# PART XI – GROUNDS OF REVIEW

## I *Procedural Fairness*

### A *Introduction*

#### 1 *The nature of a ground of review*

Grounds of review are, broadly speaking, criteria for determining whether a decision was made unlawfully. If a ground of review is available, the effect is that the decision is justiciable. If a ground of review is successfully pleaded, a remedy may be available and the decision will normally be declared unlawful.

At a statutory level, the recognised grounds of review are largely formalisations of the common law bases on which the lawfulness of a decision could traditionally be tested. As set out by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (‘*ADJR*’), they go towards determining whether the decision-maker went beyond their lawful authority. More than one ground may be applicable to a given case.

#### 2 *Breach of the rules of natural justice*

Section 5(1)(a) of the *ADJR* sets out the various grounds of review. Among them is ‘breach of the rules of natural justice’:

> ***Section 5 — Applications for review of decisions:***
>
> (1) A person who is aggrieved by a decision to which this Act applies … may apply … for an order of review … on … the following grounds:
>
> (a) that a <u>breach of the rules of natural justice</u> occurred <u>in connection with</u> the making of <u>the decision</u>;

Section 6(1)(a) provides for an identical basis for reviewing conduct preceding a decision:

> ***Section 6 — Applications for review of conduct related to making of decisions:***
>
> (1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply … for an order of review in respect of the conduct on any one or more of the following grounds:
>
> (a) that a <u>breach of the rules of natural justice</u> has <u>occurred</u>, is <u>occurring</u>, or is <u>likely to occur</u>, in connection with <u>the conduct</u>;

In formalising this common law ground of review, the *ADJR* recognises that, where it applies to a decision, it may be used as a basis for challenging that decision. However, the ground does not alter the situations in which natural justice or procedural fairness will apply; this remains determined by the common law (*Kioa v West*).

The rationale for the common law position may be summarised thusly:

> *They must be masters of their own procedure. They should be subject to no rules save this: they must be fair … The public interest demands it.*[1]

In its original form, natural justice only had to be accorded by courts and judicial bodies. The rules of natural justice have gradually developed to encompass other decision-makers.

The phrase 'natural justice' is traditionally used to describe the rules of procedure which such a decision-maker must observe in order to achieve fairness. In recent times, however, that phrase has fallen from popular usage in favour of the term 'procedural fairness':

> *the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual ... and the interests and purposes … which the statute seeks to advance or protect…*
>
> *Kioa v West* (Mason J).

## B *Breach of Natural Justice*

### 1 *What is natural justice?*

Natural justice proceeds out of the belief that logical reasoning is most conducive to just results. Deriving from Roman law, the term posits that certain principles are so obvious as to be required by nature so that they should be applied universally.

### 2 *Common issues*

Two issues arise frequently in relation to this ground of review:

1. **Is there an obligation to accord natural justice?**
   Such an obligation exists where the decision would affect an individual's rights, interests or legitimate expectations, subject to contrary statutory intention: *Kioa*

2. **If the obligation applies, what does it require?**
   Contextual factors shape its precise content (*Kioa*) but it will normally encompass at least the following two doctrines:

   **(a)** ***Audi alteram partem***
   The hearing rule: the right to a fair hearing; and

   **(b)** ***Nemo judex***
   The bias rule: no-one can be a judge in their own cause.

[1] *Re Pergamon Press Ltd* (1971) HL (Lord Denning MR).

## C *Implication*

Not all decisions will be judicially reviewable on the basis of procedural fairness. Whether a right to procedural fairness exists necessitates answering the question: ‘Is there a duty to hear the applicant’s case?’

The policy issue which arises at this stage is: ‘To what extent should adversarial procedural criteria be applied to administrative decision-makers?’ Fairness to the parties must be balanced against the efficiency of administration.

The scope of the common law duty to accord procedural fairness was conclusively determined by the High Court in *Kioa v West* (1985) 159 CLR 550, 584 (Mason J):

> *It is a fundamental rule of the common law doctrine of natural justice … that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it…*
>
> *The reference to ‘right or interest’ in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests…*

Justice Deane agreed, noting that in the absence of contrary legislative intention, a decision-maker ‘entrusted with a statutory power to make an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity … is bound to observe the requirements of natural justice or procedural fairness.’

However, it is useful to understand the history and development of this ground of review through its various incarnations.

### ***Cooper v Wansworth Board of Works*** **(1863):**

Facts

- Cooper builds a house, but failed to give notice to the Board of Works
- In the dead of night, the Board of Works demolishes the house
- Cooper brings an action for common law trespass, arguing that — in failing to give him notice of the intended demolition, and an opportunity to explain and respond — the Board’s conduct was in breach of the principles of natural justice
- The statute did not require notice be given to the owner of a house subject to demolition

Issue

- Was the decision lawful (and hence conferred a right to enter Cooper’s property)?

Reasoning

- Court of common pleas: where the statute fails to provide, the common law will remedy the situation
- The common law impliedly recognises natural justice, imposing an obligation on the Board to afford procedural fairness to a person whose interests are affected

Decision

- No, decision not lawful; the trespass claim is upheld and the plaintiff is successful

***Ridge v Baldwin*:**

Facts
- An employee, previously dismissed, seeks review
- No reasons for dismissal were provided to the employee

Reasoning
- The Court adopts an expanded notion of procedural fairness

Decision
- However, the employee's rights are governed by contract not statute, so this is not an administrative decision
- The challenge is unsuccessful

***Salemi v McKellar* (1977) HCA:**

Facts
- An Italian immigrant unlawfully lives in Australia (his visa had expired)
- The government announces an amnesty for unlawful immigrants (conditional on meeting certain criteria)
- Salemi comes forward, but the government then tries to deport him
- He challenges that decision on the grounds that he wasn't given proper notice of the reasons for deportation, and that the amnesty created a legitimate expectation
- The *ADJR Act* was not yet in effect

Issue
- Is there an obligation to afford procedural fairness?

Decision
- No, there is no obligation to accord natural justice beyond the statute [???]

***Kioa v West* (1985) HCA:**

Facts
- Mr Kioa travels to Australia on a temporary visa
- He applies for an extension to his visa so he can return with his wife in March of the following year
- Come March, neither of them leave; they move address and lose contact with the Department
- Some two years later, Mr Kioa is found and the Department now seeks to deport him
- Kioa challenges their decision to deport on the basis that he was not given an opportunity to respond to claims made against him
- These claims included an allegation that he was involved in supporting illegal immigrants circumvent the immigration system

Issue
- Is Mr Kioa entitled to procedural fairness?

- If so, what does this entail in the circumstances?

Reasoning

- Mason J:
  - Distinguishes *Salemi*: *ADJR Act* had not yet come into effect
  - The common law presumption of entitlement to natural justice (procedural fairness) applies unless there is a clear contrary indication in the statute
    - Specifically, it applies where 'rights, interests or legitimate expectations' are prone to be affected by the decision
    - 'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it'
    - 'The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests'
    - Essentially, the recognised class of rights and interests is expanded: it now includes legitimate expectations as well as proprietary and personal liberty rights
      - These interests go beyond legal rights
    - 'Legitimate expectation'
      - Applies even where the order will not deprive an individual of a legal right or interest
      - Eg, licence renewal application: expectation is that licence will continue to be granted: gives
      - Eg, past conduct or practice of a Department
      - Eg, where, as in *Salemi* (offering amnesty), Departmental conduct gives rise to an expectation by affected persons (that those coming forward would receive a visa)
    - Where the expectation is denied (or the interest affected), the affected party should be given notice and an opportunity to respond

- Brennan J: probably most reflective of current HCA's approach
  - Starting point: statutory intention: 'so long as the decision is consistent with the statutory context, there will be a presumption of procedural fairness, but only where the presumption of statutory power is apt to affect the interests of an individual in a manner with a substantially different affect on interests of the public'
  - The concept of 'legitimate expectation' is not especially helpful
  - Interests: old conception is too narrow — could be any individual interest, so long as it differs from (ie, particular to the individual and not) the general public
    - This is not limited to financial, proprietary or reputation rights

- Wilson J: agrees, but describes the applicant's victory as 'narrow and technical'

- Gibbs CJ (dissenting):
  - *Salemi v McKella* should have been applied
  - The *Migration Act* already affords sufficient fairness in the procedures it imposes

Decision

- Applicant deported

Note criticism of the notion of 'legitimate expectations' by McHugh J in *Ex Parte Lam* (2003) HCA. The concept of a legitimate expectation is indeed elusive. However, the following at least may be said about it; a legitimate expectation is likely to arise when:

- The decision-maker gives an undertaking or assurance that the applicant would be consulted before making a decision: *Liverpool*;
- The decision-maker normally acts in a certain way (eg, giving notice and inviting submissions): *Kioa v West*; *Cooper*;
- A policy or treaty exists which gives rise to an expectation that it will be followed or taken into account: *Teoh*; or
- The applicant has a right as licensee (expecting renewal), prospective licensee (expecting due consideration of an application) or has had their right renewed in the past or been provided with some indication about their likely chances of success (expecting prior conduct to continue in the absence of other supervening circumstances): *McInnes v Onslow-Fane*.

*Kioa v West* confirms that a legitimate expectation is not a substantive right in itself. Rather, it simply gives rise to a right to be heard (for procedural fairness to be accorded) before a decision is made or action taken: *Salemi v MacKellar [No 2]*. However, it does not require a decision-maker to act or decide in a certain way — just that they accord procedural fairness: *Minister of Immigration and Ethnic Affairs v Teoh*.

## D *Exclusion*

Even if procedural fairness would be ordinarily applicable, it may be denied (excluded) by statutory provision (*Medway v Minister for Planning*). For example, many procedures in the *Migration Act* are said to be exempt from procedural fairness. Statutes often exclude procedural fairness because they already provide for review using other procedures, themselves ensuring fairness.

In general, no right to procedural fairness will exist in circumstances where:

- There is clear statutory language to the contrary;
    - Mason J's exception: if the legislative intention is to provide procedural fairness within the statute, then this may indicate that no additional procedural fairness need be imposed by courts
    - This will normally occur if the legislation describes a power as able to be exercised 'without a hearing being afforded to the affected party' (*Twist v Randwick Municipal Council*)
    - However, this intention must be 'unambiguously clear' (*Twist* per Barwick CJ) and cannot be assumed by inference or equivocal words (*Commissioner of Police v Tanos*)

- The decision is political in nature; or
    - This includes policy and other broad aims, as well as decisions affecting the public at large
    - If the decision concerns matters of national security, the right to be heard may be overcome by those considerations: *Council of Civil Service Unions v Minister for the Civil Service*

- (Possibly) the decision is made by a 'political' figure
    - For example, the Governor–General, Cabinet, Prime Minister, etc

## E *Content of Duty*

**Issue:** what features must a hearing possess to satisfy the requirement of procedural fairness, if one is found to exist?

There are two elements of the hearing rule:

1. The applicant's right to know the case against them; and
2. The applicant's right to present their own case.

Determining the content of procedural fairness requires courts to balance two competing values: fairness to the individual and institutional efficiency. These are not entirely inconsistent, but do exhibit occasional tension.

Hearings may be characterised along a continuum of adversarialism by reference to the features shared with a civil trial:

**(a) Notice of charges**
The applicant has a right to know the case against them;

**(b) Evidence (discovery)**
Disclosure of evidence adverse to the applicant's claim;

**(c) Legal representation**
Mounting a defence with the aid of an expert and complying with oral or written procedures;

**(d) Hearing**
The representative making submissions in the required format;

**(e) Cross examination**
Whether the applicant can question witnesses brought by the opposing party; and

**(f) Adjudication**
Authoritative determination of the dispute.

According to Gibbs CJ in *Kioa*, this is the 'irreducible minimum' of the duty to accord procedural fairness. Beyond this, what is required will depend on the nature and circumstances of the case and the interests the affected party has in the decision.

