Are expectations legitimate and, if so, do they run to international conventions?

*Dr Steven Churches**

Procedural fairness, the concept that an individual must be heard as to her or his side of a story before discretionary official action adverse to that person's interests is taken, has a long history in the common law[1] and is a key element in structuring personal autonomy as a social benefit.

The centrality of natural justice: the original extension to 'rights and interests'

Protection was traditionally expressed as extending to 'rights and interests', but they in turn were not restricted to tangible property, so that the great historical cases involved threat of termination in office. See *Bagg's case*[2] (the recalcitrant councillor Bagg, having said while presenting his posterior to the Mayor of Plymouth, Thomas Fowens, 'Come and kiss') for a ruling by King's Bench that Bagg could not be removed from office by decision of the Plymouth Corporation without a hearing. Dr Bentley's long-term litigation to retain his degrees and the position of Master, Trinity College, Cambridge, is another example.[3] Claims to existing offices may have been intangible, but they were recognised as legal rights.

The evolution to deal with modern interests that did not amount to legal rights

More complex social relations, particularly involving greater executive governmental powers, raised questions as to whether procedural fairness might be required where a body with discretionary power over status (for example, illegal or legal alien) altered the basis on which it had declared that it would decide.[4] And the status of those whose livelihoods depended on renewal of licences or permits were similarly in question. If there were to be denial of renewal, should they be assured of a hearing? It is now a little over half a century since these prospective issues came to a head and resulted in expansion of the rubric 'rights and interests' for matters that attracted procedural fairness. As Brennan J put it in *Kioa v West*[5] ('*Kioa*'):

> [Disbelieving that a legislature would intend] that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights. The protected interests which do not amount to legal rights are nowadays frequently described as 'legitimate expectations'.[6]

---

* Dr Steven Churches is an Adelaide Barrister. This article is an edited version of a paper presented at the Australian Institute of Administrative Law National Conference, Canberra, July 2022.

1 SC Churches, 'Western Culture and the Open Fair Hearing Concept in the Common Law: How Safe is Natural Justice in Twenty First Century Britain and Australia?' (2015) 3 *Chinese Journal of Comparative Law* 28 (Oxford Journals).

2 (1615) 11 Co Rep 93b; 77ER 1271. Note that *Bagg's case* involved a power of removal under a Royal Charter granted to Plymouth, not under statute.

3 *R v Chancellor of the University of Cambridge* (1723) 1 Str 557; 93 ER 698. See Churches (n 1) 32−3 for an explanation of the context for this litigation.

4 *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 140; 143 ER 414 (*Cooper*), together with the dissent on which it was based, illustrates the boundaries of modernity: see Churches (n 1) 34−6.

5 (1985) 159 CLR 550 ('*Kioa*').

6 Ibid 616.9−617.1.

Has the phrase 'legitimate expectation' still work to do in the third decade of the 21st century?

The extension of procedural fairness to prospective 'rights' that did not amount to property rights was the point of the nomenclature, 'legitimate expectation'. But by the second decade of the 21st century it was fashionable to say that the phrase 'legitimate expectation' had no work to do and no role to play, as it was by then accepted that any discretionary decisions taken under statute that adversely affect individuals might necessitate a fair hearing, if unfairness would otherwise result. Sir Gerard flagged his considerable doubts as to the concept of 'legitimate expectation' in *Kioa*. The question in 2022 is whether the phrase still

has work to do in encompassing prospective matters that do not raise property rights but are sufficiently identifiable to require a fair hearing before they are adversely impacted.

'Legitimate expectations' spring from Lord Denning's fertile brow

Shortly before Christmas 1968, Lord Denning MR delivered an *ex tempore* judgment in *Schmidt v Secretary of State for Home Affairs*[7] ('*Schmidt*'), which concerned the power of the respondent Secretary of State to renew the right of residence of two Americans studying Scientology in the United Kingdom.

Lord Denning's judgment has become notorious for dicta[8] in which his Lordship added the concept of 'legitimate expectation' to the rights or interests that attracted a requirement of a fair hearing. Lord Denning mused that, if a student were allowed in for a particular time period and his permit were revoked prior to the termination of that period, 'he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time'.[9] But such were not the appellants' facts and, in any case, as the Master of the Rolls pointed out, the Home Secretary was open to hearing representations from the students.

Lord Denning's reasoning evolved on sketchy hypothetical facts. A legitimate expectation arose from a perception (in the context, presumably subjective) that a state of affairs pertained into a future now being altered by official decision-making; and, secondly, the decision-maker could (presumably if not prohibited by statute) alter the terms of the application of a discretionary power — for example, cancel a visa even though it had been granted for a longer period. Such alteration, against the interests of the affected party, might raise a need for procedural fairness because of a legitimate expectation held by the affected party as to continuity of a reasonably expected application of the discretionary power.

7 [1969] 2 Ch 149 ('*Schmidt*').
8 Ibid 170−1.
9 Ibid 171 A−B.

'Legitimate expectations' come to Australia

That set the scene for the first run of 'legitimate expectations' in the High Court of Australia: *Salemi v MacKellar (No 2)*[10] ('*Salemi*'). Ignazio Salemi was an overstayed alien (as non-citizens were then designated) in Australia and subject to deportation under the *Migration Act 1958* when, in the period January to April 1976, the Minister for Immigration published public statements to the effect that an amnesty would exist for overstayed aliens who made themselves known before the end of April 1976 so long as they met health and good character criteria. Salemi met these criteria and applied for the amnesty. He was refused by the Minister and ordered to be deported.[11] He applied to the High Court to challenge the Minister's order for having been made with a lack of procedural fairness.

The competing arguments set the scene for much of what was to follow. Mr AR Castan for Salemi said:[12]

> The news releases created in the plaintiff a 'legitimate expectation' that he would be entitled to remain. That expectation could only be taken away by a procedure which complied with the requirements of natural justice.

The riposte from Mr MH Byers QC SG referred to the informality of the amnesty offer (it 'requires a formal document') and then continued:

> Whether a person in exercising statutory powers must comply with the requirements of natural justice depends on the construction of the provisions in question.[13]

The reasoning of the naysayers in *Salemi*: note the context in which they wrote

Perhaps emblematic of the path of legitimate expectations in Australian jurisprudence, the High Court in *Salemi* split 3:3 on the issue of whether the Minister needed to afford a hearing to Salemi before making the order for removal. Barwick CJ's casting vote, with the judgments of Gibbs and Aickin JJ, denied the need for a hearing. Of the 'statutory' majority, the Chief Justice alone explored legitimate expectations in any depth, and Aickin J not at all. As had been the case in *Schmidt*, the reasoning against any requirement of natural justice was made good irrespective of any reference to legitimate expectations, so what was said about them was strictly obiter.

Salemi, like *Schmidt*, was decided by reference to the grey no-man's land between the trenches of administrative law in the first half of the 20th century (discretionary decisions by the executive did not require natural justice, as not judicial) and the upland that emerged

10 (1977) 137 CLR 396.

11 Salemi was a member of the Italian Communist Party and an agitator in industrial affairs in Australia: see S Battiston, '*Salemi v MacKellar* Revisited: Drawing together the Threads of a Controversial Deportation Case' (2005) 28 *Journal of Australian Studies* 1−10. The Minister plainly felt antagonistic to Salemi's presence in Australia: Commonwealth, *Parliamentary Debates*, House of Representatives, 8 August 1977, 898.

12 (1977) 137 CLR 398.5. Castan relied specifically on Lord Denning in *Schmidt* and later cases.

