APPREHENDED BIAS IN AUSTRALIAN ADMINISTRATIVE LAW

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Although the basic test for apprehended bias is now well-established in Australian law, its application continues to present difficulties. The basic test is whether a fair-minded lay observer with knowledge of the material objective facts *might* reasonably apprehend that the judicial or administrative decision-maker *might not* bring an impartial and unprejudiced mind to the resolution of the question at hand.[1] It is equally well-established that, while the same objective test applies to judges as to tribunal members and other public decision-makers, the application and content of that test varies depending on the context, including differences in decision-making roles, functions, powers and processes.[2]

The application of the test can be problematic and somewhat unpredictable. For example, despite the unqualified terms of the relevant parts of the High Court's decision in *Ebner,* it now appears that, at least in the context of curial decision-making, the *Ebner* two-step test is not universal in its application. It requires some refinement in certain circumstances, including where the alleged apprehended bias arises from matters giving rise to an 'association', where those matters are ongoing at the time of the relevant decision-making.[3]

Another area of difficulty and uncertainty concerns the extent of the knowledge to be imputed to the lay observer. The basic test is intended to be wholly objective, but some significant subjective elements are emerging to the point where the test is described by some as fundamentally 'a matter of general impression derived from the

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1 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293–94, 300; *Re Polites; Ex Parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78; *Webb v R* (1994) 181 CLR 41, 67 ('*Webb*'); *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] ('*Johnson*'); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337,344 [6] ('*Ebner*'); *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425, 434 [27] ('*Ex Parte H*'); *Concrete Pty Ltd v Parramatta Design & Developments Pty Limited* (2006) 229 CLR 577 ('*Concrete Pty Ltd*'), 609 [110]; *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 ('*McGovern*'); *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29 [35].

2 *Ebner*, 344 [4]; *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 533, 539 [78], [101], [102] ('*Jia*'); *Ex parte H* at [28], [29]; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 ('*Hot Holdings*'); *Greyhound Racing NSW v Cessnock and District Agricultural Association* [2006] NSWCA 333 (Unreported, Beazley, Hodgson and Basten JJA, 27 November 2006) [118] ('*Greyhound Racing NSW*'); *McGovern* (2008) 72 NSWLR 504, 507-08 [6]–[13], 517-18, [75]–[77].

3 *Murlan Consulting Pty Limited v Ku-ring-gai Municipal Council* (2009) 170 LGERA 162, 177 [57] ('*Murlan*').

evidence',[4] while others see it as requiring a more detailed analysis.[5] Such subjectivity is particularly evident when a review court selects only some (and disregards other) particular aspects of the conduct, relationship or interest said to give rise to a reasonable apprehension of bias which ought to be imputed to the hypothetical lay observer. The success or failure of an allegation of apprehended bias is frequently dictated by the extent of the knowledge or information so imputed.

One commentator has suggested that 'conflicting and confusing' jurisprudence has developed because courts are applying the basic test too literally and detached from competing policy objectives.[6] He has suggested that a better approach would be to inject an open balancing exercise into the application of the test. Such a balancing exercise would require the review court openly to address and assess competing policy considerations. Such suggested considerations include not only maintaining public confidence in public decision-making, but also other policy objectives, such as reducing the risk of erroneous decisions, promoting efficiency of public decision-making and acknowledging the interests of the party asserting apprehended bias.

Having regard to the less demanding requirements of a 'might/might not' test, it is unsurprising that, with few exceptions, litigants see no need to raise claims of actual bias (which carry a 'heavy onus' and must be 'distinctly made and clearly proved').[7] As a matter of general impression, there is a growing trend to raise apprehended bias in judicial review proceedings.[8] That may be partly explicable because some litigants are taking advantage of the uncertain boundaries and less demanding requirements of a test which has at its core concepts of 'might/might not'.

This article explores these and related issues.

THE BASIC TEST FOR APPREHENDED BIAS IN AUSTRALIAN ADMINISTRATIVE LAW

As noted above, the current formulation of the basic test for apprehended bias in Australian law is the same for both curial and non-curial decision-making. It is whether a fair-minded lay observer with knowledge of the material objective facts might reasonably apprehend that the judicial or administrative decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question at

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4 *Jia* (2001) 205 CLR 507, 552 [146].

5 See, eg, *Johnson* (2000) 201 CLR 488; *Mid Western Community Action Group Inc v Mid-Western Regional Council (No 2)* [2008] NSWLEC 143 ('*Mid Western*').

6 Simon Atrill, 'Who is the "fair-minded and informed observer"? Bias after *Magill*' (2003) 62 *Cambridge Law Journal*, 279, 289.

7 See *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 (Unreported, Giles JA, Tobias JA, McColl JA, 16 February 2007) [97]. *Jia* involved claims of both actual and apprehended bias, reflecting statutory restrictions on heads of judicial review under the *Migration Act 1958* (Cth) and their non-application to the constitutional writs. Traditionally, actual bias appears to be the only test applicable to domestic or non-statutory tribunals: see *Maloney v NSW National Coursing Association Ltd* [1978] 1 NSWLR 60 and J R S Forbes, *Justice in Tribunals,* (2nd ed, 2006) 279, but see also *Bundagen Co-operative v Battle* [2010] NSWSC 160 (Unreported, Latham J, 5 March 2010).

