

14. Procedural Fairness

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Summary

14.1 A fair procedure for decision making is an important component of the rule of law. The common law recognises a duty to accord a person procedural fairness—a term often used interchangeably with natural justice—before a decision that affects them is made.¹

14.2 Procedural fairness promotes sound decision making:

A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power.²

1 *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ); Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 397.

2 Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 25, 47.

14.3 This chapter considers the duty to afford procedural fairness in administrative decision making. Procedural fairness in judicial proceedings is addressed when considering laws encroaching on the right to a fair trial.

14.4 A number of Commonwealth laws affect the common law duty to afford procedural fairness to persons affected by the exercise of public power. Excluding procedural fairness may be justified in some instances. In particular, it may be justified where urgent action needs to be taken in the public interest.

14.5 Migration laws that encroach on the duty to afford procedural fairness attracted the most comment and criticism in submissions to this Inquiry. Some of these laws would benefit from further review to consider whether the infringement of the duty to afford procedural fairness is proportionate, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those in the *Migration Act 1958* (Cth) (*Migration Act*) relating to:

- the mandatory cancellation of visas; and
- the fast track review process for decisions to refuse protection visas.

The common law

14.6 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (Lam)*, Callinan J explained that ‘natural justice by giving a right to be heard has long been the law of many civilised societies’. He quoted Stanley de Smith, Harry Woolf and Jeffrey Jowell:

That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca’s *Medea*, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.³

14.7 The common law required courts of law to observe the two basic requirements of natural justice: fair hearing and the avoidance of actual or apprehended bias. These rules were extended to administrative tribunals that have a ‘duty to act judicially’ in making decisions affecting vested rights and liberties of persons. Later, judges began to speak of a ‘duty to act fairly’ because the idea of acting judicially was not flexible enough to apply to administrative actions that were not strictly judicial but nevertheless affected vested rights and liberties.⁴

3 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [140], quoting Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 378–9. See also Chief Justice Robert French, ‘Procedural Fairness—Indispensable to Justice?’ (Sir Anthony Mason Lecture, University of Melbourne Law School Law Students’ Society, 7 October 2010).

4 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 8th ed, 1998) 573.

14.8 Procedural fairness traditionally applied to decisions affecting rights and interests related to ‘personal liberty, status, preservation of livelihood and property’.⁵ Over the course of the 20th century, the concept of procedural fairness developed significantly, eventually applying to a diverse range of government decisions affecting property, employment, reputation, immigration and financial and commercial interests.⁶

14.9 In *Annetts v McCann*, a case involving the right of two parents to make submissions at a coronial inquiry into the deaths of their two sons, Mason CJ, Deane and McHugh JJ noted the continued evolution of the concept of procedural fairness. They remarked that ‘many interests are now protected by the rules of natural justice which less than 30 years ago would not have fallen within the scope of that doctrine’s protection’.⁷ It has more recently been said that the common law doctrine has a ‘wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers’.⁸

14.10 There has been some debate as to whether the duty to afford procedural fairness in the exercise of a statutory power derives from the common law or from construction of the relevant statute.⁹ In *Plaintiff M61/2010E v Commonwealth*, the Full Bench of the High Court thought it ‘unnecessary to consider whether identifying the root of the obligation remains an open question or whether the competing views would lead to any different result’.¹⁰ In 2012, the High Court considered that such a debate was unproductive and proceeded on a false dichotomy. The principles and presumptions of statutory construction are part of the common law, and as such

the ‘common law’ usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.¹¹

Procedural fairness: the duty and its content

14.11 ‘Procedural fairness’ means acting fairly in administrative decision making. It relates to the fairness of the procedure by which a decision is made, and not the

5 Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, ‘2.5 Judicial Review of Administrative Action: Procedural Fairness’ [2.5.170].

6 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) [10.1.9].

7 *Annetts v McCann* (1990) 170 CLR 596, 599.

8 Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39 *Monash University Law Review* 285, 285.

9 Cf the judgments of Mason J and Brennan J in *Kioa v West* (1985) 159 CLR 550. Mason J considered this to be a ‘fundamental rule of the common law doctrine of natural justice’: 582. Brennan J reasoned that ‘there is no free-standing common law right to be accorded natural justice by the repository of a statutory power’: 610. See further Groves, above n 8.

10 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [74].

11 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).

fairness in a substantive sense of that decision.¹² A person may seek judicial review of an administrative decision on the basis that procedural fairness has not been observed.¹³ In *Re Refugee Tribunal; Ex parte Aala*, the High Court held that the denial of procedural fairness by an officer of the Commonwealth, where the duty to observe it has not been validly limited or extinguished by statute, will result in a decision made in excess of jurisdiction and thus attract the issue of prohibition under s 75(v) of the *Constitution*.¹⁴

14.12 In considering whether there has been a denial of procedural fairness, courts will examine two issues:

- whether a duty to afford procedural fairness exists; and
- if such a duty exists, the content of procedural fairness in the particular case.

Is there a duty?

14.13 In 2015, the High Court succinctly stated that, in ‘the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions’.¹⁵

14.14 The manner in which a person’s interests are affected is relevant to whether a duty to afford procedural fairness exists. There is less likely to be a duty to afford procedural fairness where a decision affects a person as a member of the public or a class, rather than in their individual capacity.¹⁶ Procedural fairness may not apply where a decision ‘affects so many people that it is really a legislative act; or where the range of public policy considerations that the deciding body can legitimately take into account is very wide’.¹⁷

12 Aronson and Groves, above n 1, 399. However, a decision made without evidence, or contrary to evidence, will not generally be considered to have afforded procedural fairness: Bill Lane, ‘The “No Evidence” Rule’ in Matthew Groves and Hoong Phun Lee (eds), *Australian Administrative law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 233, 241–2.