13 Ibid 399.3. Byers QC referred to *Cooper* — a seminal case, but perhaps containing Delphic reasoning. *Cooper* provided slender support for the Byers argument (see Churches (n 1) 35−6). The war over the basis for natural justice was ultimately futile and is glossed over below.

with *Ridge v Baldwin*[14] in which the description 'quasi-judicial decision-making' was swept away as the basis for a fair hearing. What now mattered was whether an individual's rights or interests (query his/her legitimate expectations) were to be adversely impacted by a discretionary decision, usually pursuant to statutory power. Avoiding the repercussions of *Ridge v Baldwin*, in *Salemi* the Chief Justice denied any need for natural justice because

'It cannot be said that the power to order deportation is a power to affect a right of the prohibited immigrant'.[15]

That assumption would be undone only eight years later in *Kioa*[16] by reference to the impact of the *Administrative Decisions (Judicial Review) Act 1977* and other, then recent, legislation.[17]

In *Salemi* Barwick CJ despatched 'legitimate expectations' with some asperity.[18] The Master of the Rolls' 'eloquent phrase' had more 'literary quality' than 'precise meaning and the perimeter of its application'. The Chief Justice, after surveying Lord Denning MR's case law on the subject, appeared to allow for a 'right' that would attract a hearing for a licensee or permittee who had fulfilled all conditions and could reasonably expect renewal, if the grantor determined to refuse the renewal: 'Such a person might be said to have a lawful expectation'.[19] But his Honour was vehemently opposed to any obligation to afford a hearing arising in the context of government policy dealing with discretionary powers.[20] The attack on the policy front was, however, couched in terms of the subject matter of the Migration Act and the power of deportation:

> We are not here dealing with the administration of a statute or statutory instrument which on its proper construction involves judicially recognizable limitations upon the discretion confided to the body or official. We are dealing with the exercise of a fundamental national power exercisable according to government policy, for which ultimately there is responsibility to the Parliament.[21]

The amnesty offer was no more than a statement of policy, and such statements do not create legal obligations 'though they may understandably excite human expectations as distinct from lawful expectations'.[22]

The minority view in *Salemi*

The leading judgment is that of Stephen J, Jacobs J adding briefly on the critical matter, and Murphy J focusing on the concept of 'amnesty'. Justice Stephen agonised over whether the Minister, in exercising deportation power under s 18 of the *Migration Act 1958* (as then

14 [1964] AC 40.
15 (1977) 137 CLR 404.4.
16 (1985) 159 CLR 550.
17 See eg ibid 578−9 (Mason J).
18 (1977) 137 CLR 404−6.
19 Ibid 405.8.
20 Ibid 405.9−407.3.
21 Ibid 403.6.
22 Ibid 406.9.

numbered) was required to provide a hearing to the affected party. However, his Honour, having reflected on the impact of *Ridge v Baldwin*, thought it 'by no means clear' that the Minister could summarily deport an alien without a hearing.[23]

In the context of the Minister's amnesty offer,[24] Stephen J observed the birth pangs of legitimate expectations in *Schmidt* and later English cases, and then suggested that the basis upon which the possession of a legitimate expectation gave rise to a right to be accorded natural justice stemmed 'from the same fertile source as has nourished the concept that those who possess rights and interests should not, in the absence of express enactment, be deprived of them by the exercise of an arbitrary discretion and without observance of the rules of natural justice'.[25]

Legitimate expectations might be based in assumptions of non-revocation or past behaviour of renewal, but also express assurances (in the context of government, policy announcements)

The concept of legitimate expectation (and its possible differing bases) was then set out in terms of renewal of licences but then, recognising that Salemi's claim was of a different nature, resting on a ministerial assurance:

> as in the *Liverpool Corporation Case* [(1972) 2 QB 299], it is upon an express assurance that the expectation is based: an assurance given by a Minister of the Crown as to the way in which the discretionary power conferred upon him by statute would be exercised.[26]

Talk of 'assurances' given by the Crown raised the matter of policy change. Policy was a matter for executive government, but departure from policy required that those affected by change be allowed to make representations.[27]

The building blocks of the requirement of a hearing in this matter were set out:

i. Salemi's status was transformed by the amnesty: he went from being under threat of deportation to havin a belief that he would be granted lawful resident status;

ii. given the terms of the amnesty, since he was not in ill health, deportation carried the imputation that he was of bad character or a criminal; and

iii. the nature of the sanction, deportation, applied to a person who apparently satisfied the terms of the amnesty, called for a hearing.[28]

23 Ibid 436.3.
24 Ibid 436.5.
25 Ibid 438.9.
26 Ibid 439.3 and 439.6.
27 Ibid 440.4.
28 Ibid 441−2.

Legitimate expectations attract procedural rights only, not substantive rights

Critically, Stephen J then set out the limitation on impact of a legitimate expectation: it might attract a fair hearing, but it did not confer substantive rights. The Minister could not be prevented from exercising his powers of deportation by reference to the policy expressed in the amnesty, providing procedural fairness was afforded.[29] As Jacobs J put it:

> a person may have … a 'legitimate expectation'. That does not mean that the expectation is itself the right. The right is the right to natural justice in certain circumstances and a 'legitimate expectation' is one of those circumstances.[30]

Salemi as template for the ensuing 45 years

The Court divided 3:3, but the statutory majority (in the shape of Barwick CJ on the subject of legitimate expectations) was writing in a backward-looking context: the deportation power was too 'special' to be subject to procedural fairness, and the relevant legislation showed no intention of requiring natural justice. The first of these limbs was swept away eight years later in *Kioa*,[31] and the statutory intention argument dragged on to a stalemate, exhausted by the futility of the fight.

The battle lines over legitimate expectations

The possibilities arising from *Schmidt* and *Salemi* were twofold: extinguish legitimate expectations as a jurisprudential obfuscation; or explore their possibilities. The outcomes in English and Australian jurisprudence over 50 years have been utterly contrary, although the divergence is arguably only over nomenclature. This article has space and time only to cover the Australian aspect of the story: the English and New Zealand evolution has been very different, allowing for legitimate expectations to found judicial review — that is, attract substantive as opposed to merely procedural relief.[32]

Suffice it to say that the two cases provided battlefields on which the contending arguments for and against legitimate expectations were first drilled:

1. *What is a 'right' that necessitates procedural fairness*: Lord Denning MR in *Schmidt* dealt only with permittees; in *Salemi* Barwick CJ restricted such 'rights' to permittees; while Stephen J plainly extended to those reliant on policy.

2. *Does a legitimate expectation require a subjective appreciation of the expectation, or will an objective requirement be adequate*: the facts in *Schmidt* and *Salemi* did not attract general comment on this issue, but in *Salemi* Stephen J addressed the expectation as subjective.

29 Ibid 443.1 and 443.6.
30 Ibid 452.4.
31 See n 5 above.
32 An early illustration in *New Zealand Maori Council v Attorney-General* [1994] 1 AC 466; [1994] 1 NZLR 513 (PC) ('assurance' given by the Solicitor-General). Most recently, and reflecting the hold of substantive relief in New Zealand jurisprudence, received through the Privy Council, see *Te Pou Matakana Limited v Attorney-General* [2021] NZHC 2942; [2022] 2 NZLR 148 (obligations arising from te Tiriti: the Treaty of Waitangi).

3. *Does a legitimate expectation require a formal statement to the public — for example, in a Gazette*: in *Salemi* Byers QC SG submitted that a 'formal document' was required: press statements were inadequate to found an expectation with procedural consequences; Barwick CJ thought that mere policy statements had no legal consequences; and Stephen J plainly thought that ministerial assurances attracted consequences in administrative law.

4. *Do legitimate expectations attract legal sanctions beyond the procedural — that is, natural justice*: in *Salemi* Stephen J and Jacobs J were decisively clear that such expectations attracted procedural rights only, not substantive rights.

The immediately subsequent High Court decisions on this matter

Heatley: what is a protected right?

Two months after handing down *Salemi* the High Court delivered judgments in *Heatley v Tasmanian Racing and Gaming Commission*[33] — a case involving the appellant being 'warned off' all Tasmanian racecourses, a statutory power available to the respondent. Query whether the Racing and Gaming Commission had to give Mr Heatley a hearing before giving him notice of his exclusion.

Chief Justice Barwick adhered to his stance in *Salemi*. Entitlement to a fair hearing arose only from association with a legal right.[34] Heatley's claim to a legitimate expectation that, upon paying the entry fee, he could enter racecourses was denied by the Chief Justice by analogy with a frequent visitor *chez* Barwick. Such a visitor might have a human and reasonable expectation of entry, but it will not be a lawful expectation. There is no right of entry to the Barwick residence or to a racecourse,[35] and hence no legitimate expectation of such entry.

Justice Murphy again avoided analysis of legitimate expectations, but Stephen J and Mason J agreed with Aickin J, who ventured into the fray. His Honour crisply identified the nature of the 'right' that attracted a fair hearing. Seeing beyond the Chief Justice's homely analogy, Aickin J noted that racecourses were open to the public on payment of a fee, and thus Heatley had an expectation of entry. Justice Aickin carefully circumscribed the bounds of such an expectation: 'It is of course only an opportunity or an expectation and not a legally enforceable right'.[36] His Honour observed the two differing bases for admitting a legitimate expectation:

i. the expectation that a governmental authority will exercise its powers in a particular manner; and

ii. the expectation of the continuation of a customary activity.

