Apprehended Bias and the Personal Injury Commission*

Personal Injury Commission's Annual Member Conference – 27 May 2022

1 I have been asked to address you on the topic of apprehended bias in the context of the work of the Personal Injury Commission.

2 As will emerge, the central legal principles are relatively uncontroversial. Not unusually, however, the difficulty arises in their application to the myriad of circumstances in which allegations of apprehended or ostensible bias emerge. The subject matter is rendered even more complicated by the diverse functions performed by Personal Injury Commission's (**PIC**) members. They are not only first instance decision-makers, they are also responsible for facilitating the conciliation of disputes between injured persons and their employer or insurer. I understand that the PIC uses a blended model of conciliation/arbitration and operates in circumstances where it is common for the same legal representatives to appear almost daily. Accordingly, professional or personal associations are often well developed before people are appointed to the PIC. This has the potential to provide a foundation for claims of apprehended bias.

3 The structure of the paper is as follows:

(a) A brief discussion of the relevant legal principles concerning apprehended bias;

(b) Summarising relevant features of the *Personal Injury Commission Act 2020* (NSW) (***PIC Act***), the *Personal Injury Commission Rules 2021* (NSW) (***PIC Rules***) and the PIC *Member Code of Conduct*;

(c) Some practical illustrations from the caselaw; and

(d) Some practical observations and tips.

(a) **Some legal principles**

4 You are probably familiar with the relevant principles which apply to allegations of bias, as one of two limbs of procedural fairness[1]. In brief, in Australia, in open curial proceedings, the test for apprehended bias is whether a fair-minded lay observer **might** reasonably apprehend that the judge **might** not bring an impartial mind to the resolution of the question to be decided[2]. A similar test applies in the case of administrative proceedings, but account must be taken of various matters which inform the different standard or degree of neutrality expected of an administrative decision-maker, including the particular nature of the body or tribunal and the different character of such proceedings.

5 Close attention must be paid to relevant statutory provisions governing the proceedings, the nature of the inquiries to be made and the particular subject-matter[3]. In a case involving an administrative tribunal proceeding being held in private, the High Court has suggested that it might be preferable to formulate the test for apprehended bias "by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias" [4]. Thus, the principles relating to apprehended bias in respect of both Judges and administrative decision-makers is substantially similar, although there is a different emphasis.

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[1] See my paper 'Apprehended Bias in Australian Administrative Law' (2010) 38 *Federal Law Review* 353 and Alan Robertson, 'Apprehended Bias – The Baggage' (2016) 42 *Australian Bar Review* 249. See also the recent Consultation Paper published by the Australian Law Reform Commission, *Judicial Impartiality* (CP 1, April 2021).

[2] See *Ebner v Official Trustee* [2000] HCA 63; 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[3] See *Re Refugee Review Tribunal;* ***Ex parte H*** [2001] HCA 28; 179 ALR 425 at [5] per Gleeson CJ, Gaudron and Gummow JJ and *South Western Area Health Service v* ***Edmonds*** [2007] NSWCA 16 at [97] ff per McColl JA (Giles and Tobias JJA agreeing).

[4] *Ex parte H* (n 3) [28].

6 A claim of actual bias requires proof that a decision-maker approached the issues with a closed mind or had prejudged them. An applicant alleging actual bias carries a heavy onus of establishing by cogent evidence that the decision-maker was in fact biased or that there was at least a "high probability" of such[5]. Actual bias requires a review court to assess the state of mind and actual views of the relevant decision-maker.