The requirements of a fair hearing vary between a judicial trial before a jury (for a criminal proceeding), down to written notice of a

Factors influencing the content of the duty to accord procedural fairness include:

- The nature of the decision-making process
  - If it has multiple stages, procedural fairness will be satisfied if the process, when viewed as a whole, may be so characterised: *South Australia v O'Shea*
  - However, a right to be heard later cannot cure a deficiency in procedure at an earlier stage, unless the steps and persons involved in decision all form part of one process: *Ainsworth v Criminal Justice Commission*

    - Whether the stage of decision-making under consideration is a preliminary or later stage: *Rees v Crane*

- The legislation authorising the decision
    - A right to be heard later will not necessarily mean that a right to be heard at an earlier stage is excluded, but this may (though will not necessarily) be the case if the initial investigation is 'purely preliminary' (as where no consequences flow from it): *Rees v Crane*, where the Privy Council said:
        - If an investigation is purely preliminary, such that complaints can be dealt with later, then procedural fairness need not be accorded
        - The exclusion of 'the *audi alteram partem* maxim is justified by urgency or administrative necessity' and the fact that 'no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice'
    - A hearing at an early stage may defeat the legislative intent or be contrary to the public interest (eg, privacy or secrecy implications)

- The circumstances and subject matter of the case

### 1 *Notice of charges*

The giving of notice is the minimum content of procedural fairness (*Kioa v West*; *R v North; Ex parte Oakey*). That is, a hearing cannot be fear if an applicant is not made aware of the case against him.

The notice must not be overly vague and must be complete and comprehensible (*Re Palmer and Minister for the Capital Territory*). This means that the recipient must be made aware of the relevant issues of fact, including the basis on which the proposed decision is to be made.

In *Kioa v West*, Mason and Brennan JJ each noted that the applicant should have received notice of the allegations (that he had colluded to subvert the immigration system) and been given an opportunity to respond to those allegations.

**_Bond v Australian Broadcasting Tribunal_ (???) HCA:**

<u>Facts</u>

- Bond wanted further particulars of the case against him, and the order of witnesses appearing so he could call his own witnesses in an appropriate order
- The Tribunal is exercising its powers under the Act to determine whether Bond is 'a fit and proper person' to hold a broadcasting licence

<u>Issue</u>

- What must be done to satisfy Bond's right to procedural fairness?

<u>Reasoning</u>

- Not an adversarial trial

<u>Decision</u>

- Bond not entitled to any further procedural fairness: he did receive a notice and some particulars; that is sufficient

It is often said that an individual must be given a chance to respond to any adverse comments: *Kioa v West*; *In re Pergamon Press Ltd*. This will often entail being given the ability to rebut or respond to any prejudicial statement (*Board of Education v Rice*).

2 *The right to evidence*

***Minister for Immigration v Kurtovic* (???):**

Facts
- K is deported
- K seeks access to parole officer's reports which she thinks may have influenced the decision

Issue
- Can K have access to the reports?

Reasoning
- Pragmatic approach adopted (no strict rule)

Decision
- No, couldn't respond to it
- Contains confidential information about officer, etc; could perhaps disclose subject to confidentiality obligationsto K's lawyer
-

Administrative practices may also give rise to an entitlement to procedural fairness.

***Hamilton v MILGEA* (???):**

Facts
-
- Department's practice is to supply explanatory notes to assist with filling out application forms
- Hamilton is not provided with the explanatory notes
- She is subsequently refused her permanent residency application
- She applies for review on the grounds that she was denied procedural fairness

Issue
- Was there a breach of natural justice?

Reasoning
- Hamilton is entitled to the notes
- Established practice of providing explanatory notes gave rise to a legitimate expectation that they would be provided
    - Where a department intends to depart from an established practice, it will often be a legitimate expectation that the applicant will be heard on that issue or notified of the departure
- Consistency of treatment is important to procedural fairness

Decision

- This constituted a denial of procedural fairness
- However, Hamilton hadn't complied with other regulations, and those errors were not impacted upon by the failure to provide notes, so the decision is not void

3 *The right to legal representation*

There is no general right to legal representation, unless the accused is charged with a serious criminal offence. In such cases, proceedings must be stayed until representation can be obtained: *Dietrich v R*. If not, there is likely to be a miscarriage of justice.

However, even in some civil or lesser criminal cases, procedural fairness may not be satisfied if the applicant or accused does not have legal representation (*McNab*). Whether this is so depends upon:

- The relevant legislation, including the legislative intention, properly construed; and
- Whether there is a hearing, and whether it involves complex questions of law (*White v Ryde Municipal Council*).

Also relevant is the identity of the party seeking representation. Legal representation will not normally be granted to a party other than the actual accused (*NSW v Canellis*). This is especially so when no proceedings have yet been instigated against the third party.

**_NSW v Canellis_ (1994):**

Facts

- A convict has been provided with legal aid to fund his defence to homicide charges
- Witnesses called in his defence argue that as a matter of procedural fairness, they should also be entitled to legal representation

Issue

- Does procedural fairness require that the witnesses be given legal representation?

Reasoning

- No general requirement to provide legal representation
- However, there might be circumstances where it might be a requirement of procedural fairness that representation be provided
- Factors:
    - Identity of the parties requesting representation (here not the accused)
    - Stage of the proceedings (before conclusions have been formed about them)

Decision

- It would be premature to grant representation here
- It is not yet known whether the Commission enquiry is going to form adverse conclusions about the witnesses

The necessity of legal representation further depends upon a person's capacity to represent themselves effectively (*Krstic*; Cains *v Jenkins*); this includes consideration of

- The extent to which the applicant is familiar with the relevant legal and procedural rules

- The applicant's linguistic fluency
- Whether the applicant suffers from a physical or mental disability
- The seriousness of the decision to be made
- The applicants age, health and confidence

No legal representation will be required where the applicant is able to effectively represent herself and the decision-maker does not adopt formal rules of procedure (*Krstic v ATC*).

### ***Krstic v ATC*** **(1988):**

<u>Facts</u>

- The probationary employment of Ms Krstic, a public servant, was terminated
- She seeks review of the decision on the grounds that she was entitled to but did not receive representation at the hearing

<u>Issue</u>

- Was Ms Krstic, as a matter of procedural fairness, entitled to legal representation before the tribunal?
- Even if not so entitled, was she entitled to be represented by another person of her choosing?

<u>Reasoning</u>

- Legal representation
  - The tribunal was not to perform proceedings like a court
  - Not bound by rules of evidence
    - Able to conduct proceedings as it saw fit
  - Because of its constitution and provisions governing proceedings, procedural fairness does not require Krstic to be represented by a lawyer
- Other representation
  - Whether procedural fairness requires some form of representation depends on the attributes of the person
  - Can the individual effectively represent him or herself?
    - Age
    - Confidence
    - Fluency of language
    - Illness
  - Here, Ms Krstic was able to effectively represent herself

<u>Decision</u>

- Not entitled to legal or other representation

4 *The right to a hearing*

There is no general right to make submissions (*Chen*). However, where it does arise, the decision-maker must act in good faith and listen fairly (*Board of Education v Rice*).

### ***Chen v Minister of Immigration, Ethnic and Cultural Affairs*** **(200x) Court:**

<u>Reasoning</u>

- No general obligation on decision-makers obliged to provide procedural fairness to allow an oral hearing
- Justifications:
    - Resource limitations
        - Not desirable to impose judicial standards of enquiry upon administrative decision-makers
    - Government departments are not like courts
    - Imposing a blanket rule might be counter-productive
    - Less experienced officers may deal with the applications: more hearings dilutes quality of administrative decision-making
- Exceptions:
    - When determining the credibility of the applicant: entitled to make oral submissions
    - French J: [???]

Decision
- [???]

5 *The right to cross-examine*

***O'Rourke v Miller* (1985) Court:**

Facts
- A police officer is alleged to have harassed two women and used his badge to gain entry to private premises
- The women make complaints against him
- The Chief Commissioner initiates proceedings to decide whether to terminate the constable's probationary employment
- The constable was aware of the case against him, including the contents of the complaints
- He was also given the opportunity to respond to the allegations
- He argued that he should also have been able to cross-examine the women who had made the complaints

Issue
- Should the constable have been entitled to cross-examine the witnesses?

Reasoning
- The nature of the process does not require cross-examination
- Police officers are supposed to be upstanding citizens of high integrity
- It is sufficient that the Chief Commissioner entertains doubts about the constable's integrity for him to be terminated
    - Need not be satisfied beyond reasonable doubt
- There was no reason for the women to be fabricating their stories

Decision
- No, no right to cross-examine

### E *Effect of a Failure to Accord Procedural Fairness*

If there is a breach of procedural fairness, the decision will be prima facie void (*Kioa v West*; *Ridge v Baldwin*).

However, if the court is satisfied that the breach would not have affected the decision, the decision will stand. For example, in *Hamilton*, even if Mrs Hamilton had been given explanatory notes, the consequences would have been the same. See further *Stead*.

Note also that although the decision is declared void, a court still has jurisdiction to hear an appeal against it pursuant to the *ADJR*, it having been purported to be made (*Calvin v Carr*).

# II *Bias*

## A *Introduction*

The rule against bias prohibits actual or reasonably apprehended bias by a decision-maker charged with the exercise of public power. Actual bias is difficult to assert because a subjective state of knowledge must be proved. It is also considered improper to accuse a decision-maker of harbouring bias in so forthright a manner. Consequently, most issues of bias concern the apprehended or ostensible variety.

### 1 *Purpose of the rule against bias*

For the rule of law to function, neutrality is demanded of decision-makers. Laws must apply equally to all individuals, regardless of their relation to the adjudicator. Public power affecting the rights and interests of individuals should be exercised only according to the merits of the case. Confidence in law and the judicial and tribunal systems could be undermined if decision-makers were able to exercise power on arbitrary, capricious or even ostensibly biased grounds.

For these reasons, the second rule of natural justice forbids decision-makers, being decision-makers obliged to afford natural justice, from exercising power in a way that evinces actual or ostensible bias.

### 2 *Other justifications*

'Neutrality, and the public and political confidence which that engenders, are regarded as essential to the successful and proper operations of the public service, the tribunal system and the judiciary.'[2]

- Instrumental (consequentialist) goals
  - Promotes accuracy of fact finding
  - Improves the quality of decision-making and policy
  - Persons adversely affected are more likely to accept the decision if they entertain no doubts about the decision-maker's objectivity
  - Maintain confidence in the administrative process

In *Webb v R*, for example, the Court described the primary objective of the bias rule as being to retain public confidence in the administration of justice. This led to the formulation of a test which defers to the public's reasonable perceptions (see below).

- Deontological (non-instrumental) goals
  - Treat parties equally
  - Afford equal respect and dignity to all subjects
  - Acknowledge the public's right to participate in decisions affecting them
  - Enhance the institutional legitimacy of government agencies, tribunals and the judiciary
  - Further the broad goal of neutrality and impartiality of law

[2] Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (2004) 563.

The futility of an approach which seeks to eliminate bias might well be questioned on several reasonably sound philosophical grounds. To what extent *can* all bias be eliminated? In light of bias inherent in the minutiae of subjective experience and linguistic interpretation, the answer must surely be, 'a finite amount'. However, this does not pose a substantial impediment to the attainment of natural justice. Indeed, to eliminate all such bias would reduce decision-makers to the impossible position of a computational automaton; it is their personal viewpoint which makes them capable of complex adjudication, so in addition to being impossible to eliminate all forms of bias, it would be undesirable even if it was possible. The rule against bias may nevertheless be criticised as inadequately combating personal racism, ethnocentrism, and gender bias.

