Apprehended Bias and Administrative Tribunals*

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1 We live in difficult and challenging times. Public confidence in traditional institutions appears to be diminishing. An increasing number of litigants in both Courts and Tribunals are self-represented. Most, but certainly not all, are unfamiliar with Court and Tribunal processes. For many, it will be their only experience of such proceedings. Regrettably, some also have mental health challenges.

2 Institutional resources are also under considerable strain, yet the volume of cases grows for many administrative tribunals.

3 These matters combine to create a perfect storm when it comes to the obligation of Judges and Tribunal members alike to maintain impartiality, both in actuality and in appearance. That is the topic for this session.

4 The need for impartiality is important not only for the persons affected by tribunal decision-making, but more broadly in maintaining public confidence in the integrity and fairness of that decision-making process.

5 The structure of the paper is as follows:

(a) A brief discussion of the relevant legal principles concerning bias.

(b) Some practical illustrations from the caselaw.

(c) Some practical observations and tips.

(a) Some legal principles

6 I imagine that you are familiar with the relevant principles for bias, as an aspect of procedural fairness[1]. In brief, in both Australia and New Zealand (see *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72, [2010] 1 NZLR 35), in open curial proceedings, 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 to be decided[2]. A

*This is revised version of a paper given by the author at the NCAT Members' Conference on 21 October 2019

[1] See my paper "*Apprehended Bias in Australian Administrative Law*", (2010) 38 Federal Law Review 353 and Alan Robertson, "*Apprehended Bias – The Baggage*", (2016) 42 Australian Bar Review 249. See also the recent Consultation Paper published by the Australian Law Reform Commission, *Judicial Impartiality,* April 2021.

[2] See *Ebner v Official Trustee* [2000] HCA 63; 205 CLR 337 at [6].

similar test applies in the case of administrative proceedings, but account must be taken of various matters which inform the different standard or degree of neutrality expected of an administrative decision-maker, including the particular nature of the body or tribunal and the different character of such proceedings. From the outset, close attention must be paid to any relevant statutory provisions governing the proceedings, the nature of the inquiries to be made and the particular subject-matter[3]. In a case involving an administrative tribunal proceeding being held in private (as is usually the case, for example, in NCAT's Guardianship Division), the High Court has suggested that it might be preferable to formulate the test for apprehended bias "by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias".[4]

7 A claim of actual bias requires proof that a decision-maker approached the issues with a closed mind or had prejudged them. An applicant alleging actual bias carries a heavy onus of establishing by cogent evidence that the decision-maker was in fact biased or that there was at least a "high probability" of such.[5] Actual bias requires a review court to assess the state of mind and actual views of a decision-maker.

8 In an apprehended bias case, the applicant also carries the burden but the burden is more easily discharged because the question is not one of high probability, but rather one of objective possibility. Such a claim does not require a review court to make findings about the subjective motives, attitudes, predilections or purposes of the decision-maker. Rather, the issue falls to be determined through the prism of the hypothetical fair-minded and informed lay person. In addition to the matters set out above, application of the apprehended bias test will take into account whether tribunal proceedings are inquisitorial or adversarial in nature and also whether the parties are represented.[6]

9 Justice Gageler suggested in *Isbester v Knox City Council* [2015] HCA 20; 255 CLR 135 at [59] that there are three steps in determining whether there is an appearance of disqualifying bias in an administrative context:

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[3] See *Re Refugee Review Tribunal;* ***Ex parte H*** [2001] HCA 28; 179 ALR 425 at [5] per Gleeson CJ, Gaudron and Gummow JJ.
[4] *Ex parte H* at [28].
[5] See *R v Australian Stevedoring Industry Board; Ex parte Northern Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116.
[6] *Ex parte H* at [29].

(a) identification of the matter which underpins the apprehension that a decision-maker might decide a case other than on its legal and factual merits;

(b) articulation of the logical connection between that matter and a feared deviation from the course of deciding the case on its merits; and

(c) consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.

10 There are four main categories of apprehended bias:

(a) Disqualification by interest, such as where the decision-maker has a direct or indirect interest in the proceedings, whether pecuniary or otherwise, which creates a reasonable apprehension of prejudice, partiality or pre-judgement.

(b) Disqualification by conduct, including published statements and excessive intervention in questioning made within or outside a formal proceeding.

(c) Disqualification by association, such as where an apprehension of pre-judgement or other bias results from a direct or indirect relationship, experience or contact with the person involved in the relevant proceeding, including a party and a witness.