33 (1977) 137 CLR 487.
34 Ibid 491.8.
35 Ibid 492.3.
36 Ibid 508.7.

Heatley's matter fell in the second.[37] Having determined the necessity of a hearing by the Commission, Aickin J also noted the impact of the 'warning off' on Heatley's reputation.[38]

FAI Insurances Ltd: annual licensees may have a right; and the basis for necessitating natural justice may lie in statutory construction

FAI Insurances Ltd v Winneke[39] ('*FAI*') concerned the *Workers Compensation Act 1958* (Vic), which provided that companies offering workers compensation insurance required the approval of the Governor in Council. Approvals were for one year and might be renewed if the Governor saw fit. With only Murphy J dissenting, the other six members of the Court determined that, if the government was minded to refuse a renewal of approval to the appellant company, natural justice must be provided.

Chief Justice Gibbs noted the commercial realities of running an insurance company[40] which is not set up a business of insurance in the expectation that it will last for only one year. Consequently[41] a company classified as an approved insurer would have a legitimate expectation that its approval would be renewed absent reason existing for refusing to renew it. The requirement for procedural fairness follows at that point.

Justice Stephen agreed in the reasons of Mason J, which explored whether an annual approval raised a legitimate expectation analogous to a licence renewal. The answer was yes.[42]

Justice Wilson provided lengthy reasons to the same effect, leaving Brennan J writing the final judgment.

Justice Brennan and the ultra vires paradigm

Justice Brennan agreed with the majority in the result but unveiled an analysis that was, briefly, the nemesis of legitimate expectations, at least in the eyes of its opponents. This approach may be summed up in the sentence 'The cases earlier cited [the standard repertoire extending back to *Cooper v Wandsworth Board of Works*] show legislative intention to be the foundation upon which a requirement to apply the principles of natural justice rests',[43] followed by:

> The common law attributes to the legislature an intention that the principles of natural justice be applied in the exercise of certain statutory powers, and the legislature's intention provides the sole and sufficient warrant for judicial review of the exercise of those powers when an applicable rule of natural justice is not observed.[44]

37 Ibid 509.5.
38 Ibid 512.3.
39 (1982) 151 CLR 342.
40 Ibid 348.4.
41 Ibid 348.6.
42 Ibid 369.6.
43 Ibid 409.2.
44 Ibid 409 5.

This is now described as 'the ultra vires paradigm' for discerning the requirement or not of natural justice. It is distinguished from its rival theory, 'the common law paradigm', pursuant to which it is said that discretionary decisions that may adversely impact personal interests require a fair hearing, unless the relevant statutory power is expressed in terms of clarity as nullifying any need for natural justice.

The adverse impact of the ultra vires paradigm on legitimate expectations results from that paradigm's hostility to any factors external to the text of the statute itself being allowed to affect the construction of the legislation. The subjective expectations of a licensee for renewal consequently fall away. Similarly, on this analysis, reference to government policy asserted to channel discretionary powers under a statute is an external factor which should not affect the assessment of whether the statute allows or, indeed, requires natural justice to be provided.

The basis for requiring natural justice not further pursued in this article, as ultimately a red herring; in any case, natural justice as a 'free standing right' is recognised by the principle of legality

Chief Justice French, writing extrajudicially, commented, 'It may be that the distinction between the common law and a common law rule of statutory implication approaches a distinction without a real difference'.[45] In *Commissioner of Police v Tanos*[46] ('*Tanos*') Dixon CJ and Webb J had relied on *Cooper v Wandsworth Board of Works* in enunciating a classic 'principle of legality' statement, in the context of the requirement for a hearing. Natural justice as 'free-standing right' theory (the common law paradigm) is assumed to be good law, outside the Kabbalistic debate that marks modern Australian administrative law.

The High Court case law over the next decade: 1982 to 1992

Kioa*: *Mason J plumped firmly for 'legitimate expectations' having utility beyond simple 'rights and interests'

Kioa[47] was the next cab off the rank, determining that the Minister of Immigration was required to provide a fair hearing before making a decision to deport. There was some discussion of legitimate expectations, most pertinently by Mason J, who expressed the general common

45 Robert French AC, 'Procedural Fairness — Indispensable to Justice?' (2010) Sir Anthony Mason Lecture, the University of Melbourne Law School, p 16; and see pp 16−18 for references to the High Court grappling with 'the distinction'. The lack of real difference has not prevented consequential doctrinal dispute over the existence of legitimate expectations.

46 (1958) 98 CLR 383, 395. The joint judgment not only relied on *Cooper* but also, at 396, on *In re Hammersmith Rent Charge* (1849) 4 Ex 87 at 97; 154 ER 1136 at 1140, the dissent of Parke B upon which *Cooper* built.

47 (1985) 159 CLR 550. The case is famous for the battlelines drawn between Mason J and Brennan J over the basis for requiring procedural fairness, not further pursued in this article, although Brennan J's theory of statutory intent was used to undercut the use of legitimate expectations.

law rule in terms of potential deprivation of benefit from an individual of some right, interest or legitimate expectation (relying on the usual suspects from then recent case law) and then said:

> The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.
>
> The reference to 'legitimate expectation' makes it clear that the doctrine applies in circumstances where the order will not result in the deprivation of a legal right or interest.[48]

Importantly, in the realm of government policy and behaviour, Mason J noted the extension to expectations beyond enforceable legal rights; 'The expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision', and some of the Court in *Salemi* thought that the amnesty constituted such an undertaking.[49]

A recognition of the utility of legitimate expectations as extending from traditional rights and interests

In *Kioa* Deane J wrote, affirming the need for natural justice for the applicants, of 'an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity'.[50]

Three of the Kioa majority expand their views on legitimate expectations in O'Shea: Mason CJ and Deane J now firmly in support of 'legitimate expectations', while Brennan J deepens his animus

Mr O'Shea was a paedophile unable to control his sexual instincts. Under South Australian law, a recommendation for his release from prison, made by a medical panel, had to be agreed in by the Governor — that is, the Cabinet: the decision or not for release was nakedly political. The medical panel recommended release, and the Cabinet refused to follow the recommendation. O'Shea sought relief on the ground that he was entitled to a hearing by the Cabinet before they could refuse to follow the medical panel's recommendation.

In *South Australia v O'Shea*[51] Mason CJ referred in general terms to what he had said in *Kioa*[52] but refused O'Shea relief, as he was guaranteed a fair hearing by the medical panel under the relevant statute. The Cabinet had access to his submissions. Justice Brennan also referred to his views in *Kioa*, saying:

> The procedural requirements affecting the exercise of the Governor's power should not depend on whether a favourable recommendation has created a 'legitimate expectation' in the offender. I have elsewhere stated my view about this notion: see *Kioa v West*, at pp 617−622. *It is a notion which, if taken as a criterion, is apt to mislead for it 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.*[53]

48 Ibid 582.9.
49 Ibid 583.3.
50 159 CLR 632.7.
51 (1987) 163 CLR 378.
52 See n 47 above.
53 (1987) 163 CLR 411.3 (emphasis added).

A champion for expanding the nomenclature of rights and interests that attract natural justice

Justice Deane had been almost mute on the subject of legitimate expectations in *Kioa* but now expressed unabashed approbation. His Honour conceded that 'legitimate expectation' was an 'unsatisfactory phrase' but then said:

> the common law requirements of procedural fairness cannot, in any event, properly be confined, in a case involving the exercise of government power or authority, by reference to some formula framed in terms of 'rights' or of some rigid view of 'legitimate expectation'. … [In *Kioa*] I was led to use the words 'rights ... or legitimate expectations' by the strong support which their use derives from modern authority. I added the words 'interests' and 'status', which I consider to be words of wide and flexible connotation, to cover other cases in which the effect of the exercise of public power or authority on the person, affairs or aspirations of another, in his individual capacity as distinct from merely as a member of the general public, is such that minimum standards of fairness demand that consideration be given to his particular position and circumstances.[54]

Quin and *Haoucher*: the former an unsuccessful claim based in a continuation in office expectation; the latter a successful application in the context of expectation based in stated policy

On the same day in June 1990, the High Court delivered two judgments in the relevant field: *AG (NSW) v Quin*[55] ('*Quin*') and *Haoucher v Minister for Immigration and Ethnic Affairs*[56] ('*Haoucher*'). *Quin* involved all 100 serving magistrates in New South Wales being dismissed pursuant to statute, with 95 of them being reappointed. Quin was one of the five non-appointees and succeeded in his claim in the New South Wales Court of Appeal that he was entitled to a fair hearing before being rejected. But the State's appeal succeeded by 3:2 in the High Court, Mason CJ and Brennan J agreeing in that result through different reasoning.