13 Australian Constitution s 75; *Judiciary Act 1903* (Cth) s 39B; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(a). Judicial review is considered further in Ch 15.

14 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [17], [41] (Gaudron and Gummow JJ, Gleeson CJ agreeing); [132], [151]–[152] (Kirby J); [169]–[171] (Hayne J). Prohibition is a prerogative remedy issued by a court to prevent a tribunal or inferior court, which is acting or threatens to act in excess of its jurisdiction, from proceeding any further: Ray Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (2015). Where there is a decision-making procedure that has been statutorily prescribed, failure to comply with it in making a decision may also amount to jurisdictional error, known as ‘procedural ultra vires’, and the decision will be invalid: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, [77] (McHugh J); [173] (Kirby J); [204]–[208] (Hayne J).

15 *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ). Procedural fairness will not be implied in relation to an exercise of legislative power by an administrator—that is, in the making of delegated legislation.

16 Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, ‘2.5 Judicial Review of Administrative Action: Procedural Fairness’ [2.5.150]. See also Aronson and Groves, above n 1, 428–36.

17 Smith and Brazier, above n 4, 570.

14.15 A duty to afford procedural fairness may be excluded by legislation. This is a matter of statutory construction, the key question being whether legislation, ‘properly construed, limits or extinguishes the obligation to accord natural justice’.¹⁸ Professors Mark Aronson and Matthew Groves have suggested that courts increasingly construe legislation so as to imply that a duty to afford procedural fairness exists, particularly since the statement by the High Court in *Saeed v Minister for Immigration and Citizenship* (*Saeed*) that procedural fairness is protected by the principle of legality.¹⁹ This has made legislative exclusion ‘very difficult in practice’.²⁰

14.16 Courts have found that a duty to afford procedural fairness may be impliedly excluded where it would be inconsistent with the proper operation of the relevant statutory provisions.²¹

14.17 Express statutory provisions that set out procedural requirements to be followed in the making of a decision may not establish with the requisite clearness an intention to exclude natural justice.²² Groves has observed that the ‘weight of more recent cases suggests that the courts are very reluctant to accept that a legislative code is exhaustive and therefore intended to exclude the implication of further common law hearing rights’.²³ This may be the case even where the provisions are described as a ‘procedural code’.²⁴ In *Saeed*, the High Court accepted that provisions stating that procedures contained in the *Migration Act* were ‘exhaustive’ statements of the natural justice hearing rule were effective to exclude the implication of natural justice, but only in relation to the matters to which the provisions referred.²⁵

Content of procedural fairness

14.18 There is no fixed content to the duty to afford procedural fairness. The fairness of the procedure depends on the nature of the matters in issue, and what would be a reasonable opportunity for parties to present their cases in the relevant circumstances. Mason J stated in *Kioa v West* that ‘the expression “procedural fairness” ... conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case’.²⁶ In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, Gleeson CJ emphasised that ‘fairness is not an abstract concept’ and that the ‘concern of the law is to avoid practical injustice’.²⁷

14.19 Aronson and Groves have noted that the willingness on the part of the courts to imply a duty to afford procedural fairness, and reluctance to find that it has been

18 Aronson and Groves, above n 1, 454.

19 Ibid 455.

20 Ibid.

21 Ibid. See, eg, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

22 Aronson and Groves, above n 1, 259–60.

23 Groves, above n 8, 310.

24 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, [90]–[95] (Gaudron J); [143] (McHugh J); [178] (Kirby J).

25 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

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

27 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [37]. For a more detailed discussion of practical justice, see Ch 8.

excluded by statute, has meant that the crucial question will usually be the content of procedural fairness rather than whether the duty exists.²⁸

14.20 Procedural fairness traditionally involves two requirements: the fair hearing rule and the rule against bias.²⁹ The hearing rule requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests.³⁰ In *Kioa v West*, Gibbs CJ said that the ‘fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power’.³¹ The rule against bias ensures that the decision maker can be objectively considered to be impartial and not to have pre-judged a decision.³²

14.21 The content of the rule against bias is flexible, and determined by reference to the standards of the hypothetical observer who is fair minded and informed of the circumstances.³³

14.22 The specific content of the hearing rule will vary according to statutory context. However, a fair hearing will generally require the following:

- Prior notice that a decision that may affect a person’s interests will be made.³⁴ This has been referred to as a ‘fundamental’ or ‘cardinal’ aspect of procedural fairness.³⁵
- Disclosure of the ‘critical issues’ to be addressed, and of information that is credible, relevant and significant to the issues.³⁶
- A substantive hearing—oral or written—with a reasonable opportunity to present a case.³⁷ Whether an oral hearing should be provided will depend on the circumstances. The ‘crucial question is whether the issues can be presented and decided fairly by written submissions alone’.³⁸ In some circumstances, there may be a duty to allow a person to be legally represented at a hearing.³⁹

28 Aronson and Groves, above n 1, 491. This echoes the language used by Mason J in *Kioa v West*, who said that 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?’: *Kioa v West* (1985) 159 CLR 550, 585.

29 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [25] (Gleeson CJ); Aronson and Groves, above n 1, 398–9.

30 Aronson and Groves, above n 1, 398–9.

31 *Kioa v West* (1985) 159 CLR 550, 563, quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360.

32 Aronson and Groves, above n 1, 399; Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, ‘2.5 Judicial Review of Administrative Action: Procedural Fairness’ [2.5.20].

