

Natural area

Instant case

In recent years courts have tended to imply a duty to observe the principles of natural justice. It has been said that “[t]he 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.”¹ However, there are some circumstances in which a duty to observe natural justice will not be implied: “the law has not yet reached the stage of applying the obligation of natural justice to every decision which disadvantages individuals.”²

In the instant case, the decision affected the property, right, interest, status, or legitimate expectation of the applicant; the decision is apt to have a discrete impact on the interests of the applicant; the power is of a nature that would suggest that procedural fairness would be applied; the statutory or factual criteria focused on matters which were discrete to the interests of the applicant; the decision-maker was not a high-level policy-maker; there is no statutory right to appeal against the decision; and there were no circumstances which would have made an obligation to observe natural justice inappropriate.

In my opinion—following *Annetts v. McCann*—a duty to observe natural justice is implied.

In *Annetts v. McCann*,³ a 1990 decision of five judges of the High Court of Australia, a coroner had been conducting an inquest into the death of a 16-year old boy. The boy’s parents (Mr and Mrs Annetts) sought to make a submission before the coroner made a finding. The coroner decided that the *Coroner’s Act 1920* (WA) gave him the discretion (which he chose to exercise) to disallow their submission. The Annettses appealed.

The High Court (Mason CJ, Brennan, Deane, Toohey and McHugh JJ) held that their son’s reputation gave the Annettses an interest in the Coroner’s inquiry. “A finding in an inquest into a death is naturally likely to deal with the conduct of the deceased leading to death. An unfavourable reflection on the deceased is usually a matter of concern to her or his parents, spouse or children and, if they choose to appear at the inquest in order to safeguard the reputation of the deceased, the familial relationship suffices, in my view, to establish the deceased’s reputation as a relevant interest which should not be adversely affected without according natural justice to those who are seeking to safeguard that reputation.”⁴

The Court held that the fact that the coroner’s decision was merely recommendatory (whether or not to prosecute) was not sufficient to avoid the implication of natural justice; the coroner was bound to hear the Annettses before making any finding adverse to them or their son.⁵

The instant case is on all fours with *Annetts v. McCann*.

If *McInnes v. Onslow-Fane* is followed then a duty to observe natural justice is not implied.

In *McInnes v. Onslow-Fane*,⁶ a 1978 decision of the Chancery Division of the English High

¹*Kioa v. West* (1985) 159 CLR 550 at 584 per Mason J.

²*Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd* (1987) 15 FCR 274 at 306 per Wilcox J.

³(1990) 170 CLR 596.

⁴*ibid.* at 173–4 per Brennan J.

⁵*ibid.* at 170 per Mason CJ, Deane and McHugh JJ, at 174 per Brennan J, at 178 per Toohey J. Note, however, that Brennan and Toohey JJ dismissed the appeal because they believed that the decision of the Full Court of the Supreme Court of Western Australia (from which the Annettses appealed) was right on the material before it.

⁶[1978] 1 WLR 1520.

Court, McInnes had held, at various times, licences to promote, train and act as master of ceremonies in professional boxing. All his licences were revoked by the British Boxing Board of Control. He made five unsuccessful applications for a manager's licence. With his sixth application he requested an oral hearing and prior notification of anything that might prevent the area council (to which he applied) making a favourable recommendation to the board. The board refused his applications without giving him an oral hearing or informing him of the case against him.

Megarry V-C held that the board was under no duty to provide reasons to McInnes or to allow him a hearing: "This is not a case in which there has been any suggestion of the board considering any alleged dishonesty or morally culpable conduct of the plaintiff. A man free from any moral blemish may nevertheless be wholly unsuitable for a particular type of work . . . In such circumstances, in the absence of anything to suggest that the board have been affected by dishonesty or bias or caprice, or that there is any other impropriety, I think that the board are fully entitled to give no reasons for their decision, and to decide the application without any preliminary indication to the plaintiff of those reasons. The board are the best judges of the desirability of granting a licence, and in the absence of any impropriety the court ought not to interfere."⁷

The instant case is on all fours with *McInnes v. Onslow-Fane*. Note, however, that *McInnes v. Onslow-Fane* is only a decision of the Chancery Division of the English High Court and not as good authority as a case decided by five judges of the High Court of Australia—like *Annetts v. McCann*.

