Seminar Paper

Administrative Decision Making - Delegations and Avoiding Bias

Katie Miller, Managing Principal Solicitor
Domenic Cristiano, Managing Principal Solicitor
Penina Berkovic, Principal Solicitor
Table of Contents

Delegation and Bias 4

Delegation - some useful principles ................................................................. 4
  Exercise of power under an express delegation provision ............................. 4
  How delegation works ................................................................................. 5
  How is a power, duty or function actually delegated? ................................. 5
  Who is the delegator? ................................................................................... 5
  What is being delegated? .............................................................................. 5
  How is a power to be delegated, and on which terms? ................................. 6
Exercise of power where there is no express delegation provision ............... 7
  Implied delegation? ..................................................................................... 7
  Acting under authorisation ........................................................................ 7

Conclusion ....................................................................................................... 8

Dealing with bias from the perspective of an administrative decision maker .... 8
  Introduction ................................................................................................ 8

General principles .......................................................................................... 8
  Foundations of the bias rule for administrative decision-makers ............... 8
  Mechanisms for protecting against bias .................................................... 9
  The common law rule regarding bias ........................................................ 9
    Actual bias ................................................................................................ 9
    Apprehended bias .................................................................................... 10
    Does the bias rule apply to all administrative decision-makers? ............. 10
    How does the rule against bias apply to administrative decision-makers? 11
    Why should the rule against bias be less strict for administrative decision-makers than for judges? ......................................................... 11

How should an administrative decision-maker deal with concerns about bias? 11
  Disclosure .................................................................................................. 11
  Decision-makers will need to decide whether to act conservatively or robustly. 12
  Necessity ...................................................................................................... 13

Additional obligations on public servants ..................................................... 13

Conclusion ..................................................................................................... 13

Appendix - Examples of how the courts have applied the bias rule to different decision-makers ............................................................. 15

Least strict application of the bias rule - Ministers of the Crown .................. 15
  Minister for Immigration & Multicultural Affairs; Ex parte Jia Legeng ......... 15
    Facts of the case ....................................................................................... 15
    High Court’s decision .............................................................................. 16
  The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources .................................................. 16
    Facts of the case ....................................................................................... 16
    Federal Court’s decision ........................................................................ 16

Less strict application of the bias rule – panels appointed by a Minister ......... 17

Less strict application of the bias rule - municipal councils ......................... 17

Application of the bias rule for public officials involved in administrative decision-making ............................................................. 18
  Mongan v Woodward ............................................................................... 18
    Facts of the case ....................................................................................... 18
    Findings of the Court .............................................................................. 18
  Hot Holdings Pty Ltd v Creasy .................................................................... 19

Second strictest application of bias rule - administrative tribunals ............... 19
  Maguzzu v Business Licensing Authority .................................................. 20
  Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka 20
Strictest application of the bias rule - courts

R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet (No 1)
Delegation and Bias

Delegation - some useful principles

Many of you will be familiar with the following common law maxim: *delegatus non potest delegare*. That is, one who is vested with a particular statutory power must exercise it personally, rather than delegate it. The rationale behind this maxim is straightforward; had Parliament intended for someone other than the particular person or body stipulated in an Act to exercise a power, or carry out a duty or function, Parliament would have so legislated.

In a practical sense, always following this maxim could prove to be very inconvenient, if not impossible. For example, what if the exercise of a particular power is vested in a statutory body such as a Board or Tribunal, as opposed to an individual? Or what if the power is one of a multitude of powers vested in a particular person, such as a Secretary or Minister?

In recognition of these difficulties, many Acts expressly allow for the delegation of powers, duties or functions vested in a particular person or body.

Delegation allows a person who has been delegated a power (the delegate) to exercise that power 'without further authorisation'.  

**Exercise of power under an express delegation provision**

Delegation provisions in Acts are all different. Some are broad and some are quite limited. When delegating pursuant to an express delegation provision in an Act, delegation is necessarily limited by the scope of the terms of that provision. It is therefore important to closely consider a delegation provision so that you have a clear understanding as to what may be delegated, and to whom, under that delegation provision.

For example, let’s consider the delegation provision in s 44 of the *Plant Health and Plant Products Act 1995*.

4.3 Delegations by a Minister

(1) The Minister may by instrument delegate to any person or class of persons employed in the administration of this Act (other than an inspection agent) any power of the Minister under this Act except this power of delegation and the powers under sections 5A, 17, 20 and 46.

(2) The Minister may by instrument delegate to the Secretary the power of the Minister under section 17, subject to the condition that an order made by the Secretary under that section as delegate of the Minister must not operate for any period exceeding 7 days.

(3) The Minister may by instrument delegate to the Secretary the power of the Minister under section 5A.

This delegation provision contains many self-imposed limitations. First, it only applies to powers vested in the Minister, as opposed to any other person or body. Second, it provides that only some of powers vested in the Minister under the Act may be delegated (ie, not powers contained in ss 20 and 46). The powers that are able to be delegated may be delegated to persons employed in connection with the administration of the Act but not by inspection agents. In relation to the Minister’s powers in ss 5A and 17, the delegation provision allows these to be delegated to the Secretary only, and in relation to the power under s 17 under prescribed conditions only.

This example demonstrates that a good understanding of a delegation provision itself is necessary, prior to the usage of that provision to delegate powers, duties or functions. A failure to have that understanding could lead to the risk of an *ultra vires* delegation being made, ie, a delegation being made without power.
How delegation works

Let’s now consider some of the ‘nitty-gritty’ factors in connection with delegation. These may be summarised as follows:

• How should a power, duty or function actually be delegated?
• Who is the delegator? And to whom are they delegating?
• What is being delegated?
• How, or under which terms, is the power to be delegated?

How is a power, duty or function actually delegated?

Typically, delegation is done by a written instrument, which records particulars about the delegation. Many delegation provisions in Acts specifically require a delegation to be contained in an ‘instrument’. The instrument of delegation should in itself be an entire record of the delegation. It should clearly state who is the delegator of the power, duty or function and who is/are the recipient(s). It should specify the exact nature of the powers, duties or functions being delegated, and contain any limitations or conditions on the delegation. It is also best practice for the instrument of delegation itself to be entitled as an ‘instrument of delegation’, and for it to expressly refer to the provision of the Act under which the powers, duties and/or functions are sought to be delegated.