33 Aronson and Groves, above n 1, 609.

34 Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, ‘2.5 Judicial Review of Administrative Action: Procedural Fairness’ [2.5.460].

35 Aronson and Groves, above n 1, 517.

36 *Kioa v West* (1985) 159 CLR 550, 587 (Mason J); Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, ‘2.5 Judicial Review of Administrative Action: Procedural Fairness’ [2.5.530]; Aronson and Groves, above n 1, 517.

37 Aronson and Groves, above n 1, 549; Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, ‘2.5 Judicial Review of Administrative Action: Procedural Fairness’ [2.5.630].

38 Aronson and Groves, above n 1, 564.

39 *Ibid* 567.

14.23 The balancing of issues to determine what fairness requires in a particular case may have the result that the content of procedural fairness is greatly reduced. This may be the case, for example, where issues related to national security arise. In *Leghaei v Director-General of Security*, the Federal Court considered the duty to afford procedural fairness in the making of an ‘adverse security assessment’ by the Australian Security Intelligence Organisation (ASIO).⁴⁰

14.24 Adverse security assessments are relevant to administrative decisions related to visa status.⁴¹ In *Leghaei*, the receipt of an adverse security assessment resulted in the cancellation of the plaintiff’s residency visa.⁴²

14.25 The primary judge found that there existed ‘a duty to afford such degree of procedural fairness in the making of an adverse security assessment as the circumstances could bear, consistent with a lack of prejudice to national security’.⁴³ However, upon considering the balance to be struck between the public interest in national security and a duty to disclose the critical issues on which an administrative decision is likely to turn, the primary judge held that the content of procedural fairness was ‘reduced, in practical terms, to nothingness’.⁴⁴

14.26 On the other hand, it may be that, where a decision ‘would have especially serious consequences upon a person affected, the hearing rule would require detailed procedural requirements’.⁴⁵

Protections from statutory encroachment

Australian Constitution

14.27 The *Australian Constitution* does not prevent statutory encroachment upon the duty to afford procedural fairness in administrative decision making. It does not

40 *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005). An adverse security assessment is one that is prejudicial to the interests of the person, and contains a recommendation that prescribed administrative action, the implementation of which would be prejudicial to the interests of the person, be taken or not be taken: *Australian Security Intelligence Organisation Act 1979* (Cth) s 35.

41 The exercise of any power, or the performance of any function, in relation to a person under the *Migration Act* falls within the definition of ‘prescribed administrative action’: *Australian Security Intelligence Organisation Act 1979* (Cth) s 35(1).

42 *Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007) [14]. Additionally, a person who receives an adverse security assessment will not be eligible for a protection visa: *Migration Act 1958* (Cth) s 36(1B).

43 *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005) [83].

44 *Ibid* [88]. On appeal, the Full Federal Court considered that the balance struck by the primary judge was correct: *Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007) [51]–[55]. See also *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1. The situation for a non-citizen affected by an adverse security assessment has been described as a ‘legal black hole’: the person is ‘unable to know the case against them and thus unable to effectively challenge the unknown allegations; enjoying no right at all of merits review; and enjoying only a legal fiction of judicial review’: Ben Saul, ‘“Fair Shake of the Sauce Bottle”’ [2012] *Alternative Law Journal* 221, 222. A number of submissions addressed questions of procedural fairness in relation to the making of adverse security assessments: Councils for Civil Liberties, *Submission 142*; Legal Aid NSW, *Submission 137*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

45 Aronson and Groves, above n 1, 491, n 2.

prevent Parliament from modifying, by clear language, the rules of natural justice in their application to non-judicial decisions under Commonwealth law. However, as noted above, denial of procedural fairness in the exercise of a statutory power, where the duty to observe it has not been validly limited or extinguished by statute, will result in a decision made in excess of jurisdiction and attract the issue of prohibition under s 75(v) of the *Constitution*.⁴⁶

Principle of legality

14.28 The principle of legality provides some protection from statutory encroachment upon the duty to observe procedural fairness.⁴⁷ When interpreting a statute, courts will presume that Parliament did not intend to exclude procedural fairness, unless this intention was made unambiguously clear.⁴⁸ The High Court has stated that exclusion of the principles of natural justice can only occur by ‘plain words of necessary intendment’.⁴⁹ In *Saeed*, the High Court said that the ‘presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality’.⁵⁰

14.29 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.⁵¹ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.⁵²

International law

14.30 Article 14.1 of the *International Covenant on Civil and Political Rights* (ICCPR)⁵³ provides that all persons should be ‘equal before the courts and tribunals’ and that, ‘in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’. The phrase ‘suit at

46 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82. The original jurisdiction vested in the High Court by s 75 of the *Constitution* cannot be removed by Parliament: *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 36 (Brennan, Deane and Dawson JJ). See also Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 196–197. See further Ch 15. For consideration of the constitutional protection of procedural fairness in the judicial process, see Ch 8.