Chief Justice Mason rejected Quin's submissions on the basis that the statutory mechanism and the executive functions of judicial appointment countered any requirement of natural justice. His Honour also examined at length the need for legitimate expectations to have only procedural effect, not the substantive impact suggested by English judges at the time (and later actually acted on in English cases).[57]

Justice Brennan also dealt with this latter topic,[58] but his Honour's references to legitimate expectations in *Quin* remained bound by his 'statutory power' ultra vires paradigm approach.[59]

Haoucher was pre-eminently a policy case. The Minister for Immigration detailed a policy to Parliament covering his deportation power. A deportee would have the right to appeal to the Administrative Appeals Tribunal ('AAT'), and a recommendation overruling the Minister's decision was only to be overturned by the Minister 'in exceptional circumstances' and on

54 (1987) 163 CLR 417.5−418.1.
55 (1990) 170 CLR 1.
56 (1990) 169 CLR 648.
57 (1990) 170 CLR 1, 21−3.
58 Ibid 39.5.
59 Ibid 39.3.

'strong evidence'. The appellant was subject to a ministerial deportation order, successfully appealed to the AAT, and the Minister then overturned the AAT ruling, reinstating the deportation. The appellant sought relief on the basis that he was entitled to a fair hearing by the Minister as to the exceptional circumstances and the strong evidence relied on by the Minister. Haoucher succeeded by 3:2.

Utility expressed for expanding the categories of rights and interests that attract natural justice; affirmation of the common law theory of procedural fairness; and the nature of a stated position by government

Justice Deane, in the majority, had no truck with the ultra vires assumption that a requirement of a fair hearing must be found in the statute. His Honour said of the Minister's overturning of the AAT[60] (employing his expanded suite of categories that might attract natural justice), in the light of 'a published, considered statement of government policy':

> It directly affected the appellant's rights, interests, status and legitimate expectations in his individual capacity. … *In those circumstances, the justice of the common law demanded that the appellant be accorded an opportunity of being heard* on the questions whether the 'recommendations of the ... Tribunal should be overturned' by reason of 'exceptional circumstances' and whether 'strong evidence can be produced to justify' such an overturning of the Tribunal's recommendation.[61]

As to the impact of policy and the creation of the legitimate expectation referred to above (which included 'reputation'[62]), Deane J said:

> For so long as that published policy was operative, a deportee would reasonably be expected to see it as providing a critical reference point in determining the desirability and effectiveness of an application to the Tribunal for review of a deportation order.[63]

Justice Toohey went further in directly controverting the Brennan J ultra vires paradigm,saying:

> As a matter of construction of the relevant provisions of the *Migration Act*, the Minister may not have been bound to afford the appellant a further hearing merely because, in reconsidering his earlier decision, he decided to affirm it. However, in the present case, there is another question — whether an entitlement to a further hearing arose as a matter of construction of the criminal deportation policy.[64]

The ministerial policy, external to the text of the statute, could be construed as to whether a post-AAT hearing was required. Justice Toohey rounded his judgment with a statement as to the requirement of natural justice in the context of ministerial policy:

> If, as here, the Minister asserts that the reconsideration was in accordance with the criminal deportation policy, the deportee is entitled to know what were the circumstances said to be 'exceptional' and what was the evidence said to be 'strong', and to be heard in answer. Procedural fairness requires that much.[65]

60 (1990) 169 CLR 655.5.
61 Ibid 654.9 (emphasis added).
62 Ibid 655.6 — the ministerial statement 'would almost inevitably be damaging to the appellant's reputation'.
63 Ibid 655.2.
64 Ibid 670.4.
65 Ibid 671.2 and see also 671.5.

Justice McHugh examined the arrival of legitimate expectations and their utility:

> *Before Lord Denning's judgments in* Schmidt *and* Breen*, the common law rules of natural justice only protected a person's existing rights and interests.* … The introduction of the concept of legitimate expectation into public law extended the range of protection given by the common law rules of natural justice. *Prospective, as well as existing, rights, interests, privileges and benefits are now within the domain of natural justice. … [T]he common law now gives a person the right to be heard before the exercise of a statutory power prejudices some right, interest, privilege or benefit which that person can legitimately expect to obtain or enjoy in the future.*[66]

McHugh J had complemented Deane J's addition of status and legitimate interests as categories that attracted natural justice, with privileges or benefits which might legitimately be expected to obtain or be enjoyed in the future. Turning to statements of government policy and decision making which thwarted expectations raised by such policy, McHugh J said:

> A legitimate expectation may arise from the conduct of the person proposing to exercise the power or from the nature of the benefit or privilege enjoyed: *Kioa*, at p 583. [See n 47 above] In *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, the Privy Council held that a policy announcement that illegal immigrants would be interviewed and their cases considered on their merits gave rise to a legitimate expectation that an immigrant would not be deported without the policy being implemented. *Ng Yuen Shiu* is an illustration of an undertaking giving rise to a legitimate expectation.[67]

Justice McHugh concluded that procedural fairness was owed to the appellant/applicant on the same basis as that found by Deane J and Toohey J.[68]

Annetts v McCann

In *Annetts v McCann*[69] ('*Annetts*') a majority (Mason CJ, Deane and McHugh JJ in joint judgment) relied on simple *Tanos* principle of legality assumptions to find that the Western Australian Coroner owed the parents of a dead teenager a right to make submissions as to his good character before making any findings adverse to the parents or the deceased:

> 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 …[70]

Justice Brennan dissented at length, explaining his distrust of legitimate expectations in the light of the ultra vires/statutory power paradigm.

66 Ibid 679.9−680.4 (emphasis added).
67 Ibid 681.5.
68 See nn 61 and 64 above.
69 (1990) 170 CLR 596.
70 Ibid 598.2; 603.9.

Ainsworth v Criminal Justice Commission

Ainsworth v Criminal Justice Commission[71] resulted in a unanimous vindication of Mr Ainsworth's claim that he was entitled to procedural fairness in the preparation of a report by the Queensland Criminal Justice Commission under statutory power, as his reputation was at stake in the report to be tabled in Parliament. The plurality (Mason CJ, Dawson, Toohey and Gaudron JJ) quoted the pithy statement from the majority in *Annetts*[72] and left no doubt that a finding in the report adverse to Mr Ainsworth would damage his reputation. Hence he was entitled to a fair hearing.

Justice Brennan also quoted the summation from *Annetts* and went on to observe that the Act did 'not exclude the implied requirement that the rules of natural justice be observed in the preparation of a report'.[73] So far so agreeable with the plurality, but in what must pass as dicta (since his Honour thought the potentially damaged reputation did not require to be classed as raising a legitimate expectation), Brennan J said, immediately prior to his affirming words above:

> For reasons which I have expressed elsewhere [inter alia *FAI*, *Kioa* and *Quin*] I do not find the concept of 'legitimate expectations' illuminating of the circumstances which attract the obligation to accord natural justice.[74]

Into the vortex: *Teoh* as the focal point for criticising legitimate expectations

Minister for Immigration and Ethnic Affairs v Teoh[75] ('*Teoh*') concerned a Malaysian citizen, Ah Hin Teoh, who sought review of the decision of a ministerial delegate, based in the reasoning of an Immigration Review Panel. Mr Teoh's application for an extension to his entry permit had been refused, following his conviction, after his application, of importing heroin for his wife's use. The impetus for the review sought was that Mr Teoh had seven children in his care, as his wife, the birth mother of all seven, had been declared an unfit mother by the Western Australian Government. If he were refused an entry permit extension, he would be an illegal alien, and subject to immediate removal. The result was that the seven children would be split up and fostered out or placed in orphanages.[76]

71 (1992) 175 CLR 564.
72 See n 69 above.
73 (1992) 175 CLR 592.1.
74 Ibid 591.9.
75 (1995) 183 CLR 273.
76 The CLR summary of arguments, and the judgments, do not make the position of the children clear, but in argument in the Full Federal Court they were clearly understood to be in jeopardy. The decision in *Teoh* raised a political and media storm. Federal governments of both persuasions mounted a total of three legislative attempts to overrule the High Court, but each failed in the Senate. South Australia, not known for the impact of Conventions on its decision-makers, passed the *Administrative Decisions (Effect of International Instruments) Act 1995*, which provided in s 3(2) that 'an international instrument that does not have the force of domestic law under an Act of the Parliament of the Commonwealth or the State cannot give rise to any legitimate expectation that — (a) administrative decisions will conform with the terms of the instrument; or (b) an opportunity will be given to present a case against a proposed administrative decision that is contrary to the terms of the instrument'. The conservative arms of the print media were outraged by *Teoh* — see eg PP McGuiness over many years in *The Australian* (his initial attack, on the Full Federal Court decision, was in the *Sydney Morning Herald*).