(d) Disqualification by extraneous information, such as where knowledge of a prejudicial and inadmissible fact gives rise to an apprehension of bias.[7] This category contracts in the case of a tribunal which is not bound by the rules of evidence, but fair hearing requirements will apply to the use of material which is outside the record before the tribunal.

(b) Some practical illustrations

11 Let me give you some examples of how these principles have been applied in practice. I will outline the essential facts of a few cases and pause and invite your assessment as to whether or not you think apprehended bias was established.

Case study 1

12 Put yourself in the shoes of the Refugee Review Tribunal. You have refused an application for review of a decision which declined to accept that the applicant was a refugee. The Tribunal

[7] See *Webb v R* (1994) 181 CLR 41 at 74 per Deane J.

confirms the primary decision on the basis of the applicant's lack of credibility. Ten months after the hearing, the Tribunal member published on his internet homepage a statement of his personal views about his position as a member of that Tribunal. The member published some photographs of himself and his friends and set out his life's story. He then explained his approach to his job (which the High Court described as allowing enthusiasm to outrun prudence). The following are among the comments he posted about his work:

> One is independent and able to use one's critical faculties to accomplish something that is worthwhile, giving protection to people in need and, one hopes, ultimately promoting the observance of basic human rights… when I was first appointed, a colleague who shall remain nameless said to me, "let em all in, Rory!" But while I would like to let in to Australia at least 95 percent of applicants who come to us, who are usually deserving cases and decent human beings even if they lie through their teeth (as they often do) in their desperation to find a better life, it's not as simple as that… We work with dishonesty and corruption on all sides: foreign governments who practise the most aberrant forms of cruelty… immigration officials bent on keeping out as many people as they can irrespective of need… applicants who weave webs of lies, lawyers and migration agents who prey on them to rip off what little money they have...

13 Learning of this material, the applicant sought judicial review in the High Court on the issue of apprehended bias.

14 Was there apprehended bias?

15 No, there wasn't according to the High Court plurality (Kirby J concurring).[8] The plurality found that the Tribunal member's comments would not lead to a reasonable apprehension that the member might not have brought an impartial mind to bear on the applicant's credibility. The plurality emphasised that the words had to be read in context. Although some of the remarks were described as "regrettable", such as those about applicants telling lies, account had to be taken of the fact that those remarks were made in the context of explaining the difficulty of the Tribunal's task. Moreover, the plurality viewed the overall tenor of the remarks as emphasising the member's sympathy for, not his antipathy against, review applicants and that he was emphasising how conscientiously he performed his duties.

16 Some of you might regard the outcome as surprising.

Case study 2

17 The next case study is from New Zealand. The acting chief executive of the NZ Institute of Valuers lodged a formal complaint with the Valuers Registration Board after an individual registered valuer (Mr Bates) sent an "intemperate email" to the President of the Institute and

[8] *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* [2001] HCA 23; 206 CLR 128

other persons accusing her of being "inept" or "corrupt" in the context of her change of position regarding major reforms to the valuation industry. A preliminary investigation was conducted and the question of whether Mr Bates engaged in "grave misconduct" was referred to the Board for inquiry and determination. Under the *Valuers Act 1948* (NZ), which was described by Kos J in *Bates v Valuers Registration Board* [2015] NZHC 1312 at [28] as "a somewhat antiquated piece of legislation" and "the ill-suited to modern administrative law requirements", the Board was constituted by five members (including the Valuer General) with a minimum quorum requirement of three members. Mr Bates sought the recusal of two Board members on the basis that each was involved in major valuation firms which were likely to benefit from the proposed reforms. One of the challenged members was a director and shareholder of such a firm, while the other was simply an employee. The Board recused the former member but not the latter. The reconstituted Board made a second decision to proceed with an inquiry.

18 Before the inquiry proceeded any further, Mr Bates sought judicial review on various grounds, including apprehended bias relating to the second non-recused member. Mr Bates contended that there was no valid distinction between the two challenged members and that the status of the second member as an employee of a large valuation firm which was likely to benefit from the reforms was sufficient because a fair-minded lay observer might think that such an employee would be prone to influence, even unwittingly, in the general interests of his employer.

19 In the event, the Court did not need to rule on this apprehended bias issue. That was because Kos J held that the doctrine of necessity applied to overcome any apprehended bias which may have existed. Disqualification of the second member would have rendered the Board inquorate and unable to determine the charges. As Kos J said at [74]:

> Natural justice is a modestly flexible concept, adaptable to exigency created by the statutory scheme and necessity is a recognised exception to bias…

Case study 3

20 Although the legal principles relating to apprehended bias are regarded as well settled, the application to particular facts can create division. For example, take the following facts. The appellant was in immigration detention and was convicted of damaging Commonwealth property at the detention centre. The Immigration Assessment Authority conducted a review of a refusal to grant the appellant a protection visa. The Department provided the Authority with documents which asserted that the appellant had a "history of aggressive and/or

challenging behaviour when engaging with the Department" and had been involved in many incidents while in immigration detention. The appellant was not informed of the contents of those documents, but most of the information had been disclosed by the appellant in his own protection visa application.

