CONTENTS TO SUBMISSIONS ON BEHALF OF METRO POL INVESTMENT PTY LTD

Amendment C258 to the Melbourne Planning Scheme

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BEST HOOPER
LAWYERS

8 November 2018

Joseph Morrow
Project Officer
Planning Panels Victoria
Planning | Department of Environment, Land, Water and Planning
Level 5, 1 Spring Street
MELBOURNE VIC 3000

By email only: joseph.morrow@delwp.vic.gov.au

Dear Mr Morrow,

Please pass this response to Panel Members Moles, Tonkin and McKenzie.

Amendment C258 to the Melbourne Planning Scheme

We continue to act for Metro Pol Investment Pty Ltd, the owner of 263-267 William Street, Melbourne.

We **enclose** our client's outline of the basis of its application that the Panel ought to recuse itself.

Yours faithfully
BEST HOOPER

John Cicero
Principal

Enc.

CC. Panel Circulation list for Amendment C258.

IN PLANNING PANELS VICTORIA

MELBOURNE PLANNING SCHEME

AMENDMENT C258

Metro Pol Investment Pty Ltd

Submittor

and

Melbourne City Council

Planning Authority

and

Others

Submitters

BASIS OF APPLICATION THAT PANEL OUGHT RECUSE ITSELF

8 NOVEMBER 2018

1. The application is made on behalf of Metro Pol Investment Pty Ltd which is the owner of land at 263-267 William Street, Melbourne.

2. This land is developed with an established hotel known as the Metropolitan Hotel (Metro Pol).

3. Application is made that the Panel, ought recuse itself from the future hearing of this matter.

4. The Panel is bound by the rules of natural justice (section 161(1)(b) of the *Planning and Environment Act* 1987).

5. Natural justice includes procedural fairness.

6. The first basis of the application is that the hearing of the matter before the presently constituted Panel has progressed too far to enable the hearing rule to be accommodated – it is no longer possible for the current members of the Panel to undo what has occurred to date and to provide a fair hearing before them.

7. The second basis upon which the Panel ought recuse itself is that continuing with the panel hearing with the presently constituted panel would give rise to an appearance of bias, (i.e. ostensible bias), in that a fair-minded lay observer might reasonably apprehend that the panel might not bring an impartial mind to the matters for recommendation:

   i. Because the panel could not "put out of its mind" the evidence and submissions that have been made in the absence of the new submitters; and

   ii. Because of the current and past association of members of the Panel with the National Trust, which is a submittor to the Panel that supports the proposed amendment. This apprehension also relates by association to all members of the Panel.

Date: 8 November 2018

.....

John Cicero, Principal
BEST HOOPER Lawyers for
and on behalf of the Metro Pol Investment Pty Ltd

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IN PLANNING PANELS VICTORIA

MELBOURNE PLANNING SCHEME

AMENDMENT C258

Metro Pol Investment Pty Ltd

Submittor

and

Melbourne City Council

Planning Authority

and

Others

Submitters

OUTLINE OF SUBMISSIONS ON BEHALF OF THE METRO POL INVESTMENTS PTY LTD IN SUPPORT OF APPLICATION THAT PANEL OUGHT RECUSE ITSELF

12 NOVEMBER 2018

Introduction

1. These submissions are made on behalf of Metro Pol Investment Pty Ltd which is the owner of land at 263-267 William Street, Melbourne. This land is developed with an established hotel known as the Metropolitan Hotel (Metro Pol).

2. Application is made that the Panel, ought recuse itself from the future hearing of this matter on the basis that the Panel is bound by the rules of natural justice (section 161(1)(b) of the *Planning and Environment Act* 1987 ('the Act'). Natural justice includes procedural fairness.

3. The first basis of the application is that the hearing of the matter before the current members of the Panel has progressed too far to enable the hearing rule to be accommodated – it is no longer possible for the current members of the Panel to undo what has occurred to date and to provide a fair hearing before them.

4. The second basis upon which the Panel ought recuse itself is that continuing with the panel hearing with the presently constituted panel would give rise to an appearance of bias, (i.e. ostensible bias), in that a fair-minded lay observer might reasonably apprehend that the panel might not bring an impartial mind to the matters for recommendation:

   i. Because the panel could not "put out of its mind" the evidence and submissions that have been made in the absence of the new submitters; and

   ii. Because of the current and past association of members of the Panel with the National Trust which is a submittor to the Panel that supports the proposed amendment. This apprehension also relates by association to all members of the Panel.

Explanation of timing of application

5. Towards the conclusion of the directions hearing on 7 November 2018, the Panel stated that it observed that the application for recusal should have been made earlier in the day.

6. The submissions of Metro Pol on 7 November 2018 were set out on the basis of what was set out at paragraph 43 of that document – that is:

> *Upon the delivery of a written[1] Statement of Reasons[2] in respect whether a complete or partial hearing will be provided, submissions in relation to future conduct of the hearing can be made and considered. In the meantime, the Panel should adjourn.*

7. Also, at paragraph 7 of the 7 November 2018 submissions of Metro Pol, it was stated:

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[1] In the context of a forum where there is no recording or transcript, it is submitted that in this matter, a written Statement of Reasons ought be provided. If the Panel is not prepared to provide a written Statement of Reason, it is submitted that a recording device ought be arranged so that the Panel's reasons can be accurately recorded and later transcribed.

[2] In *Osmond v Public Services Board* [1984] 3 NEWLR 447 at 463, Kirby P explained the benefits of a duty to provide reasons – firstly, it enables the recipient to see why any appealable or reviewable error has been committed, with a view to informing the decision whether to appeal, challenge or let the matter lie. Secondly, it answers the frequently voiced complaint that good and effective government cannot win support or legitimacy unless it accounts for itself to those whom it affects. Thirdly, the prospect of public scrutiny will provide officials with a disincentive to be 'arbitrary'. A separate, but related point is that the discipline of giving reasons can made administrators more careful and rational. Finally, providing reasons can give guidance for future cases.

It is unknown whether any declarations were made by Panel members either at the Directions hearing, at the start of the hearing, or during the hearing.

8. Upon delivery of that paragraph of the Metro Pol submission, the Panel advised that declarations had been made earlier in the hearing. It was agreed that the Panel would advise of those declarations later in the day.

9. It was not until near the end of the directions hearing on 7 November 2018 that the Panel advised that it would reserve its findings in relation to the content of the hearing.

10. Similarly, it was not until near the end of the directions hearing on 7 November 2018 that the Panel advised of the declarations that had previously been made in the hearing (in response to the earlier exchange relating to paragraph 7 of the 7 November 2018 Metro Pol submissions) together with what is understood to be a new disclosure, that the Panel Chair was now the Deputy Chair of the Heritage Council.

11. This explains the reason why the application for recusal was made after these matters had been disclosed by the Panel.

Submissions in support of recusal

12. At the conclusion of the directions hearing on 7 November 2018, the Panel reserved its decision as to the future conduct of the hearing. If the Panel determines that it is not appropriate for it to continue to hear the matter in view of the hearing rule of procedural fairness, then the question of recusal for apparent or ostensible bias does not arise.

13. It is submitted that the Panel should determine that it should cease to hear the matter, and the appropriate course would be for a new Panel to be appointed before which the parties would attend for directions in the first instance.

14. If the current Panel determines that it will continue to hear the matter, Metro Pol respectfully makes application that the current Panel ought recuse itself from hearing this matter.

15. On 7 November 2018, it was requested by Metro Pol that the appropriate course was for the Panel to hand down its written statement of reasons in relation whether a full or partial hearing is to take place and then list the matter for a further directions hearing to consider future conduct. The Panel denied that request[3].

16. During the afternoon of 7 November 2018, the Panel Chair stated that the following declarations had previously been given (although it is understood that the Panel Chair made a new declaration that she is now the Deputy Chair of the Heritage Council), it stated that this occurred probably at the directions hearing:

> ***Member Moles***
>
> *That she considers that she has no conflict. She was at the earlier time an alternate general member of the Heritage Council and is now the Deputy Chair of the Heritage Council. She had been a Panel member for Melbourne City Council Amendments C240, C207, C186, C270.*
>
> ***Member Tonkin***
>
> *Was a member of the Melbourne City Council Amendment C207, 186 Panel.*
>
> *Was former Executive Director of Heritage Victoria.*
>
> *Mr Tonkin is a current financial member of the National Trust.*
>
> ***Member McKenzie.***
>
> *Member McKenzie is a current financial member of the National Trust.*

17. The Panel advised that these matters were raised in the earlier hearing and that the Panel had indicated that it had stood down in the earlier hearing to allow consideration by the parties and upon the return of the Panel, no parties in the earlier hearing raised any matters in relation to the declarations that had been made.

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[3] Metro Pol reserves its position in relation to the Panel's ruling on this matter as a potential basis for recusal pending the determination.

Background

18. The background of this matter is recorded in the submissions of Metro Pol dated 7 November 2018.

Relevant statutory provisions

19. Under the provisions of the *Planning and Environment Act 1987* ('the Act'):

    i. the Panel must consider all submissions referred to it and give a reasonable opportunity to be heard to any person who has made a submission referred to it (section 24);

    ii. S157 – Panels with more than one member, quorums and ability of Minister to appoint other members if there is a vacancy.

    iii. a Panel may make directions about the times and places of hearings, matters preliminary to hearings and the conduct of hearings (section 159(1)).

    iv. a Panel may regulate its own proceedings (section 167);

    v. in hearing submissions, a panel:

    - S161(1)(a) must act according to equity and good conscience without regard to technicalities or legal forms; and
    - S161(1)(b) is bound by the rules of natural justice.

    (iv) Section 161(4) - A panel may hear evidence and submissions from any person whom this Act requires it to hear.

    (v) Section 161(5) - Submissions and evidence may be given to the panel orally or in writing or partly orally and partly in writing

    (vi) Section 165 – a panel may from time to time adjoin a hearing to any times and places and for any purposes it thinks necessary and on any terms as to costs or otherwise which it thinks just in the circumstances.

20. There are various others statutory functions and obligations under the Act for a Panel which are not set out in this submission.

Impact of proposed Amendment on Metro Pol

21. The impact of the proposed Amendment on the interests of Metro Pol are specific and are set out in the Metro Pol submissions dated 7 November 2018.

Submissions

22. It is submitted the hearing rule, which is a requirement of natural justice, is the first basis upon which the Panel ought recuse itself.

23. Whilst determining the content of procedural fairness and natural justice depends upon the facts and circumstances of a particular case, in the case of the hearing rule, it is sometimes said that there is an element of '*I know it when I see it*'[4] when deciding upon whether the hearing rule is likely to be breached.

24. The background of this matter is recorded in the earlier submission from 7 November 2018. Much has happened before this Panel – all in the absence of Metro Pol, such that it is not now possible for Metro Pol to know the case that has been put, or present its own case[5].

25. The Panel has been together for a considerable period and no doubt has had discussions, made observations and considered matters. This has all occurred prior to the involvement of Metro Pol.

26. Oral and written submissions have been received, evidence has been called, witnesses have been cross-examined. Various other things have occurred – all without Metro Pol being present.

27. It is submitted that in the circumstances here, it is inescapable that this Panel ought recuse itself from the further hearing of this matter, recognizing that to continue

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[4] See for example the commentary to The Hearing Rule at Chapter 8 of Aronson, M & Groves, M, *Judicial Review of Administrative Action*, Fifth Edition (2013) at page 493.

[5] This is particularly in circumstances where there is no recording or transcript. There is no way to disclose to Metro Pol (or the other new parties) the materials contained in paragraph 49 of the Metro Pol submissions of 7 November 2018. *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J at paragraph 40 illustrates the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that the person may have an opportunity of dealing with such matters. http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1985/81.html?context=1;query=kioa;mask_path=au/cases/cth/HCA

would be a breach of the hearing rule of procedural fairness – the matter has progressed too far in the absence of Metro Pol (and various other parties).

28. The second basis upon which the Panel ought recuse itself is, it is submitted, that continuing with the panel hearing with the presently constituted panel would give rise to an appearance of bias (i.e. ostensible bias), in that a fair-minded lay observer **might** reasonably apprehend that the panel might not bring an impartial mind to the matters for recommendation:

    i. because the panel could not "put out of its mind" the evidence and submissions that have been made in the absence of the new submitters; and/or

    ii. because of the current and past association of members of the Panel with the National Trust which is a submittor to the Panel that supports the proposed amendment. This apprehension also relates by association to all members of the Panel.

29. Either of those circumstances alone satisfies the test for apprehended bias, as explained below which sets out the logical connection between the circumstances, and that a fair-minded lay observer **might** reasonably apprehend that the panel might not bring an impartial mind to the matters for recommendation.

30. In relation to the first element of this matter, this is not the fault of the panel – it is just the result of the circumstances that have arisen.

31. It is simply a function of the fact that the hearing has travelled so far without the involvement of the new submitters.

32. The fact that the Panel has heard so much of this hearing is not a benefit. It is in large part, the problem here.

33. *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 [6][6] provides an authoritative statement of the apprehended bias rule/ostensible bias[7]:

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[6] http://classic.austlii.edu.au/cgi-bin/download.cgi/au/cases/cth/HCA/2000/63

[7] Applied in *Rajendran v Tonkin & Ors* [2002] VSC 585 at paragraph 17. Summarised in *Mildura Rural City Council v Minister for Major Projects* [2006] VCAT 623 at paragraph 9.

> 6 *Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide . That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.*

34. The application of the apprehension of bias principle to a panel member in the facts and circumstances of the Nowingi case was discussed in *Mildura Rural City Council v Minister for Major Projects* [2006] VCAT 623[8]. In that case, an application was made that one member of the Panel ought be recused. The case provided a useful commentary of the application of the apprehension of basis principles to a panel member in the circumstances of that case. At paragraph 14, it was stated:

> 14 *In order to ascertain the manner in which the apprehension of bias principle should be applied in the context of a panel member, it is necessary to ascertain the legal basis, and obligations, of a panel. This is primarily to be discerned from the Act; but may also be influenced by practice.*

35. Paragraphs 22-25 contains a useful commentary[9]. At paragraph 22, the Tribunal stated:

> *... Thus the apprehension of bias principle (which forms part of the requirements of natural justice) ought not be applied to a panel as if it were a court. ...*

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[8] http://classic.austlii.edu.au/cgi-bin/download.cgi/au/cases/vic/VCAT/2006/623

[9] The Tribunal then proceeded to consider the particular facts and circumstances of that case and found that the particular member did not need to be recused.

36. Whilst the rule is not applied in the same way as it might be in a court, it is submitted that the apprehension of basis principle does apply to a body such as a Planning Panel which is obliged to afford natural justice.

37. The role of a Planning Panel in the planning process is very significant. It has statutory functions. Its function has serious impacts upon participants in the planning process. Its considerations and report are high influential in terms of whether Amendments proceed, are altered and whether they are ultimately approved.

38. The independence, neutrality and impartiality of Planning Panel and its role, function and reputation forms a large part of the considerations in this matter. The integrity of the process, of the forum and the hearing process in large part explains the protective measures that are ingrained in the hearing rule and apprehension of bias principle.

39. Similar sentiments were outlined by the Tribunal in *Jinshan Investment Group PL v Melbourne CC & Ors* [2015] VCAT 635[10] at paragraph 30:

> *... most importantly, the Tribunal has a critical decision making role in relation to planning matters in Victoria. It is an imperative that the impartiality and independence of the Tribunal be, and be seen to be, above reproach. Justice must not only be done, it must be seen to be done. The applicant's proposal is a major development proposal in the Central Business District of Melbourne. It would be of no benefit to anyone if there was ongoing concern as to the impartiality of the Tribunal, or the legality of the decision. Likewise, it would be of no benefit to anyone if there were subsequent applications to the Tribunal for recusal, or appeals to the Supreme Court concerning this issue. It is much better to make a fresh start with a differently constituted Tribunal.*

40. There are elements of the hearing rule and the apprehension of bias (ostensible bias) that overlap in this matter.

41. The disclosures that the Panel made on the afternoon of 7 November 2018 impact significantly upon the ability of this Panel to continue to hear this matter.

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[10] http://classic.austlii.edu.au/cgi-bin/download.cgi/au/cases/vic/VCAT/2015/635

42. The National Trust of Australia (Victoria) is a submittor to the proposed amendment. The National Trust supports the amendment[11].

43. It is understood based upon the timetable, that it made a submission before this Panel on 13 August 2018. It is assumed that the submission was partly oral, but in so far as it is written, the National Trust submission is Panel document 23.

44. Melbourne Heritage Action is a submitter to the proposed amendment. Melbourne Heritage Action supports the amendment.

45. It is understood based upon the timetable, that it made submissions before this Panel on 10 August 2018. It is assumed that the submission was partly oral, but in so far as it is written, the Melbourne Heritage Action submission is Panel document 18.

46. Melbourne Heritage Action is a heritage advocacy group which is facilitated and supported by the National Trust[12].

47. The difficulties associated with the members of this Panel continuing to hear this matter are set out in *Rajendran v Tonkin & Ors* [2002] VSC 585[13], see amongst other parts of the decision, paragraphs 12-17, 20, 24, 28-29, 34, 36, 37, 55, 58, 60.

48. In *Jinshan*, the Tribunal found:

> *31 While I accept, as the Council submitted, that it has not been shown that Deputy President Gibson's interest in the National Trust has ever extended beyond mere membership, or that she has ever had any involvement in the management of the National Trust, I am nonetheless of the view that, in the circumstances of this case, the need for the administration of justice to be seen to be above reproach is the paramount consideration in the exercise of the discretion conferred by s 108 of the VCAT Act[14].*

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[11] See National Trust submission document 23.

[12] See *Jinshan Investment Group PL v Melbourne CC & Ors* [2015] VCAT 635 at paragraph 8. Also see Melbourne Heritage Group website - https://melbourneheritage.org.au/about/ – '*We are a community-based lobby group supported by the National Trust (Victoria), with whom we work closely.*'

[13] http://classic.austlii.edu.au/cgi-bin/download.cgi/au/cases/vic/VSC/2002/585

[14] Which is the provision that relates to reconstitution.

49. The membership of the National Trust (including financial membership) by two members of this Panel, impacts upon the ability of the all members of the Panel to continue to hear the matter.

50. This is because of the length of time that the Panel members have been empaneled together in this case.

51. No doubt the Panel members have conferred with each other, have discussed various matters associated with the matter and have deliberated before the delivery of various rulings in the matter.

52. In these circumstances, it is submitted that a fair-minded lay observer **might** reasonably apprehend that the Panel might not bring an impartial mind to the matters for recommendation.

53. A further factor in this context is that the Panel Chair is now the Deputy Chair of the Heritage Council which is a body that is obliged to include members of the National Trust[15].

54. In the context of a bias case (as compared with apprehended bias), in *IW v City of Perth* (1997) 191 CLR 1 at 50-51[16], Gummow J suggested that the bias of one or more members of a multi-member body tainted the others. Even if the biased members are outnumbered. He explained this partly as the produce of the law's unwillingness to take evidence as to the degree of influence actually exerted on those who were biased on their colleagues and partly on the policy ground of the need to eliminate bias from decision making bodies[17].

