



ADMINISTRATIVE REVIEW COUNCIL

**A GUIDE TO
STANDARDS OF CONDUCT FOR
TRIBUNAL MEMBERS**

September 2001
Revised August 2009

Administrative Review Council Information

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Administrative Review Council

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PREFACE

It is appropriate and important to the proper functioning of government that the ways in which the merits of decisions are reviewed are both robust and professional.

The Administrative Review Council's *Guide to Standards of Conduct for Tribunal Members* was first published in 2001. The Guide proved to be an extremely popular and valuable tool for tribunal members and managers.

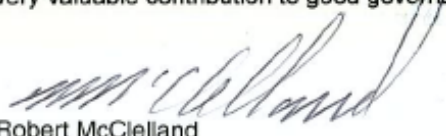
Tribunals play an integral role in maintaining lawfulness, fairness, openness and efficiency in the administrative law system. However, the work of tribunals is continually changing and they are constantly striving to work harder and smarter to meet these changing needs.

This updated version of the Guide has been developed to reflect the evolving role of tribunals and changing public expectations of tribunal members. Accordingly, this update by the Council on appropriate standards of behaviour is very relevant. The publication of guides such as this is an essential part of the Council's statutory role of promoting knowledge and contributing to the discussion of administrative law matters, within government and more widely.

Drawing on core administrative law values, the Council has identified seven major themes – respect for the law, fairness, independence, respect for persons, diligence and efficiency, integrity, and accountability and transparency. The Guide uses these themes to illustrate the standards of conduct expected of tribunal members.

Maintaining high level skills and ensuring personal and professional integrity is an important feature of performance management for members and for tribunal managers and a key to achieving excellence in tribunal outcomes. The Guide provides practical assistance and much food for thought in support of this process.

I trust that this updated Guide will play a key role in promoting discussion and continuous improvement in the area of tribunal performance. If so, it will make a very valuable contribution to good governance in Australia.



Robert McClelland
Attorney-General

August 2009

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PART 1

1 INTRODUCTION

The Guide is intended to set out principles of conduct and professional behaviour to guide tribunal members in light of their public duties and private interests – to the extent that they impact on the tribunal. It is intended to be used as a tool, to promote discussion and awareness of behavioural expectations of tribunal members when performing their duties. It is also a behavioural reference point and an aid to accountability.

The first version of this Guide was published in September 2001 and reflected input from consultations and workshops and comments on an exposure draft. This revision of the Guide reflects consultations undertaken in late 2008 and early 2009 to ascertain the use that had been made of the Guide and suggestions for improvement.

The Council's statutory responsibility under the *Administrative Appeals Tribunal Act 1975* includes monitoring the Commonwealth administrative review system¹ and facilitating the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions. This Guide was originally prepared with members of Commonwealth merits review tribunals in mind. However, it is clear from the consultations that the Guide has a broader application.²

The Council believes that the identification and articulation of principles of conduct for tribunal members should be an ongoing responsibility. These principles of conduct are not intended to be a static statement of tribunal members' obligations. Rather, the Council anticipates that they will evolve over time as tribunal members respond to changing public expectations of them.

The Council of Australasian Tribunals (COAT), set up in 2002 under the auspices of the Council, is now well established and continues to promote interest in standards of conduct for tribunal members. In 2006, it issued its own Guide, the 'Practice Manual for Tribunals', designed to provide practical guidance on various issues, operational and ethical, faced by tribunal members when exercising their powers within a legal framework. A second edition of COAT's Practice Manual was published in early 2009.

¹ The relevant provision, section 51 of the *Administrative Appeals Tribunal Act 1975*, is set out in Appendix 1 to this Guide.

² See for example the *Claims Assessment and Resolution Service Code of Conduct* (part of The Motor Accidents Authority of NSW), the *Code of Conduct for Non-judicial members of the State Administrative Tribunal* (WA) under section 121 of the *State Administrative Tribunal Act 2004* (WA), and the *Arbitrators' Code of Conduct* developed by the Workers' Compensation Commission.

2 DEVELOPMENT OF THE GUIDE

Why ‘principles’?

To distinguish it from more specifically directed codes of conduct, the Council has chosen to describe the standards of conduct for tribunal members contained in the Guide as a set of ‘principles’ rather than a ‘code’.

The principles of conduct are not directed at any particular tribunal. Rather, they are intended to provide broad general guidance to members of all tribunals, allowing tribunals the opportunity to articulate more specific standards according to their particular needs.

Purpose of the guide

The Council encourages tribunal members and managers to use the Guide as a means of promoting discussion and awareness of issues of conduct. In this regard, the Guide can be used as:

A behavioural reference point

Concise and well-publicised principles of conduct can play a valuable role in informing tribunal members of the basic behavioural standards expected of them and in clarifying where the boundaries of acceptable behaviour lie. For tribunal managers, principles of conduct can set a reference point for the development and implementation of performance management programs and facilitate tribunal training activities.

A catalyst for discussion and awareness

The Guide provides the acceptable standard of professional behaviour expected of tribunal members in light of their public duties and private interests – to the extent that they impact on the tribunal. It is intended to be used as a tool, to promote discussion and awareness of behavioural expectations of tribunal members when performing their duties. It is anticipated that the Guide may be of particular assistance in this regard to smaller tribunals with commensurately small training resources.³

An aid to accountability

The Guide is a tool from which a tribunal could develop its own code of conduct or as training material for tribunals. For tribunal users, principles of conduct provide

³ As part of the 2008-09 consultation process, the Council was advised that the Guide has been of particular assistance to such tribunals, for example the Dental Tribunal of New South Wales, the Psychologists Tribunal of New South Wales and the Physiotherapists Tribunal of New South Wales.

reassurance as to the accountability of tribunals and their members, establishing a framework against which an individual's actions can be assessed.

An aid to interaction

At a more pragmatic level, principles of conduct provide a basis for tribunal users to determine what constitutes acceptable behaviour both in and out of the tribunal.

For instance:

...if an agency's publicly available code of conduct sets clear and unambiguous rules in relation to gifts, benefits and entertainment, it is much less likely that staff will be faced with the need to deal with improper offers from those who deal with the agency. And if they occur, the code of conduct is a readily available reference for the public sector member to quote to the offerer in refusing the offer.

In such circumstances, there should be no unsolicited champagne found on one's doorstep...⁴

Factors shaping the principles

Consistency with tribunal values

To be effective, principles of conduct need to be derived from and consistent with tribunal values. The Council has identified five values as critical elements of the administrative review system and, by extension, administrative tribunals:

- lawfulness
- fairness
- rationality
- openness (i.e. transparency), and
- efficiency.⁵

⁴ Comments by the Hon B S J O'Keefe AM QC in a speech delivered on 24 February 1999 entitled 'Australian Public Service Values at Work: Building the Foundation – APS Values at Work', 10.

⁵ Highlighted in the Council's 1996 submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Certain Matters Relating to the Role and Functions of the Administrative Review Council, at paragraph 15.

These provide the basis for the seven values for tribunal members underpinning the principles of conduct:

1. Respect for the law
2. Fairness
3. Independence
4. Respect for persons
5. Diligence and efficiency
6. Integrity, and
7. Accountability and transparency.

In order to facilitate the principles being used as a management tool, they expressly recognise the obligation of tribunal heads to ensure the availability, to members, of adequate support and resources. Principle 8, 'Responsibility of tribunal head', directly addresses this with links to all seven values.

The Council believes that the most effective ethical guidelines are those which take account of the views of those to whom they are intended to apply and those most likely to come into contact with tribunals and their members.

In developing the Guide, the Council has taken account of:

- obligations placed on tribunal members under the general law and by virtue of their position as public/statutory officers
- legislation and administrative regulations relating to the objects of tribunals and the role of members, and
- other relevant value statements often encapsulated in codes and principles of conduct.

The Council took particular note of the status of Commonwealth merits review tribunal members as public officers, accountable not only to those who employ them, but also to members of the public who place their confidence and trust in them by virtue of their office. Although this is reflected in all the principles of conduct, it is particularly evident in Principle 1, 'Respect for the law', Principle 6, 'Integrity' and Principle 7a, 'Accountability'.

By virtue of their status as public officers, the community expects tribunal members to discharge their statutory duties and functions to the highest ethical standards.⁶ To

⁶ Indeed, the ethical standards of those holding positions of public office are greater than those expected of persons who pursue private occupations. For instance, while most people would consider it inappropriate for a tribunal member to appoint a member of their family as a personal assistant or researcher, many professionals employ their partners or other members of their family in the practice.

maintain confidence in our public institutions and assist good decision-making, such standards are essential.

These high expectations of public officers are also reflected in many other ethics statements, codes and principles of conduct referred to by the Council in developing the Guide. These and other sources are discussed in greater detail in Appendix 2.

Relationship between values, principles, law and management

Principles and values

There is substantial overlap between the values and, consequently, the related principles of conduct underlying them. For example, ‘integrity’ may be seen as a prerequisite to ‘fairness’, ‘diligence’, ‘accountability’ and ‘respect for the law’; elements of ‘fairness’ have connections with ‘independence’ and ‘transparency’; and aspects of ‘respect for the law’ have links to ‘diligence’ and ‘accountability’. However, the Council has taken the view that some separation of closely related concepts promotes better understanding.

A number of values may also be regarded as ‘competing’ in the sense that full and unmeasured compliance with one may encroach upon compliance with another. ‘Accountability’ and ‘independence’⁷ have this potential, as do ‘diligence’ and ‘effectiveness’.

In applying the principles it is important not to view them in isolation. Neither they, nor the related values underpinning them, have a hierarchy or order of precedence. Rather, they form an interlocking, sometimes overlapping framework, by which tribunal members should be guided in the performance of their duties.

Principles and law

A number of the issues covered by the Guide reflect matters also dealt with by the law. For example, principles of fairness which translate into principles such as the right to be heard and the absence of bias relate to well-articulated concepts under the common law. Issues of financial accountability are addressed legislatively.

It has been suggested that, given the general professionalism of tribunal members, the only obligation that should be placed on tribunal members is to comply with the law. The Council believes that such a view represents a misunderstanding of the respective roles of principles of conduct and rules of law.

The principles and the law both provide an external framework for the evaluation of tribunal members’ conduct. However, the principles are also intended to guide and encourage sound judgement by tribunal members. Legislation can only play a limited role in this regard:

⁷ Although, as discussed below in relation to Principle 7a (accountability), the conflict here is more apparent than real.

The role of legislation in relation to standards of conduct is necessarily limited...Legislation can provide penalties for defined undesirable conduct, but it cannot itself prevent it occurring. Similarly, it can impose positive requirements, but when these go to desired kinds of behaviour requiring the application of personal judgement...they serve as indicators rather than as objective, measurable standards.⁸

In view of the high standards expected of public officers, mere compliance with the law alone – the minimum standard of behaviour expected of all members of society – is insufficient. This sentiment is reflected in the following comments:

It may be assumed that we come to a consideration of this question [i.e. ethics] upon the premise that at the very least people will obey the law. There is no particular virtue in that. Sanctions by way of penalty exist to compel obedience. It may also be assumed that, other things being equal, people will follow the dictates of their own self-interest and will do so in an enlightened fashion which recognises that such self-interest requires at least some degree of consideration of the rights and interests of others. There is no particular virtue in that either. It is not necessary to be a student of Hobbes to realise, as most people do almost instinctively, that a life devoted to completely self-regarding activity would be “solitary, nasty, brutish and poor.”⁹

Principles and management

In various respects, the Guide ‘rubs shoulders’ with issues of tribunal management. It has been suggested that an understanding of the importance of acting fairly and rationally, and of understanding the role of a member and the jurisdictional limits of the tribunal, are matters best dealt with through the appointment of members with the appropriate skills and knowledge.

For these reasons, the Council agrees that it is critical that the highest standards are applied in the appointment of tribunal members. However, just as heads of tribunals should accept an ongoing commitment to such standards, so too must individual members.¹⁰

⁸ A joint publication of the Management Advisory Board and its Management Improvement Advisory Committee, *Ethical Standards and Values in the Australian Public Service*, MAB/MIAC Report No.19, May 1996, 7. This report preceded the introduction of the *Public Service Act 1999*.

⁹ The Hon Justice M A Gleeson, Opening Address to a Symposium on the Law, the Corporation and the Individual, 25 October 1989, St James Ethics Centre, Sydney. A similar approach is evident in the *Code of Conduct for Members of the Canadian Federal Human Rights Tribunal*. Principle 2 of the Canadian Code provides that members: ‘...have an obligation to perform their official duties and arrange their affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law’.

¹⁰ Principle 5b provides that ‘A tribunal member should take reasonable steps to maintain and to enhance the knowledge, skills and personal qualities necessary to the performance of their tribunal functions.’

Drafting the principles - a general rather than a specific approach

The principles of conduct are couched in general rather than specific terms. The Council is conscious of differences between the statutory frameworks, subject matter and applicants before various tribunals.¹¹

The Council considers that general principles should complement, not undermine, the integrity of tribunal members. Principles of conduct that are too prescriptive may be seen to reduce the independence of tribunal members and of the tribunal as a whole:

...rules are often extremely detailed about what should be self-evident, leaving the average citizen with the impression that those appointed to public life have no moral sense. When this happens, it does more to corrode public confidence than enhance it.¹²

As the High Court said in *Ebner's* case in addressing the topic of apprehended bias:

Issues such as the present are best addressed by a search for, and the application of, a general principle rather than a set of bright line rules which seek to distinguish between the indistinguishable, and which were formulated to meet conditions and problems of earlier times. Furthermore, the brightness of the lines sometimes dims over time, as circumstances change or issues are raised in different forms.¹³

Further:

A rule-bound ethos invites circumvention tactics – technicalities to beat the technicalities – leading to more rules and less personal responsibility for moral judgement thereby discrediting the ‘ethics’ process...¹⁴

The principles of conduct do not remove the responsibility of individual tribunal members to determine the appropriate standard of behaviour and to conduct themselves accordingly. Rather, the principles are intended to provide members with

¹¹ For example, the practical application of Principle 2a of the Guide, ‘The right to be heard’, will necessarily differ depending upon the type of representation permitted before the particular tribunal.