## B *Reasonable Apprehension of Bias*

### 1 *Requirements*

The primary issue is whether the circumstances are such as to give rise to a reasonable apprehension of a lack of impartiality by the decision-maker in the mind of a fair-minded and informed member of the public.[3] This test has the advantage of never actually imputing bias to the decision-maker (a clear victory in protocol). Where the English test involves a judicial assessment of 'reasonable likelihood', the Australian bias test leaves the judge's reputation intact, thus preserving public confidence in the decision-maker concerned.

An authoritative statement of this test was given in *Ebner* by Gleeson CJ, McHugh, Gummow and Hayne JJ:

> *First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.*

Their Honours go onto describe the test for apprehended bias as follows:

> *[W]hether a fair-minded lay observer might reasonably apprehend that the judge [tribunal or decision-maker] might not bring an impartial mind to the resolution of the question the judge [tribunal or decision-maker] was required to decide…*

The test thus involves two steps:

1. **What could lead to bias?**
   Identify a 'possibly corrupting influence'

2. **What is the connection between that bias and the decision?**
   Determine the effect on the decision-maker

Prior to *Ebner v Official Trustee*, judges were automatically disqualified if they had a direct pecuniary interest. However, *Ebner* qualified the existence of a possibly corruption influence with the requirement that it have some determinable effect upon the decision maker. The case concerns the financial interest of a justice of the Federal Court, shareholder of a company affected by the outcome of the case.

[3] *Webb v R* (1994) 181 CLR 41.

### *Ebner v Official Trustee* (2000) HCA:

Facts

- Goldberg J is a shareholder in the ANZ Bank as a result of his being a director of his family trust's board of trustees, which holds between 8 000 and 9 000 shares in the ANZ Bank
- The creditor supporting an application by another trustee in bankruptcy is the ANZ Bank
- Goldberg J refuses a request from Ebner, the bankrupt party, to disqualify himself
- Goldberg J declares this interest, and subsequently decides in favour of the trustee in bankruptcy (and the bank)

Issue

- Has the rule against bias been breached because of a reasonable apprehension of bias?

Reasoning

- There is no separate rule of automatic disqualification for cases where a judge holds a direct pecuniary interest: it would be in some respects too wide, and in other respects too narrow
- The very concept of an 'interest' is 'vague and uncertain'
- 'The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interests, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.' (at 345 per Gleeson CJ, McHugh, Gummow and Hayne JJ)
- All interests, regardless of their character, should be judged according to the same basic test
    - However, the test should take into account the character of the decision-maker
    - Its operation is tailored to the circumstances of each case, and flexibly applied
- First step:
    - Pecuniary interest
- Second step
    - Will this interest lead Goldberg J to determine the issues otherwise than on their merits?
    - It's unlikely that the decision will, either way, affect ANZ's share price, so it is very unlikely that his pecuniary interest will be affected
    - Even if a proceeding is 'price sensitive', the amount at stake is too small to give rise to a reasonable apprehension
    - There may, however, be circumstances where the value of a pecuniary interest would be directly affected by a proceeding such as to give rise to a reasonable apprehension of bias

Decision

- No reasonable apprehension of bias because the share price could not possibly be affected

As *Ebner* demonstrates, obligations to act impartially are strongest for judges. However, the expectations of a reasonable member of the public are attenuated in respect of administrative tribunals. An example of this leniency is provided by *Epeabaka*:

***Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*** **(2001) HCA:**

Facts
- A member of the Refugee Review Tribunal maintains a website on which he regularly makes comments about his colleagues and applicants who appear before him
- An applicant alleges that the presence of the website gives rise to a reasonable apprehension of bias

Issue
- Is there a reasonable apprehension of bias?

Decision
- The website, while 'regrettable', did not give rise to a reasonable apprehension of bias
- The member 'may have allowed enthusiasm to outrun prudence', but did not breach the rule against bias

*Epeabaka* illustrates how judicial standards of bias are diluted when applied to tribunal members. Departments and ministers may have even fewer obligations (*Jia*).

***Minister for Immigration and Multicultural Affairs; Ex parte Jia*** **(2001) HCA:**

Facts
- Jia is convicted of a criminal offence
- His visa is cancelled on character grounds
- The AAT overrules the immigration department's decision
- The responsible minister has the power to deport Jia, and decides to do so
- Before making this decision, he makes various pejorative comments about the AAT and the character requirements in a radio interview; he outlines his own views about how these requirements should operate
- Jia seeks judicial review of the minister's decision

Issue
- Has the rule against bias been breached by the minister?

Reasoning
- Rule is applied more leniently in relation to the Minister
- Different standards are applied because (D&J 689)
  - 'the minister is in a different position. The statutory powers in question have been reposed in … a member of the executive government who not only has general accountability to the electorate and Parliament but in s 502 is made subject to a specific form of Parliamentary accountability'
  - 'the public interest is a matter of political responsibility'
  - No need to codify political responsibility in separate administrative rule

Decision
- Rule against bias has not been breached

*Jia* may be explained in terms of a reluctance by the judiciary to prevent members of the executive from expressing their opinions on certain matters. To require that they remain silent when asked for their opinion during public debates could undermine their political functions.

These cases demonstrate that a connection between the alleged corrupting influence and the character of a resulting decision is central to the enquiry into bias. The question to be asked is: 'how is this conduct or influence likely to affect the decision-making?'

## *Hot Holdings v Creasy* (2002) HCA:

<u>Facts</u>

- Recommendation that company get an exploration licence for mining. Minister signed a Minute of Advice prepared by departmental officials – this was the permission. But one officer who was involved in preparing the advice owned shares in a company that had an option to purchase 80% of the licence if HH obtained it. Adult son of another officer involved in drafting had similar options. Minister knew nothing of this.
- Who was accused of bias? On what grounds?
- Minister reasonably apprehended of bias bc of the bias of the officials.
- What role was played in the decision-making by the two officials who were accused of bias?
- Note that the Minister was the only person who made an official 'decision'. The others gave him advice.

<u>Issue</u>

- Is there a reasonable apprehension of bias?

<u>Reasoning</u>

- McHugh J:
    - Relevant test:
        - Whether a fair-minded person 'properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to the decision.'
        - This is determined objectively
    - What role does a decision-maker's pecuniary interest play?
        - There is no automatic assumption of bias, even if the Minister or their adviser has a pecuniary interest
        - The precise nature of the interest and its relationship to the decision must be examined
    - In what ways does the test for bias apply differently to judges and administrative decision-makers?
        - The test is the same
        - However, the content (ie, the required standard of objectivity) may be different
        - A Minister is subject to a lower standard because he or she is already responsible to their electorate and to Parliament
    - Relevant factors
        - An advisor's bias will not normally infect a Minister's decision
        - None of the key people involved in making the decision had any bias themselves or knowledge of the bias of the other two
        - The 'major participants' were 'independent and disinterested'
        - If advisors had been biased and had influenced minister significantly, then the outcome might be different
        - However, they had not such influence here

- What role might personal relationships play in determining bias?
  - ‘A court will not conclude that there was a reasonable apprehension of bias merely because a person with an interest in the decision played a part in advising the decision-maker. **The focus must be on the nature of the adviser’s interest, the part that person played in the decision-making process and the degree of independence observed by the decision-maker in making the decision.** If there is a **real and not a remote possibility** that a Minister has not brought an **independent mind** to making his or her decision, the role and interest in the outcome of his or her officers may result in a finding of reasonable apprehension of bias.’
  - ‘It would do so in the present case, for example, if either Mr Phillips or Mr Miasi were biased or their circumstances gave rise to an apprehension of bias and either of them had influenced the Minister’s decision. Thus, **the role played by an adviser** is a critical factor in determining whether the interest of an adviser in the outcome of a decision **taints the decision with bias or a reasonable apprehension** of bias.’
  - ‘In some cases, a reasonable apprehension of bias may arise simply from the close connection of a decision-maker with a person who may be affected by the outcome of the decision. The relationship of the parties may be so close and personal or the person interested in the outcome so influential or dominant that a fair-minded person might reasonably apprehend that the decision-maker might not make the decision impartially.’
  - ‘However, whether or not the mechanics of the process are known, no conclusion of apprehended bias by association can be drawn until the court examines the nature of the association, the frequency of contact, and the nature of the interest of the person associated, with the decision-maker. It is erroneous to suppose that a decision is automatically infected with an apprehension of bias because of the pecuniary or other interest of a person associated with the decision-maker. Each case must turn on its own facts and circumstances.’
- Was there bias in this case?
  - In the present case, the evidence showed that neither Mr. Miasi nor Mr. Phillips influenced the Minister’s decision. Because that is so, the only way the first respondents can make out a case of reasonable apprehension of bias is by relying on the principle of bias by association. Again the peripheral role of the two officers is both relevant and decisive.
  - ‘Mr. Creasy claimed that the Minister’s decision gave rise to a reasonable apprehension of bias because Mr. Phillips played a part in preparing the Minute and his son was affected by the decision because his son had a shareholding in AuDAX. But both the son’s interest and Mr. Phillips’ relationship with the Minister’s decision are too far removed to give rise to any apprehension of bias by reason of Mr. Phillips’ association with the Minister. Mr. Phillips’ relationship with the Minister was no more than that of Minister and public servant. He had no direct pecuniary interest in the decision. It is true that he reviewed the draft Minute and made amendments before Mr. Burton prepared the final Minute. But that had little resemblance to the draft. It is also true that some comments made by Mr. Phillips went into the Minute submitted to the Minister. But the Minister knew nothing of the son’s interest.’
  - ‘Put most favourably for Mr. Creasy, the question is whether a fair-minded lay person, properly informed as to the nature of the process, might reasonably apprehend that the Minister might not have made his

decision impartially because Mr. Phillips was an adviser and his son had a shareholding in a company that would benefit from the grant to Hot Holdings. I do not think that any fair-minded person could think that the Minister might be so irresponsible that he would allow this association with Mr. Phillips to affect his decision. Moreover, in this case, the evidence revealed the decision-making process. It is not a case where an apprehension of bias might be increased by the combination of an interested person being closely associated with the decision-maker or involved in the decision-making process and the mechanics of the decision-making process being unknown to the fair-minded observer. Once the Minister's lack of knowledge of the son's shareholding is taken into account, no fair-minded observer could possibly conclude that the Minister might not have made his decision impartially.'

        - 'The relationship between the Minister and Mr. Miasi was simply that of Minister and public servant with Mr. Miasi playing no part in formulating the contents of the Minute. Add to this, the fact that the Minister was unaware of Mr. Miasi's shareholding and it is impossible to find that any fair-minded observer would reasonably apprehend bias on the Minister's part in granting Hot Holdings' application.'

- Kirby J (dissenting):
    - Disqualification for pecuniary interest:
        - 'there was no separate principle of disqualification for pecuniary interest. Such cases were to be treated by the "application of the apprehension of bias principle": at 357 [55].'
    - Disqualification for bias and ministerial decision-making:
        - 'In *Jia* I expressed the opinion, which I still hold, that it is "quite wrong to suggest that, because the decision-maker is a Minister, necessarily a politician and an elected official, he or she is exempt from the requirements of natural justice, or enjoys an immunity from disqualification for imputed bias" … This must be so because, in every case, the minister must be able, if challenged, to demonstrate that he or she has exercised the statutory powers in question "by reference only to considerations that are relevant to the grant of power and compatibly with the exercise of that power"'
    - Consequences of biased decisions:
        - 'To the extent that a minister departs from the source of the power … the law will have been breached. The link to the source of power will be severed. The decision will be invalid. A party with an interest will be entitled to judicial relief from the purported decision. That party will be able to secure an order quashing the decision and requiring that it be made again, lawfully.'
    - Application:
        - 'Although the separate argument that the Minister had merely "rubber stamped" the recommendation from his Department was not pursued in this Court, it remains the fact that the departmental recommendation contained in the officers' minute was incontestably the recorded basis of the Minister's decision. Most members of the Australian public would, I think, assume that that decision was, at the least, profoundly influenced by the departmental minute and the recommendation expressed in it. One of the officials, who participated in the deliberations leading up to the recommendation, failed to disclose the pecuniary interest of his son who stood to gain from the recommendation.'
        - 'Once it is also established that a crucial part of the minute was actually drafted by another departmental officer with an undisclosed personal

financial interest in the recommendation being made, the conclusion reached unanimously by the Full Court was open. I see no error in that conclusion. On the contrary, I believe that it is the conclusion that the impartial observer in the Australian public, with knowledge of the contextual matters that I have mentioned, would similarly draw.'

