

THE TRIUMPH OF PRACTICAL FAIRNESS OVER LEGITIMATE EXPECTATION IN AUSTRALIAN ADMINISTRATIVE LAW

This article explores the adoption and ultimate rejection in Australian administrative law of the idea of a legitimately held expectation as a basis for implying a duty of procedural fairness in administrative decision-making or fleshing out the content of that duty. The article analyses the peaks and troughs of the application of the concept of legitimate expectation, from its shaky beginnings and adoption, implementing UK law, to its subsequent demise and death in the High Court decision in the *Minister for Immigration and Border Protection v WZARH* (“WZARH”). Cases after WZARH are discussed and the new overall test of practical fairness in administrative decision-making is reviewed.

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1 The questions in the two limbs of the doctrine of natural justice in administrative decision-making – when the duty to accord procedural fairness arises, and what the content of that duty of natural justice is – are not always easy to answer clearly in particular cases, hence the volume of litigation that has passed and still passes through the superior courts in Australia seeking adjudication on these questions.

2 The High Court in *Saeed v Minister for Immigration and Citizenship*¹ neatly summarised the position by stating: “when a statute confers power to destroy or prejudice a person’s rights or interests, principles of natural justice regulate the exercise of that power”;² and “all statutes are construed against a background of common law notions of justice and fairness”;³ thus Parliament must use clear words to exclude natural justice. Further “[o]bservance of the principles of natural justice is a condition attached to such a statutory power and governs its exercise

1 (2010) 241 CLR 252.

2 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [11], per joint judgment of French CJ, Gummow, Hayne, Crennan and Kiefel JJ. Their Honours relied on *Annetts v McCann* (1990) 170 CLR 596 for this statement.

3 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [11].

[and a] failure to fulfil that condition means that the exercise of the power is inefficacious”,⁴ rendering the decision invalid.⁵

3 One aspect of the duty to accord natural justice and the provision of fairness in decision-making concerns the extent to which expectations created by, or arising from, promises of administrative decision-makers in the exercise of their discretion should be honoured, or the well-founded expectations of the person to be affected by the decision either create obligations of natural justice in the decision-maker or increase the content of the duty to accord natural justice. Should, for example, a promise made to an individual that certain people will be consulted before a decision is made to deport that individual be honoured as part of a reasonably held expectation as to fair process and procedure of the decision-maker?⁶ Should a licence-holder be able to hold that licence for a period and reasonably expect or anticipate that he would be given notice of any change and opportunity to argue the case about revocation of the licence? Should an individual affected by a policy change relevant to a decision to be made by an administrative decision-maker be afforded an opportunity to address that policy change? Is a reasonably founded expectation about process or procedure to be followed, representations made or policy to be applied in making an administrative decision an interest that attracts the duty to accord natural justice and/or is relevant to determining the content of the duty?

4 These questions were answered in Australia for a period of some three to four decades by utilising the concept of legitimate expectation in administrative law. Categories of cases to which legitimate expectations might attach during this period were identified as follows:⁷

Legitimate expectations came to be invoked in four main categories:

- where people had relied upon a policy or norm of general application but were then subjected to a different rule or policy;
- where a policy or norm of general application existed and continued but was not applied to the case at hand;

4 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [13].

5 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [13].

6 See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Lam* (2003) 214 CLR 1.

7 Matthew Groves & Greg Weeks, “The Legitimacy of Expectations About Fairness: Can Process and Substance Be Untangled?” in *Public Law Adjudication in Common Law Systems: Process and Substance* (John Bell, Mark Elliott, Jason N E Varuhas & Philip Murray gen eds) (Hart Publishing, 2016) ch 8, at p 178, utilising a taxonomy in Paul Craig, *Administrative Law* (Sweet & Maxwell, 7th Ed, 2012) at pp 679–680.

- where an individual received a promise or representation which was not honoured because of a later change to a policy or norm of wider application; and
- where an individual received a promise or representation which was subsequently dishonoured, not because of a general change in policy but because the decision-maker changed its mind in that instance.

5 The concept of legitimate expectation, though, was not without its critics, and eventually the judicial voices opposing the use of the concept and expressions by judges of their doubts about its utility gathered in volume and won the day to relegate the doctrine to history.

6 The journey of acceptance, application, critiques and challenge to the validity of the concept of legitimate expectation, and its final demise in 2015 will be addressed in this article. The position reached today in Australia will be examined as to how the law of natural justice treats expectations previously regarded as legitimate, whether there is a diminution of procedural fairness, and what the current test is for attracting natural justice in administrative decision-making.

I. Origins and shaky beginnings

7 It was Lord Denning MR in the case of *Schmidt v The Secretary of State for Home Affairs*⁸ (“*Schmidt*”), who created the expression “legitimate expectation” as giving rise to natural justice in certain circumstances, that is, there might be “some legitimate expectation, of which it would not be fair to deprive [the individual] without hearing what he has to say”.⁹ The context of the decision was a successful application to strike out a statement of claim alleging breach of procedural fairness and the Master of the Rolls made it clear that legitimate expectation was not regarded as a right. Whilst the UK had begun to recognise the concept of legitimate expectation in the late 1960’s, superior courts in Australia were slower to adopt it and did not reveal the same level of acceptance of the concept.

8 Nearly a decade after *Schmidt*, in a case before the High Court of Australia in the late 1970’s, *Salemi v MacKellar (No 2)*¹⁰ (“*Salemi*”), it was argued that the announcement by the Minister for Immigration and Ethnic Affairs of an amnesty for certain classes of “illegal immigrants” created for Mr Salemi, the individual plaintiff, a legitimate expectation that he might have a right to remain in Australia and therefore he was

8 [1969] 2 Ch 149.

9 *Schmidt v The Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170.

10 (1977) 137 CLR 396.

entitled to natural justice prior to any decision by the Minister about deportation.

9 The plaintiff's argument about legitimate expectation was couched by Stephen J as follows:¹¹

The plaintiff contends that the announcement of the amnesty, coupled with the plaintiff's response to it, operated to confer upon him some right, or at the least some legitimate expectation of being accorded a right, to remain in Australia. This, it is said, is enough to impose upon the Minister an obligation to act fairly towards the plaintiff having regard to the requirements of natural justice. This in turn obliges the Minister to give to the plaintiff the opportunity of presenting for his consideration reasons why he should [not] exercise his power of deportation ...