21 Apprehended bias or not? The Full Court divided two to one in concluding that there was no apprehended bias, primarily because the documents in question were irrelevant to the issues which the Authority had to determine and much of the information in the documents was before the Authority in any event, including the reasons of the delegate (see *CNY17 v Minister for Immigration and Border Protection* [2018] FCAFC 159; 264 FCR 87). On appeal to the High Court, the Court split three to two in allowing the appeal. The majority (Nettle, Gordon and Edelman JJ) held that a fair-minded lay observer, familiar with the operation of the relevant legislation, might have apprehended that the Authority might not have brought an impartial mind to the review because of the irrelevant and prejudicial material before it. Emphasis was placed on the fact that, under the statutory scheme, information provided by the Department to the Authority was information which the Secretary considered to be "relevant" to the Authority's task, and the Authority has a statutory obligation to consider that information.

22 The minority (Kiefel CJ and Gageler J) disagreed, holding that a hypothetical fair-minded lay observer, acting reasonably, would not entertain as realistic the possibility that anything contained in the relevant documents might have diverted the Authority from its statutory function, particularly in circumstances where most of the information had been referred to by the appellant himself in his protection visa application (*CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; 375 ALR 47).

Case study 4

23 Here's another example which is closer to home for some of you because it illustrates how apprehended bias can arise from a part-time appointment and the member's non-tribunal work and relationships. You are a University academic and an acting commissioner of the Land and Environment Court. You (together with another commissioner) hear a Class 1 appeal, which is a hearing on the merits akin to a hearing in NCAT or the AAT, in respect of the deemed refusal by a Council of a development application. The appeal is dismissed. So too is a subsequent appeal from that decision to a Judge. Subsequently, the appellant learns of matters which indicate an association between you and the respondent Council. You received research funding from the Australian Research Council in your other job as an academic. The funding

involved a degree of collaboration between academics and "eligible partner organisations", one of which was the Council who committed project funding of $6,000 per annum for three years. The total funding was $.5m and included other organisations apart from the Council. You did not directly receive any money personally from the Council; rather the Council acted as your patron through the funding of collaborative research projects which was used to further your academic career.

24 In your academic capacity, you attend a conference in Albury, at which you co-author and present two papers together with a Council staff member. This occurs around the time of the hearing of the appeal. The co-authors expressed gratitude to 'many staff at Ku-ring-gai Council for their help in the field".

25 Prior to your appointment as an acting commissioner you were an active member of the Council's Bushland, Catchments and Natural Areas Reference Group. You resigned your membership upon being appointed an acting commissioner. You were also a member of the Council's Small Community Grants Committee and you resigned your membership after the hearing of the Class 1 appeal. A month after the primary judge dismissed the appeal from the Class 1 decision, you receive a Mayoral award for outstanding service.

26 The Court of Appeal upheld an appeal from the Land and Environment Court's decision which rejected the development applicant's claims of apprehended bias based on pecuniary interest and association.[9] Basten JA said at [62] and [63]:

> 62 This complaint is justified. A close connection between an adjudicator and one party may be sufficient to give rise to a reasonable apprehension of partiality without there being any connection between the nature or subject matter of the relationship and the issue in dispute. The relationship in the present case was professional in nature, but in other circumstances it might have been purely social. It is easy to envisage a social relationship having characteristics sufficient to preclude one party acting as an independent decision-maker with respect to disputes between the other and third persons. The fear of deviation from a proper degree of independence and impartiality would not, in such circumstances, necessarily depend upon any connection between the characteristics of the relationship and the issue in dispute. Whilst such a connection may be necessary where that which is feared is pre-judgment of the dispute, to limit the consideration in that way with respect to all forms of association is erroneous.
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> 63 The on-going collaborative association in the present case was one which was no doubt mutually beneficial to both the academic researchers and the Council. The major contributions anticipated from the Universities (through payment of the salaries of the chief investigators), and from an ARC grant, may have allowed the Council to obtain

[9] *Murlan Consulting Pty Limited v Ku ring gai Municipal Council* [2009] NSWCA 300; 170 LGERA 162.

