Judicial Review

a paper delivered by Mark Robinson SC to the Australian Lawyers Alliance
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This paper covers the conduct of a typical judicial review case. While the focus is in NSW, the principles apply equally in the federal jurisdiction and in the other states and territories.

I will first outline what is in effect a brief refresher on administrative law. I will talk about:

- Administrative law process and remedies;
- The primary tenets of administrative law;
- Merits review and judicial review (the legality/merits distinction);
- An overview of jurisdictional error and some developments in the grounds of judicial review.

The Administrative Law Range

The full range and scope of administrative law process and remedies should be first identified. At its broadest, administrative law relates to or concerns the following:

1. ***Self-help*** remedies or processes may be invoked by aggrieved persons or entities from time to time (be they personal, political, fair or unfair, lawful or not). It can be as simple as picking up the telephone and speaking to the administrator who made the impugned decision or a letter-writing campaign.

2. ***Internal Review*** - where there is provision (usually in the enabling Act, but not necessarily so) for a person superior in employment status to the original administrative decision-maker to look at and re-make the subject decision (usually afresh). Sometimes it is done without a statutory provision, as a matter or practice or policy.

3. ***Need the Documents? - Freedom of Information*** (in NSW, under *Government Information (Public Access) Act 2009* (NSW)("**GIPAA**") . The agency decisions under GIPAA are subject to merits appeals to the Information Commissioner and then to the NSW Civil and Administrative Decisions Tribunal ("**NCAT**"));

4. ***Breach of Privacy? - The Privacy Commissioner***, and NCAT in administering the *Privacy and Personal Information Protection Act 1998* (NSW) – involves breach of privacy by a State government agency only; Federal privacy breaches by eligible companies and the federal government are actionable by the Office of the Australian Information Commissioner under the *Privacy Act 1988* (Cth).

5. ***Maladministration? - The Ombudsman*** - whose office investigates and reports on systemic and particular instances of maladministration and makes recommendations (which are usually accepted by the government);

6. ***Corrupt Conduct? - The Independent Commission Against Corruption***; (NSW only).

7. ***Ex gratia or act of grace payments*** – When someone has suffered a financial or other detriment as a result of the workings of the government. This detriment must be of a nature which cannot be remedied or compensated through recourse to legal proceedings. Payments are discretionary in nature and it is for Ministers to determine individual applications (in NSW, see NSW Treasury Circular NSW TC 11-02 dated 1 February 2011 – for the Commonwealth, see the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme)- an administrative, not a statutory (legislative) scheme. It has been established under the executive power of section 61 of the Constitution). See also the *Public Governance, Performance and Accountability Act 2013* (Cth) which, from 1 July 2014, replaced the now repealed *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth).

8. ***External Merits Review*** - is the process of obtaining an external review of the merits of a statutory (administrative) decision by a person or entity independent of the original decision-maker, who comes to a new decision. Merits review involves making a decision "*de novo*" (meaning, literally, from the very beginning, anew). It has also been referred to as "*standing in the shoes of the decision-maker*" and concerns a "*remaking*" of the decision under review in order to come to the correct or preferable decision based on evidence now presented. The jurisdiction of the Administrative and Equal Opportunity Division of NCAT is a leading example of an

independent, external merits review body (as is the Commonwealth's Administrative Appeals Tribunal). The leading case on the nature and scope of external merits review is *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

9. ***Judicial Review*** - the legality of administrative decisions, including those of Ministers, Governments and Tribunals that affect rights, interests or legitimate expectations of persons or entities. These proceedings known as "*judicial review*" of administrative action are usual dealt with in NSW by the Supreme Court of NSW, Common Law Division, in the Administrative Law List. In the Commonwealth, most matters are heard by the Federal Court of Australia or the Federal Circuit Court of Australia. This is usually the option of last resort for an applicant, and it is undertaken when all other options for challenge are not available. A leading NSW case concerning the nature of judicial review is *Bruce v Cole* (1998) 45 NSWLR 163.

Administrative law did not develop in a vacuum.