55. Whilst actual bias is not alleged here, it is submitted that a fair-minded lay observer here might reasonably apprehend that whether conscious or not, the Panel may have influenced, infected or tainted each other's views.

56. It is submitted with respect that the whole Panel here ought recuse itself.

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[15] Section 10 *Heritage Act* 2017.

[16] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1997/30.html?context=1;query=iw%20AND%20city%20of%20perth;mask_path=au/cases/cth/HCA

[17] As summarized at page 620 of M & Groves, M, *Judicial Review of Administrative Action*, Fifth Edition (2013).

Statement of Reasons

57. The Panel is respectfully requested to provide a written Statement of Reasons in response to this application.

Peter O'Farrell

Isaacs Chambers

Counsel for the Metro Pol Investments Pty Ltd

Instructed by Best Hooper Lawyers

12 November 2018

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Fifth Edition

MARK ARONSON • MATTHEW GROVES



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8

The Hearing Rule

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8.1 Introduction

[8.10] In this chapter we examine the principles governing the content of the hearing rule. That issue has become more prominent by two of the simultaneous trends examined in the previous chapter, namely the greater willingness of the courts to imply a duty to observe procedural fairness and a greater reluctance to accept its exclusion by the legislature. The result is that the crucial question is now usually one of precisely what the hearing rule requires rather than whether it applies.[1] In some instances, this change of focus may simply require that the same issues be considered under a new guise. Obvious examples are the effect of urgency on procedural fairness, or the potential consequences a decision may have upon a person affected. In previous times, such issues were often considered as part of the threshold question. They can now be viewed as an issue bearing on content.[2]

Determining the content of procedural fairness remains difficult. Australian courts are reluctant to reduce that content to fixed rules, preferring instead to use the intuitive standard of "fairness" that is moulded by reference to the statutory framework and factual circumstances of each case. Gleeson CJ invoked similar notions when he suggested that "[F]airness is not an abstract concept. It is essentially practical ... the concern of the law is to avoid practical injustice."[3] The term "fairness" often appears to be used in an ordinary sense to

1 That point was made by Mason J in *Kioa v West* (1985) 159 CLR 550 at 585. It has been cited with approval on countless occasions.

2 Each issue might bear quite differently on the procedural content of the hearing rule. If it was accepted that the circumstances required a decision to be made urgently, that would greatly reduce the content of the hearing rule. If it was accepted that a decision would have especially serious consequences upon a person affected, the hearing rule would require detailed procedural requirements.

3 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13–14. This echoes other statements where his Honour suggested that the "practical context" within which powers are exercised should influence the interpretation of legislation in which they are located: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 69 per Gleeson CJ and Hayne J. See also *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511 (FCAFC) at 525.

signify a (supposedly) commonly understood standard.[4] However the idea that the term carries its ordinary everyday meaning, or an obvious practical quality, implies a simplicity that is difficult to reconcile with the sophistication of some of the procedural requirements it is used to justify.

The notion of fairness is not the only part of natural justice that is approached intuitively. When courts balance relevant issues to decide what fairness requires in any particular case, they often balance those various factors in a fairly intuitive manner without further explanation.[5] We accept that, while it may be easy to identify the range of factors that should be considered to determine the content of fairness in any case, balancing them is not. Even when judges do attempt a more detailed explanation of how they have weighed the complex and often competing factors, it may simply highlight the intuitive nature of the balance struck in each case.[6]

If we accept that fairness and any balance of factors undertaken to reach it have an instinctive element, it follows that the decisions which assess or seek to achieve fairness may be necessarily imprecise. To accept an inherent imprecision in the content of fairness creates other problems. It appears to cast the administrative process adrift. Legislatures, officials and the people affected by administrative action have no clear guidance about the requirements of fairness beyond intuitive findings which hint at a test of "I'll know it when I see it." The imprecise and almost unspoken balance that courts typically reach when deciding the requirements of fairness in any case might also be questioned on constitutional grounds. The less able the courts are to express in clear principle how they balance issues to decide what fairness requires, the more one might suspect that something is concealed. Perhaps the imprecision is a cloak for merits review. We suggest it is more likely to conceal judicial discretion.

English law illustrates why there may be little to be gained from more open judicial attempts to explain concepts of fairness. In the wake of their adoption of a more substantive conception of fairness, English courts have struggled to explain why a decision is unfair and deserving of a remedy. Whenever they move to explain the supposed content of more general principles, such as "conspicuous unfairness" or "abuse of power", the results seem heavy on subjective judicial perception and light on clear legal doctrine.[7] English cases

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4 We agree with Loughlin that the suggested standard appeals to "an imaginary consensus": M Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28 UTLJ 215 at 238.

5 See, eg, *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 407–410 per French J (affd *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591). See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12–14 where Gleeson CJ emphasised the "practical" character of the requirements of procedural fairness, with little explanation of the differing meanings that might be given to this concept.

6 And in many decisions of the High Court, the differing assessment of the facts and their relevance that often emerges between judges on the principles governing such matters. See, eg, the varying approaches in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601.

7 The area and its problems are succinctly assessed in C Harlow and R Rawlings, *Law and Administration* (3rd ed, Cambridge UP, Cambridge, UK, 2009), pp 222–232. The recent English law is relevant to the strong instrumentalist flavor that Galligan gives to his concept of "fair procedures". He argues that one must start with the notion of "fair treatment", meaning treatment in accordance with legal standards and other authoritative standards, and then ask what procedures (institutions, mechanisms) are necessary to secure such treatment: DJ Galligan, *Due Process and Fair Procedures — A Study of Administrative Procedures* (Clarendon Press, New York, US, 1996), pp 330–334. The English experience of late suggests that the development of principles in this way does not lend itself to doctrinal coherence.

of Perth[74] Gummow J suggested that the bias of one or more members of a multi-member body tainted the others, even if the biased members are outnumbered. He explained this partly as a product of the law's unwillingness to take evidence as to the degree of influence actually exerted by those who were biased on their colleagues,[75] and partly on the policy ground of the need to eliminate bias from decision-making bodies.

The New South Wales Court of Appeal divided on the issue in *McGovern v Ku-Ring-Gai Council*.[76] Spigelman CJ rejected a strict application of the rotten apple principle and doubted whether the cases relied upon by Gummow J revealed a clear view. His Honour thought that the principle was especially suited to judges because of "the historical significance of independence and impartiality" to the judiciary.[77] He thought the rule should also apply to other "special cases" where one tainted member had "particular influence" on others. That led his Honour to favour a "but for" approach, in which the question was whether the person(s) against whom a reasonable apprehension was established had "decided the outcome."[78] Basten JA favoured a stricter use of the rotten apple principle because it removed any need for the court to inquire into either the existence of bias as a matter of fact or the motives and knowledge of individual members.[79] According to this view, a decision should be set aside once a reasonable apprehension is established against one or more members of a multi-member body because they "may have tainted the proceedings and vitiated the decision."[80] Campbell JA expressly declined to rule on the rotten apple principle.[81]

The suggestion of Spigelman CJ that the principle should apply most stri[ct] to judges is difficult to accept, particularly if that is justified by judicial independence. Judges assert their independence frequently, sometimes stridently, and there are many bias cases in which the courts have stressed the hypothetical observer's knowledge and acceptance of judicial integrity. It is not clear how those weighty factors evaporate when judges sit with colleagues. The lesser independence and training of non-judicial decision-makers arguably provides reason for a stricter application of the principle outside the courts. The "but

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the Deputy Commissioners did not instigate the events or participate in many of them, but did not publicly disassociate themselves from the conduct: at [163]. Proof was not a problem because the inquiry and its many errors were played out in the public domain.

74 (1997) 191 CLR 1 at 50–51.

75 Cf *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 61–67, where Finn J examined the individual reasons of each member of the authority that made the decision.

76 (2008) 72 NSWLR 504.

77 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at 511.

78 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at 513.

79 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at 523.

80 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at 524. Basten JA noted that many cases about bias in a multi-member body included a claim of procedural irregularity, such as the participation of a non-member in deliberations: at 523–524. But see *Mer[chant] Council of Hong Kong v Chan* [2010] 3 HKLRD 667 (HKCFA) at 691. Bokhary PJ, whom all the court agreed, held that the mere presence of an advisor or observer during the deliberations of a tribunal would not necessarily cause an apprehension of bias. His Honour thought this was also true if an adviser or assistant who drafted the decision, so long as this was clearly done at the tribunal's instruction. That reasoning was influenced by the existence of a clear practice direction of the tribunal governing such issues.

81 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at 553. His Honour noted that many cases involved participation of an otherwise disqualified person and also that many older cases which applied the principle strictly on the basis that participation of a member contravened a duty to act judicially were now outdated: at 555–557.

KIOA AND OTHERS . . . . . APPELLANTS;
APPLICANTS,

AND

WEST AND ANOTHER . . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA.

H. C. OF A. 1985.

Feb. 5, 6; *Dec.* 18.

Gibbs C.J., Mason, Wilson, Brennan and Deane JJ.

Immigration and Aliens — Deportation — Power of Minister — Principles of natural justice — Whether applicable — Standing as Australian citizen of infant daughter of aliens — Intended deportation order — Whether notice required — Migration Act 1958 (*Cth*), *ss.* 6, 6A, 7, 18.

Administrative Law — Decision — Natural justice — Procedural fairness — Order for deportation of aliens — Review of decision — Administrative Decisions (Judicial Review) Act 1977 (*Cth*), *ss.* 5, 13.

Two Tongan citizens and their daughter, who was an Australian citizen, applied pursuant to s. 5(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) for review of deportation orders made against both parents by the Minister's delegate under the *Migration Act* 1958 (Cth) and of refusal of their applications for further temporary entry permits and for permanent entry permits. The father entered Australia on a student visa. His wife was allowed temporary entry. Their daughter was born in Australia. Their entry permits having expired, they remained illegally in Australia to raise money for relatives in Tonga who had suffered loss in a cyclone.

Held, (1) that s. 5(1) of the *Administrative Decisions (Judicial Review) Act* imposed no obligation that the rules of natural justice should be observed in relation to every decision to which that Act applied.

Minister for Immigration and Ethnic Affairs v. Haj-Ismail (1982), 57 F.L.R. 133, at pp. 140-141; 40 A.L.R. 341, at p. 347 and *Smith v. Minister for Immigration and Ethnic Affairs* (1984), 53 A.L.R. 551, at pp. 554-555, approved.

Per Mason J. The primary object of the Act was to achieve procedural reform and not to work a radical substantive change in the grounds on which administrative decisions were susceptible to challenge at common law.

(2) That the infant daughter in the circumstances had no entitlement to be heard before the deportation orders were made against her parents, as the effect of those orders upon her would be indirect and consequential and it had been sufficiently considered by the Minister's delegate.

Per Wilson J. The weight to be given to the presence in an immigrant family of an Australian-born infant is a matter for the decision-maker and not the courts.

Per Brennan J. The daughter had a right to be heard, but no right to a

that his decision conformed with the Covenant or the Declaration. However, this argument is quite academic, for in any case the only relevant provisions of the Covenant and the Declaration are those which declare that the family is entitled to protection by society and the State and that this protection should inure for the benefit of a child who is a member of the family. To deport the parents of a child with the natural expectation that the child will accompany them is not in any way depriving the family or the child of the protection to which the Covenant refers. Nothing that the delegate did failed to conform with the provisions of the Covenant or those of the Declaration.

For these reasons I would dismiss the appeal.

MASON J. This is an appeal by Mr. and Mrs. Kioa (who are citizens of Tonga) and their infant daughter Elvina (who is an Australian citizen) against the dismissal by the Full Court of the Federal Court of their appeal against the dismissal of an application for judicial review under s. 5(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the A.D.(J.R.) Act") of: (1) deportation orders made against Mr. and Mrs. Kioa by the delegate of the Minister for Immigration and Ethnic Affairs on 6 October 1983; (2) refusal of their applications for further temporary entry permits; and (3) refusal of their applications for permanent entry permits.

The circumstances in which the appeal arises are set out in the reasons for judgment of Northrop and Wilcox JJ. in the Full Court of the Federal Court which I now restate. Mr. Kioa entered Australia on 8 September 1981 in order to attend a three month training course at the International Training Institute in Sydney. This course was related to his then employment by the Tongan Tourist Office. Mr. Kioa entered Australia upon a student visa and was granted a temporary entry permit valid for a period of three months.

Mrs. Kioa arrived in Australia on 7 November 1981 with her daughter Elitisi, who was born on 31 July 1979. They were granted temporary entry permits valid until 31 March 1982.

Mr. Kioa was granted four months leave by his employer so that he was not expected to resume duties in Tonga until early April 1982. Having decided to spend that leave in Australia, he made application on 15 December 1981 for an extension of his temporary entry permit until 31 March 1982, when the family was due to leave Australia to return to Tonga. In the event, and due to the necessity to obtain certain information, the application for an extension of the temporary entry permit was not determined prior to 31 March 1982.

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In March 1982 Mr. Kioa resigned his position in Tonga and commenced employment as a machine operator in Melbourne. He subsequently stated that the reason for his decision to remain in Australia with his family was that parts of Tonga had been devastated by Cyclone Isaac and, as a consequence, relatives in Tonga had advised him to remain in Australia for the purpose of sending money home to them.

Because officers of the Department of Immigration and Ethnic Affairs believed that the Kioa family had returned to Tonga at the end of March they took no further action until July 1983 in relation either to the application for an extension of the temporary entry permit or to the continued presence of the Kioa family in Australia. In the meantime, on 14 November 1982 a second daughter, the appellant Elvina Kioa, was born.

Mr. Kioa was apprehended at his place of work on 25 July 1983. He was released from custody on 5 August 1983, subject to daily reporting conditions. Mrs. Kioa was interviewed on 26 July. She stated that she had not worked in Australia and that she wished to leave all decisions to her husband. Mr. Kioa was interviewed on the following day. He stated that he wished to remain in Australia because he had a good job with an employer who wished him to continue and because he and his family had established a life for themselves here and that they wished to remain.

On 26 July 1983 the Director of Legal Aid, Legal Aid Commission of Victoria, wrote to the respondent Minister on behalf of Mr. Kioa. The letter referred in some detail to the circumstances of the family and made express reference to the birth of Elvina and the fact that, having been born in Australia, she was an Australian citizen. The letter included this passage:

> "Naturally Mr. Kioa would like to remain in Australia and we would hope that you will exercise your discretion to allow him and his family to do so. As you know, the question of deportation in circumstances where one of the children is an Australian citizen has received a great deal of attention recently by numerous groups interested in immigration matters and I will not labour the point."

The Director's letter was supported by letters from Mr. Kioa's employer and from his fellow employees. Although the letter did not specifically request that further entry permits be granted to Mr. and Mrs. Kioa, the letter was treated by the Department and the Minister's delegate as involving a request for permanent entry permits.

On 12 September 1983 the Department wrote to Mr. Kioa formally refusing his application of 15 December 1981 to extend his

temporary entry permit and requiring him to make immediate arrangements to leave Australia with his family. He failed to do so. On 6 October 1983 a submission, prepared by the Director, Enforcement Section, of the Department was put before the Deputy Secretary, the delegate of the Minister appointed under s. 66D of the *Migration Act* 1958 (Cth). That submission recited the facts and made reference to Elvina's Australian citizenship. The submission included the following paragraphs:

> "20. Mr. Kioa claims that the catalyst for his staying in Australia was the devastating cyclone which hit Tonga in March 1982. Yet it should be noted that this occurred at least 3 months after his TEP had expired.
>
> 21. If Mr. Kioa had been genuine in his desire (in Dec 1981) to seek a legitimate extension of his stay, it would have appeared likely that he might have sought a decision on his application rather than change his address without apparently notifying the Department. Then when his wife's TEP expired around the time of the Tongan cyclone no attempt was made to lodge a formal application to regularise their status . . .
>
> 22. Mr. Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern.
>
> POSSIBILITY OF REGULARISATION OF STATUS
>
> 23. Mr. and Mrs. Kioa could apply for a further TEP but having regard to the applicable policy, such an application is unlikely to be approved. They do not fulfil the conditions of section 6A of the *Migration Act* 1958 for the grant of permanent residence in Australia.
>
> SUMMARY OF POLICY OF DEPORTATION OF PROHIBITED IMMIGRANTS
>
> 24. Persons who enter as students, or their dependants, are expected to honour the undertakings contained in visa applications signed overseas. It is in the public interest to ensure that persons abide by normal immigration selection procedures and do not queue-jump by remaining illegally in Australia to the prejudice of prospective migrants who abide by the procedures. Presence of such queue-jumpers is inimical to the Government control of Migration programs as well as impacting upon job availability for legal residents. Illegals who do not leave voluntarily should expect to face the prospect of deportation when located.
>
> ASSESSMENT
>
> 25. Mr. and Mrs. Kioa and their daughter Elitisi are prohibited immigrants. They have committed an offence in becoming prohibited immigrants. Despite their attempts to adapt to life in Australia they cannot be said as prohibited immigrants to have been absorbed into the Australian community. Although it remains possible for their status to be regularised (by grant of a further TEP) bearing in mind the

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policy as it stands and taking into account the circumstances of this family as related above, you may decide to order their deportation.

RECOMMENDATION

26. If you accept the above assessment, it is recommended that you sign the attached orders for the deportation of Isileli and Fheodolina Kioa. Their children are to accompany them at Commonwealth expense. The attached responses to representations are for your signature if the terms are suitable."

No recommendation was made in relation to the deportation of Elitisi or, of course, Elvina, but the submission envisaged that they would depart with their parents. On the same day, 6 October 1983, the delegate signed deportation orders against Mr. and Mrs. Kioa.

Pursuant to a request under s. 13 of the A.D.(J.R.) Act the delegate made a statement of reasons for his decisions on 11 November 1983. That statement, which included findings on material questions of fact, made reference to Elvina's status as an Australian citizen. The document stated the following reasons for the decision:

"24. By virtue of section 7(3) of the Act the applicants became prohibited immigrants following the expiration of their temporary entry permits on 8 December 1981 (Mr. Kioa), and 31 March 1982 (Mrs. Kioa), and both have maintained that status from these respective dates as no further temporary entry permits applicable to them have come into force.

25. The applicants do not fulfil one or more of the conditions of section 6A(1) of the Act necessary for consideration for grant of a (permanent) entry permit.

26. While I accepted that it remains possible to regularize the applicants continued presence in Australia, for a limited period if they so requested, by directing the grant to them of a further temporary entry permit I was satisfied that such a grant would have been inappropriate in the circumstances by reason of the applicable policy, their breach of the undertakings made by them in connection with their visitor visa applications, their deliberate remaining in Australia as prohibited immigrants, Mr. Kioa's illegal working without written permission in Australia, and their length of stay in Australia which was well beyond that normally allowed students in similar circumstances as set down in policy guidelines.

27. While a permanent entry permit may not be granted to the applicants after their entry to Australia by reason of section 6A(1) of the Act, I accepted that it was possible to direct the grant of a further temporary entry permit to them for the purpose of allowing consideration of an application for grant of (permanent) entry permit on the basis that the conditions of section 6A(1)(e) of the Act are fulfilled. Accordingly I considered whether, apart from the fact that the applicants do not hold temporary entry permits in force, there are strong

compassionate or humanitarian grounds for the grant of (permanent) entry permits to them.