- 'Whether or not there is an appearance of bias should be capable of determination in advance. Such an approach gives the decision-maker the opportunity to rectify any such impression. … Test it this way. If Mr Miasi and Mr Phillips had disclosed their respective interest and association to the Minister, who can doubt that the Minister in such a sensitive area of decision-making would have said — and rightly said — "Well you had better have nothing to do with this matter. And please record that you informed me and that I gave you that instruction".'
- 'In such a long drawn out process of litigation, the result that I favour would be disappointing to the appellant which is individually innocent … of any wrong doing. It would also be costly to the parties. In the final outcome, it might produce no ultimate change in the final decision. But, at least then, the decision would be lawful. It would be made without disqualifying flaw. Moreover, an important principle for the integrity of public administration would have been reinforced that has prophylactic utility, symbolic importance and great economic value. Confirming the Minister's decision, in my view, diminishes that principle… Financial probity, and the absence of undeclared pecuniary self-interest, or undeclared but known interests of close family members, are not the only attributes of sound public administration. They lie at its heart. This Court should reinforce them. It should not sanction practices that have a tendency to undermine their strict observance.'

<u>Decision</u>

- No, the decision-makers' interests do not give rise to a reasonable apprehension of bias

### 2 *Contextual factors*

The content of obligations relating to procedural fairness, including the rule against bias, varies according to the context in which they are applied (*Kioa*). In particular, the strictness of the requirement that decision- makers exercise their powers impartially varies according to the identity of that decision-maker. This is because the standards applied by a 'fair-minded observer' vary according to the character of the decision maker (*Ebner*).

The bias rule is applied most strictly to the judiciary. Tribunals, departments and Ministers are treated far more leniently. They are not held to such high standards as judges:

- Courts (judges): strictest (*Kartinyeri*)
- Tribunals (members): less strict, but still quasi-judicial (*Epeabaka*)
- Government departments: relatively lenient
- Ministers: very lax
    - 'It would be wrong to apply to a [Minister] the standards of detachment which apply to judicial officers or jurors' (*Jia* per Gleeson CJ and Gummow J)

### 3 *Practical considerations*

Alleging bias against a decision-maker (especially a judge) is a serious claim with far-reaching consequences. The decision-maker faces embarrassment (though this is lessened as a result of the 'public perception' test). The lawyer making the allegation also faces various professional and psychological inhibitions. Professional comity is a factor. The consequences of a failed allegation are also significant (at the least, judicial distrust or, at worst, professional misconduct).

The consequences are multiplied when dealing with allegations of actual (as compared with ostensible) bias. 'Actual bias requires proof as to the mind of the decision-maker rather than the fair-minded observer. A court will only find actual bias if satisfied that the decision-maker approached an issue with a closed mind.' Allegations of this nature must be made with 'great delicacy.' They are dealt with by judges 'with even greater circumlocution.'

Judges are 'honour bound' to disqualify themselves from a case if they know of circumstances clearly creating a reasonable apprehension of bias. This duty is not enforceable, however. In relation to more ambiguous sources of bias or more tenuous connections, the judge is expected to voluntarily disclose the matter and seek waiver to continue.

Note also that the bias rule is not designed to deal with complaints of systemic bias.

### 4 *Exceptions*

#### (a) Waiver

The bias rule may be waived expressly or by implication. Implied waiver usually arises from a failure to make any timely objection upon learning of facts that give rise to apprehended bias. In this way, a party cannot keep bias 'up their sleave' as an appeal ground. However, as Callinan J noted in *Johnson v Johnson*, there are many difficulties associated with objecting to perceived bias during a trial:

- It may anger the judge, and so lead to actual (if concealed) bias
- Bias is often the cumulative result of individual matters the full impact of which may not be visible until after judgment
- A party may not want to raise the issue for fear of embarrassment until they knew it was absolutely necessary
- Judges may not be able to easily respond to a claim of bias during the course of proceedings

#### (b) Necessity

Where disqualifying a biased decision-maker would prevent a proceeding from being heard according to statutory or other practical requirements, that decision-maker, by necessity, may hear the case:

> *The rule of necessity permits a member of a Court [or tribunal] who has some interest in the subject matter of the litigation [or dispute] to sit in a case when no judge [or tribunal member] without such an interest is available to sit…*
>
> *Laws v Australian Broadcasting Tribunal* (Mason CJ and Brennan J).

Although, on the facts, no bias was apparent, in *Laws*, if bias had been present, necessity would 'prevail over and displace the rules of natural justice' in order to give effect to the statutory intention that the tribunal perform its assigned functions (at 88–9). In cases where the trial is

excessively long, central witnesses have died or disappeared, or decision was reserved for some time, the Court may also give effect to necessity (*Ebner* per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

### ***Laws v Australian Broadcasting Tribunal*** **(1990) HCA:**

Facts

- Mr Laws, a radio announcer, made comments critical of Aboriginal welfare payments during a talkback radio programme on the 2GB radio station
- As a result of which, complaints were lodged with the Australian Broadcasting Tribunal ('ABT')
- The ABT dealt with the radio station but not directly with Laws
- Three members announced he had breached the standard three days before the inquiry was announced (only an inquiry decision could determine guilt)
    - One Tribunal member commented on the case in a way that seemed to conclude that he was guilty
    - Three had issued a statement saying that Laws had breached the standard by ABT before the inquiry into his behaviour was announced
- Laws accuses all the members of the Tribunal of bias
    - The other members were said to be biased because they participated in the decision to defend defamation and review proceedings brought by Laws

Issue

- Is there a reasonable apprehension of bias?
- Does entering the defence create such an apprehension?
- If so, is the Tribunal nevertheless required to decide the outcome of the dispute?

Reasoning

- Mason CJ and Brennan J:
    - Entering the defence was not sufficient evidence of actual bias and no other evidence existed
    - Is apprehended bias a matter of fact or law?
        - Fact
        - The test is legal, but its application is factual
    - Against which members of the Tribunal was there apprehended bias?
        - The members who prematurely announced that Laws breached the standards
    - What hypothetical person's position should courts take when determining whether there is apprehended bias?
        - The 'fair-minded observer' to whom is attributed the 'knowledge of the actual circumstances of the case'
        - Don't assume that they have legal knowledge, but assume that understand that defenses to the Tribunal are not assertions of belief or admissions
        - Therefore asserting a defence is not a prejudgment of the issues
        - A corporate decision to defend does not implicate individuals (especially since the government would cover any costs incurred as a result or in determination of a defamation trial)
        - So there is no material interest 'direct or indirect' in the outcome of the inquiry
    - What role does necessity play?
        - Even if there was bias, the tribunal still has a statutory function to perform

        - They could not perform this function if every Tribunal member was disqualified from hearing
        - The statutory function trumps procedural fairness when both cannot be accommodated

- Deane J (dissenting)
    - Considers the legislative context:
        - There will be an on-going relationship between the Tribunal members and those they supervise
        - Members may form general views on certain issues, people, broadcasters, &c, over time
    - Why was this case different from the prejudgment that is part of the regulatory context?
        - In this case, members prejudged the 'very issue involved in an inquiry'
    - Does prejudice by some Tribunal members normally taint all members?
        - No
        - Prejudgment is shielded by an institutional façade
        - However, all members may still be deemed biased where the circumstances are such as to suggest that all members are biased
    - Relevant factors:
        - The public statements made by the Director in her official capacity and as a representative of the tribunal
        - The fact that three members (including the most senior) have prejudged issues
        - A majority of the Tribunal presumably accepted their position by agreeing to the inquiry
        - Even after a decision to challenge the inquiry was made, a senior official defended the prejudgment
        - The Tribunal as a whole in the Court defended Ms Paramore's statements
        - The defence of matter in court; and
        - The refusal in court to pierce the institutional veil
    - Relevant test:
        - An 'informed and fair-minded lay observer would have a reasonable apprehension that the whole Tribunal is affected by disqualifying bias', that is, a real likelihood that members would not bring an 'impartial and unprejudiced mind to the determination'
        - Qualifications: twofold
            - First, that there be no positive and substantial injustice; this is because it cannot be presumed that the legislature intended that
            - Second, where the rule applies it does only to the 'extent that necessity justifies'
    - Application and partial compromise:
        - The Tribunal was to be constituted only by people who were members not personally involved in any of the impugned actions

- Gaudron and McHugh JJ:
    - Effect of the filing of the defences on the fair-minded observer:
        - While lawyers know that it does not constitute an admission, a fair-minded observer would conclude in the context of the justifications given that the Tribunal believed that the defences were true
    - What is the fair-minded observer looking for to conclude that there is bias?
        - Having a conclusion about an issue involved in an inquiry is not enough
        - It must firmly establish that the decision-maker's mind is 'so prejudiced in

favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to her.'
    - Even strong views (eg, about the desirability of equal pay) were acceptable so long as they are provisional
  - How should the filing of defences therefore be understood in this context?
    - The Tribunal members did have a view, but nothing to say that they would not fairly consider the evidence before them
    - This is different to a case in which a judge had a settled view of the facts from an earlier conclusive determination
  - Necessity:
    - It is unnecessary to decide the issue
    - By the wayside: it is contrary to the principles of fairness to require a person to submit to a biased decision-maker
    - There is much to be said for the view that a clear statutory intention will be required before necessity has any operation

Decision
- Pleading the defence was not sufficient evidence of actual or apprehended bias
- Mason CJ and Brennan J: even if there was such evidence, the statutory function would still need performance and so the Tribunal could remain constituted by necessity of fulfilling that function

However, necessity does not apply to a decision made by a Minister whose statements led to a reasonable apprehension of bias (*Jia* per Kirby J). In that case, the legislation did not require the Minister to exercise power, so if bias was apparent another Minister could do so.

(c) Statutory abrogation

Legislation can exclude or alter the bias rule. However, this is rarely done.

### C *Social and Political Views*

Social and political commitment to a cause being decided may also support a finding of apprehended bias, especially where the decision-maker is ideologically affiliated with a party to the proceeding. In such circumstances, merely being a member of the party's organisation may be enough to warrant disqualification (*Pinochet (No 2)*).

***R v Bow Street Magistrate; Ex parte Pinochet (No 2)* (2000) HL:**

Facts
- Extradition proceedings are brought in England against General Pinochet, who is alleged to have committed various human rights violation
- Lord Hoffman is a member of the House of Lords, which hears the case
- Amnesty International intervenes as *amicus curiae*
- Hoffman LJ is an unpaid director of a charity wholly controlled by Amnesty International

Issue
- Is there a reasonable apprehension of bias?

Reasoning

- Lord Hoffman, Amnesty International and the charity were separate legal entities, so his Lordship is not formally a party to the proceeding and thus not a judge in his own cause
- However, the connection is still an interest that leads to disqualification
- Even mere non-directorial membership of AI could have required Lord Hoffman's automatic disqualification
- Note, however, that this proceeding was unique in that Amnesty was actually a party to the proceedings (as *amicus curiae*)

Decision

- Lord Hoffman steps aside

### D *Gender Bias and Racism*

Fortunately, instances of racism are relatively infrequent in adjudicatory proceedings. Many would allege gender bias to underpin findings of fact (especially in criminal law) and the law more generally; however, the bias rule is largely inapplicable to this kind of systemic bias. It has been suggested, by Mason P, for example, that to accused the judicial system of being biased because dominated by males would confuse impartiality with representativeness. However, the issue arises, more broadly, of the significance of unexpressed assumptions and prejudices in adjudication.