8 In Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action*, (4th ed, 2009) 746, the authors refer to 'an alarming increase in the number of cases in which bias is now alleged'.

hand. But when that basic rule is applied outside the judicial system, account must be taken of various matters which inform the different standard or degree of neutrality expected of an administrative decision-maker, including the different nature of the body or tribunal whose decision is in issue and the different character of its proceedings. In applying the basic test in an administrative decision-making context, it is also clear that, from the very outset, close attention must be paid to any relevant statutory provisions 'applicable to the proceedings in question, the nature of the inquiries to be made and the particular subject-matter with which the decision is concerned.'[9]

The High Court reaffirmed the basic test in *Ebner*. That decision is also important in establishing the following related principles, which apply equally to judicial and administrative decisions, and inform the ultimate question of the reasonableness of the asserted apprehended bias:

(a) application of the test requires no prediction or findings about how a judge or a juror will approach or has in fact approached the matter … 'the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror';[10] and

(b) application of the test requires two steps:

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

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

Although the basic test is the same for both curial and non-curial decision-making, the underlying rationale for that test is not identical in those areas. For judicial decision-making, the High Court has repeatedly emphasised that the rationale relates to fundamental and deep-rooted considerations of judicial independence and the need to maintain and promote public confidence in the independence and impartiality of courts.[11]

In contrast, the apprehended bias principle for non-curial decision-makers is derived solely from natural justice or procedural fairness requirements.[12] The

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9 See *Ex Parte H* (2001) 179 ALR 425, 426 [5].

10 *Ebner* (2000) 205 CLR 337, 345 [7]. As Kirby J stated in *Jia* (2001) 205 CLR 507, 541 [111], 'imputed bias does not require the complainant to establish anything about the subjective motives, attitudes, predilections or purposes of the decision-maker.' Similarly, see Hayne J, 564 [184].

11 *Ebner* (2000) 205 CLR 337, 343 [3]. Gaudron J went further, stating at 362 [79] that the requirements that a court act impartially and also be seen to act impartially are requirements 'embedded in common law and in all developed legal systems', but, in addition, 'they are also required by Ch III of the Constitution'. The High Court has also emphasised the relationship between the apprehended bias test and the need to maintain confidence in the judicial process in *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Webb* (1994) 181 CLR 41, 68; *Johnson* (2000) 201 CLR 488, 492-3 [12]; and *Ex parte H* (2001) 179 ALR 425, 426 [5].

12 *Ex parte H* (2001) 179 ALR 425, 246 [5]. There is an ongoing debate in Australian administrative law as to whether the ultimate source of procedural fairness requirements is to be found in statute or in the common law. See, eg, *Kioa v West* (1985) 159 CLR 550, 584,

significance of the differing rationales may be summarised as follows. First, while public confidence in the integrity of administrative decision-making can properly be seen as an aspect of procedural fairness requirements, the rules of procedural fairness (in common with other heads of judicial review of administrative action) also serve wider purposes. They include what Spigelman CJ has described as 'institutional integrity', which encompasses the maintenance of fidelity to the public purposes for the pursuit of which an institution is created and the application of public values, including procedural values, which the institution is expected to obey.[13]

Secondly, the rationale underlying the apprehended bias test as it applies to curial decisions has a further dimension. The test's focus on the reasonable apprehensions of a fair-minded and informed observer operates to avoid unfair damage to the judge in question, who ordinarily will not be a party to the appellate proceedings in which the issue of reasonable apprehension of bias is raised and whose subjective thought processes will not have been investigated by the appellate court because it is unnecessary to do so under the reasonable apprehension test.[14] Indeed, an important part of the rationale for a test which focuses on whether there is a reasonable apprehension of bias (as opposed to a test of 'real likelihood' or 'real danger', as applied in England prior to *Porter v Magill*),[15] is to avoid the review court having to make findings which could undermine the core aim of maintaining and promoting public confidence in the judiciary.[16] That core aim is sufficiently achieved by findings of apprehended bias.

On one view, this particular dimension of the rationale has less relevance to judicial review of administrative decision-making. Although there is no obligation to do so, such decision-makers may give evidence in judicial review proceedings challenging their decisions and, in certain circumstances, an adverse inference might be drawn if they do not give evidence.[17] But since the apprehended bias test obviates the need for any inquiry into the actual thought processes of the decision-maker, this difference between judicial and administrative decision-making may be more apparent than real.

Thirdly, the apprehended bias test must accommodate the fact that administrative procedure is more varied than judicial procedure. Common features which distinguish the latter from the former include the taking of a judicial oath as well as a duty to

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609–11 ('*Kioa*'); *Applicant VEAL of 2002 v Minister for Immigration Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 93-4 [10]; *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 143 [36]; *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000* [2008] NSWCA 356 (Unreported, Spigelman CJ, Allsop P, Sackville AJA, 19 December 2008) [52]–[54]; and most recently *Saeed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507, 511 [12]-[13].

13 J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77-91. See Kirby J in *Jia* (2001) 205 CLR 507, 550 [138].

14 *Webb* (1994) 181 CLR 41, 72.

15 [2002] 2 AC 357. The Australian basic test has now also been adopted in New Zealand: see *Muir v Commissioner of Inland Revenue* (2007) 3 NZLR 495, [44]–[64].

16 *Webb* (1994) 181 CLR 41, 72.

17 For an example of a case where several members of a multi-member administrative body gave evidence in a case raising the first limb of procedural fairness requirements, see *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561. For a discussion of the principle in *Jones v Dunkel* (1958) 101 CLR 298 in judicial review cases, see *Minister for Aboriginal and Torres Strait Islander Affairs v Douglas* (1996) 43 ALD 203, 222-223.

exercise judicial functions when jurisdiction has been regularly invoked. Judges must sit in cases to which they are assigned and 'they are not at liberty to decline to hear cases without good cause.'[18] Court processes are generally adversarial and judges need to be wary of entering the fray too vigorously by, for example, taking over counsel's role in cross-examining witnesses, lest their impartiality be questioned. Some of these matters might apply to some administrative tribunals exercising quasi-judicial functions, but generally they do not. Consequently, there is a lesser standard of neutrality expected in administrative decision-making.