28. Based upon my findings and the representations made on their behalf I considered and gave weight to the circumstances of the applicants' case and in particular to the fact that the tragedy of the March 1982 cyclone in Tonga necessitated Mr. Kioa giving financial assistance to his family in Tonga (which I accept he was better able to do from Australia). However I was of the view that in all the circumstances there were no strong humanitarian or compassionate grounds for the grant to them of (permanent) entry permits.

29. In the particular case of the applicants:

(a) Mr. Kioa, knowing that an application for further temporary permit had not been finalized and that, in any event, the period of extension sought had expired, deliberately chose to remain in Australia, to work without written permission contrary to s. 31B(2) of the Act, and to resign his position in Tonga with the Tourist Office.

(b) The applicants made no attempt to communicate with the Department after 15 December 1981 nor advised of any change of address to enable the Department to communicate with them. In particular they made no attempt to enquire of their earlier application or to further regularize their status following receipt of news of the cyclone in March 1982.

(c) Mr. Kioa failed to honour his obligation as a student visitor to return home at the completion of his studies or permitted stay.

30. I considered that these actions constituted a blatant disregard for the normal migration selection procedures and the migration law. I considered nonetheless the circumstances of their case, in particular as set out in paragraphs 17 and 28 above, but decided that their expulsion from Australia was appropriate. I considered that the application of the stated policy set out in paragraph 22(b) supra was appropriate and just. In all the circumstances I decided to order their deportation."

By an application made on 18 October 1983 which was subsequently amended, the appellants applied for a review under the A.D.(J.R.) Act of the deportation orders, the refusal of their application for further temporary entry permits and the refusal to grant permanent entry permits to them. The application for review was dismissed with costs by Keely J. (71). An appeal from his decision was dismissed with costs by the Full Court of the Federal Court (72) and it is from that decision that the present appeal is brought.

The case presented for the appellants is that the relevant decisions of the Minister's delegate were vitiated by failure to abide by the rules of natural justice and by a failure to have regard to relevant

(71) (1984) 53 A.L.R. 658. (72) (1984) 4 F.C.R. 40.

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considerations. The appellants' case necessarily involves discussion of the judgments in *Salemi v. MacKellar* [No. 2] (73) and *Reg. v. MacKellar; Ex parte Ratu* (74) which examined the provisions of the *Migration Act*, especially s. 18, as they stood at that time, although we are not requested to reconsider the correctness of the decisions. It is submitted that legislative developments since 1977, consisting of amendments to the *Migration Act* and the A.D.(J.R.) Act, have substantially altered the basis on which in those cases the Court considered the application of the rules of natural justice.

The appellants' first submission is that the effect of s. 5(1)(a) of the A.D.(J.R.) Act is to impose an obligation that the rules of natural justice be observed in relation to every decision to which the Act applies. Section 5(1) provides that a person who is aggrieved by a decision to which the Act applies may apply to the Federal Court for an order of review in respect of the decision on any one or more of the grounds which it sets out. Paragraph (a) provides as a ground:

> "that a breach of the rules of natural justice occurred in connection with the making of the decision".

The manner in which par. (a) is expressed is to be contrasted with par. (b) of the same section. That paragraph is in these terms:

> "that procedures that were required by law to be observed in connection with the making of the decision were not observed".

This contrast, according to the appellants, suggests that par. (a) proceeds on the footing that the rules of natural justice necessarily apply to the making of every decision to which the A.D.(J.R.) Act applies. If it were otherwise, par. (a) would be expressed in much the same way as par. (b). And, with the exception of s. 5(1)(b) and of s. 5(1)(h), which is expressly qualified by s. 5(3), all the grounds in s. 5 including s. 5(1)(a) are expressed without qualification.

The statutory grounds of review enumerated in s. 5(1) are not new — they are a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law. The section is therefore to be read in the light of the common law and it should not be understood as working a challenge to common law grounds of review, except in so far as the language of the section requires it: see, for example, s. 5(1)(f). It is in this respect that s. 5(1) makes every decision to which it applies subject to review on the grounds stated and in so doing it may give a number of grounds a wider reach than they would have at common law. But it is not the primary object of the section to amend or alter the common law content of the various grounds.

(73) (1977) 137 C.L.R. 396.

(74) (1977) 137 C.L.R. 461.

Viewed in this light, par. (a) does not impose an obligation to apply the rules of natural justice where, apart from s. 5, there is no obligation on a person making a decision to comply with those rules or any of them. When the paragraph prescribes a breach of the rules as a ground of review it makes no assumption that the rules apply to every decision to which the sub-section relates. Under the general law it is always a question whether the rules apply and, if so, what rule or rules apply to the making of the particular decision. The language of the paragraph according to its natural and ordinary meaning is apt to import this concept of natural justice as a ground for review. The language does not manifest an intention to work a radical substantive change in the law by attaching to every decision to which s. 5 applies an obligation to comply with the rules of natural justice. Accordingly, I agree with the interpretation given to s. 5(1)(a) by Bowen C.J. and Franki J. in *Minister for Immigration and Ethnic Affairs v. Haj-Ismail* (75).

The appellants rely on extrinsic materials in the form of the Minister's Second Reading Speech, the Report of the Commonwealth Administrative Review Committee (Parliamentary Paper No. 144 of 1971) and the Report of the Committee of Review of Prerogative Writ Procedures (Parliamentary Paper No. 56 of 1973): see the *Acts Interpretation Act* 1901 (Cth), s. 15AB. These materials do not support the appellants' submission. Instead they reinforce the view that the primary object of the A.D.(J.R.) Act was to achieve procedural reform and not to work a radical substantive change in the grounds on which administrative decisions are susceptible to challenge at common law.

The appellants' next submission is that in any event the rules of natural justice apply to the making of the decisions which are challenged in the present case. The appellants contend that the making of the relevant decisions involved a departure from the rules of natural justice in that they were given no opportunity of replying to the matters stated in the Director's submission to the delegate, especially in pars. 20, 21, 22, 24, 25 and 26. This submission calls for some examination of *Salemi* [No. 2] and *Ratu*. In the first of these cases, which was decided by a statutory majority, Barwick C.J., Gibbs and Aickin JJ. considered that the power of deportation conferred by s. 18 was not limited by a requirement to observe the rules of natural justice and that the announcement by the Minister of an "amnesty" for prohibited immigrants did not give the plaintiff

(75) (1982) 57 F.L.R. 133, at pp. 140-141; 40 A.L.R. 341, at p. 347.

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an independent entitlement to a hearing before a deportation order was made against him. Stephen J. doubted that there was no obligation to accord natural justice in making a deportation order and concluded that the amnesty gave rise to a legitimate expectation requiring the observance of natural justice. Jacobs J. thought that there was no legislative intention wholly to exclude the principles of natural justice, although those principles would not apply in the ordinary case where the deportee's status as a prohibited immigrant was the reason, as well as the occasion, for the exercise of the power (76). However, in his view the "amnesty" attracted the application of the principles. Murphy J. considered that, quite apart from the "amnesty", the power was conditioned by an obligation to accord natural justice.

Unlike *Salemi* [No. 2], *Ratu* was a unanimous decision, though the members of the Court differed as to the grounds for refusing relief. A majority (Barwick C.J., Gibbs, Mason, Jacobs and Aickin JJ., Murphy J. dissenting, and Stephen J. not deciding) held that the exercise in that case by the Minister of the power conferred by s. 18 was not subject to an obligation to observe the rules of natural justice. Barwick C.J., Gibbs, Mason and Aickin JJ. considered that the statute displaced, or left no room for, the general obligation that the common law might otherwise impose in relation to natural justice. Jacobs J., having referred to the view which he had expressed in *Salemi* [No. 2] about s. 18, went on to hold that this was a case where an order for deportation was made against the prosecutors because they were prohibited immigrants. Barwick C.J., Stephen and Murphy JJ. held that there was no denial of natural justice in any event.

The legislative amendments which have been made since *Salemi* [No. 2] and *Ratu* were decided in 1977 are of such significance that we should not regard those decisions as foreclosing the answers to the questions that the appellant's argument now raises. The most important change is that brought about by s. 13 of the A.D.(J.R.) Act. The making of a deportation order and the other decisions now complained of are decisions to which the section applies with the consequence that there is an obligation under s. 13(2) upon the person making a decision, following receipt of a notice under sub-s. (1), to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. The existence of this obligation is to be seen in association

(76) (1977) 137 C.L.R., at pp. 452-453.

with the right conferred by s. 5(1) of the A.D.(J.R.) Act on a person affected by a decision to apply to the Federal Court for an order of review. The absence of any obligation to give reasons was a factor relevant to the conclusion which I reached in *Ratu* (77) though it was not expressed to be a decisive factor and it was a matter which was discussed in the judgment of Stephen J. in *Salemi* [No. 2] (78). His Honour concluded by noting that Lord Reid in *Malloch v. Aberdeen Corporation* (79), had observed that the absence of an obligation to give reasons did not necessarily predicate absence of an obligation to afford a hearing. Acceptance of this view does not deny that the existence of an obligation to give reasons, especially in association with a right in the person affected to apply for an order of review by a court of the decision, strengthens the case for saying that there is an obligation to comply with the rules of natural justice.

Then there are the amendments of the provisions of s. 6(5) and s. 6A(1) of the *Migration Act*. Section 6A(1) now prescribes specifically the only grounds on which entry permits may be granted to an immigrant after his entry into Australia. These provisions replaced the general discretion to grant an entry permit for which s. 6(5) had earlier provided. In *Salemi* [No. 2] and *Ratu* some significance attached to the circumstance that s. 18 left the making of a deportation order entirely to the discretion of the Minister: see *Salemi* [No. 2] (80); *Ratu* (81). This was because an unconditional power, involving an unregulated discretion, to make a deportation order indicated that the Minister was not required to determine any question or form any judgment or opinion on any particular matter before making the order. The new provisions to be found in s. 6(5) and s. 6A(1) do not, of course, touch s. 18 itself, although the refusal of further entry permits under these sections leaves the Minister free to make a deportation order under s. 18.

Section 27(1)(ab) now makes it an offence for a person to become a prohibited immigrant upon the expiration of a temporary entry permit that is applicable to him. This was not an offence under s. 27 as it stood at the time of *Salemi* [No. 2] and *Ratu*. Associated with this amendment is the defence for which sub-s. (2A) now provides. This defence recognizes that the defendant's status as a prohibited immigrant may be terminated by the grant to him of a further entry permit or by the expiration under s. 7(4) of a period of five years

(77) (1977) 137 C.L.R., at p. 479.
(78) (1977) 137 C.L.R., at pp. 443-444.
(79) [1971] 1 W.L.R. 1578, at p. 1582; [1971] 2 All E.R. 1278, at p. 1282.
(80) (1977) 137 C.L.R., at p. 420.
(81) (1977) 137 C.L.R., at p. 479.

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after he became a prohibited immigrant without any deportation order against him being in force. Section 27(1)(ab) attaches a criminal sanction to a person becoming a prohibited immigrant by reason of his overstaying his entry permit. And the existence of the defence under sub-s. (2A) enhances the importance of the grant or refusal of a further entry permit. The consequence of the grant of such a permit is that the immigrant is no longer in breach of s. 27(1)(ab): see s. 10. The consequence of refusal is that the immigrant continues to be, or becomes, a prohibited immigrant.

In place of the old s. 7(5), s. 31A now confers a general power on the Minister or an authorized officer to require a person who is a prohibited immigrant to leave Australia within a time specified and the section imposes an obligation on the immigrant to comply with that requirement. The penalty prescribed is $1,000 or imprisonment for six months. This power is an alternative to the deportation power. If exercised, it enables the immigrant to make his own arrangements for deportation from Australia. Unlike deportation, it does not expose him to arrest, detention in custody and liability under s. 21A (a section introduced in 1979) for the costs of his conveyance from a place in Australia to a place outside Australia.

The general scheme of Pt II of the *Migration Act* dealing with "IMMIGRATION AND DEPORTATION" is that an immigrant's authority to enter and to remain in Australia depends on his having a current entry permit applicable to him, that he becomes a prohibited immigrant if he enters Australia without a permit or overstays his entry permit or further entry permit (ss. 6(1), 7(3)), that he thereby commits a criminal offence unless his presence in Australia is regularized by the grant of a further entry permit (s. 27) and may be required to leave (s. 31A) or may be deported (s. 18) with the consequences which I have already mentioned. Apart from the general power which s. 18 confers on the Minister to "order the deportation of a person who is a prohibited immigrant under any provision of this Act" Pt II contains other deportation powers directed to specific situations. Although they have no direct relevance to this case I should briefly mention them. The Minister may deport an alien convicted of certain crimes: s. 12. The Minister may deport immigrants who have been convicted of certain offences within five years of entry or who become inmates of a mental hospital or public charitable institution within that period: s. 13. And there is provision for the deportation of an alien whose conduct appears to the Minister to have been such that he should not be allowed to remain in Australia: s. 14(1). Similar but more limited provision is made for the deportation of prohibited immigrants by s. 14(2). The exercise of the power is conditioned by procedural

requirements which are designed to ensure that the person proposed to be deported will have an opportunity of participating in an inquiry conducted by a Commissioner appointed for the purposes of the section to consider the ground specified by the Minister. Where an inquiry is held the power may not be exercised unless the Commissioner reports that the ground specified by the Minister has been established.

For the purposes of the present case the statutory provisions relating to the issue of entry permits and the status of a person as a prohibited immigrant are of critical importance. Although the Act is by no means consistent in the references which it makes to them, it distinguishes between a temporary entry permit and an entry permit that is not temporary (which I have termed for the sake of convenience a "permanent entry permit"), the former being one which is expressed to be for a specified period only: s. 6(6). An entry permit may be granted to an immigrant upon his arrival in Australia or, subject to s. 6A, after he has entered Australia: s. 6(5). Section 6(5) evidently refers to entry permits generally, that is temporary entry permits as well as permanent entry permits. On the other hand s. 6A relates to permanent entry permits only: see s. 6A(8). I shall return to it shortly.

Subject to the reference in sub-s. (2) to "a further entry permit" which may include a permanent entry permit, s. 7 deals with temporary entry permits. The Minister may in his absolute discretion cancel such a permit by writing under his hand: s. 7(1). A further entry permit may be granted, at the request of the holder, to a person who holds or has held a temporary entry permit. Upon the expiration or cancellation of a temporary entry permit, the holder becomes a prohibited immigrant unless a further entry permit comes into force: s. 7(3). But a person who is a prohibited immigrant ceases to be a prohibited immigrant if and when an entry permit or further entry permit is granted to him and not otherwise: s. 10. And, notwithstanding s. 10, a person who becomes a prohibited immigrant by virtue of s. 7(3) ceases to be a prohibited immigrant at the expiration of a period of five years from the time at which he became a prohibited immigrant unless, at the end of that period, a deportation order in relation to him is in force: s. 7(4). Section 6A(1) prohibits the grant of a permanent entry permit to an immigrant after his entry into Australia unless one or more of certain conditions are fulfilled in relation to him. Of the conditions set out, one only is relevant to the present case. It is par. (e) which is in these terms:

"he is the holder of a temporary entry permit which is in force

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and there are strong compassionate or humanitarian grounds for the grant of an entry permit to him".

Because they did not hold temporary entry permits at the relevant time, s. 6A(1) precluded the issue to Mr. and Mrs. Kioa of permanent entry permits on the footing that they satisfied the condition in par. (e). However, the delegate and, it seems, the Department correctly recognized that, if they were first granted further temporary entry permits, they would have been eligible for the grant of permanent entry permits provided that "strong compassionate or humanitarian grounds" for the grant of such permits existed. Paragraph 23 of the submission to the delegate states that "having regard to the applicable policy" an application for further temporary permits would be unlikely to succeed. Paragraph 26 of the delegate's statement of reasons sets out the grounds why he considered such permits would be refused and par. 28 states his conclusion that there were "no strong humanitarian or compassionate grounds" for the grant of permanent entry permits.

In passing I note that s. 6A(1) refers to the objective existence of the conditions which it enumerates, rather than to the opinion or satisfaction of some authority that the conditions or any of them are fulfilled. No doubt the existence or non-existence of many of the matters mentioned in pars. (a) to (e) inclusive may be readily established. However, "strong compassionate or humanitarian grounds" stand in a different position and may be very much a matter of opinion.

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it: *Twist v. Randwick Municipal Council* (82); *Salemi* [No. 2] (83); *Ratu* (84); *Heatley v. Tasmanian Racing and Gaming Commission* (85); *F.A.I. Insurances Ltd. v. Winneke* (86); *Annamunthodo v. Oilfields Workers' Trade Union* (87). The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.

The reference to "legitimate expectation" makes it clear that the doctrine applies in circumstances where the order will not result in

(82) (1976) 136 C.L.R. 106, at p. 109.
(83) (1977) 137 C.L.R., at p. 419.
(84) (1977) 137 C.L.R., at p. 476.
(85) (1977) 137 C.L.R. 487, at pp. 498-499.
(86) (1982) 151 C.L.R. 342, at pp. 360,376-377.
(87) [1961] A.C. 945.

the deprivation of a legal right or interest. Take, for example, an application for a renewal of a licence where the applicant, though he has no legal right or interest, may nevertheless have a legitimate expectation which will attract the rules of natural justice. In *Salemi* [No. 2] (88) Barwick C.J. expressed the view that the expression "legitimate expectation" adds little, if anything, to the concept of a right. However, later decisions demonstrate that the concept of "legitimate expectation" extends to expectations which go beyond enforceable legal rights provided that they are reasonably based: *Heatley* (89); *F.A.I.* (90); *Attorney-General (Hong Kong) v. Ng Yuen Shiu* (91). The expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision. In the view of some members of the Court in *Salemi* [No. 2] the "amnesty" constituted an example of such an undertaking. Alternatively, the expectation may arise from the very nature of the application, as it did in the case of the application for a renewal of a licence in *F.A.I.* (92) or from the existence of a regular practice which the person affected can reasonably expect to continue: *Council of Civil Service Unions v. Minister for the Civil Service* (93). The expectation may be that a right, interest or privilege will be granted or renewed or that it will not be denied without an opportunity being given to the person affected to put his case.

It has been said on many occasions that natural justice and fairness are to be equated: see, e.g., *Wiseman v. Borneman* (94); *Bushell v. Secretary of State for the Environment* (95). And it has been recognized that in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness. This is because the expression "natural justice" has been associated, perhaps too closely associated, with procedures followed by courts of law. The developing application of the doctrine of natural justice in the field of administrative decision-making has been very largely achieved by reference to the presence of characteristics which have been thought to reflect important characteristics of judicial decision-making. The effect of Atkin L.J.'s influential observations in *R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ltd.* (96), was to focus attention on those elements in the making of administrative decisions which are analogous to judicial determination as a means

(88) (1977) 137 C.L.R., at p. 404.
(89) (1977) 137 C.L.R., at pp. 508-509.
(90) (1977) 137 C.L.R., at pp. 348, 351-352, 369, 412.
(91) [1983] 2 A.C. 629, at p. 636.
(92) (1982) 151 C.L.R. 342.
(93) [1985] 1 A.C. 374, at p. 401.
(94) [1971] A.C. 297, at pp. 308, 309, 320.
(95) [1981] A.C. 75.
(96) [1924] 1 K.B. 171, at p. 205.