7 In an apprehended bias case, the applicant also carries the onus of proof but this burden is more easily discharged because the question is not one of high probability, but rather one of objective possibility. Such a claim does not require a review court to make findings about the subjective motives, attitudes, predilections or purposes of the decision-maker. Rather, the issue falls to be determined through the prism of the hypothetical fair-minded and informed lay person. As the High Court recently emphasised in ***Charisteas*** *v Charisteas* [2021] HCA 29; 393 ALR 389 at [18] (which, although directed to apprehended bias in a judicial setting, applies equally to an administrative setting):

> … The apprehension of bias principle is so important to perceptions of independence and impartiality "that even the *appearance* of departure from it is prohibited lest the integrity of the judicial system be undermined" (emphasis added). No prediction by the court is involved in deciding whether a judge might not bring an impartial mind to bear. **No question as to the understanding or motivation of the particular judge arises**.
>
> (emphasis added, footnotes omitted)

8 In addition to the matters set out above, application of the apprehended bias test in a particular case will take into account whether tribunal proceedings are inquisitorial or adversarial in nature, and whether the parties are represented[6].

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[5] See *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 116.
[6] *Ex parte H* (n 3) [29].

9 Justice Gageler suggested in *Isbester v Knox City Council* [2015] HCA 20; 255 CLR 135 at [59] that there are three steps in determining whether there is an appearance of disqualifying bias in an administrative context:

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

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

(c) consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.

10 Matters which might underpin an apprehension that a decision-maker might decide a case other than on its merits may be split into four overarching categories. Those are:

(a) Where the decision-maker has a **direct or indirect interest** in the proceedings, whether pecuniary or otherwise, which creates a reasonable apprehension of prejudice, partiality or pre-judgment.

(b) Where the decision-maker engages in particular **conduct**, including publishing statements or excessive intervention in questioning made within or outside a formal proceeding.

(c) Where the decision-maker has an **association**, whether from a direct or indirect relationship, experience or contact with a person involved in the relevant proceeding, including a party and a witness, from which an apprehension of pre-judgment or other bias results. This category of apprehended bias assumes particular relevance in the context of the PIC for the reasons given above.

(d) Where the decision-maker has knowledge of **extraneous information**, such as a prejudicial and inadmissible fact.[7] This category has less relevance in the case of a tribunal which is not bound by the rules of evidence, but fair hearing requirements will apply to the use of material which is outside the record before the tribunal.

11 Beyond identifying the subject matter which might give rise to an apprehension of bias, much of the difficulty (and uncertainty) which can arise in applying the settled legal principles relates to the nature and extent of the information which is attributed to the informed lay observer through whose eyes the question of apprehended bias falls to be determined. The point is well illustrated by the High Court's decision in *Charisteas*. The majority of the Full Court of the Family Court had held below that a fair-minded lay observer, properly informed as to the relationship between the judiciary and the bar, would take into account that barristers are professional members of an independent bar who do not identify with the client, that judges are usually appointed from the senior ranks of the bar and that it may be expected that they will have personal or professional associations with many barristers who appear before them. Accordingly, the Full Court majority reasoned that the hypothetical lay observer would be able to tolerate some degree of private communication between and judge and a barrister, even if such communication went undisclosed. The High Court described this reasoning at [21] as "erroneous" (footnote omitted and emphasis added):

> … The alignment of the fair-minded lay observer with the judiciary and the legal profession is inconsistent with the apprehension of bias principle and its operation and purpose. The hypothetical observer is a standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system. **The hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts**. It would defy logic and

[7] See *Webb v R* (1994) 181 CLR 41, 74 per Deane J.

render nugatory the principle to imbue the hypothetical observer with professional self-appreciation of this kind.

12 Presumably, however, it is reasonable to impute to the hypothetical lay observer information or knowledge regarding the procedures and operations of a body such as PIC which are described on the PIC's website or in some other publicly available document, such as a Practice Note or Rule.