It was developed by the courts in England and Australia over 500 years and for good reason. Its purpose was to keep a check on inferior court judges and tribunals and quasi-judicial tribunals as well as to keep check on executive decision-makers so as to ensure they all acted lawfully and within the meaning, scope and purpose of their legal powers.

Primary tenets of administrative law have developed over time. Overall, they are to ensure that in the making of administrative decisions, there is:

a. legality (judicial review and merits);
b. fairness; (judicial review and merits)
c. participation (merits);
d. accountability; (merits)
e. consistency; (merits)
f. rationality; (judicial review and merits)
g. proportionality (judicial review and merits); and,
f. impartiality (judicial review and merits).

The usual aim of an **external merits review** process in a tribunal is to provide the review applicant with a correct or preferable administrative decision, while at the same time,

improving quality and consistency in relation to the making of decisions of that kind. It is an aid to good public administration.

The primary aim of **judicial review** in the court is to ensure (and to some extent, enforce) legality, namely the legal correctness of administrative decisions. It seeks to prevent unlawful decisions from remaining or standing on the public record.

The fundamental distinction between the two is known as the "*legality/merits distinction*".

Judicial Review of Administrative Action

Framework and Procedure

The jurisdiction of superior courts by way of judicial review of administrative action was developed by the courts in accordance with the common law or general law. It involves a court assessing or examining a decision or purported decision of an executive or governmental body or a tribunal for legal error (and not on the merits of the particular case).

The relief granted (which is discretionary) may be to quash or set aside the decision, declare the decision invalid or void and, in some cases, to remit the decision to the original or primary decision-maker for re-consideration according to law (sometimes with a direction that the matter be decided by a different decision-maker or differently constituted tribunal).

While judicial review in NSW lies largely in the realm of the common law (as does the constitutional writ jurisdiction of the High Court and in the Federal Court via section 38B of the Judiciary Act 1901 (Cth)), its existence in the states is constitutionally entrenched and protected by section 73 of the Commonwealth *Constitution* (see, *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 and, "*The Centrality of Jurisdictional Error*", Hon J Spigelman AC (2010) 21 Public Law Review 77). Because judicial review in NSW is protected by the Constitution, it cannot be taken away by any State legislation (at least for correction for jurisdictional error).

The NSW Government has deliberately chosen not to enact a codification of the law of judicial review here [with enactment of an Act such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("**ADJR Act**") or the *Judicial Review Act 1991* (Qld)] – although that might change in the near future. The consequence is that, in so far as decisions of most public bodies and officials made or required to be made under statute are concerned, the avenue for

judicial review is neither helped nor hindered by statutory considerations. The grounds for such review are still evolving through decisions of various courts and many of these grounds overlap.

Early identification of the most appropriate ground or grounds of judicial review is the key to success in this area, providing you have also sought the appropriate remedy and the discretionary factors do not work against you. The discretionary factors are these. A remedy will not normally be granted (on the finding of a legal error or defect) if:

- a more convenient and satisfactory remedy exists (such as a merits appeal to the NCAT);
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay, or,
- if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made[1]; also;
- an applicant should not have acquiesced in the conduct of proceedings known to be defective. An applicant cannot "*sleep on their rights*" - they should make an election to challenge or no longer participate in the executive or court-like process below.

Ordinarily then, the grounds of judicial review are known as:

- error of law amounting to identification of the wrong question,
- ignoring relevant material,
- relying on irrelevant material or, at least, in some circumstances,
- making an erroneous finding or reaching a mistaken conclusion,

leading to an excess of power or authority, will give rise to the availability of relief against the decision of that administrative body for what has come to be known nowadays as a "**jurisdictional**" error of law.

1 See the discussion of the discretion and the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [91]-[92] per Kirby J.

Jurisdictional Error and the Grounds of Judicial Review

Ordinarily, judicial review remedies (orders in the nature of the prerogative writs, certiorari, prohibition and mandamus and injunctions and declarations) are available under the *Supreme Court Act* 1970 (NSW) in the Court's exercise of its supervisory jurisdiction over State statutory decision-makers and tribunals.