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of determining whether the rules of natural justice apply in a particular case. The emphasis given in subsequent decisions to the presence and absence of these characteristics diverted attention from the need to insist on the adoption in the administrative process of fair and flexible procedures for decision-making, procedures which do not necessarily take curial procedures as their model: see *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (97).

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. It seems that as early as 1911 Lord Loreburn L.C. understood that this was the law when he spoke of the obligation to "fairly listen to both sides" being "a duty lying upon every one who decides anything": *Board of Education v. Rice* (98). But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly. This is because the act or decision which attracts the duty is an act or decision:

> "... which directly affects the person (or corporation) individually and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a 'policy' or 'political' decision and is not subject to judicial review."

(*Salemi* [No. 2] (99), per Jacobs J.)

Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation* (1), Kitto J. pointed out that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on "the particular statutory framework". What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter,

(97) (1978) 88 D.L.R. (3d) 671, at pp. 680-682.
(98) [1911] A.C. 179, at p. 182.
(99) (1977) 137 C.L.R., at p. 452.
(1) (1963) 113 C.L.R. 475, at pp. 503-504.

and the rules under which the decision-maker is acting: *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (2); *National Companies and Securities Commission v. News Corporation Ltd.* (3).

In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations: cf. *Salemi* [No. 2] (4), per Jacobs J.

When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case? It will be convenient to consider at the outset whether the statute displaces the duty when the statute contains a specific provision to that effect, for then it will be pointless to inquire what the duty requires in the circumstances of the case, unless there are circumstances not contemplated by the statutory provision that may give rise to a legitimate expectation. However, in general, it will be a matter of determining what the duty to act fairly requires in the way of procedural fairness in the circumstances of the case. A resolution of that question calls for an examination of the statutory provisions and the interests which I have already mentioned.

Notwithstanding the characteristics of the power and the elements in the statutory framework which were thought in *Salemi* [No. 2] and *Ratu* to indicate an intention to displace the principles of natural justice in relation to s. 18, I do not think that it can now be said that the *Migration Act* as it has been amended wholly displaces the duty to act fairly in accordance with the doctrine of natural justice. In one very important respect there has been a radical legislative change. The exercise of the power is susceptible of judicial review and an element in that review is the obligation, on request, to

(2) (1969) 122 C.L.R. 546, at pp. 552-553.

(3) (1984) 156 C.L.R. 296, at pp. 311, 319-321.

(4) (1977) 137 C.L.R., at p. 451.

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furnish a statement setting out material findings of fact, referring to the evidence and other materials, and giving the reasons for the decision. In the light of this it can scarcely be suggested now that the existence of an obligation to comply with the requirements of procedural fairness is inconsistent with the statutory framework or that it will entail administrative inconvenience which is destructive of the statutory objects. In this new setting the remaining considerations which influenced the Court in the two earlier decisions are not sufficient to displace the obligation to follow fair procedures.

I do not agree with the view expressed by Barwick C.J. in *Ratu* (5) that the Minister has no discretion under s. 18 not to order the deportation of a prohibited immigrant. The Minister may decide not to make such an order for a variety of reasons. He may do so pending consideration of an application for a further entry permit or because he considers that the prohibited immigrant will in due course make his own arrangements to leave Australia or because the case is one calling for a s. 31A notice rather than a deportation order.

But what does procedural fairness entail in its application to the exercise of the discretionary power conferred by s. 18? It would be going too far to say that fairness requires that in all cases in which a deportation order is to be made notice should be given to the prohibited immigrant of the intention to make such an order and of the grounds upon which it is to be made. The *Migration Act* plainly contemplates that in the ordinary course of events a deportation order will be made ex parte. And the prohibited immigrant may be a person who, intent upon remaining in Australia without lawful right or title, has evaded the authorities and will continue to do so. He may even be a person who has been required under s. 31A to leave, but has declined to do so. To insist that he be notified of the intention to make a deportation order would serve only to facilitate evasion and frustrate the objects of the statute. These considerations indicate that, in the case where the reason for the making of the order is that the person concerned is a prohibited immigrant, the dictates of natural justice and fairness do not require the giving of any advance notice of the proposed making of the order: *Salemi* [No. 2] (6), and *Ratu* (7).

But it may be otherwise where the reasons for the making of the order travel beyond the fact that the person concerned is a prohibited immigrant and those reasons are personal to him, as, e.g.,

(5) (1977) 137 C.L.R., at p. 466.
(6) (1977) 137 C.L.R., at pp. 452-453.
(7) (1977) 137 C.L.R., at p. 480.

where they relate to his conduct, health, or associations. And if the order is made in consequence of a refusal to grant a further entry permit to him, the reasons on which that refusal is based may require that as a matter of fairness the person affected should have the chance of responding to them.

However, this is not to say that fairness will necessarily, or even generally, require that an applicant for a further entry permit be given an opportunity to be heard even where deportation may follow from its refusal. The grant of an entry permit is a matter of discretion. Indeed, the cancellation of a temporary entry permit is expressed to be a matter of absolute discretion: s. 7(1). In the ordinary course of granting or refusing entry permits there is no occasion for the principles of natural justice to be called into play. The applicant is entitled to support his application by such information and material as he thinks appropriate and he cannot complain if the authorities reject his application because they do not accept, without further notice to him, what he puts forward. But if in fact the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter: *In re H.K. (An Infant)* (8). If the application is for a further temporary entry permit and it is made in circumstances which are relevantly similar to those in which the earlier permit was granted, the applicant may have a legitimate expectation that the further entry permit will be granted or will not be refused in the absence of an opportunity to deal with the grounds on which it is to be refused. And if the refusal is to be attended by the making of a deportation order, the case for holding that procedural fairness requires that such an opportunity be given is unquestionably stronger.

In this respect recent decisions illustrate the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it. *F.A.I.* (9) is one illustration. *Cole v. Cunningham* (10), is another, as are *Reg. v. Gaming Board for Great Britain; Ex parte Benaim and Khaida* (11); and *Daganayasi v. Minister of Immigration* (12).

Of the paragraphs in the submission to the delegate of which the

(8) [1967] 2 Q.B. 617.
(9) (1982) 151 C.L.R. 342.
(10) (1983) 49 A.L.R. 123.
(11) [1970] 2 Q.B. 417, at p. 431.
(12) [1980] 2 N.Z.L.R. 130.

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appellants complain, it seems to me that there are two matters only in respect of which fairness demands that the applicant should have the chance of replying. The first is the comment in par. 21 that had Mr. Kioa been genuine in his desire to seek a legitimate extension of his stay in Australia he might have sought a decision on his application "rather than change his address without apparently notifying the Department". The second matter is that contained in par. 22, namely, the statement that Mr. Kioa's concern for other Tongan illegal immigrants and his active involvement with other persons who were seeking to circumvent Australia's immigration laws "must be a source of concern". Although the statement of reasons makes no reference to the contents of par. 22, it does not disavow them. As the paragraph was extremely prejudicial, the appellants should have had the opportunity of replying to it. The other material of which the appellants complain consists of policy, comment and undisputed statements of fact. It does not call for a chance to reply.

A separate submission is made on behalf of Elvina Kioa. It is contended that she had a legitimate expectation as an Australian citizen that she would not be deprived of, or impeded, in her enjoyment of the day to day benefits and privileges of Australian citizenship and a legitimate expectation of continued residence in her country of citizenship with her family. The suggestion is that before a deportation order was made against her parents she should have been given an opportunity of presenting a case against the making of such an order. In my opinion the duty to act fairly does not extend so far. Certainly the making of a deportation order had consequences for her, but it would be quite unreal to suggest that as an infant ten-months-old she should have been given an opportunity of presenting a case beyond the case presented on behalf of her parents for an extension of their stay in Australia.

The appellant's final submission is that the delegate failed to have regard to a relevant consideration, namely that she was an Australian citizen and that deportation of her parents would have necessarily entailed her deportation from Australia. The short answer to this submission is that the statement under s. 13 made reference to Elvina's status as an Australian citizen. It is obvious that the delegate proceeded on the footing that Elvina would accompany her parents to Fiji and that this would inevitably deprive her of the privilege of residing in Australia during her infancy.

In the result I would allow the appeal and quash the deportation order on the ground that a breach of the rules of natural justice occurred in connexion with the making of the decision.

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MAXWELL WILLIAM EBNER APPELLANT

AND

THE OFFICIAL TRUSTEE IN BANKRUPTCY RESPONDENT

Ebner v The Official Trustee in Bankruptcy [2000] HCA 63
7 December 2000
M131/1999

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

G T Bigmore QC with M N C Harvey for the appellant (instructed by Clayton Utz)

J B R Beach QC with M Clarke for the respondent (instructed by Deacons)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CLENAE PTY LTD & ORS — APPELLANTS

AND

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED — RESPONDENT

Clenae Pty Ltd v ANZ Banking Group Ltd
7 December 2000
M2/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

F M Douglas QC with K M Connor and W D H Walsh for the appellants (instructed by McKean & Park)

D F Jackson QC with R L Berglund QC for the respondent (instructed by Blake Dawson Waldron)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Ebner v The Official Trustee in Bankruptcy
Clenae Pty Ltd v ANZ Banking Group Ltd

Courts and judges – Bias – Reasonable apprehension of bias – Direct or indirect shareholding by judge in a corporation which is a party to litigation or financially interested in its outcome – Whether judge automatically disqualified – Principles governing disqualification – Disclosure – Relationship between principles governing disqualification and requirement of disclosure – Necessity – Whether there is a principle of necessity – Circumstances for operation of principle of necessity.

Constitutional Law (Cth) – Chapter III – Judicature of the Commonwealth – Impartiality of Judiciary – Bias – Reasonable apprehension of bias – Whether requirement of impartial and independent judge derived from implications arising from Chapter III of the Constitution.

Words and Phrases: "impartial", "independent".

Constitution, Ch III.

Secondly, few administrative decision makers would enjoy the degree of independence and security of tenure which judges have.

5 These differences, however, must not obscure the fundamental principle. That principle is obviously infringed in a case of actual bias on the part of a judicial officer or juror. No suggestion of actual bias is made in the present appeals.

6 Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide[13]. That principle gives effect to the requirement that justice should both be done and be seen to be done[14], a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

7 The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion

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12 (1982) 151 CLR 342 at 348-349, 362-363.

13 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 74 ALJR 1380; 174 ALR 655.

14 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.

8 The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) 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.

9 The apprehension of bias principle which has become part of the common law of Australia is expressed somewhat differently from the corresponding principle adopted in England[15]. Allowing for that difference, it is of interest to note what was said recently by the Court of Appeal of England in *Locabail (UK) Ltd v Bayfield Properties Ltd*[16]:

> "In practice, the most effective guarantee of the fundamental right [to a hearing before an impartial tribunal] is afforded not ... by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias."

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15 See also *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 and *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 at [12]-[18], [33].

16 [2000] 2 WLR 870 at 883; [2000] 1 All ER 65 at 73.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO. P812/2006

CATCHWORDS

PLANNING LAW – Containment facility for hazardous waste – Apprehended bias – Declaration sought that submissions made to planning panel will not be heard in accordance with rules of natural justice – Power of tribunal in the nature of judicial review – Nature of the obligation upon panel to accord natural justice– Principles concerning apprehended bias depend on the circumstances – Role of planning panel diverges substantially from judicial paradigm – Apprehension of bias test needs to be considered in the context of an expert panel – *Planning and Environment Act* 1987, ss 39, 161 – *Environment Effects Act* 1978, s 9.

APPLICANT	Mildura Rural City Council
FIRST RESPONDENT	Minister for Major Projects
SECOND RESPONDENT	Minister for Planning
SUBJECT LAND	Crown land, NOWINGI
WHERE HELD	Melbourne
BEFORE	Justice Stuart Morris, President
HEARING TYPE	Hearing
DATE OF HEARING	10 and 12 April 2006
DATE OF ORDER	19 April 2006
CITATION	Mildura Rural City Council v Minister for Major Projects [2006] VCAT 623

ORDER

The reference to the tribunal is dismissed.

Stuart Morris
President

APPEARANCES:

For Applicant for Review	Mr C J Canavan QC and Mr J Pizer of counsel instructed by Maddocks, solicitors
For First Respondent	Mr Adrian J Finanzio of counsel instructed by Clayton Utz, solicitors
For Second Respondent	Dr K L Emerton of counsel instructed by the Victorian Government Solicitor

REASONS

1 The Victorian Government is proposing to establish a containment facility for hazardous waste at Nowingi in the north-west of the State. The proposal is controversial. It is strongly opposed by the relevant municipal council, the Mildura Rural City Council ("the council"). A panel of four members has been appointed to consider submissions concerning the proposal. The panel is scheduled to commence public hearings in Mildura on 26 April 2006. A member of the panel – who has also been appointed as the chairperson – is Dr Bill Russell.[1] At a directions hearing conducted by the panel on 27 March 2006 the council submitted that Dr Russell should disqualify himself as a member of the panel on the ground of apprehended bias. Dr Russell did not disqualify himself. The council has now initiated a reference to the tribunal pursuant to section 39 of the *Planning and Environment Act* 1987 ("the Act") and seeks a declaration to the effect that a panel which includes Dr Russell would not hear submissions in accordance with the rules of natural justice, as required by section 161 of the Act.

2 The tribunal's powers in determining an application of this type are in the nature of judicial review powers.[2]

Contentions

3 The council contends that a fair minded lay observer might reasonably apprehend that Dr Russell might not bring an impartial mind to the resolution of the issues that the panel is required to consider. It relies upon a number of circumstances. First, it points to the fact that the proponent of the Nowingi facility is the State Government itself. Second, it says that Dr Russell has had a close association with the State Government and previous Australian Labor Party governments. Third, it submits that when challenged at the directions hearing Dr Russell's response was indicative of bias. Fourth, it contends that Dr Russell's appointment was unorthodox and was the result of intervention from a high level of government. Fifth, it relies upon the manner in which the government has resisted the application that Dr Russell be disqualified.

4 The proponent of the Nowingi facility is nominally the Minister for Major Projects, Mr John Lenders. At the directions hearing before the panel Mr Lenders was represented by Mr Mark Dreyfus QC and Ms Juliet Forsyth of counsel. Mr Dreyfus made submissions to the panel to the general effect that Dr Russell should not disqualify himself. At the hearing before the tribunal, Mr Lenders was represented by Mr Adrian J Finanzio of counsel. He made no submissions to the tribunal in respect of the current application.

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1 I prefer to use the designation "Dr" Russell. Dr Russell also uses the designation "Professor" Russell. (He is not a full-time professor, but an adjunct professor and a visiting professor.)

2 See *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029.

5 The Minister for Planning, who is the minister responsible for the Act, appeared before the tribunal and joined issue with the matters raised by the council. Counsel for the Minister for Planning made submissions about the nature of a panel hearing under the Act and provided additional information about Dr Russell's qualifications and associations. Having regard to these matters, counsel submitted that there was no basis to grant the relief the council sought.

Issues

6 The requirement to accord natural justice is a defining aspect of the legal obligations cast by administrative law upon decision makers.[3] Often it is necessary to make an implication that a decision maker – or a person conducting an inquiry leading to a decision – is bound by the rules of natural justice. However in the present case the statute makes it clear: section 161(1)(b) of the Act states that "in hearing submissions, a panel is bound by the rules of natural justice".[4]

7 Natural justice is a doctrine of indefinite scope. It should not be thought that the *content* of the obligation to accord natural justice is universal. Rather it depends upon the context and the circumstances. Thus the first issue to be resolved is to identify, in the context of apprehended bias, the nature of the obligations required of a member of a panel under the Act.

8 Having identified the nature of the obligation, it will then be possible to resolve the second issue: namely whether the panel will be in breach of the rules of natural justice if, in hearing submissions, it includes Dr Russell as a member. This will involve the making of findings of fact and an evaluation of the contentions advanced by the council.

Nature of panel's obligation to be impartial

The general nature of an obligation to be impartial

9 In *Ebner v The Official Trustee in Bankruptcy*[5] the High Court of Australia clearly established that where a question arises as to the independence or impartiality of a judicial officer, the governing principle is that, subject to qualifications relating to waiver or necessity, the judicial officer is disqualified if a fair minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial mind to the resolution of the question the judicial officer is required to decide. The court noted that it

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3 See Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (2005), page 513.

4 Counsel for the Minister submitted that the panel is not bound by the rules of natural justice in the performance of its functions other than the hearing of submissions. This is a difficult and complex question, as an obligation to fairly *hear* submissions tends to imply an obligation to fairly *consider* the submissions that have been heard. For the purpose of this decision I have assumed that the natural justice obligation – whatever that is - applies to all of the panel's duties.

5 [2000] HCA 63, (2001) 205 CLR 337.

was convenient to refer to this principle as the "apprehension of bias" principle.[6]

10 The present case is not about a judicial officer. This may be significant, because the requirements of natural justice depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.[7] Indeed, in *Ebner* the court noted that the application of the apprehension of bias principle in connection with the decision makers outside the judicial system must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making.[8]

11 The apprehension of bias principle in respect of judicial officers applies in much the same manner to tribunals based upon the judicial model. In State jurisdictions it is common for tribunals to be based upon this model and to possess many characteristics of courts.[9] Thus it has been held that the former Administrative Appeals Tribunal of Victoria (which has effectively been subsumed in the Victorian Civil and Administrative Tribunal) is subject to the same principles of natural justice in relation to bias as would apply to a court.[10]

12 It is true that the principle articulated in *Ebner* has been applied to bodies not based upon the judicial model, such as Victoria's Heritage Council, a body exercising statutory decision making powers pursuant to the *Heritage Act* 1995.[11] But in *Minister for Immigration and Multicultural Affairs v Jia*[12] the High Court of Australia made it clear that the application of the *Ebner* principles concerning bias will depend on the circumstances. The court pointed out that the application of the principles will not be the same when a decision is vested, not in a judicial officer, but in a minister. The court explained that ministers may be obliged to give genuine consideration to the relevant issues and to bring to bear on those issues a mind that is open to persuasion: but ministers are not additionally required to avoid conducting themselves in a way as would expose a judge to a charge of apprehended bias.[13] In observations endorsed by Gleeson CJ and Gummow J,[14] Hayne J emphasised that the content of administrative law requirements in relation to bias by prejudgment depend upon the circumstances. In this context he observed that there can be no automatic application of rules,

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6 [2000] HCA 63, (2001) 205 CLR 337, at [6].

7 See *Russell v Duke of Norfolk* [1949] 1 All ER 109, at 118, per Tucker LJ; *National Companies and Securities Commission v News Corporation Limited* (1984) 156 CLR 296, at 311-312; *City of St Kilda v Evindon Pty Ltd* [1990] VR 762, at 775.