¹² Canadian Ethics Counsellor, Counsellor Howard R Wilson, ‘Ethics and Governance’, Notes for a presentation to the ‘II Global Forum Democratic State and Governance in the XXI Century’ Brasilia, Brazil, May 2000, at page 3 of the Notes. Principles of conduct that are too prescriptive may also be seen to reduce the independence of tribunal members and of the tribunal as a whole, particularly if the principles have legislative status and require the endorsement of Parliament.

¹³ *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337, per Gleeson CJ, McHugh, Gummow and Hayne JJ, at paragraph 32.

¹⁴ Noel Preston, ‘Can Virtue be Regulated? An Examination of the EARC Proposals for a Code of Conduct for Public Officials in Queensland’ (1992) 51(4) *Australian Journal of Public Administration* 410. This is also the view of the Canadian Federal Government: see comments by Canadian Ethics Counsellor, Counsellor Howard R Wilson, ‘Ethics and Governance’, Notes for a presentation to the ‘II Global Forum Democratic State and Governance in the XXI Century’ Brasilia, Brazil, May 2000, 2.

a degree of guidance. In keeping with this approach, each principle is supplemented by a commentary elaborating on its intended application.

Application of the principles

Application to whom?

The principles of conduct are intended to apply to full-time and part-time tribunal members and to tribunal heads.

To be fully effective, the Council believes that principles of conduct need to be embraced from the top down. It has been said in this regard that:

An agency will not have a culture of ethical behaviour unless that culture is manifest in the senior management.

The first duty of managers and supervisors in providing leadership in the area of ethics is...to provide a consistent example of highly ethical conduct.¹⁵

Application to what?

Obligations arising from the duties of public officers have been held to extend to dealings in an officer's private as well as their public capacity.¹⁶ Consistent with this, it has been said that:

...A public official is not off duty if words or deeds off duty may discredit public office...¹⁷

In common with other value statements for public officers, the principles have an application to behaviour beyond a tribunal member's official duties to the extent that such behaviour may impact adversely upon the tribunal.¹⁸

In the areas of bias and conflict of interest, aspects of a tribunal member's private life may be relevant to the performance of their functions as a tribunal member. Additionally, the principles require tribunal members to uphold the integrity and reputation of their tribunal by not engaging in behaviour that may impact adversely

¹⁵ Management Advisory Board and its Management Improvement Advisory Committee Report, *Ethical Standards and Values in the Australian Public Service*, MAB/MIAC Report No.19, May 1996, 14.

¹⁶ Justice Paul Finn, 'Public Officers: Some Personal Liabilities', (1977) 51ALJ 313 at 317 citing *R v Boston* (1923) 33 CLR 386, and *Horne v Borbes* (1920) 27 CLR 501-2.

¹⁷ Michael Jackson, 'Merits, accountability and ethics', *Australian Quarterly*, Spring 1994, 45.

¹⁸ For instance, subsection 13(11) of the *Public Service Act 1999* requires that an APS employee 'must at all times behave in a way that upholds the APS values and the good reputation of the APS'. The approach that private activities can impact on public duties has also been adopted internationally including the Canadian Tribunal Heads' Code of Conduct Steering Committee's *General Principles of Conduct for Members of Federal Administrative Tribunals, A Guide with Examples and Advice*, June 1999, and in the Canadian Judicial Council's *Ethical Principles for Judges*, Ottawa, Ontario, November 1998.

upon the tribunal.¹⁹ It was suggested, during the early consultations, that only behaviour in private life capable of having a detrimental effect on a tribunal's reputation should come within the purview of the principles of conduct. However, the better view is that tribunal members should behave according to the same standards of good character that they apply to applicants – that is, in such a way that would not attract criticism from the tribunal.

Implementation of the principles

As discussed above, the Guide has been used as:

- a basis upon which tribunals have developed their own codes of conduct, and
- training materials for new tribunal members.

However, these are not the only ways in which tribunals could utilise the Guide. Including standards of conduct in tribunal planning processes is a fundamental and effective way of encouraging a principled environment. Many tribunals already include the promotion of standards of conduct in their human resources programs and, in some tribunals, in their performance appraisal processes.²⁰

Induction training is an important element of such strategies, but it must not stop there. Given the changes to tribunal membership over time, and the varying demands and expectations on all members, ongoing and up-date training is also essential.

While training should be responsive to the requirements of each tribunal, the Guide should provide a general starting point for the identification of tribunal member values and standards. Ideally, a training program would include analysis of practical examples of the application of the standards in particular situations. Consideration might be given to the development of a training handbook.

Clear complaint channels should also be developed within tribunals and for tribunal users, although the formality and complexity of complaint channels should depend on the needs and resources of each individual tribunal.

¹⁹ For further discussion of considerations relating to extra-tribunal principles, see the commentary to Principle 1b, (respect for the law). In contrast, the focus of other principles, such as Principle 5a (diligence and timeliness), is on tribunal-related functions.

²⁰ For example, the Migration Review Tribunal and the Refugee Review Tribunal have a code of conduct (see <http://www.mrt-rrt.gov.au/docs/MemCofC010106.pdf>) linked to performance agreements obliging members to:

- behave with propriety and discretion especially in public places where a Member is identifiable as a Member
- behave appropriately and avoid possible perceptions of bias if communicating or meeting privately with migration agents, interpreters or departmental officers, and
- except with the specific and prior consent of the Principal Member, not engage in public debate or make public statements on matters related to immigration or refugee policy or on matters related to the affairs of the Tribunal.

3 PRINCIPLES OF CONDUCT

This section of the Guide sets out the seven values the Council identifies as applying to tribunals, together with their related principles of conduct for tribunal members. An additional principle with links to all seven values is included to reflect the responsibility of tribunal managers to help members comply with the principles.

The principles are to be read in conjunction with the commentary set out in the Part 2 of the Guide. They should also be read in conjunction with provisions relating to tribunal members in tribunal legislation, in the law generally and in any administrative guidelines for tribunals.

1 RESPECT FOR THE LAW

- 1a A tribunal member should demonstrate respect for the law in the performance of their tribunal responsibilities.
- 1b A tribunal member should demonstrate respect for the law in their private life.

2 FAIRNESS

- 2a A tribunal member should ensure that each party to a proceeding is afforded a reasonable opportunity to put their case.
- 2b Bias
 - (i) A tribunal member should act in an impartial manner in the performance of their tribunal decision-making responsibilities so that their actions do not give rise to an apprehension of bias, or actual bias.
 - (ii) A tribunal member should be pro-active and comprehensive in disclosing to all interested parties interests that could conflict (or appear to conflict) with the review of a decision.
 - (iii) A tribunal member should have regard to the potential impact of activities, interests and associations in private life on the impartial and efficient performance of their tribunal responsibilities.
 - (iv) A tribunal member should not accept gifts of any kind where this could reasonably be perceived to compromise the impartiality of the member or the tribunal.

3 INDEPENDENCE

A tribunal member should perform their tribunal responsibilities independently and free from external influence.

4 RESPECT FOR PERSONS

- 4a A tribunal member should be patient, dignified and courteous to parties, witnesses, representatives, tribunal staff and officials and others with whom the member deals, and should require similar behaviour of those subject to their direction and control.
- 4b A tribunal member should endeavour to understand and be sensitive to the needs of persons involved in proceedings before the tribunal.

5 DILIGENCE AND EFFICIENCY

- 5a A tribunal member should be diligent and timely in the performance of their tribunal responsibilities.
- 5b A tribunal member should take reasonable steps to maintain and to enhance the knowledge, skills and personal qualities necessary to the performance of their tribunal responsibilities.

6 INTEGRITY

- 6a A tribunal member should act honestly and truthfully in the performance of their tribunal responsibilities.
- 6b A tribunal member should not knowingly take advantage of, or benefit from, information not generally available to the public obtained in the course of the performance of their tribunal responsibilities.
- 6c A tribunal member should not use their position as a member to improperly obtain, or seek to obtain, benefits, preferential treatment or advantage for the member or for any other person or body.
- 6d A tribunal member should be scrupulous in the use of tribunal resources.
- 6e In private life, a tribunal member should behave in a way that upholds the integrity and good reputation of the tribunal.

7 ACCOUNTABILITY AND TRANSPARENCY

- 7a A tribunal member is accountable for decisions and actions taken as a tribunal member and should fully participate in all applicable scrutiny regimes (including legislative and administrative scrutiny).
- 7b A tribunal member should be as open as possible about all decisions and action (including lack of action) taken in the performance of their tribunal responsibilities.

8 RESPONSIBILITY OF TRIBUNAL HEAD

A tribunal head should assist tribunal members to comply with the principles of conduct, and to perform their tribunal responsibilities, through the provision of appropriate leadership, training and support.

PART 2

PRINCIPLES OF CONDUCT – COMMENTARY

1 Respect for the law

Underpinning this value is the concept of tribunal members, as public officers, having a duty to maintain and uphold the integrity of administrative tribunals and of the administrative decision-making process.

The cardinal importance of adherence to the law arises, not just because particular laws exist, but because in a society in which so much responsibility for the administration of public officers is willingly placed in official hands, the public must be able to rely on the probity of those entrusted with such responsibility.²¹

In keeping with this statement and the scope of the principles of conduct generally, the two principles flowing from the value of ‘respect for the law’ contemplate more than mere compliance with the law. The value and its related principles also encapsulate a commitment to the legal principles binding tribunal members by virtue of their office.

However, as comments by one High Court judge suggest, a ‘respect for the law’ does not curtail independent thought and legitimate debate:

The fact that a person has criticised, albeit in strong language, the decision of a tribunal or court, particularly a decision involving discretionary considerations does not mean that the person regards himself or herself as not being bound by the decision of that Court or Tribunal, or that when the occasion comes to reconsider the matter...the critic will remain obdurately committed to a different, wrong view.²²

Respect for the law is closely related to another value, that of ‘integrity’. In so far as it involves the discharge of a member’s tribunal functions, it is also related to ‘diligence’. Nonetheless, the Council is of the view that ‘respect for the law’ warrants separate consideration, an approach which coincides broadly with that adopted under the Australian Public Service (APS) Code of Conduct.²³

Compliance with the principles flowing from the value of ‘respect for the law’, should not be the sole responsibility of tribunal members. Tribunal heads have an obligation to assist member compliance.

²¹ Management Advisory Board, *Building a Better Public Service*, MAB Report No. 12, 1993, 4.

²² *Minister for Immigration and Multicultural Affairs v Jia; Re Minister for Immigration* (2001) 205 CLR 507, per Hayne J, at paragraph 280.

²³ See for instance, sub-sections 13(1) (honesty and integrity) and (4) (compliance with all applicable Australian laws) of the *Public Service Act 1999*.

1a In the exercise of a member's tribunal responsibilities

A tribunal member should demonstrate respect for the law in the performance of their tribunal responsibilities.

Commentary

In most cases, compliance with the law will satisfy the requirements of this principle. In the performance of their tribunal responsibilities therefore, a tribunal member can demonstrate 'respect for the law' through an awareness and understanding of:

- statutory and non-statutory legal obligations imposed upon tribunal members in the exercise of their functions
- statutory and non-statutory legal obligations under legislation such as the *Financial Management and Accountability Act 1997* and the *Crimes Act 1914*, and non-statutory legal obligations applicable to tribunal members in their exercise of functions, by virtue of their status as statutory or Commonwealth officers
- procedural requirements imposed by the tribunal, and
- any contractual instruments applying to tribunal members in their official capacity.

In particular, members need to be able to distinguish between policy instruments with legislative status, which must be followed, and policy instruments without legislative status, which should be followed unless the policy is itself unlawful, unjust or unreasonable in the circumstances based on sound administrative law principles.²⁴

Where the tribunal member has used best endeavours to comply with the law, the concept of 'respect for the law' allows for minor departures that do not put public confidence in the tribunal at issue. Conversely, in some situations, although committing no breach of the law, a tribunal member's behaviour or comments concerning the law could constitute disrespect.

The Council suggests that when such behaviour has the capacity to damage the integrity or reputation of the tribunal or raise doubts as to the ability of the member to perform tribunal functions in an appropriate fashion, it is in breach of the principle of 'respect for the law'.

²⁴ See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 69-70 by Bowen CJ and Deane J and, subsequently, by Brennan J (as President of the AAT) in *Drake v Minister for Immigration and Ethnic Affairs* (No.2) (1979) 2 ALD 634 at 642-643.

1b In a member's private life

A tribunal member should demonstrate respect for the law in their private life.

Commentary

While strict compliance with the law is not the central focus of this principle, it is obviously a strong indicator of 'respect'.

In his text, *Judicial Ethics in Australia*, the Hon Justice Thomas draws a distinction between offences such as driving offences, where negligence is commonly a major element, and pre-meditated offences such as dishonesty or deliberate violence, on the basis that the former 'does not necessarily stamp the offender as a person of poor character'.²⁵

With reference to drink-driving offences, Justice Thomas suggests that:

Obviously, the circumstances of the case will determine whether the conduct is sufficiently disgraceful. If it shows a disrespect for the law (as distinct from an isolated lapse), then public confidence will be involved and resignation (or if necessary, dismissal) may ensue.²⁶

In the context of tribunal members, Justice Thomas expresses the view that:

In practice, I suspect that [Administrative Appeals Tribunal] members accept the same disciplines as judges, and that is a strong indicator that the same standards apply.²⁷

The principle is not directed at instances of disrespect for the law that may have occurred prior to a member's appointment to a tribunal. Such matters are more appropriately addressed in the context of tribunal appointment.

Unless specifically provided for by statute or administratively, the question of what is and what is not acceptable behaviour must be determined on the basis of the facts of each case. The determinant is the likely impact of the behaviour on the tribunal member and the tribunal as viewed by a reasonable person.

Tribunal members need to be aware of the extent to which the principles should extend into private life and tribunals should carefully align their expectations in accordance with the work they undertake. Individual tribunals should clarify expectations as part of any training program for new tribunal members.

