

There are no universal rules – the key questions to ask are whether there is something that has denied the person affected a real and meaningful opportunity to present her case; and whether any claim of unfairness is open in the statutory context.

### Calling witnesses

#### Bond v ABT (No 2) (1988)

Some of the witnesses called to assist the ABT were employees etc of the Bond companies. The companies argued they should be able to determine the order in which these witnesses were called and conduct the examination in chief.

**Issue;** Could the applicants determine the order which the witnesses would be called to give evidence?

**Held:** No. 1. These witnesses have been called to give evidence by the Tribunal, so the Tribunal is allowed to work out the order. Bond cannot control the order at the state. Later on, Bond will be given an opportunity to present his case, at that point, he can control the order of the witnesses.

### **Cross-examination**

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#### O'Rourke v Miller

**A right to cross-examine may be required some cases e.g. where credibility of the witness is in issue.**

**Facts:** Policeman on probation had his employment terminated. Termination based on harassment complaint. Deputy Commissioner of Police interviewed the policeman prior to termination. Policeman requested that he cross examine the complainants, and this was not permitted.

**Issue;** was the policeman entitled to cross-examine the complainants?

**Held:** No. Cross examination not required, no formal hearing required. In informal proceedings there is no requirement for cross-examination.

- Gibbs; exceptions to the above general principle – ‘there is no suggestion that the women had concocted their story’ – implication? If there were a doubt regarding the veracity of the claims, cross-examination might have been required. The content of p.f. is very fact and circumstance specific.

## 3 - Decision-maker's responsiveness

***Procedural fairness is not meant to be used to assess the merits of a decision – it concerns fair process not fair outcomes.***

- Purposes and values are served by procedural fairness - including dignitarian, utilitarian.
- These suggest there should be some consideration of the decision-maker's engagement with the matters put forward in the hearing.

### A. Delay after hearing

#### NAIS v MIMIA (2005)

The circumstances in which delay vitiates proceedings are rare, but the HCA held that the RRT's delay in this case did constitute procedural unfairness. 1997 – 2003, delay in oral hearings 1998, to 2003.

**Issue:** Whether delay in a decision – affects a procedure/can be regarded a breach of procedural fairness.

**Held:** It can put at risk the hearing process, and if that happens, there will be a breach of procedural fairness. If there is a risk to the integrity to the hearing there will be a breach of procedural fairness.

**Discussion;** usually the decisions are based on the credibility of the applicant; from the application and the hearing. In the hearing the member has to make a decision whether they are credible or not, Gleeson suggests that the 4 year delay risks the **possible recollection of the member regarding credibility/worthiness of the applicant assessed in the oral hearing** – this goes to the **integrity** point.

### *B. Inattentiveness to argument presented*

#### *Dranichnikov (2003)*

**To not respond to the argument that the applicant is making, can be a denial of procedural fairness. Gummow/Callinan**

**Facts:** Claim for refugee status based on his membership of a particular social group (which is qualifying under the refugee status). Publicly criticise law enforcement, and advocate for political reform. Very detailed and specific category of social group he was claiming. RRT – application refused – no evidence that ‘businessmen in Russia are persecuted’

**Held:** HCA picked up on the generality put forward by the Tribunal and the specific argument advanced by **Dranichnikov** – *to fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr D natural justice*

- HCA majority held that procedural fairness was denied when the RRT failed to respond to ‘substantial, clearly articulated argument relying upon established facts’ – at [24], [95].

**Dranichnikov applied** – e.g. *Offshore Processing Case* (2010):

- PI claimed reasonable fear of persecution in Sri Lanka on grounds of: (i) ethnicity or imputed political opinion (as a Tamil whose brother in law was a member of LTTE); (ii) membership of a social group (Tamil business owners/Tamils who are perceived to be wealthy).
- IMR, in recommending to Minister that PI is not a person to whom Australia has protection obligations, failed to address PI’s claim (ii) re membership of social group.
- HCA at [90], citing *Dranichnikov*: IMR failure to address both claimed bases for PI’s fear of persecution was procedural unfairness.

### *C. Fraud by a Third Party*

#### *SZFDE*

**Facts:** Application for protection visa was refused by the Department of Immigration. Fraudulent misleading by Mr Hussain who held himself out as a solicitor and migration agent (he had been struck off). Provided bad advice, advised appellants not to bring appeal to the RRT and instead request minister to substitute a more favourable decision – Minister rejected request.

**Issue;** Did Mr Hussain’s fraudulent contact result in a breach of the procedural requirements of the Migration Act and a breach of p.f.?

**Held:** Hussain’s fraudulent conduct disabled the tribunal from carrying out the function it was required to do under the act. It couldn’t carry out its function – there was a fraud not only on the plaintiff’s but also on the tribunal.

### *D. Reasons for decision does the Common law require it? No.*

#### *Public Service Board v Osmond*

**Facts:** Osmond applied for a vacant position which was given to another person. He appealed to the Public Service Board – appeal was dismissed. Osmond requested Board’s reasons for decision and this was refused by the board – no legislative requirement to give reasons.

