LEGITIMATE EXPECTATIONS AND FAIRNESS: NEW DIRECTIONS IN AUSTRALIAN LAW

MOIRA PATERSON[1]

CONTEXT

Background

The concurrent development of the concepts of legitimate expectations and fairness, which has occurred both in the United Kingdom and Australia in the years following the landmark decision in *Ridge* v *Baldwin*[2] has considerably expanded the frontiers of judicial review on the ground recently described by Lord Diplock as procedural impropriety.[3] It has, however, also created considerable uncertainty as the boundaries between substance and procedure and between procedural impropriety and irrationality/illegality have become blurred and issues of justiciability have come to the fore.

The concept of legitimate expectations has long been recognised and used by the Australian courts as a tool for extending the implication of a duty to accord procedural fairness beyond the narrow confines of decisions affecting legally enforceable rights.[4] It does not, however, expand the range of interests which attract procedural protection to include, for example, status or other forms of new property[5] as such but rather supplements the protection of traditional interests by attaching legal significance to expectations engendered by a past course of conduct or promise/undertaking on the part of the decision-maker.[6] An important feature of the concept is that it does not generally extend to decisions in respect of initial applications for discretionary benefits — a category which has been described as the paradigm of the non-justiciable issue in natural justice[7] — thereby obviating any need to consider the question of justiciability.

The doctrine of fairness, on the other hand, has been longer in gaining acceptance in Australia. While there had been frequent references to fairness in the context of natural justice, it was not until its decision in *Kioa* v *West*[8] that the High Court was willing to give effect to a fairness principle more liberal in its scope than the traditional conception of natural justice. Mason J summarised the new doctrine in the following terms:

[1] BEc (Mon), LLB (Hons)(Melb), LLM (Lond), Lecturer-in-Law, Monash University.

[2] [1964] AC 40.

[3] *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] 1 AC 374.

[4] See, for example, *Heatley* v *Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487; *FAI Insurance Ltd* v *Winneke* (1982) 151 CLR 342.

[5] C Reich, 'The New Property', (1964) 73 *Yale LJ* 733.

[6] For a comprehensive summary of the legal parameters of legitimate expectations see P Tate 'Legitimate Expectations and the Foundations of Natural Justice' (1988) 14 *Mon LR* 48–54.

[7] M Allars, 'Fairness: Writ Large or Small?' (1987) 11 *Sydney LR* 306, 321.

[8] (1985) 159 CLR 550.

> 'The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.'[9]

However, he emphasised that the duty did not attach to every decision of an administrative character but only to those which directly affected a person individually and not simply as a member of the public or of a class of the public. This screening test, which has derived from the judgment of Jacob J in *Salemi* v *MacKellar (No 2)*,[10] seeks to identify those decisions which are appropriate for procedural review by reference to the existence of a direct and individual effect. It involves an implicit assumption that it is inappropriate for the courts to review the exercise of a policy-making function and that a decision which affects an individual alone is not a policy decision. The view that the policy-making function does not lend itself to judicial review is one which occurs frequently in the cases and is usually explicable in terms of the fact that courts are not inherently suited to consider issues of a polycentric nature.[11] It is not, however, clear why the courts are necessarily ill equipped to consider the fairness of a procedure adopted in the making of a polycentric decision (as opposed to the decision itself) nor is it clear that a decision which directly affects an individual alone can be accurately described as lacking a significant policy content given the incremental nature of much administrative decision-making.[12]

Mason J did not explain what he meant by the expression 'rights, interests and legitimate expectations' in the context of the revised implication test. However, in a previous part of his judgment where he referred to a formulation of the doctrine of natural justice which contained an identical phrase, he stated 'the 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'.[13] This definition clearly encompasses rights in new as well as traditional forms of property.

As far as the content of the duty to act fairly was concerned, Mason J took the view that this had to be considered 'in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.'[14] There is no mention

[9] Ibid 584.
[10] (1977) 137 CLR 396.
[11] See P Cane, *An Introduction to Administrative Law,* (Oxford, Clarendon Press, 1986) pp 149–52.
[12] See D Braybrooke and C Lindblom *A Strategy of Decision,* (Oxford University Press, 1970); D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion,* (New York, 1986) pp 117–28.
[13] (1985) 159 CLR 550, 582.
[14] Ibid 585.

of the conduct of the decision-maker but this would seem to be encompassed within the reference to interests insofar as these include legitimate expectations. The fact that Mason J regarded the conduct of a decision-maker as significant is made abundantly clear in his analysis of what fairness required in the context of applications for entry permits.[15] In his view, fairness did not normally require that an applicant should be given an opportunity to be heard even where a refusal could result in deportation, but the position was different if the applicant had had a previous entry permit approved in similar circumstances or if the decision-maker proposed to reject an application by reference to some consideration personal to the applicant on the basis of information obtained from another source.

The consideration of the behaviour of the decision-maker is consistent with the view of Mason J that fairness is a common law duty which, although it may be expressly excluded by statute, is not dependent exclusively on how the decision-maker's powers are defined but focuses instead on what fairness requires in the circumstances of each individual case. It is clear from his judgment that the content of the duty to act fairly may be only minimal and that fairness will not necessarily always require that an applicant be given an opportunity to be heard.

In a similar vein Deane J stated:

> 'In the absence of a clear contrary legislative intent, a person who is entrusted with statutory power to make an administrative decision which direclty 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.'[16]

Although the language of Deane J is not identical to that of Mason J, the same key elements are present in his judgment; the treatment of procedural fairness as a common law right displaceable only by a clear statutory intention to the contrary, a broad implication test qualified by a standing-type requirement and an acknowledgement of flexibility in the content of fairness.