(b) The *PIC Act*, *PIC Rules* and the *Member Code of Conduct* summarised

(i) Relevant features of *PIC Act*

13 Consistently with the need to pay close attention to the statutory framework within which administrative decision-making takes place in applying the principles of apprehended bias[8], the following features of the *PIC Act* should be noted. First, the objects set out in s 3 are highly relevant, including the repeated references to "fairness", which necessarily informs the standard in both limbs of procedural fairness (emphasis added):

> **3 Objects of Act**
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> **The objects of this Act are as follows--**
>
> (a) to establish an **independent** Personal Injury Commission of New South Wales to deal with certain matters under the workers compensation legislation and motor accidents legislation and provide a central registry for that purpose,
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> (b) to ensure the Commission--
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> (i) is accessible, professional and responsive to the needs of all of its users, and
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> (ii) is **open and transparent about its processes**, and
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> (iii) encourages early dispute resolution,

[8] See *Edmonds* (n 3) [55] ff for an application of this principle in the context of an arbitrator's conduct and decision-making under previous workers' compensation legislation.

(c) to enable the Commission **to resolve the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible**,

(d) to ensure that the decisions of the Commission are timely, **fair**, consistent and of a high quality,

(e) to **promote public confidence in the decision-making** of the Commission **and in the conduct of its members**,

(f) to ensure that the Commission--

(i) publicises and disseminates information concerning its processes, and

(ii) establishes effective liaison and communication with interested parties concerning its processes and the role of the Commission,

(g) to make **appropriate** use of the knowledge and experience of members and other decision-makers.

14 I will not set out or summarise the provisions relating to membership of the PIC, its different divisions and the provisions relating to the making of the Rules and the giving of procedural directions by the President. I will assume that you are familiar with them.

15 Mention should be made, however, of the various Codes of Conduct which the President has issued under s 16 of the *PIC Act*. Commencing on 1 March 2021, separate Codes of Conduct have been published with respect to the conduct of members, medical assessors, merit reviewers and mediators. As you know, the Codes deal with topics such as what is required to provide fairness, consideration of conflicts of interest, independence, accountability and transparency and practical matters such as receipt of gifts and hospitality, as well as constraints concerning social media and public engagements. Given that the Codes are publicly available and are expressly designed to provide PIC users with information to frame assessments of conduct it can be expected that they will be

relied upon in cases involving claims of bias. I will have something more to say shortly on the Codes.

16 Reference should also be made to ss 42 and 52, which relevantly provide:

> **42 Guiding principle to be applied to practice and procedure**
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> (1) The "**guiding principle**" for this Act and the Commission rules, in their application to proceedings in the Commission, is to facilitate the just, quick and cost effective resolution of the real issues in the proceedings.
>
> (2) The Commission must seek to give effect to the guiding principle when it--
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> (a) exercises any power given to it by this Act or the Commission rules, or
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> (b) interprets any provision of this Act or the Commission rules.
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> (3) Each of the following persons is under a duty to co-operate with the Commission to give effect to the guiding principle and, for that purpose, to participate in the processes of the Commission and to comply with directions and orders of the Commission--
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> (a) a party to proceedings in the Commission,
>
> (b) an Australian legal practitioner or other person who is representing a party in proceedings in the Commission.
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> (4) In addition, the practice and procedure of the Commission should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Commission is proportionate to the importance and complexity of the subject-matter of the proceedings.
>
> (5) However, nothing in this section requires or permits the Commission to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions.
>
> …

52 Hearings and conferences

…

(2) Subject to any procedural directions, the Commission may hold a conference with all relevant parties in attendance and with relevant experts in attendance, or a separate conference in private with any of them.