Fourthly, in the context of administrative decision-making which is generally conducted without a public hearing (unless, for example, an administrative tribunal is involved and it conducts public hearings), some adjustment needs to be made to the terms of the basic test because the notion of an 'observer' is inapt. Hence, the High Court has suggested that it would be better, in the case of administrative proceedings held in private, '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.'[19]

MAIN CATEGORIES OF APPREHENDED BIAS

In an administrative law context the facts and circumstances which might ground an allegation of apprehended bias are numerous and are probably incapable of exhaustive classification. But some general guidance is provided by the following four main categories helpfully identified by Deane J in *Webb* concerning apprehended bias in a judicial context, which also cover much of the spectrum in an administrative decision-making context (while noting that the categories may also overlap): [20]

(a) disqualification by interest i.e. where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, creates a reasonable apprehension of prejudice, partiality or pre-judgment;

(b) disqualification by conduct, including published statements. The relevant conduct may occur in the course of or outside any formal proceedings;

(c) disqualification by association, such as where an apprehension of pre-judgment or other bias results from direct or indirect relationship, experience or contact with anyone interested in, or otherwise involved in, the relevant proceedings; and

(d) disqualification by extraneous information, such as where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to an apprehension of bias on the part of a judicial decision-maker.

It should not be assumed that the principles concerning apprehended bias apply uniformly to those four categories. As noted above, the Court of Appeal in New South Wales recently held that a 'broader test' is appropriate in a case involving apprehended

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18 *Ebner* (2000) 205 CLR 337, 348 [19].

19 *Ex parte H* (2001) 179 ALR 425, 434-5 [28].

20 *Webb* (1994) 181 CLR 41, 74. The fourth category operates by reference to a court being bound by the rules of evidence which will have limited or no application in an administrative decision-making context unless the case involves an administrative tribunal which is bound by the rules of evidence.

bias arising from a continuing association. That broader test relates to the 'potential for deviating from the course of deciding the case on its merits, being a test not limited to a connection with the issue in dispute'.[21]

HOW MUCH INFORMATION TO IMPUTE TO THE HYPOTHETICAL OBSERVER OR PERSON

One of the most difficult issues presented by the basic test for apprehended bias is the extent of the knowledge or information to be imputed to the hypothetical observer or person. Not all judges approach the matter consistently. In *Webb*,[22] Deane J said that the knowledge to be attributed to the hypothetical person is 'a broad knowledge of the material objective facts as ascertained by the appellate court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court'. In *Laws v Australian Broadcasting Tribunal,*[23] Mason CJ and Brennan J said that the fair-minded observer had to be imputed with knowledge of 'the actual circumstances of the case'. Significantly, their Honours then proceeded to attribute to the hypothetical observer knowledge of the fact that defences filed by the Australian Broadcasting Tribunal in defamation proceedings did not amount in law to assertions of belief or admissions. This led to the conclusion that there was insufficient reason for an observer to conclude that the defences amounted to a prejudgment of the issues to be determined by the Tribunal in an administrative inquiry. This approach was taken notwithstanding the acknowledgement that it was not proper to attribute to the fair-minded observer 'the understanding that a lawyer would have of the capacity of the members of the Tribunal to make an independent decision uninfluenced by previously expressed opinions and conflicting interests'.[24]

The cases are replete with references to the hypothetical observer not being a lawyer or having a detailed knowledge of the law, but the issue becomes complicated when the basis for the apprehended bias claim necessarily raises legal matters, as occurred in *Laws*. That tension can arise in both a judicial and administrative decision-making setting, as is reflected in *Johnson*. There, while acknowledging that the fictional observer was not taken to have a detailed knowledge of the law, the High Court said that the reasonableness of any suggested apprehension of bias had to be considered in the context of modern court practice and procedure, including active case management.[25]

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21 *Murlan* (2009) 170 LGERA 162 [57]. Other cases suggesting that different principles may apply to particular categories of apprehended bias, such as where an interest or preconception exists independently of the circumstances of the particular case, include *Re JRL: Ex parte CJL* (1986) 161 CLR 342, 372 ('*Re JRL*') and *R v Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 [21].

22 (1994) 181 CLR 41, 73.

23 (1990) 170 CLR 70, 87 ('*Laws*').

24 Ibid.

25 *Johnson* (2000) 201 CLR 488, 493 [13]. See also *Concrete Pty Ltd* (2006) 229 CLR 577, 609–10 [111], 635–6 [177].

Such is the range of the potential variables in an administrative decision-making context it is virtually impossible to draw up a comprehensive list of the relevant matters or circumstances to be imputed to the hypothetical observer.[26]

ILLUSTRATING THE PRACTICAL DIFFICULTIES OF APPLYING THE BASIC TEST

The practical difficulties presented by the choice of knowledge or information to be imputed to the hypothetical observer is illustrated by contrasting two decisions of the Land and Environment Court in New South Wales. Both decisions involve claims of apprehended bias on the part of two Councils concerning the grant of development consents.

In *Mid Western*,[27] the re-grant of a development consent was challenged on the basis of an alleged apprehension of bias on the part of the Mayor and a Councillor. It was common ground between the parties that an apprehension of bias on the part of even one member of a council, if made out, was capable of vitiating the decision by the council as a collegiate body, relying on obiter dictum in *IW v City of Perth*.[28]

The allegation of apprehended bias against the Mayor stemmed from sharp exchanges which occurred between the Mayor and the chairman of a community action group opposed to the development. Heated words were exchanged during a Planning Committee meeting about a series of postcards ridiculing the Mayor and opposing the development which were sent to his home by the Action Group and read by the Mayor's 90-year-old mother, who subsequently suffered a stroke. The allegation was that the Mayor's strong language, tone of voice and heated reaction disclosed a degree of hostility by the Mayor to the Action Group sufficient to give rise to a reasonable apprehension of bias.