47 The principle of statutory interpretation known as the ‘principle of legality’ is discussed more generally in Ch 2.

48 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

49 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

50 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

51 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

53 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

law' has been taken to include some administrative law matters, and this right extends to all individuals, including non-citizens.⁵⁴

Bills of rights

14.31 In some countries, bills of rights or human rights statutes provide some protection of procedural fairness.

14.32 In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.⁵⁵ In New Zealand, human rights legislation requires any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law to observe natural justice.⁵⁶ In Canada, any deprivation of life, liberty and security of the person must be informed by principles of 'fundamental justice'.⁵⁷

Justifications for laws that deny procedural fairness

14.33 Some have argued that no justification exists for excluding procedural fairness, given the scope that exists for flexibility in its content. For example, the Administrative Review Council has said that that 'procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary with the circumstances'.⁵⁸

Proportionality

14.34 Some stakeholders favoured the adoption of a proportionality test to determine if a law that excludes procedural fairness is justified.⁵⁹ The UNSW Law Society argued that applying a proportionality test to laws that exclude procedural fairness would involve assessing whether the laws are:

- (1) practically suitable for achieving a legitimate policy objective;
- (2) necessary, in the sense that there are no alternative means of pursuing that objective that are less inimical to procedural fairness, yet are equally practicable and as likely to succeed; and
- (3) appropriate, in that the detriment caused by infringing on procedural fairness must not exceed the social benefit of the legislation. Legislation is particularly likely to be inappropriate when it detrimentally affects the essential content of the right.⁶⁰

54 United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [16]–[17].

55 *United States Constitution* amend V.

56 *New Zealand Bill of Rights Act 1990* (NZ) s 27(1).

57 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 7.

58 Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006) 52.

59 Human Rights Law Centre, *Submission 39*; UNSW Law Society, *Submission 19*. For further discussion of the use of proportionality to consider whether a law that limits rights is justified, see Ch 2. See also *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).

60 UNSW Law Society, *Submission 19*.

Urgency

14.35 It may be justified to exclude procedural fairness where urgent decisions need to be made to prevent a pressing or serious harm. However, a distinction has been drawn between a statutory power which is, by its nature, inconsistent with an obligation to afford procedural fairness, and a power that may sometimes need to be exercised in urgent situations.⁶¹ An example of the former might include a power to forcibly enter premises in case of fire or natural disaster.⁶² In the latter case, it may not be justified to statutorily exclude procedural fairness. Instead, it may be more appropriate that procedural fairness be excluded only where urgency is established, or that the content of procedural fairness be limited in urgent circumstances.⁶³

14.36 A related justification that is sometimes made for excluding procedural fairness is the need to reduce delay by streamlining administrative processes.⁶⁴ However, some have argued that the aim of quick decision making should not justify a denial of procedural fairness. For example, the ANU Migration Law Program argued, in the context of migration law, that ‘the erosion of procedural fairness obligations should not be justified on the basis of efficiency or expediency in decision-making’.⁶⁵

Laws that exclude procedural fairness

14.37 A number of Commonwealth laws purport to expressly exclude procedural fairness in the exercise of a statutory power, by providing, for example, that natural justice does not apply to a particular decision.⁶⁶

14.38 Some of these laws are examined below, in relation to corporate and commercial regulation; migration law; and the exercise of maritime powers.

Corporate and commercial regulation

14.39 Procedural fairness is excluded in provisions of the *Corporations Act 2001* (Cth). The Australian Securities and Investments Commission (ASIC) highlighted a number of these, but noted that these provisions are the exception rather than the rule.⁶⁷ ASIC submitted that it may be appropriate in some circumstances to limit procedural fairness to ‘prevent financial loss or to protect the integrity of financial markets’.⁶⁸

14.40 Provisions of the *Corporations Act* that are designed to prevent financial loss caused by fraud or improper financial management contain limitations on procedural fairness to meet this policy objective. Section 739 empowers ASIC to issue interim ‘stop orders’ prohibiting offers of security where a disclosure document or associated

61 *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 241.

62 *Ibid.*

63 Aronson and Groves, above n 1, 458.

64 See eg, Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) [729], [894], [941].

65 ANU Migration Law Program, *Submission 59*.

66 See further Aronson and Groves, above n 1, 452–5.

67 Australian Securities and Investments Commission, *Submission 74*.

68 *Ibid.*

advertisement is defective.⁶⁹ Such stop orders may be made without the holding of a hearing where ASIC considers any delay in making the order would be prejudicial to the public interest.⁷⁰

14.41 The Law Council of Australia (Law Council) considered s 739 to be justified, arguing that it was a ‘legitimate temporary measure’, and that there exists a ‘public interest in exercising such an emergency power in avoiding financial loss caused by fraud or improper management’.⁷¹ Such arguments may suggest that the provision satisfies the kind of proportionality analysis set out above.

14.42 Section 915B enables ASIC to suspend or cancel an Australian Financial Services (AFS) licence by giving written notice, and without first providing procedural fairness by way of a hearing, in certain circumstances. These include where the licensee:

- becomes insolvent;⁷²
- is convicted of serious fraud;⁷³
- becomes incapable of managing their affairs because of mental or physical incapacity;⁷⁴ or
- is a body corporate and the body is a responsible entity of a registered investment where the scheme members have or are likely to suffer loss because of a breach of the *Corporations Act*.⁷⁵

14.43 An ASIC regulatory guide outlines the factors taken into account when considering whether to suspend or cancel an AFS licence. It notes that, in general, suspension or cancellation of an AFS licence is likely where there exist serious concerns about the licensee: this is ‘particularly so in instances where there is a need to protect the public and where conduct may result in investor detriment’.⁷⁶

14.44 ASIC submitted that s 915B appropriately enables the exclusion of procedural fairness from a decision to suspend or cancel an AFS licence in specified exceptional circumstances.⁷⁷ In all other circumstances, ASIC is expressly required to afford procedural fairness before seeking to suspend or cancel a licence.⁷⁸

69 See also *Corporations Act 2001* (Cth) s 1020E.

70 *Ibid* s 739(3).

71 Law Council of Australia, *Submission 140*.

72 *Corporations Act 2001* (Cth) s 915B(1)(b).

73 *Ibid* s 915B(1)(c).

74 *Ibid* s 915B(1)(d).

75 *Ibid* s 915B(3)(c).