Consequently, there is nothing in *McInnes v. Onslow-Fane* to warrant any change in my conclusion.

Hypothetical 1

Consider the instant case changed so that the following is true: the statutory or factual criteria focused on matters of policy or public interest; and the decision-maker was a high-level policy-maker.

If that were so then my opinion would be that—following *South Australia v. O'Shea*—a duty to observe natural justice is not implied.

In *South Australia v. O'Shea*,⁸ a 1987 decision of five judges of the High Court of Australia, O'Shea had been convicted of two offences of indecent assault of young children. He was released on licence and remained at liberty after the licence expired. Over a year later, after allegations had been made against him, O'Shea was apprehended and detained. The parole board recommended his release on licence on various conditions, but the Governor in Council resolved to take no action. O'Shea had been given a hearing by the Parole Board, but he claimed he was entitled to a further hearing before the Governor in Council could exercise his discretionary powers under s. 77a(7a) of the *Criminal Law Consolidation Act, 1935* (SA).

Mason CJ, Wilson, Brennan and Toohey JJ (Deane J dissenting) held that O'Shea was not entitled to a further hearing. "Given the nature of this decision, it cannot be said that Mr. O'Shea could have more than a hope that the Governor would be prepared to act on the recommendation of the Board. Hope, of itself, is not sufficient to ground an expectation that will attract legal consequences. So far as the concept of legitimate expectation is concerned, Mr. O'Shea must be taken to know that the Act committed to the Governor, with the advice and

⁷ibid. at 223.

⁸(1987) 163 CLR 378.

consent of the Executive Council, the responsibility for determining where the public interest lay . . . The nature of the decision that they were required to make was such that participation by Mr. O’Shea was inappropriate.”⁹

The hypothetical case is on all fours with *SA v. O’Shea*.

If *Macrae v. Attorney-General for New South Wales* is followed then a duty to observe natural justice is implied.

In *Macrae v. Attorney-General for New South Wales*,¹⁰ a 1987 decision of the New South Wales Court of Appeal, five magistrates who had been appointed under the Justices Act 1902 (NSW) were not appointed under the Local Courts Act 1982 (NSW). The new Act had reorganized the magistracy in NSW, and magistrates appointed under the old Act were entitled to apply for appointment as magistrates under the new Act. The five had applied and were interviewed. Allegations were made privately to the Attorney-General claiming that they were unfit to be appointed, but these allegations were not brought to their notice at the time of the interviews.

The Court of Appeal held that the Attorney-General’s decision not to recommend the appointment of the magistrates was void because they were denied their legitimate expectation of procedural fairness. “They have not been treated fairly.”¹¹

The hypothetical case is on all fours with *Macrae v. AG*. Note, however, that *Macrae v. AG* is only a decision of the New South Wales Court of Appeal and not as good authority as a case decided by five judges of the High Court of Australia—like *SA v. O’Shea*.

Consequently, there is nothing in *Macrae v. AG* to warrant any change in my conclusion.

Affected area

Instant case

In the instant case, the decision did not affect a financial, property or occupational interest of the applicant; the decision did not affect the applicant’s personal liberty; the decision affected the applicant’s reputation; and the applicant did not have a legitimate expectation which was affected by the decision.

In my opinion—following *Annetts v. McCann*—the decision affected the property, right, interest, status, or legitimate expectation of the applicant.

In *Annetts v. McCann*,¹² a 1990 decision of five judges of the High Court of Australia, a coroner had been conducting an inquest into the death of a 16-year old boy. The boy’s parents (Mr and Mrs Annetts) sought to make a submission before the coroner made a finding. The coroner decided that the *Coroner’s Act 1920* (WA) gave him the discretion (which he chose to exercise) to disallow their submission. The Annettses appealed.