There was some support amongst the justices of the High Court for the doctrine of legitimate expectation. In his support of the doctrine, Stephen J stressed that it was a procedural safeguard, rather than a substantive matter, and that "the news releases [about the amnesty] and the plaintiff's response to them gave rise to an expectation which the law recognizes as entitling to procedural protection".¹² The law does not interfere in the exercise of discretion by the Minister, Stephen J articulated, but will make sure that "procedural safeguards are observed".¹³

10 Jacobs J, too, accepted the judicial authorities in the UK which supported giving persons an opportunity to be heard in certain circumstances where there was legitimate expectation. His Honour stressed that the legitimate expectation was not itself a "right" but "[t]he right is the right to natural justice in certain circumstances and a 'legitimate expectation' is one of those circumstances".¹⁴

11 In the same case, there was an objection, perhaps not unexpected but strongly held, from Barwick CJ, who queried the meaning of "legitimate expectation" in a sentence often quoted since – his Honour remarked: "I am bound to say that I appreciate its literary quality better than I perceive its precise meaning and the perimeter of its application".¹⁵

11 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 428–429.

12 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 443.

13 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 443.

14 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 452.

15 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 404.

12 More significantly, Barwick CJ felt the concept added nothing to the concept of a “right”, stating:¹⁶

But, no matter how far the phrase may have been intended to reach, at its centre is the concept of legality, that is to say, it is a lawful expectation which is in mind. I cannot attribute any other meaning in the language of a lawyer to the word ‘legitimate’ than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right.

13 Gibbs J also took the view that the concept added nothing to natural justice: it did nothing to alter whether there was duty to accord natural justice in particular circumstances. If the power to make a decision to deport could be lawfully exercised without attracting the principles of natural justice, the concept of legitimate expectations did nothing more, even if the decision not to heed the amnesty in the individual case seemed unfair. However, if the Minister were obliged to decide in accordance with natural justice, the ministerial statements made, and any reliance on them, might be relevant.¹⁷ Hence, the view of Gibbs J was that the concept was not relevant to whether or not the duty of procedural fairness had been discharged.

II. Legitimacy of legitimate expectation

14 Leaping ahead less than a decade from the support, albeit qualified, of legitimate expectation in *Salemi*, by 1985, the year of the decision in *Kioa v West*¹⁸ (“*Kioa*”), the High Court had embraced more fully the doctrine of legitimate expectation. Mason J stated in *Kioa*:¹⁹

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it ...

15 Whilst the words “right” or “interest” related to proprietary rights or personal liberty, the idea of legitimate expectation, in the view of Mason J “[made] it clear that the doctrine applies in circumstances where the order will not result in the deprivation of a legal right or interest”²⁰ and that it goes beyond rights which are enforceable at law,

16 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 404.

17 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 422, *per* Gibbs J.

18 *Kioa v West* (1985) 159 CLR 550.

19 *Kioa v West* (1985) 159 CLR 550 at 582.

20 *Kioa v West* (1985) 159 CLR 550 at 582–583.

provided they are reasonably based. His Honour summarised the idea of the expectation as follows: “[t]he expectation may be that a right, interest or privilege will be granted or renewed or that it will not be denied without an opportunity being given to the person affected to put his case”.²¹ Deane J similarly accepted legitimate expectation as a foundation of natural justice.²² As a matter of more precise terminology, though, Gibbs CJ seemed to indicate a preference for using the term “reasonable expectation”, rather than “legitimate expectation”.²³

16 Gaudron J, too, in *Haoucher v Minister for Immigration and Ethnic Affairs*²⁴ (“*Haoucher*”), decided five years after *Kioa*, accepted the doctrine as part of the law of natural justice when her Honour stated:²⁵

The notion of legitimate expectation is one to which resort may be had at two distinct stages of an enquiry as to whether there has been a breach of the rules of natural justice. It may serve to reveal whether the subject matter of the decision is such that the decision-making process is attended with a requirement that the person affected be given an opportunity to put his or her case ... On the other hand, it may serve to reveal what, by way of natural justice or procedural fairness, was required in the circumstances of the particular case.

17 Thus, her Honour viewed the doctrine as relevant to the stage of determining the duty to accord natural justice and to the stage of determining the content of that duty. Deane J, in *Haoucher*, described the concept as “well established”²⁶ in Australian administrative law.

18 In that same year of 1990, High Court justices, Mason, Deane and McHugh JJ in *Annetts v McCann*²⁷ (“*Annetts*”), regarded the concept of legitimate expectation as settled and accepted law in Australia, with their words in the following passage being cited later with approval:²⁸

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, the rules of natural justice regulate

21 *Kioa v West* (1985) 159 CLR 550 at 583.

22 Deane J stated in *Kioa v West* (1985) 159 CLR 550 at 632:

In the absence of a clear contrary legislative intent, a person who is entrusted with statutory power to make an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity (as distinct from as a member of the general public or of a class of the general public) is bound to observe the requirements of natural justice or procedural fairness [emphasis added].

23 *Kioa v West* (1985) 159 CLR 550 at 563.

24 (1990) 169 CLR 648.

25 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 672.

26 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 651.

27 (1990) 170 CLR 596.

28 *Annetts v McCann* (1990) 170 CLR 596 at 598.

the exercise of that power unless they are excluded by plain words of necessary intentment ...

19 In the decision of *Ainsworth v Criminal Justice Commission*²⁹ two years later, the High Court accepted that an interest which was not a legal right but a reputational interest, in this case the reputation of the business, attracted the duty to accord natural justice. The nature of the complaint before the court was that a report had been produced by the Criminal Justice Commission of Queensland, which would have an adverse effect on the business reputation of the appellants in the case (which were manufacturers and suppliers of poker machines), without their having an opportunity to address matters in the report. Whilst there were certain legal technical hurdles in granting the remedy that the appellants sought – *certiorari* and *mandamus* – the court granted a declaration as some protection of the appellants’ interests. Brennan J, reiterating his earlier criticism of the concept as not being “illuminating”, nonetheless agreed with the view of Mason CJ, Deane and McHugh JJ in *Annetts*.³⁰

III. Peak of the doctrine: *Teoh*

20 The highest point of the application and acceptance of legitimate expectation was reached in the case of *Minister for Immigration and Ethnic Affairs v Teoh*³¹ (“*Teoh*”) where the High Court held that the Government’s ratification, but not adoption or enactment into Australian law, of the United Nations Convention on the Rights of the Child³² (“the UN Convention”) gave rise to a legitimate expectation that the interests of a child would be taken into account as a primary factor by a decision-maker in deportation decisions; in other words, the ratification of the convention created an expectation that decision-makers would conform to, or act in accordance with, its principles. Interestingly, the principles of natural justice applied in this case: that was not in dispute. However, the *content* of the duty was increased in the particular circumstances of this case, where it was held that the interests of the children of the deportee were to be considered. In particular, Art 3.1 of the UN Convention elevated the interests of the child to paramount importance, providing: “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

29 (1992) 175 CLR 564.