Establishing a ground of judicial review is all that is ordinarily required in order to move the Court for a remedy (which in judicial review, as we have seen, is discretionary in most cases – possibly except for denials of natural justice – see: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, at [80] (per McHugh, with Kirby J agreeing)).

Examples of jurisdictional errors of tribunals and executive decision-makers include:

- identifying a wrong issue;
- asking a wrong question;
- ignoring relevant material;
- relying on irrelevant material; or an incorrect interpretation and/or application to the facts of the applicable law

in a way that affects the exercise of power (see: *Craig v State of South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]; and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [60] to [70].

The words there "*in a way*" are in bold for good reason. It must be something that moves the Court to find for legal error.

Jurisdictional errors that may be committed by a tribunal or executive body (post *Craig's case*) that will always be corrected by a Superior Court (as extended by the High Court decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]-[84]) can also be discussed as follows:

- The definition of "*jurisdictional error*" in *Craig's case*, is not exhaustive (*Kirk's* case also held this at [60] to [70]).
- Those different kinds of error may well overlap (*Yusuf* at [82]).

- The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question, and ignoring relevant material (*Yusuf* at [82]).

If an error of this kind is made, the decision-maker did not have authority to make the decision that was made. It is now acceptable to say he or she did not have jurisdiction to make it - *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 esp at [51] to [53]. This language is important in understanding judicial review cases from more than 10 years ago.

Denials of natural justice or breaches of the rules of procedural fairness almost invariably result in a jurisdictional error - *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 508 [83]; *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82; and, *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* (2001) 206 CLR 57.

The remaining traditional grounds of judicial review (in addition to denials of natural justice or breaches of procedural fairness – including bias and apprehended bias) in respect of tribunals and executive decision-makers include:

1 Errors of law (including identifying a wrong issue; making an erroneous finding; and reaching a mistaken conclusion).
2 improper purpose;
3 bad faith;
4 irrelevant/relevant considerations;
5 duty to inquire (in very limited circumstances);
6 acting under dictation;
7 legal unreasonableness;
8 proportionality (not presently available, except via legal unreasonableness);
9 no evidence;
10 uncertainty;
11 inflexible application of a policy (without regard to the individual merits of the application);
12 manifest irrationality or illogicality (possibly a sub-branch of legal unreasonableness);
13 failure to afford a "proper, genuine and realistic consideration" of material; and,

14 failure to provide reasons or adequate reasons where reasons are required to be provided as part of the decision-maker's power.

The Record

It should be borne in mind that as an alternative to jurisdictional error, one need only prove that there was an error of law on the face of the record on any of these grounds in order to obtain relief in the nature of certiorari (quashing or setting aside). Accordingly, attention should be drawn to errors such as this as they go to legality as well in the sense that once found, a decision is usually set aside by the court. Any of the above errors is capable of constituting error of law on the face of the record, and, if they are serious enough, they also constitute jurisdictional error or a constructive failure of the decision maker to exercise his or her jurisdiction (or both or all three).

In *Craig v State of South Australia* (1995) 184 CLR 163, the High Court held that what constitute the "record" may be very narrow at times. It may not even include the decision-maker's statements of reasons. In *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, the High Court hinted that it may have gone a little too far and signalled that it might be prepared to reconsider this (on-one has yet taken up the cudgels).

In NSW, *Craig's case* (as to the narrow record only) has been overturned by section 69(3)&(4) of the *Supreme Court Act 1970* (NSW). Here, the "*record*" of a tribunal is taken to include the written reasons expressed for its "*ultimate determination*".

As to **improper purpose**, this ground of judicial review is best explained by the description of it in s 5(1)(e) read with s 5(2)(c) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which provides: "*The making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made [in that there was] an exercise of a power for a purpose other than a purpose for which the power is conferred*." The common law position in Australia is that the improper purpose complained of must be or have been a substantial purpose in the sense that the decision or act complained of would not have occurred but for the improper purpose: *Thompson v Randwick Municipal Council* (1950) 81 CLR 87 at 105–106 and *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491. Improper purpose is also sometimes linked to *Wednesbury* or legal unreasonableness – see for example, *East Melbourne Group v Minister for Planning* [2008] VSCA 217 at [340]–[341] (per Ashley and Redlich JJA).