²⁵ The Hon Justice Thomas, *Judicial Ethics in Australia*, the Law Book Company Ltd, Second Edition, 1997, 141.

²⁶ The Hon Justice Thomas, *Judicial Ethics in Australia*, the Law Book Company Ltd, Second Edition, 1997, 140.

²⁷ The Hon Justice Thomas, *Judicial Ethics in Australia*, the Law Book Company Ltd, Second Edition, 1997, 199 and preceding discussion, 198-199.

2 Fairness

2a The right to be heard

A tribunal member should ensure that each party to a proceeding is afforded a reasonable opportunity to put their case.

Commentary

A fundamental requirement of the rules of natural justice is that a party whose rights, property or legitimate expectations may be adversely affected by an administrative adjudication has the right to be heard.

Information obtained by a tribunal that is prejudicial to the interests of a party must be disclosed to provide parties with the opportunity to offer information in response, explanation or rebuttal.

There are no fixed rules governing the form of procedure to be adopted in all cases:

There are...no words which are of universal application to every kind of enquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter being dealt with and so forth.²⁸

However, as a minimum, the tests have been summarised as follows:

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.²⁹

For tribunal members, the statutory requirements relating to hearings in each tribunal will have a bearing upon the practical application of the principle. As many of these requirements are reflected in legislation establishing tribunals, members of those

²⁸ Lord Justice Tucker in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 (CA).

²⁹ *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592.

tribunals should be familiar with the relevant provisions of that legislation. Tribunal client service charters may also contain requirements of which members should be aware.

Particular obligations for a tribunal member beyond those arising legislatively or administratively flow from:

- the application of the principle to unrepresented parties
- the investigative nature of tribunals and the initiative given to members to obtain evidence in any way they see fit, and
- the reliance on personal knowledge.

Unrepresented parties

The application of this principle to unrepresented parties requires some consideration. In particular, although ‘afforded an opportunity to put their case’, an unrepresented party may be unable to seize that opportunity. In such circumstances, compliance with this principle may require a more proactive response from tribunal members. There is, of course, a counter responsibility to ensure that such a response does not give rise to an apprehension of bias (see discussion following in relation to principle 2b(i), ‘Bias and tribunal decision-making’).

Model Litigant obligations

Under the Legal Services Directions the Commonwealth has an obligation to act as a model litigant.³⁰ Being a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act with complete propriety, fairly and in accordance with the highest professional standards. The Commonwealth and its agencies should not take advantage of a claimant who lacks the resources to litigate a legitimate claim and should not commence legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution. The model litigant obligation applies to litigation including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes. Tribunal members should be alert, as a matter of fairness, to monitor the conduct of the Commonwealth, and its agencies as parties before the tribunal to ensure compliance with these Directions.

³⁰ Issued by the Commonwealth Attorney-General pursuant to section 55ZF of the *Judiciary Act 1903*.

The investigative nature of tribunals

There is no freestanding legal duty on a tribunal to assist a person to make the best possible application, to initiate inquiries to supplement the information provided by an applicant, or to advise a person of deficiencies in their application.³¹ On the other hand, the view is taken that in exceptional circumstances there can be a duty on a decision maker to initiate an inquiry to obtain additional information or clarification before making a decision where it would be unreasonable for a decision maker to make a decision without obtaining information that was centrally relevant and readily available.³²

These circumstances may be to foster good administrative practice,³³ where an hypothesis is fairly raised by the evidence,³⁴ where the material contains some omission or obscurity that needs to be resolved before a decision is made,³⁵ where a critical finding is made which is not supported by evidence.³⁶ Such cases are more likely to arise where the applicant is unrepresented,³⁷ or where the disability of the applicant invites a proactive approach by the tribunal,³⁸ and where an inquiry initiated by the tribunal itself places the authenticity of documents otherwise before it in issue.³⁹ Less frequently, there may be a duty to suggest other avenues of eligibility where these have not been raised by the applicant.⁴⁰ The inquisitorial nature of a tribunal also plays a role in determining when further inquiry on the part of the tribunal should be made.⁴¹

³¹ *Enichem ANIC Srl v Anti-Dumping Authority* (1992) 111 ALR 178 at 190 per Hill J (Gummow & O'Connor JJ agreeing); *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at 21-22 per Gummow & Hayne JJ. For a comprehensive summary of the cases to the date of that decision see *Minister for Immigration and Citizenship v Le* (2007) 97 ALD 112.

³² *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155; *Applicant VEAL v Minister for Immigration and Multicultural Affairs* (2005) 87 ALD 512.

³³ *SZJBA v Minister for Immigration and Citizenship* (2007) 164 FCR 14.

³⁴ *Hill v Repatriation Commission* (2005) 85 ALD 1.

³⁵ *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 at 178.

³⁶ *Luu v Renevier* (1989) 91 ALR 39 at 47-50.

³⁷ *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003* (2004) 222 CLR 1.

³⁸ *Applicant VEAL v Minister for Immigration and Multicultural Affairs* (2005) 225 CLR 88.

³⁹ *Minister for Immigration and Citizenship v SZIAI* [2008] FCA 1377 per Flick J. At the time of writing the High Court had granted special leave to appeal.

⁴⁰ *Re Richards and Australian Federal Police* (1999) AATA 724; *Brew v Repatriation Commission* (1999) 56 ALD 403; *Weinstein v Medical Practitioners Board of Victoria* [2008] VCA 193.

⁴¹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* [2003] HCA 60 per Gummow and Heydon JJ, at paragraph 57; *Applicant S v Minister for Immigration and Multicultural* (2004) 217 CLR 387, at 413 per McHugh J; *SZJBA v Minister for Immigration & Citizenship* (2007) 164 FCR 14 per Allsop J, at paragraph 59.

Reliance on personal knowledge⁴²

If tribunal members feel the need to rely on their own expertise or that of other tribunal members, this must be disclosed to the parties to enable them to respond. Members should be careful not to stray out of their own area of expertise.

Tribunal members may have contacts with other professionals in a particular subject area. In situations where there is an 'information void' in a case, it would not be appropriate for a tribunal member to seek the assistance of such contacts without the person being brought before the tribunal, with the agreement of the parties.

⁴² See also the Guide's commentary to Principles 3, 'Independence' (reliance on personal knowledge, experience) and 7b, 'Transparency' (transparency and decision-making).

2b Bias

'Bias' has been described as:

A particular tendency or inclination, especially one which prevents unprejudiced consideration of a question.⁴³

Bias may be actual or apprehended and may manifest itself in the conduct of a member, in the member's personal associations, or interests, or in the method of undertaking the decision-making process including use of extraneous information.⁴⁴ Bias involves an actual or perceived lack of impartiality which has led to the finding by the tribunal. In other words the bias must be causative of the outcome.⁴⁵

Subject to the need to accommodate differences between court proceedings and proceedings before other kinds of tribunals, the High Court has made it clear that the rule against bias would be as applicable to a tribunal as to a court.⁴⁶ Notwithstanding differences between the roles of judicial officers and tribunal members, the standards for apprehended bias are in both cases rigorous.⁴⁷

If bias is established, a tribunal member may be disqualified from hearing or continuing to hear an application. The disqualification rule does not apply if, as a matter of necessity, to prevent a failure of justice (or a frustration of statutory provisions), an otherwise biased tribunal member is the only qualified person available to hear the proceeding.⁴⁸

Actual bias

Actual bias is established only if an applicant for relief can prove that a decision maker was actually prejudiced against them. Actual bias has been described in these terms:

The state of mind...so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented.⁴⁹

⁴³ *Macquarie Concise Dictionary*, Fourth Edition, the Macquarie Library Pty Ltd, 2006.

⁴⁴ See for instance *Webb v The Queen* (1994) 181 CLR 41 at 74, referred to in the majority judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337, at paragraph 24.

⁴⁵ *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow & Hayne JJ, at paragraph 33.

⁴⁶ *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337, at paragraph 4.

⁴⁷ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 per Kirby J, at paragraph 115.

⁴⁸ See, for example, *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, per Mason CJ & Brennan J (as he then was) at 88.

⁴⁹ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 532 per Gleeson CJ and Gummow J. See also *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 and *Johnson v Johnson* (2000) 201 CLR 488.

The onus of demonstrating actual bias lies upon the applicant for judicial review:

The fact that the applicant may have demonstrated that on the decision-maker's provisional views he has an uphill battle to persuade him away from those views is not enough to demonstrate actual bias.⁵⁰

Proof of actual bias is onerous. Hence it is more common for applicants to rely on a claim of apprehended bias.

Perceived or apprehended bias

The test for perceived or apprehended bias is an objective one, related to whether there has been conduct or some event involving the decision maker that might undermine public confidence in the administrative process. The test is one of a possibility not a probability. As stated by the High Court, the test is whether:

...a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.⁵¹

In further elaboration, the Court held that:

Deciding whether a [decision-maker] might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided the question is one of possibility (real and not remote), not probability.⁵²

The interest or association giving rise to apprehended bias can be either pecuniary or non-pecuniary. Non-pecuniary bias may involve:

- a social or personal relationship with a witness, party or representative
- preconceived views for example, views in relation to race, gender or culpability
- a political relationship or affiliation
- an association or professional relationship, or
- a communication between a member and a witness or parties.

Pecuniary bias may involve a financial interest in a party or the matter under consideration.

⁵⁰ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, at paragraph 106.

⁵¹ *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ, at paragraph 6.

⁵² *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ, at paragraph 7.

Application of the rule of apprehended bias relies to some extent on the nature of the decision-making process, and the identity of the decision maker. As noted by Hayne J in *Jia's* case:

The decision-maker, in a body like the Refugee Review Tribunal, will bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or formed in the course of deciding other applications. A body like the Refugee Review Tribunal, unlike a court, is expected to build up 'expertise' in matters such as country information. Often information of that kind is critical in deciding the fate of an individual's application, but it is not suggested that to take it into account amounts to a want of procedural fairness, by reason of prejudgment.

The analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm. It is trite to say that the content of the rules of procedural fairness must be "appropriate and adapted to the circumstances of the particular case". What is appropriate when [a] decision of a disputed question is committed to a tribunal whose statutorily defined processes have some or all of the features of a court will differ from what is appropriate when the decision is committed to an investigating body. Ministerial decision-making is different again.⁵³

Apprehended bias requires more than a mere association between a decision maker and a litigant. For example, in *Ebner's* case, while noting that there are only four major banking groups in the country, that they are all frequent litigants, and that it may therefore be assumed that all Australian judges have an association with a bank, the Court said:

In each case, however, the question must be how it is said that the existence of the "association" or "interest" might be thought (by the reasonable observer) possibly to divert the judge from deciding the case on its merits...unless that connection is articulated, it cannot be seen whether the apprehension of bias principle applies..."an association" will not suffice to answer the relevant question. Having a mortgage with a bank, or knowing a party's lawyer, may (and in many cases will) have no logical connection with the disposition of the case on its merits.⁵⁴

Prior to *Ebner*, the principle was that any direct pecuniary interest disqualified the decision maker from hearing the matter.⁵⁵ It is now settled that there is no separate and free standing rule of automatic disqualification where a decision maker has a direct pecuniary interest in the outcome of an application. The applicable rule is the same as the general test of apprehended bias described above. In the practical application of the general test:

...economic conflicts of interest are likely to be of particular significance, and...the circumstance that a judge has a not insubstantial, direct,

⁵³ *Minister for Immigration and Multicultural Affairs v Jia; Re Minister for Immigration*, (2001) 205 CLR 507 per Hayne J, at paragraphs 180–181.

⁵⁴ *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ, at paragraph 30.

⁵⁵ Based on the decision in *Dimes v Proprietor of Grand Junction Canal* (1852) 3 HLC 751, 10 ER 301.

pecuniary or proprietary *interest in the outcome of litigation* will ordinarily result in disqualification. (emphasis added)⁵⁶

2b(i) Bias and tribunal decision-making

A tribunal member should act in an impartial manner in the performance of their tribunal decision-making responsibilities, so that their actions do not give rise to an apprehension of bias, or actual bias.

Commentary

The following issues are relevant to bias and tribunal member decision-making.

The inquisitorial approach to eliciting evidence

As a result of the inquisitorial approach of some tribunal proceedings, especially where an applicant is unrepresented and the relevant government agency does not participate, a tribunal member may have a far more active role to play than a judge. On the one hand, the member may have to encourage information from the applicant in support of their case. On the other hand, the tribunal is bound to 'test' the applicant's arguments, often vigorously, by asking questions and by turning to alternative information sources such as independent medical reports, particularly if the applicant's account is inconsistent with other material. Finally, the tribunal makes a decision on the basis of this possibly conflicting information.

In seeking to elicit information, particularly where a party is unrepresented, a tribunal member should take care to avoid the appearance of questioning a participant in proceedings aggressively or in a way that could give rise to apprehended bias.

In encouraging information from an applicant, a member should be careful not to give the impression that they are taking over the carriage of a party's case.

Ex parte dealings

Another way in which a tribunal member might offend this general principle is by meeting with one party in the absence of other parties or by holding private interviews with witnesses. Although the member and the party may be talking about no more than the football, the 'meeting' could be perceived by others as relating to an exchange of information about the case at hand. Even something as innocuous as taking a break from proceedings by the entrance to the building and coincidentally talking to others, some of whom might be witnesses in the matter being heard, could give rise to such a perception.

⁵⁶ *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ, at paragraph 58.

2b(ii) Disclosure

A tribunal member should be pro-active and comprehensive in disclosing to all interested parties interests that could conflict (or appear to conflict) with the review of a decision.

Commentary

In order to reduce the likelihood of bias, a tribunal member is required both under the common law and, in some instances, by statute⁵⁷ to disclose any interest that could conflict with the proper execution of the decision-making function. In the absence of a waiver by a potentially affected participant, following disclosure, a member will need to consider whether standing down from the matter is necessary. Although as a matter of law a waiver may be implied, it is for a tribunal member to expressly raise the question of consent with the potentially prejudiced party.