30 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 591–592.

31 (1995) 183 CLR 273.

32 (20 November 1989) GA res 44/25 (entered into force 2 September 1990).

21 As Mason CJ and Deane J warned in the case, legitimate expectation does not compel a particular decision to be made; rather:³³ “if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course”.

22 Applying that to the circumstances of this case, their Honours concluded:³⁴

So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps [of giving notice and an opportunity to present their case].

Toohy J, too, expressed the role of legitimate expectation where there is ratification of a convention, but not enactment of its principles into municipal law as follows:³⁵

It results in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course ...

23 His Honour was mindful that ratifying conventions would have “undue consequences for decision-makers”, stressing, however, that the concern was not with “enforceable obligations, but with legitimate expectations”.³⁶

24 McHugh J’s strong dissent rejected the notion that legitimate expectation had arisen in the circumstances of this case. However, his Honour opined that the need for the concept of legitimate expectation would be obviated if the question of procedure were approached from the viewpoint of: “what does fairness require in all the circumstances of the case”?³⁷

33 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291–292, in Mason CJ and Deane J’s judgment.

34 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 292, in Mason CJ and Deane J’s judgment.

35 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 302, per Toohy J.

36 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 302, per Toohy J.

37 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 312, per McHugh J.

25 *Teoh* was significant in a number of respects:

(a) Firstly, it ruled on the application of legitimate expectation to the *content* of the duty to accord natural justice.

(b) Secondly, the legitimate expectation is objective. As Pelma Rajapakse pointed out, the immigrant applicant need not “be aware of the undertaking given by the executive or that the immigrant personally entertain the expectation”,³⁸ that is, there is no need for a subjectively held expectation; rather, the expectation should be “reasonable, in the sense that there are adequate materials to support it”.³⁹

(c) Thirdly, it led to international conventions ratified by the Australian government but not yet (or ever to be) enacted in Australian municipal law having an impact in areas beyond immigration and deportation decisions and to the internationalisation of Australian law.⁴⁰

26 However, despite *Teoh* being of such significance and the strong, clear words of the judges in their support of legitimate expectation, the High Court was later to refer to *Teoh* as involving “tentative acceptance in Australian law”⁴¹ of the concept of legitimate expectation.

IV. The foundations tremble

27 Despite what could be regarded as the peak of acceptance, and application, of the doctrine of legitimate expectation in *Teoh*, the doctrine, nonetheless, had its vociferous critics. These criticisms were not new but could be traced back to the shaky beginnings of acceptance of the doctrine in Australia, and to cases during the following three to four decades where the doctrine had been applied but particular judges expressed reservations or warnings about it. It will be recalled that

38 Pelma Rajapakse, “Application of Human Rights Principles for Protection of Legitimate Expectations in Immigration Cases” (2016) 27(2) *King’s Law Journal* 236 at 242.

39 Pelma Rajapakse, “Application of Human Rights Principles for Protection of Legitimate Expectations in Immigration Cases” (2016) 27(2) *King’s Law Journal* 236 at 242.

40 See Marilyn J Pittard & Richard B Naughton, *Australian Labour and Employment Law* (LexisNexis, 2015) at pp 81–82, Kristen Walker, “Treaties and the Internationalisation of Australian Law” in *Courts of Final Jurisdiction: The Mason Court in Australia* (Cheryl Saunders ed) (Federation Press, 1996) and Alison Duxbury, “The Impact and Significance of *Teoh* and *Lam*” in *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Matthew Groves & Hoong Phun Lee eds) (Cambridge University Press, 2007) ch 19.

41 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30].

Barwick CJ in *Salemi* had criticised its lack of precision in meaning, and Brennan J in *Kioa* had warned that examining legitimate expectation as a criterion in determining fairness “may divert enquiry from what is procedurally reasonable and fair into an examination of the merits of an applicant’s case as it is presented in court”.⁴²

28 However, Pamela Tate⁴³ argued in her meticulous analysis that there was a role to play for legitimate expectation and concluded that, despite arguments about its uncertainty, it can be both “coherent and certain”.⁴⁴

My examination of the concept of legitimate expectation began with the recognition that it has been subject to the objections of incoherence and uncertainty. The task of this article has been to show that the concept can be rendered both coherent and certain. I have argued that the concept is best seen as an objective status or form of entitlement to a benefit which must be objectively justifiable in the sense of having been generated from one of the five sources which the courts have recognised as providing legitimacy. I have also identified the ways in which the prima facie recognition of a legitimate expectation can be defeated. In this way, I have attempted to identify the legal parameters of the concept.

29 That it had not been unanimously and universally accepted by the judges of the highest court in the land was clear. Brennan J, post *Kioa*, reiterated in *Annetts* his disquiet with the concept and in *Ainsworth v Criminal Justice Commission*,⁴⁵ stated that he did not find the concept “illuminating” – in particular, “I do not find the concept of ‘legitimate expectations’ illuminating of the circumstances which attract the obligation to accord natural justice”.⁴⁶ Having said that, however, his Honour was prepared, “subject to that observation”, to accept the formulation of their Honours in *Annetts* that:⁴⁷

‘It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.’

42 *Kioa v West* (1985) 159 CLR 550 at 627.

43 She later became the Honourable Justice Tate when she was appointed to the Court of Appeal in Victoria in 2010.

44 Pamela Tate, “The Coherence of Legitimate Expectation” (1988) 14 *Monash University Law Review* 15 at 80.

45 (1992) 175 CLR 564.

46 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 591.

