



Victorian Government
Solicitor's Office

Client Newsletter

Procedural Fairness – The Hearing Rule

September 2007

The objection for want of notice can never be got over... Even God did not pass sentence on Adam before he was called upon to make his defence.¹

Procedural fairness (also known as 'natural justice') requires that a person whose interests are to be affected by a decision (whether adjudicative or administrative) receive a fair and unbiased hearing before the decision is made. Government bodies that fail to comply with the requirements of procedural fairness risk having their decisions declared invalid by a court or tribunal, not because the decision itself was wrong, but because the decision-making *process* was wrong in some way.

Two basic principles of procedural fairness are the 'bias rule' and the 'hearing rule'. This newsletter focuses on some key elements of the hearing rule.

Obligation to provide a hearing

The hearing rule requires a decision-maker to inform a person of the case against them or their interests and give them an opportunity to be heard. The extent of the obligation on the decision-maker to afford procedural fairness under the hearing rule is variable. It will depend on the relevant statutory framework and on what is 'fair' in all the circumstances. The more significant the decision is, in terms of its effect on a person's interests, the greater the care the

Summary

Decision-makers need to be aware of the requirements of procedural fairness when making decisions which affect a person's rights or interests. Failure to notify a person of a potentially adverse decision, or to allow them an opportunity to be heard, is contrary to good government, and may result in the decision being set aside by a court.

The Victorian Charter of Human Rights now also provides that a person charged with a criminal offence or party to a civil proceeding has a right to have the charge or proceeding determined after a 'fair' hearing. This essentially codifies the hearing rule.

decision-maker should take to provide that person with an opportunity to be heard.

The concept of a person's 'interests' is broad and includes things such as legal status, business and personal reputation, liberty, confidentiality, livelihood and financial interests.² The High Court has held that procedural fairness will be breached where a person has a 'legitimate expectation' that a decision-maker will act in a certain way but fails to do so, to the person's detriment.³ However, more recent High Court authority has reiterated that the ultimate question remains whether there has been unfairness in all the circumstances of the case, not whether a representation has been departed from or whether an expectation has been

disappointed. An expectation created by a decision-maker may affect the practical content of the requirements of fairness, but not every departure from a stated intention necessarily involves unfairness.⁴

Where a decision affects a large group of people or the general public, procedural fairness does not normally require that each person be afforded a hearing.⁵ Similarly, political and policy decision-making is unlikely to attract the hearing rule where the circumstances of individual persons are not taken into account.

The requirements for procedural fairness have developed primarily through the common law and it is important to note that a statute can limit the hearing rule expressly or through necessary implication. The common law duty to act fairly in the making of administrative decisions is subject only to the clear manifestation of a contrary legislative intention.⁶

Notice & adverse information

A person should be provided with notice of a proposed decision that may adversely affect them. They should also be provided with details of any credible, relevant and significant adverse information which the decision-maker has, and which may affect the decision to be made, and be given an opportunity to respond.⁷ This applies to both oral hearings and where decisions are made solely on the basis of written submissions.

Adequate time should be given to the person to prepare for an oral hearing (if there is one) or prepare written submissions before a decision is made. If a person has already responded to some material, but further information comes to the attention of the decision-maker before a decision is made, then the person should also be given an opportunity to respond to that extra information.

There are no set rules and the decision-maker should always have regard to what is fair in the circumstances and, in an appropriate case, be prepared to modify procedures which are generally applied.

Confidential information

Sometimes a decision-maker will possess adverse information that is subject to some form of

confidentiality. Whilst the obligation to maintain confidentiality might mean that copies of confidential documents or names of persons supplying information should not be disclosed, the hearing rule will generally require that the substance or essence of the information be provided.⁸ Alternatively, the confidential information could be provided to the person's legal representative, on an appropriate undertaking to act in their client's interest, but without disclosing the information to the client. The public interest in protecting confidentiality will override the requirement to accord procedural fairness only in rare circumstances.

Oral hearing?

Whether an oral hearing is required will depend on the terms of the relevant statute⁹ and the individual circumstances of the case. Where a person's credibility is in question or where there are apparent factual inconsistencies in the evidence before the decision-maker, then an oral hearing is more likely to be necessary. An oral hearing may also be necessary where the person is at some sort of disadvantage in preparing written submissions. However, for practical reasons, the courts are less likely to impose a requirement for an oral hearing in areas of high-volume administrative decision-making.

The function of conducting an oral hearing, or reviewing and summarising written submissions, may be delegated by a decision-maker where there is express or implied authority to do so.¹⁰ It is generally permissible for Ministers and senior office holders to adopt findings and recommendations of delegates without considering all the evidence themselves.¹¹

A person should be given a reasonable opportunity to make submissions, give evidence and call witnesses where necessary. A person will not always have the right to cross-examine witnesses, even in an oral hearing. Again, it will depend on what is fair in all the circumstances.¹²

Legal representation

Legislation is often silent as to whether parties have a right to legal representation at an oral hearing. Whether a person has a right to legal representation may depend on their capacity to

represent themselves (eg, their level of education and ability to communicate in English) and the complexity or seriousness of the legal and factual issues involved. Where a board or tribunal is empowered under statute to conduct itself informally, and the statute does not provide otherwise, then legal representation may not be allowed as of right.¹³

The effect of the relevant caselaw is that in the absence of a statutory indication to the contrary, administrative bodies and lay tribunals are in general free to exclude lawyers; but the circumstances of the particular case may be such that a refusal to allow legal representation may constitute a denial of natural justice.¹⁴ In relation to informal hearings by health boards (now referred to as professional standards panels and health panels in the new *Health Professions Registration Act 2005*) there is explicitly no right to legal representation except in certain circumstances.¹⁵