> valuable research for a small contribution to the total package. For the chief investigators, including the Acting Commissioner, the carrying out of such research may well have constituted a significant element of their academic and professional careers. There was sufficient basis in these circumstances for the Court to be required to ask whether the reasonable lay observer might reasonably apprehend that the Acting Commissioner might not bring an impartial mind to the determination of an appeal in relation to a development application which had been refused by the Council, in proceedings involving the Council as a party.

27 On the remitter, the primary judge emphasised the difference between a commissioner and a judge and the expectation that a full-time or part-time commissioner will have qualifications and experience which enables him or her to carry out the Class 1 merits review function. Her Honour held that the acting commissioner's financial interests relating to the funding of his research did not give rise to an apprehension of bias in circumstances where he received no direct financial payment from the Council and all sums were paid to his University. As to the claim of apprehended bias arising from association with the Council, having regard to the proximity, duration, nature and intensity of the association, her Honour found that they simply identified normal academic activities and collaborative research which had no connection to the acting commissioner's role when he heard and determined the appeal. The apprehended bias claim was dismissed.[10] Given these findings, the Court did not need to confront the difficult and perhaps unsettled question of the effect of apprehended bias on the part of a single member of a panel of decision-makers.[11]

28 Difficult issues can arise in specialist tribunals where a person may be sitting as a part-time member of the Tribunal one day and appear as a witness in front of another Tribunal panel another day. The prudent course in such case would be to disclose these facts to the parties, including to a litigant in person, so that any recusal application can be made at an appropriate time. I do not mean to suggest, however, that any such recusal application should be granted. Each case necessarily turns on its own facts, as is well illustrated by the case study immediately above.

29 What, should be the case if a part-time member on a specialist tribunal appears before the Tribunal as an advocate for a party? In my view, this situation should be not permitted to arise because it puts the Tribunal in an impossible position. Part-time members should not be permitted to act as advocates in a tribunal in which they sometimes sit. That is why retired

[10] *Murlan Consulting Pty Limited v Ku-ring-gai Municipal Council* [2008] NSWLEC 318.
[11] See *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504.

judges who return to private legal practice are prevented from appearing before their former Court for several years.

Case study 5

30 Another potential minefield is how apprehended bias can arise from private communications or social contact between a tribunal member and other persons, including with legal practitioners who appear before the tribunal. The point is vividly illustrated by a matter in which the High Court granted special leave to appeal on 12 February 2021 and the appeal will be heard later this year ([2021] HCATrans 28). It involves a judge of the Family Court of Western Australia, but it could equally apply to a member of an administrative tribunal. The judge heard an acrimonious and long-running matrimonial dispute. During the course of the trial, the trial judge rejected a recusal application brought by the husband. The hearing proceeded over several weeks and the trial judge reserved for 17 months. After judgment was eventually delivered, the husband learned for the first time that either during the course of the long trial or during the period when judgment was reserved the judge had been in frequent contact with the wife's female counsel. The contact took the form of several face to face meetings for coffee or drinks, as well as telephone calls and text messages. None of this contact had been disclosed to the parties.

31 What do you think? Apprehended bias or not?

32 The Full Court split two to one on whether there was apprehended bias (*Charisteas & Charisteas* [2020] Fam CAFC 162). The principles were not in dispute, but the Court divided on whether, in the particular circumstances, these private communications and social contact amount to apprehended bias. In rejecting the husband's complaint of apprehended bias, the majority said that regard had to be given to the totality of the circumstances, which included the fact that the judge and the barrister had been friends for a long time, that there was no mutual contact when evidence was being taken, and that three social meetings between them during the 17 months when judgment was reserved took place in a public setting.

33 The dissenting judge also relied upon the totality of circumstances, but came to a different conclusion. He attached significance to the fact that the trial judge had failed to disclose to the parties any of the communications he had had with the barrister. This failure itself was said to give rise to a reasonable apprehension of bias in circumstances where the contact was "protracted, premeditated and contrary to the ethical obligations each individual owed to the

Court". The dissentient emphasised that "during the trial and whilst judgment is reserved, judges are required to remain isolated from friends and colleagues with whom they have had a close professional and/or personal association".

34 I will leave it to you to assess the prospects of a successful High Court appeal. Presumably, the High Court will provide important guidance on the topic, which may have implications for you as tribunal members (while recognising, however, that different standards apply to judicial, as opposed to administrative, decision-making and the ongoing need not to over-judicialise administrative decision-making, a point which was emphasised by Lady Hale in her Keynote Address to this Conference).

35 You should also note that in its recent Consultation Paper, the ALRC has raised the question whether amendments should be made to Uniform Conduct Rules relating to the legal profession so as specifically to address the problems which can arise from external communications between judges and lawyers or parties appearing before them.