76 Australian Securities and Investments Commission, *Licensing: Administrative Action against Financial Service Providers* Regulatory Guide 98 (July 2013) 14.

77 Australian Securities and Investments Commission, *Submission 74*.

78 *Corporations Act 2001* (Cth) s 915C. See also Australian Securities and Investments Commission, *Submission 125*.

14.45 The Law Council agreed that there may be a public interest in suspending an AFS licence without a hearing in certain circumstances, but considered that cancellation of a licence without affording procedural fairness was not justified.⁷⁹

Migration law

14.46 The ALRC received a number of submissions regarding provisions in migration law that exclude procedural fairness.⁸⁰ In particular, concerns about procedural fairness were raised in the following areas:

- decisions to refuse to grant or to cancel a visa, and the mandatory cancellation of visas; and
- the ‘fast track’ review process for decisions to refuse protection visas to some applicants.

14.47 The ALRC considers that the laws in relation to mandatory cancellation of visas on character grounds and the fast track review process would benefit from further review to consider whether the exclusion of the duty to afford procedural fairness is proportionate, given the gravity of the consequences for those affected by the relevant decision. The Law Council has suggested that the question of whether laws disproportionately encroach upon the duty to observe procedural fairness would most effectively be considered by an independent monitor of migration legislation, akin to the Independent National Security Legislation Monitor.⁸¹ The Senate Legal and Constitutional Affairs Committee recommended that changes made to the *Migration Act* in 2014, including the establishment of the fast track review process, should be reviewed three years after their enactment.

Decisions to refuse to grant or to cancel a visa

14.48 A visa may, or in some circumstances, must, be cancelled or not granted if the visa holder does not satisfy the Minister that they pass a ‘character test’.⁸² A person does not pass the character test if, among other things, the person has a ‘substantial’ criminal record; has been convicted of certain offences; or is reasonably suspected of being a member of, or having an association with, a group or organisation involved in criminal conduct.⁸³

79 Law Council of Australia, *Submission 140*.

80 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Legal Aid NSW, *Submission 137*; Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 91*; Law Council of Australia, *Submission 75*; ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Australian Lawyers for Human Rights, *Submission 43*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*; Kingsford Legal Centre, *Submission 21*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

81 Law Council of Australia, *Submission 140*; *Independent National Security Legislation Monitor Act 2010* (Cth).

82 *Migration Act 1958* (Cth) s 501.

83 *Ibid* s 501(6).

14.49 Section 501(3) excludes natural justice from the Minister's discretionary power to refuse to grant or to cancel a visa if the Minister reasonably suspects that a person does not satisfy the character test and is satisfied that the decision is in the national interest. Decisions made under s 501(3) may only be made by the Minister personally.⁸⁴

14.50 The rules of natural justice are excluded from a decision made under s 501(3A) of the *Migration Act*,⁸⁵ which compels the Minister to cancel a non-citizen's visa if the Minister is satisfied that:

- the person has been sentenced to death, or imprisonment for life or to a term of imprisonment of 12 months or more;⁸⁶ or
- an Australian or foreign court has convicted the person of one or more sexually-based offences involving a child, or found the person guilty of such an offence, or found a charge proved for such an offence, even if the person was discharged without conviction;⁸⁷ and
- the person is serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a state or a territory.⁸⁸

14.51 The mandatory visa cancellation power was introduced in 2014. The Explanatory Memorandum to the Bill containing the proposed amendment stated that the intention of the provision is that

a decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued.⁸⁹

14.52 A number of submissions raised concerns about the Minister's visa cancellation powers.⁹⁰ There was particular concern about the mandatory visa cancellation under s 501(3A). Prior to 2014, visas were not subject to mandatory cancellation on character grounds. A decision maker was able to consider a range of factors when exercising the discretion to cancel a visa. Kingsford Legal Centre argued that, 'in removing the Minister's discretion to consider these factors, the person whose visa is to be cancelled is denied due process'.⁹¹ Councils for Civil Liberties observed that the 'exclusion of

84 Ibid s 501(4).

85 Ibid s 501(5). Section 501(3A) was introduced in 2014 by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

86 Ibid s 501(3A)(a)(i).

87 Ibid s 501(3A)(a)(ii).

88 Ibid s 501(3A)(b).

89 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

90 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Kingsford Legal Centre, *Submission 110*; ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Refugee Advice and Casework Service, *Submission 30*; Kingsford Legal Centre, *Submission 21*. Concerns about the impact of these powers on freedom of association are considered in Ch 6.

91 Kingsford Legal Centre, *Submission 21*.

natural justice in these circumstances does not appear to serve any legitimate purpose'.⁹²

14.53 Some stakeholders argued that the seriousness of a decision to cancel a visa necessitates the application of procedural fairness to the decision-making process.⁹³ Cancellation of a visa may have implications for a person's liberty: a non-citizen in Australia without a valid visa is subject to mandatory detention.⁹⁴ Where a person cannot be removed from Australia,⁹⁵ that person may be detained indefinitely.⁹⁶

14.54 The Law Institute of Victoria argued, in relation to mandatory visa cancellation, that

[t]he provision denies natural justice which can only be justified where a decision must be made urgently to preserve a position or prevent something happening. This clearly would not be the case when an individual is incarcerated for more than 12 months and a decision could be made earlier in their period of detention.⁹⁷

14.55 They further argued that other existing provisions allowing for cancellation of a visa on character grounds were

already sufficient to ensure that the visa of a person who poses a real risk of harm to the Australian community can be cancelled before their release from prison and to ensure that they are detained in immigration detention while merits appeals are being conducted. The mandatory cancellation provisions are, in our view, unnecessary to achieve the stated policy intention.⁹⁸

14.56 A mandatory decision to cancel a visa is not reviewable by the Administrative Appeals Tribunal (AAT). However, a person is able to seek revocation of the decision,⁹⁹ and a decision of a delegate of the Minister not to revoke the visa cancellation will be reviewable by the AAT.¹⁰⁰

14.57 The Minister, acting personally, is empowered to set aside a decision of the AAT to revoke the cancellation of a visa under s 501(3A), and the rules of natural justice do not apply to the Minister's decision.¹⁰¹ The Explanatory Memorandum to the

92 Councils for Civil Liberties, *Submission 142*.

93 ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Refugee Advice and Casework Service, *Submission 30*. The Institute of Public Affairs commented specifically on the refusal or cancellation of visas under s 500A of the *Migration Act*.

