

Legitimate Expectations in Procedural Fairness after *Lam*

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There is little doubt that the High Court's decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*¹ ("*Lam*") marks a turning point in the law on procedural fairness in Australia. But it is not so easy to say where the new direction lies. This essay considers what *Lam* means for the treatment of legitimate expectations in the Australian approach to procedural fairness, and speculates as to the future treatment of issues previously addressed under that label. I will not discuss the doctrine, as applied in the past, or the extensive literature on that issue. The High Court appears to be moving away from the use of "legitimate expectation" as a broad and flexible concept,² and I wish to focus on the implications of such a move.

The concept or doctrine of legitimate expectation has always been controversial in Australia. It is tempting to pronounce it "dead but not buried" as a result of *Lam*, but that would probably be unwise. Some uses of the concept will not survive the decision. But legitimate expectation covered (potentially, at least) a lot of ground. The High Court has not committed itself on all of that territory, although some judges in *Lam* have made their views plain. Most of the judges appear to be inclined to

* Special Counsel Dawson Waldron. Blake Dawson Waldron acted for the Minister in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; however, I had no involvement in the matter. The views expressed in this essay are my personal views and do not represent the views of Blake Dawson Waldron. I wish to thank Jeffrey Goldsworthy and Matthew Groves for their helpful comments on a draft of this essay. This essay was written in the first half of 2004 and is current to 1 July 2004, but some later decisions are discussed in a postscript.

1 (2003) 214 CLR 1.

2 That is not to suggest that "legitimate expectation" will cease to be used. It would not be surprising, however, if it were used less, and with greater care, than in the past. Some may think that not a bad thing. See H Burmester, "Teoh Revisited After *Lam*" (2003) 40 *AIAL Forum* 33 at 39.

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