



NATURAL JUSTICE IN THE TRIBUNAL SETTING: TRACING THE NATURE AND SCOPE OF THE OBLIGATION OF PROCEDURAL FAIRNESS IN TRIBUNALS

*KRISTINA STERN
JUDGE OF APPEAL
SUPREME COURT OF NEW SOUTH WALES*

WHAT NATURAL JUSTICE ENTAILS

That persons liable to be directly affected by proposed administrative acts, decisions or proceedings are given a reasonable opportunity to be heard prior to the making of that decision
(the so-called Hearing Rule)

That the decision-maker is free from bias
(includes both actual and ostensible bias)

Whether natural justice applies may depend upon the statutory context

In most cases, the question is not whether natural justice applies, but what it entails

Content depends upon statutory and factual context

Issues are nature, scope and application of the duty to afford procedural fairness

SCOPE OF THIS PAPER: THE HEARING RULE

Functions of tribunals

Core principles of procedural fairness

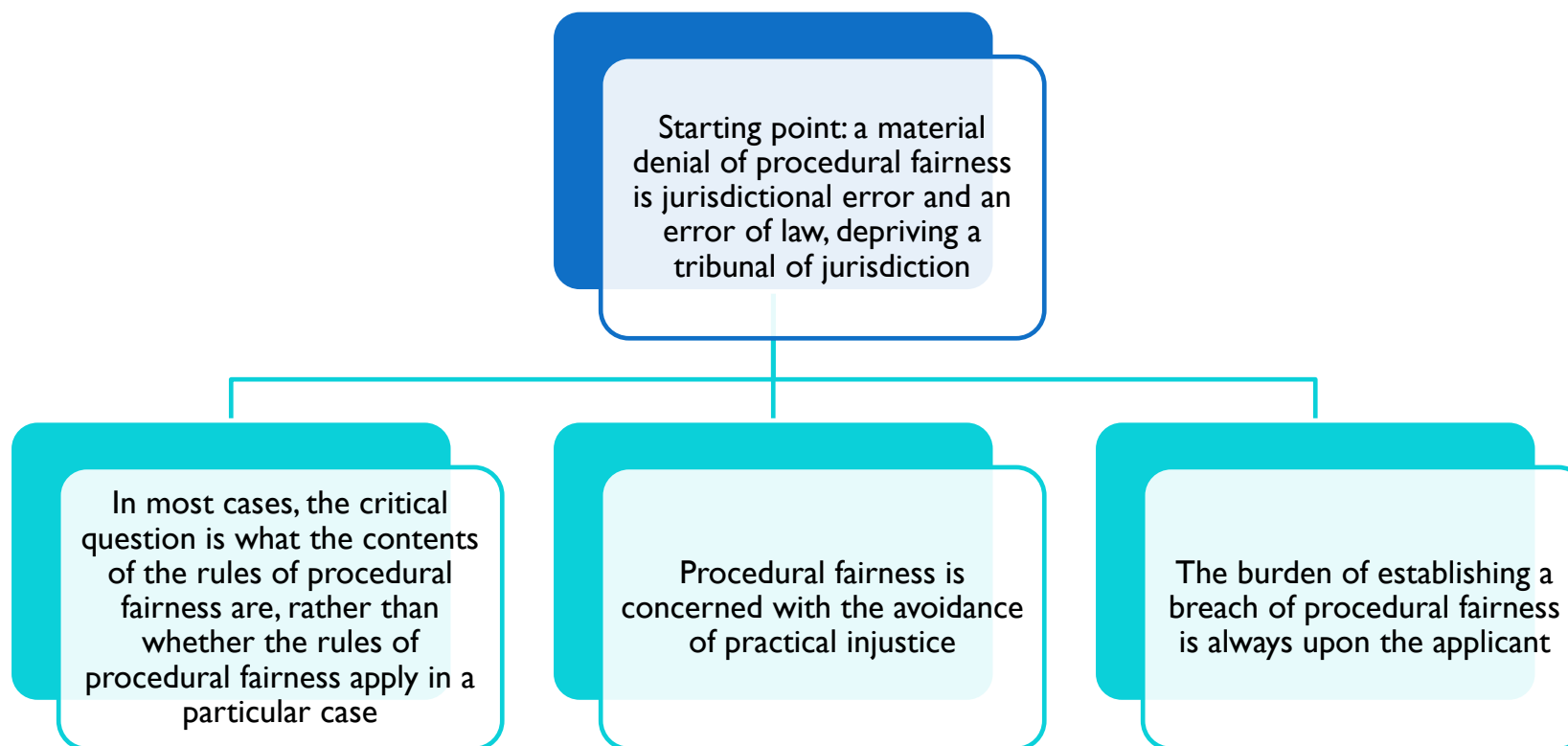
Application of principles of procedural fairness