94 *Migration Act 1958* (Cth) s 189. The cancellation of a person's visa, in certain circumstances, may also affect the rights of others such as family members.

95 Because, for example, they are a refugee or a stateless person: *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562.

96 *Migration Act 1958* (Cth) s 196. See also Refugee and Immigration Legal Centre Inc, Submission No 13 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 15 October 2014.

97 Law Institute Victoria, Submission No 12 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 3 November 2014.

98 *Ibid*.

99 *Migration Act 1958* (Cth) s 501CA. A person may also seek revocation of a decision to cancel a visa made under s 501(3); *Ibid* s 501C.

100 *Migration Act 1958* (Cth) s 500(1)(ba).

101 *Ibid* s 501BA(2)–(4).

Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) justified this by stating that ‘natural justice will have already been provided to the non-citizen through the revocation process’.¹⁰²

14.58 The Refugee and Immigration Legal Centre Inc (RILC) was concerned about the Minister’s power to set aside AAT decisions regarding visa cancellations, considering that this was ‘an unwarranted and unprecedented expansion of personal powers of the Minister [which] would also lead to persons being denied a real and meaningful opportunity to present and explain their case before a decision is made on it’.¹⁰³

14.59 The *Migration Act* also makes provision for mandatory cancellation of a visa on security grounds. If ASIO makes an assessment containing advice that it suspects that the person might be, directly or indirectly, a risk to security, recommends that the person’s visa be cancelled, and the person is outside Australia, the Minister must cancel that person’s visa.¹⁰⁴ The rules of natural justice do not apply to this decision.¹⁰⁵

14.60 Where a visa is cancelled under s 134B, the Minister must revoke the cancellation as soon as reasonably practicable after 28 days from the date of cancellation, or where ASIO makes an assessment recommending that the cancellation be revoked.¹⁰⁶ However, cancellation must not be revoked if ASIO makes an assessment containing advice that the former visa holder is a risk to security and recommending that the cancellation not be revoked.¹⁰⁷ These provisions were introduced into the *Migration Act* in 2014.¹⁰⁸

14.61 The Explanatory Memorandum to the Bill containing the proposed amendments explained that the power to cancel a visa under s 134B could be used in circumstances where ASIO suspects that a person who applies for a visa from outside Australia may pose a risk to national security, but ASIO either has insufficient information or lacks time to furnish a security assessment in advance of the person’s anticipated arrival in Australia.¹⁰⁹

14.62 ASIO argued that the provisions were justified. It stated that the regime prior to the amending Act was

effective where ASIO has the time and information available to conduct an assessment as to whether a person is directly or indirectly a risk to security, or a danger to the Australian community. However, scenarios can arise where the travel of a non-citizen to Australia is imminent, but assessing whether that person presents a direct or indirect risk to security on the basis of new information is not feasible before

102 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

103 Refugee and Immigration Legal Centre Inc, Submission No 13 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 15 October 2014. See also Kingsford Legal Centre, *Submission 110*.

104 *Migration Act 1958* (Cth) s 134B.

105 *Ibid* s 134A.

106 *Ibid* s 134C(2), (4)–(5).

107 *Ibid* s 134C(3).

108 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

109 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

the person travels. ... Depending on the gravity of the potential threat, it may be appropriate to delay that non-citizen's travel to Australia while further investigation is undertaken.¹¹⁰

14.63 The Inspector-General of Intelligence and Security (IGIS) noted that the Act provides 'no express provision allowing or preventing ASIO from making multiple temporary cancellation requests'.¹¹¹ It further noted that such cancellation requests are not subject to AAT review, and that such requests, particularly any cases of multiple requests, will be subject to IGIS scrutiny.¹¹²

14.64 A number of other provisions of the *Migration Act* explicitly provide that natural justice does not apply in decisions to revoke, not to grant or cancel a visa. The rules of natural justice are excluded from a decision of the Minister, acting personally:

- To cancel a visa when satisfied that information provided for the purpose of obtaining that visa was incorrect or bogus, and that it would be in the public interest.¹¹³
- To cancel a visa when satisfied that a ground for cancellation of the visa exists under s 116 and that it would be in the public interest.¹¹⁴ Section 116 provides the Minister with a power to cancel visas for a range of reasons, including that the holder has not complied with a condition of the visa,¹¹⁵ or that the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the Australian community, or a risk to the health or safety of an individual or individuals.¹¹⁶
- To refuse to grant to a person a temporary safe haven visa, or to cancel a person's temporary safe haven visa.¹¹⁷

Fast track review process

14.65 In 2014, the *Migration Act* was amended¹¹⁸ to create a new 'fast track' review process for decisions to refuse protection visas to some applicants, including 'unauthorised maritime arrivals'¹¹⁹ who entered Australia between prescribed times.¹²⁰ Those applicants are described in the Act as 'fast track review applicants'.¹²¹ Several

110 ASIO, Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters Bill 2014)* (2014).

111 IGIS, Submission No 1 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters Bill 2014)* (2014).

112 *Ibid.*

113 *Migration Act 1958* (Cth) s 133A(3)–(4), (7), 101–109. See also Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 91*.