The argument in the High Court revolved over whether the *Convention on the Rights of the Child* ('CROC'), ratified by and then entered into force for Australia, carried consequences in decision-making. The Convention provided in Art 3(1): 'In 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'. The Panel said:

> It is realised that Ms *Teoh* and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency.[77]

This reasoning did not give the children 'a primary consideration' as prescribed by the Convention. The Convention had not been enacted into law in Australia. Did a failure to adhere to its precepts in administrative decision-making matter?

The argument that the Convention raised a legitimate expectation

Both Teoh (respondent after succeeding in the Full Federal Court) and the Human Rights and Equal Opportunity Commission, intervening, argued that, if the Panel/delegate proposed to act inconsistently with Art 3, Teoh should have been informed so that he had the opportunity for making submissions as to why the Convention standard should be adhered to. The obligation for procedural fairness arose from a legitimate expectation based in the Convention, that the decision-making process would be consistent with its terms.[78] Teoh referred on this aspect to *Haoucher* and *Quin*, while the Commission referred to *Haoucher* and *Tavita v Minister for Immigration*[79] — a New Zealand case which inveighed against ratification of Conventions becoming mere 'window-dressing'.

Mason CJ and Deane J wrote the leading judgment, stating:

> The critical questions to be resolved are whether the provisions of the Convention are relevant to the exercise of the statutory discretion [to deny an extension of a residency permit] and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention.[80]

Ratification of a Convention as a positive statement by the Executive to the Australian people

Noting the context of the Convention in dealing with basic human rights affecting the family and children, their Honours stated (in what might be termed 'the Positive Statement paragraph'):

> *ratification of a Convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation*,

77 (1995) 183 CLR 281.1.
78 Ibid 277−8.
79 [1994] 2 NZLR 257.
80 (1995) 183 CLR 288.7.

> absent statutory or executive indications to the contrary, *that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration'.* It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.[81]

No reliance was made on 'policy' cases such as *Haoucher*, but the Convention as 'positive statement' was treated in similar vein. And their Honours were clear that a legitimate expectation arose on an objective basis: it did not require an affected party to hold a subjective expectation.

The behaviour of the executive raises the expectation on an objective basis: it will not have to be perceived at a personal level

Justice Toohey reasoned in similar style. His Honour cited[82] his views in *Haoucher* as to a legitimate expectation arising on an objective basis, that is, the claimant for a hearing did not have to have had a subjective expectation at the relevant time. His views were summarised:

> It follows that while Australia's ratification of the Convention does not go so far as to incorporate it into domestic law, it does have consequences for agencies of the executive government of the Commonwealth. 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.[83]

No reference was made to the 'policy' cases. Justice Toohey rested on an assumption that Australia's ratification of the Convention resulted in an expectation that relevant decision makers would adhere to the 'primary interests' standard for children. Since the children (and their parents) did not have to have a subjective expectation, such expectation must have arisen on the 'positive statement' approach of the joint judgment, and that in turn accords with the reasoning of the majority in *Haoucher* concerning non-adherence to policy in that case.

A general approach to procedural fairness being necessitated by the relevant issue: the best interests of children raise such necessity absent the Convention

Justice Gaudron wrote briefly to the point that the Convention embodied standards that ought to be applied by government and courts of a civilised democratic society. She agreed generally with the reasoning of the joint judgment, but her Honour laid down a marker as to the need for procedural fairness, absent any reference to 'legitimate expectation', by reference to reasonable assumptions arising from the best interests of children, irrespective of CROC.[84]

81 Ibid 291.3 (authorities removed, emphasis added).
82 Ibid 301.5.
83 Ibid 302.5.
84 Ibid 305.3.

The dissent

Justice McHugh dissented, trenchantly. His Honour accepted that an undertaking by a public official had procedural consequences. Referring to *AG (Hong Kong) v Ng Yuen Shiu*[85] and *Haoucher*, McHugh J observed that the High Court accepted that:

> if a public official had undertaken to exercise a power only when certain conditions existed, a person affected by the exercise of the power had a right to be informed of the matters that called for the exercise of the power.[86]

Natural justice as a free-standing right culminated in the broadest reach of 'rights and interests', so 'legitimate expectations' have no role to play

His Honour then moved to deploy the common law paradigm for the requirement of natural justice in a devastating manner. He reasoned that after *Kioa* and *Annetts* a question arose as to whether the doctrine of legitimate expectations had any role to play. Those cases accepted procedural fairness as a 'free-standing right' (neither they nor McHugh J employed that phrase, but it summarises the situation). A hearing was now required where a statute empowered a public official to make an administrative decision that affects a person, so that, absent a statutory indication to the contrary, the question is not whether natural justice is required but merely what will be the nature of the procedural fairness on offer.[87]

Justice McHugh jettisoned (without reference) his acceptance in *Haoucher*[88] that legitimate expectations had work to do in dealing with prospectivity issues: decisions being taken with a view to interests not yet in existence but discernible in the future. His Honour now rested entirely on the general requirement in the common law for natural justice where administrative decisions might have impact on individuals.[89]

The rejection of procedural fairness where a decision-maker not bound by, undertaken nor asked to apply a standard

The dissenter then moved[90] to his point of rejection of Teoh's claim: legitimate expectations had hitherto rested on express or implied undertakings to affected persons that benefits or privileges would continue into the future.

Justice McHugh's denial of reliance on the Convention to raise a legitimate expectation was then expressed:

> As long as a decision-maker has done nothing to lead a person to believe that a rule will be applied in making a decision, the rules of procedural fairness do not require the decision-maker to inform that person that the rule will not be applied. Fairness does not require that a decision-maker should invite a person to make submissions about a rule that the decision-maker is not bound, and has not undertaken or been asked, to apply. Indeed, in those circumstances, a person cannot have a reasonable expectation that the rule will be applied.[91]

85 [1983] 2 AC 629.
86 (1995) 183 CLR 311.4.
87 Ibid 311.6.
88 See n 66 above.
89 (1995) 183 CLR 311.9.
90 Ibid 312.4.
91 Ibid 313.5.

His Honour provided no explanation as to how the Convention differed in theory from the policy statement to Parliament in *Haoucher*, a policy that McHugh J had found to anchor a legitimate expectation. The difference can only be that the *Haoucher* policy had political impact having been made to Parliament, while the Convention was corralled in the fantasy land of diplomacy, where statements of intent were mere 'window-dressing'. The policy had no more legal impact than the Convention. Neither was required by law to be observed. The majority in *Teoh* merely determined that procedural fairness was required prior to any departure from the Convention standard, as had been the case regarding the policy in *Haoucher*.

Legitimate expectations under siege

Legitimate expectations were now subject to minimisation under the Brennan J ultra vires / statutory power approach, while caught in the twofold pincers of McHugh J's insistence on subjective appreciation of an expectation (that is, the government had to indicate that it would be bound by its statement of offer and claimants had to have a personal understanding of their expectation), coupled with expansion of the common law / free-standing approach under which natural justice was so organic that it naturally extended to prospective events, so that legitimate expectations were an otiose category. The latter proposition was to receive expanded explanation in the next instalment of what was to become the *via crucis* of legitimate expectations: *Re Minister for immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[92] ('*Lam*').

Re Minister for immigration and Multicultural and Indigenous Affairs; Ex parte Lam

Lam arose from visa cancellation for a failure to pass the 'character test', as had also been the case for Mr Teoh, the test then in an earlier iteration. Mr Lam was informed of the Minister's intention to cancel his visa, and he was invited to make submissions. He replied, pointing out that he had two children, Australian citizens, whose best interests would be damaged if his visa was cancelled. He annexed a letter from the children's carer. The department wrote back asking for the contact details of the carer, stating that the department wanted to contact the carer to assess the impact that cancellation would have on the children. Mr Lam provided the contact details, but no departmental officer ever contacted the carer.

