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Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

Facts: Australia's ratification of the (unincorporated) Convention on the Rights of the Child was held capable of generating a legitimate expectation that a decision-maker (deciding on deportation of a parent) would act consistently with the Convention, or give notice and an opportunity to argue against departing from it.

Principle / Rule: High-water mark of the doctrine — an UNINCORPORATED TREATY could found a legitimate expectation relevant to procedural fairness. Heavily criticised afterwards (arguably undemocratic — the executive alone, via ratification, shaping domestic procedural obligations).

Re Minister for Immigration; Ex parte Lam (2003) 214 CLR 1

Facts: The applicant argued a legitimate expectation arose from an official's indication about a course of action later not followed.

Principle / Rule: The High Court began questioning the utility of 'legitimate expectation' — Gleeson CJ (9-14) discussed the PURPOSE of natural justice; the concept can distract from the real inquiry, namely what fairness actually requires.

Plaintiff S10/2011 v Minister for Immigration (2012) 246 CLR 636

Facts: Concerned whether a discretionary, 'non-compellable' statutory power (dispensing with visa criteria) attracted natural justice at all, given no legitimate expectation could easily be identified.

Principle / Rule: The High Court effectively DISCARDED 'legitimate expectation' as the touchstone. Adopting Brennan J in Kioa: the presumption of natural justice may apply to ANY statutory power apt to affect ANY interest of an individual, whether or not that interest amounts to a legal right, or is proprietary/financial, or relates to reputation. 'Legitimate expectation' and standing to sue may overlap but are not necessarily co-extensive.

Confirmed in Minister for Immigration v WZARH (2015) 90 ALJR 25: the High Court called 'legitimate expectation' "an unfortunate expression" that neither determines whether, nor the content of, procedural fairness. The safer modern formulation: in the absence of clear contrary legislative intent, administrative decision-makers must accord procedural fairness to those affected by their decisions — full stop.

4. Statutory Exclusion or Modification of Natural Justice

Even where the threshold is met, Parliament may exclude or modify natural justice. But courts apply a strong presumption AGAINST exclusion – the 'principle of legality'. Such intention must be **clearly manifested** by **unmistakable unambiguous** language¹².

4.1 The Principle of Legality

Annetts v McCann (1990) 170 CLR 596

Facts: Parents of boys who died sought standing/notice in a coronial inquiry into the deaths.

Principle / Rule: Mason CJ, Deane & McHugh JJ: natural justice principles can be excluded only by "plain words of necessary intendment" – NOT inferred merely from the presence in the statute of some procedural rights consistent with natural justice.

Commissioner of Police v Tanos (1958) 98 CLR 383

Facts: Concerned whether a statutory procedure impliedly excluded a hearing requirement.

Principle / Rule: Dixon CJ & Webb J: **an intention to exclude natural justice is not to be assumed** or "spelled out from indirect references, uncertain inferences or equivocal considerations."

¹ Coco v The Queen

² As seen in cases such as Annetts and Tanos, Natural Justice is a fundamental common law right. The exclusion of NJ...

Minister for Immigration v WZARH (2015) 256 CLR 326

Facts: Considered whether a person is always entitled to an ORAL hearing.

Principle / Rule: There is NO general rule that procedural fairness requires an oral hearing in every case. Whether one is needed depends on the practical requirements of fairness in context (e.g. it may be needed where there are evidential inconsistencies, credibility is at issue, or the person's English is limited).

Khalil v Minister for Home Affairs (2019) 271 FCR 326 [31]-[36]: a refusal of a short ADJOURNMENT during a hearing was examined both as a possible denial of natural justice AND as potentially 'legally unreasonable' — the two grounds can overlap on the same facts (see also Minister for Immigration v Li (2013) 249 CLR 332, a failure-to-adjourn case discussed further under unreasonableness in Workshop 6).

5.4 Representation and Cross-Examination

Cains v Jenkins (1979) 42 FLR 188

Facts: Considered whether a party is entitled to legal representation before a tribunal.

Principle / Rule: Sweeney & St John JJ: there is NO absolute right to representation, even where livelihood is at stake – but the seriousness of the matter and complexity of the issues may mean a refusal offends natural justice.

WABZ v Minister for Immigration (2004) 134 FCR 271, 295: representation may be required where the matter is complex and the person lacks the capacity to comprehend the proceedings without assistance.

There is no general right to CROSS-EXAMINE witnesses in administrative proceedings (more informal/inquisitorial than civil litigation) — but Commissioner for Children and Young People v FZ [2011] NSWCA 111 confirms cross-examination may need to be PERMITTED where the credibility of a key witness is in issue.

5.5 Special Context: Political and Cabinet Decisions

South Australia v O'Shea (1987) 163 CLR 378

Facts: O'Shea was under indefinite ('preventive') detention. A 3-tier release process required: (1) medical practitioners' assessment; (2) a Parole Board hearing (O'Shea and his lawyer appeared, and the Board recommended release); (3) Cabinet's decision (advised the Governor NOT to release, citing the 'public interest', without O'Shea appearing before Cabinet).

Principle / Rule: The High Court held the hearing before the Parole Board gave O'Shea a sufficient opportunity to present his case — viewed as a WHOLE, the process (Board hearing + Cabinet's political decision on public interest) satisfied procedural fairness; O'Shea did not need a separate hearing before Cabinet itself. Mason CJ: the duty to accord natural justice CAN require that written submissions (or a summary) be put before Cabinet on matters closely related to the individual case — but it is unrealistic to require Cabinet to hear submissions on high-level general policy. If Cabinet intends to rely on NEW material not before the Board, fairness would then require the person be given a chance to address it.

6. Materiality of a Breach

Even where a breach of natural justice is established, it will only amount to jurisdictional error (and **ground relief**) if the breach is **MATERIAL** to the decision – a realistic possibility the decision COULD have been different absent of the error.

Minister for Immigration v SZMTA (2019) 264 CLR 421

Facts: A visa applicant was not told that some documents before the Tribunal were covered by a 'notification certificate' (s438 Migration Act) withholding them on public interest grounds.

Principle / Rule: Bell, Gageler & Keane JJ (majority): a breach of procedural fairness is a jurisdictional error only if it results in 'PRACTICAL INJUSTICE' — i.e. it denies an opportunity to make submissions AND that denial is MATERIAL to the