Of note here, s 41A of the Interpretation of Legislation Act 1984 provides that where there is a power to make an instrument, there is also a power to amend it or revoke it.

It is useful to note that an instrument of delegation may be amended or revoked at any time by the delegator.

It is best practice for instruments of delegation to be reviewed regularly. In this sense, it is a good idea to diarise to review instruments of delegation for which you are responsible at regular intervals, maybe once a year or every six months, and in any event, review instruments of delegation when there is a change in government, or change in office (eg, new Secretary or Director) or a change in the relevant legislation.

Who is the delegator?

The delegator must be the person or body vested with the particular power, duty or function which is sought to be delegated. The delegator should be described in the instrument of delegation by their particular title (eg, the Minister, the Secretary, the Director etc) and this title should be consistent with that referred to in the delegation provision in the relevant Act. Similarly, the instrument of delegation should clearly describe to whom particular powers, functions and duties are to be delegated. Delegation should be to the holder of a position rather than to a named individual and may be to more than one position of office. Unless it is expressly stipulated in a delegation provision or elsewhere in the Act, there are no set rules as to how many persons a power, duty or function may be delegated to, nor as to who is the holder of a suitable position of office for the purposes of delegation. These are matters for the delegator. A sensible and practical approach should be taken. For instance, if a particular power which is sought to be delegated is routinely exercised every day, it would make sense for that power to be delegated to a number of persons, so that if a delegate is absent from work one day, the business of government can continue.

Further, if a particular power sought to be delegated is quite significant, and is suitable for exercise at a high level only, it is important that it is delegated to only high level officers. Of note here, and as will be later discussed, a delegate exercises a power on his or her own behalf (as opposed to on the delegator’s behalf). Keeping this in mind, a power should only be delegated to someone whom the delegator believes is competent to make the relevant decision.

What is being delegated?

The instrument of delegation should be explicit in outlining which of the delegator’s powers are being delegated. This may mean referring to particular provisions, or sub-provisions of the Act in question. Only powers that are in existence at the time of delegation may be
delegated. Further, and as I mentioned earlier, the delegation provision itself may limit the powers that are able to be delegated.

**How is a power to be delegated, and on which terms?**

The Interpretation of Legislation Act 1984 provides some useful guidance here:

**42 Exercise of delegated powers**

(1) Where the discharge, exercise or performance by a person of a responsibility, power, authority, duty or function under an Act or subordinate instrument is dependent upon the opinion, belief or state of mind of that person in relation to a matter and the responsibility, power, authority, duty or function is, in accordance with the Act or subordinate instrument, delegated, the delegate may, unless the contrary intention appears, discharge, exercise or perform the responsibility, power, authority, duty or function upon the delegate's own opinion, belief or state of mind (as the case requires) in relation to that matter.

(2) Subsection (1) applies in relation to a delegation made under an Act or subordinate instrument, whether the delegation was made before or after the commencement of this Act.

**42A Construction of power to delegate**

(1) If an Act or subordinate instrument confers on a person or body a power to delegate the discharge, exercise or performance of a responsibility, power, authority, duty or function under that or any other Act or subordinate instrument, then, unless the contrary intention appears—

(a) the delegation does not prevent the discharge, exercise or performance of the responsibility, power, authority, duty or function by the person or body;

(b) the delegation may be made subject to such conditions or limitations as the person or body may specify; and

(c) a responsibility, power, authority, duty or function so delegated, when discharged, exercised or performed by the delegate, shall, for the purposes of the Act or subordinate instrument, be taken to have been discharged, exercised or performed by the person or body.

(2) If an Act or subordinate instrument confers power to delegate to the holder of an office or position, then, unless the contrary intention appears, a delegation may be made to any person for the time being acting in or performing the duties of that office or position.

Section 42 provides that a delegate must utilise his/her own 'opinion, belief or state of mind' in making a decision pursuant to a delegation. Thus s 42 confirms that a delegate is an independent decision-maker. Section 42A provides some useful insight into how delegation actually 'works':

- Delegation of a power, duty or function does not prevent the delegator from exercising the power, duty or function him/her/itself;

- The effect of a delegate exercising a delegated power, duty or function is the same as if the delegator had done so;

- A delegation may be subject to any conditions or limitations specified by the delegator; and

- A delegation may also be made to a person 'acting' or 'performing the duties' of a delegate.

It is useful to further discuss the types of conditions and/or limitations which may be imposed on a delegation. Typical conditions include those which require a decision to be made by a delegate in a manner which is consistent with policies, procedures and directions issued by the relevant government department or statutory body. It is important for any such policies to be clear so that no question will arise as to whether a decision made by a delegate is invalid because the delegate did not follow the policy. It is also good practice for delegates to state explicitly in any written decision that the relevant policy was taken into account by the delegate when making the decision.
A delegator, however, must take care to ensure that any conditions or limitations placed on a delegate in connection with the exercise of a power, duty or function, do not hinder that delegate from making an independent decision based on his/her ‘opinion, belief or state of mind’. The risk of failing to take such a precaution is that the delegate could be seen to be ‘acting under dictation’ or inflexibly applying policy, and decisions made by that delegate could be subject to challenge.

**Exercise of power where there is no express delegation provision**

We have discussed delegation pursuant to an express delegation provision in an Act. But what if there is no such express delegation provision in an Act?

**Implied delegation?**

While it is the general rule that if there is no express power of delegation in an Act, powers, duties and functions found in that Act cannot be delegated, in some circumstances it may be possible to construe from the way an Act is set up an implied power to delegate. It is necessary to consider the nature, scope and objects of the relevant Act, the character of the power to be delegated and the circumstances when the power is able to be exercised, as well as any other relevant considerations. It may also be possible to use a general delegation provision in one Act to delegate a power in another Act, where it is clear that the legislative scheme set up requires the two Acts to be read together. Caution should be exercised, however, in purporting to rely on an implied power to delegate.