Urgent decisions

Sometimes urgent decisions have to be made and, in such situations, the requirements under the hearing rule may be reduced to almost nothing. (However, courts do not look kindly upon decisions that are made urgently due to the decision-maker's delay.) This is likely to happen only in rare circumstances and such decisions should generally, be short-term and allow the person to submit reasons to the decision-maker as to why the decision should be overturned.¹⁶

Breach of the hearing rule

Breach of the hearing rule will usually, though not always, amount to jurisdictional error and void the decision. In cases of a minor breach, the court may consider that the breach of the hearing rule made no difference to the decision. In these rare circumstances, breach of the hearing rule may not be fatal to a decision.¹⁷

Charter of Human Rights and Responsibilities Act 2006

The *Charter of Human Rights and Responsibilities Act 2006* (Charter) recently commenced. Section 24 of the Charter provides

the right to a fair hearing. What impact might this right have on the common law hearing rule?

Section 24 provides that:

A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding determined by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 24 reflects the common law hearing rule by the requirement that a hearing be 'fair'.

The first thing to note is that the application of s 24 is limited to criminal charges and civil proceedings before a 'court' or 'tribunal'. The Department of Justice's Human Rights Unit has prepared useful guidelines to assist government bodies in determining whether s 24 applies to their decision-making process.¹⁸ Bodies including VCAT, VOCAT, the Firearms Appeals Committee and certain disciplinary and professional admission boards come within the scope of s 24. These bodies need to be attentive to the standards imposed by s 24 in conducting their hearings. Unlike the hearing rule, s 24 does not apply to other types of administrative decision-making, for example, by a Minister.

From 1 January 2008, s 32 of the Charter will come into effect and require courts, tribunals and public authorities to interpret all legislation compatibly with human rights, consistent with the purposes of the legislation. The Charter explicitly provides for the consideration of international law in this regard. As such, where a question about the requirement under a Victorian statute to provide procedural fairness arises, and s 24 applies to the relevant decision-making process, the content of s 24 of the Charter may be raised in addition to the content of the hearing rule. International law relating to the right to a fair hearing may be considered and applied. International law could also become relevant where a person seeks judicial review of an act or decision of a public authority and then, under s 39 of the Charter, alleges a breach of s 24 of the Charter as well.

Whilst the application of the common law rules of procedural fairness by courts is likely to be largely co-extensive with the application of the Charter, the use of international law in applying

s 24 of the Charter could potentially extend beyond the parameters of the hearing rule at common law. However, all rights in the Charter are subject to the general limitations clause in s 7. This means that a prima facie limitation on a right will nonetheless be upheld by a court where the limitation is reasonable and demonstrably justifiable. Section 7 allows the court to look at policy justifications and other reasons behind a prima facie limitation of a right.

It is also important to note that courts' interpretation and application of s 24 of the Charter cannot affect or modify the common law hearing rule itself. It is beyond the power of a State Parliament to direct that the common law in one State be developed differently from the common law in another jurisdiction, as the High Court has held that there is a single unified common law in Australia.¹⁹

Only time will tell what impact s 24 of the Charter might have on a person's right to be

heard. VGSO is equipped to provide specific advice to clients on this, and any other aspect of the hearing rule.

For further information

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The VGSO is the primary source of legal services to the Victorian state government and its statutory authorities, providing strategic advice and practical legal solutions.

¹ *R v University of Cambridge* (1723) 1 Strange 557; 98 ER 698 per Fortescue J, cited in Forbes 'Justice in Tribunals' p 90.

² Aronson, Dyer, Groves, *Judicial Review of Administrative Action*, (3rd ed) 389.

³ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁴ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12 per Gleeson CJ; at 27 per McHugh and Gummow JJ.

⁵ Aronson, Dyer, Groves (n ii above) at 411.

⁶ *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 at 584 per Mason J; The intention of Parliament to exclude procedural fairness must be 'unambiguously clear': *Twist v Randwick City Council* (1976) 136 CLR 106 at 109 per Barwick CJ.

⁷ *Kioa v West* (1985) 159 CLR 550.

⁸ *Ansett v Minister for Aviation* (1987) 72 ALR 469; *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411.

⁹ For example, s 13(3) of the *Motor Car Traders Act 1986* (Vic) provides that the Business Licensing Authority is not required to conduct a hearing in relation to an application for a motor car traders licence.

¹⁰ Delegation is a separate topic discussed in the upcoming VGSO newsletter on delegations.

¹¹ Aronson, Dyer, Groves, n ii above, 497. A Minister has a multitude of functions and cannot be expected to carry them all out personally: *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, *Carltona Limited v Commissioners of Works* [1943] 2 All ER 560, *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.

¹² *O'Rourke v Miller* (1985) 156 CLR 342.

¹³ *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486.

¹⁴ *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 557 at 570. See also *Wabz v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 687, at 59.

¹⁵ ss 62,69 pf the *Health Professions Registration Act 2005*.

¹⁶ *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 514-5.

¹⁷ *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122.

¹⁸ *Supplementary Guidelines on the Right to a Fair Hearing: When section 24 applies to a Hearing*, Human Rights Unit, Department of Justice, April 2007.

¹⁹ *Charter of Human Rights and Responsibilities Draft Guidelines for Legislation and Policy Officers in Victoria*, Human Rights Unit, Department of Justice (December 2006) 36.