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Précis Paper

Procedural Fairness In Multi-Stage Decision-Making Processes

A discussion about when the obligation to afford procedural fairness arises in multi-stage decision-making processes and what the content of this obligation is.

Discussion Includes

- Different types of decision-making processes
- At what stage in the decision-making process does the obligation to afford procedural fairness arise?
- What is the content of this obligation?
- When a defect in procedural fairness can be cured at a later stage in the decision-making process
- When suspensions must afford an obligation of procedural fairness

Précis Paper

Procedural Fairness In Multi-Stage Decision-Making Processes

1. In this edition of BenchTV, Naomi Sharp (Barrister) and Celia Winnett (Barrister) discuss when the obligation to afford an affected party the reasonable opportunity to be heard arises in multi-stage decision-making processes.

Introduction

2. It is challenging to distinguish between multi-stages in a single decision-making process and a process that contains multiple, separate decisions. The obligation to afford procedural fairness will manifest differently, according to each.

3. In *South Australia v O'Shea* (1987) 163 CLR 378, Justice Brennan articulated that what is required from an administrative decision-maker, is different to what is required from a judicial decision-maker. Modern, complex bureaucracies have greater needs for efficiency and thus have greater flexibility to delegate stages of the decision-making process. The fact finder does not have to be the ultimate decision-maker in administrative decisions.

4. Whether the stages are steps along the way to a final decision, or separate distinct decisions, will affect the time at which the obligation to confer a proper opportunity to be heard arises.

5. In *Kioa v West* (1985) 159 CLR 550, Justice Mason held that procedural fairness was a common law duty, whilst Justice Brennan held that procedural fairness was a principle of statutory construction. In *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 this debate was settled and the concepts were fused through the principle of legality. Procedural fairness is a fundamental common law right and, as a matter of statutory construction; it is presumed that the legislature does not intend to interfere with common law rights unless it is made abundantly clear. In *S10/2011 v Minister for Immigration & Citizenship* (2012) 246 CLR 636, (confirmed in *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901), the court held that the presumption of procedural fairness could be displaced if the words of the statute, or a necessary implication in the statute, excludes the obligation.

Interests apt to attract the obligation

6. The starting point is to ask if a person or company's interest will be affected by the exercise of statutory power. The test is very broad.

7. The concept of legitimate expectation in Kioa v West (1985) 159 CLR 550 is now redundant. Instead, it was articulated in *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901) that:

> "a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to the individual."

8. The view of Justice Brennan in Kioa v West (1985) 159 CLR 550, has now been picked up by the entire High Court. It suggests that an interest attracts the obligation of procedural fairness wherever a person's interests are affected in a different way to the majority of the public. Therefore, often the issue does not revolve around the existence of the obligation, but its content.

Content of the obligation

9. There is no fixed content. What is required to discharge the obligation to afford a reasonable opportunity to be heard will depend upon the statutory regime and the circumstances of the case. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 it was emphasised that the law is concerned with avoiding practical injustice.

10. It is important not to assume fairness will be determined on the judicial model of procedural fairness, in *South Australia v O'Shea* (1987) 163 CLR 378 Justice Brennan identified the greater ability for delegation in the administrative decision-making process.

11. There are many dimensions to the reasonable opportunity to be heard. They include, requirements for the timeline and content of notice; obligations of disclosure on the part of the decision-maker; and the form of the opportunity to be heard. Particularly, whether an oral hearing is necessary or a submission will suffice.

The obligation in a multi-stage decision-making process

12. The timing of the obligation of procedural fairness is determined in relation to the precise identification of the functions of the various statutory actors and the purposes for which they are exercising their powers.

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

13. This case concerned a preventive detention legislative regime in South Australia under the *Criminal Law Consolidation Act 1935* (SA). Mr O'Shea was convicted of two offences of indecent assault against children. Pursuant to s77a, the sentencing judge declared Mr O'Shea to be a person who was "incapable of exercising proper control over his sexual instincts" and he was detained indefinitely.

14. The Parole Board accorded Mr O'Shea procedural fairness. Despite their recommendations that Mr O'Shea be released on licence, the Governor-in-Council decided against his release. Mr O'Shea claimed that he had been denied procedural fairness because he did not have a separate opportunity to be heard before the Governor-in-Council.

15. The High Court held that the Governor-in-Council owed an obligation to afford procedural fairness to Mr O'Shea, but, as the Parole Board and the Governor-in-Council were involved in different stages of the same decision-making process, the decision-making process "viewed in its entirety" provided sufficient procedural fairness to discharge its obligation to Mr O'Shea.

16. If the ultimate decision-maker takes into account a matter, which was not in issue during the "hearing", then the ultimate decision-maker must give the affected party a fresh opportunity to be heard.

17. This is also relevant for single decision-making processes (*Duncan v ICAC* [2016] NSWCA 143; Glynn v ICAC (1990) 20 ALD 214). As long as the affected party is given an opportunity to be heard, on all of the relevant matters raised for consideration by the end of the hearing or investigation then the obligation is discharged.

Brettingham-Moore v St Leonards Municipality (1969) 121 CLR 509

18. A local council challenged a report that the Municipal Commission prepared and submitted to the Governor. It recommended the reconstruction of certain local government areas in Tasmania. The local council alleged it had been denied procedural fairness because the Municipal Commission had not exposed all the material available to it or expressed the views it held about matters before reporting to the Governor about them.

19. S14 of the *Local Government Act 1962* (Tas) was silent on the procedure for the preparation of the report, but, s15, was very detailed on the procedures to be followed once the report was received by the Governor.

