

6.3 THE RULE AGAINST BIAS

6.3.1 Reasonable apprehension of bias - general principles

CNY17 v Minister for Immigration and Border Protection 2019

Test for reasonable apprehension of bias

Courts:

- The public is entitled to expect that issues determined by judges and other public office holders should be decided, among other things, free of prejudice and without bias
- Bias connotes the absence of impartiality
- **The breach of the rules of PF, including where apprehended bias is demonstrated = jurisdictional error!!!**
 - Attracts relief of [s75\(v\) of the Constitution](#)

Test:

- A fair minded lay observer might reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the question the decision maker is required to decide
- Not to be reached lightly
- Determination of whether an apprehension of bias is “reasonable” is not assisted by philosophical conceptions of the varieties of seriousness or materiality
 - I.e. it does not matter if it is material to the outcome!

2 part step:

1. Identify what is said to affect the decision-makers impartiality
 - direct/indirect interest in the proceedings? (pecuniary or otherwise)
 - Conduct
 - Association
 - Extraneous information
2. (link to deviation feared) Logical connection must be articulated between the identified thing and the feared deviation from deciding the case on its merits

Application of the test:

- A fair minded lay observer must consider/have:
 - Legal, statutory and factual contexts in which the decision is made
 - Broad knowledge of the material objective facts (not detailed knowledge of the law)
 - BUT must have knowledge/ability to think about the key elements of the statutory regime

Remedies for Bias:

- Must seek remedy at the earliest possible time!
- Recusal of the decision maker (at the beginning of proceedings)

Note: Courts **do not require actual bias** to set aside a decision on the grounds of jurisdictional error → **merely the reasonable apprehension of bias!**

- Actual bias will more likely to be addressed by other grounds of reasoning ie improper purpose

Pecuniary interest

Ebner v Official Trustee in Bankruptcy 2000

Whether or not judges were biased where they own shares in companies which are in some way implicated in the matter which they must decide

Facts:

- E = wife of bankrupt husband.
- Husband had a system where all ppty would be transferred to E if bankruptcy were to arise
- ANZ gets involved → Judges had shares in ANZ = on the face of the litigation seemed to have a financial interest in the matter
 - First judge, beneficiary of a trust which had shares of ANZ (disclosed indirect interest)
 - Second judge held ANZ shares personally (not disclosed)

Q: Is the outcome of the litigation going to affect the value of ANZs shares?

Court:

- Objection to judge 1 hearing the case overruled → issues of case could have no significant effect on the share price of the ANZ Bank and therefore he had no real pecuniary interest → Fair-minded observer would not likely hold the relevant apprehension
- Ownership of shares in a listed public company = common form of saving and investment (public generally and judges)
- Dimes rule has therefore dimmed due to the extent of ownership of shares

Q: Should a financial interest in one of the parties automatically disqualify the judge/decision-maker even when the decision will have no effect on the financial interest?

- Judges not automatically disqualified if found that the share value is affected, must still go through a reasonable observer test!
- Kirby's Dissent → Rule: if there is a financial interest, automatically disqualified (Dimes Case)

2 part test: confirmed (still applied where pecuniary interest exists - no automatic disqualification)

- Identify what might lead a judge to decide a case other than on its legal and factual merits
- Make the logical connection between this and the feared deviation from the course of deciding the case on its merits

Hot Holdings v Creasy 2002

Facts:

- Minister granting exploration license under Mining Act 1978 after receiving recommendation of the mining warden (very value - company can conduct tests on land which they intend to mine)
- Minister takes advice from DG in form a minute confirming recommendation
 - Involvement of 2 departmental officials in drafting of the minute
 - Miasi (held shares in company which had option to purchase an interest in the license if granted) and
 - Phillips (whose son owned shares in the company)

Q: Does the bias rule apply when it is clear that the decision-maker is not biased, but it looks like departmental officers who had some involvement in the decision-making process were biased?