The High Court (Mason CJ, Brennan, Deane, Toohey and McHugh JJ) held that their son’s reputation gave the Annettses an interest in the Coroner’s inquiry. “A finding in an inquest into a death is naturally likely to deal with the conduct of the deceased leading to death. An unfavourable reflection on the deceased is usually a matter of concern to her or his parents, spouse or children and, if they choose to appear at the inquest in order to safeguard the reputation of the deceased, the familial relationship suffices, in my view, to establish the

⁹ibid. at 402 per Wilson and Toohey JJ.

¹⁰(1987) 9 NSWLR 268.

¹¹ibid. at 283 per Kirby P.

¹²(1990) 170 CLR 596.

deceased's reputation as a relevant interest which should not be adversely affected without according natural justice to those who are seeking to safeguard that reputation."¹³

The Court held that the fact that the coroner's decision was merely recommendatory (whether or not to prosecute) was not sufficient to avoid the implication of natural justice; the coroner was bound to hear the Annettses before making any finding adverse to them or their son.¹⁴

The instant case is on all fours with *Annetts v. McCann*.

If *Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd* is followed then the decision did not affect the property, right, interest, status, or legitimate expectation of the applicant.

In *Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd*,¹⁵ a 1987 decision of the Full Court of the Federal Court of Australia, Peko-Wallsend held various mining interests in Stage 2 of Kakadu National Park. Federal Cabinet decided to nominate Stage 2 for inclusion in the World Heritage List, so it became "identified property" within the meaning of s. 3(2) of the *World Heritage Properties Conservation Act 1983* (Cth). This meant that the Governor-General could, by proclamation, make mining operations unlawful in the area. The decision did not affect Peko-Wallsend's mining rights which were preserved under s. 8B of the *National Parks and Wildlife Conservation Act 1975* (Cth).

Before Cabinet's decision, Peko-Wallsend had lobbied Ministers and other officials extensively, seeking to preserve their mining interests. After the decision they commenced proceedings to prevent the Government from taking any further steps to have Stage 2 nominated on the World Heritage List, claiming that Cabinet was bound by the rules of natural justice and had failed to give Peko-Wallsend an opportunity to be heard. Beaumont J (a Federal Court judge) agreed, and held the Cabinet decision void.¹⁶

The Full Court of the Federal Court disagreed. Bowen CJ decided that "it would ... be inappropriate for this court to interfere to set aside a Cabinet decision involving such complex policy considerations".¹⁷ Both Sheppard and Wilcox JJ held that Peko-Wallsend had had adequate opportunity to put their case to relevant Ministers and officials before the Cabinet decision, and were not denied natural justice.¹⁸ However, Wilcox J (with whose reasons the other two judges generally agreed) held that the Cabinet's decision in this case did not attract the obligations of natural justice.¹⁹

There are several similarities between the instant case and *Minister v. Peko-Wallsend*: the decision did not affect a financial, property or occupational interest of the applicant; the decision did not affect the applicant's personal liberty; and the applicant did not have a legitimate expectation which was affected by the decision.

However, there is one extremely significant difference between the instant case and *Minister v. Peko-Wallsend*. In that case the decision did not affect the applicant's reputation. Note also that *Minister v. Peko-Wallsend* is only a decision of the Full Court of the Federal Court

¹³ibid. at 173–4 per Brennan J.

¹⁴ibid. at 170 per Mason CJ, Deane and McHugh JJ, at 174 per Brennan J, at 178 per Toohey J. Note, however, that Brennan and Toohey JJ dismissed the appeal because they believed that the decision of the Full Court of the Supreme Court of Western Australia (from which the Annettses appealed) was right on the material before it.

¹⁵(1987) 15 FCR 274.

¹⁶*Peko-Wallsend Ltd v. Minister for Arts, Heritage and Environment* (1986) 13 FCR 19.

¹⁷(1987) 75 ALR 218 at 225.

¹⁸ibid. at 228 per Sheppard J, at 253 per Wilcox J.

¹⁹ibid. at 253.

of Australia and not as good authority as a case decided by five judges of the High Court of Australia—like *Annetts v. McCann*.

Consequently, there is nothing in *Minister v. Peko-Wallsend* to warrant any change in my conclusion.

Hypothetical 1

Consider the instant case changed so that the following is true: the decision did not affect the applicant's reputation.