47 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 592, quoting Mason CJ, Deane and McHugh JJ in *Annetts v McCann* (1990) 170 CLR 596 at 598.

30 McHugh J's clear decision not to apply legitimate expectation in the circumstances of *Teoh* served to underscore that legitimate expectation had some limits or should not be extended. In his Honour's view, it did not apply to an expectation which the person could not have where they did not have knowledge of the UN Convention.⁴⁸

V. Beginning of the end?

31 The case of *Re Minister for Immigration and Multicultural Affairs, ex parte Lam*⁴⁹ ("Lam"), decided less than a decade and a half after the trilogy of decisions in *Kioa*, *Annetts* and *Ainsworth*, signalled a change of approach. This case can fit in the category outlined above⁵⁰ about a departure from a representation made as to the process to be followed by the decision-maker. Mr Lam did not meet a character test under the Commonwealth Migration Act 1958⁵¹ due to committing criminal offences, and the Minister for Immigration cancelled his visa. Mr Lam had been notified by a department official that the best interests of his children would be taken into account in the visa-cancellation decision and that he should nominate a carer for the children who would be consulted by the Department. Specifically, he was informed by the Department: "[t]he Department wishes to contact [the carers] in order to assess your relationship with the children, and the possible effects on them of a decision to cancel your visa."⁵² In the end, this consultation did not occur (though a statement by the carer was attached to the file). It was accepted by the parties that if Mr Lam were notified that procedure had changed and that the applicant was given an opportunity to put his case as to why the procedure should not be changed, there would be no breach of fairness.⁵³

32 The High Court took the view, however, that no unfairness had resulted in this instance, looking at the overall position as to whether fairness of process was given. Gleeson CJ's expression was succinct: "[n]o practical injustice has been shown."⁵⁴ Spelling this out more fully, Gleeson CJ stated:⁵⁵

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

49 (2003) 214 CLR 1.

50 See para 4, n 7 above.

51 No 62 of 1958.

52 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [9].

53 See, eg, *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [29], per Gleeson CJ.

54 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [38], per Gleeson CJ.

55 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [36], per Gleeson CJ.

A statement of intention, made in the course of decision-making, as to a procedural step to be taken, is said to give rise to an expectation of such a kind that the decision-maker, in fairness, must either take that step or give notice of a change in intention. Yet no attempt is made to show that the applicant held any subjective expectation in consequence of which he did, or omitted to do, anything. Nor is it shown that he lost an opportunity to put any information or argument to the decision-maker, or otherwise suffered any detriment.

33 McHugh and Gummow JJ took the opportunity to emphasise that there are limits to the application of the doctrine: “[n]ot every expectation or hope which might be entertained by a ‘reasonable man’ will necessarily attract the doctrine”.⁵⁶ And, further, the meaning of “expectation” is not certain as the following questions are invited by the doctrine:⁵⁷

In the field of public law, to speak of an expectation placed in a decision-maker invites the questions (i) who entertains the expectation; (ii) how does it come to arise; and (iii) to what outcome is it addressed? All these issues arise to some degree in the present case ...

34 Similarly, Hayne J stated that even if there were a departure from a legitimate expectation, the applicant was given full procedural fairness so the departure did not provide an avenue for granting a remedy.⁵⁸ His Honour, however, questioned the doctrine of legitimate expectation, postulating that it raised many questions, and in fact more than it answered! The questions which Hayne J said “invite close attention” are:

- (a) What does “legitimate” mean?
- (b) Is the expectation a subjective one and if so, whose state of mind should be examined, and how is that state of mind established?

56 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [61], per McHugh and Gummow JJ.

57 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [63], per McHugh and Gummow JJ.

58 Hayne J stated in *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [122]:

For present purposes, it is enough to say that even if the Department’s letter engendered some relevant legitimate expectation, departure from it, where it is accepted that neither the expectation nor departure from it affected the course which the applicant pursued, gives no ground for relief. He was afforded a full opportunity to be heard ...

(c) Alternatively, if not subjective, is the expectation to be gauged by “reference ... to a legally required standard of behaviour”?⁵⁹

35 Hayne J noted that not all of these questions had been explicitly addressed in *Teoh* and concluded:⁶⁰

At the least they are questions which invite attention to the more fundamental question, posed by McHugh J in *Teoh*, of whether legitimate expectation still has a useful role to play in this field of discourse now that it has served its purpose in identifying those to whom procedural fairness must be given as including more than persons whose rights are affected.

36 Callinan J, with McHugh and Gummow JJ, criticised the UK doctrine as elevating procedural rights to substantive rights, and indicated his lack of confidence in the doctrine when he stated that “the expression ‘legitimate expectation’ is an unfortunate one, and apt to mislead”.⁶¹

37 Alison Duxbury, writing soon after *Lam*’s decision, noted that the judgments in *Lam*, expressing reservation with the doctrine, raised two questions:⁶²

The first relates to the question whether an expectation has to be held by a particular individual in order for it to be regarded as ‘legitimate’. The second concern draws upon the merits/legality distinction in administrative law and deals with the issue as to whether a legitimate expectation can give rise to substantive as well as procedural benefits.

38 After the decision in *Lam*, in the case of *Plaintiff S10/2011 v Minister for Immigration and Citizenship*⁶³ (“*Plaintiff S10/2011*”), four justices of the High Court, Gummow, Hayne, Crennan and Bell JJ, were of the view that *Lam* had effectively killed the doctrine of legitimate expectation. It is worth noting that their Honours agreed with McHugh and Gummow JJ, Hayne J and Callinan J in *Lam*, and interpreted that case as holding that legitimate expectation “adds nothing”, “poses more questions” and “is an unfortunate expression which should be

59 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [121], per Hayne J.

60 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [121], per Hayne J.

61 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [140].

62 Alison Duxbury, “The Impact and Significance of *Teoh* and *Lam*” in *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Matthew Groves & Hoong Phun Lee eds) (Cambridge University Press, 2007) ch 19, at p 309.