Wilson J, although he did not articulate any test for implication, followed a similar approach to that of Mason and Deane JJ. He proceeded on the basis that, as there was no longer any relevant statutory framework which excluded the observance of natural justice, it was open to the appellants to seek review on the ground of natural justice. In his view, procedural fairness was an apt description of what natural justice required in the context of administrative decisions. What was fair would depend on the particular statutory framework within which the decision was taken, although even within the same framework differing circumstances might call for a different response. Like Mason and Deane JJ, he concluded that, although a failure to provide a hearing would not normally be regarded as unfair in the context of a deportion decision, it should be regarded as so in the circumstances of this particular case.

[15] Ibid 587.
[16] Ibid 632.

The remaining majority judge, Brennan J expressed the test for implication in the following terms:

> '[The presumption of natural justice] applies to any statutory power the exercise of which is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public.'[17]

While this formulation is not dissimilar to those of Mason and Deane JJ, Brennan J deviated from the approach of other majority judges in three respects. First, he referred to natural justice rather than fairness throughout his judgment. This did not, however, make any significant difference in terms of content since he also took the view that there was no irreducible minimum to the content of natural justice. Secondly, he took the view that implication was purely a matter of statutory interpretation and that the question of whether or not a statutory power was conditioned on the observance of natural justice demanded a universal answer i.e. applicable to all situations. He therefore differed from the others in concluding that, in the absence of any overriding necessity to act to the contrary, there was a requirement to give an applicant for an entry permit an opportunity to be heard.

Finally, Brennan J differed from the rest of the majority in his emphatic rejection of the concept of legitimate expectations as a device for implication.[18] He was, however, prepared to acknowledge that the circumstances which have been identified in case law as giving rise to a legitimate expectation might be relevant to the issue of content, although he left open the question 'whether those circumstances include not only the matters which induce an expectation but also the expectation which is induced'.[19] (The latter distinction is explicable in the light of his view that legitimate expectations are concerned with the subjective state of mind of an individual, a view which is at odds with the objective approach which has been consistently taken both in Australia and the United Kingdom.[20])

The approach of Brennan J to legitimate expectations is consistent with his universalistic approach to the issue of interpretation.[21] If implication is purely a matter of statutory interpretation then the conduct of the decision-maker and the expections of the individual affected are both clearly irrelevant. On the other hand, if such a duty is implied, then there is no reason why it should not be interpreted in terms of a flexible duty to act fairly which varies according to the particular circumstances.

[17] Ibid 619.
[18] Ibid 617–22.
[19] Ibid 618.
[20] See, for example, *FAI Insurance Ltd* v *Winneke* (1982) 151 CLR 342; *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] 1 AC 374.
[21] See P Tate, 'The Coherence of Legitimate Expectations and the Foundation of Natural Justice' (1988) 14 *Mon LR* 15, 67–71.

The Issues

An issue which has arisen in the aftermath of *Kioa* is whether the development of a broad implication test has rendered redundant the concept of legitimate expectation, as suggested by Allars,[22] and what consequences flow from this in terms of the need to exclude from the ambit of judicial review decisions of a non-justiciable nature.

The decisions of the majority do not offer much assistance. Brennan J was alone in rejecting the concept but, while Mason and Deane JJ both proceeded on the basis that it was relevant to search for a legitimate expectation, they neither adverted to the fact that the Kioas fell outside the traditional categories developed by the courts nor sought to specifically expand these categories. Furthermore, while Mason, Deane and Brennan JJ all sought to develop some form of screening test, there was no uniformity in their approach.

A second issue which requires consideration is the extent to which the courts are able to provide substantive relief in the case of an action based on legitimate expectations/procedural fairness. This may arise in two separate contexts. The first is where there has been a promise/undertaking that a person will receive a favourable decision if he or she meets specified criteria or where there has been a past practice of giving favourable decisions if specified criteria are met. In this case it is clear that procedural relief will not be sufficient to protect the substance of the expectation. The second is where there has been a breach of the duty to act fairly and where there has been some subsequent change in circumstances whereby the granting of procedural relief will be inadequate to redress the adverse effects of the failure to act fairly. In such a case even if the respondent is required to remake the initial decision and remakes it in favour of the applicant, the applicant will still be worse off than if he or she had received a favourable decision initially. In the second case the inadequacy of procedural relief arises as a result of a change in the circumstances affecting the applicant and irrespective of the existence of any expectation of a substantive nature.

This issue has, until very recently, been discussed only in the United Kingdom in the first context. In *Schmidt* v *Secretary of State for Home Affairs*,[23] the case in which the concept of legitimate expectation was first introduced, Lord Denning appeared to envisage that a legitimate expectation, whether or not of a substantive nature, could be protected only by the requirement to observe the rules of natural justice. This approach was adhered to expressly or implicitly in the subsequent cases where the concept was applied until the mid 1980's when it was for the first time challenged in two decisions of the English High Court.

In *R* v *Secretary of State for the Home Department; Ex parte Khan*[24] the applicant sought review of a decision by a Minister in which he had applied

[22] M Allars, *Introduction to Australian Administrative Law*, (Sydney, Butterworths, 1990) p 240.
[23] [1969] 2 Ch 149.
[24] [1984] 1 WLR 1337.

criteria which differed from those set out in a circular which outlined the criteria to be applied in making such decisions. Parker LJ, one of the two majority judges, expressed the view that the Home Office circular afforded the applicant a reasonable expectation that a favourable decision would be given if the Minister was satisified of the matters mentioned in it. He then stated:

> 'The Secretary of State is, of course, at liberty to change the policy but in my view, vis-a-vis the recipient of such a letter, a new policy can only be implemented after such recipient has been given a full and serious consideration whether there is some overriding public interest which justifies a departure from the procedures stated in the letter.'[25]

The other majority judge found in favour of Khan on the basis of Wednesbury unreasonableness.