8 [2000] HCA 63, (2001) 205 CLR 337, at [4].

9 See *Buttigieg v Minister for Planning* [2004] VCAT 868 and *Commonwealth of Australia v Wood* [2006] FCA 60. The situation may be different in relation to Commonwealth tribunals having regard to constitutional provisions that affect Commonwealth, but not State, tribunals.

10 *City of St Kilda v Evindon Pty Ltd* [1990] VR 762.

11 *Rajendran v Tonkin* [2002] VSC 585, (2002) 19 VAR 448.

12 (2001) 205 CLR 507.

13 (2001) 205 CLR 507, at 532.

14 (2001) 205 CLR 507, at 538.

developed in the context of judicial decision making, to administrative decisions.[15]

13 In my opinion, the observations of Hayne J in *Jia* are relevant to the application of the apprehension of bias principle in the context of previous associations. I note the observation made by Hayne J that:

> The analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm.[16]

Subsequently Hayne J observed:

> In the case of a court, it will usually be self-evident that the issue, if an issue of fact, is one which ought to be considered afresh for the purposes of the particular case by reference only to the evidence advanced in that case. Other decision-makers, however, may be under no constraint about taking account of some opinion formed or fact discovered in the course of some other decision. Indeed, as I have already pointed out, the notion of an "expert" tribunal assumes that this will be done. Conferring power on a Minister may well indicate that a particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject. It is critical, then, to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker.[17]

14 In order to ascertain the manner in which the apprehension of bias principle should be applied in the context of a panel member, it is necessary to ascertain the legal basis, and obligations, of a panel. This is primarily to be discerned from the Act; but may also be influenced by practice.

The role and character of panels under the *Planning and Environment Act*

15 The purpose of the Act is to establish a framework for planning the use, development and protection of land in Victoria. Planning controls are imposed by planning schemes, which are made pursuant to the Act. Schemes exist for all municipalities within Victoria.

16 It is common that planning authorities seek to amend planning schemes; and the Act sets forth a procedure for the making of amendments, a procedure that generally involves notice and public participation.[18] The Act provides that a planning authority must consider submissions which are

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15 (2001) 205 CLR 507, at 562.
16 (2001) 205 CLR 507, at 563.
17 (2001) 205 CLR 507, at 564]. See also *R v Commonwealth Conciliation and Arbitration Commissioner; ex parte Angliss Group* (1969) 122 CLR 546, at 553.
18 The procedure is outlined in more detail in *East Melbourne Group Inc v Minister for Planning* [2005] VSC 242.

made in respect of an amendment to a planning scheme.[19] After considering a submission which requests a change to an amendment the planning authority must either change the amendment as requested, abandon the amendment or refer the submission to a panel appointed under part 8 of the Act.[20] The panel must consider all submissions referred to it and give a reasonable opportunity to be heard to, inter alia, any person who has made a submission referred to it.[21] The panel must then report its findings to the planning authority and, in its report, may make any recommendation it thinks fit.[22] The planning authority may make the panel's report available for public inspection; and must do so if it has decided whether or not to adopt the amendment or if 28 days have elapsed since it received the panel's report (whichever is earlier).[23] The planning authority must consider the panel's report before deciding whether or not to adopt the amendment.[24] The final decision about an amendment is made by the Minister for Planning.[25] (Under recent changes to the Act it is now possible for the Minister to permit the planning authority to *approve* the amendment, but even if this permission is given the Minister retains the power to revoke such permission at any time before the approval is given.[26])

17 Division 1 of Part 8 of the Act sets out general provisions in relation to panels. Importantly, section 153 of the Act provides:

> The Minister must appoint a panel to consider submissions to be referred to a panel under this Act.

A panel may consist of one or more persons. It is contemplated that panel members might be persons employed by or on behalf of the Crown, as special provision is made for the fees and allowances of such persons.[27] The Act provides that where a panel consists of more than one member not all members must be present for the panel to transact its business, but it can operate provided it has a quorum as specified in the Act.[28] The relevant planning authority is required to provide a panel with any secretarial and other assistance that the panel requires to carry out its functions.[29]

18 Division 2 of Part 8 of the Act contains provisions concerning panel hearings. A panel may give directions about procedural matters; it must conduct its hearings in public other than in special circumstances; in

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19 *Planning and Environment Act* 1987, section 22.
20 *Planning and Environment Act* 1987, section 23(1).
21 *Planning and Environment Act* 1987, section 24.
22 *Planning and Environment Act* 1987, section 25.
23 *Planning and Environment Act* 1987, section 26.
24 *Planning and Environment Act* 1987, section 27.
25 *Planning and Environment Act* 1987, section 35.
26 *Planning and Environment Act* 1987, section 11.
27 *Planning and Environment Act* 1987, section 156.
28 *Planning and Environment Act* 1987, section 157. Although the operation of this section was the subject of submissions, it is unnecessary to decide how the quorum provisions intersect with a panel's natural justice obligation.
29 *Planning and Environment Act* 1987, section 158.

hearing submissions it must act according to equity and good conscience, without regard to technicalities or legal forms, and is not required to conduct the hearing in a formal manner. A panel is not bound by the rules or practice as to evidence, but may inform itself on any matter as it thinks fit and without notice to any person who has made a submission. The panel may prohibit or regulate cross-examination in any hearing; and submissions and evidence may be given to the panel orally, or in writing, or partly orally and partly in writing.[30] A panel is also empowered to regulate its own proceedings.[31]

19 Each year there are many amendments to the planning schemes in force in Victoria. To facilitate the conduct of panel hearings in relation to these amendments, in 1996 there was established within the department then responsible for planning a division called Planning Panels Victoria ("PPV"). PPV presently consists of a Chief Panel Member, a small number of full-time senior panel members, a small number of administrative staff and a pool of over 100 sessional panel members who may be called upon from time to time to constitute a panel. The Chief Panel Member has the responsibility of managing PPV. In practice this will usually involve the Chief Panel Member recommending (or nominating) the members of the pool to constitute a panel in a particular instance. The actual appointment of a panel is, of course, the responsibility of the Minister or his or her delegate.

20 In addition to constituting panels to assess planning scheme amendments under the Act, PPV also provides panels in other circumstances. These include:

- assessing planning scheme amendments in conjunction with permit applications under Division 5 of Part 4 of the Act;
- assessing permit applications, and offering advice to the Minister, when the application has been called in by the Minister;
- proffering general planning advice as an advisory committee constituted by the Minister pursuant to section 151 of the Act; and
- conducting an inquiry under section 9 of the *Environment Effects Act* 1978.

Sometimes a panel will be appointed to perform more than one of these functions at the same time.

21 In 1997 the Chief Panel Member (who was then Mrs Helen Gibson) prepared a manual for panel members. This manual noted that planning

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30 *Planning and Environment Act* 1987, sections 159-161.
31 *Planning and Environment Act* 1987, section 167.

panels were a means of facilitating public participation in planning and environmental decisions in Victoria. It also stated that panels provide a means of independently assessing planning proposals. Further the manual stated that, although panels only make recommendations, with the final decision being left to statutory bodies or ministers, panel reports carry considerable weight.

The application of the apprehension of bias principle in respect of panels

22 In my opinion, the apprehension of bias principle to be applied to panels under the Act must have regard to the administrative and policy role of a panel, the source of its authority, the procedure it may follow, and the fact that it makes recommendations, not decisions. It is also relevant that both a panel and PPV lack any significant degree of institutional independence.[32] A panel appointed under the Act diverges significantly from the judicial paradigm. Thus the apprehension of bias principle (which forms part of the requirements of natural justice) ought not be applied to a panel as if it were a court. In particular, it ought not be applied in a manner that requires the exclusion of persons as panel members because they have had extensive experience in advising the incumbent government, or had associations with the incumbent government, without more. This is so even if the proponent of the amendment to be considered is the government of the day.

23 It is useful to note the significant differences between a panel under the Act and a body such as the Victorian Civil and Administrative Tribunal ("VCAT"). Members of VCAT are appointed for a fixed term which, in the case of non-judicial members, must be five years; panel members are appointed ad hoc to a panel to consider a particular proposal. The President of VCAT – a person who must be a Supreme Court judge - assigns members to hear particular proceedings; members of a panel are appointed by the Minister. The President and Vice Presidents of VCAT are responsible for the management of the administrative affairs of the tribunal; PPV is part of the Department of Sustainability and Environment and a panel obtains administrative support from the planning authority which has prepared the amendment being considered. VCAT makes decisions; a panel makes recommendations. VCAT has both a review jurisdiction and an original jurisdiction (which, as this case illustrates, includes the exercise of judicial power); the panel exercises neither judicial power nor a power to determine substantive rights.

24 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

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[32] This observation concerns the system as it is; it is not an endorsement of the existing institutional arrangements.

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.

A panel is intended to be an expert body

25 An additional point I would make is that the Nowingi panel is intended to be an expert body. The recent decision of the United Kingdom House of Lords in *Gillies v Secretary of State for Work and Pensions*[33] is helpful in understanding the application of an apprehension of bias principle in the context of an expert tribunal. In that case it was alleged that there was a reasonable apprehension that a medical member of a disability appeal tribunal was biased. The apprehension of bias test applied in the United Kingdom differs subtly from the test applied in Australia, but that does not affect the significance of the case. In *Gillies* the appellant was concerned that the medical member of the panel also had an on-going relationship with the agency responsible for the payment of benefits, as she was also an expert adviser to that agency. But Lord Hope of Craighead, who delivered the principal judgment, said:

> A fair minded observer who had considered the facts properly would appreciate that professional detachment and the ability to exercise her own independent judgment on medical issues lay at the heart of her relationship with the Agency. He would also appreciate that she was just as capable of exercising those qualities when sitting as the medical member of the appeal tribunal.[34]

Subsequently Lord Hope observed:

> The fact is that the bringing of experience to bear when examining evidence and reaching a decision upon it has nothing whatever to do with bias.[35]

Thus when a claim is made that a member of an *expert* tribunal or panel is biased solely because the member has previously advised a party to the proceeding, or was in an advising relationship with that party, there will be no legitimate basis for an apprehension of bias if that previous advice, or the advising relationship, was given or based upon a professional relationship in which the adviser was expected to exercise independent judgment.

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33 [2006] UKHL 2.
34 [2006] UKHL 2 at [18].
35 [2006] UKHL 2 at [23].

The impartiality of Dr Russell

26 In support of its application, the council relied upon a number of grounds. It is convenient to deal with these separately although, in the final analysis, it is also necessary to consider them cumulatively.

Association with ALP State Governments

27 The council submitted that there was a history of close association between Dr Russell and Victorian Labor governments. It said that this close association, particularly when taken in the context of other facts, meant that a fair minded lay observer might reasonably apprehend that Dr Russell might not bring an impartial mind in discharging his duties as a panel member in relation to the Nowingi proposal. In order to deal with this submission it is necessary to set out, and make findings on, certain background issues involving Dr Russell.

Dr Russell's qualifications and experience

28 Dr Russell holds several degrees: a Bachelor of Arts, with Honours, a Bachelor of Economics, a Diploma of Architecture and a Doctorate of Philosophy.

29 Dr Russell is currently the managing director of his own consulting company. He also holds a number of posts as an adjunct professor or visiting professor at universities. He holds current appointments as a member of the board of the Northern Health Corporation (a government body), the Public Records Advisory Council (a statutory advisory body) and the Best Value Commission (a government body).

30 Dr Russell has had 38 years experience in the public sector or working in close connection with the public sector. He was Secretary of the Department of Minerals and Energy in the 1980s and was subsequently Director General of Property and Services. He has sat on the board of various Victorian statutory authorities, including the State Electricity Commission of Victoria. In recent years Dr Russell has been involved in advising the Victorian Government in relation to the review of Victoria's ports, the organisation of public transport administration, aspects of water policy and local government planning issues. It is clear, and I find, that Dr Russell is both a person of considerable qualification and experience and a person in whom members of the State Government have confidence as a wise adviser.

Observations about Dr Russell's qualifications and experience

31 It has not been suggested that Dr Russell has attained his position as a regular adviser of Labor governments by reason only of political skills, such as skills in organising numbers for preselection contests or work in intra-party (or even intra-factional) machinations. Dr Russell is very highly qualified – both academically and by experience – in public administration and public policy.

32 Persons are only likely to have extensive experience in public policy if they have had extensive associations with governments. Fair minded and informed persons know this. Hence a fair minded person would not reasonably apprehend that a person, experienced in advising on public policy questions, might not bring an impartial mind if asked to advise on a proposal that involves public policy issues, simply because they had advised governments on previous occasions. On the contrary: the fair minded person would be likely to be comforted by knowing that the relevant adviser was a person of intellect and experience in relation to public policy questions.

Specific contentions concerning Dr Russell's associations

33 In support of its application, the council referred to a number of specific matters. One of these was the appointment of Dr Russell as the head of an Audit Review panel to examine major contracts entered into by the Kennett Government. Mr C J Canavan QC, who appeared for the council, characterised the role of this panel of doing a "hatchet job" on the Liberal Government between 1992 and 1999. In support of this submission Mr Canavan referred to a speech made by Ms Asher, the Member for Brighton, on 16 December 1999 which was critical of Dr Russell's appointment. In this speech Ms Asher said of Dr Russell:

> He was the darling of the Labor Party during the Cain/Kirner era. When the Labor Party wanted a job done it turned to Bill Russell.

The council also referred to a subsequent speech of Ms Asher, made on 31 May 2000, in which she described Mr Russell as "a real mate" of the Labor Party and "a Labor hack".

34 I make two observations about Ms Asher' comments. First, these comments are at odds with a more cerebral speech delivered by the shadow Treasurer, Mr Robert Clark MP, on 26 February 2002, in which he described the Russell Report as "a reasonable assessment of the major PPP and privatisation contracts of the Kennett Government" and containing recommendations that "in general terms, were quite sound". Second, I observe that political attacks often reveal more about the attacker than the person being attacked. Political attacks are often made for defensive purposes: for example, to attempt to undermine (in advance) a report that has been commissioned that might be critical of particular political decisions. Far too often politicians play the man (or the woman). I cannot accept that the content of Ms Asher's political attack ought be taken to reveal a truth or create an apprehension. On the contrary, all it reveals is that it was politically convenient for such an attack to be made at that time.

35 The council also relied upon other matters: that Dr Russell had been engaged by the government to head a review of port reform in Victoria; that Dr Russell had been engaged by the Government to chair a body known as the Best Value Commission; that Dr Russell had been engaged by the government to head the Consumer Utilities Advocacy Centre; and that Dr

Russell had advised the government at a high level in relation to water reform. These appointments suggest that Dr Russell is an able adviser, with a broad and deep understanding of public policy questions. It is also true, as the council submitted, that these appointments also suggest that Dr Russell has the confidence of the State Government as an adviser. But it is a huge step to infer, as the council argues, that this confidence means that Dr Russell would be other than impartial in proffering his advice. An analogy is appropriate. A patient is likely to have confidence in his or her doctor if the doctor tells it as it is. But no patient is likely to have confidence in a doctor, particularly over the long term, if all the doctor says is what the patient wants to hear.

36 Indeed, based upon information put before the tribunal on behalf of the Minister, it is clear that Dr Russell does not always give advice that the government may wish to hear. Evidence was placed before the tribunal that Dr Russell has criticised the government as being excessively "freeway friendly". Dr Russell has also undertaken a study in relation to metropolitan transport that is critical of government. Moreover, in the case of his recommendations in relation to port reform, it was reported that the Department of Treasury and Finance "bitterly opposed his report and its recommendation". Dr Russell's work has been regularly adopted by State Government critic, Kenneth Davidson, in his column in "The Age" newspaper. Thus a full understanding of Dr Russell's associations does not support any notion that he is a "yes man" to governments or to Labor governments.

Other observations

37 The council's submission seems to rely upon the notion that government – or, at least, an ALP government – is a monolith. This is a misconception. In every shade of government, agencies and departments jockey for position, sometimes bitterly. The favourite adviser of one department may be the sworn enemy of another. This diversity is also true of political parties, including the Australian Labor Party. Anyone who doubts this proposition should read *The Latham Diaries*,[36] particularly Appendix 1 which sets out the members of the federal caucus in mid-2003 by reference to faction and sub-faction.[37]

38 In the case of a government project it is inevitable that the government will be both the proponent and the assessor. It will not always be practicable to keep these functions apart. In this case the primary assessor is the Minister for Planning. The panel is to report to the Minister for Planning. It is the delegate of this Minister who has appointed Dr Russell. It is this Minister who must proffer advice to government in relation to environmental effects. If a relevant connection exists between Dr Russell and the State

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36 Mark Latham, *The Latham Diaries*, Melbourne University Press, 2005.

37 This appendix is titled *Who's Who in the Factional Zoo (mid-2003).*

Government this can be understood just as much to be a connection with the assessor as with the proponent.

39 In my opinion, the council's submission is also unduly suspicious of the integrity of those who engage in public life. The submission seems to imply that loyalty to a government or party is likely to override individual judgment and integrity. Whilst this may sometimes be true of caucus members in parliamentary votes, it is quite unlikely in the case of an independent, professional and qualified adviser. It is important that public life be attractive to highly qualified and skilled persons. The application of the apprehension of bias principle ought avoid driving good people away from public life: as this is itself inimical to the public interest.

Conclusion on association

40 For the reasons I have set out, I find that a fair minded person, informed about Dr Russell's associations and the nature of a panel hearing pursuant to the *Planning and Environment Act*, would not reasonably apprehend that Dr Russell might not bring an impartial mind to his task as a panel member.

The appointment of Dr Russell

Facts

41 Ordinarily the task of organising panel hearings falls to the Chief Panel Member of PPV. The current occupant of this position is Ms Kathy Mitchell, an experienced town planner and panel member. Ms Mitchell has the responsibility for the overall management and supervision of PPV within the Department of Sustainability and Environment.

42 The position of Chief Panel Member has no statutory basis. When it comes to the appointment of panel members, I was told that it was the usual practice that the Chief Panel Member makes a recommendation (or nomination) which is then considered and implemented by a Deputy Secretary of the Department, who the holds delegated power from the Minister in relation to the appointment of panels pursuant to section 153 of the Act. But this practice does not prevent (and could not prevent) the Minister or the delegate from choosing to adopt a course different from that recommended by the Chief Panel Member. Further, if a recommendation is not accepted, it is not appropriate to characterise this as the Minister (or his delegate) "over-riding" the Chief Panel Member. The Parliament has given the power to appoint panels to the Minister, not the Chief Panel Member.

43 Some time in September and October 2005 Ms Mitchell commenced to make arrangements for the appointment of a panel in relation to the Nowingi proposal. By 14 October 2005 she had determined that an appropriate panel should consist of Cathie McRobert (chair), Robin Saunders, Graeme David and Bob Evans. She wrote to the secretariat of PPV on 14 October 2005 asking that the process of preparing documentation commence in relation to the appointment of these persons.