If that were so then my opinion would be that—following *Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd*—the decision did not affect the property, right, interest, status, or legitimate expectation of the applicant.

Details of *Minister v. Peko-Wallsend* are summarized above. The hypothetical case is on all fours with *Minister v. Peko-Wallsend*.

If *Bread Manufacturers of New South Wales v. Evans* is followed then the decision affected the property, right, interest, status, or legitimate expectation of the applicant.

In *Bread Manufacturers of New South Wales v. Evans*,²⁰ a 1981 decision of five judges of the High Court of Australia, the Bread Manufacturers claimed that an order made by the Prices Commission was void. The order affected the classification of bread products and had an incidental effect on the price of hamburger buns. The Bread Manufacturers complained that they should have been given the right to put their case to the Commission.

The Prices Regulation Act 1948 (NSW) provided that a public inquiry had to be held before an order could be made setting prices, except where the Minister consented to dispensing with the inquiry. The Minister had dispensed with an inquiry before this order was made. Hence, “[t]he argument that the Commission was bound to disclose to the Association the fact that it proposed to make an order which would have the incidental effect of reducing the price of hamburger buns can only succeed if the Commission, although not bound to hold an inquiry, was bound to observe the rules of natural justice”.²¹

The High Court held that there was no denial of natural justice in relation to the order, because “the reduction of the maximum price in respect of one item was simply a minor incident in a major revision of the price framework covering the whole range of bread products. The effect of that major revision was generally to increase prices. There was, in our opinion, no obligation on the Commission to give advance notice of this development or of the possibility of its occurrence.”²²

There are several similarities between the hypothetical case and *Bread Manufacturers v. Evans*: the decision did not affect the applicant's personal liberty; the decision did not affect the applicant's reputation; and the applicant did not have a legitimate expectation which was affected by the decision.

However, there is one extremely significant difference between the hypothetical case and *Bread Manufacturers v. Evans*. In that case the decision affected a financial, property or occupational interest of the applicant.

Despite the fact that *Bread Manufacturers v. Evans* is a decision of five judges of the High Court of Australia (and better authority than a case decided by the Full Court of the Federal

²⁰(1981) 180 CLR 404.

²¹ibid. at 101 per Gibbs CJ.

²²ibid. at 119 per Mason and Wilson JJ, with whom Murphy and Aickin JJ agreed on this point.

Court of Australia—like *Minister v. Peko-Wallsend*), there is nothing in *Bread Manufacturers v. Evans* to warrant any change in my conclusion.

Expectation area

Instant case

If the applicant had a legitimate expectation which was affected by the decision, natural justice may be implied. “[L]egitimate expectations’ . . . are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis”.²³

In the instant case, the decision-maker did not break a promise or undertaking; the decision-maker did not go against an established course of practice; the decision did not involve a refusal to renew an existing interest; neither the decision-maker nor a statutory provision suggested that an initial interest would be granted; the decision did not affect an established liberty or interest; and there was no standard administrative procedure which the decision-maker should have followed.

In my opinion—following *Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd*—the applicant did not have a legitimate expectation which was affected by the decision.

In *Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd*,²⁴ a 1987 decision of the Full Court of the Federal Court of Australia, Peko-Wallsend held various mining interests in Stage 2 of Kakadu National Park. Federal Cabinet decided to nominate Stage 2 for inclusion in the World Heritage List, so it became “identified property” within the meaning of s. 3(2) of the *World Heritage Properties Conservation Act 1983* (Cth). This meant that the Governor-General could, by proclamation, make mining operations unlawful in the area. The decision did not affect Peko-Wallsend’s mining rights which were preserved under s. 8B of the *National Parks and Wildlife Conservation Act 1975* (Cth).