20. The court held that this was a single decision-making process involving a number of steps and that it should not be assumed that procedural fairness should be afforded at the first stage. Barwick CJ discerned a legislative intention that an affected party should be accorded an opportunity to be heard at the second stage due to the detail in s15.

Minister for Local Government v South Sydney City Council (2002) 55 NSWLR 381

21. Unlike in *Brettingham-Moore*, the *Local Government Act 1993* (NSW), s.263 contemplated that the hearing would take place at the first stage. The legislative intent was that an opportunity to be heard was to be conferred at the first stage of the process and that obligation could not be ignored on the basis that the Minister may subsequently afford the affected parties an opportunity to be heard.

M47/2012 v D-G of Security (2012) 251 CLR 1

22. This was a challenge to an "adverse security assessment" issued by ASIO under the ASIO Act 1979 (Cth). French CJ (in the minority on this point) considered that a challenge on the grounds of procedural fairness may be rejected on the basis that it is premature or hypothetical. His Honour's reasoning demonstrates that, in some cases, until the subsequent exercise of the power, or the later stage in the process is completed, it is premature to say that procedural fairness has not been afforded. For example, procedural fairness may be cured by opportunities provided at a later stage of a multi-stage decision-making process.

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

23. The court concluded that when there are two distinct decision-making processes, a lack of procedural fairness at one stage of the process could not be cured by affording procedural fairness at a later stage of the process.

24. Under the *Criminal Justice Act 1989* (Qld), the Criminal Justice Commission in Queensland recommended to a Parliamentary Committee that the Ainsworth Group should not be permitted to participate in the gaming machine industry in Queensland. The report received wide publicity. Ainsworth had not been notified or provided the opportunity to be heard or answer the allegations against them.

25. The High Court accepted that the Ainsworth Group was entitled to procedural fairness by reason that the report impacted its business reputation. The functions of the Criminal Justice Commission were distinct to the Parliamentary Committee and therefore Ainsworth had not been afforded procedural fairness by the 'entire process'. It was significant to the Court that the second stage of the process could not undo the reputational damage to the Ainsworth Group that arose from the first stage. This was another reason for characterising the two processes as involving distinct decisions.

Haoucher v Minister of State for Immigration and Ethnic Affairs (1990) 169 CLR 648

26. Mr Haoucher was a national of Lebanon residing in Australia. He was convicted of an offence relating to the possession and intention to supply cannabis. The minister's delegate decided to deport him under the Migration Act 1958 (Cth).

27. The Administrative Appeals Tribunal made recommendations to the minister to overturn its decision. The government's policy was that the minister would only overturn a decision in "exceptional circumstances" where "strong evidence" could be produced. The majority found these factors constituted a separate decision-making process that required procedural fairness was afforded to Mr Haoucher. The minority found that the policy constituted a degree of discretion and was not inconsistent with the finding of a single, multi-stage decision-making process.

Suspension

28. If the respondent represents a danger, threat or other challenge to the public interest, it may be necessary to take a precautionary approach by suspending the respondent pending the resolution of the case. In *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594, it was held, that suspension and subsequent investigation and inquiry were not to be regarded as being part of the same decision-making process for the purposes of determining whether and when the obligation to afford procedural fairness arose.

Day v Harness Racing New South Wales (2014) 88 NSWLR 594

29. Two horse trainers were suspended on an interim basis in an exercise of public power under the *Harness Racing Act 2009* (NSW). Urine samples from two horses had been found to contain prohibited performance enhancing substances. Prior to the suspension decision the trainers received no notice or opportunity to be heard. There were no requirements for urgency or any imminent danger or threat if the trainers continued to train the horses. The suspension had a dramatic affect on the trainers' livelihoods.

30. The suspension was an exercise of statutory power, which affected the interests of the trainers and thus carried an obligation of procedural fairness. Nothing in the statutory language displaced that obligation. A stage in a multi-stage decision-making process that has a direct and immediate effect suggests the need for an opportunity to be heard.

31. The need for urgent exercise of a statutory power can either limit the opportunity of an affected person to be heard or, in exceptional cases, reduce the content of procedural fairness "almost to nothingness".

Conclusion

32. Practitioners must first look at the terms of the statute to glean the legislature's intention for when the opportunity to be heard is to be conferred. Sometimes the statute can be unclear or silent on the procedure to be followed. Secondly, practitioners should consider at what point in time there could be an immediate and direct effect on a person's interest, the opportunity to be heard must be conferred before this point. When new factors are considered, the party should be afforded another opportunity to be heard.

33. The courts must strike a balance between the effectiveness and efficiency of government administration and the practical requirements of justice for an affected individual.

BIOGRAPHY

Naomi Sharp

Barrister, Sixth Floor, Selborne Wentworth Chambers

After completing an association with Justice Gaudron at the High Court and lecturing in public law, Naomi was admitted as a solicitor in 1998 and called to the Bar in 2002. There are three key strands to Naomi's practice. First she practises in public law including judicial and merits review, constitutional law and public interest immunity. Secondly, Naomi acts in inquests, special inquiries and disciplinary proceedings and has recently appeared as Counsel Assisting in a number of case studies in the Royal commission into Intuitional Responses to Child Sexual Abuse. Naomi also practises extensively in competition law and trade practices.

Celia Winnett

Barrister, Sixth Floor, Selborne Wentworth Chambers

Celia was admitted to practice in 2009 and called to the Bar in 2016, accepting briefs in all areas of law. Before coming to the Bar, she served as Counsel Assisting the Commonwealth Solicitor-General, Justin Gleeson SC. Celia's principal areas of practice are public law, competition and consumer law, contract and general commercial law and taxation and revenue law.

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