The Minister cancelled the visa, and Lam applied to cancel the decision, claiming a denial of natural justice resulting from the department's failure to contact the carer, after it represented that it would, and further failure to notify the applicant that it would not contact the carer. The decision of a unanimous High Court in four judgments condensed to a ruling that procedural fairness was required where otherwise a procedure adopted would be unfair and, further, a representation that engendered an expectation that was then disappointed did not attract the necessity of a fair hearing, in the absence of unfairness.

92 (2003) 214 CLR 1.

Coughlan as bogeyman/strawman: procedural fairness relates to procedural matters, not substantive merits of a case

Haoucher and *Teoh* were two decisions of the Court that became measuring sticks for the reasoning in *Lam*. And in the background lurked the bogeyman case of *R v North and East Devon Health Authority; ex parte Coughlan*[93] ('*Coughlan*') in which the English Court of Appeal gave effect to substantive, not merely procedural, expectations. The reaction to this case in *Lam* revolved around concern to ensure that judicial review in Australia dealt only with the legality of the decision under review, not with the merits of the review and, in a broader sense, to ensure that the courts did not concern themselves with a supervisory jurisdiction aimed at 'abuse of power'. The joint judgment of McHugh and Gummow JJ damned the English approach:

> The notion of 'abuse of power' applied in *Coughlan* appears to be concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards now identified by the English common law. These standards fix upon the quality of the decision-making and thus the merits of the outcome. As was indicated in *Coughlan* itself, this represents an attempted assimilation into the English common law of doctrines derived from European civilian systems.[94]

A *tour d'horizon* followed of the authorities in New Zealand and Canada, affirming that they had also eschewed the heresy of judicial review of 'abuse of power' — all prelude to an examination of the role of legitimate expectations[95] but suspiciously in the form of a straw man designed to direct legal obloquy onto such expectations.

Legitimate expectations said to have no role

The joint judgment drew on McHugh J in *Teoh*[96] and Brennan J in *Quin*[97] for the claim that there is no further need for any doctrine of legitimate expectation. It was said[98] that this was now the law in Australia and that *Teoh* provided nothing to the contrary. Nothing was said of the reasoning of Brennan J and McHugh J being contradictory: McHugh J's adoption of the common law approach to natural justice had (perhaps unintended) long-term consequences for preserving rights to procedural fairness in decision-making regarding non-property status such as citizenship classification.

Teoh deconstructed in record length dicta: an objective expectation allowed for renewals; denied for prospectivity claims based in governmental statements as to future behaviour

Note that the entire attack that followed on *Teoh* was dicta, as the decision in *Lam* went off on there being no practical unfairness to the applicant in the failure to adhere to a stated intention to contact a person involved with the applicant's children: all knowledge from such a person had already been collected.

93 [2001] QB 213.
94 (2003) 214 CLR [73] 23.9.
95 Ibid [81]ff 27.4.
96 See concepts referred to at n 87 above.
97 (1990) 169 CLR 39.
98 (2003) 214 CLR [83] 28.3.

The joint judgment analysed propositions in *Teoh* said to support the idea of legitimate expectations being objectively based — that is, the claimant for procedural fairness did not have to show a personal knowledge or reliance on, for example ratification of a Convention.[99] Justice McHugh's dissent in *Teoh*, attacking legitimate expectations on the 'objective' front was advanced, but then it was asserted that a legitimate expectation did not hang on an 'actual or conscious appreciation' as to the conferral or continuation of a privilege or benefit.[100] *FAI* was the example: there was a 'natural expectation' that an insurance company would run on from year to year. The discrimen was, apparently, that a legitimate expectation could be inferred in the case of insurance company operators and paying members of the race-course-entering public (*Heatley*), which inference did not arise in the case of those arguably within the terms of a Convention:

> It is one thing for a court in an application for judicial review to form a view as to the expectations of Australians presenting themselves at the gates of football grounds and racecourses. It is quite another to take ratification of any Convention as a 'positive statement' made 'to the Australian people' that the executive government will act in accordance with the Convention and to treat the question of the extent to which such matters impinge upon the popular consciousness as beside the point.[101]

Haoucher, Teoh and what constitutes a 'positive statement'

It is obvious that *Haoucher*, dependent on a statement of government policy that did not raise an *FAI* self-executing inference, and McHugh J being part of the majority, presented a major hurdle for the joint judgment in *Lam*. McHugh and Gummow JJ said:

> *Haoucher* does not stand beside *Teoh*. In the former case there was a statement made in the Parliament bearing immediately upon the exercise of the particular power in question. In *Teoh* there were in the Convention various general statements and there was no expression of intention by the executive government that they be given effect in the exercise of any powers conferred by the Act. The decision-maker in *Teoh* had acted in accordance with a specific policy which made 'good character' requirements the primary consideration, yet the result was reviewable error.[102]

The antagonism between the joint judgments in *Teoh* and *Lam* condensed to what constituted a 'positive statement' sufficient to raise a legitimate expectation. The implicit charge that failure to accept a Convention's administrative impact left the Convention as 'window-dressing' 'does not necessarily mean that the executive act of ratification is to be dismissed as platitudinous; an international responsibility to the contracting state parties or other international institutions has been created'.[103]

What use this responsibility might be, regarding a Convention aimed at the welfare of children, was not made clear.

The joint judgment in *Lam* referred to the CROC as not being self-executing and as creating, according to *Teoh*, a mandatory relevant consideration for judicial review for want of procedural

99 Ibid [87]ff 28.9ff.
100 Ibid [91] 30.5.
101 Ibid [95] 31.9. The reference to a Convention as a 'positive statement' lies inside the quotation from Mason CJ and Deane J in *Teoh* at n 81 above.
102 Ibid [96] 32.2 (citation removed).
103 Ibid [98] 32.8.

fairness.[104] Presumably the policy statement in *Haoucher* had also raised such a 'mandatory relevant consideration' for assessing natural justice requirements, in the context that Conventions were said in *Teoh* not to be allowed to raise relevant considerations generally.

The other judgments in Lam to similar effect

Chief Justice Gleeson's judgment in *Lam* evinced the same antipathy to *Coughlan*, but, as a route to undermine *Teoh*, it is ineffectual. His Honour set off after another strawman — that of reliance on a statement of intention.[105] This had been dealt with in the joint judgment even more openly as creating an analogue to estoppel,[106] with a view to showing why the claimant for a legitimate expectation had to have subjective knowledge of the basis for the claim, that being fundamental to estoppel. The separate judgments of Hayne J and Callinan J were to similar effect, particularly questioning the need for a doctrine of legitimate expectations at all and emphasising what was seen as the anomaly in *Teoh* that there was no subjective knowledge by the applicant of the ratification of CROC.

The more recent developments in *Plaintiff S10/2011* and *WZARH*

Plaintiff S10/2011 v Minister for Immigration and Citizenship[107] ('*Plaintiff S10/2011*') involved applications for procedural fairness to be mandated when the Minister was called on to exercise ministerial dispensing powers regarding the 'lifting of the bar' on repeated applications for protection visas. The decision of the High Court rested on the fact that the relevant decisions had to be taken in the public interest, and the personal factors related to each applicant were not 'mandatory relevant considerations'.[108] In such a context, the glancing references to legitimate expectations were strictly dicta. The joint judgment of Gummow, Hayne, Crennan and Bell JJ noted:

> for the reasons given in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* by McHugh and Gummow JJ, Hayne J and Callinan J, the phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded. The phrase, as Brennan J explained in *South Australia v O'Shea*, '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'.[109]

Legitimate expectations were doubly damned in this dicta: first for posing questions and being an unfortunate expression; and, secondly, because it was said that they tended to focus on merits when judicial review in Australia must be scrupulously restricted to issues of the legality of the decision.

Minister for Immigration and Border Protection v WZARH[110] ('*WZARH*') arose from a finder of fact (an Independent Merits Reviewer) enquiring into the respondent's refugee claim and that, the reviewer not being able to complete the process, a second reviewer took up the work. In

104 Ibid [99], [101] 33.1 and 33.9.
105 Ibid [36]ff 13.6ff.
106 Ibid [62] 20.8.
107 (2012) 246 CLR 636.
108 Ibid [99] 667.8.
109 Ibid [65] 658.4 (citations removed).
110 (2015) 256 CLR 326.

the Full Federal Court Flick and Gleeson JJ observed that the respondent had a legitimate expectation that the original interviewer would be the person to make the recommendation to the Minister and that, further, he believed that he would have an opportunity to make oral submissions to the decision-maker, which opportunity the second reviewer denied him.[111]

The High Court, in two judgments, upheld the decision of the Full Court below, but in dicta attacked the use made by that court of legitimate expectations. Natural justice was mandated by the factual matrix in which unfairness arose if the second reviewer did not allow for the oral submissions agreed in by her/his predecessor, but legitimate expectations were an unnecessary ingredient in the assessment.