A similar approach to that of Parker LJ, was taken by Taylor J in *R* v *Secretary of State for the Home Department, ex parte Ruddock*[26] in respect of a decision to authorise the interception of a telephone call, a case in which there could clearly be no expectation of consultation or a hearing. Taylor J, commenced with a discussion of the *GCHQ* case.[27] He noted that, while Lords Diplock and Roskill both appeared to envisage that the doctrine of legitimate expectation was confined to expectations of a procedural nature, Lord Fraser specifically recognised that an applicant might have a legitimate expectation of receiving some benefit or profit which was capable of protection by judicial review. He concluded: 'The doctrine of legitimate expectations in essence imposes a duty to act fairly. Whilst most of the cases are concerned . . . with a right to be heard, I do not think that the doctrine is so confined.[28]

In contrast, in *Re Findlay*[29] the House of Lords rejected an argument by a prisoner who was adversely affected by a change in policy governing the remission of sentences to the effect that he had a legitimate expectation of receiving the remission to which he would have been entitled under the previous policy. It concluded that the most he could legitimately expect was that his case would be examined fairly in the light of whatever policy the Minister saw fit to adopt and that he was not entitled to be consulted prior to the implementation of any change in policy. While the decision turned on the court's assessment of the content of the prisoner's expectation, it was clear that it attached paramount weight to the notion that the executive should not be fettered in the exercise of discretionary powers. Similarly, while the issue of substantive protection did not specifically arise for consideration in *Kioa*, the concept of fairness was discussed by the High Court solely in the context of natural justice/procedural fairness.

It is clear that the doctrine of ultra vires operates to preclude any attempt to hold a decision-maker to a representation of a substantive nature which is not

[25] Ibid 1347.
[26] [1987] 1 WLR 1482.
[27] *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] 1 AC 374.
[28] [1987] 1 WLR 1482, 1497.
[29] [1984] 3 WLR 1159.

within his or her actual or ostensible authority.[30] On the other hand the decisions of the House of Lords in *Attorney-General for Hong Kong* v *Ng Yuen Shiu*[31] and *GCHQ*,[32] both of which were approved by the High Court in *Kioa*, have established that procedural fairness may require a decision-maker to give effect to a representation (whether express or implied from a previous course of practice) regarding intra vires procedures. The position with regard to the latter type of representation is, however, more complicated where the decision is characterised as a policy decision insofar as there are more recent authorities including the House of Lords' decision in *Re Findlay*[33] and the High Court decision in *State of South Australia* v *O'Shea*[34] which have attached paramount importance to the notion that the executive should not be fettered in the exercise of its policy-making function. In the latter case, the High Court held that, where there is a two-step decision-making process involving a recommendatory body and a final high level decision-maker, the latter is free to depart from previously applied policy and to depart from recommendations made to it provided it does not take into account new factual material.

A final interrelated question is to what extent a person who is adversely affected by a change in policy has a legitimate expectation which entitles him or her to at least procedural protection in the form of a right to make representations prior to the application of any new policy to his or her case. In other words, quite apart from the issue of the availability of substantive relief to protect the substance of legitimate expectations, are there circumstances where the fact that a change in the criteria which are required to be met (or even in the procedures required to be followed) in order to obtain a favourable decision is characterised as a change in policy precludes an applicant from obtaining even procedural relief? The courts have adopted conflicting approaches to this problem. At one end of the spectrum is the view taken by the House of Lords in *Re Findlay*[35] that a legitimate expectation entitles an applicant only to have his or her case decided in accordance with existing policy. At the other end is the view expressed in *R* v *Secretary of State for the Home Department; Ex parte Khan*[36] that interested applicants should be afforded a hearing. Likewise in the *GCHQ* case[37] Lord Diplock expressed the view that, where a legitimate expectation is withdrawn, procedural propriety requires communication of the reason for withdrawal and an opportunity to comment on it.

Ganz, who considered this issue, has stated, in the context of the question as to whether someone who is deleteriously affected by change of policy has a legitimate expectation which entitles him or her to make representations that:

[30] *Southend-on-sea Corporation* v *Hodgson* [1962] 1 QB 416.
[31] [1983] 2 AC 629.
[32] [1985] 1 AC 374.
[33] [1985] 1 AC 318.
[34] (1987) 73 ALR 1.
[35] [1985] 1 AC 318.
[36] [1984] 1 WLR 1337.
[37] [1985] 1 AC 374.

> 'This is where the clash between the public and private interest is most acute. If the approach adopted in . . . *Khan* were to prevail over that used in *Re Findlay* it would have a profound effect on policy-making.'[38]

The public interest to which she refers is the interest in ensuring that public authorities are not fettered in the exercise of their discretionary powers. In her view, the 'telescoping' of the concept of legitimate expectations with the separate concept of a public authority having to honour its undertakings (presumably as epitomised in *Khan*) could make policy changes difficult if not impossible. With respect it is suggested that the approach of Parker LJ does not preclude a decision-maker from altering a published policy, it merely requires a decision-maker to consider whether or not it is in the public interest to apply a new policy to an individual who has expectations based on previous policy, bearing in mind that there is a public interest in ensuring that individuals are treated as fairly as possible in the circumstances.