Having alerted the parties to the possibility of bias, the obligation on the member is to invite submissions on the matter and to consider those submissions. Disclosure of a potential interest does not, in itself, give rise to disqualification.

There are a number of reasons for the duty to disclose. First, as noted in *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd and Ors*:

...it cannot be expected that the parties will be aware of, let alone inquire into, potentially disqualifying circumstances concerning a judge or a tribunal.

...In the usual course, the parties are entirely reliant upon disclosure in order to consider whether an issue of disqualification may arise, and if so, whether an application to disqualify is to be made...⁵⁸

Additionally, a proactive approach to disclosure is likely positively to enhance the tribunal's credibility overall, that is:

If the appearances are just and the procedures manifestly fair, the likelihood is that just and fair conclusions will follow. As well, appearances

⁵⁷ See for instance section 14 of the *Administrative Appeals Tribunals Act 1975* (Disclosure of interests by members). The provision relates to interests pecuniary or otherwise and to proceedings occurring or pending. Except with the consent of all the parties to the proceedings, the member is not to take part in the proceeding or a review of the decision to which the proceeding relates.

⁵⁸ Merkel J in *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd, Qantas Airlines Ltd and Federal Airports Ltd* (1994) 135 ALR 753 at 758.

affect the confidence of the community in the...exercise...[of] power on the community's behalf.⁵⁹

More specifically:

The failure to disclose, of itself, can be one of the circumstances which together with others may give rise to a reasonable apprehension of bias... A party or the public may well be left with the impression that there was intentional concealment or non-disclosure, or that something was "wrong about it all". A failure to disclose, no matter how unwitting, can undermine public confidence in the integrity of, and the administration of justice by, the judicial officer or the tribunal concerned.⁶⁰

Further:

...disclosure of itself, necessarily assists in securing the object that justice is "seen" to have been done...⁶¹

As a matter of good practice, disclosure should be required at a relatively low level, that is, members should disclose anything to the parties which they consider might have a bearing on their impartiality. Such an approach coincides with that associated with the Principle 7b, Transparency, discussed below. Early disclosure also assists tribunal planning and allocation of matters for hearing.

Deciding the circumstances in which disclosure should be made could be assisted by considering how the parties or the public might react if the relevant matter were made public. In circumstances where family members appear before a court (or by extension, a tribunal), it has been said that:

Surely the test here is always whether if the losing party finds out that his opponent was represented by the judge's son/daughter, will that party think he got a "fair go", or put another way, if the party unrepresented by the judge's relative were to be told before the case commenced of the relationship between the opposing advocate and the judge, would that party be prepared to go on?⁶²

⁵⁹ *Minister for Immigration and Multicultural Affairs v Jia; Re Minister for Immigration*, (2001) 205 CLR 507 per Kirby J at paragraph 136. In the majority judgment in *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337 it was also said that the rule relating to apprehended bias: '...gives effect to the requirement that justice should both be done and be seen to be done' and that: '...So important is the principle (of tribunal impartiality) that even the appearance of departure from it is prohibited lest the integrity of the judicial (read tribunal) system be undermined.' (paragraphs 6-7).

⁶⁰ *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd, Qantas Airlines Ltd and Federal Airports Ltd* (1994) 135 ALR 753 at 758-759, per Merkel J.

⁶¹ *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd, Qantas Airlines Ltd and Federal Airports Ltd* (1994) 135 ALR 753 at 759, per Merkel J.

⁶² Judge Gordon Lewis, 'When in doubt, out! Judicial Conflict of Interest' *Law Institute Journal*, 68 (12) December 1994, 1176 at 1179.

In some circumstances, a tribunal member may elect to stand aside. In those circumstances, the member should explain to all the parties why this is being done. In deciding whether or not to take this course, the member should take account of the stage the case has reached and the possible additional expense to the parties and the tribunal. In some instances, the parties might be occasioned greater harm if a member were to withdraw from the case than if the member were to proceed. In such cases, disclosure and general communication with the parties (i.e. transparency) is very important.

Although disclosure is primarily a matter of personal responsibility and integrity, the Council considers that tribunal heads have an obligation to ensure that tribunal members are aware of the need to declare conflicts of interest and of the consequences that may result from failure to do so.

2b(iii) Bias arising from a member's private life

A tribunal member should have regard to the potential impact of activities, interests and associations in private life on the impartial and efficient performance of their tribunal responsibilities.

Commentary

Judges are able, because of their security of tenure, to make a commitment to a judicial career and to distance themselves from their political and business associates. However, tribunal members, particularly part-time members, are in a different position and may well have alternative occupations and workplaces.

Nevertheless, and notwithstanding that many tribunal members are appointed to a tribunal precisely because of their knowledge of and interest in a particular group or field of professional activity, a high standard of impartiality is required.

There are no firm rules about the extent to which a member may properly maintain links with groups and activities outside the tribunal. In determining whether a particular activity or involvement is acceptable, a member should consult any relevant legislative or administrative directives. The public interest should take priority in any potential conflict with private activities, and a member should consider how a third party would view the behaviour, and how the activity or association might impinge upon the integrity of the tribunal.

Particular issues

Part-time membership of tribunals

A member's behaviour, outside the tribunal, may be highly relevant to perceptions of partiality or impartiality within the tribunal. Irrespective of who exercises tribunal decision-making powers, whether they are full or part-time members, the obligation with respect to bias remains a substantial one.

Accordingly, a part-time member who engages in another profession, occupation or business should take care to ensure that those activities do not undermine the discharge of responsibilities as a tribunal member.

Part-time members have a positive obligation to arrange their other professional, employment or business affairs so as to minimise the likelihood of conflicts arising which might impinge upon their impartiality or give rise to an allegation of apprehended bias. A part-time member should be prepared to ensure that people from whom they accept briefs or for whom they work in private practice do not appear before them when they are sitting as tribunal members. For example, it might be advisable for a medical member with a practice involving the giving of medico-legal opinions to cease giving such opinions on matters likely to come before the tribunal.

Consistent with Principle 8, 'Responsibility of tribunal head', this is an area in which tribunal heads have an obligation to ensure that adequate training and education resources are available to enable part-time members fully to understand their tribunal responsibilities.

Interests and associations

Politics

Although political affiliations, both past and present, are seldom said to have been the basis for disqualification of judges,⁶³ it appears well settled that partisan political activity in relation to issues of public controversy is not considered appropriate. Such activity may result in perceptions of partiality or bias.⁶⁴

Chapter 15 of the *APS Values and Code of Conduct in Practice*,⁶⁵ the official guide to conduct for Australian Public Service employees and agency heads, provides that:

It is quite acceptable for APS employees to participate in political activities as part of normal community affairs.

However, this right is not totally unfettered. The APS Values and Code of Conduct also says that:

...where a public servant is involved in publicly promoting party or other views on certain issues, and where their duties are directly concerned with advising or directing the implementation or administration of government policy on those issues, then there is potential for conflicts of interest.⁶⁶

⁶³ Judge Gordon Lewis, 'When in doubt, out! Judicial Conflict of Interest', *Law Institute Journal*, 68(12) December 1994, 1179.

⁶⁴ See The Hon Justice Thomas, *Judicial Ethics in Australia*, The Law Book Company Ltd, Second Edition, 1997, 100-101.

⁶⁵ Australian Public Service Commission, Section 4 'Personal Behaviour' (as updated in May 2009), www.apsc.gov.au/values/conductguidelines17.htm.

⁶⁶ Australian Public Service Commission, Section 4 'Personal Behaviour' (as updated in May 2009), www.apsc.gov.au/values/conductguidelines17.htm.

The APS Values and Code of Conduct provides a reasonable starting point for tribunal members.

Accordingly, some partisan political activity might be acceptable for a tribunal member, as long as it does not bring the member into disrepute, is not directly related to the work of the tribunal and does not impinge upon perceptions as to the impartiality of the member and/or the tribunal.

In determining the answers to these questions, some of the matters to which a tribunal member should have regard include: the type of political activity, the level of involvement of the official in this activity, the nature of the tribunal, the position and level of the tribunal member in both the tribunal and the political organisation, and the ability of the person to continue to carry out tribunal activities with impartiality. These considerations will also be relevant to the discussion below.

Associations with community and other organisations

Because tribunal members are often drawn from the field of interest in which the tribunal operates, they are frequently members of social or professional organisations that also have an interest in tribunal proceedings.⁶⁷ It is impractical to require members to cancel all their memberships and, indeed, some wider involvement may coincide with a member's obligation to keep up to date on relevant issues and to provide the tribunal with the benefit of their particular knowledge or expertise. Membership of tribunals by active, knowledgeable people is clearly of benefit to the tribunal system.

Nevertheless, a tribunal member needs to be aware of the potential problems that membership of such organisations may create.

Guidance on this issue appears in the decision of the House of Lords in Pinochet's case⁶⁸ setting aside an earlier order by that House to extradite former Chilean dictator, General Pinochet. In that case it was decided that Lord Hoffmann should not have been involved in the hearing of the earlier case on the basis that he was a member of the Amnesty International Charity Limited, an organisation deeply involved in the work of a party to the case, Amnesty International. This work included development of reports of human rights abuses and torture in Chile.⁶⁹

As noted by Lord Hutton in Pinochet's case, although there was not actual bias:

...the links...between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened...to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand.⁷⁰

⁶⁷ Some tribunals, e.g. the Veterans' Review Board, require a service representative (i.e. someone with a service background), to sit on the tribunal.

⁶⁸ *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [2000] 1 AC 119.

⁶⁹ The House did not consider the position of Lady Hoffmann as an employee of Amnesty International or the fact that Lord Hoffmann was involved in a recent appeal for funds for Amnesty International.

⁷⁰ *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [2000] 1 AC 119, 144.

A similar approach is taken to this issue in the Canadian *General Principles of Conduct for Members of Federal Administrative Tribunals*:

Members may participate in community, professional, charitable or similar organisations, but should consider the potential for bias or conflict arising from their own activities or those of the organisation. For example, a reasonable apprehension of bias was found to exist where a member was the president of a small independent chapter of a national organisation which made strong public comments on an issue which eventually came before the tribunal, although neither the member nor the chapter had taken a position or made a public comment on the issue.⁷¹

While tribunal members may belong to a committee or advisory body which deals with law reform or other legal issues, tribunal members should be mindful that their involvement may include advising on issues which are controversial or inconsistent with their tribunal role. The expression of a conflicting view could diminish respect for the member and the authority of the tribunal.⁷²

It might not only be membership of an organisation that is an issue. In some circumstances, support for an organisation could be equally compromising, particularly if it were in the nature of public comment or writing. Donations to a particular organisation might also be of concern. Even anonymous donations could breach the principle. In assessing the character of their involvement, tribunal members should think about how 'a reasonable well-informed observer' might react if the interest or involvement were to be made public.

Public speaking, teaching, writing

Although these activities have the potential to give rise to an apprehension of bias, it would be unreasonable, in the Council's view, to seek to preclude tribunal members from such activities.

However, tribunal members should ensure that their participation does not create an opportunity for a reasonable apprehension of bias or otherwise affect the integrity and reputation of the tribunal.⁷³ Generally, if a tribunal member is in any doubt about the appropriateness of their membership interests or a public speech or comment, they should consult with the head of the tribunal.

⁷¹ Canadian Tribunal Heads' Code of Conduct Steering Committee's *General Principles of Conduct for Members of Federal Administrative Tribunals, A Guide with Examples and Advice*, June 1999, 20.

⁷² Participation in commercial and personal activities, memberships and involvement with organisations is discussed in further detail in *Guide to Judicial Conduct* (Second Edition), the Australasian Institute of Judicial Administration, 2007, 21-26.

⁷³ While not prohibiting such activities, the Canadian Tribunal Heads' Code of Conduct Steering Committee's *General Principles of Conduct for Members of Federal Administrative Tribunals, A Guide with Examples and Advice*, June 1999, 20, provide as follows in relation to public speaking, teaching, writing and similar functions that may or may not be related to tribunal members' public duties:

'In all such activities, members should ensure that their participation does not create an opportunity for a reasonable apprehension of bias or otherwise affect the integrity of the tribunal.'

In determining the existence of bias, case-law suggests that the courts will have regard to the status of the person making the comments. In the High Court in *Jia*, the court was prepared to accommodate comments by a Minister which would not have been acceptable if made by a tribunal or a court. In particular, while noting the differences between courts and tribunals and the impact of those differences upon the requirements of procedural fairness, Hayne J noted that while courts (particularly appellate courts) are limited to consideration of the evidence before them:

Other decision-makers...may be under no constraint about taking account of some opinion formed or fact discovered in the course of some other decision...Conferring power on a Minister may well indicate that a particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject. ...The application of the rules [about bias or the apprehension of bias] requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker.⁷⁴

See also comments by Kirby J that:

Ministerial decisions are not the subject of the same requirements of actual and manifest independence and impartiality as are required by law of the decisions of courts and tribunals.⁷⁵

The Minister's prior comments in *Jia* did not demonstrate actual or apprehended bias, but the same decision would not have been reached if they had been made by a tribunal member.

It may be more appropriate for tribunal heads to make public statements, in relation to the need for legislative change for instance, or the impact proposed changes might have on the tribunal. In such circumstances, however, the tribunal head should not broach matters relating to a particular case or cases.⁷⁶

Tribunal members also need to be aware of tribunal guidelines concerning communication with the media and with the public generally.

Family member interests

In some circumstances, the pecuniary or non-pecuniary interests of family members may give rise to perceptions of bias on the part of tribunal members.

⁷⁴ *Minister for Immigration and Multicultural Affairs v Jia; Re Minister for Immigration* (2001) 205 CLR 507, at paragraph 187.

⁷⁵ *Minister for Immigration and Multicultural Affairs v Jia; Re Minister for Immigration* (2001) 205 CLR 507, at paragraph 122.

⁷⁶ See article by D Mullan, 'Where Do Tribunals Fit into the System of Administration and Adjudication? - a Canadian Perspective' in R Creyke (ed) *Administrative Tribunals: Taking Stock*, Australian National University, Centre for International and Public Law, 1992.