…

17 These provisions differ in some respects from those which governed decision-making by the Workers' Compensation Commission (**Commission**) under previous legislation. For example, s 354 of the *Workplace Injury Management and Workers' Compensation Act 1988* (NSW), which dealt with the Commission's procedures, was summarised by McColl JA in *Edmonds* at [87]:

> 87 … To recapitulate briefly, the jurisdiction the Arbitrator was exercising under s 354 of the *WIM Act* required proceedings to be conducted with as little formality and technicality as the proper consideration of the matter permitted (s 354(1)). Section 354(4) provided that the Arbitrator was not bound by the rules of evidence but might inform himself on any matter in such manner as he thought appropriate and as the proper consideration of the matter permitted (s 354(2)), enabled him to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms, enabled informal hearings to be conducted. Section 354(6)) enabled him to dispense with a conference or hearing. Section 354 and other provisions give the Commission a wider range of discretionary choices about the procedure appropriate for a particular case than existed under earlier legislation: *Aluminium Louvres & Ceilings Pty Limited v Xue Qin Zheng* [2006] NSWCA 34 at [22] per Bryson JA (Handley JA and Bell J agreeing).

18 It is also relevant to note McColl JA's observations at [94]:

> 94 Nevertheless, although the Commission operates pursuant to a legislative framework which frees it, to some degree, from "constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals" (*Minister for Immigration and Multicultural Affairs v Eshetu* at [49]), it is modelled on adversarial proceedings to the extent that issues are primarily defined by what

> for convenience can be described as "pleadings" (cf the primary judgement at [11]), the parties are entitled to be represented by a legal practitioner or agent and they adduce the evidence upon which they wish to rely before the Arbitrator. The proceedings "take the form of litigation between parties": see *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (at [23] per Gleeson CJ, McHugh, Gummow and Hayne JJ). In contrast, in the "pure" European model of the inquisitorial process, the "task of the judge… is to act as a protagonist in the proceedings and it is the judge and prosecuting officials, not the parties, who have the responsibility for seeking out and testing the evidence, often in advance of a formal hearing": Creyke and Bedford, at 4. Although I note, in this respect, that the Guidelines state "[q]uestions to witnesses, if any, will be by or through the Arbitrator", it is not clear to what extent this is actually observed. *Aluminium Louvres & Ceilings Pty Limited v Xue Qin Zheng*, for example, concerned a complaint that an Arbitrator hearing a case in 2003 limited the time for cross-examination by the employer.

19 The importance of paying close attention to relevant statutory provisions in this area is further illustrated by the Court of Appeal's decision in *Inghams Enterprises Pty Ltd v Belokoski* [2017] NSWCA 313, where an allegation of apprehended bias was made based on a claim that an arbitrator had proceeded to make a substantive determination in managing a process of conciliation. In rejecting that claim, Basten JA said at [41]:

> 41 Assuming that some steps were taken by the arbitrator on 25 September 2014 which involved active management of the case through a process of conciliation, the appellant was confronted by the statutory provision in s 355(2) of the *Workplace Injury Act* set out at [8] above. In other words, the fact that an arbitrator has used his or her best endeavours to bring about a settlement will not form the basis of a challenge to an award or determination if conciliation fails and an arbitrated outcome is required.

(ii) Relevant features of *PIC Rules*

20 Without being exhaustive, mention should be made of cl 3, which identifies the object of the *Rules* as giving effect to the "guiding principle" as set out in s 42 of the *PIC Act*. The Rules apply to PIC proceedings, mediation proceedings,

medical assessment proceedings, merit review proceedings and panel review proceedings. There is a power under cl 6 to dispense with the Rules and a power to issue directions under cl 7 in circumstances not covered by the Rules.

21 It is also relevant to note cl 128, which expressly provides that review panels are not bound by the rules of evidence.

(iii) Relevant features of *Member Code of Conduct*

22 The Code has been issued by the President under s 16 of the *PIC Act*. The Code sets out the standards of conduct required of members and identifies potential ethical issues. The Code sets out the general responsibilities of members, both in their activities as members and in their personal activities. It also sets out a series of "Commission values" which include respect for the law, fairness, avoidance of conflicts of interest, independence, diligence and timeliness, integrity, accountability and transparency, respect for persons and privacy and confidentiality.

23 Clause 45 of the Code provides that where there is non-compliance, the President may direct the member concerned to take specified action to rectify their conduct and further work may not be allocated to the person until the breach is rectified. The President is empowered to suspend a member's appointment in the case of "serious breaches".