Case study 6

36 A recent Australian example of a case alleging apprehended bias because of excessive intervention and rudeness is the Full Court's decision in *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144. The relevant parts of the transcript between a self-represented litigant and a Judge of the Federal Circuit Court, although lengthy, are revealing and sound a warning for tribunal members in similar situations:

> HIS HONOUR: You can't just change the goal posts just before the trial. You're lucky that the trial is being delisted because, quite frankly, if I had looked at this and I had said yes you could do this you would be paying the costs of the other side for bringing an application so soon to the trial which would mean that it would have to be delisted in any event, but anyway I'm still trying to work out your - you know, I'm - - -
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> MR GAMBARO: Can we go back - - -
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> HIS HONOUR: You get - you will get judges very frustrated very easily, Mr Gambaro. Your claims are, in short compass, very narrow matters but you keep wanting to widen them in an incredible way. Now, what is it that you want to say to me?
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> …
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> MR GAMBARO: Your Honour, it's very important evidence that's missing so –

but - - -

HIS HONOUR: But everything is very important to you, Mr Gambaro.

MR GAMBARO: So, your Honour, getting back to the lateness, I would have provided this to the defence legal counsel earlier. I did advise them on 5 October by email that I was going to do an interlocutory application and for the past month I've been in the Federal Court of Australia in appeals with no extensions granted by Logan J and I had to appear in that appeals process so that prevented me - - -

HIS HONOUR: So what. There's plenty - - -

MR GAMBARO: That - - -

HIS HONOUR: - - - of people who have to do all sorts of things at the one time.

MR GAMBARO: Well, I'm labour - - -

HIS HONOUR: You've got no idea what legal counsel have to juggle and you've got what three matters before the court?

MR GAMBARO: I'm labour law, your Honour.

HIS HONOUR: So what. So what. Are you saying that you can't do three things at the one time?

MR GAMBARO: Yes, your Honour, I can't do three things at - - -

HIS HONOUR: Well, then that's your fault. You're the one that's – the plaintiff in all of these things. You've got to work things out. The courts are not here at your convenience.

MR GAMBARO: Yes.

HIS HONOUR: Okay. My goodness. You've got three matters on the hop. No, no - -

MR GAMBARO: To - - -

HIS HONOUR: - - - try with most lawyers who've got about 20 or 30 matters. Try judges who have got 600 matters on the hop at the one time and you're getting – you're saying we should be looking after you because you've got three matters. My goodness gracious me.

MR GAMBARO: I'm not – I'm just asking for a little bit of leniency, your Honour.

HIS HONOUR: You have had more than enough lenience in my court, Mr Gambaro, and I'm sick of it.

…

HIS HONOUR: How is there statute changes? Either the law is as it was - - -

MR GAMBARO: Workplace - - -

HIS HONOUR: Do not ever interrupt me. Do not ever. You've been told many times when I talk your mouth goes closed. You do not ever interrupt me or you will be cited for contempt. I'm not putting up with your rubbish.

MR GAMBARO: Yes, your Honour.

HIS HONOUR: There's only one person in charge here and it's me. Now, make your submission.

MR GAMBARO: I thought you were going to explain something, your Honour.

HIS HONOUR: You interrupted me. What's so important? What is so important that you would risk the wrath of the court in trying to tell me that there is something more important. Tell me what it is.

…

MR GAMBARO: Well, there has been no evidence provided, your Honour.

HIS HONOUR: But, sorry, it's like telling me that I should be giving you a court file about an alien invasion. And I say, "Well, I haven't got a file court about the alien invasion." And you're saying, "Well, you haven't proved to me that you haven't got a court file about the alien invasion so, therefore, you're hiding something." Do you understand how absurd that seems? You do, don't you?

MR GAMBARO: Well - - -

HIS HONOUR: You do, don't you?

MR GAMBARO: No. Well, your Honour, if - - -

HIS HONOUR: You do, don't you?

MR GAMBARO: No, I don't agree, your Honour.

HIS HONOUR: You don't agree. So that if you ask me for a file - the court file on alien invasions and I said, "Well, I haven't got it," that, therefore, I am not complying with any requests by you for a court file on alien invasions?

MR GAMBARO: If a - - -

HIS HONOUR: You're saying that you don't agree that such a conclusion is absurd?

MR GAMBARO: Your Honour, to be compliant - - -

HIS HONOUR: No. Do not change the subject. You answer my questions. You say that if you asked for a court file on alien invasions and I said that there wasn't one that I would, therefore, be refusing to give you the court file on alien invasions.

Yes or no?