In rejecting the apprehended bias claim, Jagot J emphasised the need to understand the relevant contexts within which the exchanges took place. In so doing she imputed to the fair-minded lay observer awareness of a wide range of matters, including that:

(a) members of councils will often have families whom they wish to protect from the 'intrusions' of public life;

(b) councillors, like other people, might on occasion feel affronted by another person's conduct and can use more robust language in the political forum of a local council meeting than would be the case in a court;

(c) the re-grant of the development consent was supported by a lengthy independent assessment report concerning the development, which annexed all of the submissions received as part of the notification and exhibition process, including the Action Group's objection; and

(d) councillors have a statutory duty under s 439 of the *Local Government Act 1993* (NSW) to act honestly and exercise a reasonable degree of care and diligence in carrying out their functions.

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26 See *Gascor v Ellicott* [1997] 1 VR 332, 342–3 and similarly see *IOOF Australia Trustees Ltd v Seas Sapfor Forests Pty Ltd* (1999) 78 SASR 151, 182 [185].

27 [2008] NSWLEC 143.

28 (1996) 191 CLR 1, 49–51. See further pages 367–8.

The second source of the alleged apprehended bias related to comments made by a Councillor at a Council meeting which occurred 12 months before the Council re-granted the development consent. The Councillor made reference to the Council not being able to reject the development application. The Action Group's claim of pre-judgment relied on that statement and also on the terms of a contract between the Council and the developer for the sale of the land. The contract included clauses which stated that the Council as vendor believed that development on the land should occur and completion of the contract was conditional upon development consent being granted.

In rejecting this part of the apprehended bias claim, Jagot J referred to the other conditions in the contract, including a reference to the Council determining the development application in accordance with 'the proper exercise ... of its powers as the development authority' and the need to view the Councillor's comment in its proper context (including subsequent references to an ongoing assessment of the application so as to achieve the right outcome). Reliance was also placed on the sheer passage of time between the Councillor's comments in December 2006 and the Council's decision in December 2007.

The approach in *Mid Western*, which involved imputation to the hypothetical figure knowledge of a wide range of matters, including all relevant terms of the contract, should be contrasted with the more selective approach adopted by Biscoe J in *F & D Bonaccorso Pty Ltd v City of Canada Bay Council (No 2)*.[29] A Council's decision to grant development consent to the demolition of ten houses was challenged on various judicial review grounds, including apprehended bias. Three of the ten houses had been sold by the Council in 2000 to Arinson Pty Ltd. Special condition 17 in the contract of sale was to the effect that the Council would approve the demolition of those three houses. The other seven houses were owned by Omaya Holdings Pty Ltd or a related company. Omaya Holdings Pty Ltd was not a related company of Arinson Pty Ltd and those two companies had entered into an agreement for Omaya to purchase Arinson's three houses. The development application, which was approved in February 2007, was lodged by Omaya, not Arinson. There was no evidence that the 2000 contract was before the Council when it made its decision.

The Court noted a history of previous development consents having been granted to Arinson permitting the demolition of the three houses, but all those development consents had either lapsed, been surrendered or declared invalid. Biscoe J upheld the allegation of apprehended bias, relying upon the terms of the special condition and 'a continuum of conduct consistent with honouring special condition 17'.[30] He imputed knowledge of those matters to the hypothetical observer, yet declined to impute knowledge of other arguably relevant matters, namely that:

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29 (2007) 158 LGERA 250 ('*Bonaccorso Pty Ltd*'). The danger of excessive selectivity in imputing knowledge to the hypothetical observer was emphasised by Clarke JA in *Najjar v Haines* (1991) 25 NSWLR 224, 240.

30 *Bonaccorso Pty Ltd* (2007) 158 LGERA 250, 295.

(a) the contract as a whole could not be enforced by Arinson because they were not a party to it (and also the special condition itself was invalid and unenforceable as it was an unlawful fetter); and

(b) the fact that the 2000 contract was not before the Council when it made its decision some 7 years later in February 2007.

It is difficult to see why these matters were not relevant to the apprehended bias claim. If they were not to be imputed to the hypothetical observer in accordance with *Laws*, arguably they were relevant to an assessment of the reasonableness of the apprehension, consistently with the approach in *Johnson*.

SOME SUGGESTED NON-EXHAUSTIVE RELEVANT CRITERIA

The impossibility of listing exhaustive criteria guiding the imputation of knowledge to the hypothetical observer has been emphasised above. The difficulty is perhaps accentuated in an administrative decision-making context where potentially the objective variables can range so widely, as also can the terms of the overarching statutory framework which necessarily informs the significance and application of those variables. The paramountcy of the statutory context cannot be over-emphasised. As Spigelman CJ stressed in *McGovern*,[31] the statute must be part of the assessment from the outset and not merely a qualification at the end of the process.

With those qualifications in mind, the cases indicate that the following criteria may be relevant where claims of apprehended bias are made in an administrative decision-making context.

(a) Nature and role of the decision-maker

One of the key matters influencing the degree of neutrality to be expected of an administrative decision-maker by the hypothetical figure concerns the nature and role of the relevant decision-maker. Different considerations can apply depending on whether the decision-maker is a minister, a local government council, an administrative board or tribunal or a public servant. It is not simply a matter of contrasting these decision-makers with judges, but there are also relevant differences within the class of administrative decision-makers.