In the Australian judicial context, it has been said that:

...when the credit, reputation or success (material or otherwise) is in issue of someone in whose favour you are personally prejudiced (be it a son, daughter or old friend) there is a conflict of interest.⁷⁷

This statement coincides with the requirement of the APS Values and Code of Conduct⁷⁸ that:

In carrying out their duties, APS employees should not allow themselves to be improperly influenced by family or personal relationships. Situations may arise where a decision has to be made and that decision would directly affect a person who has a relationship with the decision maker. In these cases APS employees should declare the conflict and should refer the matter to their manager who should be asked to make the decision on the merits of the case.⁷⁹

The potential for actions of family members to impact on the duties of a tribunal member in this area, particularly a part-time member, may well be less than for a judge. However, the overriding test is an objective one revolving around the reasonable apprehension of bias by an informed third party. Personal relationships whether family, friends, professional or other association need to be considered and the appropriate judgement exercised. For example, a past professional association may not itself be sufficient to warrant disqualification from hearing a matter, however, it would be appropriate in regard to recent or current business dealings.⁸⁰ Tribunal members should be aware of relevant disclosure provisions in tribunal legislation.

2b(iv) Gifts

A tribunal member should not accept gifts of any kind where this could reasonably be perceived to compromise the impartiality of the member or the tribunal.

Commentary

The risk in relation to the acceptance of gifts is that the member may be placed, or have the appearance of being placed, under an obligation to a person or organisation that might profit from special consideration on the part of the office holder.

⁷⁷ Judge Gordon Lewis, 'When in doubt, out! Judicial Conflict of Interest', *Law Institute Journal*, 68 (12) December 1994, 1179.

⁷⁸ This approach was also reflected in regulation 8B of the Public Service Regulations under the former *Public Service Act 1922* which, in requiring public servants to disclose situations where their private interests may conflict with their official duties, covered the financial and personal interests not only of the public servant involved, but also the interests of immediate family members to the extent that those were known.

⁷⁹ Section 4 'Personal Behaviour', Australian Public Service Commission (as updated in May 2009), at www.apsc.gov.au/values/conductguidelines17.htm.

⁸⁰ Further guidance is provided in a judicial context in *Guide to Judicial Conduct* (Second Edition), The Australasian Institute of Judicial Administration, 2007, 13-14.

As a general rule, where a gift (whatever its nature or value) could be seen by others as either an inducement or a reward which might compromise the appearance of impartiality, it should not be accepted. For an individual tribunal member, it is suggested that a helpful threshold consideration would be whether or not the gift is being offered to them because of their position as a tribunal member. If the answer is 'yes', they should think carefully before accepting it. It might also be prudent to discuss the matter with a more experienced tribunal member or the tribunal head.

The prudent course would clearly be to refrain from accepting all gifts. However, it is also clear that there may some circumstances where the acceptance of some gifts might not give rise to a reasonable apprehension of bias.

In any event, gifts should not be personally appropriated by tribunal members, but should be retained in a public area of the tribunal such as the registry or (in the case of foodstuffs or flowers) handed on, for example, to a hospital or old age home.

In considering whether accepting a gift will give rise to a reasonable apprehension of bias, a tribunal member should have regard to the nature and value of the gift, the identity of the person giving it, that person's relationship to the tribunal and the context in which the gift is being given.

The line between token gifts of appreciation and those which might compromise the recipient is often not easily defined. The monetary value of the gift will clearly be relevant, though not always. Gifts of a nominal value or customary hospitality such as a cup of coffee or the occasional luncheon are unlikely to give rise to a reasonable apprehension of bias.⁸¹ However, hospitality in a corporate box at a sporting event, or even a ticket to a musical recital or theatrical event may well represent a significant gift.

The identity of the donor is also relevant. For example, a gift from a one time tribunal user who is unlikely to appear before the tribunal again, such as a temporary income support recipient, is unlikely to compromise the recipient's impartiality.

The context in which gifts are given is also relevant. Where a book or a bottle of wine is given in connection with a public event, such as where the member has delivered an address, it is unlikely that the gift would be viewed as an attempt to impinge upon the impartiality of either the tribunal or the member. The public nature of the 'giving' will also be relevant in this regard. Given their greater visibility, gifts to the head of a tribunal may be subject to particular scrutiny.

The principle is wide enough to permit more explicit guidelines to be developed by individual tribunals. The practice of requiring disclosure to heads of tribunals or to some other specifically nominated person within the tribunal of all gifts offered/received is useful in this regard. The practice not only provides members with assistance in determining the correct response, but also assists tribunal transparency and accountability.

⁸¹ If the lunch or coffee were to become a regular occurrence, then it might give rise to concerns about the independence of the tribunal member. Additionally, if it involved only a single tribunal member, then it might be a more sensitive issue.

3 Independence

A tribunal member should perform their tribunal responsibilities independently and free from external influence.

Commentary

While review tribunals are part of the executive arm of government, tribunal members must bring the same quality of independent thought and decision-making to their task, as do judges. It is crucial that members of the community feel confident that tribunal members are competent and of the highest integrity, and that they perform their duties free from undue government or other influence.⁸²

Independence has been defined as:

...The ability to make decisions free from external pressures and without fear of personal consequences including reprisals. Decisions must be based on facts, evidence, expertise, and properly delegated discretion. Independence allows for sufficient freedom to structure the process consistent with the legislation, fairness and natural justice and to deal with the matter placed before the adjudicator.⁸³

The principle is not intended to exclude lawful statutory direction. The objective for merits review tribunals is that they will provide 'merits review that is, and is seen to be, independent of the agency whose decision is under review'.⁸⁴ Demonstrable independence is an important attribute of effective, credible merits review,⁸⁵ and perceptions of a lack of independence have been damaging to the credibility of individual tribunals.⁸⁶

Although tribunal independence is essentially a systemic issue, areas of sensitivity for tribunal members include:

- the position of part-time and public service appointees

⁸² Australian Law Reform Commission, *Managing Justice; a review of the federal civil justice system*, Report No. 89, 2000, at paragraph 2.215.

⁸³ Society of Ontario Adjudicators and Regulators, *Principles of Administrative Justice: A Proposal*, 1995. This publication was updated in April 2005.

⁸⁴ Administrative Review Council, *Better Decisions: a review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, at paragraph 2.51.

⁸⁵ Administrative Review Council, *Better Decisions: review of Commonwealth Merits Review Tribunals*, Report No 39, 1995, at paragraph 2.13.

⁸⁶ Administrative Review Council, *Better Decisions: review of Commonwealth Merits Review Tribunals*, Report No 39, 1995, at paragraph 2.31.

- the interaction between the tribunal and stakeholders including exchange of information with decision-making agencies and social interaction with stakeholders, and
- the extent to which the member might rely on personal knowledge and experience.

The position of part-time and public service appointees

It is incumbent on a part-time or public service appointee to ensure that in the performance of tribunal duties, the member does so to the exclusion of all other roles that the member may possess. Actual and perceived conflicts of interest should be declared in circumstances where there is an affiliation with parties appearing before a member, either through a common employer or association.

Part-time members of tribunals are frequently drawn from organisations or occupations that have an ongoing role in relation to administrative review. As a result, issues common to all tribunal members about balancing obligations may be particularly acute for this group.

For example, lawyers and doctors sitting on a tribunal on a part-time basis may have close professional links with tribunal stakeholders (for example, membership of a group that carries out advocacy or advisory activities in the relevant jurisdiction). In accepting a part-time appointment, a tribunal member should be particularly sensitive to ongoing affiliations and relationships, which might impact adversely on the apparent independence of the tribunal.⁸⁷ Similar issues may arise in relation to public service appointees who are drawn from the decision-making agency, or from a closely related agency.

Interaction between tribunals and stakeholders

There appears to be general agreement that regular interaction between a tribunal and its stakeholders is acceptable. However, the following considerations might assist in maintaining the appropriate separation between interaction and independence:

- balance: in an event organised or attended by a tribunal or its members, participation of stakeholders from all sides should be encouraged; if possible, any interaction between a tribunal member and a stakeholder should be in the presence of stakeholders with different or contrasting perspectives. Indeed, a meeting in which this is considered problematic, might in itself raise questions of impartiality on the part of the tribunal
- transparency: dealings between a tribunal member and a stakeholder should be open and made with the knowledge of their senior or presiding member. Where possible, it is advisable for all stakeholders to be informed if not invited (although this will depend on the nature of the meeting), and

⁸⁷ See also comments in relation to part-time members – Principle 2b, ‘Bias’.

- control: as far as practicable, the tribunal or its members should be in a position to control the form of interaction. For example, it may be inappropriate for an agency to invite tribunal members to its premises for a seminar on government policy, but it may be appropriate for the tribunal to request the agency to address tribunal members on a subject nominated by the tribunal, on tribunal premises. It may also be appropriate for a tribunal member to run training or information sessions for the agency.

The position of a tribunal head might differ from that of a tribunal member. Whereas it might be quite acceptable, and indeed to the benefit of good administrative decision-making, for a tribunal head, representing the tribunal as a whole, to have regular contact with agencies and other stakeholders,⁸⁸ there may be less justification for such interaction on the part of individual tribunal members. It is important that there be consistency across tribunal members in the approach which is taken.

Exchange of information and knowledge with decision-making agencies

The Council's *Better Decisions* report observed that a degree of contact between tribunals and agencies could enhance the normative effect of tribunal decision-making. However, that report also observed that particular kinds of contact can intensify the perception that 'the possibilities for agencies to influence (or to be seen to influence) review tribunals are increased and capable of exercise in subtle ways'.⁸⁹

This is particularly so where a tribunal member's responsibilities relate to reviewing decisions of one particular agency.

In such circumstances, a tribunal may well be required to maintain an ongoing relationship with the agency. Additionally, tribunal members may have repeated dealings with particular agency officials. As a matter of course, a member may develop perceptions as to the capabilities and trustworthiness of particular agency officers. Members should be alert to this possibility, and ensure that they decide each case on its merits.

Social interaction with stakeholders

It is useful for tribunals to participate in functions that bring together a range of tribunal users to discuss issues such as work trends and procedural and legislative changes. Many tribunals already do this, and it is usual for some element of hospitality to be included.

There are differing views about whether it is appropriate for tribunal members to attend social functions hosted by or involving people who may appear before the tribunal, or who may have a general interest in the outcome of a hearing. On the one hand, attendance at what may be regarded as essentially private or closed functions

⁸⁸ Discussions would not be in the context of a particular case, however, but directed rather at systemic and procedural issues. The nature of the agency/organisation and the tribunal may also be relevant.

⁸⁹ Administrative Review Council, *Better Decisions: a review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, at paragraph 4.4.

organised by one particular entity or individual is always inappropriate. Conversely, it may be that some functions give rise to less concern, particularly if large and relatively public (for example, Christmas drinks hosted by a large law firm). However, legal firms often use such functions as marketing opportunities to demonstrate their good relations with tribunals. For these reasons, such invitations should be considered and discussed with either managers or, where appropriate, tribunal heads, before attending.

As a general statement, attendance at functions involving a cross-section of people with an interest in tribunal affairs should not compromise members' independence. However, if tribunal members attend social functions involving persons interested in tribunal decisions or operations, they should be careful to avoid being seen to be influenced by particular interests.

Irrespective of assessments of the propriety of members attending social functions, it will always be inappropriate for a tribunal member to discuss any particular matter at such a function. Similarly, attendance at a social function with the representatives or clients in a matter that is part heard or where a decision has been reserved is inadvisable, unless both sides are present.

Reliance on personal knowledge and experience

It is generally appropriate for a member of a tribunal appointed with specialist knowledge, expertise or experience, to rely on those attributes. However, problems may arise when a member relies on personal knowledge or experience. These problems can be particularly acute in relation to a member, such as a doctor, lawyer or former member of the armed services, appointed for their expert or technical knowledge or background.

Where a tribunal member is appointed because the member has professional skills or background experience, that member should take care to base any decision in a particular case on the facts of that case and not simply on the member's preconceived views or knowledge. Procedural fairness would require such a member to disclose to the parties any specific knowledge derived from their expertise. However, disclosure is only required if the specific knowledge is adverse to the applicant, or if there could be a perception of bias.

A member may have personal knowledge not simply of a particular field, but also of the people who work within it. However, the accuracy of the member's knowledge or information will be untested. This kind of information must not be taken into account without disclosure to the parties.

If a tribunal member has personal knowledge of particular people involved or events at issue in a case, apart from knowledge gained through normal professional association, the member should seek to be excused from hearing the matter. A tribunal member should explain to the parties why the tribunal member is being excused from the case. Alternatively, the member could make full disclosure of the personal knowledge obtained and give the parties the opportunity to respond.⁹⁰

⁹⁰ See also earlier discussion in the Guide concerning disclosure of interests – Principle 2b(ii), 'Disclosure'.

4 Respect for persons

4a Courtesy

A tribunal member should be patient, dignified and courteous to parties, witnesses, representatives, tribunal staff and officials and others with whom the member deals, and should require similar behaviour of those subject to their direction and control.

Commentary

Respect for persons is an important element of any workplace,⁹¹ including a tribunal.

Courtesy to parties, witnesses, representatives

If merits review is to be fair and seen to be fair, it is vital that parties appearing before tribunals are treated with courtesy and respect.

Examples of ways in which courtesy may be demonstrated include:

- using the proper names for parties appearing before a tribunal, and addressing parties respectfully
- listening patiently, carefully and attentively to parties, and
- refraining from making sarcastic or demeaning comments.

Another aspect of respect for parties that can produce unfortunate misunderstandings is the exercise by a tribunal member, of a sense of humour. A former Chief Justice of the High Court made these observations on the point:

Some judges, out of personal good nature, or out of a desire to break the tension that can develop in a courtroom, occasionally feel that it is appropriate to treat a captive audience to a display of wit...When it is not appreciated the consequences can be very unfortunate. Judges and legal practitioners may underestimate the seriousness which litigants attach to legal proceedings, and they can become insensitive to the misunderstandings which might arise if the judge appears to be taking the occasion lightly or, even worse, if the judge appears to be making fun of someone involved in the case...In almost ten years of dealing with

⁹¹ The APS Values, set out in subsection 10(1) of the *Public Service Act 1999*, include the following provisions:
'(c) the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves...