In the event that a legitimate expectation is regarded as giving rise only to a right to make representations as suggested by Ganz, the potential inhibition of policy changes must be even less. In such cases the main arguments against the implication of a right to make representations are summarised in the following passage from the judgment of Wilcox J in *Peninsula Anglican Boys' School* v *Ryan*:[39]

> 'Policy considerations are almost infinitely variable. In one case they may loom larger, in another they may be insignificant. The relevance and weight of policy considerations may not be apparent until the matter is fully considered by the decision-maker. A rule which required the then imminent decision to be deferred whilst notice was given of the policy considerations which appeared to be relevant would be, at least, high inconvenient. Moreover, policy considerations change from time to time; sometimes quickly and frequently. The inconvenience and delay attendant upon giving notice of each shift of wind is obvious.'[40]

While it is not disputed that policy often has an incremental basis or that policy considerations are variable, it does not necessarily follow from this that a decision-maker should be relieved of a duty to act fairly in the circumstances. As stated by Brennan J in *Kioa*: An implication that a statutory power is conditioned on observance of the principles of natural justice does not prevent the repository of the power from modifying procedure to meet the particular exigencies of the case.[41]

The approach which has been taken to natural justice/fairness in the context of policy change has varied according to whether the issue is characterised as a failure to give effect to a representation/discontinuation of an established practice or as a change in policy. As pointed out by Allars[42], a failure to honour

[38] G Ganz, 'Legitimate Expectations' in C Harlow (ed) *Public Law and Policy* (London, Sweet and Maxwell, 1986), 161.
[39] (1985) 69 ALR 555.
[40] Ibid 570.
[41] (1985) 159 CLR 550, 615.
[42] M Allars, op cit, para 6.51.

a representation within the *Attorney-General (Hong Kong)* v *Ng Yuen Shiu*[43] category usually at the same time constitutes a decision to change policy. The same can be said of a failure to comply with a long standing procedural practice, as occurred in the *GCHQ* case.[44]

It is the aim of this article to re-explore these issues in the light of three recent decisions by the High Court in *Attorney-General* v *Quin*[45], *Haoucher* v *Minister for Immigration and Ethnic Affairs*[46] and *Annetts* v *McCann*[47] and the decision of the Full Federal Court in *Minister for Immigration and Ethnic Affairs* v *Kurtovic*.[48]

RECENT AUSTRALIAN DECISIONS

The Cases

In *Quin* the High Court by a majority of 3 to 2 upheld an appeal against a decision of the New South Wales Court of Appeal to grant a declaration which required the Attorney-General to consider the respondent's job application in accordance with the terms of previous policy. The background to the case was briefly as follows. Quin's office of stipendiary magistrate had been abolished as part of a reconstruction of inferior courts and he, together with all the other stipendiary magistrates, was invited to apply for appointment as magistrate under the new legislation. As one of a small number not reappointed, he successfully obtained a declaration in the Supreme Court that there had been a denial of procedural fairness in the decision not to appoint him and subsequently obtained a further declaration from the New South Wales Court of Appeal to the effect that he was entitled to have his original application considered on its own merits in accordance with the previously existing policy rather than in competition with other new applicants as required under the new policy. In arriving at its decision, the majority of the High Court took the view that Quin did not have a legitimate expectation which was entitled to the substantive protection provided by the Court of Appeal's declaration above.

On the same day in *Haoucher* a differently constituted High Court overturned a decision of the Full Federal Court, again by majority of 3 to 2. In that case the Minister, in an apparent departure from a published policy statement, had gone against a recommendation of the AAT not to deport the applicant. The statement had provided that he would not accept such a recommendation only where there were special circumstances and that, in such an event, he would table in Parliament at the first opportunity a statement of the reasons for his decision. The majority in the High Court concluded that

[43] [1983] 2 AC 629.
[44] [1985] 1 AC 374.
[45] (1990) 93 ALR 1; (1990) 64 ALJR 327.
[46] (1990) 93 ALR 51; (1990) 64 ALJR 357.
[47] (1991) 97 ALR 177.
[48] (1990) 92 ALR 93.

the statement created a legitimate expectation on the part of the appellant that, in view of the AAT's recommendation, the deportation order would be revoked in the absence of exceptional circumstances and strong evidence justifying a decision not to implement it, and that the Minister's statement of reasons for his decision did not make out exceptional circumstances or strong evidence.

During the interval between the High Court hearings in *Haoucher* and *Quin* and the handing down of the decisions in those cases, the Full Federal Court gave its decision in *Kurtovic*. That case also concerned the validity of a decision to deport a person under s12 of the *Migration Act* 1958 contrary to a recommendation of the AAT, in the context of the same criminal deportation policy which was in issue in *Haoucher*. In *Kurtovic* the respondent had been given an opportunity to make written submissions but had not been informed of allegations contained in various prison reports which were considered by the appellant Minister prior to making his decision. The Full Court upheld the decision of Einfeld J to set aside the deportation order on the basis that the failure to disclose the nature of the allegations contained in the reports was a denial of procedural fairness and that the Minister's policy gave rise to a legitimate expectation on the part of the respondent which required that the matters on which the Minister's decision turned should have been put to him. It, however, rejected a finding that the Minister was estopped from exercising his discretion to deport the respondent because his predecessor had accepted the AAT's recommendation and had revoked the original deportation order.

Finally, in *Annetts* the High Court by a majority of 3 to 2 allowed an appeal against a decision of the Full Federal Court on the basis that the appellants had a common law right to be heard by the respondent coroner in opposition to any potential adverse finding in relation to themselves and their deceased son. It concluded that the fact that the appellants had been granted representation at the coronial inquiry created a legitimate expectation that the respondent would not make any finding adverse to the interests which they represented, including the protection of the reputation of their deceased son, without giving them the opportunity to be heard in opposition to that finding.

Fairness and Legitimate Expectations

Neither the question as to whether or not the development of a broad implication test in *Kioa* has rendered redundant the concept of a legitimate expectation nor the consequences of a broad implication test in terms of the issue of justiciability were directly addressed in any of the four cases. However, while the test for implication was couched in the language of legitimate expectations in at least two of the judgments, what was notable in a significant number of the judgments was a shift in emphasis from the use of the concept as a device for implication to its use in determining the content of a duty to act fairly. In other words, the implication test is now so broadly defined that an applicant who has the standing to seek judicial review is unlikely to have any problems establishing that he or she is owed a duty of fairness, but the content of that duty may, in some circumstances, be so minimal as to preclude a

possibility of obtaining redress. The legitimate expectation has therefore in reality become redundant as a device for implication despite its continued usage in this context by a small number of judges but it now plays a similar role in the context of content by excluding applicants from obtaining redress in circumstances which would normally be regarded as non-justiciable, thereby obviating any need for the courts to specifically consider the issue of justiciability.