*RDS v R* highlights the issue of the extent to which judges are legitimately expected to identify and counter their own preconceptions. There, a black, female judge acquitted a young black man of assault, engaging in 'contextual judging' to favour the accused's testimony. Justice Ipp cautions that the cause is 'a sharp reminder that judges should examine their own subconscious attitudes and biases'.

Judges and tribunal members may harbour actual bias without being aware of it. That this is so has been the subject of increased judicial awareness:

> *A decision-maker may not be open to persuasion and, at the same time, not recognise that limitation. Indeed, a characteristic of prejudice is the lack of recognition by the holder. … Decisions made upon assumptions or prejudgments concerning race or gender have been made by many well-meaning judges, unaware of the assumptions or preconceptions which, in fact, governed their decision-making. Thus, actual bias may exist even if the decision-maker did not intend or did not know of their prejudice, or even where the decision-maker, believes, and says, that they have not prejudged a case.*[4]

Regardless of the prevalence of these forms of bias, which are to some extent inevitable, the issue is not existential — it is whether their presence gives rise to a reasonable apprehension of bias on the part of the public. General assumptions about causality, phenomenology and morality are unlikely to have this effect.

[4] *Sun v Minister for Immigration and Ethnic Affairs* (1997) 151 ALR 505, 563–4 (North J).

### E *Relatives, Personal Friendships or Dislikes*

Whether a relationship with one of the parties will disqualify an adjudicator depends on its intensity. The Australian Chief Justices' *Guide to Judicial Conduct* classifies them by degree:

- Primary tier: Parents, children, siblings, spouses, domestic partners
- Secondary tier: Grandparents, grandchildren, aunts, uncles, nephews and nieces, in-laws
- Tertiary tier: Cousins, other relatives[5]

However, in all these circumstances, it is still essential to identify a connection between the source of bias and the resulting decision. No such connection existed in *Kaycliff v ABT*.

**_Kaycliff Pty Ltd v Australian Broadcasting Tribunal_ (1989) FCA:**

<u>Facts</u>
- The Tribunal Chairperson's husband had been critical of advice given by a solicitor to one of the parties
- The wife had not talked to her husband, and his views were his own

<u>Issue</u>
- Could bias reasonably be apprehended?

<u>Reasoning</u>
- Must be able to trace the bias through to the decision-maker
- Here, no evidence of an opinion conduit from husband to wife
- I tribunal should not be deflected by assertions as to its views by apparently credible third parties
- Treat spouses as fully autonomous unless evidence to the contrary

<u>Decision</u>
- No apprehension of bias

Similarly, knowledge of the witnesses does not necessarily disqualify a judge, especially if the area is regional (*Trustees of Christian Brothers v Cardone*).

### F *Professional Involvement*

Upon crossing the bar table, judges are not required to go 'into some form of monastic seclusion', nor could they. They maintain various ties for former colleagues, professors, law schools, and former clients or other parties. In much the same way, but to a greater extent, tribunal members maintain other connections outside of their adjudicatory roles — often in political or commercial contexts. Thus, for reasons of practicality, not all forms of prior contact will lead to disqualification. However, continuing involvement may lead to this result. In all cases, the basic question to be asked is whether the involvement is such that a fair-minded observer might reasonably apprehend bias as a result (*Ebner*).

[5] Council of Chief Justices, *Guide to Judicial Conduct* (2003) 3.3.4.

A judge's past may make them unsuitable to judge; however, there is no clear line of separation between past work and continuing duties. What is important is the connection between their history and the public's apprehension of bias:

> *Every judge has a past. The question … is whether something in that past would be seen by the reasonable or fair-minded observer as having the potential to divert the judge from deciding the case on its merits.*[6]

Relevant factors when determining this issue include:

- The nature and intensity of the previous relationship
- The duration of the previous relationship
- Whether the relationship is continuing or ceased
- If it has ceased, how much time has elapsed
- Whether the previous relationship relates to the current matter

A fair minded observer would not apprehend bias just because the judge, or his wife, engaged the solicitor of one party to draft his will (*Taylor v Lawrence*). However, the result may well be different had a will been amended by the solicitor on the night before judgment is handed down.

A judge cannot prosecute as well as adjudicate (*R v Leckie; Ex parte Felman*).

Ex-barristers are instantly able to overcome their ties to those who previously briefed them (*Westcoast Clothing Co Pty Ltd v Freehill Hollingdale and Page*).

A prior relationship in the capacity of legal adviser does not generally disqualify the adviser from hearing a case involving their former client, or to which he or she is a party. However, if the advice given induced conduct which is the very subject of the present determination, disqualification will occur (*Re Polites; Ex parte Hoyts Corp Pty Ltd*):

> *If the correctness or appropriateness of advice given to the client is a lve issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser could not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate.*[7]

The issue of prior advice arose most recently in the High Court in *Kartinyeri's Case*. There, Callinan J stepped aside on the basis of previous professional ties to the defendant.

### ***Kartinyeri* (19xx) HCA:**

Facts

- Previous to his appointment to the High Court, Callinan QC had given advice to the Commonwealth in relation to the *Bridge Case (No 1)*, which is substantially relevant to the present proceedings
- Callinan J argues that he gave advice to the senate (and not the government), which was not a party

[6] *Wentworth v Rogers* [2002] NSWSC 1198, [24] (Barrett J).
[7] *Re Polites; Ex parte Hoyts Corp Pty ltd* 91991) 173 CLR 78, 87–8.

- Callinan J also argues that his opinion was confined to legal issues, rather than the present challenge, which was constitutional in nature
- He later discovers that he had, in fact, given advice to the government, and steps aside voluntarily

There are clear practical limitations to the application of the bias rule in these scenarios. At first instance, the judge will decide themselves whether to step aside. While this may be appealed, it is unlikely to be overturned except in the most questionable of circumstances, especially where a superior court is concerned. In *Kartinyeri*, for example, if Callinan J had not stepped aside, there would have been little that the parties could have done.

### G *Improper Contact*

Judges and magistrates of judicial bodies must not have any form of contact with parties, witnesses or their advocates unless both parties are present. Any other contact will be improper and give rise to a reasonable apprehension of bias (*Re JRL; Ex parte CJL*).

**_Re JRL; Ex parte CJL_ (1986) HCA:**

Facts
- A court counsellor, who was a potential witness in proceedings, initiates a meeting with a Family Court judge
- They confer privately, albeit briefly, in her chambers
- The judge immediately disclosed to both parties what transpired and called for responses to her strongly expressed views

Issue
- Is there a reasonable apprehension of bias?

Reasoning
- The meeting itself is sufficient to give rise to a reasonable apprehension of bias
- Informing the other judges is insufficient to remove that apprehension
- The judge should have distanced herself from the improper *ex parte* contact by expressing disapproval and stating that she would put it out of mind
- Mason J: the bias rule does not prevent a judge consulting with court personnel or 'with other judges who have no interest in the matter'

Decision
- Yes, there is

A similar rule applies in relation to governmental officials. However, a lower degree of isolation is required. For example, in *Peko-Wallsend*, the Court held that *ex parte* contacts with opposing parties were permissible for administrative and Ministerial inquiries, providing that the other party was afforded a chance to respond. R *v Coburn* concerns a public service officer.

***R v Coburn*** **(19xx) HCA:**

Facts
- A police officer is disciplined following charges brought by another officer
- The public services officer visited the relevant prison and conversed with the other officer (bringing the charges) in the absence of the accused (analogous to a judge meeting with the prosecutor without the accused being present)

Issue
- Is there a reasonable apprehension of bias?

Reasoning
- Muirhead J: nothing improper had been done
- The statutory provisions governing disciplinary proceedings obviated the need for formal hearings and prioritised speed of disposition; an appeal to a court-like tribunal was also possible
- However, the initial hearing was not meant to be court-like, so investigators are not under the same obligations as judges

Decision
- No reasonable apprehension of bias

## H *Prejudgment*

Pre-judgment is said to occur when a decision-maker approaches a live issue not having an open mind to the merits of the case. If the decision maker has prejudged the issue, they come to the decision with a closed mind. In doing so, they will not consider the issue on its merits, subverting the purpose of review or judicial determination.

As a matter of procedural fairness, a judge should direct counsel towards live issues and allow them equal opportunity to make arguments about them. However, the issue will arise when a judge's comments during the course of a trial give rise to an apprehension of prejudgement, and hence bias.

### 1 *Contextual approach*

Judges are required to approach each case no the fewest possible preconceptions about it, the parties or their witnesses. However, they are also deemed to possess 'a highly trained capacity to forget things they should not know'. Conversely, Ministers, departmental officials, and tribunal members are required to exhibit a lesser degree of judicial detachment. Correspondingly, they are also deemed to be less able to exercise their adjudicatory function in a disciplined manner.

### 2 *Relevant factors*

Prejudgment normally arises when a decision-maker expresses an opinion on how the case is going to be decided. Factors for determining whether prejudgment has occurred include:

- The stage of the trial at which the impugned remark was uttered
    - Earlier more likely to evidence prejudgement: *Kaycliff v ABT*
    - *ANI v Spedley Securities* (interlocutory, pre-trial proceedings)

- The manner in which it was expressed
    - Indicative of closed-mindedness or willingness to enter into argument?
    - The judge or member may simply have been directing counsel to a live issue

- If the adverse finding occurred in previous proceedings, whether they are related to the present matter
    - Witness credibility: *ANI v Spedley Securities*
    - Adverse finding against a current party or relevant witness

- If the comment was made extra-judicially, its language and any associated issues

3 *Extra-judicial comments*

Judicial writings on various matters are helpful to barristers preparing arguments. Prolific judicial writing also instils confidence in parties that the judge is knowledgeable (eg, Justice William Gummow's voluminous writings on equity).

The issue of at what point an opinion becomes bias thus seems rather a moot point. It is, to some degree, inevitable. It doesn't necessarily prevent a judge hearing a case on its merits, and may actually improve the ability of a decision-maker to grapple with complex legal and factual environments. Thus, far from undermining the public's confidence in the judicial or tribunal systems, extrajudicial comments are likely to enhance it.

4 *Previous proceedings: witness credibility*

Rulings in previous proceedings on similar facts or on the same witness' credibility may give rise to an apprehension of bias (*ANI v Spedley Securities*). It is arguable that, as a matter of convenience when deciding related matters, some pre-judgments ought to be permissible. Indeed, taken to its logical extreme, if two identical cases arise, the doctrine of precedent would demand prejudgment, at least to the extent that the facts are the same.

***Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) NSW SC:**

Facts
- A judge hears interlocutory applications in connection with several interrelated cases
- His Honour expressed concerns about the credibility of two men who were critical witnesses in all of them
- The proceedings were structured so that each party would be bound by the outcome of any finding on an issue in which they had participated
- It is alleged that in conceiving of the case in this manner, the judge had prejudged the case's outcome

Issue
- Are observations made at an interlocutory (pre-trial) stage grounds for preventing that judge hearing the trial?

Reasoning
- Would the judge necessarily go on not to decide the case on its merits?
    - Arguably, having taken evidence and heard argument, no indication that the judge will not consider relevant factors

  - Important part of pre-trial proceedings: judge ought to express an opinion about appropriateness for trial
  - May not divert the decision-maker from assessing the claim on its merits
- Majority: there is an appearance of prejudgment
  - The argument of convenience for consolidating all the trials into one cannot be upheld

Decision

- Majority of NSWCA: should have stepped aside for the trial

5 *Previous decisions: general*

Prejudgment cannot normally arise from a previous, though related, proceeding unless it involved an adverse finding against the credibility of a party or witness (see *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corp Ltd*).