Courts:

- Minister (decision maker) had no pecuniary interest or knowledge of the shareholdings of the 2 officials
 - No ground to apprehend that he might have been influenced by a desire to promote their interests
 - Miasi's involvement = **peripheral = no significant contribution to decision**
- Central distinction - **is the role peripheral or central?**
- No person with a financial interest in the outcome participated in a significant manner in the making of the decision
- Kirby (Dissent)
 - Court should reinforce time reasoning/decision!

6.3.2 Prejudgement

Minister entitled to be forthright - in different positions from judges

Minister for Immigration and Multicultural Affairs v Jia Legeng (2001)

Facts:

- Minister's delegate refusing a special entry permit to Jia (student visa)
 - Convicted of 4 offences including rape & sentenced to 6 years and 3 months imprisonment
- AAT on appeal remitting decision to Minister on ground that Jia was a person of good character in spite of being convicted of rape
 - Character = enduring moral qualities (longer term assessment) not bound by one decision
- Minister makes public statements on radio saying he is unhappy with the AAT's decision and application of the good character test

Q: Would the conduct of the minister here raise issues about impartiality and raise a reasonable apprehension of bias?

Courts:

- Minister = elected official → accountable to the public and the parliament and is entitled to be forthright and open about the administration of his portfolio which is a matter of continuing public interest and debate
- Minister = substantially different from judge (cant apply same standards!)
 - Parliament did not intend to impose such standards of judicial officers on ministers!
- Minister = power (by s502) to consider the national interest / political responsibility
- Kirby Dissent
 - Imputed bias is established (language of pre-judgement)

Judges' views?

Livesey v NSW Bar Association 1983

Court

- Judges asked to disqualify themselves in hearing application to strike Livesey from roll of barristers because of comments they'd made about Livesey (corruption) in separate legal proceedings
- What is in issue is appearance and not actuality
- Reasonable apprehension of bias if the judge has in previous cases expressed clear views about question of fact which is significant issue

Vakautu v Kelly 1989

Unless discussion between bar and bench

Facts:

- Judge in NSW supreme court in medical negligence case referring to medical practitioners commonly called as witness by insurers as 'that unholy trinity' → sarcastic remarks

Q: Does this amount to bias?

Courts:

- Distinction must be drawn between case where:
 - Judge has some preconceived views about the expertise or reliability of the professional opinions of an expert medical witness and
 - Where a judge has preconceived views about the credit or trustworthiness of a non-expert witness 'whose evidence is of significance on a question of fact'
- it is inevitable that judges will develop preconceived views about expert witnesses

- The requirement of impartial justice will **not be infringed** if a **judge** with **preconceived views** about the **reliability** of **medical witnesses** is **disclosed in the course of the dialogue between Bench and Bar**

6.3.3 Extraneous Information

CNY17 v Minister for Immigration and Border Protection 2019

When a decision-maker is informed of matters that are irrelevant to the issues to be determined

Facts:

- CNY17 = in detention on Christmas Island
- Claim for refugee status determined under part 7AA ie fast-track for people arriving by boat
- Decision made by immigration assessment authority on appeal
- The Department said it had provided the IAA with the decision record, material given by the appellant to the Department, and “any other material the Department considers to be relevant to the review” - that material was not identified
- The IAA affirmed “it had regard to the material referred by the secretary under the act” the material was not particularised
- Material only particularised when CNY17 applies for judicial review, included:
 - History of aggressive behaviour, involved of many incidents in detentions, involved in a riot

Issue: Did the fact that the IAA had been provided with that info mean that it had been provided with extraneous info and was therefore biased?