114 *Migration Act 1958* (Cth) s 133C(3)–(4), (7).

115 *Ibid* s 116(1)(b).

116 *Ibid* s 116(1)(e).

117 *Ibid* s 500A(1), (3), (6), (11).

118 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

119 'Unauthorised maritime arrival' is defined in *Migration Act 1958* (Cth) s 5AA.

120 *Ibid* s 473BA.

121 *Ibid* s 5(1), 473BB.

stakeholders argued that this new process arbitrarily and unfairly excludes procedural fairness from protection visa application processes for those subject to it.¹²²

14.66 Under pt 7AA of the *Migration Act*, the Minister must refer decisions to refuse protection visas to fast track review applicants to a new body, the Immigration Assessment Authority (IAA).¹²³ The fast track review process confines the obligation for the IAA to observe the rules of natural justice by way of an exhaustive statement of the natural justice hearing rule that applies to its reviews.¹²⁴

14.67 The obligation to provide a visa applicant with a hearing is excluded in the fast track review process.¹²⁵ Unless there are exceptional circumstances, the IAA must review decisions referred to it without accepting or requesting new information and without interviewing the referred applicant.¹²⁶

14.68 Additionally, some applicants for protection visas will not be eligible to have a refusal reviewed by the IAA. These applicants include persons who, in the opinion of the Minister, have made a claim for protection in another country that was refused; give or present a bogus document in support of their application; or make a claim that is manifestly unfounded.¹²⁷ The Minister may expand both the class of persons subject to the fast track review process, and the class of persons excluded from this process, by legislative instrument.¹²⁸

14.69 The Explanatory Memorandum for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) emphasised the importance of the fast resolution of the visa application process:

The Government believes the faster a case can be finally determined, the better outcomes it can deliver for both the applicant and those who support them in the Australian community—eliminating long periods of uncertainty and allowing people to move on and make decisions about the next stage of their lives.

...

[The IAA] will deliver the Government's policy outcome of improving the efficiency and cost effectiveness of merits review currently experienced by refused protection visa applicants in Australia and ensure timely progress of their cases towards a final and accurate determination regarding their immigration status.¹²⁹

122 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Refugee Advice and Casework Service, *Submission 30*.

123 *Migration Act 1958* (Cth) s 473CA, 473JA.

124 *Ibid* pt 7AA, div 3; ss 473GA, 473GB.

125 *Ibid* s 473DB.

126 *Ibid* s 473DB, 473DC, 473DD.

127 *Ibid* s 5(1) (definition of 'excluded fast track review applicant').

128 *Ibid* s 5(1AA).

129 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth). The *Tribunals Amalgamation Act 2015* (Cth) amalgamated the AAT with other tribunals including the Refugee Review Tribunal. The RRT's functions are now carried out by the Migration and Refugee Division of the AAT.

14.70 A number of criticisms of this process were made on procedural fairness grounds.¹³⁰ The Refugee Council of Australia (RCOA) argued that the new fast track system administered by the IAA fails to provide ‘an adequate framework for ensuring accuracy and procedural fairness in decision-making’.¹³¹

14.71 The ANU Migration Law Program noted that ‘there is no provision to require a fast track applicant to be notified that the primary decision has been referred by the minister to the IAA’.¹³² The lack of provision for a hearing, except in exceptional circumstances, was also a cause of concern. The RCOA argued that:

Through denying asylum seekers the opportunity to put forward or respond to information relevant to their claims and, in some cases, blocking access to review altogether, the fast-track process will create a much higher risk of inaccuracy in decision-making. This in turn increases the danger of asylum seekers being erroneously returned to situations where they could face persecution or other forms of serious harm.¹³³

14.72 RACS queried the proportionality of the fast track process, ‘in light of the gravity of what is at stake in the context of refugee status determination—not only the deprivation of a person’s liberty under the Migration Act but potential for the exposure of a person to a risk of persecution’.¹³⁴ The Law Council similarly ‘considered that the objective of administrative efficiency is not sufficient to deny procedural fairness’.¹³⁵ Councils for Civil Liberties said that

while protecting the Australian community from threats posed to their safety and security is a laudable objective that is justified in a free and democratic society, the Fast Track Assessment Process has nothing to do with making Australians safer. ... The real purpose of the Fast Track Assessment Process appears more clearly targeted at ensuring that those who have come to Australia by boat and remain in Australian detention centers are not granted protection by being processed quickly with limited access to review. Further, it is part of a broader aim to deter others from coming to Australia by boat. ... [T]his purpose is not justified and should have no place in a free and democratic society.¹³⁶

14.73 The ANU Migration Law Program suggested that the end of processing claims expeditiously could be met by other means with less impact on procedural fairness:

There is no reason why the review of primary ‘fast track’ decisions of applicants who form part of the ‘asylum legacy caseload’ cannot and should not be undertaken by the RRT ... and prioritised ahead of other on-shore protection cases. This would ensure that reviews of ‘fast track’ decisions are finalised efficiently and expeditiously in

130 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Legal Aid NSW, *Submission 137*; Refugee Council of Australia, *Submission 109*; Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 91*; Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Refugee Advice and Casework Service, *Submission 30*.