6 *Stage of hearing*

Whether a comment evinces prejudgment will depend partly on the stage of the trial at which it was made. An opening statement that expresses tentative views about one of the parties is unlikely, when made by a tribunal member, and after reading the relevant claim documents, to give rise to an apprehension of bias (*Kaycliff v ABT*).

### ***Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) FCA:**

Issue

- Is there a reasonable apprehension of bias?

Reasoning

- 'The stage at which a preliminary view is announced appears to us to be relevant. For example, if at the end of the evidence, but before addresses, a judge expresses strong suspicion about a witness' veracity, one would hardly expect a claim of ostensible bias to be made.'
- A judge may express an opinion and even form a tentative conclusion, so long as that opinion is 'subject always to the possibility of their being changed by further evidence or argument, as they go along'
- 'It can be useful for the parties to be given an insight into some or all of a court's or tribunal's developing opinions. Much depends on the personal style of the particular judge or member'
- '[W]e do not regard this court as having the function of minutely scrutinising expressions used by members of administrative tribunals during the course of hearings before them to find, if possible, some impropriety'

Decision

- No, no such apprehension

By contrast, in a case involving a judge trying a criminal case without a jury, to strongly object to the calling of witnesses on the basis of their lack of objectivity evidences prejudgment (*Vakauta v Kelly*). In such circumstances, the judge crosses 'an ill-defined line' between permissible and

impermissible comment (per Brennan, Deane and Gaudron JJ). Arguably, however, all the judge did was voice privately helped preconceptions, which may well be present (and operative) in many other cases.

'[I]t is not enough that the decision-maker displayed irritation or impatience or even used sarcasm.' (*Sun v Minister for immigration and Ethnic Affairs* per Wilcox J). However, if there is visible hostility between counsel and judge, as where argument becomes overly heated or degenerate, the judge may be disqualified (*R v Lars*).

A tribunal officer who makes a public statement repeating the allegation of infringement, is subsequently sued for defamation, and relies on the substantial truth of a certain imputation defence, will not be disqualified for prejudgment (*Laws v Australian Broadcasting Tribunal*). Although the allegation of infringement is the very matter to be decided by the tribunal, a reasonable observer would appreciate that a defence pleading does not necessarily represent that party's personal belief, views of admissions (Mason CJ and Brennan J). Gaudron and McHugh JJ also held that no bias would be apprehended, for though a reasonable bystander would believe that the tribunal believes in the veracity of their statement, they would also believe that its members were amenable to persuasion and not in any way shown to be closed-minded.

Another option might have been for the tribunal to stay the defamation action and not file a defence until the trial is complete (however, this may still give the impression that the tribunal will 'make the statement true' in order to exonerate themselves from liability). By far the most compelling approach to this scenario is, however, to prevent a party who initiates the separate legal proceedings from subsequently relying on statements made in connection with those secondary proceedings to disqualify the defendants to those proceedings from deciding the case.

### 7 *Application to Ministers and departmental officials*

Certain experienced tribunal members are sometimes subjected to the same standards of impartiality expected of judges (*Bohills v Friedman*). However, as was noted in *Epeabaka*, a generally more lenient standard is applied. See further *Jia*.

# III *Exceeding Powers*

## A *Ultra Vires and Jurisdictional Error*

Jurisdiction is the authority to decide.[8] Jurisdictional error is thus where a body or tribunal makes a decision without the authority to decide. It provides a ground for reviewing a decision made by such a body or tribunal. Jurisdictional error was a ground of judicial review at common law.

Ultra vires, meaning 'beyond power',[9] is an analogous ground of review applied in the context of the executive branch of government. Historically, it differed from jurisdictional error in two important ways.

### 1 *Applicable Bodies*

First, where jurisdictional error applies to courts, ultra vires applies to the exercise of administrative power by officials and tribunals. Prior to the *Anisminic Case*, tribunals were said to exercise quasi-judicial power and were hence subject sometimes to review only on the basis of jurisdictional error (and not ultra vires).[10] Today, however, tribunals are counted among members of the executive branch and accordingly exercise administrative power.

### 2 *Scope of Application*

Second, ultra vires is broader than jurisdictional error as a ground of review. Jurisdictional error solely concerns whether a court (or, historically, a quasi-judicial tribunal) had power to decide a question. Such a body could still exercise the power improperly. However, ultra vires requires that any grant of executive power is subject to the condition that it is exercised with propriety.

This gives rise to a broader concept of ultra vires — various tests and duties designed to determine whether the executive power to make a decision on a matter has been exercised properly. They are grouped together under the general heading of 'broad ultra vires'.

Thus, if a body is classified as judicial or quasi-judicial in nature, excess of power will only form a ground of review to the extent that the body exceeded its jurisdiction. However, decisions by an administrative body may be reviewed on the broader ultra vires ground, which encompasses not only jurisdictional error but also the extended concepts of misuse of (administrative) power. Naturally, this gave rise to lengthy arguments between litigants as to whether the relevant body was of an administrative or judicial character.

Today, however, these distinctions '[have] all but evaporated':[11]

- All bodies within the executive arm of government are said to exercise administrative, not judicial or quasi-judicial, power; this limits the importance of the distinction, if any, for the purposes of administrative law (*Anisminic*);

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[8] *Abebe v Commonwealth* (1999) 197 CLR 510, 524 (Gleeson CJ and McHugh J).
[9] Note that 'vires' is, in its Latin form, already plural. 'Vis' is the singular formal; however, both translate as 'power'.
[10] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
[11] Christopher Enright, *Federal Administrative law* (2001) 378.

- Error of law is now a viable ground of review at common law (*R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*), meaning that decisions by judicial bodies can today also be reviewed on many of the grounds covered by broad ultra vires;
- Courts reviewing administrative decisions no longer attempt to classify a body as judicial or administrative and use the phrases 'jurisdictional error' and 'ultra vires' interchangeably (*David Jones Finance & Investment v Commissioner of Taxation*).

The collapse of the categories demarcating jurisdictional error and ultra vires has led some commentators to speculate that the distinction, if any, is 'purely semantic'.[12]

## B *Common Law Avenues of Review*

### 1 *The High Court's Jurisdiction*

Section 75(v) of the *Constitution* confers upon the High Court of Australia the power to grant remedies of prohibition, mandamus and inunction against an officer of the Commonwealth. Because the jurisdiction is not susceptible to statutory abrogation, it continues to provide a useful avenue of review in circumstances where lower courts would be unable to hear another form of statutory judicial review.

The High Court's jurisdiction under s 75(v) will ordinarily be invoked 'to correct a jurisdictional error by an officer of the Commonwealth, manifested either as a want of jurisdiction, an excess of jurisdiction or a failure to exercise jurisdiction.'[13] Whatever the resemblance of common law jurisdictional error to broad ultra vires today, the constitutional avenue continues to remain open to litigants appealing decisions by Commonwealth officers.

### 2 *Jurisdictional Error*

Jurisdictional error is theoretically a ground for reviewing any decision made pursuant to a statutory instrument. If the ground is successfully pleaded, a writ of prohibition may be issued to set aside the decision.

The precise meaning of jurisdictional error as a ground of appeal will vary with the context in which a decision is made. In particular, the scope is typically narrower when considering decisions made by a court than when considering decisions made by a statutory body, such as a tribunal (*Craig v South Australia*):

> *An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act.*[14]

The result will be the issue of a writ of certiorari, which has the effect of quashing the infected decision. Such a writ will be issued where the order 'is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.'[15]

[12] Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (1987) 11.
[13] Robyn Creyke and John McMillan, *Control of Government Action: Text Cases and Commentary* (2005) 792.
[14] *Craig v South Australia* (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
[15] Ibid.

## C *Narrow Ultra Vires*

Sections 5(1)(c) and 5(1)(d) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provide for ultra vires as a ground on the basis of which a court may review an administrative decision. The equivalent provisions in s 6(1) provide for review on the same ground of conduct relating to such a decision:

> ***Section 5 — Applications for review of decisions:***
>
> (1) A person who is aggrieved by a decision to which this Act applies … may apply … for an order of review … on … the following grounds:
>
> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

There are several aspects to narrow or 'simple' ultra vires:

### 1 *The Decision-Maker Must Be Authorised*

If a decision-maker is not authorised to make the decision, their decision may be reviewed by virtue of s 5(1)(c) of the *AD(JR) Act* or on the basis of common law narrow ultra vires. Whether this is the case involves assessment of the qualifications and characteristics of the decision-maker by reference to any statutory or other requirements:

- **Identity:** if X is authorised to make a decision, but Y in fact makes it, then the decision will be invalid;
- **Qualifications:** to validly exercise power, a decision-maker must be qualified; that is, they must meet any requirements of appointment and stature to which they are subject;
- **Appointment:** relatedly, the decision-maker must have had power properly conferred upon them by a valid process of formal appointment;
- **Disqualification:** any conditions of disqualification must not have been met (eg, age, bankruptcy); if they are met, the decision-maker is removed from office with the effect that they no longer have authority to make decisions from that point;
- **Constitution of the body:** the tribunal must be properly constituted
    - Power must be exercised in the right division (eg, civil or criminal)
    - The members must be present (eg, quorum met)

### 2 *The Decision Must Be Authorised*

The decision itself must also be authorised. A decision will only be authorised when it is made pursuant to and in accordance with the enactment conferring authority. Thus, determinations

falling outside the scope of the conferral of power will be unauthorised and, hence, nullified by operation of ss 5(1)(d) and 6(1)(d) of the *AD(JR) Act*.

Determining whether a decision is authorised entails several elements:

- **The type of power conferred:** if X is authorised to do P, X cannot do Q;
  - Authority to prohibit pollution from open fires does not entail authority to prohibit such fires themselves (*Paul v Munday* (1976) 9 ALR 245)
  - Authority to operate trams does not entail authority to operate buses (*London County Council v Attorney-General* [1902] AC 165)
  - Authority to prosecute does not entail authority to make an appeal against conviction (*Bond v The Queen* (2000) 169 ALR 607)
  - Authority to hear a civil matter does not entail authority to try a criminal case (*Craig v South Australia* (1995) 184 CLR 163, 177)

- **Over whom the power may be exercised:** if the power can only be exercised in respect of certain classes of people, then its recipient may not exercise it over people who fall outside such classes;
  - Authority for bona fide residents of premises to use them for certain purposes does not entail authority for non-residents to use them for those purposes (*Boyle v Charge* (1987) 73 ALR 446)

- **For what reasons the power may be invoked:** if the power can only be brought to bear in certain circumstances or on the satisfaction of particular preconditions, then the power may not be exercised outside of those circumstances or in the absence of those preconditions;
  - If the power requires 'reasonable belief, suspicion or opinion' (eg, 'If the Minister has reason to believe'), it may only be exercised when such a state of mind is held or can reasonably be inferred to have been held;
  - This requirement could be interpreted as purely requiring a subjective belief, as setting a standard of proof (in which case review will involve re-examining findings of fact), or as requiring the decision-maker to adduce reasonable evidence to justify their belief[16]

- **Whether the power was exercised completely:** paradoxically, an exercise of power to an extent less than required goes beyond that power
  - Substantive: where an issue requiring decision has not been decided
    - Example: where a decision-maker must make several findings, one or more of which are not made
  - Procedural: where a decision is not phrased with sufficient clarity or precision (this is technically procedural ultra vires); this applies even if the power is highly discretionary
    - Example: where a notice must specify some particular, which is not specified

### 3 *Primary Issues*

- **Determining the authority of the decision-maker:** whether he or she is qualified or the body appropriately constituted;

- **Characterising the authorised power:** whether the decision-maker is authorised to do X or A;

[16] See, eg, *Liversidge v Anderson* [1942] AC 207

- This proceeds according to the terms of the statutory instrument conferring power upon the decision-maker
- In the absence of specific statutory intention, look to the nature and function of the power (*National Crime Authority v AI* (1997) 145 ALR 126)

- **Characterising the exercised power:** whether the power actually exercised is that conferred or something else; and

- **Characterising the scope or other preconditions** for exercise of the power, and whether these were met.