24 The President has also published Codes of Conduct for Medical Assessors, Merit Reviewers and Mediators.

25 It can be expected that the Codes will be relied upon by disgruntled persons as providing relevant standards within which the *Ebner* test is applied for apprehended bias. In other words, the Court would be urged to attribute knowledge of the contents of the Codes to the reasonable, informed lay bystander.

(b) Some practical illustrations

26 Let me give you some examples of how the legal principles concerning apprehended bias have been applied in practice. I will outline the essential facts of a few cases and pause and invite your assessment as to whether or not you think apprehended bias is established.

Case study 1

27 You are an assessor under the previous *Motor Accidents Compensation Act 1999* (NSW). You are also a legal practitioner in private practice. Compensation is sought for an injury in a motor vehicle accident. The claimant states that she has not, either before or since the accident, had any other injury to the same part of her body as was the subject of the claim and that she has never made a claim for personal injury compensation previously. The insurer has information which shows that the claimant had in fact made a claim for injuries sustained in a motor vehicle accident some five years earlier and that this claim had also been assessed by you. The insurer seeks your recusal on the ground of apprehended bias. Notably the recusal is sought not on the basis of any claim of prejudgment arising from your past involvement but rather on a claim that the previous involvement means that you may have acquired relevant information which was unavailable to the insurer. The insurer also applies to have the current claim exempt from assessment under s 92. You reject the recusal application on the basis that the latest claim is in respect of an unrelated subsequent motor vehicle accident. You also reject the application under s 92 on the basis that while some of the information in the claim was incorrect, you were not persuaded that that information was deliberately false and misleading. In what might properly be described as a brain snap, you publish your reasons on the letterhead of your private legal practice.

28 The insurer challenges both decisions by way of judicial review. Apprehended bias or not?

29 In determining proceedings based on the above facts, Justice Campbell held in *Insurance Australia Limited (t/as NRMA Insurance) v* ***Banos*** [2013] NSWSC 1519; 65 MVR 312 that the assessor's decision regarding s 92 was invalid for jurisdictional error. Accordingly, it was strictly unnecessary to determine the apprehended bias claim. His Honour indicated, however, that if it had been necessary to determine the matter, he would have rejected it. First, he said that the insurer's solicitors were aware of the assessor's previous involvement, yet they expressly disavowed any claim of prejudgment. As noted above, the basis for the recusal application was much narrower. His Honour held that this amounted to a waiver by the insurer of any objection which might have been available on the ground of apprehended bias.

30 Secondly, Campbell J added that, in any event, the assessor's involvement in a previous claim did not necessarily amount to apprehended bias and that the situation needed to be distinguished from a case where there was a previous adverse finding as to credit (citing *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411).

31 Although in *Banos* Campbell J would have rejected the apprehended bias claim, it is relevant to note his adverse comments on the assessor's lack of judgment in publishing her reasons for decision on her law firm's letterhead:

> 54 There is one final point. Doubtless through inadvertence, the claims assessor published the reasons supporting her preliminary assessment of 16th May 2013 on the letterhead of the legal practice of which she is a partner. Nothing of substance turns on this in the present case. However, I wish to record (with the concurrence of counsel) that I consider it very undesirable that this should occur. Notwithstanding the provisions of s.99(3), the purpose of s.105(2) and (3) is that a claims assessor should be entirely independent in making "any of the decisions of the assessor that affect the interests

> of the parties to an assessment". The rules of natural justice, which underlie the assessment process, also require that he or she should be entirely impartial. Just as with courts of ordinary jurisdiction justice must be seen to be done, so too with CARS the assessors must be seen to be both independent and impartial. I fully understand that most claims assessors are appointed on a part-time or sessional basis. That they are selected from the ranks of barristers and solicitors who have lengthy experience practicing in the personal injuries area, no doubt, may be considered a strength of the system. Further, much work is required to be done in the chambers or office of the assessor rather than at the premises of the Motor Accidents Authority. Publishing a decision on professional letterhead, is of course, only a small slip. But assessors should take great care to avoid such infelicities because they may detract from the essential appearance of independence and impartiality.