As to **bad faith** - this ground relates to the discretionary powers of a decision-maker. Fraud and bad faith operate very much like their common law counterparts. A finding of fraud or bad faith in the making of a decision will vitiate the decision. The High Court considered the concepts of fraud and bad faith in public law in *SZFDE v Minister for Immigration & Citizenship* (2007) 232 CLR 189 in particular, in the context of federal executive decisions and federal constitutional law. The Refugee Review Tribunal was held to have made a decision affected by a third party fraud, in that the refugee applicant's former migration advisor had fraudulently advised the applicants to not turn up at the tribunal's oral hearing.

As to **dictation** - this ground of judicial review applies when a decision-maker is possessed of personal statutory decision-making power. In that circumstance, the decision-maker must not be dictated to by politicians or more senior public servants, or by anyone else. Further, blind adherence to government policy might well provide evidence of dictation. A decision-maker must not abdicate his or her personal judgment or personal duty to anyone. The leading cases are: *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 and *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

As to **irrelevant/relevant considerations** - A decision-maker must take into account only relevant considerations and must not take into account irrelevant considerations. The leading case in Australia is *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–42 where Mason J (as he then was) set out the position.

As to **legal unreasonableness**, this ground was first identified by the High Court of Australia in *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618; 297 ALR 225. The Court held that <u>every</u> statutory discretionary power has attached to it by the common law a requirement that it be exercised reasonably, having regard to the statutory purpose of the power. In this regard, the High Court held that the decision-maker must not be "*unreasonable in a legal sense*" (at [72]).

This new notion of "*legal unreasonableness*" (as it is described in *Li* at [66]) does not involve the courts in undertaking a review of the merits of an exercise of discretionary power (*ibid)*. The courts must look to the scope and purpose of the statute conferring the discretionary

power and divine its real object (at [67]) applying ordinary statutory construction principles, such as in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

The High Court in *Li* criticised the strict and limited operation of the former test of unreasonableness contained in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 as being "*circular*" and as having been construed in a limited way by the courts (at [68] and [70]).

The ground of legal unreasonableness reflects the requirement of the law that a decision-maker must understand his or her statutory powers and obligations (at [71]) and it will be established as a jurisdictional error when, for example:

1. where no sensible authority acting with due appreciation of its responsibilities would have so decided (at [71]);
2. the decision-maker has failed to give adequate weight to a relevant factor of great importance (at [72]);
3. the decision-maker has given excessive weight to an irrelevant factor of no importance (*ibid)*;
4. reasoned illogically or irrationally (*ibid*);
5. when the decision is a disproportionate response by reference to the scope of the power (at [73]-[74]);
6. when a decision lacks evident and intelligible justification (at [76]);
7. where it is not apparent how a conclusion was reached, but the decision itself bespeaks error (at [82] and [85]).

Legal unreasonableness is an inference that is to be drawn from the facts and from the matters falling for consideration in the exercise of the statutory power (at [76]).

In *Li's case* the High Court held that a Migration Review Tribunal acted beyond jurisdiction in refusing an adjournment application by a migration applicant visa who sought it so she could tender the result of her final skills test results (that had been appealed).

This ground was formerly described as "*Wednesbury* unreasonableness" after the leading English Court of Appeal decision *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

Section 5(1)(e) read with s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act*

1977 (Cth) states the former common law rule in the following terms:

> The making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made [in that there was] an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

Leading Australian cases on the former *Wednesbury* ground of judicial review include: *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155; 65 ALR 549; *Minister for Primary Industries & Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381; 30 ALD 783; *Fuduche v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 45 FCR 515; 117 ALR 418; *Bienke v Minister for Primary Industries & Energy* (1994) 34 ALD 413, 125 ALR 151; and *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379; 63 ALJR 561; and *Edelsten v Wilcox* (1988) 15 ALD 546; 19 ATR 1370; 83 ALR 99.

