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PRACTICAL JUSTICE AND PROCEDURAL FAIRNESS

In this paper, I describe the legal concept of procedural fairness (also known as natural justice) and explain some aspects of its content and operation.

In examining procedural fairness, one must bear in mind the concept of “practical justice” as introduced by the Chief Justice Gleeson in the High Court case of *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 where, in discussing the manner in which procedural fairness cases are approached by the courts, he said (at [37]):

“Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.”

The kinds of practical injustices that may occur in the context of the work of an administrative decision-maker are numerous. Most of them are unforeseen. By spending some time and considering some of them - and some appropriate responses, administrators might be able to minimise their exposure to having their determinations rejected by the NSW courts on the grounds of a denial of procedural fairness (or on other administrative law grounds, of which natural justice on but only one).

Why Accord Procedural Fairness?

The common law requires administrative decision-makers to accord procedural fairness to applicants or parties at all times.

If administrative decision-makers do not accord it to the applicant or to the parties, their decision or parts of it (if it is severable) will be liable to be rejected by the court in any judicial review court action.

Further, an administrative decision may be declared by a court to be void (or made without power or unlawfully made) under the principles of judicial review of administrative decisions in administrative law. Procedural fairness, which is a classic administrative law ground of review of government decisions is also known as “natural justice”.

What is Procedural Fairness?

Procedural fairness comprises two broad common law rules designed to ensure fair procedures are followed in the making of decisions which affect the rights, obligations or legitimate expectations of individuals. The two rules or limbs, expressed in traditional terms, are:

- 1 The decision maker must afford a “hearing” in appropriate circumstances; and
- 2 The decision maker should not be biased or seen to be biased.

Any breach of the rules of procedural fairness is a very serious matter. It is described as a “jurisdictional error”. If procedural fairness is denied, the decision can be said to be a decision not lawfully made, and there is not a decision in law or in fact (eg: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 598).

It will be as if the decision was never made.

The Hearing Rule

The right to a “hearing” is a technical expression in administrative law (see: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 77 ALJR 699 at [105]). It means many things, depending upon the circumstances of the particular case, and:

- 1 The nature of the inquiry;
- 2 The subject matter; and
- 3 The rules under which the decision maker is acting.

The modern statement of the hearing rule appears in *Kioa v West* (1985) 159 CLR 550 where the High Court said at 584 & 585:

"The law has now developed to a point where it may be accepted that 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 a contrary statutory intention. ...

The critical question in most cases is not whether the principles of natural justice apply. It is: **what does the duty to act fairly require in the circumstances of the particular case?** ...

In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations." (my emphasis)

Major aspects of the hearing rule that might affect an administrative decision are set out in the following propositions:

1. A person should have matters adverse to that person or that person's application put to

that person for comment or evidence before an adverse decision is made (*Kioa v West* (1985) 159 CLR 550).

2. A decision-maker should not make a decision having had regard to undisclosed material being adverse information that was credible, relevant and significant to the decision to be made without first putting that material to the relevant person (*Kioa, ibid*, at 629.3 per Brennan J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; and *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966).
3. A decision-maker should bring to a person's attention the critical issue or factor on which the decision is likely to turn so that the person may have an opportunity to deal with it (eg: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 at [81]).
4. A decision-maker should not mislead a party as to the importance of a factor to the decision-maker (either actively or impliedly) (*Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966).
5. A public decision-maker should have regard to any promise (express or implied) or regular practice adopted by the decision-maker in the making of particular decisions when a failure to do so may result in some unfairness in the procedure now adopted (*Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 at [48] and [105] per McHugh & Gummow JJ).
6. A public decision-maker should ordinarily continue to comply with any procedural promise or representation (express or implied) or regular practice unless the proposed change is first put to the affected person and an opportunity for that person to put a

response as to that proposed change is allowed (*Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; and *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6).

7. In inquiries or in matters where there is no fixed issue, a public decision-maker should first notify affected parties of defined relevant issues in respect of which there is a possibility that he or she might make findings adverse to them and permit an opportunity for them to respond (*Annetts v McCann* (1990) 170 CLR 596 at 601).

The most troublesome aspect of the hearing rule is determining what is its content.

Some examples of the decided content of the hearing rule in the legal cases (depending on the circumstances of the particular cases) are as follows:

- 1 The right to receive notice of a hearing;
- 2 The right to receive notice of matters to be dealt with at a hearing;
- 3 The right to legal representation;
- 4 The right to an interpreter;
- 5 The right to make submissions (written or oral); call evidence and/or cross examine witnesses; and
- 6 The right to receive a transcript and/or other evidence.

Bias

The bias rule of procedural fairness is that a decision maker must not be personally biased (actual bias) or be seen by an informed observer to be biased in any way (apprehended or

ostensible bias) in the hearing of or dealing with a matter during the course of making of a decision.

The rules in this area are broadly the same in respect of courts, tribunals and for executive decision makers.

The apprehension of bias principle has its justification in the concept that judges, tribunal and statutory decision-makers should be independent and impartial. The essential question is whether there is a *possibility* (real and not remote) and not a *probability* that a decision-maker *might* not bring an impartial mind to the question to be determined (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7]-[8]). The question is answered by reference to whether the fair-minded lay observer *might* reasonably apprehend that the decision-maker *might* not bring an impartial mind to the resolution of the issue to be decided (*ibid*, at [33]).

Bias may arise from:

- interest - pecuniary or proprietary;
- conduct;
- association;
- extraneous information; or
- from some other circumstance (*Ebner, ibid*).

The High Court has stated that the apprehension of bias principle “admits of the possibility of human frailty” and “its application is as diverse as human frailty” (*Ebner, ibid*, at [7]).

In the case of administrative proceedings conducted in private (such a Refugee Review Tribunal hearings) the appropriate apprehended bias rule might in future be stated in the following terms (from the High Court in *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [28]):

“Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a *hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias.*” (my emphasis)

Normally, if bias becomes an issue, it should be raised or be dealt with by an applicant immediately upon the issue first becoming apparent. In court proceedings this might well occur while proceedings are being conducted. Allegations of bias can be waived by failure to raise the issue promptly and before the decision maker concerned.

Actual bias cases are rare. They are normally clear cut and rarely become the subject of legal proceedings. Apprehended or ostensible bias is not as straightforward to ascertain and is very often litigated.

Apprehended bias was considered by the High Court in *Vakauta v Kelly* (1989) 167 CLR 568 where the Court held that in respect of comments by a judge, in making observations about some doctors in the course of his comments while hearing a personal injuries case, those comments amounted to ostensible bias because they might lead to the conclusion, in the mind of the reasonable or fair-minded observer, that the judge was heavily influenced by views he had formed on other occasions rather than by an assessment based on the case in hand. In that case, at page 572-3, the Court said:

“The learned trial judge's adverse comments about Dr. Lawson, Dr. Revai and Dr. Dyball in the course of the trial of the present case were indeed strong:

"that unholy trinity"; the G.I.O.'s "usual panel of doctors who think you can do a full week's work without any arms or legs"; whose "views are almost inevitably slanted in favour of the GIO by whom they have been retained, consciously or unconsciously."

His Honour indicated that he regarded those three medical practitioners as falling within a "particular category of doctors" to whom he had an adverse attitude. He stated that he expressed his views "for the benefit of the present parties in the negotiations which were taking place." The implication of that last comment would seem to have been that the parties should negotiate any settlement on the basis that his Honour would not be influenced by what those three doctors might say in evidence. In the event, only Dr. Lawson was called to give oral evidence. Dr. Revai's written report was received in evidence. No evidence from Dr. Dyball was received."

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