**Acting under authorisation**

It may also be possible for powers, duties or functions to be carried out by agents of the person or body vested with them. Such powers, duties or functions are carried out ‘in the name’ of the person or body vested with it. This is known as the *Carltona* principle after the case in which the principle was put forward. The *Carltona* principle was accepted as applying in Australia in the High Court case of *O’Reilly v State Bank of Victoria Commissioners*. The *Carltona* principle recognises that Government officials or bodies have agents within their departments who may be authorised to carry out certain tasks without having a formal delegation to do so. The rationale for this is that ‘[N]o permanent head of a department in the Public Service is expected to discharge personally all the duties which are performed in his name…’.

Authorisation pursuant to the *Carltona* principle differs from delegation in that the authorised agent acts in the name of the person or body vested with a particular power, rather than in their own name. Authorisation pursuant to the *Carltona* principle may be express (eg, set out in an express instrument of authorization) or implied. As with delegation, it is also good practice to create a written instrument of authorisation.

The exercise of a power, duty or function as an agent pursuant to the *Carltona* principle, is only appropriate in some circumstances, usually when the relevant power duty or function is of an administrative nature and routine. As Mason J explained in *Minister for Aboriginal Affairs v Peko-Wallsend*:

‘The cases in which the principle has been applied are cases in which the nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by the repository personally because administrative necessity indicated that it was impractical for him to act otherwise than through his officers…’

It should therefore not be assumed that the *Carltona* principle may be applied to overcome a situation where there is no express ability to delegate. It may be that some powers, duties or functions, particularly if their exercise would have significant repercussions, may only be validly exercised by the person or body vested with them.
Conclusion

In summation of today’s discussion, the following matters should be considered when determining how a particular power, duty or function is to be exercised:

1. Does the Act in question have an express provision allowing for delegation?
   a. If so, that provision should be considered carefully and any limitations contained in that provision should be noted.

2. If delegation is expressly allowed, it should be recorded in an instrument of delegation, which should contain all of the information relevant to the delegation, including:
   a. The source of the power to delegate.
   b. The powers, duties and functions that are sought to be delegated.
   c. The identity of the delegator and the delegate(s).
   d. Any conditions or limitations to be placed on the exercise of the powers, duties or functions delegated.

3. Instruments of delegation should be regularly reviewed.

4. If there is no express provision for delegation in the Act, or if the delegation provision in the Act does not attach to the power, duty or function sought to be delegated, consider whether it is administrative or routine in nature, and whether it is therefore able to be carried out by an agent pursuant to the Carltona principle.

5. If there is no express provision for delegation in the Act, or if the delegation provision in the Act does not attach to the power, duty or function sought to be delegated, consider whether it may have been Parliament’s intention that the power, duty or function was to be exercised only by the person or body within which it has been vested.

Dealing with bias from the perspective of an administrative decision maker.

Introduction

As the nature and scope of administrative decisions made by public officials continues to expand, it remains more important than ever for public officials and their lawyers to be familiar with the law relating to bias. Unlike the bulk of legal writing regarding the bias rule, which focuses on judicial officers, this paper examines the bias rule as it applies to non-judicial officers. 9

Once the general principles of the bias rule are set out, we look at how the bias rule affects administrative decision-makers and how they should consider a claim of apprehended bias. We also look at the additional layers of accountability imposed on public sector employees by the Public Administration Act 2004 (the PA Act).

General principles

Foundations of the bias rule for administrative decision-makers

In Hot Holdings Pty Ltd v Creasy10 (Hot Holdings), Kirby J traced the history of the civil service in England and Australia to highlight the importance of the bias rule in contemporary Australian society. As Kirby J noted, the nineteenth century saw significant growth of the civil service in England. As a response to this growth and the increasing potential for corruption, competitive examinations were introduced which helped create a culture of personal integrity and financial probity in the civil service.11 The Australian colonies and, after federation, the Commonwealth and the States, inherited this strong tradition.12 It is a tradition which the courts continue to protect when they engage in judicial review of administrative decisions.

Federal and State Governments have also played an important role in the development of the law
on bias with the significant reforms of their bureaucracies in the 1980s and 1990s. One of the outcomes of this reform was the adoption of codes of conduct for public servants in most Australian jurisdictions.

Mechanisms for protecting against bias

Achieving proper accountability of government activity 'is the very essence of responsible government'. The proper accountability of public service employees can be seen to have three typical features:

- accountability to official superiors and peers;
- accountability to agencies such as the Auditor-General, the ombudsman and Parliament; and
- accountability to members of the public directly, either as individuals (as through administrative law mechanisms) or as a community (who elect the Government which oversees the public service).

In other words, while it is easy to focus exclusively on the common law rule regarding bias, it needs to be remembered that true accountability extends beyond this and also includes accountability to the Parliament and the Executive.

The common law rule regarding bias

The rules of procedural fairness (or natural justice) are minimum standards of fair decision-making imposed by the common law on administrative decision-makers. The rules of procedural fairness are generally formulated as the rule against bias and the right to a fair hearing. If the rules of procedural fairness are not complied with, an aggrieved person will (usually) be able to seek judicial review of the administrative decision.

The common law recognises two forms of bias, actual bias and apprehended bias. It should also be noted briefly that bias is not exactly the same as a conflict of interest, they are slightly different concepts.

There can be bias without any conflict of interest, as where a decision-maker prints personal comments on a web-site that suggest they have pre-existing views about certain issues, or if a decision-maker receives an inappropriate email from a supervisor which could be seen as affecting the ability of that person to bring an open-mind to a decision. Winky Pop Pty Ltd v Hobsons Bay City Council is a recent example of this situation.

Similarly, there may also be cases where something could amount to a conflict of interest, but may not amount to bias.

Actual bias

Actual bias has been described by the Federal Court as follows:

Actual bias exists where the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant: Wannakuwattewa v Minister for Immigration and Ethnic Affairs (Federal Court of Australia, North J, 24 June 1996, unreported) and Singh v Minister for Immigration and Ethnic Affairs (Federal Court of Australia, Lockhart J, 18 October 1996, unreported).

The courts have rarely found actual bias to exist. That is principally because, at common law, a reasonable apprehension of bias suffices to disqualify a judicial officer. Where actual bias exists, reasonable apprehension of bias will also exist and, consequently, courts concerned with supervising the application of the requirements of natural justice have not had to go so far as to find actual bias. Another reason is that actual bias is difficult to prove. Rarely will a judicial officer expressly reveal actual bias.