On 14 November 2005 it would appear that there was some slight change in arrangements, no doubt due to questions of availability. On this date Ms Mitchell advised the Deputy Secretary of the department that the panel would be drawn from the following: Cathie McRobert (chair), Robin Saunders, Graeme David and Gordon Anderson. It is to be noted that Cathie McRobert is a full-time member of PPV and has the designation of a Senior Panel Member.

44 On 22 November 2005 the Deputy Secretary, Built Environment, of the Department, Ms Genevieve Overell, sent an email to Ms Mitchell confirming conversations that Ms Overell had had concerning the Nowingi Panel. In this email Ms Overell said:

> LRN [which was a reference to the Secretary of the Department, Mr Lyndsay Nielson] has requested that we ensure that the proposed panel comprise experts of sufficient standing and breadth to fully address the gravity and content of issues raised by this matter.

The email identified three names put forward by Mr Nielson (none of whom were Dr Russell). The email also requested Ms Mitchell and another officer to prepare a list of potential candidates, specifying their respective skill sets, for consideration by Mr Neilson.

45 It would appear that, from the procedure which I have described, the name of Dr Bill Russell emerged. As a result, on 23 December 2005, his name was added to the list of sessional panel members.

46 It was acknowledged within the department that Dr Russell had excellent public policy credentials and considerable experience. However the idea of appointing Dr Russell was not without contention, particularly as Dr Russell was not then a person whose name was on the register of persons for appointment to panels. Indeed, Ms McRobert twice indicated to Ms Mitchell that she had real concerns about a departure from the normal panel appointment processes. Further, Ms Mitchell expressed some private frustration (at least she would have thought it was private at the time she expressed it) by suggesting in an email that it seemed that others were doing her job for her.

47 Because the Nowingi proposal was to be subject of an inquiry under section 9 of the *Environment Effects Act* 1978 (as well as the subject of a panel under the *Planning and Environment Act* 1987) it was necessary for the Governor in Council to grant approval to the Minister for Planning to appoint persons to hold an inquiry into the environmental effects of the proposal.[38] Possibly for this reason the question of the appointment of a panel (under both the *Environment Effects Act* and the *Planning and Environment Act*) was the subject of a submission to Cabinet. The Cabinet

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38 See the requirements of section 9(1) of the *Environment Effects Act* 1978. It would also appear that the inquiry was designed to fulfil statutory requirements under the *Environment Protection Act* 1970 and the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth), but nothing turns on this.

submission produced to the tribunal appears to be a draft document but, in the absence of other evidence and having regard to the submissions of the parties, I infer that a document in substantially the same form was submitted to Cabinet. It would appear that Cabinet was told of the persons who were to be appointed to the panel and were provided with a brief summary of their qualifications. The Cabinet submission noted:

> The Minister requested the Chief Panel Member to identify suitably qualified and experienced persons for appointment to this Inquiry/Panel. The Chief Panel Member identified a number of persons from the pool of panellists maintained by Planning Panels Victoria (PPV) for panels established under the P&E Act. Due to the complexity of the proposal and the large number of submissions that have been received potential members were considered from outside the PPV pool.
>
> In selecting the Inquiry/Panel it is considered that all members must have the following experience and abilities in order to provide a high level capacity for critical analysis of the effects of the proposal:
>
> - prior experience as members of an independent panel inquiry, including the appointment of a highly experienced panel inquiry chairperson;
> - high level ability to accurately interpret the implications of the proposal with respect to relevant legislation and policy;
> - high level understanding of information requirements for government decision making;
> - high level understanding of performance based approaches for environmental management;
> - high level ability to judge the validity of contending viewpoints and analyses of potential effects; and
> - ability to formulate balanced and robust conclusions and recommendations.
>
> Further, a mix of the following skills and expertise must be represented on the EES Inquiry:
>
> - expertise in hydrology;
> - expertise in geology;
> - expertise in biodiversity;
> - expertise in transportation;
> - expertise in listening to and responding to "community" issues.
>
> The proposed appointments meet the above criteria.

48 It would appear that on 6 February 2006 Cabinet agreed with the Cabinet submission and made the decision that a panel, with Dr Russell as chairperson, be appointed. Consequently on 9 February 2006 the Minister's delegate appointed the panel under the *Planning and Environment Act*; on

14 February 2006 the Governor in Council gave approval to the Minister for Planning to appoint nominated persons to a panel under the *Environment Effects Act*; and, on that day, the Minister appointed those persons to conduct an inquiry under that Act.

Observations and conclusions

49 It may be thought desirable that PPV be an entity independent of the executive branch of government and that the Chief Panel Member have statutory authority to appoint members of a panel to consider a particular proposal. If that was the case, then the conduct of the Secretary of the department would have been intolerable. But PPV is not independent from the Department of Sustainability and Environment; it is part of that department. And, significantly, the task of appointing persons to be members of a panel to consider a particular proposal is a task that the Parliament has vested in the Minister for Planning, not the Chief Panel Member. Although it is true that the Minister for Planning may delegate this power (and has delegated this power), it has always remained the case that the Minister has the right to appoint a panel himself.

50 In my opinion, a fair minded lay observer, reasonably informed about the facts and the substance of the law, would not reasonably apprehend that a person might not bring an impartial mind to their panel duties because that person was not a person recommended by the Chief Panel Member. The fair minded and informed person would understand that a panel hearing is essentially an administrative and policy proceeding; and they would understand that such a proceeding was not a judicial proceeding. This being so, the mode of Dr Russell's appointment would not create a reasonable apprehension that he might not bring an impartial mind to his duties as a panel member.

Dr Russell's conduct in rejecting the application

51 At the panel directions hearing held on 27 March 2006 Dr Russell introduced himself and his colleagues. He said of himself that he was an adjunct professor at certain universities, that his expertise was in public policy and public management, and that he had conducted a number of reviews for different levels of government over the last two decades. Senior counsel for the council, Mr Canavan, then told the panel that his client had concerns in relation to the fairness of the appointment of Dr Russell. Mr Canavan pointed to a number of matters – many of which have been repeated in the present application to the tribunal – and in particular identified what he said was a "close relationship" between Dr Russell and successive ALP State governments. Mr Canavan said that it was inconceivable that PPV did not nominate a permanent panel member to chair the hearing; and that the only inference that could be drawn was that the State Government had overridden any PPV nomination.

52 At the conclusion of Mr Canavan's initial submissions Dr Russell called upon Mr Dreyfus, who was acting for the Minister for Major Projects, to make submissions. Mr Dreyfus' submissions were to the effect that there was no basis for the council's submissions.

53 From the way the council submission was put to the panel, it was unclear as to whether or not Mr Canavan was actually making an application that Dr Russell disqualify himself. In any event Dr Russell said he would reflect on the matters raised and respond within the next two weeks. At this point Mr Canavan submitted that it was necessary for Dr Russell to make a decision sooner than that as it would impact upon whether the hearings could commence on 26 April 2006. Hence, after a lunch break, Mr Canavan submitted that Dr Russell should immediately disqualify himself as the chairperson and as a member of the panel.

54 Dr Russell responded to this application, not immediately, but in writing on 3 April 2006. In that written response Dr Russell stated that he could not reasonably be viewed as being so "close to government" that it might impair his capacity to act independently of the present government or might lead to bias in the exercise of his judgment as a panel member. He pointed out that he had had an active career in public service and in that role had advised governments of different political persuasions. Dr Russell emphasised a number of roles he had played in which he had offered advice to governments other than ALP State governments.

55 In his submission to the tribunal Mr Canavan argued that the way in which Dr Russell dealt with the bias application also supports an apprehension of bias. I do not agree.

56 First, I observe that it is often difficult for persons inexperienced in the cut and thrust of oral hearings to quickly and adeptly respond to submissions made by experienced and forceful counsel. In these circumstances it is perfectly understandable if an immediate oral response might be described as clumsy. Second, the emphasis that Dr Russell placed in his written response to his experience in relation to non-ALP governments was perfectly understandable, as it was responding to the implied suggestion contained in Mr Canavan's submission that Dr Russell only, or at least principally, was an ALP government adviser. Given its context it was neither misleading nor inappropriate. Third, when an application is made that a person disqualify themselves on the ground of apprehension of bias and that application is rejected, it is legitimate for that person to give their reasons, even forcefully; although tactful reasons will usually be better advised. Certainly there is nothing in the reasons in this case that supports the council's application.

Conduct of Government

57 Mr Canavan also contended that there was an apprehension of bias by reason of the manner in which the government had resisted the application

that Dr Russell disqualify himself. Mr Canavan pointed to an alleged failure of the Department of Sustainability and Environment to make full disclosure of documents pursuant to the *Freedom of Information Act*. He also relied upon the manner in which Mr Dreyfus made submissions at the panel hearing. In my view, neither of these two specified matters – or indeed any of the matters relied upon more generally in respect of government conduct – can advance the case in relation to apprehension of bias on the part of Dr Russell.

58 There are many possible explanations as to why documents may not have been disclosed pursuant to a freedom of information request (if this is what actually occurred). Certainly I have no reason to doubt that all relevant documents were discovered, and were available at the hearing of the present application, by reason of a summons which had been directed at the Chief Panel Member.

59 Although it is arguable that some of the submissions made by Mr Dreyfus at the panel hearing did not fully state the applicable legal principles in relation to apprehension of bias, it is drawing a very long bow to suggest that this involved some deliberate attempt to improperly retain Dr Russell on the panel. As I understand it, Mr Dreyfus had no warning that a submission would be made in respect of Dr Russell. In the finest traditions of the Bar, Mr Dreyfus, no doubt, responded as best he could. If he did misconceive the nature of the application or, as suggested, did not correctly identify the legal principles in his submission, this is irrelevant to the present application: it has no logical connection to the question of whether Dr Russell should be apprehended to be biased.

Conclusion

60 It has been convenient to deal with the various bases upon which the application is made separately. However it is also necessary to consider whether these contentions, taken cumulatively, make the case being advanced by the council. My conclusion is that no such case is made. Hence the reference is dismissed.

Stuart Morris
President

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO. P2148/2014

CATCHWORDS

Reconstitution of the Tribunal – Allegations of illegality of a party – Reasonable apprehension of bias – Failure to disclose by oversight until after hearing concluded – Perception of impartiality and independence of the Tribunal – Grant of indemnity certificate – *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 108 – *Appeal Costs Act 1998* (Vic) s 10 – *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

APPLICANT	Jinshan Investment Group Pty Ltd
RESPONDENT	Melbourne City Council
OBJECTORS	National Trust of Australia (Vic) and others
WHERE HELD	55 King Street, Melbourne
BEFORE	Justice Greg Garde AO RFD, President
HEARING TYPE	Section 108 application
DATE OF HEARING	15 May 2015
DATE OF ORDER	18 May 2015
CITATION	Jinshan Investment Group Pty Ltd v Melbourne CC [2015] VCAT 635

ORDER

1. Pursuant to s 108(2)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Tribunal hearing the proceeding should be reconstituted by members other than the members of the Tribunal who constituted the Tribunal for the purposes of the hearing on 30 March 2015 to 1 April 2015.

2. Direct that the Principal Registrar list the proceeding for directions before the reconstituted Tribunal and for final hearing as determined by the reconstituted Tribunal.

3. Pursuant to s 10(1) of the *Appeal Costs Act 1998* (Vic), the Tribunal is satisfied that:
   (1) the hearing of the proceeding is discontinued;

(2) the reason for the discontinuance is not attributable in any way to the act, neglect or fault of any of the parties to the proceeding or their legal practitioners; and

(3) a new hearing has been ordered;

and the Tribunal grants an indemnity certificate in respect of each party's own costs of the discontinued proceeding.

Justice Greg Garde AO RFD
President

APPEARANCES:

For the Applicant:	Mr C Canavan QC instructed by Norton Rose Fulbright, Solicitors.
For the Responsible Authority:	Mr A Finanzio SC and Ms E. Peppler of Counsel instructed by Brigid Ryan, Solicitor, City of Melbourne.
For National Trust of Australia (Vic)	Mr A Walker of Counsel instructed by Harwood Andrews, Solicitors.
Other objectors	Ms Angelina Charles, in person

REASONS[1]

Background

1 This is an application under s 108 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the 'VCAT Act') by Jinshan Investment Group Pty Ltd ('the applicant') seeking to reconstitute the division of the Tribunal currently hearing this proceeding.

2 The applicant is the owner of land at 20-30 Bourke Street, Melbourne, which is the location of the Palace Theatre. The applicant seeks a permit for the demolition of existing buildings and the development of a multi-level building including basements.

3 The responsible authority, Melbourne City Council ('the Council') failed to grant that permit, and the applicant has brought an application for review under s 79 of the *Planning and Environment Act 1987* (Vic). The application for review is in the Major Cases List.

4 On 30 March 2015 a division of the Tribunal presided over Deputy President Helen Gibson, the Head of the Planning and Environment List, and Mr Peter Gray, an architect and member of the Tribunal, commenced a three day hearing of the application for review. The parties before the Tribunal included the Council and the National Trust of Australia (Vic) ('the National Trust').

5 On 10 April 2015, the Tribunal directed that the Council file and serve a set of proposed conditions addressing any residual matters in dispute, the basis of the dispute and the position of the applicant and the Council in respect of these matters. The other parties would then have leave to make submissions about the conditions within a further seven days.

6 On 9 April 2015, the Registrar of the Administrative Division advised the parties by letter that it had come to the attention of the Tribunal that at the commencement of the hearing Deputy President Gibson omitted to declare that she was currently a member of the National Trust. The Registrar advised the parties that the letter would serve as a declaration of the Deputy President's status.

7 The letter of 9 April 2015 also referred the parties to s 108 of the VCAT Act, which empowers parties to apply for the reconstitution of the Tribunal. The Registrar advised that if no request for reconstitution was received by 17 April 2015, the Tribunal as it was presently constituted would continue to determine the proceeding.

8 By a letter dated 15 April 2015 to the Principal Registrar of the Tribunal, the solicitors for the applicant sought such a reconstitution of the Tribunal. The letter refers to the fact that both the National Trust and Melbourne

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[1] This is an edited version of oral reasons for decision given on 18 May 2015.

Heritage Action, a heritage advocacy group which is facilitated and supported by the National Trust, are parties to the proceeding, and states that the circumstances of the case, including that allegations of unlawful conduct had been levelled against the applicant by those parties, had given rise to a concern that the Tribunal as currently constituted might not bring an impartial and unprejudiced mind to the resolution of the application.

9 Subsequently, there has been a chain of correspondence between the parties regarding the reconstitution application. The correspondence includes a letter from the solicitors for the National Trust to the Council which is exhibited to an affidavit of Brigid Constance Ryan sworn 14 May 2015.

10 The letter of 14 May 2015 sets out the number of subscribers to the various membership categories of the National Trust and advises that, as the National Trust website and annual reports confirm, Deputy President Gibson is not, and has never been, a board member of the National Trust. The National Trust was unable to provide any further information for privacy reasons.

The submissions

11 At the hearing of the application for reconstitution, Senior Counsel for the applicant made four main submissions:

(1) This was a permit application which involved demolition of what was said to be an important heritage building – the National Trust, Melbourne Heritage Action and the Save the Palace Action Group were all very active parties to the proceeding and had all strongly opposed the application to demolish the Palace Theatre.

(2) The allegations made by the National Trust went beyond submissions confined to the merits of the application – the National Trust had alleged that the applicant had acted illegally when it carried out internal demolition works on the building without having obtained a permit to do so.

(3) No notice or declaration of the Deputy President's membership of the National Trust had been given at the commencement of the hearing, or during the three days of the hearing. This was despite the fact that the second member of the Tribunal, Mr Gray, had spent five minutes at the commencement of the hearing disclosing his engagements and connections with the firms of the various witnesses to be called in the proceeding; and.

(4) The applicant's objections went to the perception of the Tribunal in the wider community. If public confidence was to be maintained in the integrity of planning decision-making in Victoria, it was essential that there be no suggestion that the Tribunal might be influenced by anything other than what it heard in the case.

12 Senior Counsel for the applicant relied on the decision of the High Court of Australia in *Ebner v Official Trustee in Bankruptcy*[2] as well as other authorities, and contended that a fair minded lay observer might reasonably apprehend that the Tribunal, as currently constituted, might not bring an impartial mind to the resolution of the question it was asked to decide.

13 He highlighted that the National Trust claimed on its website to be the 'premier heritage and conservation organisation' in Victoria. He noted that the National Trust, Melbourne Heritage Action and the Save the Palace Action Group were all interrelated. The co-chair of the Save the Palace Action Group had been called by the National Trust to give evidence in the proceeding. He argued that the cultural heritage significance of the Palace Theatre and the acceptability or otherwise of the proposed demolition on heritage grounds were the sole issues in the proceeding.

14 In response, Senior Counsel for the Council submitted that:

(1) The fact that a decision maker had an interest in litigation or an interest in a party to litigation was of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, was articulated.

(2) This was not a case where there could be said to have been a long or close association between the decision maker and a party, or that the decision maker had been involved at a high level with a party.

(3) Mere membership was not, in itself, a sufficient basis for disqualification. It was necessary to examine the whole of the circumstances. The nature, duration, proximity, intensity, extent, character and degree of involvement of the relationship between the decision maker and a party were relevant considerations to be accounted for in any finding as to the existence of a reasonable apprehension of bias.

(4) There was insufficient information as to the circumstances in which Deputy President Gibson's membership of the National Trust came about, and insufficient articulation as to how that membership might lead a long serving and highly respected Deputy President and member of the Tribunal to bring an otherwise than impartial mind to the resolution of the questions that she is required to decide in this proceeding.

(5) Deputy President Gibson had power both to consider the legal issues arising from a submission regarding apprehended bias, and to, if necessary, order the reconstitution of the Tribunal; and

(6) Deputy President Gibson's membership of the National Trust was not, in the absence of other information, a sufficient basis for the assertion that a reasonable apprehension of bias had been established.

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2 (2000) 205 CLR 337 ('*Ebner*').

15 Senior Counsel for the Council also referred to the shades of difference between the Council's submissions as to the internal works and those of the National Trust and other parties. The National Trust's submission on the illegality of the interior works was submitted to have been stronger than that of the Council.

16 Senior Counsel for the Council also referred to decisions of *R v Bow Street Metropolitan Stipendiary Magistrates; Ex parte Pinochet Ugarte (No 2)*;[3] *Rajendran v Tonkin*;[4] *Re Polites; Ex parte The Hoyts Corporation Pty Ltd.*[5] He also referred to a passage in the well-known text, *Judicial Review of Administrative Action.*[6] Finally, he submitted that Tribunals and courts should not be too ready to relinquish the responsibility of hearing and deciding cases, and that where reasonable apprehension of bias is relied on, it must be firmly established.

17 The National Trust and other parties provided letters setting out their position as to reconstitution of the Tribunal. They generally adopted or were supportive of the Council's submissions.

Reconstitution

18 Reconstitution is a statutory process provided for by s 108 of the VCAT Act. Section 108(1)(a) provides that at any time before the conclusion of the hearing of a proceeding, a party may apply to the Tribunal for reconstitution for the purposes of the proceeding. Section 108(1)(b) also allows the President, or a member of the Tribunal as currently constituted, to give notice that they seek the reconstitution of the Tribunal.