Case study 2

32 This next case study is from New Zealand, where similar legal principles apply. The acting chief executive of the NZ Institute of Valuers lodged a formal complaint with the Valuers Registration Board after an individual registered valuer (Mr Bates) sent an "intemperate email" to the President of the Institute and other persons accusing her of being "inept" or "corrupt" in the context of her change of position regarding major reforms to the valuation industry. A preliminary investigation was conducted and the question of whether Mr Bates engaged in "grave misconduct" was referred to the Board for inquiry and determination. Under the *Valuers Act 1948* (NZ), which was described by Kos J in *Bates v Valuers Registration Board* [2015] NZHC 1312 at [28] as "a somewhat antiquated piece of legislation" and "the ill-suited to modern administrative law requirements", the Board was constituted by five members (including the Valuer General) with a minimum quorum requirement of three members. Mr Bates sought the recusal of two Board members on the basis that each was involved in major valuation firms which were likely to benefit from the proposed reforms. One of the challenged members was a director and shareholder of such a firm, while the other was simply an employee. The Board recused the former member

but not the latter. The reconstituted Board made a second decision to proceed with an inquiry.

33 Before the inquiry proceeded any further, Mr Bates sought judicial review on various grounds, including apprehended bias relating to the second non-recused member. Mr Bates contended that there was no valid distinction between the two challenged members and that the status of the second member as an employee of a large valuation firm which was likely to benefit from the reforms was sufficient because a fair-minded lay observer might think that such an employee would be prone to influence, even unwittingly, in the general interests of his employer.

34 In the event, the Court did not need to rule on this apprehended bias issue. That was because Kos J held that the doctrine of necessity applied to overcome any apprehended bias which may have existed. Disqualification of the second member would have rendered the Board inquorate and unable to determine the charges. As Kos J said at [74]:

> Natural justice is a modestly flexible concept, adaptable to exigency created by the statutory scheme and necessity is a recognised exception to bias…

Case study 3

35 Here is another example which may be closer to home for some of you because it illustrates how apprehended bias can arise from a part-time appointment and a member's non-tribunal work and relationships. You are a University academic and an Acting Commissioner of the Land and Environment Court (**LEC**). You (together with another Commissioner) hear a Class 1 appeal, which is a *de novo* hearing on the merits, in respect of the deemed refusal by a Council of a development application. The appeal is dismissed. So too is a subsequent appeal from that decision to a judge of the LEC. Subsequently, the appellant learns of matters which indicate an association between you and the respondent Council.

You received research funding from the Australian Research Council in your job as an academic. The funding involved a degree of collaboration between academics and "eligible partner organisations", one of which was the Council who committed project funding of $6,000 per annum for three years. The total funding was $.5m and included other organisations apart from the Council. You did not directly receive any money personally from the Council; rather the Council acted as your patron through the funding of collaborative research projects which was used to further your academic career.

36 In your academic capacity, you attended a conference in Albury, at which you co-authored and presented two papers together with a Council staff member. This occurred around the time of the hearing of the appeal. The co-authors expressed gratitude to 'many staff at Ku-ring-gai Council for their help in the field".

37 Prior to your appointment as an Acting Commissioner you were an active member of the Council's Bushland, Catchments and Natural Areas Reference Group. You resigned your membership upon being appointed an acting commissioner. You were also a member of the Council's Small Community Grants Committee and you resigned your membership after the hearing of the Class 1 appeal. A month after the primary judge dismissed the appeal from the Class 1 decision, you receive a Mayoral award for outstanding service.