In the case of ministers, for example, the High Court emphasised in *Jia* that ministers are not judges. Accordingly, where an allegation of apprehended bias arose following certain prejudicial statements made by the Minister, both in a radio broadcast and in private correspondence with the President of the Administrative Appeals Tribunal, Gleeson CJ and Gummow J found that it was necessary to consider and evaluate the Minister's conduct 'in the light of his or her political role, responsibility and accountability'.[32] After noting the legislative provisions forming part of the statutory scheme under which the Minister was empowered to cancel a visa if satisfied that the person was not of good character and in determining whether it was in the national interest that a person be declared an excluded person, their Honours emphasised the Minister's political and electoral accountability:

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31 (2008) 72 NSWLR 504, 507 [6]. Similarly, see *Greyhound Racing NSW* [2006] NSWCA 333 (Unreported, Beazley, Hodgson and Basten JJA, 27 November 2006) [111].

32 *Jia* (2001) 205 CLR 507, 529 [63].

> The Minister is a Member of Parliament, with political accountability to the electorate, and a member of the Executive Government, with responsibility to Parliament. ... the Minister functions in the arena of public debate, political controversy, and democratic accountability. At the same time, the Minister's exercise of statutory powers is subject to the rule of law, and the form of accountability which that entails.[33]

Similar considerations arise when claims of apprehended bias are made against other democratically elected bodies, such as local government councils, a point which has been acknowledged in a series of cases.[34] Where decision-making authority is vested in an elected body, such as a local council, no implicit assumption can be made that the body will approach the exercise of its powers with a blank mind on matters such as whether or not a proposed development is appropriate.[35]

Public interest considerations will generally be relevant factors to be taken into account by an elected person or body, whether it be a minister or a council. In a planning context, for example, one of the mandatory relevant considerations specified in s 79C of the *Environmental Planning and Assessment Act 1979* (NSW) ('*EPA Act*') is 'the public interest'. Nevertheless, it appears that some courts seem to take the view that the weight to be accorded to the fact that a decision-maker is elected fluctuates according to the task which is being carried out. This approach commended itself to Lloyd J in his recent decision in *Gwandalan Summerland Point Action Group Inc v Minister for Planning*.[36] The danger, however, is that such an approach threatens to marginalise the important consideration that most, if not all, statutory tasks conferred on ministers or councils are conferred precisely because they are elected representatives and expected to inject their views of the public interest. Similar considerations can also arise in industry bodies where members are appointed in a representative capacity to reflect particular industry elements and with an expectation that such members will build up and apply their expertise.[37]

Considerations of political and electoral accountability which apply to ministers and councils have no application where apprehended bias is alleged against a public servant or council staff member. In the former case, for example, the High Court has

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33 Ibid 528, [61]. See also at 533–4 [78], 538–9 [99]–[102], 546 [125], 551–2 [141]–[143], 562–3 [180]–[182], 565 [187], 583–4 [244]–[245].

34 See, eg, *McGovern* (2008) 72 NSWLR 504, 508 [13], 516 [70], 517–8 [75]–[77]; *Mid Western* [2008] NSWLEC 143 [29]–[38]; *Winky Pop Pty Ltd v Hobsons Bay City Council* (2007) 19 VR 312, 322 [33] ('*Winky Pop*'); *R v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, 101 [62] ff, 107–8 [94] ff, 112 [111].

35 *McGovern* (2008) 72 NSWLR 504, 535 [157]. In local government decision-making and some other areas involving industry regulation, apprehended bias principles may operate in conjunction with statutory provisions dealing specifically with conflicts of interest, including disclosure requirements and the effect on validity where there is a breach: see *Winky Pop* (2007) 19 VR 312, 318–20 [18]–[26]; *Greyhound Racing NSW* [2006] NSWCA 333 (Unreported, Beazley, Hodgson and Basten JJA, 27 November 2006) [114] ff.

36 (2009) 168 LGERA 269, 280–1 [43]–[44], 281–2 [46]–[48] ('*Gwandalan*'). See further below pages 12-13.

37 See, eg, *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN (NSW) 307; *Builders' Registration Board of Queensland v Rauber* (1983) 57 ALJR 376, 385; *Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal* [2004] NSWCA 291 (Unreported, Sheller, Giles and Ipp JJA, 31 August 2004) [22]–[24]; *Greyhound Racing NSW* [2006] NSWCA 333 (Unreported, Beazley, Hodgson and Basten JJA, 27 November 2006) [118].

recognised the difference between a discretion vested in a minister as opposed to a departmental head. The distinction is important not only in the context of the right of a minister to take into account governmental policy in exercising powers,[38] but also, where apprehended bias is alleged, in evaluating the neutrality expected of a minister as opposed to a non-elected official or body.[39]

The degree of neutrality expected of administrative decision-makers is generally less than that expected of judges, reflecting the reality of the worlds in which they respectively operate. It is an unavoidable by-product of many regulatory regimes that regulators will have ongoing contact with persons in the industry and deal with recurring issues. As French J stated in *Century Metals and Mining NL v Yeomans*:

> Ministers and other administrators frequently have a continuing relationship with a particular issue or particular person during the course of which they necessarily form views; in practice it would generally be impossible for them to bring an open mind to a new decision pertaining to that issue or person.[40]

A claim of apprehended bias in an administrative decision-making context may also need to take into account the different roles performed by different persons in that process. In a judicial setting the focus will invariably be on the conduct of the judicial decision-maker alone. The position is different, however, where ministers or local councils have before them advice or analysis provided by their staff. The distinction is particularly significant where an allegation of bias is directed at a staff member and is said to taint the ultimate decision made by a minister or local council. In such cases it is important to identify with some precision the part played by a staff member who is not the ultimate decision-maker. Even if circumstances pertaining to such a staff member might ground a finding of apprehended bias on their individual part, that is only likely to produce invalidity where such a person has 'a central role' in the decision-making process.[41] And where such a complaint of apprehended bias arises vicariously, the ultimate decision will not of course be affected if there is an absence of factual material to ground a claim of apprehended bias against the relevant staff member, as was the case in *McGovern.*

(b) Nature of the proceedings

Obviously there are significant differences between the processes and procedures of judicial and administrative decision-making. Those differences necessarily impact upon the degree of neutrality expected of judicial and administrative decision-makers. Obvious differences include the fact that judicial proceedings are almost invariably conducted in public, are of an adversarial rather than inquisitorial nature, usually involve legal representation and are heard and determined by judges who enjoy security of tenure to ensure their independence and impartiality.