19 The reconstitution process is then governed by s 108(2). Prior to its amendment by s 13 of the *Victorian Civil and Administrative Tribunal Amendment Act 2014* (Vic), the reconstitution process first involved an application to the Tribunal hearing the proceeding. The current form of s 108(2) has removed that first step. Applications under s 108 are now made directly to a presidential member.

20 Nonetheless, and independently of the process provided by s 108, applications for recusal can be made to the Tribunal hearing a proceeding. Under s 98(1)(a) of the VCAT Act, the Tribunal is bound by the rules of natural justice.

21 The rules of natural justice, among other things, require that the Tribunal be, and be seen to be, impartial and unbiased. The test of apprehended bias is whether a fair minded lay observer, having knowledge of the material objective facts, might reasonably apprehend that the Tribunal might not bring an impartial and unprejudiced mind to determining the application

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3 [2000] 1 AC 119.
4 [2002] VSC 585 [18], [20], [29].
5 (1991) 100 ALR 634, 641-2.
6 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 4th edition, 2009) 669-70.

before it (see *Ebner*[7] and *Michael Wilson & Partners v Nicholls*[8]). An example of an administrative tribunal applying these tests can be seen in *Nikjoo v Minister for Immigration and Border Protection*.[9]

22 The High Court in *Ebner* set out a two-step test to determine whether an allegation of apprehended bias is established:

> First, it requires the identification of what it is said might lead a [member] 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.[10]

23 In *AJH Lawyers Pty Ltd v Careri*,[11] the Court of Appeal drew on a wide range of authorities to set out eight principles to assist in determining whether a proper basis for an apprehension of bias is established. As adapted to apply to the Tribunal, they are:

(1) when dealing with an appeal, grounds relating to actual or apprehended bias should be dealt with first, regardless of whether the decision was correct on its merits;
(2) members should not accept recusal simply because a party has asked for it;
(3) when called upon to assess the existence of a reasonable apprehension of bias relating to another decision maker, the test is one which requires no conclusions to be drawn about what factors actually influenced that decision maker's conclusions, or as to what their 'actual thought processes' were;
(4) apprehension refers to an apprehension of the member not deciding a case impartially, as opposed to an apprehension that a case will be decided adversely to one party;
(5) satisfaction of the test for apprehended bias requires two distinct steps – the first is the identification of what might lead a member to decide a case other than on its legal and factual merits, and the second is an articulation of the logical connection between the matter and the feared deviation;
(6) the perception of a lay observer will not be as informed as the perception of a lawyer, particularly a litigation lawyer, but they are taken to have some understanding of modern decision making practice;
(7) a line is drawn between robust indications of a member's tentative views on a point of importance in a proceeding, and an impermissible indication of prejudgment; and

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7 (2000) 205 CLR 337, 344-6 [5]-[10].
8 (2011) 244 CLR 427, 437-8 [31]-[34].
9 [2013] AATA 921 [21].
10 *Ebner* (2000) 205 CLR 337, 345 [8].
11 (2011) 34 VR 236, 241-3 [18]-[25].

(8) members do not have to devote unlimited time to listening to unmeritorious arguments, but should be cautious of the impression that can be given by rejecting a submission out of hand.[12]

24 While the discretion given to a presidential member of the Tribunal under s 108(2) is of a general character and is not limited by specific criteria, the High Court's decision in *Ebner* and the other authorities to which I have referred are of considerable assistance in determining how the discretion should be exercised. In the light of *Ebner*, any application for reconstitution of the Tribunal requires an identification of what it is said might lead the Tribunal to decide the case other than on its legal and factual merits and an articulation of the logical connection between that matter and the feared deviation from the proper course.

Decision

25 I have, on balance, come to the conclusion that I should exercise my discretion under s 108(2) to order the reconstitution of the Tribunal.

26 First, the proceeding is fundamentally about heritage matters. The National Trust in Victoria is, like its corresponding organisations in other jurisdictions, the leading heritage body that stands for the preservation of heritage buildings. That is what it, and other associated bodies, are presently doing in relation to the Palace Theatre, as of course they have every right to do.

27 Secondly, the submissions put to the Tribunal went beyond the heritage value of the Palace Theatre and the merits or demerits of the proposed development. In their submissions, the National Trust, Melbourne Heritage Action and the Save the Palace Action Group contended that the internal works already performed by the applicant were illegal, and that the applicant was attempting to demolish the Palace Theatre unlawfully. For example, in the outline of submissions dated 31 March 2015, the National Trust submitted:

> 39 The internal works are substantial, but cosmetic. They appear to represent the limit of what the Permit Applicant could remove without obtaining a building permit, or undertaking works which would require alteration to a façade of the building.
>
> 40 They include stripping most of the interior of the building. [...]
>
> 41 There are however the following things to say about the internal works and lack of internal heritage controls:
>
> 41.1 First, the internal works were illegal.
>
> [...]
>
> 41.4 Viewed objectively, the internal works are properly characterised as works for the purpose of demolishing the Palace Theatre, and not works to internally alter a building. [...]

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12 *AJH Lawyers Pty Ltd v Careri & Ors* [2011] VSCA 425 [18]-[25].

28 The existence of substantial allegations of illegal demolition by the National Trust and related parties does, in my view, and in the circumstances of what is pre-eminently a heritage case, provide a sufficient logical connection between membership of the National Trust and the feared deviation from the course of deciding the case on merits. During submissions, it was said that it was open to the Tribunal to decide the review application without actually forming a view as to the submissions of illegality. I accept that this is so, but it is nonetheless the position that serious allegations of illegal demolition were made, and stand to be decided on the evidence before the Tribunal.

29 Thirdly, it is unfortunate that disclosure of membership occurred following the conclusion of the hearing rather than at its commencement. This was an oversight.

30 Fourthly, and most importantly, the Tribunal has a critical decision making role in relation to planning matters in Victoria. It is an imperative that the impartiality and independence of the Tribunal be, and be seen to be, above reproach. Justice must not only be done, it must be seen to be done. The applicant's proposal is a major development proposal in the Central Business District of Melbourne. It would be of no benefit to anyone if there was ongoing concern as to the impartiality of the Tribunal, or the legality of the decision. Likewise, it would be of no benefit to anyone if there were subsequent applications to the Tribunal for recusal, or appeals to the Supreme Court concerning this issue. It is much better to make a fresh start with a differently constituted Tribunal.

31 While I accept, as the Council submitted, that it has not been shown that Deputy President Gibson's interest in the National Trust has ever extended beyond mere membership, or that she has ever had any involvement in the management of the National Trust, I am nonetheless of the view that, in the circumstances of this case, the need for the administration of justice to be seen to be above reproach is the paramount consideration in the exercise of the discretion conferred by s 108 of the VCAT Act.

32 I add that while it is true that an application for reconstitution of the Tribunal can be made to any presidential member, even in circumstances where the application involves a Deputy President, it was appropriate, and indeed highly desirable, for the application to be heard and determined by the President or a Vice President.

33 In the circumstances, I will order that the Tribunal be reconstituted and that the proceeding be heard anew before the reconstituted Tribunal.

Indemnity Certificate

34 Application is made by all parties for an indemnity certificate under s 10 of the *Appeal Costs Act 1998* (Vic). I am satisfied that the hearing of this proceeding will be discontinued, and that the reason for the discontinuance is not attributable in any way to the act, neglect or fault of any of the parties

to the proceeding, or their legal practitioners. I am also satisfied that it will be necessary for a new hearing to be conducted.

35 In the circumstances, an indemnity certificate will be granted under s 10(1) of the *Appeal Costs Act 1998* (Vic) to each party in respect of the party's own costs of the discontinued proceeding.

Conclusion

36 The Tribunal will make orders for the reconstitution of the Tribunal and for the grant of an indemnity certificate.

Justice Greg Garde AO RFD
President

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 5901 of 2002

IN THE MATTER OF THE HERITAGE ACT 1995;
BETWEEN:
ADRIAN RAJENDRAN AND — First Plaintiff
MARIA JOANNE RAJENDRAN — Second Plaintiff

V

RAYMOND WILLIAM TONKIN AND
THE HERITAGE COUNCIL

No. 6472 of 2002

ADRIAN RAJENDRAN AND
MARIA JOANNE RAJENDRAN — Applicants

V

RAYMOND WILLIAM TONKIN — Firstnamed Respondent

THE HERITAGE COUNCIL — Secondnamed Respondent

THE HERITAGE COUNCIL PERMIT COMMITTEE — Thirdnamed Respondent

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JUDGE:	SMITH J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	4 & 5 December 2002
DATE OF JUDGMENT:	20 December 2002
CASE MAY BE CITED AS:	Rajendran v Tonkin & Ors
MEDIUM NEUTRAL CITATION:	[2002] VSC 585

Historic Buildings – registered building – application for permit to demolish part – relevant considerations.
Judicial Review – apprehended bias – failure to consider relevant matters – refusal to allow evidence to be adduced.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr C. Porter	Wood Fussell
For the Respondents	Mr M. Dreyfus Q.C. and Mr B. Quinn	James Syme, Victorian Government Solicitor

HIS HONOUR:

The Proceedings

1 The applicants, Adrian Rajendran and Maria Joanne Rajendran, have brought proceedings by order nisi and by originating motion seeking judicial review of a decision of the Permit Committee of the Heritage Council handed down on 25 June 2002. In its decision the Committee confirmed the decision of the first respondent, Mr Tonkin, the executive director of the Council, not to grant a permit for redevelopment of a property on the Victorian Heritage Register known as the former Robin Boyd house at 664-666 Riversdale Road Camberwell.

2 The present proceedings have been brought against Mr Tonkin, the Council and the Permit Committee members.

Background and History

3 I do not propose to detail the history of the design and building of the Robin Boyd house, its ownership and use, and the earlier history of dealings between the applicants, Mr Tonkin and the Heritage Council. These are, to a very large extent, set out in the reasons for judgment of Balmford J in the matter of *Tonkin v Rajendran*.[1] In that case, Mr Tonkin sought orders for restoration of parts of the premises.

4 The heritage significance of the Robin Boyd house was described in a "Statement of Significance" noted at the time the property was registered. That statement was as follows:

> "The former Robin Boyd house at 664-666 Riversdale Road, Camberwell (previously known as 158 Riversdale Road) was built in 1946-7. It has historical and architectural significance for the following reasons: the house is the earliest known extant residence designed by the renowned Australian architect Robin Boyd. It is unique in being a house that Boyd designed for his personal use and occupied and extended over a period of twelve years. This strong association with Boyd is particularly significant because Boyd was an important architect and a prominent social critic and commentator. He played a major role in the development of architecture and

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1 [2002] VSC 128.

architectural thinking in Victoria for four decades. *The house through its alteration is important in that it demonstrates the architectural development of Robin Boyd, from the early period of his career in the 1940s when he expounded his Theories on 'Victorian Regionalism', to the emerging 'internationalism' of the 1950s* the building is a seminal work which can be regarded as the prototype of the post war modern Victorian house. It extended the leading architecture of its time and strongly influenced an emerging group of architects the house is of architectural significance in that it demonstrates innovative design with regard to response to site, informality in planning, flowing spatial arrangements, innovative use of materials and incorporation of built-in features. These are all aspects of domestic design which have now become common."[2]

The italicised passage refers to extensions added by Robin Boyd in 1952 to the north and south of the 1947 structure.

History of the present proceedings

5 For the purpose of this application, it is sufficient to note that on 2 October 2001 Mrs Rajendran lodged an application for a permit for extensions to the Robin Boyd house which involved amongst other things the demolition of extensions added to the original house in 1952. It also involved the erection of extensive new buildings to be connected to the original house.

6 The application was considered but refused by the Executive Director, Mr Tonkin on 29 January 2002. In his reasons he stated the following:

> "1. It is considered that the 1952 extension is an integral component of the significance of the registered place for a number of reasons including the following:
>
> - it was designed by Robin Boyd for his family's use,
> - it illustrates his philosophy at the time regarding planning small homes for growth,
> - it illustrates his interest in new technology to overcome the problems associated with difficult ground conditions.
>
> Demolition of this component is assessed as having a high degree of adverse effect on the heritage significance of the registered place.

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2 Italics added

2. From the information provided the proposed extension would tend to subsume the former Robin Boyd house. It would be out of scale with the registered building and have an adverse visual effect on the setting of the registered place.

3. The proposal is not supported ahead of the retention and reinstatement of the 1952 extension."

7 As to paragraph 3, it should be noted that, at the time Mr Tonkin handed down his decision, the situation was that the plaintiffs had removed the roof from portion of the 1952 extension, which actions gave rise to the proceeding before Balmford J.

8 On 14 February 2002 Mrs Rajendran appealed to the Heritage Council from the decision of Mr Tonkin. This was done pursuant to s 75 of the *Heritage Act* 1995. The matter came on for hearing before a Permit Committee of the Heritage Council on 23 May 2002. It was adjourned for further hearing to 20 June 2002. As noted above, on 25 June 2002 the Committee confirmed the decision of the Executive Director to refuse the permit application.

The Issues

9 The applicants in their order nisi and originating motion have sought to raise a number of issues.

10 For example, the applicants criticised the Committee for saying that

> "For the appeal to succeed the Committee would need to be persuaded that the development proposed in its entirety should be permitted."[3]

11 Counsel for the applicants submitted that the Committee should have viewed the application as an ambit claim and have considered specifically whether a permit should have been granted to permit demolition of the northern section of the 1952 extension – the section from which the roof had been removed by the applicants. As I understand what occurred, the Committee was not asked to proceed in that way and was correct in its view that it had to consider the application before it as presented which was to consider whether a permit should be given for the development proposed – in its entirety. This posed a problem for the applicants

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3 Page 6 of Reasons

because of the large scale of the proposed development compared with the scale of what it was proposed to leave of the Robin Boyd house - namely the original 1947 structure.

12 In the end, the issues raised by the applicants which it is necessary to consider are the following:-

1. Whether the Chairman of the Committee should have disqualified himself on the grounds of apprehended bias.

2. Whether the applicants had been denied a fair hearing because they were not permitted to call evidence concerning the degree of heritage significance attaching to the 1952 extensions.

3. Whether the Committee took the view that it was not open to it to consider the issue of the degree of heritage significance other than that described in the Statement of Significance and, if so, whether that constituted an error of law.

Issues – Bias

13 Counsel who appeared for the applicants before the Committee, Mr Porter, raised at the outset of the Committee hearing an issue of apprehended bias directed to all members of the Committee. So far as is relevant to these proceedings, it is relevant to refer only to the application directed to the Chairman. This related to the Chairman's connections with the National Trust.

14 Counsel relied on the "apprehension of bias" principle and referred the Committee to *Ebner v Official Trustee in Bankruptcy*[4]. He submitted that the Executive Director, who was a party to the appeal relied, in materials he had placed before the Committee, in part on the fact of support for his decision from the National Trust. Counsel then commented on the fact that the Chairman had been the President of the National Trust of Australia (Victoria) and invited the Chairman to indicate the extent of his association with the National Trust.

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4 74 ALJR 277.

15 The Chairman took up the invitation of Mr Porter and in substance said that his involvement in the National Trust was common knowledge and referred to his entry in *Who's Who in Australia* which included the following:

> "Emeritus President, National Trust Aust. Vic. since 2000; current Member, Emeritus Council, National Trust Aust. (Vic.); Honorary Member, since 1999; Vice President, 1992-8 and 1985-6; President 1987-1992; Deputy Chairman 1986-87; Trust Council, 1982-1997; Board Member, Australian Council, National Trust, 1987-1997."

16 The Chairman stated that the National Trust was not a party to the appeal and that he did not intend to disqualify himself. Counsel for the applicants submitted that, whether the National Trust was a party or not, it had lodged an objection to the proposal and the objection was an attachment to the submissions of the Executive Director. He further submitted that the National Trust had directly involved itself in the consideration of all applications made by the appellants in respect of the heritage place and it did not matter whether it was a party. He repeated that the Executive Director was relying on the objection of the National Trust. The Committee retired to consider the issue. On its return, the Chairman announced that they had decided that no-one needed to disqualify himself on the grounds of apprehended bias.

Issues – Bias; analysis

17 In *Ebner v Official Trustee in Bankruptcy*[5], the High Court re-emphasised the fundamental importance of judges being independent and impartial both in reality and in appearance[6]. It also noted that as a matter of principle:

> "There is no reason to limit the concept of interest (in the outcome of a proceeding) to financial interests, and there may be cases where an indirect interest is at least as destructive of the appearance of impartiality as a direct interest.[7]

The majority went on to refer to *Pinochet No 2*[8] as an example where concepts of

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5 [2000] 75 ALJR 277.
6 para 60
7 para 26
8 [2000] 1 AC 119.

interest and association can overlap.[9] After referring to the fact that a variety of forms of association might occur, for example, between a judge and a bank it emphasised the need to articulate the connection before apprehended bias can be established. The majority stated[10]:

> "As has been pointed out earlier, unless that connection is articulated, it cannot be seen whether the apprehension of bias principle applies. Similarly, the bare identification of an 'association' will not suffice to answer the relevant question. Having a mortgage with a bank, or knowing a party's lawyer, may (and in many cases will) have no logical connection with the disposition of the case on its merits."

I accept that these principles apply in the present case to the Committee and its members as does the test of apprehended bias stated by the majority of the High Court in *Ebner*[11] namely:

> "... whether a fairminded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide."

18 Counsel for the applicants relied on these principles and submitted further that the case was analagous with *R v Bow Street Stipendary Magistrate and Others, Ex parte Pinochet Ugarte (No 2)*[12] where the House of Lords held that Lord Hoffman was disqualified from hearing an appeal on the grounds of apprehended bias because of his association as unpaid director and chairman of a subsidiary, AIC Ltd., controlled by, and involved in the work of Amnesty International. The House of Lords treated Lord Hoffman's position as being that of a judge who was judge in his own cause. In the present case, counsel for the applicant submitted that the Chairman's long involvement with the National Trust at the highest level pointed to a close association with the National Trust, a body which while not a party to the proceeding was nonetheless known to the Committee to be supporting the position of the Executive Director.

19 It was submitted for the respondents that a fairminded lay observed would not

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9 para 28
10 at para 30
11 At 33.
12 [2000] 1 AC 119.

reasonably apprehend that the Chairman might not, as a matter of real and not remote possibility, bring an impartial mind to the resolution of the appeal. It was argued that there was no suggestion that he had any interest in the outcome of the appeal but was merely associated with a party that had made submissions opposing the application. Counsel submitted that the applicants had not sufficiently articulated how the association, as a real not remote possibility, might have diverted the Chairman from deciding the appeal on its merits. It was further submitted that there was no reason to believe that the Chairman held the same views as the National Trust on the merits of the appeal and that neither he nor the National Trust could obtain any sort of benefit from a refusal of the appeal.

20 As is pointed out in the authorities, benefit is not the only issue. The National Trust in this instance was supporting the decision being challenged on appeal. It would be apparent to a fairminded lay observer that the Committee would have been aware that it was the wish of the National Trust that the appeal be dismissed and that the Chairman had for many years been active at a senior level in the National Trust and was likely to share its views.

