LEGITIMATE EXPECTATION: A USEFUL CONCEPT IN ADMINISTRATIVE LAW?

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Legitimate expectation: a useful concept in administrative law? by Darren Bruno

The High Court in *Minister for Immigration and Border Protection v WZARH* has recently criticised the doctrine of ‘legitimate expectation’ in Australian administrative law.

The doctrine came to prominence in *Minister for Immigration and Ethnic Affairs v Teoh* in Australia, the doctrine has given rise to procedural protection rather than substantive rights. Where a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires the person affected to be given notice and an adequate opportunity to respond to that course.

However, since Teoh the High Court has cast doubt on the continued utility of the doctrine of legitimate expectation in administrative law. *WZARH* provides the High Court’s most recent statement on the issue.

The facts in WZARH

The respondent, an ‘offshore entry person’ within the meaning of the *Migration Act 1958* (Cth), requested a Refugee Status Assessment as to whether he was a person to whom Australia owed protection obligations. A successful assessment may have resulted in the Minister exercising a power in the Act, entitling the respondent to apply for a protection visa.

The respondent was unsuccessful with the Refugee Status Assessment. He requested an Independent Merits Review. As part of that review, an independent merits reviewer interviewed him. The reviewer told him that she would conduct a fresh rehearing of his claims and make a recommendation, to be given to the Minister, for the Minister’s consideration. She also told him that she would consider all of the information he provided to her and any further articles or information, before making her recommendation.

The reviewer subsequently became unavailable to complete the review. Unbeknown to the respondent, another individual assumed responsibility for the review. The second reviewer determined the review against the respondent, finding that he was not a person to whom Australia owed protection obligations. Adverse findings about the respondent’s credibility were also made.

Relevantly, the second reviewer did not interview the respondent, but based his decision on the written materials provided to the first reviewer, including a transcript of the respondent’s interview with the first reviewer.

Judicial review and subsequent appeal

The respondent applied for judicial review of the decision of the second reviewer, in part arguing that he had been denied procedural fairness. After failing in his application, the respondent appealed to the Full Court of the Federal Court. The Full Court allowed the appeal and declared that the second reviewer arrived at his decision in breach of the rules of procedural fairness.

The majority used legitimate expectation reasoning to arrive at the decision. The majority held that the respondent had a legitimate expectation that the person by whom he had been interviewed (the first reviewer) would be the person to make the recommendation to the Minister. The Full Court observed that the concept...
of ‘legitimate expectation’ was still a useful tool when considering ‘what must be done to give procedural fairness to a person whose interests might be affected by an exercise of power’.6

The Minister appealed the Full Court’s decision to the High Court.

**What the High Court held**

The High Court dismissed the appeal, finding that the respondent had been denied procedural fairness.7 However, in arriving at this decision the High Court criticised the concept of legitimate expectation and questioned its utility in Australian administrative law.

Keifel, Bell and Keane JJ described the notion of legitimate expectation as ‘both unnecessary and unhelpful’ and said that it ‘may 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’.5

Gageler and Gordon JJ described the concept of legitimate expectation as introducing confusion.9 Their Honours said ‘by focusing on the opportunity, expected, or legitimately to have been expected, the concept can distract from the true inquiry into the opportunity that a reasonable administrator ought fairly to have given’.10

Their Honours quoted Gleeson CJ in Lam11 where his Honour said ‘[t]he ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed’.12

The central focus for the High Court in WZARH was whether the procedure adopted by the second reviewer in proceeding on the basis of the material put before the first reviewer, without giving the respondent an opportunity to be heard about that course, was unfair in the circumstances.

The High Court ultimately concluded that the procedure was unfair, but not because the respondent had been denied a legitimate expectation. Rather, the High Court found that the procedure adopted by the second reviewer denied the respondent an opportunity to properly advance his case, which resulted in ‘practical injustice’ to him.

**Lessons for administrative lawyers**

WZARH is a reminder that the concept of legitimate expectation is not a particularly useful tool in determining whether there has been a breach of procedural fairness. Indeed, WZARH cautions against its use.

Administrative lawyers are well advised to resist using legitimate expectation reasoning when framing grounds of review in judicial review cases and when advising clients.

Instead, the analysis should focus on whether the decision was made fairly in all of the circumstances and whether the procedure adopted by the decision-maker has resulted in any practical injustice to a person affected by the decision.

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3 Ibid, [37] (Mason CJ amd Deane J).  
5 Minister for Immigration and Border Protection v WZARH (2015) 326 ALR 1, [17]  
6 Ibid.  
7 Ibid, [33]-[49] (Kiefel, Bell and Keane JJ) and [62]-[69] (Gageler and Gordon JJ).  
8 Ibid, [30].  
9 Ibid, [61].  
10 Ibid.  
12 Ibid, [34]