The appropriate standard is necessarily affected by the presence or absence of these sorts of differences between judicial and administrative decision-making, but again, that truism should not be confused with the threshold question whether or not

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38 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189.

39 *Jia* (2001) 205 CLR 507, 529 [63]. See also *Franklin v Minister of Town and Country Planning* [1948] AC 87, 104 ('*Franklin*'); *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 179 ('*CREEDNZ Inc*'); *Hot Holdings* (2002) 210 CLR 438, 455 [50].

40 (1989) 100 ALR 383, 417 and to similar effect see *Laws* (1990) 170 CLR 70, 91.

41 See, eg, *Hot Holdings* (2002) 210 CLR 438, 448–9 [22]–[24], 455–6 [52].

requirements of procedural fairness apply at all. For example, in *Ex parte H,* the High Court noted some differences between curial proceedings and those conducted by the Refugee Review Tribunal, including the fact that the latter are inquisitorial in nature and the parties are not represented. Nevertheless, in the particular circumstances there, it was still held that a reasonable apprehension of bias arose from the Tribunal's constant interruptions to the refugee applicant's evidence and constant questioning of his credibility. These matters contributed to the finding that a fair-minded lay observer or a properly informed lay person might well infer that there was nothing that the applicant could say or do to change the Tribunal's preconceived view that he had fabricated the matters relied upon as establishing his entitlement to refugee status.[42]

While there are significant differences between curial and administrative decision-making, there are some common concerns which contribute to inform the relevant standard of apprehended bias. These matters arise under the umbrella of efficiency of contemporary decision-making in both a judicial and administrative context. As noted above, in assessing allegations of apprehended bias by way of predetermination arising from comments or remarks by judges, case management procedures and principles which now characterise most judicial proceedings are relevant considerations. They include docket systems which operate to involve the ultimate judicial decision-maker from the very outset of the litigation and in overseeing potentially numerous interlocutory steps.[43] Such processes necessarily mean that judges become appraised of relevant issues well before the final hearing and may even form strong tentative views much earlier than the final hearing.

Similar considerations can also apply to some administrative decision-making processes. For example, in *McGovern* the Court of Appeal emphasised the need to bring into account the multiple stages of decision-making concerning a development application. The ultimate determination by a council of such an application does not occur in a vacuum. It is generally preceded by detailed analysis carried out by council staff and individual councillors (who may, for example, be members of a planning committee). Moreover, individual councillors frequently attend site visits and receive comments from ratepayers on development applications. Further matters can also arise at public council meetings where such applications are normally heard and ultimately determined. It is not surprising that, in those circumstances, individual councillors may have quite advanced views about the merits of a particular application well before it falls for ultimate determination. To establish pre-determination in those circumstances effectively requires the hypothetical observer to apprehend that a councillor has closed their mind and cannot be persuaded to change any predisposition having regard to all of the merits of the application.

The same could be said for ministerial decision-making in a planning context. But other considerations have sometimes been given dominance and resulted in a finding of apprehended bias. A good example is the decision in *Gwandalan.* A judicial review challenge was brought against the Minister's decision to grant concept plan and project approvals under Part 3A of the *EPA Act*. Part 3A confers decision-making powers on the Minister in respect of major developments, including a sub-class of critical infrastructure projects. The developments usually have State or regional significance.

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42 *Ex parte H* (2001) 179 ALR 425, 435 [32].

43 See, eg, *Johnson* (2000) 201 CLR 488, 499 [33]; *Ebner* (2000) 205 CLR 337, 345 [8]; *Concrete Pty Ltd* (2006) 229 CLR 577, 609–10 [111], 634 [174].

The Minister's decisions were taken against a background of two pre-existing written arrangements between the developer and two New South Wales Ministers providing for the developer to give up to the Crown certain land for environmental purposes. In return, the Minister for Planning undertook to use his 'reasonable endeavours' to approve certain land rezonings and grant approval to a concept plan and project application for separate residential developments at Gwandalan and Catherine Hill Bay. The written arrangements in question had been drafted by the State Crown Solicitor's Office. They included clauses in the obvious nature of 'savings provisions' aimed at avoiding the arrangements being held to fetter the Minister's statutory powers and responsibilities.

In upholding a claim of apprehended bias, the Court attached particular significance to factual matters outside those written arrangements. In particular, significance was attached to a series of oral and written statements made by the Minister or his staff which suggested to the Court that the Minister had committed himself to grant the relevant approvals well before his decisions were formally made. Furthermore, the Court was strongly influenced by the fact that that commitment on the part of the Minister pre-dated his receipt of the Director-General's statutory report assessing the suitability of the subject land for development.[44] The Court concluded that these matters, as imputed to the hypothetical observer, outweighed both the legal significance of the 'savings provisions' and also the consideration that, in the context of a Part 3A project, the Minister was not required to be completely neutral and could be predisposed towards granting the necessary approvals.