131 Refugee Council of Australia, *Submission 41*.

132 ANU Migration Law Program, *Submission 59*.

133 Refugee Council of Australia, *Submission 41*.

134 Refugee Advice and Casework Service, *Submission 30*.

135 Law Council of Australia, *Submission 75*.

136 Councils for Civil Liberties, *Submission 142*.

accordance with Government policy, and without sacrificing the procedural fairness safeguards guaranteed by the RRT's statutory processes and procedures.¹³⁷

14.74 In 2015, the England and Wales Court of Appeal found that a fast-track appeal process for review of applications for asylum in the United Kingdom was 'structurally unfair and unjust'.¹³⁸ Lord Dyson stated that

in view of (i) the complex and difficult nature of the issues that are often raised; (ii) the problems faced by legal representatives of obtaining instructions from individuals who are in detention; and (iii) the considerable number of tasks that they have to perform ... the timetable for the conduct of these appeals is so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases under the [Fast Track Rules] regime.¹³⁹

Maritime Powers Act 2013 (Cth)

14.75 The *Maritime Powers Act* provides a broad set of enforcement powers, exercisable by maritime officers, for use in, and in relation to, maritime areas.¹⁴⁰ The Act was amended in 2014¹⁴¹ to exclude the rules of natural justice as they relate to the exercise of a number of maritime powers:

- s 22B provides that the rules of natural justice do not apply to authorisations of the exercise of maritime powers made under pt 2 div 2 of the Act; and
- s 75B excludes the rules of natural justice from a number of provisions, which largely relate to maritime officers' powers to detain vessels and aircraft, as well as to place, detain and move persons aboard detained vessels or aircrafts.¹⁴²

14.76 The Scrutiny of Bills Committee, when examining the amending Bill, was concerned by the proposed exclusion of natural justice:

The *Maritime Powers Act* contains a number of significant and coercive 'maritime powers' and the explanatory memorandum does not provide sufficient justification for the exclusion of natural justice ... Not all the powers are the same or require the same considerations in relation to their exercise. For example, different considerations may arise in relation to powers which enable a person or vessel to be detained than in relation to powers which enable a person or vessel to be transported to a destination (which may be outside of Australia). Without further details and analysis, the claim that application of the rules of natural justice is not consistent with the 'unique circumstances ... in a maritime environment' does not enable the committee to properly consider the appropriateness of the proposed exclusion of natural justice.¹⁴³

137 ANU Migration Law Program, *Submission 59*.

138 *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 [45].

139 *Ibid* [38].

140 *Maritime Powers Act 2013 (Cth)* s 7.

141 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)*.

142 *Maritime Powers Act 2013 (Cth)* ss 9, 69A, 71–72, 72A, 74, 75D, 75F, 75G, 75H.

143 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *15th Report of 2014* (November 2014) 909–10.

14.77 In light of these concerns, the Committee sought the Minister's advice as to why the exclusion of natural justice was considered reasonable.¹⁴⁴ The Minister replied that 'in the operational context in which these powers are to be exercised, any formal requirement for natural justice would not be practicable', and provided a detailed explanation of the effect of each new provision.¹⁴⁵ The Committee reiterated its concerns about the exclusion of the rules of procedural fairness and referred the provisions to the Senate for further consideration.¹⁴⁶

14.78 In *CPCF v Minister for Immigration and Border Protection*, the High Court considered s 72(4) as it was prior to the 2014 amendments that specifically excluded the application of natural justice from the provision. The High Court found that the power under s 72(4) to take the plaintiff to a place outside Australia was not subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power.¹⁴⁷

14.79 A number of submissions to this Inquiry raised concerns about the exclusion of natural justice from the *Maritime Powers Act*.¹⁴⁸

14.80 The Human Rights Law Centre contested the claim that affording fairness at sea can be impracticable, arguing that

'impracticability' does not justify completely excluding the duty to act fairly. It is a factor relevant to what fairness practically requires in the particular circumstances. More fundamentally, to the extent that acting fairly at sea could carry practical challenges, administrative inconvenience is a necessary and reasonable price to pay to ensure important decisions affecting people's rights and liberties are properly made.¹⁴⁹

14.81 The Law Council argued that the exclusion of the rules of procedural fairness cannot be justified in light of the seriousness of the consequences for persons removed from Australian waters—for example, 'the relocation of affected individuals to a place where they face a real risk of persecution'.¹⁵⁰

144 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 910.

145 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *15th Report of 2014* (November 2014) 911–13.

146 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 914.

147 *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, [52]–[53] (French CJ); [226]–[227] (Crennan J); [305]–[310] (Kiefel J); [366]–[372] (Gageler J); [497]–[503] (Keane J). The Court considered it unnecessary to answer whether the non-statutory executive power of the Commonwealth authorised a Commonwealth officer to detain the plaintiff for the purposes of taking him to India and to take steps associated with this. The Court also considered it unnecessary to answer whether any such non-statutory executive power was subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power. For consideration of the existence of any common law right of non-citizens to enter Australia, see Ch 7.

148 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*.

149 Human Rights Law Centre, *Submission 39*. See also Councils for Civil Liberties, *Submission 142*; Law Society of NSW Young Lawyers, *Submission 69*.

150 Law Council of Australia, *Submission 75*.

14.82 The Senate Legal and Constitutional Affairs Committee has recommended that changes made to the *Maritime Powers Act* in 2014 be reviewed three years after their enactment.¹⁵¹

Conclusion

14.83 A number of migration laws encroach on the duty to afford procedural fairness. The ALRC concludes that some of these laws would benefit from further review to consider whether they unjustifiably exclude the duty to afford procedural fairness, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those in the *Migration Act* relating to:

- the mandatory cancellation of visas; and
- the fast track review process for decisions to refuse protection visas.

151 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (2014).