Dilemmas regarding actual bias will rarely arise with administrative decision-makers since their professionalism will dictate that they would not want to be involved in a decision unless they were able to bring an open mind to a decision.
While this situation will not always be clear cut, for example where a decision-maker suffers from actual bias as a result of some unconscious discriminatory belief, it is unnecessary to examine actual bias since the bulk of dilemmas facing administrative decision-makers will not involve actual bias, but the more subtle situation of apprehended bias.

**Apprehended bias**

There is now one single test for apprehended bias in Australia, and this test is the same for both administrative decision-makers and judicial officers. It has been described by the High Court as follows:20

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a [decision maker], the governing principle is that, subject to qualifications relating to waiver … or necessity …. a [decision-maker] is disqualified if a fair-minded lay observer might reasonably apprehend that [she or he] might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done... [emphasis added]

The application of this test requires two steps:21

First, it requires the identification of what it is said might lead a [decision-maker] to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed. [emphasis added]

This test rejects the notion, which had been followed by Australian courts prior to 2000, that the mere existence of a pecuniary interests should automatically disqualify a person on the grounds of bias.

While the test for bias is the same whether the decision maker is a judge or an administrator,22 the common law in Australia has recognised and accommodated the differences between court proceedings and other kinds of decision making.23 Ministers of the Crown for example will be subject to a much less stringent application of the bias rule as evidenced in *Minister for Immigration & Multicultural Affairs; Ex parte Jia Legeng*24 where Kirby J stated:

Ministers are not judges. Clearly, the pressures, processes and nature of Ministerial decision-making differ from the judicial task. Consequently, the obligations imposed by courts on officers of the Commonwealth, including Ministers, should not “over judicialise” the performance of their functions, including the making of decisions required of them by statute.

**Does the bias rule apply to all administrative decision-makers?**

The scope of administrative law developed throughout the 20th Century and by the 1990s established that the rules of procedural fairness, and therefore the bias rule, apply to administrative decisions made under statute. As was stated by the High Court in *Annetts v McCann*:25

When a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment...

However when considering the operation of the rule against bias in relation to the exercise of a statutory power, the first step is to examine the legislation under which the decision operates and to see whether there is any legislative
intention to vary (or exclude) the ordinary scope of this rule.26

One example of such a variation of the rule against bias can be seen in the decision of the New South Wales Court of Appeal in Greyhound Racing NSW v Cessnock & District Agricultural Association which examined the Greyhound Racing Act 2002 (NSW). Here, it was concluded that a decision would not be set aside for apprehended bias based solely on an association between a member of Greyhound Racing NSW and a greyhound racing club.27

A similar outcome might apply if legislation expressly deals with issues of bias. For example, if there is a specific conflict of interest provision in legislation dealing with an administrative decision-maker, this may have the effect of varying the ordinary rule of bias.28

**How does the rule against bias apply to administrative decision-makers?**

Statutory exceptions to the bias rule are uncommon and the majority of administrative decision-makers will be expected to comply with the ordinary law. The question then arises as to how this rule is to be applied for administrative decision-makers as opposed to judicial decision-makers. The following diagram provides a simplified attempt at summarising how courts have treated this distinction.

<table>
<thead>
<tr>
<th>Strictness of the bias principle</th>
<th>Less Strict</th>
<th>More Strict</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ministers/panels appointed by Ministers</td>
<td>Municipal Councils</td>
<td>Public Officials</td>
</tr>
</tbody>
</table>

Some examples of court decisions examining each of these different types of decision-makers are provided in the appendix to this paper.

**Why should the rule against bias be less strict for administrative decision-makers than for judges?**

In his 2005 paper on bias, Matthew Groves made several distinctions between judicial decision-makers and administrative decision-makers which supported a less strict approach to the bias rule for the latter. First, judges will have very different training for making decisions than administrative decision-makers. Administrative decision-makers will often be career public servants or have worked in that environment for a considerable time. Whereas the prior work of judges would have prepared them to adopt a detached approach to their work, administrative officials often retain close contact with the people affected by their decisions and are often involved in the implementation of their own decisions. In addition to this, administrative proceedings may only involve a single party, and will often be less clearly articulated to the decision-maker compared with judicial proceedings where the issues are clearly identified and addressed. Finally, the procedures for administrative decision making are less structured, so that the active involvement of decision-makers in procedural issues is more likely.

All of these factors support the view that a strict application of the bias rule is not suitable for administrative decision-making. However, this raises the questions as to when an administrative decision-maker should step aside for apprehended bias or what process a decision-maker should adopt when considering this question?

**How should an administrative decision-maker deal with concerns about bias?**

**Disclosure**

An administrative decision-maker should disclose any potential circumstances of apprehended bias to any managers or other supervising officials and consult with them before determining how a matter should proceed. This ensures that the actions of the decision-maker are accountable within the bureaucracy as well as being accountable by way of judicial review. Such disclosure is also consistent with the public sector values that public servants are expected to follow.

The decision-maker then needs to consider whether or not to disclose the interest or association to external parties. In this regard it is
important to note the distinction between what is prudent and what is a requirement of law.

In *Ebner v Official Trustee in Bankruptcy*, the majority of the High Court thought it necessary to distinguish between considerations of prudence and requirements of law. The court considered that, as a matter of prudence and professional practice, judicial officers should disclose interest and associations if there is a serious possibility that they are potentially disqualifying. However, the Court did not suggest that this amounted to a duty to disclose. In my view, this approach applies equally to administrative decision-makers.

Disclosure also has strategic importance because if a party is aware of circumstances constituting a ground for an objection on the ground of apprehended bias and fails to object, then they will be taken to have waived their right to raise this matter if they are aggrieved by the eventual decision.29

**Decision-makers will need to decide whether to act conservatively or robustly**

Assuming that the decision-maker has disclosed their concern about potential apprehended bias and has considered the views of affected parties, the decision-maker will then need to consider whether or not to continue with their administrative functions or to step aside.

The rule against bias adopts an objective test. Applying this test necessarily requires the judge to make a value decision about what a hypothetical ‘reasonable person’ would think about a certain situation. These decisions may vary from judge to judge (and from person to person).

The decision of Hot Holdings is one example where a majority of the High Court took the view that there was no apprehended bias because the persons with interests in the matter had only played peripheral roles in the decision-making process, while Kirby J and the Western Australian Court of Appeal took the view that a reasonable person would have been concerned whether an impartial decision could have been made.