Little, if any, weight was given to the fact that it was a minister who had primary decision-making responsibilities under Part 3A of the *EPA Act*. Cases such as the House of Lords' decision in *Franklin*[45] and the Court of Appeal of New Zealand in *CREEDNZ Inc*[46] were distinguished. The first basis of distinction was that the facts in both those cases did not make good the allegations of predetermination or bias. The second basis was because the Court viewed the Minister's approval of a major project of State or regional significance under Part 3A to be of a fundamentally different character to a decision, such as that in *CREEDNZ Inc*, which was made 'at the governmental level of an Order in Council, being the very apex of governmental structure, and where the proposal was a major work in the national interest'.[47]

Many — including a hypothetical figure — might contest Lloyd J's characterisation of the limited political and governmental significance of ministerial decisions under Part 3A of the *EPA Act*. Also, while the Minister had not been provided with a copy of the Director-General's assessment report when he made public announcements concerning the public benefits of the arrangements, by that time the Minister must have had a reasonable understanding of the relevant issues, not the least because the project only became subject to Part 3A of the *EPA Act* after the Minister had earlier declared the project to fall under Part 3A. The outcome of the case further illustrates how the basic test for apprehended bias is capable of producing significantly different outcomes depending upon the nature and extent of the knowledge attributed to the hypothetical observer.

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44 See especially *Gwandalan* (2009) 168 LGERA 269, 296–7 [123].
45 [1948] AC 87.
46 [1981] 1 NZLR 172.
47 *Gwandalan* (2009) 168 LGERA 269, 298 [134].

The ultimate decision in *Gwandalan* is perhaps more strongly sustained by the Court's alternative finding[48] (which was strictly obiter dictum) to the effect that, having regard to the detailed provisions in the *EPA Act* for the making of statutory land agreements (which include statutory processes for public notification and consultation),[49] and which also appear to be exclusive in terms of the making of such agreements, the non-statutory written arrangements entered into by the Ministers and the developer were irrelevant considerations.

(c) Nature of the ultimate decision

There has been a suggestion in some cases that another relevant factor in applying the basic test is the nature and impact of the administrative decision affected by the allegation of apprehended bias. This was one of the matters referred to by Kirby J in *Jia* in explaining how, as an aspect of the rule of natural justice, the test 'adapts to the nature *and significance of the decision concerned*, the character of the office of the decision-maker and the requirements, express or implied, of any legislation applicable to the case.'[50]

It may well be that a higher standard of neutrality is required of an administrative decision-maker whose decisions have an adverse effect on a particular individual's interests, especially where essential human rights are involved. But that consideration should not be overstated in circumstances where the impact of a particular decision on an individual's rights and interests is central to the threshold consideration of whether the particular administrative decision attracts the requirements of procedural fairness at all.[51] Generally speaking, the requirements of procedural fairness do not apply to decisions which affect the public at large, as opposed to the circumstances of particular individuals.[52]

(d) Other relevant matters of context

Where there is an allegation of apprehended bias based on pre-judgment arising from conduct or statements by a decision-maker, it is critical that the conduct or statements be viewed in their context by the hypothetical observer. Statements which, when viewed in isolation, might be regarded as presenting a clear case of apprehended bias can take on a different complexion when they are placed in a broader context. The point is vividly illustrated by the High Court's decision in *R v Minister for Immigration and Multicultural Affairs: Ex parte Epeabaka*.[53]

Several months after rejecting an appeal by an asylum seeker for a protection visa, a member of the Refugee Review Tribunal published on his personal internet home page various statements purporting to describe to anyone interested 'where he was coming from" in performing his duties as a Tribunal member. His commentary included

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48 See ibid 299–301 [140]–[148].

49 See ss 93F–93L of the *EPA Act*.

50 *Jia* (2001) 205 CLR 507, 549 [136] (emphasis added). To similar effect, the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 [47] stated that part of the relevant context for defining the applicable standard of apprehended bias was the individualised nature and impact of immigration decisions and their 'special sensitivity'.

51 See, eg, *Kioa* (1985) 159 CLR 550, 584.

52 See generally Aronson, Dyer and Groves, above n 8, [7.175]–[7.205].

53 (2001) 206 CLR 128.

statements that applicants for refugee status who appear before the Tribunal "often lie through their teeth' and 'weave a web of lies'. Those statements were sufficient of themselves for Heerey J to find in a related case[54] that this was a clear instance of apprehended bias by reason of the Tribunal member displaying an entrenched predisposition against the credibility of refugee claimants. Although the statements were made in the wider context of the Tribunal member demonstrating considerable sympathy and compassion for refugee applicants, those matters of context were rejected by Heerey J as impermissibly involving a 'bane and antidote' theory.

The proceedings arose in the exercise of the High Court's original jurisdiction involving the constitutional writs. Disagreeing with Heerey J's approach, the High Court insisted that the relevant statements be assessed in the wider context in which they were made. That context included that the Tribunal member was saying that Tribunal members sought to avoid presumptions one way or another; that the statements were made in the context of refugee applicants being so fearful and desperate that they were tempted to lie thereby making the Tribunal's task more difficult; that the Tribunal member's commentary overall was sympathetic, and not antipathetic, to refugee claimants and that the purpose of the Tribunal member's comments was to show how conscientious he was. The suggestion that such matters were mere 'bane and antidote' was expressly rejected and the Court observed that it was simply a matter of the statements having to be read in their context.[55]

A different but related principle has also emerged. Context is not only relevant to the threshold issue of whether or not the basic test of apprehended bias is established, but also may operate to eradicate an apprehension of bias which has arisen. That principle is well-established in a judicial setting, where subsequent statements or directions by a judge can operate to eradicate what otherwise would constitute a reasonable apprehension of bias.[56] But the principle can also apply in an administrative decision-making context. For example, in *Weinstein v Medical Practitioners Board of Victoria,*[57] in the course of a hearing of a complaint of professional misconduct against Dr Weinstein, the administrative panel conducting the hearing carried out in private a 'Google search' of the qualifications of a particular person whose expert opinion was relevant to part of the allegations against the doctor. The fact of that search was disclosed during the course of the hearing and prompted an application that the panel should disqualify itself, which the panel declined to do.