Courts:

- Presence of irrelevant prejudicial material in the hands of the IAA (mandated to consider) → knowledge of this may give rise to an apprehension of bias = yes biased
- Logical connection between this and feared deviation = satisfied!
- If it influenced the IAA, whether consciously or subconsciously, then the IAA would deviate from its own merits
- Therefore, the fair minded observer may apprehend a lack of impartiality
 - NOTE: Where there is a complex statutory context, it is necessary for the fairminded lay observer to consider the key aspects of the statutory scheme
 - Obligation to consider the documentation does not overcome the rule that the decision-maker must not be biased
- Logical connection = risk of subconscious bias

6.3.4 Decision-making by multi-member committees

Accuser must not participate in proceedings

Isbester v Knox City Council 2015

Facts:

- I's dog attacked someone → goes to court
- Council must decide what happens to the vicious dog → decides to put down
- I complains that Ms Hughes has been far too involved in the proceedings from the start = rotten barrel!
 - Involved in Magistrate's court proceedings, participated in panel decision, organised the panel etc

Court

- -fair minded observer might reasonably apprehend bias/ did not bring an impartial mind and therefore can consider the whole committee bias due to the input that she will have
- "One biased all biased" principle

Unclear whether 2nd step of the test would be satisfied on these grounds moving forward
→ connection between bias and outcome

Exclusions and Exceptions

6.3.5 The Common law principle of necessity and statutory exclusion

If a decision maker is biased, is there a scenario where the decision maker has to continue with the process?

Builder's Registration Board of Qld v Rauber

Facts:

- Builders registration board has statutory power to discipline and suspend rauber and also to get involved in a compulsory insurance scheme to protect house purchases are defects in construction
- Board have previously dealt with insurance scheme now dealing with discipline

Issue: If they had prior dealings, can members of the board be excluded from deciding subsequent proceedings? IE Does the bias rule apply to a decision-maker who has multiple functions under a statutory scheme? – where exercising one function will make them biased for another function.

Courts:

- Comes down to question of quorum
- No disqualification out of necessity → board can't function without all of its members (as they were all in prior dealings)
- If necessary = no bias
 - Limited to what is necessary to prevent frustration of the statutory scheme

Laws v ABT 1990

Facts:

- In a radio interview, a member of the ABT repeated a comment that laws was very bullying and overbearing on radio, had be racist to idnigenous peoples
- Laws bring defamation proceedings on ABT
- ABT uses defence of truth and public interest

Issue: If ABT then decides to bring proceedings against Laws, does the defences to action of defamation brought by Laws against a member of ABT rise to apprehension of bias? IE

Can the bias rule be applied if it would prevent administrative officials from carrying out their function provided by legislation?

Courts:

- Rule of necessity permits a person who has some interest in the subject matter of the litigation to sit in a case **where no judge without that interest is available**
- **Where no other judge is available and therefore the tribunal cannot perform its statutory functions → doctrine of necessity operates**

6.3.6 Waiver

Vakauta v Kelly 1989

A person who thinks the decision-maker / judge is biased must object as soon as possible. Standing by waives their entitlement to object

Problem Question 2 - Scaffold

1. Jurisdiction

- NSW:
- CTH:
 - HCA Has original jurisdiction under s75(5) of the Constitution
 - Federal Court has jurisdiction under the ADJR Act
 - Only ADJR Act if it is:
 - a decision - *ATB v Bond*
 - of administrative character - *Roche Products*
 - under an enactment
 - If it does not satisfy the criteria → s39B of the Judiciary Act

2. Standing

- NSW:
 - Common law test for standing
 - Plaintiff can sue if interference of public right also interferes with private right, and the party has 'special interest' in the subject matter - *Boyce v Paddington*
 - *ACF v Cth* → Special interest = demonstrating interest beyond interest of wider community
 - *Onus v Alcoa* → Standing granted in cases of cultural and spiritual significance.
 - Proximity/close relationship to subject matter of decision
 - Weight → substantially more affected than general public
 - *Batemans Bay* → Interest tests should be construed as being an "enabling, not a restrictive, procedural stipulation"
- CTH:
 - Original jurisdiction of HCA = common law test
 - s39B Judiciary Act (see above) = common law test
 - ADJR Act:
 - ss5 and 6 → "Person aggrieved"
 - ss3(4) includes a person whose interests are adversely affected by the decision
 - Participation in primary decision making confers standing - *US tobacco Co v Minister for consumer affairs 1988*
 - Multi-factorial Approach *North Coast v Minister for Resources*
 - Funding
 - Aims and objects aligning with subject matter
 - Peak body in the region
 - Factors to give weight to that establish sufficient connection - *Right To Life*
 - Nature of decision
 - Extent to which the party's interest rises above that of an ordinary member of the public

