

Bias

- ! • No requirement for the DM to made the decision with empty mind.
 - Judges makes decision based upon assumption/prejudgement w/out knowing [Sun]

APPREHENDED BIAS

- ★ • Object Test: would fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial or unprejudiced mind to the resolution of the question the [decision-maker] is required to decide [Ebner v Official Trustee in Bankruptcy]
 - Focus on the decision itself and the manner by which it was apparently reached.
- Judged by how the decision, and the process of arriving at it, might appear to persons affected and to the public [Jia]
- Just couz it is -ve decision does not mean it is a bias decision [Jia]
 - Jia: Minister decided to deport Jia (s.501 Migration Act) on basis that Jia's conviction for rape evidenced that he was not a person of 'good character'. Full fed crt held that the decision was bias couz the minister had made remarks prior to the decision publicly (Radio interview) and officially (letter to the President of AAT) expressing concerns about Jia's Conduct.
 - HCA: Minister's conduct didn't create any sort of bias.
 - ▶ ◻ The conduct of a minister may need to be evaluated in the light of his or her political role, responsibility and accountability' [to parliament and the electorate]
- ★ • **Apply the test** [Ebner v Official Trustee in Bankruptcy]
 - a. Identify the factors which lead to an assumption that DM might be less than impartial.
 - b. Establish (make argument) how the factors identified might have undermined the DM's impartiality/leading to a possibility of lack of impartiality.
 - Are there logical connection b/w the factors and DM's impartiality.

CATEGORIES/EXAMPLES OF IMPUTED BIAS [Webb v R]

- **Disqualification by interest** – direct or indirect interest in the proceedings, financial or otherwise.
 - Give rise to bias 'depends upon [Ebner; Hot Holdings]:
 - the directness of the interest,
 - its magnitude; and
 - surrounding circumstances
 - DM will benefit from particular outcome.
 - Judge is not legally obliged to disclose the interest [Ebner; Clenae]
 - Judge will be disqualified if their interest in the outcome is [Ebner]:
 - Substantial {essential}
 - Direct
 - Pecuniary {\$/eco/financial}; or
 - Proprietary {Relating to an owner/ownership}
 - Ebner: Judge was beneficiary of a trust that held 800 shares in bank, which was not party but was creditor of the bankrupt. The outcome of the trial would no impact on the value of the share. **Crt**: There is no connection b/w the judgement and share.
 - Clenae: Judge had inherited shares in bank before giving the decision and the judge didn't disclose this. And there was no possibility that the outcome of case would affect the share vale. The principle witness died. **Crt**: judge not disqualified since if judge were no, a new trial would be held w/out the significant witness.
 - Someone acting as both the judge and prosecutor
 - Stollery v Greyhound Racing Control Board: Smith reported to Board the S has made attempt to control the sport. The Board held inquiry and made the decision when Smith was in the room. **Crt**: Even though Smith didn't contributed to the deliberation but his staying in the room was enough to create an impression that he was in a position to either participate with deliberation or influence it. Apprehension Bias.
 - Just because same person is making investigation and DM does not create Bias.
 - Appearance of bias would be result of interest of some person other than DM [Hot Holdings]
 - Alleged bias some from somebody other than DM, consider the part the other person pays in DMP [Hot Holdings]
- **Disqualification by conduct** – including published statements, conduct either in the course of, or outside, the proceedings
 - ◦ How they conduct the hearing and what they say during the hearing.
 - Conduct indicates that DM holds preconceived views about the issue.
 - ▶ ◻ These views might be put forward in:
 - ◻ media appearance [Jia]
 - ◻ Personal Internet site [Ex Parte Epeabaka]
 - ◻ course of hearing [Vakuta v Kelley: Judge in the course of hearing claim about personal injury showed views about witness's evidence should not be relied on by crt as they were not helpful which was held to give rise to apprehension Bias]
 - ◻ Formal reasoning given for another decision [Livesey v NSW Bar Association: L, lawyer, involved in providing bail to SS. L sought to have two judges disqualified from hearing because they had made adverse findings re the credit of a witness and matters of fact in pervious decision. **Crt**: The judges have already formed views about the facts and the witness's credibility therefore, should be disqualified]
 - ◆ Re Maurice
- **Disqualification by extraneous information** – knowledge of some prejudicial but inadmissible {invalid; unacceptable} fact or

circumstance. (note the crossover here with the hearing rule on disclosure).

- DM has inappropriately communicated with a person involved in the case [Haldane v Chegwidan]
 - Crt counsellor discussed child custody case with Family Crt judge in the judge's chamber and in the absence of the PA [Re JRL]
- **Disqualification by association** – direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings.
 - Relationship: Family, business, professional, or personal, legal representative.
 - Professional associations, depends upon the nature of the association - recent, long past, the type of tribunal etc
 - Smits v Roach: R sued Freehills for unpaid fees. The judge hearing the proceeding had brother who was chairman of partners at Freehills. **HCA**: No apprehension bias as there was no logical connection. The prospect of Freehills interest being affected was remote + unforeseeable, and alleging judges brother being financially impact among other 80 partners would be negligent.
 - Hot Holdings Pty Ltd v Creasy: C alleged that two ppl involved in the process (ppl who was advising M) has (in)direct interest. **Crt**: Interest did not affect M's decision - his role in the advice process was peripheral to the ultimate decision
- **Prejudgment**: Prejudgement about the key issue or personal prejudice - already made mind up about something.
 - ▶ ○ If problem with prejudice consider whether:
 - Prejudice is specific to the parties; or
 - If general (toward the group/class of person) whether it is so intense as to amount to bias.
 - ▶ ○ The expression of opinions during a hearing or outside a hearing does not necessarily mean that the decision-maker might not bring to her/his work an unprejudiced mind [Vakuta v Kelly; Re Maurice] - Depend on the context.
 - Re Maurice: In another case Commissioner made highly critical claims of conduct and attitude of NT gov such as: commenting his concern about the conduct of the system of pastoral inspection in NT following candid evidence form pastoral inspector; express frustration in strong terms at procrastination of NT gov in dealing with the claim and cooperating with the inquiry.
 - **Crt**: commissioner should be disqualified couz the first thing he has to decide is the propriety of the NT and The commissioner's statement about the NT gov in previous case would rise a reasonable apprehension of bias.
 - Whether conduct of DM indicates prejudgement consider [Jia]:
 - The nature of the DM-ing process; and
 - The character of the person upon whom parl has conferred DM-ing capacity