The plurality, Kiefel, Bell and Keane JJ, purported to put legitimate expectations to the sword with selective quotes from High Court decisions.[112] Acceptance of this judicial execution is tempered, however, on noting that the references to Deane J[113] and Dawson J[114] are totally out of context, Deane J writing in *O'Shea* enthusiastically of legitimate expectations, and Dawson J writing in *Quin* acknowledging the utility of the doctrine. But on drove the plurality, observing the trajectory of 'legitimate expectations' in Australia[115] from tentative acceptance (*Teoh*) to rejection for the according of natural justice (*Lam* and *Plaintiff S10/2011*). Pronouncing the lack of utility of the doctrine (and hence its jurisprudential death), the plurality said:

> It is sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions. Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; 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.[116]

It is difficult not to observe the qualified success of legitimate expectations in the High Court pre-*Teoh*, allowing for the incessant concerns of Brennan J as to the ambit and utility of the concept. But a new generation, two decades on from *Teoh*, was having none of it, and the enthusiasm for this new tool from Mason CJ and Deane, Toohey and even McHugh JJ (the last pre-*Teoh*) was swept away.

What has the Federal Court made of all this?

A number of single Judge decisions prior to 2020 referencing* Teoh*: Poroa an example

In *Poroa v Minister for Immigration and Border Protection*[117] ('*Poroa*'), Perry J dealt with a claim that a failure by the Minister to revoke a visa cancellation (as allowed for under the byzantine 'character' provisions associated with s 501 of the *Migration Act 1958*) was invalid for failure to provide a hearing to the applicant to take account of his (apparently thwarted)

111 (2014) 230 FCR 130, [17] 137 and [24]−[25] 141.
112 (2015) 256 CLR [28] 334.8.
113 At n 32.
114 At n 33.
115 (2015) 256 CLR 335.4 [30].
116 Ibid.
117 (2017) 252 FCR 505.

legitimate expectations arising from the *International Covenant on Civil and Political Rights* ('ICCPR'), which provided in Art 23 for the right to have a family. If the applicant were removed to New Zealand, his partner would not, for extreme psychological reasons, be able to join him. They had been trying for over a decade to start a family.

Justice Perry accepted that *Teoh* had not been overruled[118] and applied *Teoh*, accepting that Australia's ratification of the ICCPR gave rise to a legitimate expectation that the right to found a family would be taken into account.

Her Honour then dismissed the application on the basis that the Minister had in fact expressly taken account of the problem facing the applicant and partner, that she would not be able to join him, and they would then be severed as a couple, and never start a family.

Two decisions from 2020 accepting the demise of legitimate expectations, but nonetheless requiring procedural fairness based in the existence of CROC

Justice Perry's acceptance of *Teoh's* authority (admittedly delivered in the context that the Minister did not contest it) emerged as an example of its continued relevance in *DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[119] ('*DXQ16*'). Justice Steward dealt with a claim that the Minister, while cancelling visas of a family, owed them a hearing in respect of the apparent failure in the decision-making process to take account of, and accord a primacy, to the best interests of the two school-aged children of the family.

His Honour reflected on the appellants' submissions at length, observing that the appellants understood that the nomenclature of 'legitimate expectation' had, since *Teoh*, fallen out of favour in this country: see *Lam*. The appellants submitted that *Teoh* remained good law and that its reasoning might now be seen through the lens of Gaudron J's judgment, reliant on what was a reasonable assumption as to matters that should be in issue in the decision-making.[120] Various other Federal Court decisions were referred to on the continuing utility of *Teoh*, including a very long analysis of *Vaitaki v Minister for Immigration and Ethnic Affairs,*[121] a majority Full Court decision which arguably had expanded the *Teoh* envelope.

Justice Steward said, 'I am clearly bound to follow and apply the expression of the rule in *Teoh*, as formulated in *Vaitaiki* and followed by subsequent decisions of this Court'.[122] His Honour observed that the Minister's submissions correctly referred to the nature of natural justice being shaped by the statutory framework in issue, but he did not agree in the claim that the sections in issue here destroyed the requirement for a fair hearing (presumably as to at least the Gaudron J 'reasonable assumptions' of matters that should be addressed by a decision-maker) and, if not, a hearing was required allowing the affected party to put on a case addressing such matters.

118 Ibid [51] 517.8.
119 [2020] FCA 1184.
120 Ibid [27], Gaudron J set out at n 84 above.
121 (1998) 150 ALR 608.
122 [2020] FCA 1184 [37] and see [53].

Later in 2020, Allsop CJ was faced with another visa cancellation in which the tribunal had not given proper consideration to the primacy of an affected child's interests, and hence was revealed on review as delinquent for not having offered procedural fairness to the applicant in respect of the (imputed) intention not to provide natural justice: *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[123] ('*Promsopa*'). The Chief Justice followed Steward J's reasoning closely, and as with the reasoning in *DXQ16*, 'legitimate expectations' are mentioned only in reference to submissions of the appellant's counsel, both cases observing that the nomenclature of 'legitimate expectation' has fallen out of favour and looking to the more general expression of the requirement of natural justice found in Gaudron J's judgment in *Teoh*.

DXQ16 and *Promsopa* bear direct applications of *Teoh* in the *ratio* of each case, where the decisions subversive of *Teoh* present their attacks in dicta.

Two Full Court decisions from 2021

Finally, in the past 12 months, the Full Federal Court has had two occasions to review *Teoh's* status. In *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[124] the Court heard argument on the relevance of *Teoh* and associated cases but in the context of a contested strike-out, which succeeded. However, O'Bryan J (with whom Katzmann J agreed) observed the facts in *Teoh* and then said (in the context of CROC):

> The concept of 'legitimate expectation' as a necessary criterion of an entitlement to procedural fairness has since been rejected by the High Court [his Honour referred to *WZARH*]. However, that does not undermine the conclusion reached by the High Court in *Teoh* that a breach of the requirements of procedural fairness may occur if a decision to refuse to grant, or to cancel, a visa is made without considering the best interests of a child affected by the decision as a primary consideration, and without giving the applicant an opportunity to be heard on that matter.[125]

The above is a clear statement of the requirement flowing from CROC, irrespective of the concept of 'legitimate expectations'.

And in *Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[126] ('*Ratu*') the joint judgment of Farrell, Rangiah and Anderson JJ dealt with an argument that the appellant had been arbitrarily deprived of his right to remain in Australia, contrary to Art 12(4) of the ICCPR.[127] The Court pursued the reasoning in, and fate of *Teoh* at considerable depth,[128] but this penetrating analysis was rendered as dicta by the finding that the relevant sections of the Migration Act, ss 501(3A) and 501CA(4), were inconsistent with any obligation of procedural fairness regarding Art 12(4) of the ICCPR and that the regime created by these provisions was quite different from the broad discretion that supported the ministerial power in *Teoh*.[129]

123 [2020] FCA1480.
124 [2021] FCAFC 125.
125 Ibid [177]. And see Derrington J at [60] on 'the High Court's flirtation with the now abandoned or moribund concept of "legitimate expectation"'.
126 [2021] FCAFC 141.
127 Ibid [34]ff.
128 Ibid [37]−[47].
129 Ibid [54].

But the dicta in *Ratu* makes for uncomfortable reading for those who support the ongoing application of *Teoh*. Portions of the joint judgment in *Teoh* were set out,[130] with emphasis on the 'Positive Statement paragraph' to describe the impact of ratification of a Convention.[131]

But then the Court in *Ratu* noted[132] that the doctrine of legitimate expectations had been rejected by obiter dicta statements in the High Court, and:

> In addition, to the extent that *Teoh* suggests as a general principle that the ratification of an international treaty gives rise to a presumption or expectation that the executive government will act consistently with the treaty, even in the absence of legislation adopting the treaty as part of domestic law, that reasoning was strongly doubted by a majority of the High Court in *Lam* at [95]−[96], [98] [see nn 110−112 above], [120]−[121] and [147].[133]

O Precedent, what crimes are committed in thy name?