(g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public...'

Section 13 of the *Public Service Act 1999*, which sets out the Australian Public Service *Code of Conduct*, provides that:

'(3) An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment...'

complaints made against judicial officers to the Judicial Commission of New South Wales, I have seen many cases where flippant behaviour has caused unintended but deep offence.⁹²

Courtesy to tribunal staff, officials and others

The obligation to be courteous extends also to colleagues and, in particular, tribunal staff. If a tribunal member has a direct or indirect supervisory role over APS employees, the member will be subject to the APS Code of Conduct in relation to those employees.⁹³ It is improper and unprofessional for a tribunal member to display discourtesy towards any individual.

4b Understanding and sensitivity to needs of persons appearing before tribunal

A tribunal member should endeavour to understand and be sensitive to the needs of persons involved in proceedings before the tribunal.

Commentary

Tribunals deal with a large number of people with a range of backgrounds and experiences. As public officers exercising powers and privileges authorised by Parliament, tribunal members should be sensitive to the needs and interests of parties coming before the tribunal and take those needs and interests into account when determining a matter.

In particular, the value of respect for persons requires a tribunal member to be sensitive to issues arising as a result of gender, culture, sexuality, ability, disability, geographic location and socio-economic factors, such as illiteracy and poverty.

Examples of insensitive practices could include:

- aggressive questioning, and
- making assumptions about the applicant's credibility on the basis of an irrelevant issue, such as language difficulties, the fact that an applicant had not received assistance or representation, or an applicant's attitude to government authority.

Some of these matters may give rise to issues as to the legality of the decision-making process, for example, failure to follow the requirements of procedural fairness. However, the potential for appeal or judicial review (with nothing further) would constitute a cumbersome and incomplete response to such issues. Positive

⁹² The Hon Chief Justice A M Gleeson AC, 'Performing the role of the judge' (1998) 10 (8) *Judicial Officers' Bulletin* at 58 - 59.

⁹³ See *Public Service Act 1999* sub-sections 14(2), (3) and *Public Service Regulations 1999* reg 2.2.

action to ensure understanding and sensitivity is required of both members and tribunals, particularly by way of training.

To the extent that being understanding and sensitive requires active participation by a tribunal member, it is not suggested that members be anything but impartial. Tribunal members must take care not to become de facto advocates for applicants (or for any party). Notwithstanding that, there is room for a value of respect for persons that promotes a heightened awareness of the stresses suffered by any party to a decision-making process, and of the diversities of people engaged in those processes.

Tribunal members also need to be aware of relevant common law, legislative and administrative requirements. Legislative requirements include the principles in anti-discrimination and human rights law, including applicable privacy principles.

5 Diligence and efficiency

‘Diligence’ has been described as ‘constant and earnest effort to accomplish something; pursued with persistent attention’.⁹⁴ ‘Efficiency’ has been described as ‘the fact or quality of being efficient’, that is ‘competency in performance.’⁹⁵ Being efficient is an objective in legislation for most major tribunals which requires that they operate in a manner which is ‘fair, just, economical, informal and quick’.⁹⁶

As most aspects of diligence and efficiency are best dealt with through performance management processes, the focus of the Guide is upon those aspects of diligence and efficiency which have a relationship with other principles of conduct and which require a personal commitment from tribunal members. Nonetheless, timeliness is a key performance measure for which tribunals are accountable in their annual reports, and in assessments by regulatory monitoring bodies.

5a Diligence and timeliness

A tribunal member should be diligent and timely in the performance of their tribunal responsibilities.

Commentary

Diligence

Diligence embraces concepts of thoroughness and care in the performance of tribunal functions, such as:

- a high level of attention to detail, and
- a strong commitment to making correct or preferable decisions on the basis of established facts and the correct interpretation of applicable law and principle.

For instance, a tribunal member should pay sufficient attention to the detail in a matter to identify gaps and inconsistencies in the evidence, and possess sufficient commitment to making a ‘correct or preferable’ decision to follow up those gaps and inconsistencies so that they can be resolved or explained.

The investigative nature of tribunals also imposes particular obligations upon members in relation to this value.

⁹⁴ The *Macquarie Concise Dictionary*, Fourth Edition, the Macquarie Library Pty Ltd, 2006.

⁹⁵ The *Macquarie Concise Dictionary*, Fourth Edition, the Macquarie Library Pty Ltd, 2006.

⁹⁶ See, for example, the *Administrative Appeals Tribunal Act 1975* section 2A.

Some ways in which a tribunal member might respond to this are by:

- identifying when it is necessary to seek further submissions on a matter (for example, if a tribunal member becomes aware of an error or omission in the materials before him or her), and arranging for this promptly, and
- determining when applicants require assistance from the tribunal (for example, information about the tribunal's role and procedures), and giving this assistance clearly and in a timely way.⁹⁷

There is an overlap between this principle and Principle 1a, 'Respect for the law'.

Timeliness

'Timeliness' refers to the need to conduct hearings in a timely manner and to ensure that decisions are delivered within reasonable or specified timeframes and is an important element of 'efficiency'.

Interested parties are entitled to be informed of a decision as soon as possible. There are also obvious advantages in reaching a decision and preparing reasons while all the details are fresh in tribunal members' minds. While this may be addressed through appropriate training, it also requires a positive commitment from individual tribunal members.

In some circumstances, diligence and timeliness have the potential to come into conflict. While undertaking tribunal responsibilities with care and diligence, tribunal members must also be aware of the need to resolve matters as quickly as possible. Conversely, while dealing with matters in a timely manner, tribunal members should also be aware of the need to act with the care and thoroughness that the circumstances and considerations of fairness require.

5b Enhancement of current knowledge and expertise

A tribunal member should take reasonable steps to maintain and to enhance the knowledge, skills and personal qualities necessary to the performance of their tribunal responsibilities.

Commentary

This principle flows from the element of 'efficiency' relating to 'the possession and use of the requisite knowledge, skills and industry'. It has close connections with aspects of Principle 1a, arising from the value of 'respect for the law'.

⁹⁷ For a discussion of the kind of assistance that may be required by unrepresented applicants, see Administrative Review Council, *Better Decisions: review of Commonwealth Merits Review Tribunals*, Report No 39, 1998 recommendation 62, and the Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system*, Report No. 89, paragraphs 9.106 – 9.112. See also Richard Phillips, 'Facing the hazards: ethical issues for tribunal members', *Reform*, 72 Autumn 1998, 17 at 18.

In the *Better Decisions* report, the Council identified relevant skills and expertise of tribunal members.⁹⁸ They were grouped under the following headings:

- understanding of merits review and its place in public administration
- knowledge of administrative review principles
- analytical skills
- personal skills and attributes, and
- written or oral communication skills.

The Council sees tribunals as responsible for the design of training courses and materials and professional development activities capable of fostering these skills in their members.

Although there should be an obligation on tribunals to assist members to acquire and develop the knowledge and skills necessary for the execution of their tribunal functions, there is also a degree of self motivation required on the part of tribunal members in this regard. Without a personal commitment from members, a systemic commitment on the part of tribunals cannot be fulfilled.

⁹⁸ Administrative Review Council, *Better Decisions: review of Commonwealth Merits Review Tribunals*, Report No 39, 1998, at paragraph 4.12.

6 Integrity

‘Integrity’ has been described as ‘soundness of moral principle and character; uprightness; honesty’.⁹⁹ For the purposes of these principles of conduct, it has been translated into the following elements:¹⁰⁰

- honesty and truthfulness
- proper use of tribunal information
- no improper use of position to gain advantage
- scrupulous use of resources, and
- a general obligation at all times to uphold the integrity and reputation of administrative tribunals.

6a Honesty and truthfulness

A tribunal member should act honestly and truthfully in the performance of their tribunal responsibilities.

Commentary

A tribunal member should endeavour to be an individual of the utmost honesty and truthfulness in the performance of tribunal duties.

The principle stems from the concept that tribunal members, as public officers, act in the public interest. It has links with Principle 5a, ‘Diligence and efficiency’, requiring honest effort from tribunal members in the performance of tribunal duties. It overlaps too with Principle 2b(ii), ‘disclosure’, imposing on tribunal members a responsibility to disclose any potential conflict of interest at the earliest opportunity.

6b Proper use of tribunal information

A tribunal member should not knowingly take advantage of, or benefit from, information not generally available to the public obtained in the course of the performance of their tribunal responsibilities.

⁹⁹ *Macquarie Concise Dictionary*, Fourth Edition, the Macquarie Library Pty Ltd, 2006.

¹⁰⁰ These obligations are reflected in the obligations included in the APS Code of Conduct set out in sub-sections 13(1), (6), (8)-(11) of the *Public Service Act 1999*.

Commentary

Tribunal members should treat as confidential information that they acquire in the course of their functions as tribunal members and that is not generally available to the public.

The scope of facts or documents that are the subject of 'a duty not to disclose' is indicated by legislative provisions relating to particular tribunals.¹⁰¹ Tribunal members should be familiar with the legislation applying to their tribunal.

Commonwealth tribunal members should be aware of the *Privacy Act 1988* (and the Information Privacy Principles included in that Act). They should also be aware of the potential application of section 70 (Disclosure of information by Commonwealth officers) of the *Crimes Act 1914*.

6c No improper use of position to gain advantage

A tribunal member should not use their position as a member to improperly obtain, or seek to obtain, benefits, preferential treatment or advantage for the member or for any other person or body.

Commentary

Tribunal members should remember that their appointment places them in a position of power.

Quite apart from legislative requirements, it is an element of integrity that a tribunal member avoid using their position as a tribunal member to gain (or to seek to gain) a benefit or advantage for themselves or for someone else. To do so would represent an abuse of public office.

This standard applies irrespective of whether the advantage is tangible or has significant material worth. The critical factor is a demonstrated commitment by tribunal members in the execution of official duties, giving priority to the application of administrative law values.

¹⁰¹ For example, section 66 of the *Administrative Appeals Tribunal Act 1975* and sections 377 and 378 (Migration Review Tribunal) and 439 and 440 (Refugee Review Tribunal) of the *Migration Act 1958*.

6d Use of resources

A tribunal member should be scrupulous in the use of tribunal resources.

Commentary

The public funds tribunals. Tribunal members should be aware that tribunal resources are to be used for tribunal purposes and should be familiar with tribunal directives issued in this regard.

Tribunal members should also be aware that:

- most Commonwealth tribunals are, or are part of, agencies for the purposes of the *Financial Management and Accountability Act 1997* and are subject to constitutional and statutory requirements about the proper use and management of public money, public property and other Commonwealth resources, and
- misuse of Commonwealth property can attract prosecution under the *Crimes Act 1914*.

6e Obligation to uphold integrity and reputation of tribunal at all times

In private life, a tribunal member should behave in a way that upholds the integrity and good reputation of the tribunal.

Commentary

A practical issue facing tribunals is the extent to which the requirement to act with integrity should encroach upon members' non-tribunal activities and private lives. Consistent with earlier comments in the more specific context of 'respect for the law' and 'fairness', where a member's general behaviour threatens to impact adversely upon the reputation of a tribunal it should be considered unacceptable. On this issue, the following statement is helpful:

...public officials should guard public confidence in the integrity of government by being honest, fair, caring, and respectful. A public servant should not bring disrespect onto the office. A public official is not off duty if words or deeds off duty may discredit public office.¹⁰²

¹⁰² Michael Jackson, 'Merits, accountability and ethics', *Australian Quarterly*, Spring 1994, 45.

Similar obligations apply to a wide range of public offices. For example, under the APS Code of Conduct, public servants are required to:

at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS. (emphasis added)¹⁰³

The types of behaviour which may diminish the integrity and good reputation of the tribunal are manifold. The question of what is or is not appropriate behaviour must be determined on a case by case basis. As a general rule, while a tribunal member's behaviour may not be subject to the same degree of public scrutiny as that of a judge, if conduct is likely to diminish respect for the credibility of a member or the tribunal in the minds of reasonable and fair-minded members of the community, it should be avoided. However, to establish a breach of this principle, there must be a clear connection between the behaviour and the impairment of the integrity or good reputation of the tribunal.

One useful test is whether the behaviour might appropriately be raised by the relevant tribunal head with a member. If the matter is not one the head of the tribunal could legitimately raise and positively influence through their leadership role, then such a matter would fall outside the scope of the Guide.

One way in which a tribunal member might infringe this principle could be by way of public statement. For instance, public criticism by a member of the decisions of other tribunal members, the tribunal's procedures and organisational structure, even if well-founded, may impact adversely on public confidence in the tribunal. A more appropriate way of voicing such dissatisfaction would be to bring the matter to the attention of the tribunal head so that it could be dealt with internally.

¹⁰³ Australian Public Service Commission at <http://www.apsc.gov.au/conduct/>.

7 Accountability and transparency

7a Accountability

A tribunal member is accountable for decisions and actions taken as a tribunal member and should fully participate in all applicable scrutiny regimes (including legislative and administrative scrutiny).

Commentary

Why be accountable?

It has been said in this regard that:¹⁰⁴

Accountability is fundamental to good government. It is one of the cornerstone values of a modern, open society.

The legitimacy of our institutions rests on confidence that public servants and elected representatives will provide a full and honest account of their actions when called to do so and be held accountable. Australians rightly see a high level of accountability of public officials as one of the essential guarantees and underpinnings of efficient, impartial and ethical public administration. Accountability is a central pillar of our political tradition.

At its simplest, accountability involves being called to account to some authority for one's actions.¹⁰⁵ In a democratic state, the key accountability relationships are between citizens and the holders of public office, and between elected politicians and bureaucrats.¹⁰⁶

The Council considers that such comments are equally applicable to tribunal members as public officers. More generally, it has been said that effective accountability to the public:

...is the indispensable check to be imposed on those entrusted with public power...It provides the test and measure of [their] trusteeship.¹⁰⁷

¹⁰⁴ Australian Public Service Commission, *Contemporary Government Challenges: Delivering Performance and Accountability*, (as updated at February 2009) at www.apsc.gov.au/publications09/performanceandaccountability2.htm

¹⁰⁵ G. W. Jones, 'The Search for Local Accountability' in S. Leach (ed), *Strengthening Local Government in the 1990s*, Longman, Harlow, Essex, 1992, 73.