Accordingly, in some instances, the decision by an administrator whether or not to step aside for apprehended bias will have an element of risk management to it. Often when this scenario arises, the administrative decision-maker will adopt a risk averse or conservative approach and will seek to have the decision made by another person. However sometimes a decision-maker will consider that a more robust approach to this matter is warranted where a decision-maker considers that there is no substance to a claim of apprehended bias despite the fact that one of the affected parties may have raised it as an issue. This approach might be warranted where administrative problems would arise if a conservative approach to apprehended bias was adopted. For example if stepping aside would create problems regarding quorum, such as would have arisen in the Greyhound Racing NSW case as well as in *Maguzzu v Business Licensing Authority*.30 Another situation where it could arise might be if the decision-maker is concerned that the claim of apprehended bias may be motivated by an attempt by an applicant to get a more sympathetic decision-maker.31

When considering whether to adopt a conservative approach or a more robust approach in responding to a claim of apprehended bias, a decision maker needs to carefully weigh up the potential for their decisions being legally challenged, as well as the importance of maintaining the reputation of the public service as independent and impartial against the competing factors of the strength or weakness of the claim of apprehended bias and the administrative consequences of agreeing to step aside from the decision. Independent legal advice regarding the strength of the claim of apprehended bias may be desirable, although this may not always be possible in the time needed to make a decision. In some circumstances, there will be no absolute answer as to what position a decision-maker should take and it will require the strategic judgment of a decision-maker.
**Necessity**

It is possible in some instances that the principle of necessity would allow a person of a Board, say, who is subject to an apprehended bias to hear and determine a matter. However in our view, the doctrine of necessity should only be relied upon as a last resort. In other words, before a decision-maker decides to hear a matter on the basis of the doctrine of necessity they should consider all possible options for having the matter heard by a person not affected by the apprehended bias, such as delegating the power to make a decision or appointing a substitute decision-maker for the purpose of that decision.

**Additional obligations on public servants**

In addition to the common law rule of bias, it should be remembered that public service employees are also bound by the public sector values identified in the *Public Administration Act 2004* (the PA Act).

The public sector values listed in s 7 of the PA Act include:

(b) integrity - public officials should demonstrate integrity by-

(i) being honest, open and transparent in their dealings; and

(ii) using powers responsibly; and

(iii) reporting improper conduct; and

(iv) avoiding any real or apparent conflicts of interest; and

(v) striving to earn and sustain public trust of a high level;

(c) impartiality - public officials should demonstrate impartiality by-

(i) making decisions and providing advice on merit and without bias, caprice, favouritism or self-interest; and

(ii) acting fairly by objectively considering all relevant facts and fair criteria; and

(iii) implementing Government policies and programs equitably;

... In addition to this, pursuant to s 63 of the PA Act, the Public Sector Standards Commissioner (PSSC) has developed a binding code of conduct for public service employees based on these public sector values. Clause 4.1 of the Code of Conduct states that:

4.1 **Decisions and advice**

Public sector employees make decisions and provide advice that is free of prejudice or favouritism and is based on sound judgment...Their decisions are not affected by personal influences.

4.4 **Acting fairly**

Public Sector employees deal with issues consistently, fairly and in a timely manner. Public sector employees use fair criteria and consider all relevant information in dealing with issues.

Being fair means being just and working within commonly accepted rules.

Contravention of the PA Act or the Code of Conduct by a public servant may amount to misconduct pursuant to s 22 (2) of the PA Act and could lead to disciplinary proceedings.

**Conclusion**

Administrative decision-makers always need to be mindful about the rule against bias. However, even the most diligent decision-maker will encounter situations where there might be arguments either way about whether an interest or association is significant enough to amount to an apprehended bias. In such situations, a decision-maker is best advised to be open and frank with their peers and superiors about the potential bias, seek legal advice if the circumstances warrant it and make an informed
decision about whether the most appropriate action is to step aside or to proceed to make the decision.

For more information
For further information or legal advice on any issues raised in this paper contact:

Jonathan Smithers on 8684 0411
Assistant Victorian Government Solicitor
Domenic Cristiano on 8684 0476
Principal Solicitor
Penina Berkovic on 8684 0469
Solicitor

The VGSO is the primary source of legal services to the Victorian State Government and its statutory authorities, providing strategic advice and practical legal solutions.

This topic was the subject of the monthly VGSO lunchtime seminar held on Thursday 20 March 2008.

These notes are published with the permission of the presenters Domenic Cristiano and Penina Berkovic, and co-author Emily Heffernan.

The notes are not be regarded as legal advice.

1 Re Reference under Ombudsman Act (1979) 2 ALD 86, 94.
2 For example, if a power vests in a Director of a statutory body, but the Director is commonly referred to as the ‘Manager’ of that body, the instrument of delegation should refer to that person as the Director.
3 Australian Chemical Refiners Pty Ltd v Bradwell [1986] 10 ALN N96 (unreported, NSWCCA, 28 February 1986)
4 Re Reference under Ombudsman Act (1979) 2 ALD 86.
5 Carltona Ltd v Commissioner of Works [1943] 2 All ER 560.
6 (1983) 153 CLR 1
7 Ibid at 31, pre Wilson J.
8 (1986) 162 CLR 24, at 38
9 This imbalance has been addressed in part by the paper “The requirements of the rule against bias for non-judicial decision-makers such as Ministers, tribunal members and public officials”, which was delivered by Matthew Groves at a seminar on 15 June 2005.
10 [2002] HCA 51.
11 [2002] HCA 51, [88].
12 Ibid [89].
16 Previously know by the Latin: “nemo debet esse iudex in propria sua causa” (no one may judge their own cause).
17 Previously know by the Latin: “audi alternam partem” (hear the other side).
19 Sun Zhan Qui v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71, [1].
21 Ibid [8].
22 Hot Holdings Pty Ltd v Creasy [2002] HCA 51, [70].
23 Ibid.
27 Ibid [8].
28 Section 142 of the Aboriginal Heritage Act 2006 may be an example of this.
29 Vakuata v Kelly (1989) 167 CLR 568.
31 The High Court in Ebner took the view that judicial officers should not be too ready to disqualify themselves when confronted with an insubstantial objection, lest that led to forum shopping: Ibid [20].