- NOT intellectual, philosophical or emotional concern
 - Companies and economic interest - **Argos**
 - Note statutory reform in environmental cases
- 3. Rule-making validity (if relevant) See PQ1
- 4. Grounds of Review (Procedural | Reasoning | Decisional)
 - a. Procedural Fairness
 - i. **IMPLICATION**
 - ii. Is it implied? YES - **Kioa v West**
 - Decisions which affect rights and interests
 - NOT legitimate expectations - **Minister for immigration and border protection v WZARH**
 - iii. Modification to Implication - Is it excluded?
 - By clear and exhaustive statement (still must be reasonable to exclude) - **BVD17 v Minister**
 - High level policy decisions / Where there is a discretion to exercise public interest / political or value determination - **Plaintiff S20 v Minister & SA v O'Shea**
 - iv. Consider:
 - Preliminary decision making / investigations / multi-staged decision = PF still applies - **Ainsworth v CJC**
 - Urgency - can be limited = **Marine Hull & Liability Co Ltd v Hurford**
 - v. **ELEMENTS OF PF**
 - vi. Hearing Rule - reasonable opportunity to be heard - **Minister v SZSSJ**
 - CONTENT OF THE HEARING RULE**
 - 1. Disclosure Required to Applicant - **Minister v SZSSJ**
 - Nature and purpose of inquiry
 - Issues to be considered
 - Info taken into account
 - a. Adverse Info and Critical Issues which is credible, relevant and significant - **Kioa v West**
 - Central and determinative question on review = critical issue - **SZBEL v Minister**
 - b. Info relevant and significant in the course of decision-making process - **VEAL v Minister**
 - c. Note: PF can be reduced to nothingness in case of national security - **Leghaei**
 - d. Do not need to provide particulars if they are not relevant to decision (especially adverse conclusions) - **Bond v ABT**
 - 2. Hearing must be fair (undue delay is not fair as it impairs tribunal's capacity to assess) - **NAIS v Minister**
 - 3. No entitlement to witness cross-examination - **O'Rourke v Miller**
 - 4. Decision maker's failure to respond to arguments = breach of PF - **Dranichnikov**

5. Where fraud disallows tribunal to exercise its statutory function, there is no decision made due to breach of PF = **SZFDE v Minister**

RULE AGAINST BIAS

- vii. Reasonable apprehension of violence - **2 part test (CNY17)**
 - 1. Identify what affects the decision-maker's impartiality
 - direct/indirect interest
 - Conduct
 - Association
 - Extraneous info
 - 2. Logical connection between thing identified and the feared deviation from deciding case on its merits
 - Note: A fair minded lay observed must consider:
 - General material objective facts
 - Legal, statutory and factual contexts of the decision
 - Key elements of the statutory regime
 - Note: NO ACTUAL BIAS REQUIRED - just the apprehension
 - Pecuniary Interest
 - Judge/Decision-maker not automatically disqualified where apprehension is raised - must apply test - **Ebner**
 - Peripheral role in decision & no significant contribution = no bias - **Hot Holdings v Creasy**
 - Prejudgement
 - Minister is elected & accountable to the public = can be forthright with political views in public interest context (not like judges) - **Minister v Jia Legeng**
 - Bias will not occur where a judge has a preconceived view re witnesses expressed in dialogue between bar and bench - **Vakauta v Kelly**
 - Extraneous Information
 - Decision maker's knowledge of Irrelevant prejudicial material may give rise to apprehension if 2 steps are satisfied - **CNY17**
 - Multi-Member committees
 - "One bias all bias rule" = **Isbester v Knox City Council**
 - Exclusions/Exceptions:
 - If necessary = no bias (to prevent frustration of the statutory scheme) - **Rauber**
 - Where no other judge is available and therefore the tribunal cannot perform its statutory functions → necessity - **Laws v ABT**
 - Waiver
 - Must raise bias at the beginning, standing by waives right to raise - **Vakauta**