21 It was also submitted for the respondents that the only interest the National Trust had in the Boyd house was an interest in the protection of those aspects it considered of heritage value. It was argued that this was a matter that the Heritage Council was obliged to consider in determining the appeal and something, therefore, that the Committee had to consider[13].

22 This submission is correct up to a point. The problem is, however, that the *Heritage Act* requires the consideration of matters which support arguments against protecting the heritage value. Section 73 provides in relation to applications to the Executive Director as follows:

> "73. ***Matters to be considered in determining applications***
>
> (1) In determining an application for a permit, the Executive Director must consider –

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13 s 73 of the *Heritage Act*

(a) the extent to which the application, if approved, would affect the cultural heritage significance of the registered place or object; and

(b) the extent to which the application, if refused, would affect the reasonable or economic use of the registered place or object, or cause undue financial hardship to the owner in relation to that place or object; and ..."

23 It was common ground that the s 73 matters had to be considered in an appeal to a Committee of the Heritage Council from a decision of the Executive Director in relation to an application for a permit.

24 Finally, and this was the principal argument advanced for the respondents, it was put that the "apprehended bias" principle must be considered in the context of the statute concerned; for the statute shapes the content and extent of the principle in particular cases.

25 Counsel argued that the Act contemplates that persons with associations with the National Trust "may be involved in such appeals". In support of this argument, counsel referred to s 7 of the Act which sets out the constitution and membership of the Heritage Council. It provides that there should be ten members and one of those ten must be appointed on the nomination of the Minister from a list of three names submitted by the National Trust of Australia (Victoria)[14]. Reference was also made to the requirement that three members must have demonstrated "understanding expertise or interest in Victoria' heritage or in the management of heritage places".[15] Counsel also noted that s 69 of the Act envisages that any person may make submissions in respect of a permit application and that must, he argued, include the National Trust. Finally, counsel noted that s 76 of the Act requires the Heritage Council to conduct a hearing into an appeal if requested by the National Trust and must give the Trust an opportunity to be heard at any hearing it requests.

26 It was submitted, in light of the above provisions, that the statutory scheme envisaged that the Council would have as its members persons who were members

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14 s 7(2)(b)
15 s 7(2)(c)

of the National Trust and that it was envisaged that all members would be able to perform all functions. It was put that it must, therefore, have been the legislative intention that National Trust members participate in all the Heritage Council activities including the hearing of appeals.

27 Counsel's attention was drawn to s 12 of the Act which permits the Heritage Council to delegate its functions to members of committees. In response, counsel pointed out that at the relevant time, the Council had delegated the appeals function to all members[16]. I note, however, that of the some 11 committees, only two involved delegations to all members. The other delegations ranged from one member to seven of the ten members. It was common ground that the selection of the committee to hear an appeal was made by the Chairman of the Council, Ms Heggen. Thus the legislation also envisaged that if a National Trust member was on the Heritage Council, he or she would not necessarily be involved in all activities and decisions.

28 The respondents do not argue necessity. Rather, in essence, the statutory argument is that the legislation envisaged that some at least of the Heritage Council could and would be members of the National Trust. It does not follow from that, however, that a member of the Council, who is a member of the National Trust, is, therefore, entitled to sit on an appeal where the National Trust has been involved in supporting one of the parties to the appeal. There is nothing in the Act which on its face purports in any way to modify the common law rules relating to apprehended bias and natural justice. The power to delegate enables the Council to set up committees to hear appeals with members who do not have any association with any of the parties.[17] Further, it seems to me that there is a strong case for saying that when a person is appointed to the Heritage Council that person should cease to be a

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16 Exhibit RMM-5

17 In the respondent's written submission the argument was put higher than was put orally in suggesting that the statutory scheme would be frustrated without people with an association with the National Trust hearing appeals at which the National Trust itself made submissions. No evidence has been placed before me, however, that there has ever been a situation where so many members of the Heritage Council were members of the National Trust that it would not be possible to carry out appeals without having members of the National Trust involved.

member of, or have any connection with, any organisation which may have an interest in the outcome of any matters that come before it particularly registration applications or permit appeals.

29 Returning to the question in issue, I am satisfied that there was more than a bare association between the Chairman and The National Trust. He had obviously been closely involved at a high level in the Trusts' affairs and was likely therefore, to have over the years strongly identified with it and its objectives and causes. A fair minded observer, would be aware that the Trust was supporting the Executive Director in the appeal before the Committee. In those circumstances, a fair minded observer would reasonably apprehend that the Chairman might not bring an impartial mind to the resolution of the matter.

30 If I be wrong in my analysis, there is a further matter to consider and that is the Committee's own reasons for dismissing the objection. It supplied to the applicants and other interested parties prompt, detailed, closely argued and comprehensive reasons.

31 In dismissing the objection to the Chairman, the Committee stated that:

> ". . . the Committee considered that having regard to the purposes, provisions and structure of the *Heritage Act 1995*, there was no basis for a requirement that Heritage Council members should not take part in the consideration and determination of the permit appeal, nor any ground for a reasonable apprehension of bias."

The Committee went on to say:

> "The Committee as it was carrying out its functions under the Act could, under s 11(1), have consulted with the National Trust had it wished to do so. The first main purpose of the *Heritage Act* is 'to provide for the protection and conservation of places and objects of cultural heritage significance and the registration of such places and objects (s 1).' The Heritage Council is established for that purpose and carries out its functions under the Act for that purpose. The mission of the National Trust coincides with the main purpose of the *Heritage Act*, which in turn makes provision for the National Trust to have a unique role in the processes which it contains to achieve

its purposes."

32 The Committee also stated:

> "Experience and understanding of Victoria's heritage and in the management of heritage places gained through membership of the Council of the National Trust is a qualification for membership of the Heritage Council, not a disqualification."

33 It then returned to its original point, namely, a similarity of purposes stating:

> "An association with the National Trust does not bring into play purposes or objectives other than those which the Heritage Council itself has under the Act. An association with a body which seeks the conservation of Victoria's heritage could not give rise to a reasonable apprehension of bias on the part of a member of the Heritage Council when he discharges functions under the *Heritage Act*, including the hearing and determination of a Permit Appeal under s 75 and 76."

34 Thus the Committee appears to have been of the view that because the Council's functions, purposes and objects were so aligned with those of the National Trust, the issue of apprehended bias did not arise. The Committee reasons, however, did not, in the context of this issue, address the fact that the Heritage Council, and its Permit Appeal Committees, are discharging statutory functions in which competing claims have to be determined being commonly, on the one hand, those of bodies such as the National Trust, and, on the other, applicants for permits. The Heritage Council and the Permit Appeal Committees, have to determine where to strike the balance between competing considerations. There was no express acknowledgment of this statutory role. Rather the Committee's perception of a close alignment between the objects and purposes of the *Heritage Act*, Heritage Council and the National Trust was emphasised. As a result, independently of any consideration of the association between the Chairman of the Committee and the National Trust, it appears to me, that a fairminded bystander on reading the Committee's own reasons, might reasonably apprehend that the Chairman (and the Committee) might not bring an impartial mind to the resolution of the appeal.

35 In considering this and other issues I have borne in mind, amongst other things, the

cautionary words of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[18] about the need to avoid overzealous scrutiny of the words used by bodies such as the committee in making decisions. Care must also be taken not to attach too much significance to omissions in reasons. I am satisfied, however, that the foregoing is a fair analysis of the reasons advanced by the Committee.

36 I emphasise that nothing I have said should be construed as suggesting that there was any actual bias. I have regrettably, however, come to the conclusion that the case was one where the Chairman should have disqualified himself.[19] The justification offered by the Committee appears to me to have only exacerbated the situation.

37 For these reasons I am satisfied that the first challenge is made out.

Issues – Fair Hearing – Error of Law

38 The remaining issues are related. As noted above, the applicants allege they were denied a fair hearing because of their inability to call evidence going to the degree of heritage significance of the 1952 extensions. In addition, they argue that the Committee erred in law in proceeding on the basis that evidence should not be received as to the degree of heritage significance attaching to the 1952 extensions. The applicants argue that the reason the Committee refused to allow the calling of the above evidence was its view of the relevance of the issue to which it related.

39 So far as the evidence is concerned, counsel for the applicants wished to call Dr Goad, an architectural heritage expert, on the question of a cultural heritage significance of the 1952 extensions. The Committee in relation to that noted:

> "The Committee was of the view that it could not reconsider the Statement of Significance."[20]

The Committee also stated that, it would not permit him to be called, no statement having been provided in accordance with its procedural protocol, and because of the

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18 (1996) 185 CLR 259.

19 It is in fact very difficult to distinguish this case from the *Pinochet case*.

20 p4

issue to which Dr Goad was going to be asked to speak – the heritage significance of the 1952 extensions. I am satisfied, however, that if the procedural protocol had been satisfied, the Committee would not have permitted him to be called because it was of the view that it "could not reconsider the Statement of Significance".[21] For similar reasons, Mr Rippon, the architect who had prepared the details of the application for the permit, was not permitted to develop arguments

> "directed at challenging the cultural heritage significance of the 1952 extension".[22]

40 I note as to Dr Goad's evidence, that he is an architectural historian who could give expert evidence about the work of Robin Boyd. It is not known what he would have said because he refused to provide a statement and refused to speak to the lawyers representing the applicants before giving evidence. It was for this reason that the applicants were unable to comply with the procedural protocol. Notwithstanding that they had not been able to confer with Dr Goad, the applicants wished to call him on the issue and permission was refused.

41 On 20 June 2000, the second day of the hearing, the Committee asked counsel for the applicants whether Dr Goad was being called as a witness. Enquiries were made as to his availability but he was not available and, in any event, the Committee's limitation remained as to the scope of the evidence he could give.

42 The first issue to consider is whether the Committee took the view that evidence should not be received as to the degree of heritage significance that attached to the 1952 extension and, if so, whether it erred in law in taking that approach.

43 Looking at the applicants' arguments before the Committee, they were put with a force and substance that did go to the question of whether the 1952 extensions had any significance. They were not seeking, however, to argue that the 1952 extensions should not have been placed on the register. The applicants sought to qualify or quantify the significance of the property and its parts, something not done by the

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21 p 4
22 p 4

Statement of Significance. A more detailed analysis might well have placed the property or parts of it in the highest echelons of cultural heritage significance. On the other hand, it may be that a further examination of the material, or additional evidence, would suggest that, while they were of sufficient cultural heritage significance to be placed on the register, they were not of major significance. I note also that a Conservation Management Plan developed by the Council prior to the hearing, accepted that there were degrees of significance and that, in this case, the structures were described as not of "exceptional significance" but of "considerable significance".[23]

44 Counsel for the respondents submitted that the applicants' challenge before this court was in effect a challenge to the decision on the merits. It was put that what the Committee in substance said was that, in the circumstances of the case, it was appropriate to accept the Statement of Significance as defining the matters of significance it had to consider.[24] In my view this was not the approach taken by the Committee and the applicant's challenge is not a challenge to the merits of the decision.

45 It is true that in considering the arguments on the issues referred to in s 73(1)(a), it stated that:

> "It is appropriate to accept . . . as defining that significance the Statement of Significance which is set out above"[25]

It did so in addressing the applicant's arguments "to the extent that Mr Porter's submissions sought to challenge the cultural heritage of the registered place". It stated that it should proceed on the basis that it had heritage significance and that it was "appropriate" to accept the statements "defining that significance". The statement was made, however, in the context of its earlier statement in explaining its position on the calling of Dr Goad:

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23 CMP, p 60

24 If it is, then it came to that conclusion in ignorance of the evidence that could have been given by Dr Goad and Mr Rippon.

25 Page 6

> "The Committee was of the view that it could not reconsider the Statement of Significance."[26]

Later, the Committee took counsel to task saying that the submission attempted to separate the 1952 extensions from the 1947 house and to argue against the significance of the extensions when separately considered. The Committee took the view that this was incorrect in that the registered building was the house as extended. It concluded

> "the Committee had no doubt as to the significance of the house as extended and did not regard it as legitimate to consider the extensions as if they stood apart as separate structures".[27]

46 In my view, the Committee proceeded on the basis that all were bound by the Statement of Significance and that the issue of the significance of the house and its extension could not be revisited.

47 The Committee appeared to give the Statement of Significance special status. The Statement of Significance is important. It apparently comes into existence with the nomination of a place or object for inclusion in the Heritage Register. The Executive Director, if he or she recommends to the Heritage Council that a place or object be included in the Heritage Register, must give a statement complying with s 34 to the owner of the place or object and other people. That statement has to be in writing and include "a brief statement of the cultural heritage significance of the place or object". I was informed that sometimes the Council in considering the application for registration will change the statement. Counsel were unable to direct me, however, to any statutory or regulatory provision which bound the Executive Director or the Permit Appeal Committee to the terms of that Statement in applying the provisions of s 73 of the Act. It plainly provides evidence, however, of the reasons why the building was placed on the Register.

48 Further, and in any event, what was being sought by the applicants was the opportunity to lead evidence concerning, inter alia, the degree of significance that

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26 p 4
27 p 6

attached, not to the whole building, but to the 1952 extensions and the 1947 building without them. An examination of the Statement of Significance reveals that the degree of significance attaching to these extensions was not in fact articulated in it. In addition, the Statement of Significance did not address the issue of the significance of the structure without the extensions. Thus the evidence sought to be led would not directly challenge the statement so much as add to it or qualify it.

49 Alternatively, if the Committee did not proceed on the basis that all were bound by the Statement of Significance but decided that it was not "appropriate" to consider the degree of significance of the extensions, it seems to me that it denied the appellant the opportunity to call evidence and make submissions as to the extent to which the application if approved would affect the cultural heritage significance of the registered place or object - that is, it denied that appellant the opportunity to address the first matter listed in s 73(1) of the Act as a matter that must be considered.

50 The application involved consideration of the 1952 extensions; for the permit application in part was to demolish those extensions. Therefore, it seems to me that it was necessary to consider the cultural heritage significance of the property with the extensions and without the extensions and only by doing that could a view be formed under s 73(1)(a) as to the extent to which the application, if approved would affect the cultural heritage significance of the registered place.

51 This is not the occasion to explore in detail the circumstances in which it would be appropriate, or not appropriate, to reconsider a Statement of Significance. It would be surprising, however, if it was intended to be the only material on heritage significance referred to in determining a permit application on appeal bearing in mind that any permit application will occur, after the registration of the premises. Many years could elapse and in that time there could be significant changes in the circumstances of the property, accepted views as to the significance of the history of premises, their architecture or of the architect concerned.

52 From a practical point of view, the Statement of Significance will normally be the starting point for any assessment of the significance of the premises at the time of any application and any applicant for a permit who wishes to suggest a redefinition of the significance would need to advance evidence and argument to suggest that something had been overlooked originally or had changed since the property went on the Register. Thus to allow parties seeking permits to revisit the Statement of Significance should not be a matter of major practical concern. In any event, as I have said, the Act requires the issue to be considered as at the date of the application for the permit.

53 One must be careful not to read too much into the reasons of the Committee. They are, however, as I have noted, detailed and obviously prepared with care. Viewed as a whole I am satisfied that the Committee was expressing the view that it should not entertain evidence that might in any way or to any degree qualify what appeared in the Statement of Significance. In my view, in taking this position the Committee erred in law. The Committee was obliged to allow the applicants to lead evidence as to the degrees of significance of the registered place, and any parts of it, the subject of the permit application, if they were to be heard on the issues raised by s 73(1) of the Act. As a result there was also a denial of natural justice that resulted from that error.

54 Anyone reading the material in this case would have great sympathy for the Committee. The applicants had largely ignored the protocols which the Council had put in place to enable the efficient handling of these matters and were seeking to re-open matters that had been considered previously to varying degrees. Further, the proposal, while put forward ostensibly to build on the Conservation Management Plan, largely ignored it. That plan had been prepared at the expense of the Heritage Council in an attempt to provide a practical solution to the issues that had arisen between the Executive Director and the applicants and which remained to be resolved. In all the circumstances, the Committee showed remarkable forbearance and patience in its handling of the matter. Nonetheless, I have come to

the conclusion that, in its understandable efforts to bring some order and structure to the proceedings, it misdirected itself as to what matters should be considered.

Conclusion

55 For the above reasons I am satisfied that the three principal arguments of the applicant have been made out.

56 So far as discretionary matters are concerned, the respondents ultimately relied upon submissions that the applicants can always make another application before a different Committee and, therefore, will be no worse off if the relief sought is not granted. Counsel submitted further that it might be suggested that the applicants would be better off in starting again and complying with the protocols and presenting the matter in accordance with the protocols. A case would then be presented in a better and a more persuasive way.

57 I do not find this argument persuasive. What is suggested is that the applicants would not be disadvantaged in presenting the same application to another Committee in circumstances where the previous Committee's decision still stands. Forensically, they would obviously be seriously disadvantaged in that situation before the second Committee.

58 I have considered whether to grant the applications would be futile in the sense that the same result is likely. I am not persuaded, however, that a conclusion can be reached about the likely outcome of a reconsideration of the application on relevant issues and evidence.

59 Finally I note that the applicants have filed a further permit application which does not involve demolition of the 1952 extensions . This would appear to be an alternative to the present application should the present application, if re-heard, be unsuccessful.

60 I am satisfied that the Court's discretion should be exercised to quash the decision.

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Part 2—Heritage administration

Division 1—Heritage Council

9 Establishment of the Heritage Council

(1) The Heritage Council is established.

(2) The Heritage Council—

(a) is a body corporate with perpetual succession; and

(b) has a common seal; and

(c) may sue and be sued in its corporate name; and

(d) may acquire, hold and dispose of real and personal property; and

(e) may do and suffer all acts and things that a body corporate may by law do and suffer.

(3) The common seal of the Heritage Council must be kept as directed by the Heritage Council.

(4) All courts must take judicial notice of the seal of the Heritage Council on a document and, until the contrary is proved, must presume that the document was properly sealed.

10 Members of the Heritage Council

(1) The Heritage Council consists of 10 members appointed by the Governor in Council on the recommendation of the Minister.

(2) Of the persons appointed as members of the Heritage Council—

(a) 7 persons must have recognised skills or expertise in one of each of the following areas—

(i) archaeology;

(ii) architectural conservation or architectural history;

(iii) engineering or building construction;

(iv) heritage law, planning law or property law;

(v) financial management;

(vi) history;

(vii) urban or regional planning; and

(b) one person must be appointed from a list of 3 names submitted to the Minister by the National Trust; and

(c) one person must be an Aboriginal person who has relevant experience or knowledge of cultural heritage; and

(d) one person must have a demonstrated understanding, expertise or interest in the State's heritage or in the management of heritage places.

(3) If the National Trust does not submit a list of names to the Minister under subsection (2)(b) within one month after receiving a written request by the Minister, the Governor in Council may appoint a suitable person nominated by the Minister to fill the vacancy.

11 Functions and powers of the Heritage Council

(1) The functions of the Heritage Council are—

(a) to advise the Minister on the status of the State's cultural heritage resources and on any steps necessary to protect and conserve them; and

(b) to make and publish guidelines in relation to the conservation of cultural heritage; and