MR GAMBARO: If you can - - -

HIS HONOUR: Yes or no?

MR GAMBARO: No. If you can provide an affidavit stating that it's not in your possession or custody then that's sufficient. But, your Honour, a compliant workplace would in the dismissal of an employee they would have procedures that have documents that have interaction at - - -

HIS HONOUR: But you see that's an argument. That's an argument you make at the trial.

MR GAMBARO: Okay. Well - - -

HIS HONOUR: The point is here you are asking me to make an order for something. How can I make an order for something unless I know that it actually exists? And I've asked you for the proof of how it is that I should know that it exists otherwise you are simply wasting this court's time. Now, answer my questions. How do you know that this exists.

MR GAMBARO: Because it's - - -

HIS HONOUR: How do you know that it exists and if you tell me because any place should have something like this you will be in contempt.

MR GAMBARO: Okay. Well, it does.

HIS HONOUR: Now, tell me how do you know that this exists?

MR GAMBARO: Well, I'm not going to answer that question, your Honour.

HIS HONOUR: No, you answer my question or you will be in contempt.

MR GAMBARO: Well, I don't - with all due respect I don't appreciate the threat of a contempt.

HIS HONOUR: You will answer my question.

MR GAMBARO: Your Honour, I'm a - - -

HIS HONOUR: You will answer my question or - - -

MR GAMBARO: I'm self-represented.

HIS HONOUR: You will answer my question.

MR GAMBARO: I'm self-represented and - - -

HIS HONOUR: You will answer my question.

MR GAMBARO: This is a - - -

HIS HONOUR: Get security.

MR GAMBARO: This is a complex matter.

HIS HONOUR: And - no, you are getting security because you are going to be removed from my court right now because you have failed to answer my question and you are treating this court with contempt.

MR GAMBARO: Can you repeat the question, your Honour?

HIS HONOUR: How do you know that these articles exist?

MR GAMBARO: Because the fourth respondent and the fifth respondent have put in their affidavits that they've met with other workers in the office. They've made ---

HIS HONOUR: What is there that shows me that there are notes, meeting notes and CCTV footage that shows any of this? Answer my question.

MR GAMBARO: I can get the - I will get - - -

HIS HONOUR: Answer my question.

MR GAMBARO: I'm a self-represented - - -

HIS HONOUR: No, no, no.

MR GAMBARO: I'm - - -

HIS HONOUR: No, answer my question or I will have you removed.

MR GAMBARO: I'm a self-represented applicant, your Honour.

HIS HONOUR: Okay. Remove - please remove Mr Gambaro from my court room because he is refusing to answer the questions of the court. Leave.

MR GAMBARO: Can I - - -

HIS HONOUR: Leave.

MR GAMBARO: That's for the judge and I've provided a copy to the defence. That's my medical in why I shouldn't be here today.

37 As he was being removed from the courtroom by security guards, Mr Gambaro handed up reports from his doctor and psychologist. The psychologist's report indicated that Mr Gambaro was experiencing "significantly high levels of psychological distress".

38 Well, what do you think – apprehended bias or not?

39 The Full Court had no hesitation in concluding that the Judge's conduct gave rise to apprehended bias (although the Court then divided on the issue of appropriate relief).

40 In its recent Consultation Paper the ALRC has highlighted the practical difficulties which can arise where a judicial officer insults or humiliates a party or legal practitioner. The ALRC says that the bias rule is not well-suited to managing or responding to such behaviour because raising the matter of apprehended bias before the officer concerned can further inflame the situation, unacceptable conduct can be cumulative and it is difficult to know when the "tipping-point" has been reached and even where a finding of apprehended bias is made, this does not necessarily mean that the causes of the officer's behaviour is addressed. This segues into the topical question whether there should be a Federal Judicial Commission.

(c) Some practicalities about impartiality

41 Against the background of the relevant legal principles, can I now turn my attention to more practical considerations about the impartial conduct of Tribunal proceedings? In doing so, I will draw on my own experience as a Judge while acknowledging the necessity to factor in relevant statutory and practical matters which affect your particular Tribunal.

42 As I emphasised at the outset, impartiality is critical not only to maximise the objective of having a party feel that they have had their day in court, but also, more broadly, to maintain and enhance public confidence in the integrity and efficiency of a public tribunal's decision-

making process. That process has the authority of the State and affects many people's lives, rights and interests in significant ways. Never let that be forgotten. It is an enormous power which must be exercised responsibly and fairly.

