

Apprehended Bias outside the Courtroom
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Decision makers in many contexts are required to afford protagonists natural justice or procedural fairness. In doing so, they must have regard to the hearing rule, and the bias rule which requires the decision maker to come to the decision making process with a mind open, without prejudice or prejudgment.

The rule against bias is relevant in dealings with many different types of decision makers. Courts of course, where the rule first arose, but also in the context of administrative decision making generally by government agencies, statutory authorities and tribunals.

If an allegation of bias is made out, the usual consequence is that the decision is rendered invalid, and the decision making process must be to be undertaken afresh.

Bias may be demonstrated if, for example:

1. a fair minded observer would be concerned that a decision maker could not act impartially as a result of a family, financial or other personal interest in the decision;
2. there has been a display of hostility towards one party or favouritism towards another, bor example following a particular line of questioning¹; or
3. a decision maker by conduct or words has indicated pre-judgement of the issues to be decided.

All of the above have potential to indicate that the decision maker has not brought, or is not capable of bringing, an impartial and unprejudiced mind to the resolution of the question involved: *Laws v Australian Broadcasting Tribunal*²

Courts have held, however, that a decision-maker is not required to bring an 'empty' mind to a question. The test to be applied is whether the decision-maker's mind is "so committed to a conclusion already

¹ Lohse v Arthur (3) 2009 180 FCR 334

² (1990) 93 ALR 435

formed as to be incapable of alteration, whatever evidence or arguments may be presented": *Minister for Immigration & Multicultural & Indigenous Affairs v Jia Legeng*³.

Merely expressing an opinion or a thought process in considering a question will not generally, of itself, be sufficient to establish that the decision-maker has pre-judged the question to be resolved. However, if a decision maker makes a public statement on a question of policy or opinion which is also involved in a case before him or her for decision in such a way that a 'substantial distrust' would arise in the minds of reasonable persons in relation to the ultimate decision made, bias is likely to be established: *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*⁴.

Decision makers can seek to avoid an allegation of bias by stating that he or she brings an impartial mind to the exercise of power⁵. A statement to that effect will not overcome a finding of bias which is supported by the surrounding circumstances. For example, a combination of comments made by a decision maker in relation to the credibility of one of the parties, or lack of it, and adverse comments made about that party in a previous matter, would be sufficient to create a reasonable apprehension of bias which would not be displaced by assurances that the decision making would bring an impartial mind to the proceeding.

Bias may be actual or apprehended.

Actual bias is relatively more rarely established. A finding of actual bias involves a direct serious, critical finding to be made personally about the decision maker concerned, and as a consequence the applicant is put to a high standard of proof. An allegation of actual bias must be clearly alleged and proved on the basis of cogent evidence and only in "rare and extreme" cases will actual bias be found: *SBBS v Minister for Immigration & Multicultural & Indigenous Affairs*⁶ and *MIMIA v Jia Legeng*⁷. Courts will not make a finding of actual bias lightly: *South Western Sydney Area Health Service v Edmonds*⁸

³ (2001) 205 CLR 507

⁴ (1953) 88 CLR 100 at 116

⁵ *Ruston v Ismail* [2009] VSC 625

⁶ (2002) 194 ALR 749 at [43]-[44]

⁷ (2001) 205 CLR 507 at [69] and [127]

⁸ [2007] NSWCA 16

The applicant must show that the decision maker was *so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented*: *Jia Legeng* at [72]. It is rare and exceptional for actual bias to be inferred solely from a consideration of the tribunal's reasons for decision: *SCAA v MIMIA*⁹.

An applicant alleging **apprehended bias** must establish that a fair-minded and informed person might reasonably apprehend that the decision maker might not have brought an impartial mind to bear on its decision: *Ebner v Official Trustee*¹⁰; *NADH of 2001 v MIMIA*¹¹; *Re Refugee Review Tribunal; Ex parte H*¹². The test focuses on possibility ("real and not remote") rather than probability¹³.

In an administrative context, allegations of apprehended bias can be made in relation to the conduct or interests of those involved in the decision making process, as well as the conduct or interests of the decision maker.¹⁴ However, as the High Court found in *Hot Holdings Pty Ltd v Creasy* "whether the grounds on which certiorari lie do, or should, extend to cases where a person other than the decision-maker has engaged in some conduct which is "conduct for the purpose of making a decision" (but not itself a decision) and has some interest in the outcome which, if an interest held by the decision-maker, would engage the rules about apprehension of bias, is a large question", and one which is not yet finally decided in the Australian context.

The traveller on Clapham omnibus in the context of bias is the "fair minded and informed observer".

The characteristics of that hypothetical fair minded observer were summarised by Blanchard J in *Saxmere Company Limited v Wool Board* [2009] NZSC 72 [at 5]:

The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and

⁹ [2002] FCA 668 at [38]

¹⁰ (2000) 176 ALR 644 at 647

¹¹ [2004] FCAFC 328 at [14]

¹² (2001) 179 ALR 425 at [30]-[31]

¹³ *Ebner* [at 7]

¹⁴ *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51

about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias.

In other words, perhaps, the fair minded and informed observer, moulded at least to an extent by whomever is reviewing the decision to fit the particular facts and circumstances of the case. So a fair minded lay observer being aware of the nature of a tribunal's inquisitorial proceedings would be take account of relevant matters, for example that a tribunal was not required to unequivocally accept an applicant's claims, and that in approaching its review function it may be necessary for a tribunal to assess the probative value of claims put before it by the applicant. A tribunal in that context is not obliged to accept an applicant's claims at face value: *MIEA v Guo*¹⁵, and may be obliged to ensure an applicant is afforded procedural fairness¹⁶, which requires the tribunal to confront an applicant with matters that bear adversely on his or her credit.

Courts have applied the rule against bias less strictly in relation to administrative decision makers, than in relation to judicial decision-makers. In *Mildura Rural City Council v Minister for Major Projects*¹⁷, Morris J, sitting as the President of the Victorian Civil and Administrative Tribunal, considered how the bias rule applied to expert panels established under the *Planning and Environment Act 1987*. Morris J took into account the administrative and policy role of the panel, the source of its authority, the procedure it followed under the Act, and the fact that it makes recommendations (not decisions) to the government, and concluded that such panels were to be treated differently to courts.

In that case, the Council sought to have a member of the panel appointed to consider a proposal for a containment facility for hazardous waste to disqualify himself on the basis of his past associations with the State Government which was the main proponent of the proposal. Morris J stated that

"in determining ... how a particular rule may be applied, it is not always helpful to divide decision-makers into those exercising judicial power and those who form part of the executive branch of government. Some bodies – such as the Commonwealth Administrative Appeals Tribunal – form part of the executive but are closely aligned with the judicial model. Nevertheless, as Hayne J observed in *Jia*, the degree of divergence from the judicial paradigm is relevant. The panel appointed to consider [the proposal] diverges substantially from the judicial model. The panel's task is essentially that of a government advisor. The panel is

¹⁵ (1997) 191 CLR 559 at 596

¹⁶ 228 CLR 152

¹⁷ [2006] VCAT 623

appointed by the Minister specifically for [the 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." (emphasis added)

The principles applied by courts reviewing administrative decisions for bias will apply the same principles as when considering allegations of bias against a judicial officer. However Morris J's decision suggests that at least in Victoria, those principles may be applied somewhat more flexibly depending, as always, on the particular circumstances of the decision under review.