Content

ADJR Act — Decision of an Administrative Character under an Enactment — s 3(1) .................. 4
3 Judicial Review of ‘Public Power’/Statutorily-Exercised Power by Private/Non-Governmental Entities ................................................................. 6
4 Decisional Grounds: Errors of Law and Fact .................................................................................. 8
5 Access to JR — Standing .................................................................................................................. 10
5.1 When does an Applicant Have Standing? .................................................................................. 10
5.2—5.3 The Special Interest Test ................................................................................................... 11
5.4 Statutory Reform — Planning Legislation in NSW ........................................................................ 12
5.5 Intervention and Friends of the Court (Amicus Curiae) ............................................................... 13
6 Judicial Review of Rule-Making....................................................................................................... 14
6. 1 Process for Judicial Review of Rules — the Test of Validity..................................................... 14
6. 2 Principle of Legality .................................................................................................................... 17
6. 3 Means/Ends Distinction — Purposive Powers .......................................................................... 18
7.1 Procedural Fairness: Implication ................................................................................................ 19
7.1.1 General ...................................................................................................................................... 19
7.1.2 Advisory Reports and Recommendations .............................................................................. 20
7.1.2.1 Pyramidal Structure of Administration ............................................................................. 20
7.1.3 Statue Providing for a Hearing or Right of Appeal & 7.1.4 Urgency ....................................... 21
7.2 Procedural Fairness: Content of the Hearing Rule ..................................................................... 22
7.3 Rule Against Bias ........................................................................................................................ 26
7.4 Effect of Procedural Unfairness and Discretion of the Court ..................................................... 30
7.5 Breach of Statutory Procedures .................................................................................................. 31
8 Substantive Grounds of Judicial Review ...................................................................................... 33
8.1 The ‘Considerations’ Grounds ..................................................................................................... 33
8.2 Improper or Unauthorised Purpose ............................................................................................ 36
8.3 Policies ......................................................................................................................................... 38
8.4 Representation and Estoppel ....................................................................................................... 39
8.5 Acting Under Dictation ................................................................................................................ 40
8.6 Unauthorised Delegation ............................................................................................................ 42
8.7 Unreasonableness ....................................................................................................................... 44
8.8 Uncertainty ..................................................................................................................................... 47
8.9 Jurisdictional Facts ...................................................................................................................... 48
8.10 Jurisdictional Error .................................................................................................................. 50
8.10.1 Introduction ............................................................................................................................... 51
8.10.2 Procedural Fairness — see Topic 6 ......................................................................................... 51
8.10.3 Breach of Substantive Grounds of Review .......................................................................... 52
8.10.4 No Evidence ............................................................................................................................ 53
8.10.5 Breach of Statutory Requirements ....................................................................................... 53
9 Discretionary Judicial Review Remedies ....................................................................................... 55
9.1 Remedies ................................................................................................................................................ 55
9.1.1 Certiorari and Mandamus .................................................................................................................... 55
9.1.2 Certiorari: Error of Law on the Face of the Record .............................................................................. 56
9.1.3 Equitable Remedies: Injunction and Declaration .............................................................................. 57
9.1.4 Constitutional Writs .............................................................................................................................. 57
9.2 Discretion of the Court to Refuse Relief ................................................................................................. 58
9.3 Severance (Delegated Legislation that Exceeds Statutory Authority) ...................................................... 58
9.4 ADJR Act Remedial Model ..................................................................................................................... 59
9.5 Rival Theories of Invalidity ..................................................................................................................... 60
10 Restricting Judicial Review ....................................................................................................................... 61
10.1 Privative Clauses ..................................................................................................................................... 61
10.2 No Validity Clause ................................................................................................................................... 62
10.3 Time Limit Clause ................................................................................................................................... 62
7.3 Rule Against Bias

also – take into account irrelevant considerations

- Reasonable Apprehension of Bias: Single Test applicable to all Public Decision-Making — might a reasonable observer familiar with the circumstances of the case and context in which the decision is made, apprehend that the decision-maker might not resolve the matter with a fair and unprejudiced mind? — Ebner v Official Trustee; Hot Holdings v Creasey; MIMA v Jia Legeng

  o Test of Possibility — need only be a real and not remote possibility of bias in the apprehension of the reasonable observer, need not be a probability of bias — Ebner

  o Application — Ebner

    ▪ (1) which might prevent the decision maker from bringing an impartial mind to the question
    ▪ (2) Show the logical connection between that matter and the possibility of departure from impartial decision making