43 Much of what I now say focusses upon proceedings in which the non-government party is unrepresented.

44 Patience is an essential quality and cannot be jettisoned simply because we are all working under considerable pressure. The same might be said about preparation before the hearing. The better prepared you are, the less likely it is that you will become impatient and frustrated. A calm demeanour is particularly important when there are litigants in person, some of whom have mental health issues. If things start to get testy, I frequently use two approaches. The first is to lower my voice which I find can often placate a querulous litigant, most of whom are keen to know what you are saying and thinking no matter how agitated they feel. The second approach is simply to adjourn the proceedings for five or ten minutes and hope that everyone settles down.

45 Patience should encourage appropriate self-restraint. In an inquisitorial hearing, you have no choice but to ask questions but that should be done courteously and ideally with an explanation of the issues to which the questions relate, such as a particular legislative provision. In a more adversarial hearing and where the other party is represented, it is important not to usurp their function in drawing out relevant evidence or to say things which suggest a closed mind which is not open to further persuasion.

46 Generally, most administrative tribunals are not bound by the rules of evidence and they can take steps to obtain material which is not provided by the parties. This is the case, for example, in the Guardianship Division of NCAT in NSW, where Registry officers contact the parties and persons who may be able to assist the Tribunal and collect material, which is then provided to members and parties in a pre-hearing report. It is important that inquisitorial powers are exercised in accordance with procedural fairness requirements which will operate differently in a tribunal setting to that in a Court. This is illustrated by a case in Victoria[12]. In the course of the hearing of a complaint of professional misconduct by a medical practitioner, the Panel carried out in private a Google search of the qualifications of a particular person whose expert opinion was relevant to some of the allegations against the doctor. During the course of the

[12] *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29.

hearing, the Panel disclosed the fact of the search, which prompted an application that the Panel should recuse itself. It refused to do so. On judicial review, the Court rejected the claim of apprehended bias. It viewed as significant that, having disclosed the fact of the search, the Panel subsequently told the parties that its search had confirmed the expert's credentials which reassured the Panel. This reassurance was seen to be of a positive nature as far as the doctor's rights and interests were concerned. The fact that the disclosure had been made was critical.

47 The importance of a party having their day in "court" cannot be overstated. Bear in mind that in most cases the private individual will not have had prior face to face contact with the primary decision-maker. That relationship will invariably have been conducted by correspondence or over the telephone. That relationship significantly changes if the party has a right to appear before an administrative tribunal. Then the party has the opportunity to see and engage with the Tribunal decision-maker. The likelihood of a litigant in person accepting that they have had their day in "court" is enhanced if you take the time and effort to ensure that he or she understands the nature of the proceeding and how it is to be conducted. Our Full Court has held that this is an aspect of procedural fairness.[13]

48 How do you handle a litigant in person who either swamps you with voluminous evidence, some or much of it irrelevant to the review, or who takes up an undue amount of time in presenting their case orally? One technique is to require the party to put on a concise written statement of their case, limited to say three or five pages, with cross-references to supporting materials. Whether this is permissible will depend upon the relevant legislation applying to your Tribunal. For example, under NCAT's enabling legislation, procedural rules have to be applied so as "to facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 36(1)). But it also requires NCAT's practice and procedure to be implemented so as to facilitate the resolution of the issues in a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings (s 36(4)).

49 As to unduly lengthy and unhelpful oral submissions, at the outset of oral addresses I set reasonable timeframes and explain that that is to ensure that all the parties (and other litigants) get a fair go. I then give a ten and five minute warning before the allocated time expires. Do not lose sight of the fact that the fair hearing rule requires the person to be given a **reasonable**

[13] *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301.

opportunity to present their case, not an open-ended one. Your enabling legislation may contain provisions which modify common law fair hearing requirements.

50 What if a litigant in person seeks your recusal based upon the fact that the party has been unsuccessful in earlier proceedings determined by you? Much will depend upon the basis for the earlier determination. If it relies upon adverse credibility findings against the self-represented person, it would be most unwise for you to hear a subsequent matter. Absent such a finding, however, there is generally no sound basis for recusing yourself merely because you have rejected the earlier case on its merits.

51 Can I say something briefly about conduct in the hearing room? In my experience humour is best avoided altogether or should only be used after appropriate reflection. It can often be counter-productive and suggest that you are not taking the matter seriously. It is also desirable to avoid banter with representatives of a party, particularly a representative of a Government agency. Such banter can give the impression that there is an exclusive club operating from which the unrepresented person is excluded.