63 (2012) 246 CLR 636 at [65].

disregarded”.⁶⁴ Moreover, they evinced support for the view of Brennan J in *South Australia v O’Shea*⁶⁵ that the expression “tends to direct attention on the merits of the particular decision rather than on the character of the interests which any exercise of the power is apt to affect”.⁶⁶

39 Given the criticism over the years of the doctrine and some prior observations, the attitude of these judges was not unexpected. Adding to those voices of McHugh, Gummow, Hayne and Callinan JJ in *Lam*, who were not in favour of the concept of legitimate expectation, were now the voices of Crennan and Bell JJ in *Plaintiff S10/2011*. The chorus of criticism of legitimate expectation was getting louder! It reached its crescendo some three years later in another immigration decision, *Minister for Immigration and Border Protection v WZARH*⁶⁷ (“WZARH”).

40 In her analysis, Naomi Sharp took the view that the decision in *Plaintiff S10/2011* made it clear that legitimate expectation was not relevant to creating the obligation of procedural fairness.⁶⁸ Thus, it would seem the concept was all but dead in the area of creating the duty to accord natural justice. An area of doubt remained though: could natural justice play a role in filling out the content of the duty to accord natural justice? In *WZARH*, the High Court addressed the role of legitimate expectation in the determining the content of the duty to accord natural justice.

VI. Final demise of legitimate expectation: The WZARH litigation

41 There was no question in *WZARH* that there was an obligation to accord natural justice in respect of a decision as to a Sri Lankan applicant’s Refugee Status Assessment, but the question arose as to just what that duty entailed and whether natural justice had been accorded. The independent merits reviewer (referred to in the case as “the first reviewer”) had represented that she would undertake a full rehearing of the applicant’s claims (for convenience, the applicant is referred to here as “WZARH”), following the initial decision made by a delegate of the Minister for Immigration adverse to him that he was not a refugee. The

64 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [65].

65 (1987) 163 CLR 378.

66 *South Australia v O’Shea* (1987) 163 CLR 378 at 411.

67 (2015) 256 CLR 326.

68 Naomi Sharp, “Procedural Fairness: The Age of Legitimate Expectation Is Over” (2016) 90 ALJ 797 at 798.

first reviewer interviewed WZARH. However, for reasons which were not explained, she did not complete the review task and did not make a recommendation to the Minister on refugee status; a second officer (referred to as “the second reviewer”) became involved. He reviewed the written material, the transcript plus the audio visual recording of the first reviewer’s interview of WZARH, but did not interview him. The second reviewer formed an adverse opinion of the credibility of applicant and decided that WZARH was not a refugee to whom Australia owed protection.

42 Judicial review of the second reviewer’s decision was sought. The court at first instance, the Federal Circuit Court, rejected the argument that there was a denial of procedural fairness because WZARH had not the opportunity to appear before the second reviewer.⁶⁹ However, the appeal to the full court of the Federal Court was successful, the court holding by a majority that procedural fairness had not been given when an interview was not conducted by the second reviewer.⁷⁰ The Minister’s appeal was also rejected unanimously by the High Court.

A. *Legitimate or reasonable expectation in the full Federal Court decision*

43 Whilst the decision has clear implications for review process under the Commonwealth Migration Act 1958, the focus in this article is on the implications for the tool of legitimate expectation in natural justice more broadly. This focus should now be explored more fully in the two superior court appeals (Federal Court and High Court) and in the argument put to the courts.

44 Before the full Federal Court, the argument was made that the denial of natural justice occurred when the representations about process made by the first reviewer were not followed by the second reviewer, who made the actual recommendation about refugee status to the Minister. In this argument, the denial of natural justice was not put on the basis of legitimate expectation, and in oral argument before the Federal Court, that concept was not discussed.⁷¹ However, despite the language in argument referring to “representations”, the joint judgment of Flick and Gleeson JJ squarely invoked the concept of legitimate

69 *WZARH v Minister for Immigration* [2013] FCCA 1608.

70 *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389.

71 See reference to argument before the Federal Court in the written argument of counsel for the appellant in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [18], available at http://www.hcourt.gov.au/assets/cases/s85-2015/WZARH_App.pdf (accessed 19 September 2017).

expectation. This legitimate expectation arose from the oral hearing conducted by the first reviewer, and what had been said by the first reviewer about process (full rehearing of claims in interview and making recommendation to the Minister about refugee status).⁷² Their Honours stated:⁷³

In the circumstances of the present case, it is sufficient to conclude that [WZARH] had a legitimate expectation either that the Independent Merits Reviewer who conducted the interview in January 2012 would make the recommendation to the Minister, or a legitimate expectation – in the event that someone other than that Reviewer made the recommendation – that an oral hearing would first be conducted. The legitimate expectation in the present case was that the Reviewer who made the recommendation would first hear from [WZARH].

45 Acknowledging the difficulties that had been aired by judges in respect of the concept of legitimate expectation, their Honours, nonetheless, considered that it remained “a useful concept”⁷⁴ for determining content of the duty of natural justice. Their Honours also raised the notion of “practical injustice”, which would arise even if no oral hearing were required:⁷⁵

[WZARH] suffered a ‘practical injustice’ ... or a practical detriment by the change of the administrative process which turned an oral hearing or an administrative process including an interview into merely another opportunity to make written submissions. And he was given no opportunity to address this detriment, by making submissions to the Independent Merits Reviewer who made the adverse recommendation as to how the defeat of his legitimate expectation might be redressed ...

46 Their Honours articulated the essence of the unfairness: “[t]here was a fundamental change to the administrative process being pursued without [WZARH] being alerted to the change”.⁷⁶ Nicholas J, agreeing in the result with the joint judgment, preferred to rest his reasons on “reasonable expectation” (not “legitimate expectation”), saying that the representation made during the process of decision-making “may give

72 See *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389 at [18].

73 *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389 at [17].

74 *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389 at [18].

75 *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389 at [29].

76 *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389 at [29].

rise to a reasonable expectation that the representation will be fulfilled or, at least, that it will not be departed from without reasonable notice”⁷⁷

47 Thus, at this point in the judicial approach to legitimate expectation in Australia, after the full Federal Court decision but prior to the High Court’s decision on appeal, the conclusion could reasonably be drawn that the judicial view was that there was no scope for its utility in *attracting the duty to accord natural justice*, but that it might be helpful in determining the *content* of duty in particular circumstances, though that view about its role in content did not have universal appeal.