In *Quin*, as in *Kioa*, Brennan J was the only member of the High Court who clearly adhered to a universalistic approach to implication and who emphatically rejected the legitimate expectation as a device for implication. His Honour explained his approach to implication in terms of a view that 'the essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power.'[49] It followed from this that the scope of judicial review had to be defined, not in terms of the protection of individual interests, but in terms of the extent of power and the legality of its exercise.

Despite this rejection of the relevance of individual interests as a basis for protection, Brennan J then went on to reformulate the implication test in the following terms:

> 'Generally speaking — for statute may otherwise provide — where an individual has standing to complain of the exercise of a power, the power will be such that its exercise is apt to impact differentially on individual interests and, on that account, the power will be validly exercised only by according natural justice to those whose interests will be especially affected.'[50]

Once again, there is a standing-type screening test and a shift in emphasis to content. Although he argues that the inquiry as to whether an applicant entertains a legitimate expectation is superfluous, he makes it clear that if there is, for example, any promise which would be a source of a legitimate expectation, the repository is bound to have regard to it in exercising the power.

In contrast to Brennan J, Mason CJ analysed the case purely in terms of legitimate expectations and stressed that, notwithstanding criticisms which had been levelled at it, the concept had been accepted and adopted by the High Court as a foundation for attracting a duty of procedural fairness. He did not re-state the broader test for implication which he had developed in *Kioa* but there is no indication that he intended to resile from it; the issue did not arise because his judgment focused on the issue of fettering discretion and his view that there was no justification for granting relief in a form which would compel the Executive to adhere to an approach to judicial appointment which it had decided to discard.

Dawson J, in contrast to Brennan J, concluded that the right to procedural fairness was the product of the common law not the construction of a statute, although a statute might exclude the right if the intention to do so appeared sufficiently clearly.[51] He then cited the implication test formulated by

[49] (1990) 64 ALJR 327, 341.
[50] Ibid 343.
[51] Ibid 351.

Mason J in *Kioa* but without reference to the subsequent screening test, and pointed out that it followed that the required procedures might vary according to the dictates of fairness in the particular case.

Although Dawson J did not reject the concept of a legitimate expectation as a device of implication, he drew a distinction between legitimate expectation of a substantive nature and legitimate expectation of a fair procedure, and suggested that when used in the latter sense it was apt to mislead. In his view it was artificial to suggest that the law imposed a duty of fairness in circumstances where a person legitimately expected fair treatment; such a duty arose, if at all, because the circumstances called for a fair procedure and the concept added nothing to the analysis.[52]

The two minority judgments in *Quin* proceeded on the basis that the earlier decision of the Court of Appeal in *McCrae* v *Attorney-General (NSW)*[53] established as between the parties that the decision and the conclusion on which it was based was vitiated by a denial of procedural fairness and did not reconsider the test for fairness.

The *Haoucher* decision also reflects a variety of approaches to these issues. Of the three members of the Court who where also members of the Court in *Quin*, Dawson J in a minority judgment followed a similar approach to that taken by him in *Quin*, while Toohey J again avoided any discussion of the implication test, this time by proceeding on the basis that, as a matter of construction, the ministerial policy itself entitled *Haoucher* to a hearing. Deane J, on the other hand, expressly considered the question of implication for the first time since *Kioa* and concluded that:

> '[T]he law seems . . . to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making . . . and where the question whether the particular decision affects the rights, interests, status or legitimate expectations of a person in his or her individual capacity is relevant to the ascertainment of the practical content, if any, of the requirements in the circumstances of a particular case and of the standing of a particular individual.'[54]

This approach is interesting in that the screening test is now defined in terms of content, with an acknowledgement that fairness may in some circumstances have no practical content. As in *Kioa*, Deane J did not appear to view the notion of legitimate expectation as redundant, although he expressed the view that it was not without its difficulty and there was much to be said for preferring the phrase 'reasonable expectation'.[55]

McHugh J, the third member of the majority, analysed the case in terms of whether in the light of the published ministerial policy the recommendation of the AAT gave rise to a legitimate expectation on Haoucher's part without any reference to the broader test in *Kioa*. He concluded that, since it did and

[52] Ibid 350.
[53] [1987] 2 NSWLR 208; (1987) 9 NSWLR 268.
[54] (1990) 64 ALJR 327, 358.
[55] Id.

the policy itself spelt out the circumstances in which such an expectation was liable to be defeated, the appellant was entitled to know what matters were regarded as constituting these circumstances.[56]

Finally, Gaudron J proceeded on the basis that the sole issue was what, if anything, was required by way of procedural fairness without explaining why it was that she did not regard the question of implication as an issue. As far as the concept of legitimate expectation was concerned, she envisaged a continuing dual role stating that it might serve either as a device for implication or so as to reveal what fairness required in the circumstances of the particular case. Unlike the other judges she attached considerable significance to that fact that the decision in issue was the final decision made after considering a recommendation from a recommending body obliged to comply with procedural fairness and to the approach which was taken in relation to such decisions in *South Australia* v *O'Shea*.[57] She concluded that in the case of such a decision there was no legitimate expectation that the facts would be evaluated the same way as they were in the report of the recommending body but only that the decision would be made with reference to the same body of facts.[58]

More recently in *Annetts*, Mason CJ, Deane and McHugh JJ in a joint majority judgment stated:

> '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 . . .'[59]

They also cited with approval a statement by Deane J in *Haoucher* that the law seemed 'to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making.'[60] A curious omission from the majority judgment is any reference to a screening-type test.