**Issue;** does P.f. require the board provide reasons for the decisions?

**Held:** CA – said that reasons were required. But overturned in the HCA – 1. There is no case law that requires administrators to provide reasons for decisions. 2. There is case law about judges providing reasoning. 3. Policy reasons why it is good for administrators - and bad to provide reasons (e.g. additional work required, delays etc.) also that the administrators reasons may obscure things rather than clarify e.g. transparency issue – sceptical about the content of reasons. 4. Statutes provide for reason giving, what that suggests that if there is going to be reform in this area, it is better for Parliament to do it rather than the courts.

## *6.3 The Rule Against Bias*

**Bias;** as connoting the absence of impartiality – *Ebner*

- Involves decision making *other* than on legal and factual merits of the case – *Ebner*

- Indicates 'some preponderating disposition or tendency' resulting in 'a deviation from the true course of decision-making' *Jia*

## Summary of Topic;

1. Is Plaintiff advised to argue **actual** bias – *Jia Legeng*
2. Are there grounds for a claim of **apprehended** bias?
  - a. The general principle and key requirements for application – *Ebner*
  - b. Examples of matters that may give rise to apprehension of bias
  - c. Pecuniary interests of officials other than the decision maker involved in the decision making process – *Hot Holdings*
  - d. One rotten apple and multi-member decision makers? *Isbester*
3. Does an exception to the rule against bias apply?
  - a. Waiver – *Vakauta*
  - b. Necessity/Statutory exclusion – *Rauber; Laws*

### 1 Actual Bias

**Actual bias:** Requires proof, to standard of probability, that decision maker "has a state of mind so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments might be presented": *Jia* at [72]

**Apprehended bias:** A fair-minded lay observer might reasonably apprehended that the decision-maker might not bring an impartial and unprejudiced mind to the case: *Ebner*

Both forms of bias = invalidating procedural unfairness.

### 2 Apprehended Bias

The test - *Ebner* at [6]: A fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the case.

#### *Ebner v Official Trustee in Bankruptcy (2000) – General Principles and Key requirements*

HCA by majority rejected 'bright line' rules of automatic disqualification for specified interests; stated a general principle for all apprehended bias claims.

- 2 cases – each involving judges with shares in a listed public company that was a party to, or affected by, the litigation.
- Disposition of the 2 cases – at [37]: The 'practical method of deciding' whether reasonable apprehension of bias in these cases = whether there is a realistic possibility that the outcome of the litigation would affect the value of the shares.
- Obiter – at [58]: 'The circumstance that a judge has a not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation will ordinarily result in disqualification'.

### 2B Examples

#### *2C Officials Involved in a decision making process Hot Holdings (2002)*

HCA majority held that the pecuniary interest of a departmental officer who had a peripheral involvement in a ministerial decision did not give rise to the appearance of disqualifying bias.

#### *2 D Multi-member decision-makers Isbester 2015*

Council had convened a 3-person panel to decide whether to order the destruction of a dog, after its owner had been convicted for the dog's attacks causing serious personal injury.

One of the members of the Panel, Ms Hughes, was the Council's co-ordinator of local laws, who had co-ordinated the investigations into the dog-attacks and the prosecution of the dog's owner; and was the 'moving force' for the Panel's hearing on whether to order destruction of the dog.

**Held:** HCA – at [48]: The participation of others could not overcome the apprehension that Ms Hughes' interest in the outcome might affect the decision-making.

### 3A Waiver –

#### *Vakautu v Kelly*

The trial judge in a personal injuries case made critical comments about the Df's medical witnesses in the course of the trial and in (reserved) reasons for judgment.

- The Dfs had waived the right to object to the comments made in the course of the trial - at CLR572.
- The Df had not waived their right to complain that the comments made in the reserved reasons for judgment.

### 3B – Necessity/statutory exclusion

#### *Rauber (1983)*

Principle: 'The common law allows an exception to the disqualifying effect of bias ... where the exception is necessary to allow the functioning of the sole tribunal with power to act'.

Application in Rauber:

- The Builders Registration and Home Owners' Protection Act 1979 (Qld) required the Builders Registration Board to insure homeowners against breach of warranty by registered builders; and to issue and cancel builders' registration.
- The Board, having decided to pay out an insurance claim in relation to work by Rauber, opened an inquiry into whether his registration as a builder should be suspended or cancelled.
- The rule of necessity permitted the Board to conduct the disciplinary proceeding

#### *Laws v ABT (1990)*

HCA majority dismisses claim by radio broadcaster John Laws that all members of Australian Broadcasting Tribunal were disqualified from conducting an inquiry into whether certain comments made by Laws had breached radio programme standards.

Laws argued that the Tribunal's pleadings in its defence to defamation proceedings by Laws gave rise to reasonable apprehension of bias on the part of all Tribunal members

HCA rejected Laws' argument for two reasons

- No reason for an observer to suppose that the Tribunal members have prejudged the issue or have an interest in the outcome of the defamation proceedings./
- Even if there were a reasonable apprehension of bias - the rule of necessity would ensure that the Tribunal is not disabled from performing its statutory functions.