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# Conflicts of Interest - the Rule Against Bias

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## THE RULE AGAINST BIAS

- “ Actual and apprehended bias
- “ Test for apprehended bias

# Overview

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## SITUATIONS GIVING RISE TO BIAS

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- “ conduct
- “ association
- “ extraneous information

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- “ Necessity
- “ Small town

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## THE RULE AGAINST BIAS

- “ One of the pillars of procedural fairness is the bias rule: the decision-maker must be impartial and have no personal stake or interest in the matter to be decided
- “ Normative principles . justice being done and seen to be done
  - . 1. the decision-maker must be disinterested so as to not disadvantage any party
  - . 2. the absence of bias maintains the standard of probity and fair play which promotes confidence in the institution
- “ Legal and ethical responsibility



# TYPES OF BIAS

## Actual bias

- “high threshold and subjective test
- “not commonly relied upon

## Apprehended bias

“*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344

- . a judge is disqualified if a fair-minded lay observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the question the judge is required to decide

“Test is objective and well settled but note double use of the word ~~might~~ rather than ~~would~~”

“q: how much knowledge is attributed the hypothetical observer

- . ~~the~~ hypothetical observer will always be a glove that covers judicial hands” Aronson p671



## TEST FOR APPREHENDED BIAS

The High Court in *Ebner* set out a two-stage test for apprehended bias (at 345) :

“1. identification of what is said might lead [decision-maker] to decide a case other than on its legal and factual merits (the matter+)

“2. articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits

Possible 3<sup>rd</sup> step . reasonableness of the apprehension: *Isbester v Knox City Council* (2015) 255 CLR 135 at [59] per Gageler J

Full Federal Court in *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 at [36]:

The test assumes that the hypothetical fair-minded lay observer is to be attributed with appropriate knowledge of relevant matters so as to be in a position to make a reasonably informed assessment of the likelihood of apprehended bias



## STANDARD OF IMPARTIALITY EXPECTED

- “ The nature of the decision-maker is important to the application of the bias rule
- “ The more court-like characteristics a decision-maker possesses the higher the standard of impartialityq Bannister p498
- “ Consider tribunals . informal and inquisitorial?
- “ the standard of impartiality may be different for a decision maker with a political role such as a minister: *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507



## SITUATIONS GIVING RISE TO BIAS

Deane J in *Webb v R* (1994) 181 CLR 41 at 74 .  
four distinct, though sometimes overlapping main  
categories of bias:

“interest

“conduct

“association

“extraneous information



## INTEREST

- “ Decision-maker will benefit from a particular outcome
- “ Most common type of interest is a financial interest
- “ *Ebner* . financial interest does not lead to automatic disqualification but a direct pecuniary or propriety interest in the outcome will ordinarily be grounds for disqualification
- “ Apply the 2 step test . negligible impact that outcome of case would have on the bank's finances and the value of its shares and no logical connection between the judge's shareholdings in the possibility of a case not being decided on its merits ~ apprehended bias not established





## CONDUCT

- “ decision-makers conduct indicates that they hold preconceived views about the issues that will not be altered by evidence or arguments (pre-judgement)
- “ views can be given in a variety of contexts e.g. media, social media, during the hearing or in the formal reasons given for another decision esp. findings of fact or credit: *British American Tobacco Services Ltd v Laurie* (2011) 242 CLR 283
- “ Case management is a tricky area: *Akiba on behalf of the Torres Strait Regional Sea Claim v State of Queensland* [2018] FCA 772; Olijnk



# ASSOCIATION

- “ An association between the decision-maker and a person affected can create an appearance of bias
- “ The association can be family, business, professional or personal relationship
- “ Mere knowledge of a party or witness will not create a reasonable apprehension of bias



## EXTRANEOUS INFORMATION

- “ knowledge of some prejudicial but inadmissible factual circumstances gives rise to the apprehension of bias: Deane J in *Webb v R* (1994) 181 CLR 41, 74
- “ where the tribunal relies on its own knowledge/theories/observations that are contrary to the evidence in the proceedings: COAT Manual 3.5.2
- “ overlap with the association category of bias e.g. where a decision-maker has inappropriately communicated with a person involved in the case *Re JRL; ex parte CJL* (1986) 161 CLR 342
- “ Overlap with pre-judgement if Tribunal relies on its own particular information e.g. internet search, though entitled to rely on its general expertise: COAT Manual 3.5.2



# MANAGEMENT OF BIAS CHALLENGES

- “ actual or apprehended bias will disqualify a member unless he/she discloses the relevant facts and circumstances to the party and they waive their right to object.
- “ Disclose early and give parties the right to make submissions
- “ Parties may need an adjournment esp if unrepresented or they are taken by surprise
- “ Members should be slow to accept a call for recusal due to the duty to sit *q Amos v Wiltshire* [2015] QCA 44 at [36]
  - the duty of a judge to disqualify themselves for good cause is matched by an equal duty not to do so without proper reason



## EXCEPTIONS TO THE BIAS RULE

### “ Waiver

“ express disclosure of the facts giving rise to the conflict of interest together with an express or implied agreement of the affected party to proceed.