B. Submissions of counsel to the High Court in WZARH

48 Significantly and probably predictably, counsel for the Minister appellant in the appeal proceedings in the High Court did not rely in argument on legitimate expectation. Counsel argued in written submissions that the Minister was in agreement with the court’s views in *Plaintiff S10/2011* that the concept is “unhelpful and apt to distract from the critical questions”⁷⁸ which counsel, consistently with *Lam*, expressed as follows: “what did procedural fairness require in the circumstances of this case and were those requirements complied with?”⁷⁹ The nub of the appellant’s argument was that: (a) under the law of natural justice, an oral hearing was not required in every case; (b) circumstances would decide when an oral hearing was required for procedural fairness; (c) the decision-maker would not be required to hear argument on change in procedure; (d) departing from representations made was not necessarily breach of natural justice; and (e) there was no procedural unfairness as the respondent had put various matters to the first

77 Nicholas J explained fully in *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389 at [43]:

The contents of the requirements of procedural fairness may be affected by what is said or done in the course of the decision-making process. If at the commencement of the process a decision-maker represents to the person affected that he or she will be given an oral hearing, then that may give rise to a reasonable expectation that the representation will be fulfilled or, at least, that it will not be departed from without reasonable notice. Whether or not there is a denial of natural justice in the event of such a departure is a matter that must be considered in light of all the circumstances, including whether or not the person affected was given notice of the change in procedure before the decision was made, and whether it could be said that the person affected had been given a fair hearing in spite of him or her not being given an oral hearing.

78 Appellant’s Submissions (*Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326) at para 36, available at http://www.hcourt.gov.au/assets/cases/s85-2015/WZARH_App.pdf.

79 Appellant’s Submissions (*Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326) at para 36, available at http://www.hcourt.gov.au/assets/cases/s85-2015/WZARH_App.pdf.

reviewer and was interviewed by her, and that the second reviewer had that relevant material and a recording of the interview and properly considered these.⁸⁰

49 The main argument of counsel for the respondent WZARH was that the appellant had disclosed no error of law made by the full court. As to legitimate expectation, the argument was that the concept in *Lam* had been applied with “great care”,⁸¹ with the court “well aware (and recorded) the serious limitations on the utility of that expression”,⁸² and that there was no dispute as to use of “legitimate expectation”, in the context of determining the content of a duty to provide procedural fairness, where there was already a duty to accord natural justice.⁸³

C. High Court ruling

50 It was left to the High Court to rule authoritatively on the debate about the relevance of legitimate expectation to the content of the duty. Kiefel CJ, Bell and Keane JJ considered that *Lam* was clear. After a brief historical synopsis of legitimate expectation and identifying the position that Gummow, McHugh, Hayne and Callinan JJ had reached in *Lam*, their Honours were clearly of the view that the concept had been rejected. In their words:⁸⁴

The position has been made sufficiently clear that it is not necessary for this Court to engage again in discussion of the concept of ‘legitimate expectation’ in administrative law or to trace its progress from its controversial origins,^[85] to its tentative acceptance in

80 Appellant’s Submissions (*Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326) at para 50, available at http://www.hcourt.gov.au/assets/cases/s85-2015/WZARH_App.pdf.

81 Respondent’s Submissions in Reply (*Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326) at para 29, available at http://www.hcourt.gov.au/assets/cases/s85-2015/WZARH_Res1.pdf.

82 Respondent’s Submissions in Reply (*Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326) at para 31, available at http://www.hcourt.gov.au/assets/cases/s85-2015/WZARH_Res1.pdf.

83 Respondent’s Submissions in Reply (*Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326) at paras 32, 33, 35 and 44, available at http://www.hcourt.gov.au/assets/cases/s85-2015/WZARH_Res1.pdf.

84 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30].

85 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170–171; *Salemi v MacKellar* (No 2) (1977) 137 CLR 396 at 404; *R v Secretary of State for the Home Department, ex parte Khan* [1984] 1 WLR 1337; [1985] 1 All ER 40; *R v Inland Revenue Commissioners, ex parte Preston* [1985] AC 835 at 852 and 864–867; *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 at 1497; [1987] 2 All ER 518 at 531; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 22–23 and 39.

Australian law,^[86] to its rejection^[87] as a touchstone of the requirement that a decision-maker accord procedural fairness to a person affected by an administrative decision ...

51 For emphasis their Honours stated: “[t]he ‘legitimate expectation’ of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness.”⁸⁸

52 Firmly convinced that legitimate expectation has no place in Australian administrative law, that examining it is “unnecessary and unhelpful,”⁸⁹ their Honours considered that it could “distract from the real question,”⁹⁰ namely: “what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made?”⁹¹

53 In the circumstances of this case, their Honours took the view that fairness had not been satisfied as there was no opportunity for the applicant to put relevant material in oral testimony to the second reviewer. Thus they agreed with the full Federal Court in the outcome of the case, but approached the matter differently.

54 In their joint judgment, Gageler and Gordon JJ, too, felt that the legitimate expectation concept diverted the inquiry away from examining “the opportunity that a reasonable administrator ought fairly to have given.”⁹² Thus, the true inquiry must be to determine whether there has been fairness, rather than what expectations might not have been fulfilled. And, applying that to the circumstances of the case, their Honours stated:⁹³

86 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291–292, 301–302 and 305.

87 *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Lam* (2003) 214 CLR 1 at [61]–[70], [81]–[83], [116]–[121] and [140]–[148]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [65].

88 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30].

89 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30].

90 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30].

91 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30].

92 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [61].

93 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [67], *per* Gageler and Gordon JJ.

In light of the change in procedure that had occurred, fairness required that the Second Reviewer give to the respondent notice of the changed procedure, an opportunity to supplement the written submissions previously made on his behalf, and an opportunity to request supplementation of the record of interview by further oral evidence.

VII. Aftermath of *WZARH* for legitimate expectation and procedural fairness

55 *WZARH*, one could safely say, involved a fairly efficient despatch of the doctrine of legitimate expectation to the realm of Australian administrative law history. Writing later, Alan Robertson J stated that it “confirms, in trenchant terms, that the expression ‘legitimate expectation’ is best avoided”.⁹⁴ Similarly, Greg Weeks commented: “[i]t would take a very courageous counsel to raise an argument based on legitimate expectations before the High Court, or any Australian court, again”.⁹⁵ Mark Aronson, Matthew Groves and Weeks described the doctrine as “all but moribund in Australian law”;⁹⁶ Weeks called it “dead”;⁹⁷ and Naomi Sharp said that it was “jettisoned as a concept that assists in defining the content of the obligation of procedural fairness”.⁹⁸

56 What, then, has been the judicial treatment of the concept and natural justice after *WZARH*? And, is there any diminution of natural justice since its demise? These two matters will be examined below.