Victorian Government Solicitor’s Office
Level 25, 121 Exhibition Street, Melbourne VIC 3000 Tel +61 3 8684 0444 Fax +61 3 8684 0449 vgso.vic.gov.au
Appendix - Examples of how the courts have applied the bias rule to different decision-makers

Least strict application of the bias rule - Ministers of the Crown

In *Hot Holdings Pty Ltd v Creasy* (Hot Holdings), Kirby J (who dissented) outlined the development of bias in the context of Ministerial decision-making. It is now accepted that, in the absence of any contrary statutory intent, a Minister of the Crown is subject to judicial review on the grounds of bias.

However, as with municipal councillors, the application of the bias rule for Ministers of the Crown is much less onerous than for judicial officers.

The difference in approach between Ministers of the Crown and judicial officers was clearly set out in *Minister for Immigration & Multicultural Affairs; Ex parte Jia Legeng* and the Federal Court recently reaffirmed this difference in its recent decision of the *Wilderness Society Inc v the Hon Malcolm Turnbull, Minster for the Environment and Water Resources*.

**Minister for Immigration & Multicultural Affairs; Ex parte Jia Legeng**

**Facts of the case**

This case involved (inter alia) an appeal by the Minister for Immigration and Multicultural Affairs ("the Minister") against a decision of the Full Court of the Federal Court of Australia, with respect to a decision to cancel Mr Jia’s visa. The Full Court had held that, in exercising his powers under ss 501 and 502 of the *Migration Act 1958* (Cth) to cancel the visa and declare Mr Jia to be an excluded person, the Minister was affected by actual bias.

Mr Jia was a Chinese national who arrived in Australia on a student visa in August 1991, who made an unsuccessful application for refugee status, was detained in custody for a time, and was convicted of a number of offences against the immigration and taxation laws.

In February 1995, Mr Jia was convicted of four offences—unlawful assault causing bodily harm, unlawful detention, making a threat to unlawfully harm a person, and sexual penetration without consent, for which he was sentenced to a total term of imprisonment of six years and three months.

In the aftermath of his convictions, a delegate of the Minister refused Mr Jia’s application for a Special (Permanent) Entry Permit (a decision on which had been pending). On appeal, the AAT determined Mr Jia was of good character, and overturning that decision, remitted the matter to a delegate of the Minister, with the direction that he grant Mr Jia a visa.

This decision that attracted significant comment in the media and upon invitation, the Minister agreed to be interviewed on radio. After the interviewer expressed concern about the decision of the Tribunal, the Minister said he was unhappy with the way in which the Tribunal had been dealing with a number of immigration matters, and indicated he had asked the Joint Committee on Migration of the Parliament to look into the question of criminal deportation.

When interviewer asked what the law provided as to whether a person was of good character. The Minister said:

> "What we are looking at here is the commission of offences. I don't believe you are of good character if you've committed significant criminal offences involving penal servitude. The law does
actually write down that that is the test and it adds another test ... if you are known to associate with organisations that are involved in criminal activity, you can be found to be of not good character."

When asked, in effect, what he could do about it, the Minister said:

"I'm considering what steps I can take and there are some avenues. One of the suggestions that's been made is that I could in fact grant the visa and then cancel it on character grounds. I have to weigh up whether or not that is a proper course for me to follow and I also have to look at the issue as to what the potential cost might be to the community if it opens up a whole host of other possible appeals to the Federal Court."

Following an unsuccessful appeal (and a withdrawn further appeal), the Minister's delegate granted the visa, but shortly afterwards, the Minister subsequently exercised his discretion to cancel the visa.

**High Court's decision**

The High Court unanimously determined that the Minister's appeal should be allowed, with each of the Judges emphasising the varying nature of a Minister's responsibilities, in contrast to those of judges. Kirby J for example warned that:

Ministers are not judges. Clearly, the pressures, processes and nature of Ministerial decision-making differ from the judicial task. Consequently, the obligations imposed by courts on officers of the Commonwealth, including Ministers, should not “over judicialise” the performance of their functions, including the making of decisions required of them by statute. I accept that the Minister's remark on an early morning interview should not be dissected in the way sometimes appropriate to analyses of the considered reasons of a court or tribunal.4

---

**The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources**

**Facts of the case**

This proceeding involved an application by The Wilderness Society Inc. (The Wilderness Society) made under ss 5 and 6 of the ADJR Act (Cth) and s 39B of the *Judiciary Act 1903* (Cth) to review two decisions made by the Commonwealth Minister for the Environment and Water Resources (Minister).

The Wilderness Society alleged, *inter alia*, that the decision regarding the relevant impacts of the proposed action be assessed on preliminary documentation under Division 4 of Part 8 of the EPBC Act was invalid because it is affected by apprehended bias in the Minister.

**Federal Court's decision**

The Court rejected the bias ground of review (and indeed, all grounds raised by The Wilderness Society). In reaching this conclusion, Marshall J concluded that the Minister did not have a closed mind in the assessment approach5 and stated that:

The critical issue is whether a well-informed reasonable observer would consider there was an apprehension of bias in the Minister. The Minister received strong advice from Mr Early, who firmly believed in the preliminary documentation assessment approach. Gunns lobbied him in favour of that approach. That approach also suited the Tasmanian Government and enhanced the chances of synchronisation of approval under the EPBC Act with approval by the Tasmanian Parliament. By 2 April 2007, the Minister wanted to know if an approval timeline ending in August 2007 was possible because he knew that was what the Tasmanian Government and Gunns were pursuing. However, the Minister did not consider the preliminary documentation assessment approach to the exclusion of all other approaches. Even during the course of making the assessment approach decision, the Minister...
questioned Mr Early about why another approach was not being recommended. At the time of making his decision, I do not consider that a well-informed observer could reasonably form the view that the Minister was biased towards the preliminary documentation assessment approach to the extent that he was not prepared to even consider alternative approaches, because he plainly did.

Less strict application of the bias rule – panels appointed by a Minister

In *Mildura Rural City Council v Minister for Major Projects*, Morris J sitting as the President of VCAT, considered how the bias rule applied to expert panels established under the *Planning and Environment Act 1987*. Morris J took into account the administrative and policy role of the panel, the source of its authority, the procedure it may follow, and the fact that it makes recommendations, not decisions, and concluded that such panels were to be treated quite differently as compared to courts.