## D *Broad Ultra Vires*

Sections 5(1)(e) and 5(2) *AD(JR) Act* formalise the specific forms of judicial review on the basis of broad ultra vires. Section 6(1)(e) and 6(2) formalise the same in relation to conduct preceding a decision:

***Section 5 — Applications for review of decisions:***

(1) A person who is aggrieved by a decision to which this Act applies … may apply … for an order of review … on … the following grounds:

(e) that the making of the decision was an **improper exercise of the power** conferred by the enactment in pursuance of which it was purported to be made;

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an **irrelevant consideration** into account in the exercise of a power;
(b) **failing to take a relevant consideration** into account in the exercise of a power;
(c) an exercise of a power **for a purpose other** than a purpose for which the power is conferred;
(d) an exercise of a **discretionary power** in **bad faith**;
(e) an exercise of a **personal discretionary power** at the direction or **behest of another person**;
(f) an exercise of a discretionary power in accordance with a rule or policy **without regard to the merits** of the particular case;
(g) an exercise of a power that is **so unreasonable that no reasonable person could have so exercised** the power;
(h) an exercise of a power in such a way that the **result** of the exercise of the power is **uncertain**; and
(i) any other exercise of a power in a way that constitutes **abuse of the power**.

### 1 *Relevant and Irrelevant Considerations*

Sections 5(2)(a) and 5(2)(b) afford grounds of review where the decision-maker neglected to consider relevant factors, or formed his or her decision on the basis of irrelevant factors:

***Section 5 — Applications for review of decisions:***

(a) taking an **irrelevant consideration** into account in the exercise of a power;
(b) **failing to take a relevant consideration** into account in the exercise of a power;

Statutes can expressly state relevant considerations. More commonly, however, statutes are silent about what is relevant. To construe the relevant considerations depends on analysis of statute as a whole

***Peko-Wallsend*** **(200x) Court:**

Facts

- Another aboriginal land rights claim under the *Aboriginal Land Rights Act*
    - The Aboriginal Land Commissioner was required under the Act to write a report about the claim, taking into account several expressed factors
    - The report is then to be provided to the Minister in charge for determination
    - However, the statute does not set out what considerations the Minister should take into account when exercising his power to determine the claim
- Peko-Wallsend is a mining company; it holds licences allowing it to search for and mine uranium on land that is the subject of a claim
    - It makes submissions to the effect that granting the claim would have a detrimental impact on its operations
    - The Land commissioner recommends for the claim over land to be granted on which Peko-Wallsend, among several other companies, are mining uranium
    - The Minister grants the claim
- Peko-Wallsend, using the *Freedom of Information Act*, secures a memorandum demonstrating that the Minister failed to take into account its submissions as to the effect that granting the claim would have on their business
- It argues that the Minister failed to take into account a relevant consideration and that the decision to grant the claim should be quashed as a result

Issues

- Are the submissions of Peko-Wallsend a 'relevant consideration' which the Minister failed to take into account?
- Can discretionary relief be granted?

Reasoning

- Mason J:
    - Review will only be successful if the Minister fails to take into account a consideration which he is *obliged* to consider
        - The ground will only be made out if a 'decision-maker fails to take into account a consideration he is bound to take into account in making that decision'
    - The statute must insist on its incorporation; general notions of relevance aren't relevant
        - Whether a factor is a necessary consideration is a matter of statutory construction: may be express or implied
        - Express provisions can be either exhaustive or inclusive
        - Implied provisions from the subject matter, scope and purpose of the statute

        - Factors which a decision-maker is bound to consider is a matter of statutory construction by reference to express provisions (exhaustive or inclusive) or implication arising from subject matter, scope and purpose of Act
    - If the provisions confer a broad discretion, then it will be much harder to make out this ground of review
        - 'Unconfined discretion' makes it more difficult to review such a decision by a Minister
    - Failure to take into account a consideration does not of itself justify setting aside of decision
        - The factor must have 'materially affected' the decision
        - Whether the ground succeeds is not normally about the 'weight' which a factor should have been accorded
        - The fact that a decision-maker didn't take account of a consideration *as much as* the aggrieved party would like goes towards unreasonableness, not a failure to consider relevant factors

<u>Decision</u>

- On the facts, the statute does not set out factors which a *Minister* must take into account; however, it does specify factors which the Land Commissioner must consider
    - The Court conducts 'a consideration of the subject matter, scope and purpose of the Act'
    - It concludes that the process in which reports are made gives rise to an implied obligation on the Minister to take into account the same considerations that the Land Commissioner is required to consider
- One of the relevant factors is 'detriment to the interests of affected parties'
- The Minister failed to take into account this relevant factor by not accounting for Peko-Wallsend's submissions
- The decision is remitted to the Minister to be remade in accordance with law

As it happened, the Minister took into account the submissions of Peko-Wallsend, but reached the same conclusion, granting the claim again.

### 2 *Acting for an Improper Purpose*

Discretionary administrative powers are conferred to achieve specific purposes. These purposes are contained in the authorising legislation, whether stated expressly or otherwise inferred. The exercise of power for a purpose other than that for which it is granted is ultra vires, and therefore reviewable under s 5(2)(c) of the *AD(JR) Act*:

***Section 5 — Applications for review of decisions:***

(c) an exercise of a power **for a purpose other** than a purpose for which the power is conferred;

Improper purpose means any purpose not contemplated by the statute. Purpose can be expressed in or implied by statutory provisions. If implied, the implication must occur within the four corners of the statute. In determining the nature and scope of a purpose, courts will examine the legislation as a whole.

Order or enquiry:

**1 Statutory purpose**
For what purpose is the power conferred?

(i) Look at the statutory provisions
(ii) Are objects and purposes express?
(iii) If not, can they be implied by interpreting the subject matter and language of the statute?

**2 Administrative purpose**
For what purpose was the power exercised?

(i) What were the motivations of the decision-maker or the person on whose authority or advice the decision was made?

**3 'Other than'**
Is there a discrepancy between 1 and 2?

The requirement that power be exercised only for proper purposes reflects the public nature of administrative power. Such powers must only be used for the public purposes for which they are conferred, not for private purposes or for 'illegitimate' public purposes.[17]

Prior to *R v Toohey*, the Crown and its representatives were immune from judicial review. However, by this stage, the historical bases on which Crown immunity was based were no longer tenable. As such, the High Court decided that review is possible of decisions made either by the Crown or their representative in their capacity as statutory, though not prerogative, decision-maker (*R v Toohey*). If the purpose for which the decision was made is invalid, the decision is ultra vires.

## *R v Toohey (Aboriginal Land Commissioner)* (1981) HCA:

Facts

- A claim is made to the Kenbi (Cox Peninsula) region pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
- The Act allows claims over 'unalienated Crown land', but such land must not form part of a 'town'
- Before the Aboriginal group can make a claim to the Peninsula, the Northern Territory Administrator (a position similar to governor) makes a regulation declaring that land as land within the town of Darwin
    - This had the effect of substantially increasing the town's area; the land was also geographically separated from the city proper
- The Aboriginal Land Commissioner (Toohey J) found that the land was unable to be claimed due to the regulation, and refused to consider whether it was ultra vires being made for improper purposes or in bad faith
    - He refused on the basis that actions of the Crown are not subject to judicial review (ie, he did not have jurisdiction)
- A writ of certiorari to quash that decision is sought on the grounds that the Administrator is a representative of the Crown

[17] Roger Douglas, *Douglas and Jones' Administrative Law* (4th ed, 2002) 520.

    - The Council argues that the regulation was made for the purpose of defeating the group's land claim, an improper purpose

Issues
- First, is the Northern Territory Administrator a representative of the Crown amenable to judicial review?
- If yes, has he acted for an improper purpose such that certiorari should be granted?

Reasoning
- The Administrator is a representative of the Crown, except in the exercise of its prerogative powers
    - Stephen J:
        - 'A Minister cannot in his discretion "set aside for his period as Minister the obvious intention of Parliament"; he must rather "use his discretion to promote Parliament's intention"'
        - Parliament does not confer powers upon a member of the executive 'in gross, devoid of purposes or criteria, express or implied, by reference to which they are intended to be exercised'
        - Unless Parliamentary intention indicates otherwise, courts can examine whether the exercise of power is within the scope of the statutory grant by reference to the purposes for which it was made
        - This is so regardless of whether the party exercising power is a representative of the Crown, a Minister or 'some other body or person'
    - Hence, power must not be exercised for improper purposes: a statutory power conferred upon authorities subordinate to the Crown may be exercised only for the purposes for which it is conferred
        - The Crown is simply acting on the advice of a Minister, or their delegate, in a formal capacity
        - Because Ministers are subject to judicial review, so should the Crown
    - The Land Council should hear the challenge
    - Precisely what the purposes of the power are is a matter of statutory construction
    - But note Mason J:
        - Agrees that statutory discretions of the Crown are subject to review
        - However, the exercise by the Crown of its prerogative powers cannot be impugned: prerogative powers are 'immune from attack for mala fides'
        - Courts will readily review the exercise of statutory discretion, but are reluctant to review equivalent exercises of prerogative powers
        - This is because:
            - Statutory powers
                - often affect the rights of citizens;
                - are often accompanied by a duty to exercise the discretion one way or another;
                - may be precisely limited in scope;
                - may be conferred for a specific or an ascertainable purpose;
                - are ascertainable by reference to fixed criteria or considerations, express or implied;
            - Whereas 'prerogative powers lack some or all of these characteristics' and are often, 'by reason of their very nature not susceptible of judicial review'
        - However, the historical basis of a King's prerogative is no longer present; to continue treating the Crown as immune in its exercise of such powers 'is a legal fiction'
        - '[T]he foundations on which the legal fiction was built have crumbled'

- The regulation was made for an improper purpose
  - Stephen J:
    - It is for the Land Council to determine, on the basis of evidence, whether or not the regulation was made within the scope of the grant of power

Decision
- Stephen J: the Commissioner's refusal to examine the decision is unjustifiable, so mandamus should go; certiorari is also granted
- Because the regulation was made for an improper purpose, it is not a valid exercise of statutory power

The substantive issue was subsequently decided by Olney J.

### ***R v Toohey (Town Planning Regulations)*** **(1988) FC:**

Issues
- Was the regulation made for a purpose outside the statute?

Reasoning
- Formulations from *R v Toohey*
  - A purpose 'wholly alien' to the statute (Stephen J)
  - 'Extraneous to' the statute (Mason J)
  - For an 'ulterior purpose' (placing the Pensinsula beyond the reach of a land rights claim: Wilson J)

- The relevant motivation is that of the responsible Minister for town planning, under whose advice the Administrator was acting
  - He thought that the *Town Planning Act* (NT) couldn't support the expansion of Darwin
  - He claims that the purpose of the regulation was town planning

- However, there is a 'strong inference' that the regulation was made 'to prevent any further Aboriginal land claims being made to land' in the region
- Trying to defeat a land claim is not a purpose contemplated by the *Town Planning Act*

Decision
- The regulation was made for an improper (extraneous) purpose

Because of subsequent appeals, mala fides changes to evidentiary rules in the Northern Territory, the death of a claimant, subsequent procedural hurdles, and various delays in hearing the redeterminations at Land Councils and in appeal courts, the claimant Aboriginal group was not successful in obtaining a portion of the Peninsula until late 1999!

3 *Acting at the Behest of Others*

Section 5(2)(e) includes within the scope of ultra vires review decisions made at the behest of third parties:

### *Section 5 — Applications for review of decisions:*

(e) an exercise of a **personal discretionary power** at the direction or **behest of another person**;

If a departmental head or subordinate 'automatically obeys' the *ad hoc* policy of their responsible Minister, they will have acted at the behest of another person (*Ipec-Air*). This is because they effectively defer decision-making authority to that other person, which is ultra vires.