The Court went on to note that the High Court had not directly overturned *Teoh* but then said, 'there is some difficulty in identifying the *ratio* of *Teoh*'.[134] The difficulty lay, apparently, in the references in *Teoh* to 'a Convention' in a general context, contrasted with specific references to 'the Convention', being the CROC. Reference was made above to the Kabbalah which is modern Australian administrative law, but the *Ratu* hair-splitting argument defied the plain intention of the majority judgments in *Teoh*. However, the angels on a pinhead were supported by reference to Edmonds J in *Amohanga v Minister for Immigration and Citizenship*[135] ('*Amohanga*'), the Court in *Ratu* observing that[136] Edmonds J considered that the *ratio* of *Teoh* was restricted to a legitimate expectation arising from CROC. *Teoh* did not extend to a legitimate expectation arising from the ICCPR.

Note the differing ambit accorded *Teoh* in *Amohanga* compared with *Poroa*, decided four years later. The acceptance of *Teoh* as governing decisions under the ICCPR in *Poroa* (per incuriam) is plainly at odds with the earlier view.

To read the majority judgments in *Teoh* as restricted in their reasoning to CROC is to say that *Donoghue v Stevenson* enunciated a principle that applied only to Scottish widows finding decomposed snails in ginger beer bottles. The reasoning of the *Teoh* majority Justices, while emerging in the emotive environment of child welfare, did not depend on the particular nature of CROC. The reasoning is general in the light of the operation of Conventions across the board. The treatment of *Teoh*, beginning with later High Courts, is reflective of Bentham's attack on the doctrine of precedent generally: 'Follow it unless it is most evidently contrary to what you like'.[137]

130 Ibid [39].
131 See n 81 above.
132 [2021] FCAFC 141 [42].
133 Ibid [43].
134 Ibid [45].
135 (2013) 209 FCR 487.
136 [2021] FCAFC 141 [46]−[47].
137 Quoted in HK Luecke, 'Ratio Decidendi: Adjudicative Rational and Source of Law' (1989) 1 *Bond Law Review* 36, 40.

Amohanga reflected a perception of High Court antagonism to *Teoh*, but that death of a thousand cuts by dicta was merely continued, as the decision in *Amohanga* itself rested on a statutorily based lack of requirement for procedural fairness by the Minister with respect to the ICCPR. Justice Edmonds' *obiter* reasoning as applied by *Ratu* reflects the skill set of tax lawyers in its intense parsing of definite and indefinite articles, but indifference to the sweep of the words: 'ratification of a Convention is a positive statement'. These words plainly embraced a general intention to cover all Conventions, but the academic assessment emerged to the contrary, *Teoh* being restricted in its impact to CROC.[138]

Are 'expectations legitimate' in 2022 in Australia?

Apparently not. The academic overview, in the light of the High Court's attitude this century may be seen in the following:

1. Professors Matthew Groves and Greg Weeks said, 'Whatever happens in the UK, it seems clear that the legitimate expectation zombie will not rise again in Australia'.[139]

2. The same authors, as two of the triumvirate writing *Judicial Review of Administrative Action and Government Liability*,[140] noted that the lead author, Professor Mark Aronson, had been 'an early attendee at the funeral of legitimate expectations', while they merely continued to 'feast on the decaying corpse' of the concept.

3. Professor Groves finished off the assault in the 7th edition of Aronson's *Judicial Review of Administrative Action and Government Liability*,[141] writing 'legitimate expectation is now doctrinal roadkill in the Australian story of procedural fairness'.

Teoh *still lives, but whether it applies beyond CROC to Conventions generally is in contention*

In the midst of death, there is life,[142] and while legitimate expectations will apparently not spring phoenix-like (or even zombie-like) from the ashes in this country (the position in England is very different[143]), a general underlying issue remains dealt with. Lord Denning and others employed the then new phrase to deal with prospective discretionary decisions affecting non-property rights that were thought not covered by the rubric 'rights and interests'. But the old phraseology has now been accepted as all-embracing, including decisions affecting prospective non-property rights.

138 A Edgar and R Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19(1) *Melbourne Journal of International Law* 24 n 93.

139 Editorial, 'Decline of Legitimate Expectations', (2017) 24 *Australian Journal of Administrative Law* 71, 72.

140 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2016) 425 n 163.

141 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2021) 424 [8.90].

142 The authors of *Judicial Review of Administrative Action and Government Liability* apparently hope that *Teoh* will dematerialise if they ignore it: the 5th edition (2013) carried 13 references to the case and the 6th edition seven references, while the 7th is down to three.

143 Eg *R (Sargeant) v First Minister of Wales* [2019] 4 WLR 64, in which a Divisional Court determined that a legitimate expectation arose from a press statement made by the First Minister providing undertakings as to how an enquiry would be conducted. The Court gave substantive relief, not merely procedural, for the breach of the expectation.

The arguments for tearing down legitimate expectations as a verbal construct have succeeded in Australia, that battle being over, while the war of attrition against *Teoh* merely continues. The doctrine of 'legitimate expectations' may now be only a jurisprudential ghost, but its utility, stamped onto prospective and abstract expectations as to status and privilege, lives on.[144] The charges purportedly undermining the requirement of procedural fairness regarding legitimate expectations have fallen away in respect of *Teoh's* continued authority, even as the nomenclature of 'legitimate expectations' evaporated.

The areas of contest as to applying procedural fairness from the times of *Schmidt* and *Salemi* were listed above[145] — for example, what is an appropriate 'right'; does the claimant for procedural fairness have to have a subjective appreciation of a procedural obligation owed; and does a requirement for procedural fairness only spring from a formally documented offer. With breadth and elasticity the majority implicitly determined in *Teoh* that ratification of a Convention was a 'positive statement' by the executive government sufficient to attract the requirement of procedural fairness if the Convention standards were to be ignored. The nature of the 'right' and whether there was a subjective appreciation of a Convention standard were bundled up into the obligation that flowed from the act of ratification.

The acceptance of a Convention as a 'positive statement' was picked up in *Acting MICMSMA v CWY20*[146] ('*CWY20*') per Besanko J in the lead judgment for a five-member court. His Honour recited the Positive Statement paragraph from Mason CJ and Deane J in *Teoh*.[147] *CWY20* engaged issues removed from those in *Teoh*, but the utilising of the Positive Statement concept, contrary to McHugh and Gummow JJ in *Lam*, illustrates the beating heart of *Teoh.*

Conclusion

The onslaught on *Teoh* sought to subvert the authority of its reasoning by destroying 'legitimate expectations', but the spirit of the common law saw natural justice evolve to embrace the 'Positive Statement' perceived in Convention ratification.[148] The specific attack in *Lam* as to why a Convention did not express an intention by government[149] has been lost in the general references to High Court dicta being unfavourable to *Teoh*.

144 The latest word, at time of writing (17 July 2022) is from Professor Allars, 'Exceptionalism and Formalism: A Study of the Implication of Procedural Fairness' in B McDonald et al. (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022). Allars generally agrees (88) with the thesis of this article that the phrase 'legitimate expectation' has become redundant, as the requirement of procedural fairness has extended to 'application cases'.

145 See list at text above after n 32.

146 [2021] FCAFC 195 [168].

147 See n 81 above.

148 See *Tohi* at n 124 above. A reader may survey this article for competing and complementary concepts as to what action by government might induce the need for procedural fairness: from 'formal document' (Byers QC SG in *Salemi*); 'assurances ' from the Solicitor-General in the course of litigation (*New Zealand Maori Council*, n 32 above); ministerial press releases/statements (*Salemi* and *Sargeant* n 142 above); policy tabled in Parliament (*Haoucher*); to ratifying Conventions, and decision-making under the Treaty of Waitangi (*Te Pou Matakana Limited v Attorney-General* [2021] NZHC 2942; [2022] 2 NZLR 148, n 32 above).

149 See n 102 above.

However, while *Teoh* still stands, there now exist dicta in both the Federal Court and the Full Federal Court purporting to restrict the application of *Teoh* to CROC alone. A definitive decision from the High Court is required as to whether such restriction of reasoning to the specific facts of a case is appropriate.

It remains the view of this author that Conventions in general are markers that Australian decision-makers must (absent statutory provision to the contrary) take account of, or offer procedural fairness relating to any intended failure to apply to individuals the standards embodied in such Conventions.