52 I now switch to conduct outside the hearing room which can affect impartiality. One issue in our Court, which operates a docket system under which the same judge who hears the matter will normally have case managed it, concerns communications outside the Courtroom with litigants in person. My invariable practice is to require any contact about a matter in which there is a litigant in person to be with the Registry and not directly with my Chambers. Otherwise there is a risk of misunderstanding or miscommunication which can lead to unnecessary and time consuming recusal applications. No doubt some such applications are appropriate, but at other times one has the impression that they are used by some litigants in person, together with an array of other interlocutory applications, with a view primarily to having the final hearing postponed as long as possible. Some litigants in person use all available processes to frustrate the important objective of finality in decision-making. The challenge for the decision-maker is to manage and control such conduct while maintaining impartiality and fairness.

53 Social media and email communication are a trap for the unwary and a potential source of major embarrassment, not only for you personally (including where a member of staff for whom you are responsible uses social media inappropriately), but also for the institution which you represent. Let me illustrate that by what happened in our Court a few months ago. A litigant in person claimed to be entitled to a disability support pension from an earlier date than

that which had been allowed. The matter was fixed for a prompt final hearing. Shortly before the hearing date, the litigant in person contacted the Judge's Chambers and said that she wished to discontinue the proceeding. The proceedings were then discontinued by consent, without a hearing. Shortly thereafter the applicant contacted the Judge's Chambers requesting that the discontinuance be withdrawn because she said her previous request was made when she was recovering from surgery and felt overwhelmed. Behind the scenes, there was an exchange of emails between the Judge, his Chambers staff and the Registry. They included an email from the applicant which the Judge forwarded to the Associate with this observation by the Judge:

> "Sigh".

54 Unfortunately, the Judge hit "reply all" and the applicant saw the Judge's comment. The Judge apologised but declined the applicant's request not to publish reasons for judgment. The applicant sent a further email in which she stated that she did not "appreciate being treated like a fool" and that she regarded the email as revealing that the Judge treated "this serious matter as a joke". In the interests of open justice, all these matters were then revealed in published reasons for judgment, but in which the applicant was given a pseudonym.

55 A recent decision of the Supreme Court well illustrates the embarrassing difficulties which can be created by a staff member using social media, including before they even take up a position with a Court or Tribunal[14]. The applicant sought the disqualification of the trial judge on the basis of various Facebook posts which the Judge's tipstaff had posted, which linked to the Facebook profile of another Judge's tipstaff, who described himself as a tipstaff of the Supreme Court of NSW. The other tipstaff had published various comments, some of them many years ago, on gay rights. The litigants had diametrically opposed views on that subject. The Judge declined to recuse himself on the basis of the absence of any connection between the Facebook material and the Judge's independence. The Judge said at [38]:

> An alarming and troubling aspect of the present application is the insidious way in which the personal interests and activities of a member of my court staff have become thrust, without any forewarning, knowledge or permission, into the public arena of these proceedings in the guise of what is alleged to be a concern that there is or may be a reasonable apprehension that I may not be impartial. Some members of the community might struggle to make that connection. I count myself among people in that hypothetical group. The significance of anything revealed by the evidence in this case to any issue I have to determine is about as high as it would be if I were deciding a case dealing with the water allocation example I gave earlier and one of the

[14] *Gaynor v Local Court* [2019] NSWSC 516. See generally, Justice Steven Rares, "Speaking the right social media language", paper delivered on 6 June 2019 at Council of Australian Tribunals National Conference.

parties discovered that my tipstaff had done work experience on a cotton farm in the basin or was an enthusiastic supporter of downstream wetlands integrity.

56 Social media is not the only mechanism by which your conduct can give rise to questions about impartiality. The following true event is recorded in the 2010-2011 Annual Report of this State's Judicial Commission. A Judge was due to conduct a sentencing hearing arising from a motor vehicle accident in which a person had been killed. The night before the hearing the Judge and his staff were dining in a restaurant. The Judge made certain remarks about the case which were overheard by the deceased's parents, who were seated at the next table. They complained to the Judicial Commission.

57 The Commission asked the Judge to respond. The Judge acknowledged that he had discussed the case and he agreed that he should not have done so. The Commission determined that there was substance in the complaint and that it should not be dismissed. The complaint was referred to the head of jurisdiction to deal with. In his response, the Judge apologised for his action and the Commission conveyed this apology to the complainants.

Conclusion

58 As Tribunal members, you have the authority of the State to make decisions which change people's lives whether they like it or not. It is an enormous power, which has to be exercised responsibly, fairly, lawfully and with appropriate humility. The requirement of impartiality, both in actuality and appearance, is critical. By being impartial you not only protect yourself from embarrassment but you enhance public confidence in the integrity of the administrative review function.

59 I wish you all well in discharging the important function vested in you.

Justice John Griffiths
Federal Court of Australia