

Natural justice

[ALA.2.200] Function of rules of natural justice under the Act

The rules of natural justice have a two-fold function under the Act. First, if a body is bound by one of the rules of natural justice then prima facie it is a "tribunal" within the meaning of s 2. See further [ALA.2.100]. Secondly, if a tribunal fails to observe an applicable rule of natural justice then the Supreme Court has jurisdiction to grant appropriate relief to the applicant pursuant to s 7. See further [ALA.7.320].

Whenever one is dealing with natural justice, a number of questions must be considered. What are the rules of natural justice? What is the content of those rules? When do the rules of natural justice apply? These questions will be considered briefly below. For a more detailed discussion, see GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984, Butterworths Pty Ltd, Sydney); Federal Administrative Law (looseleaf service) [ALA.7.500]ff; Aronson, Dyer and Groves Chs 7, 8 and 9; Sykes Lanham Tracey and Esser Chs 15, 16, 17 and 18; Hotop 169–216; Enright Ch 17; Allars Ch 6; and Douglas and Jones Chs 14–16.

[ALA.2.220] What are the rules of natural justice?

There are two main rules of natural justice, the *audi alteram partem* rule and the *nemo debet esse iudex in propria sua causa* rule. The first rule means "hear the other side" and embodies the notion that a tribunal must give a person a reasonable opportunity to present his or her case before making a decision. It is more commonly referred to as the "hearing rule". The second rule means "no person can be a judge in his or her own cause" and embodies the notion that a tribunal must be free from bias when making a decision. It is more commonly referred to as the "bias rule".

The phrase "observing one or more of the rules of natural justice" in the definition of "tribunal" refers to either of the two rules identified above: *Lewenberg v Legal Aid (Vic)* (2005) 22 VAR 354; [2005] VSC 28 at [51]. A "tribunal" need only be required to observe one of the rules of natural justice in order to be subject to the Act: *Keller v Bayside City Council* [1996] 1 VR 356; (1995) 8 VAR 377 at [378]. It is possible, for example, for a decision-maker to be required to observe the bias rule, even though it is not required to observe the hearing rule: *Diep v Appeal Costs Board* (2003) 146 A Crim R 151; [2003] VSC 386 at [30].

[ALA.2.240] Hearing rule

As Mason J observed in *Kioa v West* (1985) 159 CLR 550; [1985] HCA 81 at 585: "The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?" Defining the content of the hearing rule is difficult. The content of the hearing rule is not fixed. The content and application of the rule depends on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth": *National Companies & Securities Commission v News Corp Ltd* (1984) 156 CLR 296; [1984] HCA 29 at 311–312 (Gibbs CJ).

In *Re Minister for Immigration & Multicultural Affairs; Ex parte Hieu Trung Lam* (2003) 214 CLR 1; [2003] HCA 6 at 13-14, Gleeson CJ said: "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice". See also *Air New Zealand Ltd v Mahon* [1984] AC 808. In *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; [1986] HCA 7 at 676 Deane J said that the rules of natural justice are neither standardised nor immutable; their content may vary with changes in contemporary practice and standards. See also *Kioa v West* (1985) 159 CLR 550; [1985] HCA 81; *South Australia v O'Shea* (1987) 163 CLR 378; [1987] HCA 39; *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648; [1990] HCA 22; *Annetts v McCann* (1990) 170 CLR 596; [1990] HCA 57; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; [1992] HCA 10; *Johns v Australian Securities Commission* (1993) 178 CLR 408; [1993] HCA 56; *Herald & Weekly Times Ltd v Victorian Civil & Administrative Tribunal* (2006) 24 VAR 174; [2006] VSCA 7 at [41]; *Robb v Chief Commissioner of Police* (2005) 23 VAR 244; [2005] VSC 310 at [29]; *SZBEL v Minister*