Before Cabinet’s decision, Peko-Wallsend had lobbied Ministers and other officials extensively, seeking to preserve their mining interests. After the decision they commenced proceedings to prevent the Government from taking any further steps to have Stage 2 nominated on the World Heritage List, claiming that Cabinet was bound by the rules of natural justice and had failed to give Peko-Wallsend an opportunity to be heard. Beaumont J (a Federal Court judge) agreed, and held the Cabinet decision void.²⁵

The Full Court of the Federal Court disagreed. Bowen CJ decided that “it would . . . be inappropriate for this court to interfere to set aside a Cabinet decision involving such complex policy considerations”.²⁶ Both Sheppard and Wilcox JJ held that Peko-Wallsend had had adequate opportunity to put their case to relevant Ministers and officials before the Cabinet decision, and were not denied natural justice.²⁷ However, Wilcox J (with whose reasons the other two judges generally agreed) held that the Cabinet’s decision in this case did not attract the obligations of natural justice.²⁸

The instant case is on all fours with *Minister v. Peko-Wallsend*.

If *Cole v. Cunningham* is followed then the applicant had a legitimate expectation which was affected by the decision.

²³ *Cole v. Cunningham* (1983) 49 ALR 123 at 131, per Bowen CJ, Sheppard and Morling JJ.

²⁴ (1987) 15 FCR 274.

²⁵ *Peko-Wallsend Ltd v. Minister for Arts, Heritage and Environment* (1986) 13 FCR 19.

²⁶ (1987) 75 ALR 218 at 225.

²⁷ *ibid.* at 228 per Sheppard J; at 253 per Wilcox J.

²⁸ *ibid.* at 253.

In *Cole v. Cunningham*,²⁹ a 1983 decision of the Full Court of the Federal Court of Australia, Cunningham had been encouraged to resign from the Public Service because his superiors believed he had been guilty of misconduct in the performance of his duties. He had formed an attachment and begun to live with a Fijian woman whose permit extension application he had processed. He was threatened with criminal prosecution and told that “[i]f you resign now it will be a normal resignation and you’ll leave with a clean record.”³⁰

About eighteen months later, Cunningham sought reappointment to the Public Service and was told that he would be offered a position subject to police and ASIO clearances. The next day he was told that he had been given an unsatisfactory report based on the earlier events.

Bowen CJ, Sheppard and Morling JJ held that, in general, applicants for appointment or reappointment to the public service are not entitled to natural justice because they have no legitimate expectation which can be affected by a refusal to appoint. However, Cunningham did have a legitimate expectation that any decision to reappoint him would not be made on the basis of his past record.

There are several similarities between the instant case and *Cole v. Cunningham*: the decision-maker did not go against an established course of practice; the decision did not involve a refusal to renew an existing interest; neither the decision-maker nor a statutory provision suggested that an initial interest would be granted; the decision did not affect an established liberty or interest; and there was no standard administrative procedure which the decision-maker should have followed.

However, there is one extremely significant difference between the instant case and *Cole v. Cunningham*. In that case the decision-maker broke a promise or undertaking.

Despite the fact that *Cole v. Cunningham* and *Minister v. Peko-Wallsend* are both decisions of the Full Court of the Federal Court of Australia, there is nothing in *Cole v. Cunningham* to warrant any change in my conclusion.

Hypothetical 1

Consider the instant case changed so that the following is true: the decision-maker broke a promise or undertaking.

If that were so then my opinion would be that—following *Cole v. Cunningham*—the applicant had a legitimate expectation which was affected by the decision.

Details of *Cole v. Cunningham* are summarized above. The hypothetical case is on all fours with *Cole v. Cunningham*.

If *Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd* is followed then the applicant did not have a legitimate expectation which was affected by the decision.

Details of *Minister v. Peko-Wallsend* are summarized above. There are several similarities between the hypothetical case and *Minister v. Peko-Wallsend*: the decision-maker did not go against an established course of practice; the decision did not involve a refusal to renew an existing interest; neither the decision-maker nor a statutory provision suggested that an initial interest would be granted; the decision did not affect an established liberty or interest; and there was no standard administrative procedure which the decision-maker should have followed.

However, there is one extremely significant difference between the hypothetical case and *Minister v. Peko-Wallsend*. In that case the decision-maker did not break a promise or undertaking.

²⁹(1983) 49 ALR 123.

³⁰*ibid.* at 125.

Despite the fact that *Minister v. Peko-Wallsend* and *Cole v. Cunningham* are both decisions of the Full Court of the Federal Court of Australia, there is nothing in *Minister v. Peko-Wallsend* to warrant any change in my conclusion.