38 In these circumstances, the New South Wales Court of Appeal upheld an appeal from the LEC's decision which rejected the development applicant's claims of apprehended bias based on pecuniary interest and association.[9] Basten JA said at [62] and [63]:

> 62 This complaint is justified. A close connection between an adjudicator and one party may be sufficient to give rise to a reasonable apprehension of partiality without there being any connection between the nature or subject matter of the relationship

[9] *Murlan Consulting Pty Limited v Ku-ring-gai Municipal Council* [2009] NSWCA 300; 170 LGERA 162.

and the issue in dispute. The relationship in the present case was professional in nature, but in other circumstances it might have been purely social. It is easy to envisage a social relationship having characteristics sufficient to preclude one party acting as an independent decision-maker with respect to disputes between the other and third persons. The fear of deviation from a proper degree of independence and impartiality would not, in such circumstances, necessarily depend upon any connection between the characteristics of the relationship and the issue in dispute. Whilst such a connection may be necessary where that which is feared is pre-judgment of the dispute, to limit the consideration in that way with respect to all forms of association is erroneous.

63 The on-going collaborative association in the present case was one which was no doubt mutually beneficial to both the academic researchers and the Council. The major contributions anticipated from the Universities (through payment of the salaries of the chief investigators), and from an ARC grant, may have allowed the Council to obtain valuable research for a small contribution to the total package. For the chief investigators, including the Acting Commissioner, the carrying out of such research may well have constituted a significant element of their academic and professional careers. There was sufficient basis in these circumstances for the Court to be required to ask whether the reasonable lay observer might reasonably apprehend that the Acting Commissioner might not bring an impartial mind to the determination of an appeal in relation to a development application which had been refused by the Council, in proceedings involving the Council as a party.

39 On remitter, the primary judge upheld the claim of apprehended bias on the basis of the close and ongoing proximity of relationship between the Acting Commissioner and the Council[10].

40 Difficult issues can arise in specialist tribunals where a person may be sitting as a part-time member of the Tribunal one day and appear as a witness in front of another Tribunal panel another day. The prudent course in such case would be to disclose these facts to the parties, including to a litigant in person, so that any recusal application can be made at an appropriate time. I do not mean to suggest,

[10] *Murlan Consulting Pty Limited v Ku-ring-gai Council (No 4)* [2010] NSWLEC 95. There was no further appeal from the remitted determination.

however, that any such recusal application should be granted. Each case necessarily turns on its own facts, as is well illustrated by the case study immediately above.

41 What should be the case if a part-time member on a specialist tribunal appears before the Tribunal as an advocate for a party? In my view, this situation should be not permitted to arise because it puts the Tribunal in an impossible position. Part-time members should not be permitted to act as advocates in a tribunal in which they sometimes sit. That is why retired judges who return to private legal practice are prevented from appearing before their former Court for several years.

Case study 4

42 Another potential minefield is how apprehended bias can arise from private communications or social contact between a tribunal member and other persons, including with legal practitioners who appear before the tribunal. The point is vividly illustrated by the High Court's recent decision in *Charisteas.* It involved a judge of the Family Court of Western Australia, but it could equally apply to a member of an administrative tribunal. The judge heard an acrimonious and long-running matrimonial dispute. During the course of the trial, the trial judge rejected a recusal application brought by the husband. The hearing proceeded over several weeks and the trial judge reserved for 17 months. After judgment was eventually delivered, the husband learned for the first time that either during the course of the long trial or during the period when judgment was reserved the judge had been in frequent contact with the wife's female counsel. The contact took the form of several face to face meetings for coffee or drinks, as well as telephone calls and text messages. None of this contact had been disclosed to the parties.