- Key Principles of Bias

  ▪ Mere Association or Interest Insufficient — mere identification of an association or interest of the decision-maker that could affect impartiality is insufficient — party alleging bias needs to demonstrate specifically why an association or interest will actually cause the possibility of a reasonable apprehension of bias — Ebner

  ▪ Peripheral Impact on Decision — when bias might only be apprehended in a peripheral way to the decision, then it is less likely affect the decision itself in a way that breaches procedural fairness — Hot Holdings (undeclared personal interests recommend Minister; held to hold no significant role)

    • Significant Contribution to Decision — if unfairness said to result from conduct of circumstances of a person other than the decision-maker, then the role played by that person is material and critical; it should make significant contribution to the decision — Hot Holdings

- Examples of Bias

  o Direct Interest in Proceedings — if the decision-maker has some kind of personal stake in the outcome of the decision — usually cases of actual bias.

    ▪ Pecuniary Interests: Reasonable Apprehension Test — applying the Ebner test, the decision-maker must have direct, personal, and more than trivial pecuniary interest in the outcome for disqualification — Ebner

    ▪ No separate pecuniary interest rule — no free-standing rule of automatic disqualification on proof of any direct pecuniary interest — Ebner

  o Disqualification by Association — decision-maker has some kind of previous association with parties that means they might not bring impartial mind to proceedings:

    ▪ Prior Relationship — decision-maker has a prior association with one of the parties relevant to issues being decided.

    ▪ Hostility — decision-maker has demonstrated hostility to one of the parties on the basis of an association.

  o Disqualification by Extraneous Information — basing a decision on information or opinions that are irrelevant to the matter at hand:

    ▪ Prejudgement — decision-maker expresses some form of opinion as to the decision before the parties have had opportunity to present case in entirety.

    ▪ Personal Prejudice — decision-maker has a personal belief that prejudices them against a party to the proceedings
- Prejudgement: a type of bias
  - Rule on Prejudgement — Adjudicators should not sit when they have previously expressed clear views about a question of fact that is a live and significant issue or about the credibility of a witness whose evidence is significant on a question of fact in the present proceedings — Livesey v NSW Bar Association (two judges have in previous case expressed strong view that a witness was without credit whose evidence should be rejected)
  - Presumptions about Reasonable Observer — reasonable observer is not expected to be aware the judges can disabuse their minds of previous findings — Livesey v NSW Bar Association
  - Preconceived Views Are Inevitable — decision-maker will inevitably have preconceived views on the reliability of certain professionals from previous dealings — this alone will not disqualify the adjudicator,
    - Unless it Conveys Impression that Appearance of Impartial Justice could be Compromised — the opinions influence the decision-maker to an extent that they denigrate the witness or refuse to even consider evidence, and that their decision is concerned with vindicating the preconceived adverse views — Vakauta v Kelly (judge made numerous adverse, derogatory, wide-sweeping references and remarks on medical expert witness)
  - ** Policy Bias: Ministers Subject to Different Standard than Judicial/Quasi-Judicial Officer — standard of detachment applicable to ministers are different from that applicable to judicial/quasi-judicial officers in adversarial proceedings — MIMA v Jia (speak on radio about decision of tribunal not to deport Jia after imprisoned for sexual assault. Hold strong views that expectations of Australian community that such persons are not of good character)
    - Public Interests is in their Political Responsibility — the nature and role of Ministers as being accountable to the public means that they may express even strong positions on policy or other preconceived views without being considered biased — MIMA v Jia
    - Disqualifying Prejudgment only if Close to Evidence and Argument — although a Minister is subject to a lower threshold of prejudgement, they must nonetheless give genuine consideration to the issues raised in the matter and have a mind that is open to persuasion — MIMA v Jia
  - Investigations — people who have previously conducted investigations regarding a party to a matter will be disqualified from sitting in adjudication if the investigation amounted to positive or conclusive finding of fact — reasonable person would reasonably apprehend the investigator has prejudged the outcome — Laws v ABT
    - Laws v ABT — Chairman and Vice-Chairmen not allowed by HCA to sit on Tribunal because they had previously conducted investigations into Laws and made positive findings that he had contravened the code.
  - Extraneous Information
    - Permissible to Bring Own Knowledge and Expertise — decision-maker may bring his own knowledge and expertise to bear in the discharge of statutory duty; especially where decision-makers have been appointed on account of their experience/expertise in an area — Koppen v Commissioner (aboriginal decision-maker on discrimination in general)
      - Exception: Personal Knowledge — a decision-maker must not go beyond general experience and move to personal sphere, so as to actively enter the controversy between the parties, rather than conciliate it, such that it would be
reasonably apprehended that a person presiding is partisan... — *Koppen v Commissioner* (decision decision-maker adding her daughter’s experience being denied into nightclub — bias!)