### ***R v Anderson; Ex parte Ipec-Air Pty Ltd*** **(1965) HCA:**

Facts

- In 1964, Ipec-Air ('Ipec') applies for a licence that will allow it to expand its domestic Australian air routes to carry air freight between cities
- It applies under the relevant Customs legislation to import the necessary aircraft
- The Director–General has a discretion not to grant permission to fly the new routes; however, he can only refuse to issue a licence if the applicant cannot establish that it will comply with safety provisions (which Ipec could so establish)
- Various correspondence takes place; the Director–General subsequently refuses to grant permission
- Director–General had taken into account the government's 'two airline' policy in refusing the licence
- Ipec challenges the decisions (refusal to issue the charter licence and of permission to import aircraft)
- Ipec argues that because they implemented the required safety guidelines, there was no basis on which permission could be refused

Issue

- Can an order of mandamus be made, setting aside the decision?

Reasoning

- The statute only provided for refusal in the event that safety requirements were not met
  - The Court accepts this argument

- Was the government policy an irrelevant consideration?
  - No, government policy is a relevant factor unless the intention of the statute indicates otherwise
  - The fact that a licence can only be refused on particular grounds does not prohibit an administrative decision-maker having regard to the Minister's view or applicable government policy
  - [Arguably, if a decision-maker fails to take into account government policy they fail to take into account a relevant consideration]

- How should it be taken into account?
  - Ipec argues that the Director–General was not exercising its discretion and instead simply implementing government policy
  - Court: if this was the case, the decision would be set aside
  - It would be ultra vires for an administrative decision-maker to act solely on the basis of the views or policy of a third party

- Majority:
  - However, as a matter of fact, the Director–General still used his independent judgement and not solely on the basis of government policy
  - The Director–General acted independently from and not on the behest of the government
  - He simply considered the relevant government policy

- Minority (Kitto and Menzies JJ):
  - As a matter of fact, policy was here the sole basis for the Director–General's decision
  - Kitto J: he automatically obeyed an ad hoc pronouncement from the government, effectively deferring decision-making to the Minister
  - It would have been different he the Director–General had arrived at a decision of his *own* after taking account of some matter of *general* government policy

Decision

- Mandamus granted with respect to the charter licence application but refused with respect to the import permission

*Ipec-Air* illustrates the difficulty of determining, in the absence of specific references in its reasons, the grounds upon which a decision is made and by what factors it is influenced.

4 *Applying Inflexible Rules Without Regard to Merit*

Section 5(2)(f) of the *AD(JR) Act* provides for review of decisions made without regard to the merits of the case:

***Section 5 — Applications for review of decisions:***

(f) an exercise of a discretionary power in accordance with a rule or policy **without regard to the merits** of the particular case;

Such decisions are conventionally made when decision-makers strictly follow inflexible policy or other rules. A policy will be unlawful when it is inconsistent with the terms of the statute conferring power upon the decision-maker (*Green v Daniels* per Stephen J).

***Green v Daniels* (1977) HCA:**

Facts

- The *Social Security Act 2000* (Cth) sets out a series of statutory criteria for determining whether a person is 'unemployed':
  - They must be 'capable and willing to undertake suitable work'
  - They must have taken 'reasonable steps' to find work
- The Department of Social Security also applies a policy of refusing unemployment benefits to any school-leavers until the start of the following semester
  - This is clearly to prevent year 11 students from receiving the allowance other their summer holidays, but then returning to school the following semester

- Karen Green, a school-leaver, applies for and is refused benefits
- However, the *Social Security Act* said she was entitled to benefits if she had taken reasonable steps to look for work, which she claims to have taken

<u>Issues</u>

- Is the policy no more than an optional instruction to the department how to determine whether the required statutory criteria are met?
    - Or is it a binding requirement?
- If the latter, is the policy lawful?

<u>Reasoning</u>

- Stephen J:
    - It is permissible for government policy to guide the application of legislation
    - However, if government policy is inconsistent with legislative criteria it will be unlawful
    - In this case, the criteria in s 107(c)(i) and (iii) provided for certain definitions of being 'unemployed' and taking 'reasonable steps to obtain such work'
    - However, the policy had the effect of 'superimpos[ing]' upon the statutory criteria a requirement which effectively rendered the statutory criteria inoperative during the summer holidays
    - The policy is therefore inconsistent with the statute and unlawful
- Lawful for the Department to *have* policies (eg, factors involved in determining reasonable steps)
- However, policy must not be inconsistent with the statutory criteria (such policies would be unlawful and impermissible)
- Not reasonable, not consistent
- 

<u>Decision</u>

- Stephen J: remits to the Department to make the decision in accordance with law
    - Director-General advised Parliament to change the law
    - Green was found not to be qualified

The result in *Green v Daniels* highlights one of the limitations inherent in administrative law and, in particular, judicial review mechanisms. Even if a court holds that a decision was unlawful and grants mandamus, the matter is often simply returned to the original decision-maker, who is then entrusted with remaking the decision 'according to law'. In practice, however, this usually means making the *same* decision for a different, or more precisely expressed reason. Most administrators (and their departments) are none too happy to have their decisions brought into question by a court, and for this reason harbour resentment towards applicants. It is thus unsurprising that the substantive aspects of an administrative decision rarely undergo reversal as a result of judicial review.

5 *Unreasonableness*

Unreasonableness is a ground of review at both common law and under the *AD(JR) Act*. Section 5(2)(g) of the Act provides for review in cases where:

***Section 5 — Applications for review of decisions:***

(g) an exercise of a power that is **so unreasonable that no reasonable person could have so exercised** the power;

'Unreasonable' here refers broadly to irrationality. At common law, 'unreasonable' means 'a general description of the things that must not be done.'[18] This test of unreasonableness is also known as *Wednesbury* unreasonableness, after the case in which it was articulated. Unreasonableness in this sense includes taking into consideration extraneous matters (see now above Part V(D)(1)), as well as inflexible application of policy (see now above Part V(D)(4)).

It has been suggested that the *Wednesbury* formulation is redundant, not adding anything to the basic 'irrationality' understanding of unreasonableness. According to Dixon CJ, it is instead purely a way to infer the presence of other errors.[19] In this way, it operates as a kind of 'safety net', catching errors of law unimpeachable by other grounds.[20] This means that there is considerable overlap other grounds of broad ultra vires; in particular, what are now ss 5(1)(j) and 5(2)(j).

Courts are hesitant to examine 'unreasonableness' too broadly. This is the ground that comes closest to trespassing into the realm of merits review. As Mason J noted in *Peko-Wallsend*, the 'limited role of courts' in evaluating the merits of a decision should be emphasised, especially where a challenge is made to the reasonableness of a decision or weighting. For this reason, challenges to reasonableness are rarely successful.

This ground excludes absurd findings of fact (assumptions or determinations without any evidence to support them): *S20*.

***Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) HCA:**

Facts

- An asylum seeker is denied a temporary protection visa, and so seeks to challenge the immigration tribunal's determinative finding of fact as being unreasonable, irrational or illogical

Issue

- Is the decision irrational or illogical?

Reasoning

[18] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] KB 223, 229–30 (Lord Greene MR).
[19] *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360.
[20] See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (2004) 334–348.

- Gleeson CJ:
  - 'Unreasonableness is a protean concept'
  - It is 'necessary to identify and characterise the suggested error, and relate it to the legal rubric under which a decision is challenged…'

- McHugh and Gummow JJ:
  - The *Migration Act 1958* (Cth) intended to exclude *Wednesbury* unreasonableness
  - In any case, the scope of *Wednesbury* unreasonableness is limited to circumstances in which the decision-maker has discretion to determine an issue — not in relation to findings of fact or statutorily mandated conclusions
  - There is therefore no overlap between *Wednesbury* unreasonableness and challenges on the basis of irrationality or illogicality (which would result in jurisdictional error because the decision would not be unauthorised)

- Kirby J: agrees, but the scope might be broader in a constitutional context

Decision

- Because there is no overlap between the grounds, the applicant could challenge the decision in either the Federal Court or the High Court

Luckily for the High Court, *S20* effectively discovered/vested the Federal Court with jurisdiction to hear cases that could otherwise only have been heard by the High Court.

Unreasonableness is 'inescapably qualitative'. Because the impugned decision must be evaluated, it is tempting to confuse unreasonableness and merits review. However, unreasonableness is a substantially narrower basis for review than would be applied in merits review. The fact that unreasonableness challenges very rarely succeed support this distinction. *Paramatta City Council v Pestell* provides an example of a review that was successful on this basis.

***Paramatta City Council v Pestell* (200x) HCA:**

Facts

- Paramatta City Council is a local council in Sydney's suburbs
- It has the power to levy owners of properties so as to fund the creation of works and amenities
- Before it does so, it must be satisfied that the works and amenities will be of 'special benefit' to the property owners being taxed
- The Council decides to impose a levy in a predominantly industrial area, so as to construct works of general amenities; there are pockets of residential properties
- The council imposes the levy, but exempts the residential properties from payment
- As a matter of fact, the works would be of special benefit to the residents
- One of the commercial owners thought they were bearing a disproportionate share of the levy, and brings an action challenging the decision

Issue

- Was there no reasonable basis on which to exempt the residents from payment of the levy?

Decision

- Yes, the was no reasonable basis and the decision should be quashed

*Paramatta City Council* is an exceptional result. Most decisions will not be *Wednesdbury*–unreasonable: if, for example, a statute sanctions racial discrimination, a decision of that nature made pursuant to it will not be reviewable on the basis of unreasonableness, assuming it is in accordance with the statutory provisions.

## E *General Themes*

The statute is critical to construing broad ultra vires grounds of review. The following method of enquiry may prove useful:

1 What is the purported error?

2 Why is this impermissible in the context of the statutory provisions?

**Not examinable:**

- Pre in-class test materials
- Essay: external affairs and corporations power
- Online exercise: FOI and Ombudsman

## F *Hypothetical*

1 Can Hitenmiss challenge the withdrawal of permission to export abalone?

2 Can Hitenmiss challenge the government's report?

2 Can Hitenmiss challenge the regulations under the *AD(JR) Act*?

- Decision to which this Act applies (s 5): s 3
  - Decision (*Bond*)
    - Withdrawal of a licence: yes
    - Making regulations: yes, has finality, effect of law
    - Report?
  - Of an administrative character ([???])
    - Cf legislative: regulations cannot be challenged, of a legislative character
      - Regulations not reviewable
    - Withdrawal of a licence: yes
    - Report?
  - Pursuant to an enactment
    - Licence: yes
    - Report?
  - No exceptions apply
- Aggrieved person: Hitenmiss
- Grounds
  - Procedural fairness: s 5(1)(b)
    - Does it apply?

        - If yes, what does it require?
            - Hearing rule
            - Bias rule
    - Jurisdiction: s 5(1)(c)
        - Depends on the details of the administrative scheme
    - Authorisation: s 5(1)(d)
        - Assume valid appointment, qualifications
    - Improper exercise: s 5(1)(e)
        - Irrelevant consideration?  s 5(2)(a), (b)
            - 'Notoriously unreliable': irrelevant
            - Didn't consider references: relevant
        - Ulterior purpose: s 5(2)(c)
            - To make the DPI look more stringent
        - Acting at the behest of another: s 5(1)(e)
            - Following the government's report
            - Independent decision likely, unlike Kitto J in *Green*
        - Unreasonableness: s 5(1)(g)
            - Unlikely to succeed: some evidence of bad character
- Remedies

2 How can Hitenmiss secure reasons for the decision not to renew its licence?

- No general common law right
- *AD(JR) Act* s 13: need to satisfy threshold requirements, a confined entitlement
- Other mechanisms: *AAT*