Significant New South Wales cases on *Wednesbury* unreasonableness include: *Abernethy v Deitz* (1996) 39 NSWLR 701 (where the court quashed a coroner's decision to conduct a post-mortem as Wednesbury unreasonable); and *Save Our Street Inc v Settree* (2006) 149 LGERA 30; [2006] NSWLEC 570 at [27]–[31] (LGERA) (Biscoe J) (where the applicable principles and underlying rationale of the former ground are discussed in some detail).

In *East Melbourne Group v Minister for Planning* (2008) 23 VR 605; [2008] VSCA 217 Warren CJ (in dissent) described (at [72]) the *Wednesbury* ground of review by saying it is one where "the discretion has been abused [*Bienke v Minister for Primary Industries & Energy* (1994) 34 ALD 413, 125 ALR 151 at 163; *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [123]]". (See also [110]–[112] (Warren CJ); and the general discussion of the principles at [182]–[184] (per Ashley and Redlich JJA).)

In *East Melbourne Group v Minister for Planning* (2008) 23 VR 605; [2008] VSCA 217, the Victorian Court of Appeal held as invalid the exercise of a planning Minister's statutory power to exempt a proposed development from the public notification process because her public reasons for her decision did not fit the actual facts relating to the development and it was held to be unreasonable. The court considered (at [182]–[184] per Ashley and Redlich JJA) that the following matters or situations each satisfy the former *Wednesbury* test for unreasonableness – where the decision under challenge:

- is devoid of any plausible justification;
- is one that no reasonable person could have made;
- concerns the engagement by the decision-maker in an abuse of discretion;
- is manifestly unreasonable in that it simply defies comprehension;
- it must be obvious that the decision-maker consciously or unconsciously acted perversely;
- involves manifest illogicality in arriving at the decision (there being illogical findings, or inferences of fact unsupported by probative material or logical grounds);
- involves irrationality (which encompasses disregard of relevant considerations, giving regard to irrelevant considerations and manifest unreasonableness);
- is manifestly illogical;
- involves an absence of any foundation in fact for the fulfilment of the conditions upon which the existence of the power depends;
- involves a factual finding where all of the evidence points one way, and the opinion rests upon a contrary view;
- where the decision is not supported on logical grounds by the material adduced;
- where important parts of the reasons of the decision-maker were, upon consideration of the evidence, in error and could not be supported on any reasonable basis;
- if the facts disclose no basis for the decision, it will be invalidated without any distinction being drawn between errors of law and fact; or
- where by the decision-maker's own criteria it can be seen that the factual result is perverse.

The legal unreasonableness or *Wednesbury* unreasonableness grounds of judicial review are related to and can overlap with the ground of manifest or serious irrationality or illogicality.

As to the **no evidence** ground - decisions which are based upon findings of fact must be founded upon logically probative evidence and not mere suspicion. The leading cases are *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 4 ALD 139; 44 FLR 41 at 62–68 per Deane J (with Evatt J agreeing). See also *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 which accepted the no evidence ground is a proper and justiciable question of law.

As to the **inflexible application of a policy** ground - a ground of judicial review will be established where a decision-maker exercises a discretionary power in accordance with a rule of policy and without regard or apparent regard for the merits of the applicant's case.

The leading case in Australia is *Green v Daniels* (1977) 51 ALJR 463.

As to the "**proper, genuine and realistic consideration**" ground - other grounds of judicial review or formulations of the same are adopted from time to time. Some of them fall in and out of favour with the Courts. One example is the ground styled in terms that the decision-maker failed to give the matter "*proper, genuine and realistic consideration*" to a relevant matter.

It first came to attention as a separate ground of judicial review in *Khan v Minister for Immigration & Ethnic Affairs* (1987) 14 ALD 291 (Gummow J). While it is arguably appropriate to rely on it as a proper and separate ground of judicial review, be aware it was soundly criticised in the Federal Court in *Minister for Immigration & Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 441-442 and in the NSW Court of Appeal in *Anderson v Director General of the Department of Environmental and Climate Change* [2008] NSWCA 337 at [51]-[60] (Tobias JA, with Spigelman CJ and Macfarlan JA agreeing).