¹⁰⁶ R. Mulgan, "'Accountability': An Ever-Expanding Concept?", *Public Administration*, Vol. 78, No. 3, 2000, 556.

¹⁰⁷ *Report of the Royal Commission into the Commercial Activities of Government and Other Matters*, Western Australia (1992), Part II, paragraphs 3.1.1 and 3.1.6.

What is accountability?

Accountability requires:

...that public officials should ensure that government is conducted openly, efficiently, equitably and honourably and in a manner that permits citizens to make informed judgements and to hold government citizens accountable and responsible...¹⁰⁸

Administrative tribunals themselves represent an important element in the accountability infrastructure applicable to public officers involved in executive decision-making.

Accountability for what and to whom?

Primary lines of accountability for tribunals and their members are to be found in the legislation that establishes them and other mechanisms such as performance agreements, service charters and codes or principles of conduct. All promote accountability by providing a framework against which an individual's actions can be evaluated by an external observer. Merits and judicial review mechanisms are also relevant, as are the review functions of parliamentary committees and the offices of the Ombudsman and the Auditor-General.

Although these lines can be traced to the government of the day,¹⁰⁹ and it is to that government that tribunals, as executive agencies, are accountable in many important respects, as public officers, tribunal members are also accountable to the public who place their trust and confidence in them by virtue of their office.¹¹⁰

While government and its agencies must assume a significant role in the protection of this public trust, each tribunal member should also recognise and accept that the member has a personal responsibility to be accountable according to the applicable legislation and administrative mechanisms.

At a more fundamental level, a tribunal member must form their own views of the correct or preferable decision, in each case, on the basis of the materials before them. A tribunal member should be prepared to assume responsibility for and be accountable for their decisions. In this sense, there is an association between Principle 3, 'Independence', and accountability.

¹⁰⁸ Michael Jackson, 'Merits, accountability and ethics', *Australian Quarterly*, Spring 1994, 45.

¹⁰⁹ The lines of responsibility established by legislation are important in so far as they distinguish review tribunals from the agencies whose decisions they review. This process contributes to the understanding that tribunals have independent legal and political identities, although tribunals and agencies remain accountable through the executive arm of government (indeed sometimes through the same minister), to the Parliament, for their performance.

¹¹⁰ For a discussion of this dual responsibility, see generally, article by Justice Paul Finn, 'Integrity in Government' (1992) *Public Law Review* 243.

Independence and accountability

It has been suggested that there is a perceived tension between the need to maintain independence and the obligation to be accountable amongst tribunal members. Independence of tribunals and tribunal members generally falls within three categories: institutional independence, membership and appointments and tribunal values, where, there is no, or very limited, scope for interference by the Executive. Accountability on the other hand, is generally understood to be an obligation of all public officials, and the government generally, to meet reasonable expectations about how public power is used and managed.¹¹¹

From a theoretical perspective, the concepts of independence and accountability appear to be incompatible, with one working against the other. It would be of concern if any member of a merits review tribunal attempted to use independence as a shield to avoid accountability. It is the Council's view that the concepts co-exist, each necessary for the maintenance of public confidence in the decision-making process and its review. In this regard, it has been said that:

This conflict between independence and accountability is more apparent than real. The ultimate goal of both concepts is to advance impartial justice and increase public confidence in the capacity of [tribunal members] to do so.¹¹²

Indeed:

Independence is not the opposite of accountability, but should instead be recognised as a necessary feature and precondition for accountability.¹¹³

For tribunals, the concepts are reconcilable if:

- they are both aimed at maintaining the public's confidence in tribunal members, and
- tribunal members can perform their duties and make their decisions without interference from the executive or legislative branches of government.¹¹⁴

¹¹¹ See discussion in Gabriel Fleming, 'Pitfalls for Administrative Tribunals in Relying on Formal Common Law Rules of Evidence' in Robin Creyke (ed), *Tribunals in the common law world*, 2008; Robin Creyke and John McMillan, 'Accountability in an Administrative State' in *Control of Government Action*, 2005, 3.

¹¹² A.W. MacKay, 'Judicial Ethics: Exploring Misconduct and Accountability', June 1995 at <http://cjei.org/publications/mackay.html>. See also R E McGarvie, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' 1 *Journal of Administration* 236; R D Nicholson, 'Judicial Independence and Accountability: Can They Co-exist?', 1993 *Australian Law Journal* 404 at 426.

¹¹³ Society of Ontario Adjudicators and Regulators, *Principles of Administrative Justice: A Proposal*, 1995, 7.

¹¹⁴ See the speech by Mtre Jean Pierre Arsenault, President of the Commission des Lésions Professionnelles, Annual Council of Canadian Administrative Tribunals, 12 June 2000, Ottawa, 13, also, A.W. MacKay, 'Judicial Free Speech and Accountability: Should Judges be Seen and Not Heard?' (1993) 3 *National Journal of Constitutional Law* 159.

7b Transparency

A tribunal member should be as open as possible about all decisions and action (including lack of action) taken in the performance of their tribunal responsibilities.

Commentary

Transparency may be said to be about mechanisms and processes for demonstrating accountability:

The public is entitled to insist that government be conducted openly and that it be, and be seen to be, accountable for its actions.¹¹⁵

Issues of transparency are commonly dealt with in tribunal legislation. Transparency protects tribunal members from allegations of bias or partiality, as well as from suggestions that a tribunal member has taken into account irrelevant considerations, or failed to take into account relevant considerations.

In the context of merits review tribunals, aspects of transparency include:

- holding public hearings
- providing reasons for decisions, and
- decisions not being influenced by information to which the parties did not have access or an opportunity to challenge or refute.

Transparency and decision-making¹¹⁶

A tribunal member should be responsible for ensuring transparent decision-making processes, and should take the initiative to provide applicants with all relevant information and evidence. As noted by the Council in the *Better Decisions* report, when in doubt, tribunals should 'err in favour of disclosure of material wherever the case for non-disclosure is not either required or clearly made out.'¹¹⁷

Expertise of another tribunal member

An issue arising in relation to transparency is the extent to which tribunal members are entitled to rely, in making a decision, on the expertise of another member of the tribunal.

¹¹⁵ *Report of the Royal Commission into Commercial Activities of Government and other matters*, Western Australia (1992), at paragraph 3.13.2.

¹¹⁶ Comments in the context of Principle 2a, 'The right to be heard' and Principle 3, 'Independence', are also relevant. Considerations discussed in the context of 'Disclosure' (of interests) are also relevant to transparency.

¹¹⁷ Administrative Review Council, *Better Decisions: a review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, at paragraph 3.102.

As noted by the Council in its *Better Decisions* report:

...the key is that the relevant member or members remain responsible for the decision made. The closer the advice and assistance comes to the time when the decision is made in a particular case, the more care is needed to avoid the risk that the decision will be taken or will be seen to be taken, by a person other than the responsible member or members.¹¹⁸

Where the expertise or experience of a third party is a critical factor in a decision, consistent with principle 2(a), 'the right to be heard', parties should be informed and given the opportunity to respond.

It may be appropriate for tribunal members to have some discussions with tribunal colleagues outside the hearing room and not in the presence of the parties. However, while tribunal meetings where policy or legal issues are discussed may assist good decision-making, discussions amounting to a re-examination of the facts in a particular case are not appropriate.

¹¹⁸ Administrative Review Council, *Better Decisions: a review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, at paragraph 3.157.

8 Responsibility of tribunal head

A tribunal head should assist tribunal members to comply with the principles of conduct and to perform their tribunal responsibilities, through the provision of appropriate leadership, training and support.

Commentary

Tribunal heads have a responsibility to assist tribunal members to comply with the principles of conduct. This is particularly so if the Guide is to be used as part of a tribunal's performance management strategy. In addition to the personal leadership of tribunal heads, this can be satisfied by ensuring that adequate training and educational resources are available to tribunal members.

Without personal support staff, keeping up to date may be particularly difficult for part-time members. Tribunals may need to develop strategies to ensure that relevant information is easily accessible to part-time members.

Compliance with this principle might also entail support for, and cooperation with any initiatives by COAT, in relation to member training.

APPENDIX 1

ADMINISTRATIVE REVIEW COUNCIL: FUNCTIONS AND POWERS

Section 51 of the *Administrative Appeals Tribunal Act 1975* sets out the functions and powers of the Council as follows:

- (1) The functions of the Council are:
 - (aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and
 - (ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and
 - (a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and
 - (b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and
 - (c) to inquire into the adequacy of the law and practice relating to the review by the courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and
 - (d) to inquire into:
 - (i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and
 - (ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

(iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction;

and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of the matters referred to in subparagraphs (i), (ii), and (iii); and

- (e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and
 - (f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and
 - (g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and
 - (h) to promote knowledge about the Commonwealth administrative law system; and
 - (i) to consider, and report to the Minister on, matters referred to the Council by the Minister.
- (2) The Council may do all things necessary or convenient to be done for or in connection with the performance of its functions.
- (3) If the Council holds an inquiry, or gives any advice, referred to in paragraph (1)(ab), the Council must give the Minister a copy of any findings made by the Council in the inquiry or a copy of the advice, as the case may be.

APPENDIX 2

SOURCES AND MATERIALS

Details of the major sources and materials referred to by the Council in developing the Guide are set out below.

1 Legislation and administrative regulations relating to tribunals and tribunal members

1.1 Legislation

The role of tribunals in the Commonwealth merits review scheme is generally accepted as being to enable persons affected by administrative decisions of government to obtain fair, just, economical, informal and quick reconsideration of those issues.

Tribunals are, in fact, specifically so enjoined by sections 353(1) (Migration Review Tribunal) and 420(1) (Refugee Review Tribunal) of the *Migration Act 1958* and section 141 of the *Social Security (Administration) Act 1999* (Social Security Appeals Tribunal). Tribunals are also required by these provisions to act according to the substantial merits of the case. Paragraph 33(1)(b) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) provides that proceedings before the tribunal shall 'be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and of every relevant enactment and a proper consideration of the matters before the Tribunal permit.'

The general obligations can be supplemented by specific provisions, such section 39 of the AAT Act which provides for every party to a proceeding before the Tribunal to be given a reasonable opportunity to present his or her case, to inspect any documents to which the tribunal proposes to have regard in reaching a decision and to make submissions in relation to those documents. Openness is achieved by requiring proceedings to be in public except in special circumstances (section 35 of the AAT Act), and through the requirement for the Tribunal to give reasons for decisions (section 43 of the AAT Act).

Provisions within tribunal legislation specifically directed at the behaviour of tribunal members are also reflective of principles of natural justice.

For instance, section 14 of the AAT Act (Disclosure of interests by members) reflects the common law position that the opportunity to be heard includes the opportunity to be heard by an independent and impartial decision maker.¹¹⁹ These provisions extend to disclosure of interests, pecuniary or otherwise, that could conflict with the

¹¹⁹ Geoffrey A. Flick, *Natural Justice — Principles and Practical Application*, Second Edition, Butterworths, Chapter 6, 1984.

proper review of decisions. Restrictions on outside employment for full time members (section 11 of the AAT Act) are also relevant.

1.2 Administrative measures

Administrative regulation applicable to tribunal members reflects values similar to those provided for in the tribunal legislation.

1.3 Client Service Charters

Members of all federal administrative review tribunals are subject to client service obligations.¹²⁰ For example, the Administrative Appeal Tribunal's Charter requires the Tribunal to:

- treat applicants with respect and courtesy
- provide an efficient and professional service
- provide equitable access
- provide appropriate information
- provide an interpreter where necessary
- give applicants or their representatives before the tribunal the opportunity
- provide applicants with an opportunity to be heard
- provide confidentiality where appropriate
- allow representation by whoever the applicant chooses
- give reasons for decisions, and
- welcome and value comments or complaints.

1.4 Performance agreements, codes of conduct for particular tribunals

Non-legislative mechanisms in the form of performance agreements linked to codes of conduct operate for members of the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT).¹²¹

The MRT-RRT Code of Conduct sets out the obligations of tribunal members to:

- act appropriately when a conflict arises between a member's private interest and their duty to the tribunal
- be aware and sensitive to language, cultural backgrounds and special needs
- behave appropriately and avoid possible perceptions of bias, and
- 'comply with procedural fairness requirements'.

While a number of the standards of conduct in the codes relate primarily to issues of performance, others clearly reflect obligations flowing from tribunal members' status as public officers and adjudicators of peoples' rights and entitlements. Examples include:

¹²⁰ Development of charters by courts and tribunals was advocated in the report of the Access to Justice Advisory Committee, *'Access to Justice - an Action Plan'*, 1994. See particularly paragraphs 15.63 – 15.75.

¹²¹ Available at <http://www.mrt-rrt.gov.au/docs/MemCofC010106.pdf>.

- the requirement to behave with propriety and discretion especially in public places where they are identifiable as members
- the requirement to behave with integrity, and
- not accepting or soliciting gifts where it could be perceived as being related to the office of the Member.

2 STANDARDS FOR TRIBUNAL MEMBERS AS PUBLIC/STATUTORY OFFICERS

2.1 Introduction

The meaning of the term 'public officer' was defined by the English Court of Appeal in 1914 as '...an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.'¹²²

A considerable body of civil and criminal law has developed in relation to public officers. Public officers are indictable at common law for misbehaviour in office.¹²³ Moreover, a public officer who abuses his/her office and causes loss or injury to a person, may, in addition to any general liability in negligence, be subject to the tort of misfeasance in public office.¹²⁴

2.2 Standards of behaviour for public officers

Public officers will usually, by virtue of the nature of their office, owe duties to the particular authority under which they hold office and to the public who place their trust and confidence in them by virtue of their office.¹²⁵ Obligations arising from these duties have been held to extend to dealings in an officer's private as well as public capacity.¹²⁶

Considerable attention has been paid to this element of public office in recent years. Prominent Australian examples include the Electoral and Administrative Review Commission Report (EARC),¹²⁷ the Report of the Western Australian Royal

¹²² *R v Whitaker* [1914] 3 KB 1283.