The majority did not specifically discuss what they meant by legitimate expectations or what role, if any, they envisaged for the concept in terms of implication. They went on, however, to find that there was legitimate expectation on the part of the appellants based on the fact that they had properly been given a right to representation which went to rebut an implicit assumption by the Federal Court that they had no right to be heard because nothing in the evidence suggested that anything adverse to them personally could emerge from the inquiry. It should be noted that the issue went to the question whether there has been a breach of natural justice, not whether it should be implied.

In the minority, Brennan J adhered to the approach which he had taken in

[56] Ibid 370–3.
[57] (1987) 73 ALR 1.
[58] (1990) 64 ALJR 357, 368.
[59] (1991) 97 ALR 177, 178.
[60] (1990) 64 ALJR 357, 358; 93 ALR 51, 53.

Kioa and *Quin*, while Toohey J yet again, avoided the issue of implication by proceeding on the basis that it was common ground that the rules of natural justice applied to a coronial inquiry.

The Availability of Substantive Protection

In *Quin* the High Court was required to consider the validity of a declaration which in effect protected the substance of an expectation on the part of the respondent that his job application would be treated in accordance with specified criteria. Although the three majority judgments were in agreement that the relief granted by the Court of Appeal exceeded the bounds of judicial review, only those of Mason CJ and Brennan J, dealt expressly with the argument that legitimate expectations are entitled to substantive protection and only Brennan J was prepared to reject it unequivocally. In his view:

> 'That theory would effectively transfer to the judicature power which is vested in the repository, for the judicature would either compel an exercise of the power to fulfil the expectation or would strike down any exercise of power which did not. A legitimate expectation not amounting to a legal right would be enforceable as though it were, and changes in government policy, even those sanctioned by the ballot box, could be sterilised by expectations which the superseded policy had enlivened.'[61]

Mason CJ was also critical of the theory, although he was prepared to concede that substantive relief might be appropriate in some circumstances. He examined the two English authorities[62] which had been used to support the argument and concluded that the different reasons given by the two majority judges in *R* v *Secretary of State for the Home Department: Ex parte Khan*[63] failed to support the argument, although the judgment of Taylor J in *R* v *Secretary of State for the Home Department: Ex parte Ruddock*[64] did provide some qualified support for it. After pointing out that the argument encountered the objection that it would entail curial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considered most appropriate in the circumstances, he conceded:

> 'It is possible perhaps that there may be some cases in which substantive protection can be afforded and ordered by the court, without detriment to the public interest intended to be served by the exercise of the relevant statutory or prerogative power.'[65]

He, concluded however, that the present case did not fall within that category.

The remaining member of the majority, Dawson J, did not expressly deal with the issue. However, he implicitly rejected the possibility of substantive

[61] (1990) 64 ALJR 327, 343.
[62] See Forsyth, 'The Provenance and Protection of Legitimate Expectation' (1988) 47 *CLJ* 238.
[63] [1984] 1 WLR 1337; [1985] 1 All ER 40.
[64] [1987] 1 WLR 1482; [1987] 2 All ER 518.
[65] (1990) 64 ALJR 327, 336.

relief except in cases involving the selective application of an existing policy. In his view, what the respondent sought exceeded the bounds of procedural fairness because it would have effectively prevented the Attorney-General from pursuing the change which he had made in the policy for the selection of magistrates. He concluded:

> 'Fairness cannot dictate the policy which a Minister must adopt, nor can it preclude him from adopting and giving effect to a change in policy which he considers to be necessary: *Re Findlay* [1985] AC 318 at 338; *Hughes* v *Department of Health and Social Security* [1985] AC 776 at 788. It may well be different when a particular decision involves, not a change in policy brought about by the normal processes of government decision-making but merely the selective application of an existing policy in an individual case: see, eg, *R* v *Secretary of State for the Home Department; Ex parte Khan* [1984] 1 WLR 1337; [1985] 1 All ER 40.'[66]

He subsequently reiterated these views in *Haoucher*.[67]

The two minority judgments in *Quin* did not expressly deal with the issue but rather focused on that power of the court to grant relief appropriate to the particular case. They both concluded that the court was entitled to have regard to matters of substance in moulding the relief appropriate to prevent the plaintiff from being subjected to wrongful denial of procedural fairness and that the relief granted by the Court of Appeal was appropriate in the circumstances.

The approach of the minority reflects a differing view of the consequences of the granting of substantive relief in terms of interference with the performance of statutory functions. This was explained by Toohey J in the following terms:

> 'To focus unduly on the formal order of the Court of Appeal . . . without an appreciation of the circumstances which led to the making of the order, is to view the matter too narrowly. It gives inadequate emphasis to the particular circumstances in which the order was made . . . It is not inappropriate to borrow the language of the Privy Council in *Attorney-General* v *Ng Yuen Shiu* [1983] 2 AC 629 at 638 that:
> "When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."
> Implementation of the procedure adopted by the Attorney-General does not interfere with his statutory duty, for it was an entirely apt procedure to follow in the special circumstances prevailing.'[68]

The issue of the availability of substantive relief to protect legitimate expectations was also considered by the Full Federal Court in *Kurtovic*. Gummow J, whose views were endorsed in a brief statement by Ryan J, concluded that the existence of a legitimate expectation did not give rise to substantive, as distinct from procedural protection.

[66] Ibid 352.
[67] (1990) 64 ALJR 357, 363.
[68] (1990) 64 ALJR 327, 356.