A. *Judicial attention since death of legitimate expectation*

57 In the Federal Circuit Court of Australia, arguments about legitimate expectation have been rejected. A case caught in *WZARH*'s immediate aftermath was *AFH15 v Minister for Immigration*,⁹⁹ where the Federal Circuit Court had allowed further submissions on legitimate

94 Alan Robertson, “Natural Justice or Procedural Fairness” (2016) 23 AJ Admin L 155 at 160.

95 Greg Weeks, “What Can We Legitimately Expect from the State?” in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing, 2017) ch 7, at p 161.

96 Mark Aronson, Matthew Groves & Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th Ed, 2017) at p 424.

97 Greg Weeks, “What Can We Legitimately Expect from the State?” in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing, 2017) ch 7, at p 161.

98 Naomi Sharp, “Procedural Fairness: The Age of Legitimate Expectation Is Over” (2016) 90 ALJ 797 at 798.

99 [2016] FCCA 99.

expectation, given the ruling by the full Federal Court in *WZARH* and that the appeal to the High Court was due to be handed down. However, given that the High Court had rejected the doctrine, the Federal Circuit Court stated that its conclusions were not altered that.¹⁰⁰

[T]here was no obligation on the Minister or the Department to afford procedural fairness to the applicant. In those circumstances, the mere representation that a certain procedure would be adopted did not, of itself, give rise to the obligation to afford procedural fairness and also to fulfil the representation.

58 In *JF Plastering and Construction Pty Ltd v Minister for Immigration*,¹⁰¹ an additional ground was advanced in argument that the company applicant “had a legitimate expectation of a fair hearing at the Tribunal”,¹⁰² which the court rejected as having “no merit”¹⁰³ because procedural fairness had been met. Following *WZARH*, the court said: “more fundamentally, the legitimate expectation of a person does not dictate whether procedural fairness is to be accorded to the person, or for determining the content of procedural fairness that might be owed”.¹⁰⁴

59 In *SZSZM v Minister for Immigration*,¹⁰⁵ the Federal Circuit Court rejected an argument based on legitimate expectation that a person in detention could not have his mobile phone removed, pursuant to a new policy, without an opportunity to put his case. The court acknowledged that *WZARH* “forcefully re-stated”¹⁰⁶ that legitimate expectation was irrelevant to determining the duty to accord natural justice and that “[t]he issue, then, must be resolved by reference to the statutory and factual context in which it arises”.¹⁰⁷ In the end result, as a large number of people were affected by the policy change about mobile phones in detention, the applicant was not accorded the opportunity to put his individual view. Relying on Mason J’s observations in *Kioa*,¹⁰⁸ that a duty to accord procedural fairness will not apply to decisions of an administrative kind or type where the person is affected as a member of a class or group (arising from a “policy” or “political” decision), the court noted: “where a single decision directly affects a large group of

100 *AFH15 v Minister For Immigration* [2016] FCCA 99 at [46].

101 [2016] FCCA 2903.

102 *JF Plastering and Construction Pty Ltd v Minister for Immigration* [2016] FCCA 2903 at [30].

103 *JF Plastering and Construction Pty Ltd v Minister for Immigration* [2016] FCCA 2903 at [30].

104 *JF Plastering and Construction Pty Ltd v Minister for Immigration* [2016] FCCA 2903 at [32].

105 [2017] FCCA 819.

106 *SZSZM v Minister for Immigration* [2017] FCCA 819 at [109].

107 *SZSZM v Minister for Immigration* [2017] FCCA 819 at [110].

108 *Kioa v West* (1985) 159 CLR 550 at 584.

persons, procedural fairness does not normally require that each person be afforded a hearing¹⁰⁹ This decision is in keeping with other decisions on formulation of policy and had legitimate expectation been applied it would not seem to alter that conclusion.

60 At Federal Court level, in *SZUOO v Minister for Immigration and Border Protection*,¹¹⁰ Collier J was not persuaded by arguments based on legitimate expectation due to the High Court's attitude in *WZARH*; and, the full court of the Federal Court in *SZTES v Minister for Immigration and Border Protection*¹¹¹ considered that *WZARH* had not affected what the primary judge in the case had ruled on procedural fairness.

61 At state court level, also, the *WZARH* decision has been cited with approval.¹¹²

B. High Court decision after *WZARH*

62 More significant, however, is the High Court's decision in *Minister for Immigration and Border Protection v SZSSJ*¹¹³ ("*SZSSJ*"), as the court set out there clear principles for applying procedural fairness. On the question of the content of procedural fairness, the court said:¹¹⁴

[C]ompliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power. The implied condition of procedural fairness is breached, and jurisdictional error thereby occurs, if the procedure adopted so constrains the opportunity of the person to propound his or her case for a favourable exercise of the power as to amount to a 'practical injustice'.

63 Hence, the importance of avoiding "practical injustice" was reiterated. Further, the court elaborated on just what the person to be affected by the decision must be afforded in the inquiry to be conducted – what is "reasonable opportunity to be heard" and what a person whose interest may be affected must be notified of, that is:

109 *SZSZM v Minister for Immigration* [2017] FCCA 819 at [118].

110 [2016] FCA 913.

111 [2015] FCAFC 158; the High Court refused leave to appeal in *SZTES v Minister for Immigration and Border Protection* [2016] HCL 38.

112 See, eg, *Save Beeliar Wetlands Inc v Jacob* [2015] WASC 482 and *Trimble v Southern Queensland Regional Parole Board* [2015] QSC 331.

113 (2016) 90 ALJR 901.

114 *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901 at [82].

- (a) “the issues to be considered in conducting the inquiry”; and
- (b) “the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person”.¹¹⁵

64 In *SZSSJ*, the question was whether information, that the inquiry had before it (through a data breach) that it decided it was not taking into account in its decision, should be told to the person in respect of whom the decision was being made. The court clearly thought that natural justice did not extend that far: “[o]rdinarily, there is no requirement that the person be notified of information which is in the possession of, or accessible to, the repository but which the repository has chosen not to take into account at all in the conduct of the inquiry”.¹¹⁶

65 In this instance, a data breach, though regrettable, that brought certain things to the attention of the decision-maker that it should not have and that it would not take into account, did not have to be drawn to the attention of the affected parties under the application of natural justice.