- **Expression of Provisional Views** — is permissible to put a person on notice of critical issue (consistent with disclosure requirements) — *Vakauta v Kelly*
  - **Mere Case Management Not Disqualifying Prejudgment** — the decision-maker must not cross the line from case-management to disqualifying prejudgment amounting to bias — *Vakauta v Kelly*

- **Bias in Conduct of Proceedings** — person who is a prosecutor, accuser, or investigator CANNOT also be the adjudicator of the matter, if it is reasonably to be expected that his involvement creates an interest in the final outcome of the matter — clear conflict of interest — *Isbester v Knox City Council* (Magistrate’s rule of offence→Council’s decision to destroy dog; Hughes was moving party in Magistrate’s Court. Held that Hughes’s involvement in prosecution of charges created interests in final outcome of the matter
  - ‘Personal interest’ — *Isbester v Knox City Council*
    - NOT material/other benefit a person will receive
    - May be vindication of their opinion that an offence had occurred, or that particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor’s view of guilt or punishment
  - **Members Bias — Only Member of a Panel** — participation of other members in a Panel does not overcome the apprehension that X’s interest in the outcome might also affect decision-making of others — *Isbester v Knox City Council*
    - Effect: if a prosecutor/accuser is in the panel, the entire panel would be disqualified

- **Exceptions to Bias Rule**
  - **Waiver** — a party to a proceeding potentially affected by alleged bias can waive their right to use bias as a ground of review — *Vakauta v Kelly*
    - **Must Raise Bias at earliest opportunity** — a party with legal representation must raise bias as an issue at the proceeding at the earliest opportunity, by failing to object to the comment the party waives the right subsequently to object — *Vakauta v Kelly*
      - Prejudgment May be Revived by Appearance of Impermissible Bias in the Actual Decision — even where a party fails to object, such failure could not properly be seen as a waiver of any right to complain; the comments made in the judgment has the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer — *Vakauta v Kelly*
  - **Statutory Exclusion** — where a statute vests different functions in the same body which at common law would give rise to a conflict of interest — *Builders’ Registration Board of Qld v Rauber*
    - **Explanation** — if statute gives a decision-maker multiple functions which would create an apprehension of bias due to prejudgement, the statute is understood to have excluded bias rule — *BRB of Qld v Rauber*
    - **Extent of Exclusion** — statutory language will be strictly constructed so as to sanction only the form and degree of bias specifically addressed or essential for the intended operation of the statutory provision
• Bias from Another Source Impermissible — Bias arising from another source, or actual bias, that exist in proceedings will not be condoned — BRB of Qld v Rauber
  ▪ BRB of Qld v Rauber — statute gave the Board two functions: decision about insurance of builder, and disciplinary proceedings about builder. Bias alleged from fact that Board had made adverse finding on insurance about the builder that would lead to prejudgement in disciplinary proceedings. HCA rejected this — said that statute excluded prejudgement bias here in order for statute to operate as intended.

  o Necessity — decision-maker who would otherwise be disqualified under bias rule may hear and decide a matter when no other qualified person is available — Laws v ABT; BRB of Qld v Rauber
    ▪ First Consider Statutory Exclusion (above)
    ▪ Limitations on Necessity Exception
      • Alternate Decision-Maker — if an alternate decision-maker or Tribunal is available and has jurisdiction, or if a quorum can still be formed by excluding particular committee members who are biased, then necessity cannot be invoked — ABT v Laws
      • Results in Positive and Substantial Injustice — necessity will not apply when its application would result in positive and substantial injustice to the individual, e.g. where the decision-maker voluntarily/unnecessarily assumes conflicting roles or acquires extrinsic knowledge — Laws v ABT (Deane J)
      • Sparingly and to Extent Required — necessity should only be invoked in most exceptional circumstances — moreover, it should only apply to extent that necessity justifies it — Laws v ABT (Deane J)