His Honour commenced his analysis of the issue with a discussion of *Khan* and referred, in particular, to a passage in the judgment of Parker LJ, one of the two majority judges in that case, where he stated that the effect of the decision to quash the Minister's decision would leave him free either to proceed on the basis of the criteria which he had announced or 'to afford the applicant a full opportunity to make representations why in his case the new policy should not be followed.'[69] He concluded on the basis of this that *Khan* did not advance the argument that legitimate expectations were entitled to substantive protection. He also distinguished the decision in *Oloniluyi*,[70] in which the Court of Appeal treated a failure to meet a legitimate expectation as a substantive defect in the decision-making process, on the basis that the Crown had apparently accepted that as a matter of law estoppel might lie against it 'and that Dillon LJ, had described the argument' under the label of estoppel as substantially the same as the legitimate expectation argument.[71]

Gummow J then cited a passage from the judgment of Taylor J in *Ruddock* in which the latter had commented that, if it had been the Minister's practice to publish the current policy, it would be incumbent on him in dealing fairly to publish the new one, unless that would conflict with his duties. He commented that:

> 'With respect, the duty to exercise discretionary power on the merits of each case would seem to preclude the view that a prior announcement of substantive criteria on which the decision would be based could have binding force until such time as a different announcement is made . . . The expectations of applicants as to the way in which a decision will be reached as a substantive, rather than a procedural matter, cannot derogate from the duty to retain the discretionary nature of the decision-making power.'[72]

Limitations on Procedural Protection in the Context of Executive Policy-Making

The question whether a person who is adversely affected by a change in policy is entitled to procedural protection in the form of an opportunity to make representations before the application of the new policy to his or her case was not specifically answered in either *Quin* or *Haoucher*. It did not arise for consideration in *Quin* because the case turned on the issue of the availability of substantive protection. Mason CJ, who was the only member of the High Court in that case to advert to the issue, expressly left it open. He simply noted that there was an apparent conflict of authority and commented that this was a matter which required examination on the appropriate occasion.

The *Haoucher* decision does not shed much further light on this issue, except insofar as the High Court clearly did not regard the principle that the executive should be unfettered in the exercise of its policy-making function as

[69] (1990) 92 MLR 93, 127–8.
[70] [1989] Imm AR 135.
[71] (1990) 92 ALR 93.
[72] (1990) 92 ALR 93, 128.

being of paramount importance in that case. A comparison of the approaches taken by the majority in the High Court and the majority in the Full Federal Court in relation to the question as to whether *Haoucher* was entitled to procedural protection does, however, bear out Allar's contention[93] that the critical factor is how the issue is characterised. The majority in the Federal Court in *Haoucher* had characterised it primarily in terms of the power of the executive to make policy changes and found in favour of the Minister, while the majority in the High Court characterised it in terms of a failure by the Minister to comply with the terms of his undertaking as contained in his published policy statement and found in favour of Haoucher.

The majority in the Full Federal Court had attached paramount importance to the consideration that the government should be unfettered in making policy changes and held that there had been no denial of natural justice by the Minister. Northrop J[74] had distinguished *Attorney-General (Hong Kong)* v *Ng Yuen Shiu*[75] on the basis that the published policy there indicated that a special procedure would be followed before the decision to deport was taken. The policy statement in issue in *Haoucher* had not made the giving of notice a condition precedent to the making of a decision by a Minister and the requirement of tabling had at most been a condition precedent. Lee J[76] had made a similar distinction and had further added that the Minister had been entitled to abandon the policy provided he had not taken into account additional factual material in accordance with the rule formulated in *South Australia* v *O'Shea.*[77] (In that case Mason CJ took the view that, where there was a decision-making process in which the final decision was made after considering a recommendation from a body which was obliged to comply with the requirements of natural justice, fairness did not require a further opportunity to put a case before a final decision was made provided regard was had to exactly the same facts.)

In contrast, the majority in the High Court focused on the failure to comply with the terms of the publicised policy. Deane J took the view that, for so long as the published policy was operative, a deportee could reasonably be expected to see it as providing a critical reference point in determining the desirability and effectiveness of an application for review of a deportation order. He concluded that the Minister had engaged in a quite distinct and well defined process of decision-making before overturning the Tribunal's recommendation. That dealt with issues such as 'exceptional circumstances' and 'strong evidence' which had not previously arisen for consideration and, since it directly affected the applicant's rights and interests, status and legitimate expectations in his individual capacity, justice demanded that he should be accorded an opportunity to be heard in relation to those issues.

[73] See further supra.
[74] (1988) 83 ALR 535–6.
[75] [1983] 2 AC 629.
[76] (1988) 83 ALR 530, 555–8.
[77] (1957) 163 CLR 378.

In similar vein, Toohey J referred to the decision in *Barbaro* v *Minister for Immigration and Ethnic Affairs*,[78] which he stressed was decided before the issuing of the criminal deportation policy, and then went on:

> 'And, if a recommendation of the Tribunal is now only to be rejected in "exceptional circumstances" and "when strong evidence can be produced", another dimension is introduced into the decision-making process. And that dimension is one that can only arise at the stage of reconsideration by the Minister, because by definition it is something that has not been before the Tribunal or the Minister until after the Tribunal's recommendation was made.'

Finally, McHugh J took the view that policy expressly spelt out the circumstances which were liable to defeat the expectations of persons who had received favourable recommendations from the AAT and that the appellant was therefore entitled to know what were the matters which constituted 'exceptional circumstances' and 'strong evidence'.[79]

The minority also analysed the issue in terms of whether or not the Minister had acted in accordance with the terms of his policy but they reached a different conclusion, finding that he had merely differed on the interpretation to be placed on the facts found by the Tribunal. They also, like the majority in the Federal Court, attached significance to the fact that the Minister's decision was the final stage in a decision-making process which had provided the applicant with extensive opportunities to present his case.

Further light on the issue can be obtained from the decision in *Kurtovic* and, in particular, the judgment of Gummow J. His Honour first considered the question whether a decision-maker could be estopped from making a decision in the exercise of a discretionary power where that decision would have the effect of altering a previous intra vires decision. He expressed the view that, where a power was capable of being exercised from time to time (rather than once and for all), there was a discretion on the part of the decision-maker as to whether or not to exercise it again once an initial decision had been made and that this was required to be exercised on the basis of proper understanding of the statute. Consequently, an estoppel could not be allowed to operate in these circumstances as it would prevent or hinder the proper exercise of such a discretion.