(in the NCAT and the Personal Injury Commission to illustrate the role of the statutory context in shaping the application of principles of procedural fairness)

TRIBUNALS IN NEW SOUTH WALES

- Generally creatures of statute
- Perform a range of judicial or quasi-judicial functions
- Touchstone is its adjudicative nature
- Usually inquisitorial or investigative but may be adversarial
- Function of promoting the effective and efficient resolution of disputes or discharging executive functions
- Allow for resolution of certain disputes outside of the formal court structure
- May have aims of according justice with cost-effectiveness and a lack of formality
- May be subject to appeals (often of limited ambit) and to judicial review under s 69 of the *Supreme Court Act 1970* (NSW)

THE HEARING RULE: KEY PRINCIPLES



KEY PRINCIPLES (CONT)

An individual is only entitled to natural justice where their interests are directly affected or they are sufficiently interested

The precise requirements of natural justice will depend on the circumstances of the individual case by reference to statutory context, the nature of the right, interest or expectation affected, the nature of the decisionmaker and the ultimate question(s) requiring determination

The rules of natural justice are implied into statute unless clearly displaced, expanded or qualified by reference to precise statutory provisions, though this is subject to the rules of procedural fairness not frustrating legislative purpose, or the purpose for which power is conferred on the decision-maker

KEY PRINCIPLES (CONT)

There is no general right to be heard in relation to all decisions directly affecting an individual, rather it applies in relation to credible, relevant and significant material relied upon by a decision-maker which is adverse to the interests of the individual and upon which they have not been heard as part of the decision-making process and in some cases where an individual's attention to be brought to the critical issue(s) or factor(s) on which a decision is likely to turn so that they have an opportunity to deal with it

Procedural fairness will not ordinarily give rise to a right to be heard in relation to questions of policy or general application

Where the decision-making process is multi-tiered, the requirements of procedural fairness will be tested by reference to the decision-making process as a whole

RELEVANT PRINCIPLES OF STATUTORY CONSTRUCTION

- Reliance may be placed upon the statutory text, the interests affected by the statute and the repository of the power
- Where a statutory power is subject to an automatic internal review, it may sometimes be inferred that an initial decision may be made without a hearing
- The more elaborate the procedural rules prescribed by a tribunals' empowering statute, the more likely they are to be treated as an exhaustive statement of the obligations of procedural fairness
- Exclusion of the duty to afford procedural fairness cannot be inferred from statutory language that is ambiguous but the fact that there is no express exclusion will not necessarily mean that procedural fairness applies
- It should not be assumed that legislative provisions conducive with procedural fairness are exhaustive of any procedural fairness obligations required under a particular statutory scheme

PROCEDURAL FAIRNESS IN TRIBUNALS

The source of a tribunals' duty to afford procedural fairness will arise from the statute enlivening the tribunals' jurisdiction, or in the absence of such a statutory obligation, the common law

The presumption in favour of natural justice is not displaced by a statutory provision giving a tribunal "full power and authority" to determine its own procedures

Notice must be given by a tribunal to a party in respect of a decision that may adversely impact them, and this notification must convey to the party, with reasonable clarity, the duty which its service imposes upon them

Adverse allegations or information must be given to the party who will be adversely affected

