at that stage that fairness requires a company to be given the opportunity of putting its case and persuading the inspector to different views." (at page 570).

Ipp J held that he was bound by **Testro Brothers** in that the rules of natural justice have no application to an investigation of the type being considered. This finding does not go far enough in light of developments in the High Court in administrative law, particularly the decision in **Annetts' Case.** Ipp J held in the alternative that if natural justice applied, it applied in the terms described above.

Ipp J discussed the English Court of Appeal decision in **In re Pergamon Press Limited** (1971) Ch 388 where it was held that natural justice applied to an investigation conducted under the English company laws. He also considered the judgment of Wilcox J in **Bond -v- ABT** (1988) 19 FCR 494 at 511 where Wilcox J commented that an inquiry of the Executive Government may sometimes be required to identify the subject matter which it wishes to address in the context of an apparently wide ranging inquiry. The Court made reference to Gibbs CJ's decision in **NCSC -v- News Corp** (CLR at pages 315-316) where it was held there would be compliance with natural justice:

> "if the respondents are given a fair opportunity to correct or contradict any relevant material prejudicial to them. ... Further, when the Commission said that it would give the respondents adequate notice of any adverse conclusion which it has tentatively reached, or of any criticism which it tentatively proposes to make, or that it will listen with an open mind to whatever material is then put before it by the respondents and give full weight to such material."

Ipp J's decision, fails to apply or give effect to the full statement of the Chief Justice in **NCSC -v- News Corp** quoted above. In requiring that the suspect is only to be given particulars of facts and circumstances when "there is a prospect of the inspector making an adverse finding", Ipp J does not hold that, in the Chief Justice's words, the duty extends to "adequate notice of an adverse conclusion which it has **tentatively reached,** or **any criticism** which it **tentatively proposes** to make ..." (emphasis mine). In my view, Ipp J has not explained why he has departed from the wider formulation of the duty of the inspector as described in **NCSC -v- News Corp.**

In **Bond v Sulan** [1990] 8 ACLC 1,273 in the Federal Court, Gummow J decided on a matter concerning the same NCSC investigation as the case mentioned above. The Court in this case held that the NCSC may not be required to give procedural fairness to the applicant, who was seeking to be assured of certain rights, before the investigation was actually under way. Gummow J stated that the course adopted by the investigator, that he would give the applicant opportunity to make submissions when he is in a position himself to make tentative findings, was an acceptable position and fulfilled the requirements of procedural fairness.

There is no statutory obligation for the investigator to inform the suspect that there is an investigation going on. Should there be any examinations for the purposes of the investigation, a section 19 Notice under the ASC Law will issue which states, **inter alia;**

- the general nature of the matter that the ASC is investigating; and
- the examinee's rights to have a lawyer attend and to assert privilege objections to certain evidence.

Gummow J did not regard himself as being bound by the **Testro Bros** decision.

In summary, Gummow J held (expressly and, by adopting certain letters sent to the applicant by the investigator):

1. As to the nature of particulars to be given to a witness to the investigation, the investigator is not required to give broad undertakings as to future conduct, as the requirement of natural justice to give particulars to that witness will vary with the circumstances of the inquiry and the individual witness. Further there may be good reasons why a tentative finding should not be put to a witness;

2. When an investigator has gathered sufficient material to permit him to reach tentative conclusions as to the findings he might make, procedural fairness requires him to;

   - give consideration as to the extent which (if at all) those findings are adverse to a party such that the party should be afforded an opportunity to make further representations to the investigator or to adduce further evidence; and

   - take into account the nature of the tentative findings, the extent to which the party has had a prior opportunity to address the matters the subject of such findings either on examination or otherwise, and;

   - take into account all of the other circumstances of the inquiry as they then appear.

3. the party should have an opportunity to be heard in respect of material evidence adverse to them. That opportunity should be afforded to them prior to the publication of a final report.

When the case was argued before Gummow J, it appears that counsel for the parties generally agreed that:

> "... as many authorities show, the content of the requirements of procedural fairness must depend on the nature and circumstances of the inquiry, including the subject matter that is being dealt with and the consequences in a legal and practical sense, of any adverse conclusions reached in the inquiry." (at page 1, 279).

One should note the specific rejection by the majority of the High Court of the NCSC argument in the **News Corporation Case** (at page 322) that the investigation in thata case had a special character in that there was "no charge, no person is accused and no person is in jeopardy of being affected in his legal rights." In rejecting this submission, the Court recognised that, on the other hand, regard needed to be had to the need for an investigator not to be hampered in the conduct of his investigation and for the need for him not to disclose his hand prematurely if will close off other sources of inquiry (at page 323-324).

ADJR Act: "Decision", "Conduct"

If a challenge to an investigation is being contemplated, it is crucial at the outset to consider whether to proceed by:

- application to the Federal Court under the Administrative Decisions (Judicial Review) Act ("the ADJR Act");
- section 39B of the Judiciary Act 1903; or,
- application to the High Court under chapter 3 of the Commonwealth Constitution.

In the High Court decision in **Australian Broadcasting Tribunal -v- Bond** (1990) 64 ALJR 462, the High Court considerably narrowed the meaning of certain words and expressions in the ADJR Act so as to effectively make it more difficult to come within the scope of the ADJR Act. From now on a close examination will need to be made of the "decision" or "conduct" to be challenged under this legislation.

As the Gummow J described in **Bond -v- Sulan,** application could be made to the Federal Court under traditional administrative law principles by way of section 39B of the Judiciary Act in that the NCSC (and now the ASC) represents the Crown in the right of the Commonwealth. Difficult questions arise when the officer concerned is not a Commonwealth officer but is a State officer vested with both Commonwealth and State Power.

One should also consider Section 49 of the Corporations Act 1989 (Cth) which, some argue, excludes s39B of the Judiciary Act from the jurisdiction of the Federal Court in "civil matters arising under the Corporations Law" (defined to include the ASC Law).

What Can Lawyers do to assist a Client in the Context of an Investigation?

There is a good discussion of this in Nicholas Korner's paper "Investigations by the Australian Securities Commission" presented to the Law Council of Australia Business Law Section Seminar on 9 July 1991 at pages 36 and 37.

In short, the best that a lawyer can do is to assist in:

1. Ensuring the investigation operates within its own terms of reference;

2. Assessing whether documents required to be produced fall within the scope of the relevant summons or notice;

3. Appearing for a witness at an examination and, briefing counsel if necessary;

4. Advising a witness in relation to confidentiality, privilege against self incrimination, legal professional privilege or, if applicable, the availability of any protection such as is available in Section 17 of the Royal Commission's Act 1923 (NSW);

5. Making relevant submissions on the facts and the law to the investigator in response to suspicions tentatively or finally expressed or suspicions implicit in particular lines of questioning;

6. Anticipating lines of inquiry and identifying methods of resolving difficulties and issues revealed. If the investigator is not disclosing suspicions tentative or final views, generally all you will have to go on to determine where the inquiry is heading must be deduced from;

    - the witnesses is called to give evidence and any statements taken or provided;

    - the summonses, subpoenaes or notices issued by the investigator for documents to be produced;

- the line of questioning at the investigation and the evidence given to date.

As Nick Korner argues, it is also possible to "guide" the investigator to relevant documents or witnesses in order to either correct a misconception, deflect allocation of responsibility or, where the material is large, to narrow the scope of the inquiry and facilitate the efficient uncovering of what it is intended to uncover.

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