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The mode of citation of this volume is
(2016) 90 ALJ [page]

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The Australian Law Journal is a refereed journal.

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90 ALJR [page]

THE AUSTRALIAN LAW JOURNAL

Volume 90, Number 11

November 2016

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PROCEDURAL FAIRNESS: THE AGE OF LEGITIMATE EXPECTATION IS OVER

Naomi Sharp

This article reviews some of the key principles underpinning the law of procedural fairness in Australia and also charts some significant new developments. Taking the High Court’s landmark decision in *Kioa v West* (1985) 159 CLR 550 as a starting point, this article traces the key developments in the law of procedural fairness as to the source of the obligation to afford procedural fairness; the criteria that attract the obligation and the scope of the obligation. A particular focus of this article is on charting the rise and fall of legitimate expectation as an analytical construct in determining whether an obligation of procedural fairness arises in the first place, and if it does, what the content of that obligation is in the circumstances. In short, given the breadth of the interest now accepted as attracting the obligation to afford procedural fairness, the key questions are now whether a legislative intent can be discerned to exclude that obligation, and if not, what the content of that obligation is in the particular circumstances of the case. 797

HIS OR HER DUTY TO KEEP SECRET

Julie Kinross and Peter Davis QC

Public officers may be disciplined, and/or face criminal sanction for unauthorised disclosure of information. Specific offence provisions detail the type of information legislatures consider criminal to disclose. General secrecy offences require a “duty to keep secret” element to be proved. Prosecutors have started to use codes of conduct to establish the duty element. This approach clouds the long held distinction between conduct attracting disciplinary sanction and serious conduct warranting criminal sanction. *Tasmania v Johnston* (2009) 18 Tas R 195 provides judicial authority against this approach. A contextual analysis is applied to the original 1899 “Disclosure of other official secrets” offence to support that finding. *Johnston* and the analysis have national implications for the success of future prosecutions of the general secrecy offence. 813

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