PROCEDURAL FAIRNESS IN TRIBUNALS (CONT)

A person should be given an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made

Refusal of a request to call a material witness may amount to a denial of procedural fairness

It may be incumbent on a tribunal undertaking an inquisitorial or investigative procedure to alert a party to manifest gaps in their case, or to convey “critical issues” to the parties to afford them an opportunity to adduce additional material and respond prior to the tribunal’s determination, but there is no duty to conduct the case

It may be a denial of procedural fairness if a tribunal fails to raise with an unrepresented party the opportunity to apply for an adjournment in certain circumstances

It may require the opportunity to test the opposing side’s evidence by way of cross-examination

COST
EFFICIENCY,
INFORMALITY
AND
PROCEDURAL
FAIRNESS

- *Johnson v IPEC Transport Group* [1993] NSWCA 147, Kirby P (as his Honour then was) in dissent:

“The procedures of the Compensation Court, as a specialised tribunal with a large work load, are less formal than other courts of this State. A high degree of informality is permissible and condoned by decisions of this Court. However, in certain basic matters, such as the right to call relevant evidence or to address a court, that court, like any other court (including this one), is bound to observe the fundamental rules of procedural fairness. **Procedural informality must not be permitted to become a vehicle for procedural unfairness.**”
(Emphasis added).

THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL

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- ss 38(4) of the *NCAT Act*: NCAT is required to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms
 - These are not terms of art and have no fixed legal meaning independent of the statutory context in which they are found and do not mean that the decision maker is free from any obligation to apply the law: *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26
 - The modern trend is that the “equity and good conscience” requirement does not authorise decision-making other than in accordance with law: Justice Mark Leeming
 - Some statutory obligations to accord fairness, eg s 38(5) take such steps as are reasonably practicable to ensure the parties understand the nature of the proceedings



Ordering removal of a practitioner's name from the Supreme Court Roll of legal practitioners when that is not sought may give rise to procedural unfairness: *Russo v Legal Services Commissioner* [2016] NSWCA 306



Making an unpleaded finding (that a party had altered a document) gave rise to procedural unfairness where it was not pleaded or put to him in cross-examination and was not put to him during the proceedings and where it was not possible to unscramble findings on pleaded and unpleaded allegations: *Livers v Legal Services Commissioner* [2018] NSWCA 319

SPECIFIC EXAMPLES OF PROCEDURAL FAIRNESS ISSUES IN THE NCAT

ADJOURNMENTS AND PRACTICAL INJUSTICE

- A failure to adjourn proceedings may amount to a denial of procedural fairness
- Considerations will include:
 - Whether there is any good reason why the hearing could not be moved to accommodate the application
 - What reason is given for an inability to attend a hearing
 - Whether there were good reasons for the person being heard at the hearing
 - The impact of the refusal to adjourn and consequential issues of practical injustice
 - The importance of resolution of the real issues in proceedings being just as well as quick and cheap: see eg *GR v Secretary, Department of Communities and Justice* [2023] NSWCA 239

USE OF INFORMATION AND PRACTICAL INJUSTICE

- *Tangsilsat v Council of the Law Society of New South Wales* [2019] NSWCA 144: a useful illustrative case
- Use of information without alerting a party may be a denial of procedural fairness
- The information may be drawn to the party's attention in a number of ways, in *Tangsilsat* this was done orally during submissions before the NCAT
- Provided an opportunity to deal with information is given, it does not matter if the party's submissions do not grapple with the significance of the information
- Use of information in a particular way may have to be notified to a party

THE PERSONAL INJURY COMMISSION

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- In the *Personal Injury Commission Act 2020* (NSW) and the *Personal Injury Commission Rules 2021* (NSW) there are a number of provisions which either include a statutory version of an obligation to accord procedural fairness or will be relevant to the content of any obligation to accord procedural fairness
 - For example:
 - Section 52(2) of the *PIC Act* enables a hearing to take place at which only some of the parties participate
 - Rule 74 of the *PIC Rules* requires the Commission, if reasonably practicable, to assist the parties to understand the nature of the proceedings
 - The PIC is obliged to accord procedural fairness but the content of the rules of procedural fairness may be affected by the terms of the statutory provisions: see eg *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249