The criticisms of the ground relate to its vague or imprecise nature and that it is often capable of being the platform for an impermissible merits-based attack under the guise of judicial review. Notwithstanding this, the ground has been accepted and applied in NSW a number of times and at Court of Appeal level. The arguments are set out in detail in *Anderson* (*ibid*).

However, the same may be said of the *Wednesbury* or legal unreasonableness ground and other grounds. The Court is always vigilant to keep the parties to the question of legality in judicial review proceedings. Review on the merits is not permissible in such proceedings.

It would sometimes be preferable for a practitioner to attempt to recast any ground founded on the "*proper, genuine and realistic consideration*" ground into one or other of the grounds of judicial review so as to avoid this criticism.

As to **irrationality and illogicality** - A comparatively recently identified ground of judicial review is that the administrative decision was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds such that the decision-maker misconceived his or her purpose or function - *Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165. The refugee applicant there lost the case, but the principle emerged from it. The ground would also apply to a decision or reasoning that is hopelessly confused and irrational. However, it is available only in relation to such errors that are in the extremely serious category. While the ground is now established in the High Court's "constitutional writ" jurisdiction, it also applies in the NSW Courts as part of the general law.

The concept of manifest illogicality or irrationality was considered by the NSW Court of Appeal in *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [57]-[66] (see also, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [92]).

Apprehended Bias Developments

The bias rule of procedural fairness is that a decision maker must not be personally biased (actual bias) or be seen by an informed observer to be biased in any way (apprehended or ostensible bias) in the hearing of or dealing with a matter during the course of making of a decision.

The rules in this area are broadly the same in respect of courts, tribunals and for executive decision makers (even expert executive decision-makers).

The apprehension of bias principle has its justification in the concept that judges, tribunal and statutory decision-makers should be independent and impartial. The essential question is whether there is a *possibility* (real and not remote) and not a *probability* that a decision-maker *might* not bring an impartial mind to the question to be determined (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7]-[8]). The question is answered by reference to whether the fair-minded lay observer *might* reasonably apprehend that the decision-maker *might* not bring an impartial mind to the resolution of the issue to be decided (*ibid*, at [33]).

Bias may arise from:

1 interest - pecuniary or proprietary;
2 conduct;
3 association;

4 extraneous information; or
5 from some other circumstance (*Ebner, ibid*).

The High Court has stated that the apprehension of bias principle "*admits of the possibility of human frailty*" and "*its application is as diverse as human frailty*" (*Ebner, ibid,* at [7]).

In the case of administrative proceedings conducted in private (as, for example, the way that MAA motor accident claims assessment conferences are conducted) the appropriate apprehended bias rule might in future be stated in the following terms (from the High Court in *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [28]:

> "Perhaps 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*." (my emphasis)

Normally, if bias becomes an issue, it should be raised or dealt with by an applicant's legal representative immediately upon the issue becoming apparent. In court proceedings this might well occur while proceedings are being conducted. Occurrences of bias can readily, albeit inadvertently, be waived by failing to raise the issue promptly and before the decision maker concerned.

Actual bias cases are rare. They are normally clear cut and rarely become the subject of legal proceedings. Apprehended or ostensible bias is not as straightforward. There is a real potential for litigation where the perception of such bias arises.

