

ANZOA 2016 CONFERENCE

THE CONTINUOUS RISE OF THE RULES OF NATURAL JUSTICE

CLAYTON UTZ

Barry Dunphy, Partner

5 May 2016

OVERVIEW

- ▶ The importance of the rules of natural justice
- ▶ What is happening with bias cases?
- ▶ How is procedural fairness working in practice?
- ▶ What are the key emerging issues?

NATURAL JUSTICE RULES

- ▶ Chief Justice Robert French has observed that the rules of natural justice:
 - » are part of our cultural heritage;
 - » are instrumental to good decision-making;
 - » support the rule of law by promoting public confidence in official decision-making;
 - » have a rhetorical or libertarian justification;
 - » give due respect to the dignity of individuals; and
 - » is democracy's guarantee of the opportunity for all to play their part in the political process

NATURAL JUSTICE RULES

- ▶ The notion of a "fair go" means that before a decision is made that affects a person's interests, they should have a right to be heard by an impartial decision-maker
- ▶ See paper by Chief Justice Robert French titled "Procedural Fairness" - Indispensable to Justice? (dated 7 October 2010)

NATURAL JUSTICE RULES

- ▶ The implication of the principles of natural justice in a particular statute is arrived at by a process of statutory construction
- ▶ The observance of the principles of natural justice is a condition that is attached to the relevant statutory power. A failure to comply with the condition means that the resultant decision will be unauthorised by the statute and will be invalid

Saeed v Minister for Immigration and Citizenship (2010) 267 ALR 204

NATURAL JUSTICE RULES

- ▶ There has been a discernible shift in focus in the case law from the nature of the power in the hands of the decision-maker to the effect on the individual
- ▶ In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR Gleeson CJ noted:
 - » "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."

BIAS CASES

- ▶ In recent times within public sector agencies there has been a marked decrease in the number of bias cases
- ▶ This is no doubt a result of the more detailed public service ethics standards and the increased understanding in respect of declaring conflicts of interest
- ▶ So it is quite rare to have allegations made that a decision-maker is guilty of actual or apparent bias

BIAS CASES

- ▶ In *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 the High Court had to consider whether a Ministerial decision was invalid based on alleged bias
- ▶ The specific allegation was that two Departmental officers who had participated in formulating one of the key briefing documents were tainted
- ▶ The issue was whether the apprehended bias flowed through to the Minister as the final decision-maker

BIAS CASES

- ▶ The High Court set out the relevant test being whether a fair-minded observer would form a view that there was a reasonable apprehension that the final decision-maker had deviated from the true course of decision-making
- ▶ On the facts, the Minister was held by the High Court to not be guilty of actual or apparent bias. However, the facts in that case were unusual in that the Minister sought detailed external advice by way of a peer review of the Department's recommendation

BIAS CASES

- ▶ More recently in *Isbester v Knox City Council* [2015] HCA 20 the High Court considered whether a Council officer who had been involved in a dangerous dog matter was guilty of bias by then acting as a member of the Council's Domestic Animals Act Committee which resulted in the making of a decision about the possible destruction of the relevant dog
- ▶ The High Court found that the Council officer was guilty of apparent bias

BIAS CASES

- ▶ Interestingly, Justice Gageler in a separate judgement explored the circumstances where apprehension of bias could arise because an affected party (not being the final decision-maker) had:
 - » participated in the decision-making deliberations;
 - » been present during the decision-making deliberations; or
 - » had made a recommendation that the final decision be made

BIAS CASES

- ▶ In *Wirth v Mackay Hospital and Health Service* [2015] QSC 39 the Queensland Supreme Court considered the *Isbester* decision in the context of a decision by the Hospital's Chief Executive Officer in a misconduct matter
- ▶ The evidence showed that a senior doctor who had been involved in instigating the investigation against the accused doctor was alleged to have early in the investigation process formed adverse views against the accused doctor

BIAS CASES

- ▶ In the end, the Court found that the decision of the recently appointed Chief Executive Officer was not affected by apparent bias
- ▶ However the more general observations of Justice Gageler in *Isbester* should not be ignored and are likely to be closely considered in future cases

PROCEDURAL FAIRNESS CASES

- ▶ Traditionally the law has recognised that "adverse" material that is "credible, relevant and significant" will need to be disclosed to an affected third party
- ▶ The older authorities suggest that a summary of the adverse material can be sufficient
- ▶ The more recent case law is now more focused on the facts and circumstances of the particular case and the associated fairness issues
- ▶ Determining what is fair and how one is to judge it in a particular case is becoming more difficult

PROCEDURAL FAIRNESS CASES

- ▶ In *Vega Vega v Hoyle & Ors* [2015] QSC 111 Justice A Lyons considered whether natural justice had been provided to the accused doctor who was subject to a range of investigation processes
- ▶ In *Vega Vega* the Court held that a breach of the rules of natural justice had occurred because the statement evidence from 58 witnesses had not been disclosed in full to the accused doctor

PROCEDURAL FAIRNESS CASES

- ▶ The Court in Vega Vega had regard to the fact that:
 - » the accused doctor did not know who were the authors of particular adverse comments and how he was to then weigh the significance of their evidence;
 - » the interview records were significant to the findings that had been made and the recommendations that were made by the investigators;
 - » favourable aspects might have been missed. This could only be checked if all of the witness transcripts were provided; and
 - » regard should be had to the enormous personal consequences for the accused doctor

PROCEDURAL FAIRNESS CASES

- ▶ A similar outcome occurred in the Wirth case
- ▶ The Court held that the provision of a very detailed summary of adverse materials whilst comprehensive was still not sufficient
- ▶ Again the failure to provide the summaries of the evidence of the 34 witnesses was held to have denied the accused doctor of the opportunity to make submissions about the credibility of the witnesses whose evidence was adverse to the accused doctor

PROCEDURAL FAIRNESS CASES

- ▶ The Court found that the Chief Executive Officer had made credibility assessments by reference to the witness summaries and the associated legal report and annexures were held to be central to her assessment task

KEY EMERGING ISSUES

- ▶ In the bias area, one clear and emerging risk for public sector agencies is to ensure that their conflict of interest policies are being complied "on the ground" by final statutory decision-makers and by all officers who have substantial input into the decision-making outcome
- ▶ This is probably the key learning from the Isbester decision

KEY EMERGING ISSUES

- ▶ In terms of procedural fairness the Vega Vega and Wirth cases both required a high level of disclosure
- ▶ These cases have highlighted a wide range of factors that appear to be relevant where an accused party is facing a significant adverse employment/career outcome
- ▶ It will be interesting to see if the Courts in other jurisdictions over time adopt a similar approach

www.claytonutz.com