DIVERTING FROM GROUNDS OF APPEAL

- It may be a denial of procedural fairness for an Appeal Panel to determine an appeal from a medical assessment on a ground not referred to it by the registrar unless the parties are given an opportunity to deal with credible, relevant and significant adverse material.
- *Siddik v Workcover Authority of New South Wales* [2008] NSWCA 116

RESOLVING INCONSISTENCIES BETWEEN EVIDENCE WITHOUT CROSS- EXAMINATION

- The statutory provisions in the *Workplace Injury Management and Workers Compensation Act NSW (1998)* are not exhaustive of the requirements of procedural fairness
- Indication by both sides that a hearing is not required is a powerful but not decisive consideration on that question
- That might constitute a waiver of a right to cross-examine if it should have been apparent to the parties that there were conflicts in evidentiary material which might need to be resolved
- If it is proposed to determine the case on a basis not raised by the parties a hearing may nonetheless be required
- Where it was reasonably apparent that inconsistencies between the accounts of various witnesses would need to be resolved, such that the parties were on notice of this, and neither party sought an oral hearing, there was no denial of procedural fairness
- The reasons given for not convening an oral hearing for evidence to be tested by cross-examination may also be relevant: *McCarthy v Patrick Stevedores No 1 Pty Ltd* [2011] NSWCA 311

DISCLOSURE OF AN EXPERT REPORT RELIED UPON BY THE APPEAL PANEL

- An Appeal Panel may appoint one of its members to examine a party and provide a report to the Appeal Panel
- The question arises whether there is a denial of procedural fairness if that report is not provided to the party
- The answer to this depends upon the circumstances
- There is no denial of procedural fairness if the source of the material in the report is the party or if the party has previously had the opportunity to put on submissions or evidence going to the matters relied upon in the report
- There may be a denial of procedural fairness if the report is relied upon to reject a party's case on a basis not previously raised and not addressed in material provided by the parties: *Maricic v The Registrar, Workers Compensation Commission* (2011) 80 NSWLR 433

THE RELEVANCE OF THE BODY BEING AN “EXPERT” TRIBUNAL

The Appeal Panel is not permitted to look for errors which are not part of the grounds of appeal on which the appeal is made so it is impermissible for an Appeal Panel to reconsider an aspect of the medical assessment which had not been the subject of an appeal to it

The function of a Medical Panel [and an Appeal Panel] is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise: *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [47]

An appeal to the Appeal Panel may involve the formation of a medical opinion by medical experts

The determination of matters of medical expertise, such as the definition of a medical term, are matters within the medical experience or expertise of the members of the Appeal Panel

They do not have to disclose such matters in advance to the parties or invite submissions on them: *Queanbeyan Racing Club Ltd v Burton* [2021] NSWCA 304

THE RELEVANCE OF THE BODY BEING AN “EXPERT” TRIBUNAL (CONT)

Procedural fairness requires that the issue or factor upon which the decision will turn be brought to the parties’ attention, but this requires careful analysis of what that issue or factor is

The issue will not necessarily be the matters relied upon by the Medical Review Tribunal in resolving an issue or question

Rather, the issue may be the question itself, eg what had caused the particular medical disability

The fact that the tribunal relies upon particular symptoms being linked to particular causes of a disability does not make it incumbent upon the tribunal to tell the party that it is so reasoning: there is no obligation to provide a running commentary of the tribunal’s thought processes or of the effect of the party’s answers during a medical examination

The Medical Review Panel is entitled to apply its medical expertise: *AAI Ltd v Amos* [2024] NSWCA 65

CONCLUSION

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- These are just examples, none of these cases should be regarded as providing a blueprint for what is required by way of procedural fairness, or as establishing rules for how particular cases should be decided
 - All depends on context
 - That will always include the nature of the tribunal, the applicable statutory framework, and the aim of avoiding practical injustice