In this case, the Victorian Government was proposing to establish a containment facility for hazardous waste at Nowingi in the north-west of the State; a plan strongly opposed by the Mildura Rural City Council. A panel of four members was appointed to consider submissions concerning the proposal.

One member of the panel, also appointed as the chairperson, was Dr Bill Russell. The council submitted that Dr Russell should disqualify himself as a member of the panel on the ground of apprehended bias due to his Australian Labour Party links. Dr Russell did not disqualify himself.

In finding that there was no apprehended bias, Morris J stated that:

In determining the content of the rules of natural justice, or how a particular rule may be applied, it is not always helpful to divide decision-makers into those exercising judicial power and those who form part of the executive branch of government. Some bodies – such as the Commonwealth Administrative Appeals Tribunal – form part of the executive but are closely aligned with the judicial model. Nevertheless, as Hayne J observed in *Jia*, the degree of divergence from the judicial paradigm is relevant. The panel appointed to consider the Nowingi proposal diverges substantially from the judicial model. The panel’s task is essentially that of a government advisor. The panel is appointed by the Minister specifically for the Nowingi proposal. A panel may include persons who are employed by the Crown. These characteristics do not support a strict application of the apprehension of bias principle on the basis of an association between a panel member and a Minister, or the government generally.

Less strict application of the bias rule - municipal councils

The application of the Bias Rule for elected municipal councillors is much less onerous than for judicial officers. The reason for this is that councillors will often be familiar with issues that they are expected to vote on, and may indeed hold strong views in relation to them. The law has recognized this reality and taken the view that such circumstances should not invoke a strict application of the rule against bias. For example in the decision of *Old St Boniface Residents Association*, Sopinka J of the Supreme Court of Canada (on behalf of the majority of the Court) stated that:

I would distinguish between a case of partiality by reason of prejudgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of prejudgment is inherent in the role of a councillor.

Adopting this approach, the Courts have made it far more difficult to establish apprehended bias in a municipal councillor based on their personal views in relation to a matter. In the Supreme Court decision of *Winky Pop Pty Ltd v Hobsons*
Bay City Council, Kaye J described the task in the following way:

The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the Court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of council in respect of all matters which are decided at public meetings at which objectors are entitled to be heard.

This would appear to be difficult to prove, although not impossible, as was show in Bycon Pty Ltd and Ors v Moira Shire Council, Registrar of Titles and Anor where Vincent J found the local council had breached the bias rule in circumstances where the Council was so committed to a development, that it was unrealistic to suggest that the subsequent formal compliance was anything more than mere ritual, designed to avoid a successful challenge...by the creation of an illusion that any submission opposing the development had been seriously considered.

Application of the bias rule for public officials involved in administrative decision-making

The application of the bias rule to public officials is less stringent than for judicial officers, but is not as relaxed as for elected officials.

There are two different scenarios where public officials can be accused of bias. The first scenario is where the public official exercises a statutory discretion. An example of this scenario arose in the Federal Court in Mongan v Woodward. The second scenario is where another person (for example a minister) exercises the discretion and the public official is involved in giving advice to that other person. An example of the second scenario arose in Hot Holdings.

Mongan v Woodward

Facts of the case

The applicant, Edwin Mongan, was found by the second respondent, Annwyn Godwin, to have breached the Australian Public Service Code of Conduct, in relation to his storing of non-work materials on his office computer in contravention of a direction previously given by the first respondent, Lionel Woodward. The materials contained what were considered to be both offensive and pornographic matter.

Mr Woodward was the Chief Executive Officer of the Australian Customs Service ("the ACS"); Ms Godwin was National Manager (Staffing) in the ACS and was Mr Woodward's delegate in making a determination under the procedures he had established for determining whether an Australian Public Service employee in the ACS had breached the Code.

The applicant sought to restrain Ms Godwin (as delegate) and Mr Woodward (as CEO of the ACS) from proceeding under s 15 of the Public Service Act 1999 (Cth) to impose the foreshadowed sanction of termination of employment. He alleged there was a reasonable apprehension of bias in both respondents; on the basis that Mr Drury, the Deputy CEO of the ACS had forcefully expressed his views as to a desirable outcome, and Ms Godwin as a more junior member of staff, was unable, as a result, to form an independent view.

Findings of the Court

The Federal Court held that the Ms Godwin would be affected by apprehended bias and should not act further in the matter. Mr Woodward on the other hand was not prevented from hearing the disciplinary proceedings because there was no reasonable apprehension that he would be impermissibly influenced by Dr Drury’s views (although the Court thought it
would be preferable if Mr Woodward delegated the matter to someone else anyway.

In relation to Ms Godwin, the Federal Court stated that:

[19] …[a] fair minded observer might reasonably conclude that, in a bureaucratic structure such as is evidenced in this matter, their respective positions provided a sufficient relationship of influence as could make Ms Godwin susceptible to influence for impermissible reasons. I acknowledge that it might be the ideal of the APS that public servants will act fearlessly in discharging their functions. Nonetheless, it is necessary also to acknowledge that human nature is as it is.

Hot Holdings Pty Ltd v Creasy

This case arose over the granting of a mining tenement by the Western Australian Minister for Mining. The appellant and the first respondent (amongst others) applied for a mining tenement within minutes of one another over largely the same area. A mining warden decided to determine priority between the various applicants by way of a ballot. The appellant won the ballot. However the decision to grant the mining tenement lay with the Minister. The Minister received a briefing paper from his department. He subsequently had a number of meetings with a Senior Assistant Crown Solicitor and a General Manager of the Department. Six weeks after receiving the briefing paper he granted the mining tenement to the Appellant.

After the decision, it became known that two officers who had been involved in the preparation of the briefing paper had indirect interests in the outcome of the matter. The first officer, Mr Miasi owned 40,000 shares in a company (AuDAX) which had an option agreement to purchase a 80% interest in the mining tenement if the Appellant was successful. The second officer, Mr Phillips had a 29 year old son who also held shares in AuDAX.