### “ Necessity

“ where a tribunal would otherwise be disabled from performing its statutory functions+eg due to limited membership: *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 88

### “ Small town

“ relatively small communities inevitably carry a level of social and familial association would not be acceptable in larger jurisdictions: *Trustees of Christian Brothers v Cardone* (1995) 130 ALR 345, Aronson p714



## BIAS IN MULTIMEMBER PANELS

- “ The rotten apple principle - the bias of the single member will disqualify usually the whole panel: *W v City of Perth* (1987) 191 CLR 1 at 50 . 51

## CONSEQUENCES OF A FINDING OF BIAS

- “ decision by a person who is biased is invalid
- “ generally the entire proceeding that led to that decision is tainted by the invalidity
- “ breach of the bias rule can be raised as a ground in judicial review proceedings



## Scenarios- Discussion

### **Scenario 1: Review of a Planning Decision.**

**You are the Presiding Tribunal member (legally trained). You are sitting with another Tribunal member who is an expert in planning and who was a local politician until 1 year prior. The case is a review of a planning decision. A consumer group has applied to have a decision about a major development of a shopping centre area overturned. The matter is complex on its facts and law and is attracting a lot of publicity. Both parties are legally represented.**

**At the first day of hearing the respondent developer raises that the expert Tribunal member, when a politician the year before, described the owner of the developer company as a “grub”. The respondent provides evidence that this was in fact said by your colleague. The respondent submits that the expert Tribunal member should recuse himself on the basis of apprehended bias.**

**In a break from the hearing to consider the submission, your colleague advises you that they do not think they have any conflict of interest or bias issues to address. They show you information that they have just googled on the web, which you briefly read, and it shows that adverse findings have been made about the developer in another planning case. Your colleague says that given this, his earlier description of the developer as a “grub” was justified.**

## Scenarios- Discussion (continued)

### **Scenario 2: Contract Dispute**

**You are a Tribunal member sitting alone, in proceedings involving a dispute over a contract for services between a consumer and a large not-for-profit organisation. The organisation is legally represented.**

**The consumer is not legally represented. They are clearly stressed about the proceedings, and in their submissions have raised that they are frustrated with the time it has taken to “get on with the hearing”. A reading of the file by you suggests that the consumer has a strong case.**

**While neither party raises the issue, in fact you are the ex-partner of the CEO of the organisation. You co-parent a child with your ex-partner, but otherwise you have no contact with them. Your ex-partner was appointed to the position after you separated.**





## Scenarios- Discussion (continued)

### **Scenario 3: Discrimination Complaint**

**You are a Tribunal member sitting alone in a discrimination complaint against a large multi-national corporation. The applicant is very stressed and angry. In their opening statement they explain that they are marginalised, due to race and disability, and they think that they won't get a fair hearing. They say, "I bet you have shares in this company I am up against, so you won't be fair".**

**When they say that, you recall that you probably do have shares in the company in the proceedings. You only know this because each quarter you get a statement from the managed fund account you hold with a big bank. You recently received a quarterly statement that listed the holdings of your account and as far as you can recall the company was on the list.**



# Scenarios- Considerations

## Scenario 1

*Responsibility of one member for valid decision-making of Tribunal, and how to manage this;*

*Apprehended or actual bias question due to past statement, past association, which impugns a party's/witness's credibility;*

*Extraneous information from google search;*

*Necessity*

*Whether your colleague recuses themselves or not, are you now conflicted due to your involvement at the hearing;*

*What management is required and how will this be explained to parties/reasons given;*

Relevant case: *Zaburoni v Minister for Immigration and Border Protection* [2017] FCA 654, where the relevant Minister had described a visa holder as a grub from start to end on the Ray Hadley radio program. But the court found that there was no bias, given the timing and context for his remarks, and the Court also said: although the remarks by the Minister might lead a lay observer to conclude that it might be difficult for the [visa-holder] to persuade the Minister that his visa should not be cancelled, this is not sufficient to prove bias. (per Farrell J, [92])

# Scenarios- Considerations (continued)

## Scenario 2

*Apprehended or actual bias question due to current association;*

*Possibility that in your contact with your ex-partner while proceedings are underway that you will gain extraneous communication relevant to the proceedings;*

*Necessity i.e. small community;*

*What management is required and how will this be explained to parties/reasons given.*

Relevant case: *Attorney-General (NT) v Director of Public Prosecutions & Ors [2013] NTCA 2*, where the NT Court of Appeal considered whether a relieving magistrate, who was married to the local Aboriginal Legal Services principal solicitor, was conflicted from hearing a case where the defendant had been represented by that service. The Court found they did not: +Once it is realised that neither the [legal service] nor [the magistrate's partner, the principal solicitor] has a professional interest in the outcome of the present case (as distinct from ensuring that the accused is competently represented and receives a fair trial according to law), then there is no logical connection between the admitted interest and the alleged feared deviation from the course of deciding the case on its merits+(per Kelly J [39]).

## Scenarios- Considerations (continued)

### Scenario 3

“

*Pecuniary interest – is it substantial;*

“

*Should you recuse yourself;*

“

*What management is required and how will this be explained to parties/reasons given.*

“

In the case of a pecuniary interest the court in *Ebner* acknowledged that such an interest is of particular significance, and a direct pecuniary/propriety interest will normally be disqualifying unless the interest is insubstantial [(COAT (2017) [3.4.4.2] citing *Ebner* at 358; Forbes (2014) [15.39 - 15.42])]. The *Ebner* case set out the 2 step test: specify the interest e.g. shares in one of the parties, spell out the logical connection between the interest and the anticipated breach e.g. shares will drop in value if the case is lost, apply the test for apprehended bias which requires an assessment of whether there is realistic possibility (probability not required) that the outcome of the case would affect the value of the member's shareholding (*Ebner* case, at 345, 350). The test is an objective test.



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Thank you