

NATURAL JUSTICE

WHAT IS NATURAL JUSTICE

The rules of natural justice are principles developed at common law to ensure the fairness of decision making. Administrative decisions which affect rights, interests and legitimate expectations carry with them a duty to act fairly, in the sense of according procedural fairness. The terms 'natural justice' and 'procedural fairness' can be used interchangeably.

The procedural process for decision making should commence as soon as possible to ensure that persons who may be adversely affected by a decision are accorded a proper opportunity to present their case. The obligation to observe the principles of natural justice is satisfied by adopting a procedure which conforms to that which a reasonable and fair decision maker would adopt in the circumstances.¹

SUMMARY

There are three recognised rules of procedural fairness:

1. **the hearing rule** - free from bias or apprehension of bias by the decision-maker;
2. **the bias rule** - providing people likely to be adversely affected by decisions an opportunity to:
 - a. present their case and
 - b. have their response taken into consideration before the decision is made;
3. **the evidence rule** - rational or based on evidence that is logically capable of supporting the facts.

Applying the rules of procedural fairness promotes sound decision making.

DISCUSSION

Any process purporting to be in accordance with the rules of natural justice should be:

- fair;
- flexible; and
- clear to all concerned exactly how natural justice will be afforded.

Fairness is not an abstract concept and decision makers should be concerned with avoiding practical injustice.² When making a decision that affects the rights, interests and legitimate expectations of any person, the critical question is: what does the duty to act fairly require in the circumstances of the particular case?³

Excluding procedural fairness may be justified in certain limited circumstances, for example where urgent action needs to be taken in the public interest.

The common law duty to act fairly in the making of administrative decisions is subject only to the clear manifestation of a contrary legislative intention.

The hearing rule

The hearing rule provides the right to a fair hearing. A fair hearing will generally involve:

- giving a respondent prior notice that a decision that may affect their interests will be made;
- giving a respondent prior notice of the consequence of any adverse decision;
- giving a respondent, before a hearing, all material that will be considered by a decision maker;

¹ *Kioa v West* (1985) 159 CLR 550, 627.

² *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 [37].

³ *Kioa v West* (1985) 159 CLR 550, 585.

- disclosing to a respondent critical issues to be addressed;
- giving a respondent a reasonable opportunity to present their case;
- consideration of whether there should be an oral hearing or whether the issues can be presented and decided fairly by written submission alone.⁴

In many cases fairness, can be achieved without an oral hearing.

The bias rule

The bias rule provides that a person may not be the judge in his or her own case. The rule against bias is to ensure that the decision maker can be objectively considered to be impartial and not to have pre-judged a decision.⁵ The decision maker should not have an interest in the matter to be decided.

The bias rule is to be determined by reference to the standards of a hypothetical observer who is fair minded and reasonably well informed.

The evidence rule

The evidence rule provides a requirement for decisions to be made based on probative evidence, not based on mere speculation or suspicion. An inference should only be made if it is reasonably open on the facts.⁶

When reaching a decision, decision makers should:

- take into account relevant considerations;
- not take into account irrelevant considerations;
- not make a decision that is so unreasonable that no reasonable person could have so made the decision.

Decision makers should give proper, genuine and realistic consideration to any submissions and obtain further evidence, if required.

⁴ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 397.

⁵ *Ibid*, 609.

⁶ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.