Apprehended bias was considered by the High Court in *Vakauta v Kelly* (1989) 167 CLR 568. There, the Court examined comments made by Justice Hunt in the Supreme Court of NSW while he was hearing a personal injuries case. The judge was making some observations about expert doctors in the early part of the proceedings. The High Court determined that these comments amounted to ostensible or apprehended bias because they might lead to the conclusion, in the mind of the reasonable or fair-minded observer, that the judge was heavily influenced by views he had formed on other occasions rather than by an assessment based on the case in hand. In that case, at page 572-3, the High Court said:

> "The learned trial judge's adverse comments about Dr. Lawson, Dr. Revai and Dr. Dyball in the course of the trial of the present case were indeed strong:
>
> > *"that unholy trinity"; the G.I.O.'s "usual panel of doctors who think you can do a full week's work without any arms or legs"; whose "views are almost inevitably slanted in favour of the GIO by whom they have been retained, consciously or unconsciously."*
>
> His Honour below had indicated that he regarded those three medical practitioners as falling within a "*particular category of doctors*" to whom he had an adverse attitude. He stated that he expressed his views "*for the benefit of the present parties in the negotiations which were taking place*." The implication of that last comment would seem to have been that the parties should negotiate any settlement on the basis that his Honour would not be influenced by what those three doctors might say in evidence. In the event, only Dr. Lawson was called to give oral evidence. Dr. Revai's written report was received in evidence. No evidence from Dr. Dyball was received."

The High Court held that as counsel had failed to object to these remarks during the course of the hearing, that party had waived its right to complain about it. However, there were further remarks made by the judge after the hearing and in the reserved judgment itself (which came down in favour of the plaintiff) where the High Court held that there was plainly evidence of apprehended bias and it set aside the decision below. For example, his Honour said in the judgment that the evidence of one of the doctors was "*as negative as it always seems to be — and based as usual upon his non-acceptance of the genuineness of any plaintiff's complaints of pain*".

The Document "Retention" Policy that Destroyed Documents

In *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283, the High Court considered an apprehended bias case where Judge Jim Curtis of the NSW Dust Diseases Tribunal was asked to recuse himself by one of the parties because he was about to hear a case that involved determination of the very same factual issue that had been decided adversely to the defendant party in an earlier component of the case. The issue concerned whether or not a cigarette manufacturer had deliberately devised and deployed a policy of selectively destroying pesky documents that might be called for in discovery or on subpoena in legal proceedings. The primary witness to be called was to be the same witness called in the earlier proceedings. This was also in circumstances where in a interlocutory ruling on

discovery, the judge had found actual fraud on the defendant party as to its document retention policy in terms of the high test in section 125(1) of the *Evidence Act 1995*(NSW) (and not the "*reasonable grounds*" test in section 125(2)).

The High Court broadly agreed on the formulation of the correct legal test for ascertaining apprehended bias (for judges). However, there was disagreement as to the attributes to be ascribed to the hypothetical observer. The majority judgment was by Heydon, Kiefel and Bell JJ and the minority judgments were by French CJ and Gummow J.

The Court stated the accepted legal test for apprehended bias as being in the following terms (at [104]):

> "The rule requires that a judge not sit to hear a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide [*Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Johnson v Johnson* (2000) 201 CLR 488; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337]. The apprehension here raised is of pre-judgment; it is an apprehension that, having determined the existence of the policy in the earlier proceeding, Judge Curtis might not be open to persuasion towards a different conclusion in Mrs Laurie's proceeding."

As to the rationale for the apprehended bias rule, the High Court (majority) explained (at [139]-[140]):

> "It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification. Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick. It is the public's perception of neutrality with which the rule is concerned. In *Livesey* it was recognised that the lay observer might reasonably apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature.
>
> Of course judges are equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in evidence. Trial judges are frequently required to make rulings excluding irrelevant and prejudicial material from evidence. Routine rulings of this nature are unlikely to disqualify the judge from further hearing the proceeding. This is not a case of that kind. It does not raise considerations of case management and the active role of the judge in the identification of issues with which Johnson was concerned. At issue is not the

> incautious remark or expression of a tentative opinion but the impression reasonably conveyed to the fair-minded lay observer who knows that Judge Curtis has found that [the defendant party] engaged in fraud and who has read his Honour's reasons for that finding. Some further reference should be made to those reasons." (footnotes omitted)

The Court of Appeal decision which held that Judge Curtis's decision not to recuse himself was correct was set aside in the High Court which ordered that Judge Curtis be prohibited from further hearing or determining the Dust Diseases Tribunal proceedings.

Thank You