Gummow J went on to find that the criminal deportation policy operated so as to create a legitimate expectation which strengthened the applicable rules of natural justice so as to require that the matters on which the appellant Minister's decision turned should have been put to the respondent. Like the majority of the High Court in *Haoucher*, he analysed the issue in terms of the effect of the policy statement and the procedures to which it gave rise rather than in terms of the procedures which were applicable where a Minister chose to apply a revised policy. Therefore, despite his endorsement of the principle that decision-makers should not be hindered in the exercise of statutory

[78] (1982) 71 FLR 198; 46 ALR 123, 130.
[79] (1990) 64 ALJR 357, 372–3.

discretions, the effect of his judgment was to impose on the Minister more onerous procedural requirements than would have been applicable in the absence of the published policy. This approach is clearly contrary to that taken by Wilcox J in *Peninsula Anglican Boys' School* v *Ryan.*[80]

CONCLUSION

While none of the issues with which this article is concerned have been finally resolved it is nevertheless possible to draw some conclusions from the recent Australian decisions. First, as far as the interrelationship between legitimate expectations and fairness is concerned, the recent cases have not substantially clarified the post-*Kioa* position. They clearly demonstrate, however, a relaxation of the implication test coupled with an increasing emphasis on the content of the duty to act fairly. While it is now abundantly clear that a duty to act fairly can be implied in circumstances where there is neither a right nor an interest which falls within one of the traditional categories of legitimate expectation, the concept of legitimate expectation has by no means been discarded. Not only is it still used by many of the judges as an element in a revised test for implication but also it would appear to have acquired a more prominent role in terms of assessing what fairness requires in any particular case. It would seem that, in the absence of any adverse effect on a right or legitimate expectation, an applicant will have considerable difficulty in establishing procedural unfairness unless the decision-maker is tainted by bias or has been influenced by undisclosed material which is prejudicial to the applicant.

The latest formulation of the implication test by the majority in *Annetts*, which refers to a common law duty which arises where there is some power on the part of a decision-maker to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, is in some respects similar to the test used by Mason J in *Kioa* ('decisions which affect rights, interests and legitimate expectations') and Deane J in *Kioa* and *Haoucher* ('decisions which . . . affect rights, interests, status and legitimate expectations'). There has been no explanation post-*Kioa* of what the expression 'rights, interests and legitimate expectations' means, although some assistance may be derived from the definition of Mason J of 'rights and interests' and his outline of the development of legitimate expectations in *Kioa.* Similarly there has been no further reference to any standing-type requirements. It is suggested that it is not because issues of standing/justiciability are no longer relevant but because they can now be dealt with in terms of content. So, for example, where an applicant only has emotional interest in the outcome of a decision or is affected indirectly or simply as a member of the public judicial review will now be decided on the basis that the content of the duty to act fairly is so minimal that it will be satisifed even in the absence of any form of hearing or opportunity to make written submissions.

[80] (1985) 69 ALR 555. See fn 38 supra.

The question of substantive protection of legitimate expectations was discussed for the first time in *Quin* and *Kurtovic*, where the view that legitimate expectations of a substantive nature require substantive protection was rejected by the few judges who considered it. On the other hand, two of the five judges in *Quin* were prepared to uphold an order which had the effect of protecting the substance of the respondent's legitimate expectation on the basis that it was appropriate to have regard to matters of substance in moulding relief in respect of a wrongful denial of procedural justice. This approach does not reflect a view that natural justice/fairness is concerned with matters of substance as well as procedure but rather a flexible view of the court's discretionary power in the granting of remedies or judicial review.

The Australian courts therefore continue to adhere to the traditional view that natural justice/fairness is confined to matters of procedure so that, even where the issue arises in the context of an undertaking or practice of a substantive nature, the duty to act fairly will be considered exclusively in terms of procedural requirements. On the other hand it does not necessarily follow from this that an applicant will necessarily be precluded from obtaining relief of a substantive nature; that will depend on the approach which the court takes to its discretion in structuring relief. Apart from the discussion by the minority in *Quin*, this is a matter which has not received much consideration by the Australian courts.[81] It should be noted that, even if a court were willing to have regard to matters of substance in tailoring relief, it would do so only where that was necessary to ensure that an applicant was not prejudiced as a result of events which had taken place subsequently to the actual denial of procedural fairness. Such an approach might operate as it would have done in *Quin* to protect the substance of a legitimate expectation but it does not guarantee that all applicants who have substantive expectations will be able to obtain protection in respect of them.

Finally, whether fairness requires that a person who is adversely affected by a change in policy should be given an opportunity to make representations as to why the new policy should not be applied to him or her remains unresolved. The only judge who has so far specifically discussed the issue, Mason CJ in *Quin*, simply acknowledged that there was an apparent conflict of authority and left the matter open for examination on an appropriate occasion.

However, the decisions in *Haoucher* and *Kurtovic* have made it clear that if a decision-maker simply decides to ignore or depart from a pre-announced policy in making a particular decision then the matter will not be characterised in terms of change in policy. The courts will instead treat the policy as subsisting and therefore as capable of giving rise to procedural requirements which might not otherwise have been applicable. In other words, although it is unclear whether the courts will be prepared to impose procedural fetters on the discretion of the executive to change policy, they are clearly willing to do so in circumstances where a pre-announced policy has not been formally

[81] The decision in *FAI Insurance* v *Winneke* (1982) 151 CLR 342, although concerned with different issues, is the principal example of a case where the High Court has been prepared to adopt a flexible approach in tailoring relief.

abrogated or replaced with a new one. This may simply reflect a view that it is unfair to allow the selective application of policy or it may be indicative of a reluctance to attach undue significance to the view that the executive should be free from procedural as well as substantive fetters in the exercise of its policy-making function.