On judicial review the Victorian Court of Appeal rejected the claim of apprehended bias. In so doing reliance was placed on the fact that, having disclosed to the parties the conduct of the search, the panel subsequently stated to the parties that its search had confirmed the expert's credentials, which reassured the panel. The Court saw that as a reassurance which was 'of a positive nature' for Dr Weinstein.

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54 *Ferati v Minister for Immigration and Multicultural Affairs* (1998) 54 ALD 381.

55 Similarly, see *Mid Western* [2008] NSWLEC 143 [28]–[40].

56 See, eg, *Re JRL* (1986) 161 CLR 342, 372; *Vakauta v Kelly* (1989) 167 CLR 568, 572, 577; *Webb* (1994) 181 CLR 41, 53, 91–2; cf 62, 79.

57 (2008) 21 VR 29.

APPREHENDED BIAS AND MULTI-MEMBER ADMINISTRATIVE DECISION-MAKING

Until such time as the High Court squarely addresses the issue, there is currently some doubt as to whether apprehended bias on the part of a minority of members of a collegiate body, such as a local government council, vitiates the decision.[58]

The matter was recently discussed by the Court of Appeal of New South Wales in *McGovern* in the context of complaints of apprehended bias against two of the majority of Councillors who granted a disputed development application. The Court's observations on the issue are strictly obiter dicta because the Court rejected the factual basis for the claims of apprehended bias. Nevertheless, the Court was not ad idem on the issue. Spigelman CJ preferred to apply a simple 'but for' rule in the usual case of a collegiate decision-making process i.e. the Court should ask whether or not any person(s) reasonably suspected of pre-judgment determined the outcome.[59]

Basten JA seemingly preferred a less demanding test. He ultimately concluded, perhaps a little indecisively, that even if the votes of two biased Councillors were not decisive, 'their presence, if they were disqualified, *may* have tainted the proceedings and vitiated the decision.'[60] The third judge in *McGovern,* Campbell JA, preferred to decide the case on the basis of assuming, rather than deciding, that the Council's decision would be vitiated if the apprehended bias was satisfied in the case of only a minority of two Councillors.[61]

ESTABLISHING APPREHENDED BIAS

Another area of uncertainty concerns the nature of the onus carried by litigants who assert apprehended bias. The problem is compounded by the fact that the basic test comprises 'two mights'. That feature provoked Spigelman CJ's description in *McGovern* of the Australian test being one which sets 'a low threshold'.[62] It appears that some judges have taken that description out of context and viewed it as an invitation more readily to find apprehended bias.[63]

Unquestionably, the might/might not component of the test requires a less demanding standard of persuasion than a test which is expressed in terms of 'real likelihood' or 'real danger'. But that is not to say that the 'low threshold' is capable of being met by facts or circumstances which simply cause the hypothetical observer to have a vague sense of unease or disquiet. Spigelman CJ's reference to a 'low threshold' does not conflict with the long series of authoritative cases which emphasise that a

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58 Much of the uncertainty concerns the correctness of the following statement by Gummow J in *IW v City of Perth* (1996) 191 CLR 1, 50:

> It has been said that a decision of a collegiate body may be successfully attacked for bias even where but one member was biased and that member was not one of the majority. This is on the footing that in bias cases the court does not enter into difficult evidentiary questions as to the extent to which that person may have influenced the majority.

59 *McGovern* (2008) 72 NSWLR 504, 510–3 [31]–[47]. Other relevant cases include *Attorney-General (Vic) v City of Knox* [1979] VR 513; *Winky Pop* (2007) 19 VR 312.

60 *McGovern* (2008) 72 NSWLR 504, 524 [103] (emphasis added).

61 Ibid 553 [237].

62 Ibid 508 [14].

63 See, eg, *Gwandalan* (2009) 168 LGERA 269, 272 [4].

reasonable apprehension of bias does not arise merely on the basis of 'fanciful claims'. Rather, the allegation must be 'firmly established' and not 'be reached lightly'.[64]

It is also significant to note the context in which the reference was made to a 'low threshold' in *McGovern.* The point being made was that, having regard to the lowering of the bar implicit in the 'two mights', it was particularly important that a litigant who asserts apprehended bias identify with some specificity the matter or circumstance said to give rise to the apprehended bias, consistently with the principles established in *Ebner*.[65]

It is important that the Chief Justice's reference to a 'low threshold' be understood in its proper context. Experience suggests that blind acceptance and application of a formula such as 'low threshold' could result in unwarranted findings of apprehended bias and unduly disrupt timely and efficient administrative decision-making. Indeed, that danger arises not only with a formula such as 'low threshold', but also with the formulation of the basic test itself. As Basten JA wisely observed in *McGovern*, 'there is a risk of overemphasising the importance of the formula used to express the test, at the expense of its operation.'[66]

CONCLUSION

Just as application of the fair hearing limb of procedural fairness involves considerable uncertainty (particularly in determining the appropriate content of the requirements for a fair hearing), so does the basic test for apprehended bias. So much is perhaps unavoidable given the many variables produced by different statutory settings and other relevant practical considerations which influence different types of administrative decision-making and decision-makers.

There is scope, however, for uncertainty to be reduced if courts strive to act consistently in determining what knowledge or information is to be imputed to the hypothetical person. Ascribing knowledge of all relevant matters to that hypothetical figure to enable an informed assessment of the reasonableness of an assertion of apprehended bias need not result in the court itself supplanting the important function served by the hypothetical figure.

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64 See, eg, *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 519; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553; *Re JRL* (1986) 161 CLR 342, 372; *Jia* (2001) 205 CLR 507, 549 [135].

65 See also Basten JA's comments in *McGovern* (2008) 72 NSWLR 504, 525 [105]–[106].

66 Ibid 526 [111].