A majority of the High Court decided that the involvement of Mr Miasi was very limited and could be described as peripheral. That being so, it could not be said that a fair-minded and informed member of the public, who knew what Mr Miasi had done, could fairly suspect that the content of the departmental advice was influenced by the interest Mr Miasi held in AuDAX.

The majority left open whether the apprehended bias of someone other than a decision-maker could breach the bias rule because they took the view that no such circumstances existed in this case.

While agreeing his fellow judges regarding the law on bias, Kirby J reached a different conclusion which can be summarised as:

The appearance of integrity has been undermined, whatever may have been the actuality. That is enough to require that the process be performed again, exercising the participation of officials who had known but undeclared personal interests.

Second strictest application of bias rule - administrative tribunals

The application of the bias rule for administrative tribunals will still be strict, however it may be possible that the circumstances of the case permit some variation from the strictest application of this rule. This position is reflected in a number of cases where a Court has reiterated the importance of a strict application of the bias rule, but has found that the circumstances justified some variation to the normal rule. For example, in Maguzzu v Business Licensing Authority, Eames J stated that:

The principles of natural justice do not differ significantly as between what might be expected of judges of a court and persons hearing appeals before a quasi judicial tribunal, and the test as to whether conduct amounts to actual or apprehended bias, is the same for tribunals as for courts of law. However, what justice requires in a given case may vary according to the circumstances of each case, including the nature of the inquiry which is being conducted by the
tribunal, the nature of the function of the tribunal and the relationship between the tribunal and the person to whom procedural fairness must be accorded.

Two examples can be given of where the bias rule has not been found to apply to a tribunal in circumstances where it may well have been found to apply had the decision-maker been a judicial officer.

**Maguzzu v Business Licensing Authority**

Mr Maguzzu had applied for a Prostitution Service Provider Licence and this had been refused by the Business Licensing Authority. Maguzzu sought to challenge this decision in VCAT. On 7 February 2000, VCAT, constituted by three sitting members, commenced hearing this application for review. One of the members of the three member tribunal was a police officer (Mr Reid).

On 8 February 2000, Maguzzu made application that “the Tribunal disqualify itself from proceeding with the hearing on the ground of apprehended bias”. Counsel for Maguzzu told VCAT that Mr Reid had been observed the previous evening talking to another police officer (Mr Amor) who was likely to be called as a witness. Mr Amor had been offered a lift back to the police station by Mr Reid which he had accepted.

Pursuant to section 108 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the same tribunal then sat to consider whether it should be reconstituted and decided to replace Mr Reid with Ms Lambrick. The plaintiff objected to the fact that the tribunal, including the member who had announced his disqualification on the grounds of bias, should sit to consider reconstitution, as well as the ability of the reconstituted tribunal from continuing to hear his application.

Eames J held that it was not reasonably open to a fair minded and informed observer to apprehend or suspect that by virtue of the actions by Mr Reid, the other members of the Tribunal might not bring an impartial mind to the resolution of the question which the Tribunal had to decide.

**Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka**

The applicant, in April 1996, sought a protection visa, claiming to be a refugee. In September 1996, a delegate of the first respondent refused that application. The applicant, in October 1996, applied to the Refugee Review Tribunal (“the Tribunal”) to review the delegate’s decision. The Member constituting the Tribunal was Dr Rory Hudson. In January 1997 the Tribunal affirmed the delegate’s decision.

In February 1999, the applicant commenced proceedings in the original jurisdiction of this Court, claiming that Dr Hudson was affected by apprehended bias.

The source of the asserted apprehension of partiality and prejudice was a public statement made on the internet by Dr Hudson, said to reveal what counsel for the applicant referred to as his "attitudes" towards people claiming refugee status. Counsel explained that, by "attitude", he meant "an entrenched predisposition toward an issue or a class of person". The entrenched predisposition was said to involve an adverse opinion of the credibility of people claiming to be refugees.

A majority of the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) overturned the earlier finding of apprehended bias with respect to Dr Hudson. In its reasons for this decision the majority made the following comment:

The practical content of the requirements of natural justice, or procedural fairness, in the case of the operations of the Tribunal is affected both by the non-adversarial form of its procedures, the nature of the matters it is required to consider in coming to a decision, and the legislation which in some respects directly modifies those requirements... The kind of
conduct on the part of the Tribunal that might give rise to a reasonable apprehension of bias needs to be considered in the light of the Tribunal’s statutory functions and procedures. Conduct which, on the part of a judge in adversarial litigation, might result in such an apprehension, might not have the same result when engaged in by the Tribunal. That is another matter.

**Strictest application of the bias rule - courts**

The Bias Rule is enforced the most strictly with judicial decision-makers. The importance of this rule was reiterated in *Ebner v Official Trustee in Bankruptcy* where a majority of the High Court stated:\(^1\)

> Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to Magna Carta...Many other examples could be drawn from history. It is unnecessary, however, to explore the historical originals of the principle. It is fundamental to the Australian judicial system.

*R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet (No 1)*

One example of this strict application of the test can be seen in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet (No 1)*\(^2\) where the House of Lords had ruled that General Pinochet, the former dictator of Chile, was not immune from arrest and extradition in relation to the crimes he was alleged to have committed whilst in office.

The facts of this case were that, at the start of the original House of Lords hearing, Amnesty International had been given permission to intervene in the proceeding. After the House of Lords gave judgment in the appeal, it became known that one of the five judges, Lord Hoffmann, was an unpaid director and chairman of Amnesty International Charity Limited, an organisation set up and controlled by Amnesty International. It also became known that Lord Hoffmann’s wife was employed by Amnesty International. General Pinochet then applied to the House of Lords to set aside its earlier decision on the grounds that the links between Lord Hoffmann and Amnesty International had not been declared and were of a kind that would give rise to the appearance of possible bias.

In December 1998 a newly constituted panel of five judges in the House of Lords held unanimously that the relationship between Amnesty International and Lord Hoffmann disqualified him from hearing the case. The judgment of the House of Lords previously given was set aside.

The court did not find that Lord Hoffmann personally held any view, or had any objective, regarding the question whether General Pinochet should be extradited: but handed down its decision to uphold the ‘immutable’ principle that a judge cannot be sent o be acting in his or her own cause.

---

1. Ibid [119].
4. Ibid, [141].
5. Ibid, [145].
9. Ibid, [39].