¹²³ *Case 135 Anor*, 6 Mod 96; *R v Bembridge* 1783 22 State Tr 1, 151.

¹²⁴ See *Sanders v Snell* (1998) 196 CLR 329; *Northern Territory v Mengel*, (1995) 185 CLR 307, at 355.

¹²⁵ Justice Paul Finn citing *R v Boston* (1923) 33 CLR 386, and *Horne v Borbes* (1920) 27 CLR 501-2, in 'Public Officers: Some Personal Liabilities', (1977) 51ALJ 313 at 315. See also Michael Jackson, 'Merits, accountability and ethics', Australian Quarterly, Spring 1994, at 44: 'The public interest requires that public officials treat office as the public trust. Public office should not be used for private gain.' *Bacon's Abridgment*, Offices and Officers, Vol 6, 7th Edition, 1832, 41. Justice Paul Finn, 'Controlling the Exercise of Power', (1996) 7 *Public Law Review* 86, 87-88.

¹²⁶ See Justice Paul Finn citing *R v Boston* (1923) 33 CLR 386, and *Horne v Borbes* (1920) 27 CLR 501-2, in 'Public Officers: Some Personal Liabilities', (1977) 51 ALJ 313 at 317.

¹²⁷ Queensland Electoral and Administrative Review Commission *Report on the Review of Codes of Conduct for Public Officials* (the EARC Report), May 1992, 9.

Commission,¹²⁸ and the promulgation of the APS Values and Code of Conduct under the *Public Service Act 1999*.

Work in this field has also been undertaken by other national, international and regional bodies, including the UK Committee on Standards in Public Life (the Nolan Committee), the Council of Europe, the European Union, the Organisation for Economic Cooperation and Development, the Organisation for American States and the United Nations.

The report of the Western Australian Royal Commission¹²⁹ refers to ‘...the trust principle’, and declares that:

it provides the “architectural principle” of our institutions and a measure of judgement of their practices and procedures. It informs the standards of conduct to be expected of a public official. And because it represents an ideal which fallible people will not, and perhaps cannot, fully meet, it justifies the imposition of safeguards against the misuse and abuse of official power and position.

A number of principles have been identified as applying to those involved in public life. For example, the report of the Nolan Committee in the UK identified seven principles of public life applicable to members of parliament, Ministers, civil servants, executive quangos and the National Health Service:¹³⁰

- ☐ selflessness
- ☐ integrity
- ☐ objectivity
- ☐ accountability
- ☐ openness
- ☐ honesty, and
- ☐ leadership.

An alternative formulation was proposed in the EARC Report.¹³¹ In that report, the term ‘public official’ is given a wide definition to include all officers of the public administration, thereby encompassing employed public officials (officers of units of public administration), elected representatives (members of the Queensland Legislative Assembly) and elected members of statutory authorities. The Commission concluded that there are five main ethical obligations, which must be met by public officials if they are to fulfil the functions of trustees of the public interest, consistent with the Westminster system of government:

¹²⁸ *Report of the Royal Commission into Commercial Activities of Government and other matters*, November 1992.

¹²⁹ *Report of the Royal Commission into Commercial Activities of Government and other matters*, November 1992, paragraphs 1.2.5 and 1.2.6.

¹³⁰ See the UK Nolan Committee’s *Standards in Public Life First Report of the Committee on Standards in Public Life*, volume 1: Report, presented to Parliament by Command of Her Majesty, May 1995, London.

¹³¹ Queensland Electoral and Administrative Review Commission *Report on the Review of Codes of Conduct for Public Officials*, May 1992.

- | |
|---|
| <ul style="list-style-type: none"> □ respect for the law and system of government □ respect for persons □ integrity □ diligence, and □ economy and efficiency.¹³² |
|---|

The concept of public officers as trustees for the public has been given international recognition in the United Nations International Code of Conduct for Public Officers.¹³³ Article 1 of the Code states:

A public office, as defined by national law, is a position of trust, implying a duty to act in the public interest.

Ethical obligations imposed on public officials under the United Nations' Code of Conduct include:

- efficiency, effectiveness and integrity, and
- attentiveness, fairness and impartiality.

Reflective of its concern with the consequences of corruption, the UN code focuses on conflict of interest, disclosure of assets, acceptance of gifts and favours, handling of confidential information and political activities.

The public service

The APS Code of Conduct includes many of these principles,¹³⁴ for example, honesty and integrity, care and diligence, respect and courtesy, compliance with all applicable

¹³² See the Queensland Electoral and Administrative Review Commission *Report on the Review of Codes of Conduct for Public Officials* (the EARC Report), May 1992, at paragraph 2.63. The principles are reflected in the *Public Sector Ethics Act 1994* (Qld).

¹³³ Annex to United Nations General Assembly Resolution A/RES/51/59, 82nd Plenary Meeting, 12 December 1996.

¹³⁴ To the extent that they supervise APS employees, tribunal members (other than agency heads and judicial officers), are bound by the APS rules of conduct. Sub-sections 14(2) and (3) of the *Public Service Act 1999* provide that:

(2) Statutory office-holders are bound by the Code of Conduct in the same way as APS employees.

(3) In this section:

statutory office holder means a person who holds any office or appointment under an Act, being an office or appointment that is prescribed by the regulations for the purposes of this definition.'

Sub-regulation 2.2(1) of the *Public Service Regulations 1999* provides that:

'For the purposes of the definition of *statutory office holder* in sub-section 14(3) of the Act,

an office is prescribed if it is in a class of offices that:

(a) are not an office of Agency Head; and

(b) are not judicial offices; and

(c) are held by non-APS employees who:

(i) are acting in relation to the exercise of their direct or indirect supervisory

duties in relation to APS employees; and

(ii) are engaged or employed under an Act.'

Australian laws when acting in the course of APS employment, disclosure and taking reasonable steps to avoid any conflict of interest (real or apparent) in connection with APS employment. The APS values also embrace concepts of impartiality and professionalism.

Significant public sector reforms have also occurred in recent years in New Zealand. The New Zealand Standards of Integrity and Conduct establishes four principles of conduct which all public servants are expected to observe in their relationships with the Government, their chief executive, colleagues and the public. Employees of State Services organisations must be fair, impartial responsible and trustworthy.¹³⁵

The UK Civil Service Code¹³⁶ sets out the framework within which all public servants work, and the core values and standards they are expected to uphold. The UK Code requires integrity, honesty, objectivity and impartiality (the core values) from its public servants.

Requirements of the United States' Principles of Ethical Conduct for Government Officers and Employees¹³⁷ include that employees:

- not hold financial interests that conflict with the conscientious performance of duty
- not use public office for private gain
- not engage in financial transactions using non-public information or allow the improper use of such information to further any private interest
- put forth honest effort in the performance of their duties, and
- act impartially and not give preferential treatment to any private organisation or individual.

The Principles flow from the premise that:

Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.¹³⁸

Members of Parliament

A primary focus of codes for Members of Parliament, particularly Ministers, tends to be conflict of interest, financial disclosure and misuse of office.

¹³⁵ The *Standards of Integrity and Conduct* issued by the New Zealand State Services Commission replaced the Public Service Code of Conduct in 2007.

¹³⁶ A new Civil Service Code was issued on 6 June 2006 and forms part of the terms and conditions of employment of every civil servant. It originally came into force on 1 January 1996 and was revised in May 1999 to take account of the devolution of Scotland and Wales.

¹³⁷ Executive Order 12674 of 12 April 1989 (as modified by E.O. 12731). The Council also had regard to the US Office of Government Ethics *Standards of Ethical Conduct for Employees of the Executive Branch*, Final Regulation Issued by the US Office of Government Ethics, Codified in 5 CFR, Part 2635 (1/1/99 Edition), as amended at 64 FR 2421-2422 (Jan 14, 1999) and 64 FR 13063-13064 (Mar 17, 1999), and *Pamphlet for Executive Branch Employees*, April 2000.

¹³⁸ Section 101(a) of the *Code*.

Additionally, however, the preamble to the NSW Code of Conduct for Members of Parliament calls upon members to 'acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament and using their influence to advance the common good of the people of New South Wales.'

The Tasmanian Parliament's 'Code of Ethical Conduct for Members of the House of Assembly' was adopted in 1996 and has a brief preamble, a Statement of Commitment to values of honesty, accountability, courtesy and understanding and a Declaration of Principles which encompasses protecting the public interest and enhancing public confidence and trust in government, as well as provisions relating to conflict of interest, gifts, benefits and favours. The declaration also provides that Members must not take improper advantage of their former position or duty after leaving office.

2.3 Judicial ethical standards

The subject of judicial ethics has attracted much attention. The Hon Justice Thomas published the second edition of his book entitled 'Judicial Ethics in Australia', in 1997.¹³⁹ In 1996, the Australian Institute of Judicial Administration (AIJA) issued a Discussion Paper on judicial ethics¹⁴⁰ and in 2007 published the second edition of its 'Guide to Judicial Conduct'.¹⁴¹ Those publications refer to matters such as the meaning of judicial ethics, misconduct in office, 'non-official'¹⁴² or personal misconduct, community involvement, financial affairs and restrictions on activities after leaving the bench.

In its Commentaries on Judicial Conduct¹⁴³ and Ethical Principles for Judges,¹⁴⁴ the Canadian Judicial Council also identified a number of principles upon which judicial ethics draws. Those principles are judicial independence, integrity, diligence, equality and impartiality.

¹³⁹ The Hon Justice Thomas, *Judicial Ethics in Australia*, the Law Book Company Ltd, Second Edition, 1997.

¹⁴⁰ David Wood, *Judicial Ethics: A Discussion Paper*, the Australian Institute of Judicial Administration Incorporated, Melbourne, 1996.

¹⁴¹ Published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration, March 2007.

¹⁴² The expression used by Thomas J in his text, *Judicial Ethics in Australia*, the Law Book Company Ltd, Second Edition, 1997.

¹⁴³ Canadian Judicial Council, *Commentaries on Judicial Conduct*, Ottawa Ontario, 1991.

¹⁴⁴ Canadian Judicial Council, *Ethical Principles for Judges*, Ottawa Ontario, 1998.

The American Bar Association's Model Code of Judicial Conduct¹⁴⁵ requires judges to:

- uphold the independence, integrity and impartiality of the judiciary
- conduct the judge's personal and extra-judicial activities so as to minimise the risk of conflict with judicial obligations
- avoid impropriety and the appearance of impropriety in all of the judge's activities
- refrain from political activity that is inconsistent with the independence, integrity or impartiality of judicial office, and
- perform the duties of judicial office impartially, competently and diligently.

2.4 Relevance of Public Sector, Judicial and Parliamentary Standards

The Public Sector

Members of merits review tribunals are members of the executive. The statutory creation of such tribunals as independent entities does not, of itself, distinguish the functions of its members from those of other public administrators. However, the decisions of merits review tribunals are expected to be, and to be seen to be, impartial. That is, decisions must not be influenced by the views of persons outside the tribunal, including officers of the decision-making agency itself.

Further, although tribunals would ordinarily apply ministerial policy, they are not bound to do so where the policy is unlawful, or its application would produce an unjust result.¹⁴⁶ In contrast, even at the highest levels of internal review, public administrators are bound by lawful ministerial policy,¹⁴⁷ although they may recommend changes to it.

Courts

The fundamental distinction between courts and administrative tribunals flows from the status of the latter as executive agencies outside the parameters of Part III of the Constitution. Unlike judges, who generally enjoy life tenure, appointments for tribunal members are of much shorter duration, not all members hold legal qualifications and some members are appointed on a part-time basis. Nonetheless, like judges, tribunal members must exercise a quality of independent thought in decision-making.

¹⁴⁵ The *Model Code of Judicial Conduct* (February 2007) was adopted by the American Bar Association (ABA) House of Delegates on February 12, 2007 and incorporates the 'housekeeping' revisions approved by the ABA's Standing Committee on Ethics and Professional Responsibility.

¹⁴⁶ See Brennan J, *Re Drake and Minister for Immigration and Ethnic Affairs* (No.2) (1979) 2 ALD 634 at 644-645.

¹⁴⁷ As distinguished from administrative policy such as guidelines and directions.

Members of Parliament

Although there are of course many distinctions between the roles and functions of members of administrative tribunals and elected Members of Parliament, both have obligations to members of the public as a result of the positions they hold.¹⁴⁸

Conclusion

Notwithstanding the differences, tribunal members do share some common standards with judicial and public sector officers and members of parliament. Accordingly, some of the standards and administrative regulations applicable to those officers may appropriately be referred to when identifying standards of behaviour and developing a code for conduct for tribunal members.

2.5 Duties of statutory officers

Tribunal members are also subject to standards arising from their position as statutory officers. The code of conduct proposed in 1979 in the Report of the Committee of Inquiry concerning Public Duty and Private Interest (the Bowen Report) is relevant.

Endorsed by the then and subsequent governments for public sector offices, including statutory office-holders,¹⁴⁹ the code consisted of ten principles designed to promote the avoidance of conflicts of interest. These include impartiality, frank and honest dealings with colleagues, avoidance where private interests (pecuniary or otherwise) might conflict with public duty, and scrupulousness in the use of public property and services.

¹⁴⁸ Queensland Electoral and Administrative Review Commission Report on the *Review of Codes of Conduct for Public Officials*, May 1992, recommended application of the same fundamental ethical principles and obligations to all appointed officials, elected members of the Legislative Assembly and members of local authorities; see page 200 of the Report. The Report recognised, however, that the differing responsibilities and accountabilities of parliamentarians should be recognised in the 'specific content of any Code of Conduct for elected officials...'.

¹⁴⁹ As holders of statutory office, the principles set out in the Code are pertinent to tribunal members. The inclusion of the Code of Conduct in the Public Service Act in 1999 reinforced the principles underlying the Bowen code.