C. *Is there diminution of natural justice with the death of legitimate expectation?*

66 The shift in focus from what might be the legitimate expectation in the circumstances to the inquiry of what is fair in the particular case means that the effect of the decision or conduct by the administrative decision-maker is the overriding consideration. To repeat the view of Gleeson CJ in *Lam*: “[f]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice”.¹¹⁷

67 *WZARH* similarly emphasised fairness and that the “real question” is “what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made”.¹¹⁸

115 *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901 at [83].

116 *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901 at [83].

117 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 at [37].

118 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30].

68 Aronson, Groves and Weeks supported the shift to fairness of process as it means that the focus is not on “what was promised or expected but what should have been provided. That lens is clearly a better one through which to view fairness”.¹¹⁹ It was argued by Groves that little has been lost by the slow demise of legitimate expectations where the approach to procedural fairness scoops up issues previously within legitimate expectations.¹²⁰

69 Australia derived the legitimate expectation doctrine from cases decided in the UK, and it is significant that the common law courts in the UK have adhered to that doctrine, and have not been troubled with its utility in the same way as Australian judges and commentators have been. The doctrine of legitimate expectation generally remains alive and well in the UK, and Australian courts have now travelled a very different path. Aronson, Groves and Weeks advanced the theory that the different constitutional positions in part justify or explain the difference in approach between the two countries, but that “differing conceptions about fairness: the extent of the duty to be fair, the content of that duty and the rationale behind being fair at all” in the two jurisdictions also play a part.¹²¹

70 The Australian application of legitimate expectation, even in its heyday, did not go as far as the concept in the UK, where what Janina Boughey called an “intrusive” approach is employed by the courts.¹²² The main case often cited as exemplifying the intrusion into substantive decisions, going beyond procedural fairness, is *R v North and East Devon Health Authority, ex parte Coughlan*¹²³ (“*Coughlan*”), which involved an authority’s decision in 1998 to close a nursing facility in which Miss Coughlan, severely disabled by a road accident, had resided since 1993, having been promised that it would be her home forever.

119 Mark Aronson, Matthew Groves & Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th Ed, 2017) at p 427.

120 Matthew Groves, “Legitimate Expectations in Australia: Overtaken by Formalism and Pragmatism” in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing, 2017) ch 14, at p 344.

121 Matthew Groves & Greg Weeks, “The Legitimacy of Expectations about Fairness: Can Process and Substance be Untangled?” in *Public Law Adjudication in Common Law Systems: Process and Substance* (John Bell, Mark Elliott, Jason N E Varuhas & Philip Murray gen eds) (Hart Publishing, 2016) ch 8, at p 187.

122 Janina Boughey, “Proportionality and Legitimate Expectations” in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing, 2017) ch 6, at p 130 in the context of discussing *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, see n 124; and also pp 131 and 132.

123 [2001] QB 213. The Secretary of State for Health and the Royal College of Nursing were intervenors in the case.

Lord Woolf identified the facts of the case as falling within the following category:¹²⁴

Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy. [emphasis in original]

71 Lord Woolf articulated: “the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised”.¹²⁵ In this instance, the court relevantly decided that there was “an unjustified breach of a clear promise given ... to Miss Coughlan that she should have home for life at” the facility.¹²⁶ This was held to be unfair, and an abuse of power by the health authority decision-maker.¹²⁷

72 The legitimate expectation, then, operated to intervene in the substantive decision to close the facility, thereby going well beyond process. Courts in the UK have been prepared to follow a path which Australian courts early on made very clear was not open on legitimate expectation grounds – of extending to intervention in the substantive decision, rather than confined to fair process. Thus, the demise of legitimate expectation in Australia has not affected this substantive aspect of public decisions, but clearly the new contemporary approach maintains the focus on the overall fairness of process and the implications for practical injustice. Time will tell if the not unexpected death of legitimate expectation in Australia becomes a vehicle for downgrading the interests, previously couched as “legitimate expectations”, of individuals and for giving more prominence to the interests of government decision-makers and policymakers.

124 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57].

125 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [58].

126 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [117].

127 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [117]. It also breached Art 8(1) of the European Convention on Human Rights, which provides that “[e]veryone has the right to respect for ... his home”.

VIII. Conclusion

73 The journey of acceptance of the “legitimate expectation” doctrine from administrative law in the UK to its ultimate rejection in Australia has been traced. The rejection was not unexpected in that various judges in superior courts in Australia were critical of the concept and its utility, regarding it as uncertain and resulting in the focus being on what the legitimate expectation is precisely. That critical view did not, however, prevent the doctrine from reaching a pinnacle in *Teoh* to ensure that the main thrust of an international convention ratified by the Australian government, but not yet enacted into domestic or municipal law – that primacy be given to the interests of the child – be recognised in deportation decisions. This came close to influencing the substance of the decision, a position that judges had expressly denied should be the role of legitimate expectation. However, the opposing forces were gathering momentum and finally won the day in the cases of *Lam* and *WZARH*. With little real opposition from counsel in these cases, the death of the doctrine in Australian administrative law is unambiguous.

74 The approach now in natural justice cases is more holistic: to examine (a) what is procedurally fair in particular cases (where there is a duty to act in accordance with the principles of natural justice) and, therefore, (b) what the effect of the approach taken by the administrative decision-maker might be, and ask (c) is “practical injustice” avoided? It remains to be seen whether this might ultimately tilt the balance in favour of administrative decision-makers.

75 Despite the waxing and waning of the impact of “legitimate expectations” on principles of procedural fairness – verging at times as a potential impact on substantive decisions – there is little doubt that the doctrine, however, has had a lasting influence in Australian law. If nothing else, it has provided an indirect way of recognising that not only rights, but also interests of persons, could give rise to natural justice obligations – a recognition which is now firmly established in Australian administrative law. Even though the concept of “legitimate expectation”, regarded as ambiguous and uncertain, has now been rejected by the High Court and a new, more practical test adopted, it is commonly not an easy task to determine what is fair and whether practical injustice has been avoided in the circumstances.