43 What do you think? Apprehended bias or not?

44 The Full Court of the Family Court held two to one that there was not apprehended bias (*Charisteas & Charisteas* [2020] FamCAFC 162). An appeal to the High Court was unanimously allowed (see [2021] HCA 29; 393 ALR 389). After affirming the well-established principles concerning apprehended bias in judicial decision-making, the High Court said at [13] (footnotes omitted):

> Ordinary judicial practice, or what might be described in this context as the most basic of judicial practice, was relevantly and clearly stated by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* in 1986 by adopting what was said by McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* in 1972:
>
> > The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.

45 The High Court held that a fair-minded lay observer, understanding ordinary and most basic judicial practice including in relation to communications between judges and legal practitioners, would reasonably apprehend that the trial judge might not bring an impartial mind to the resolution of the questions before him.

46 The High Court described the trial judge's lack of disclosure of his communications with the wife's barrister as "particularly troubling". This highlights the need in an appropriate case for you as a PIC member to disclose to the parties at an appropriate time any matter which might arguably ground a claim of apprehended bias. If having made such a disclosure no recusal application is

made the parties are likely to be regarded as having waived any objection. May I also remind you that the PIC Codes of Conduct contain provisions relating to unilateral communications with legal practitioners, parties and witnesses during the course of a proceeding.

47 At [22], the Court acknowledged that many judges and legal practitioners may have continuing professional and personal connections. The implications of those connections, however, had to be recognised and effectively suspended during the course of a trial and may only be resumed after final orders and reasons have been published.

48 You should also note that in its recent Consultation Paper, the ALRC has raised the question whether amendments should be made to Uniform Conduct Rules relating to the legal profession so as specifically to address the problems which can arise from external communications between judges and lawyers or parties appearing before them.

(d) Some practicalities about impartiality

49 Against the background of the relevant legal principles, I now turn to more practical considerations about the impartial conduct of PIC proceedings. In doing so, I will draw on my own experience as a judge while acknowledging the necessity of factoring in relevant statutory and practical matters which uniquely affect the PIC, as well as relevant parts of the Codes of Conduct.

50 As I emphasised at the outset, impartiality is critical not only to maximise the objective of having a party feel that they have had their day in "court", but also, more broadly, to maintain and enhance public confidence in the integrity and efficiency of a public tribunal's decision-making process. That process has the authority of the State and affects many people's lives, rights and interests in significant ways. Never let that be forgotten. It is an enormous power which must be exercised responsibly and fairly.

51 Much of what I now say focusses upon proceedings in which the non-government party is unrepresented.

52 Patience is an essential quality and cannot be jettisoned simply because we are all working under considerable pressure. The same might be said about preparation before the hearing. The better prepared you are, the less likely it is that you will become impatient and frustrated. A calm demeanour is particularly important when there are litigants in person, some of whom have mental health issues. If things start to get testy, I frequently use two approaches. The first is to lower my voice which I find can often placate a querulous litigant, most of whom are keen to know what you are saying and thinking no matter how agitated they feel. The second approach is simply to adjourn the proceedings for five or ten minutes and hope that everyone settles down.

53 Patience should encourage appropriate self-restraint. In an inquisitorial hearing, you have no choice but to ask questions but that should be done courteously and ideally with an explanation of the issues to which the questions relate, such as a particular legislative provision. In a more adversarial hearing and where the other party is represented, it is important not to usurp their function in drawing out relevant evidence or to say things which suggest a closed mind which is not open to further persuasion.

54 Generally, most administrative tribunals are not bound by the rules of evidence and they can take steps to obtain material which is not provided by the parties. This is the case, for example, in the Guardianship Division of NCAT in NSW, where Registry officers contact the parties and persons who may be able to assist the Tribunal and collect material, which is then provided to members and parties in a pre-hearing report. It is important that inquisitorial powers are exercised in accordance with procedural fairness requirements which will operate differently

in a tribunal setting to that in a Court. This is illustrated by a case in Victoria[11]. In the course of the hearing of a complaint of professional misconduct by a medical practitioner, a panel of the Medical Practitioners Board of Victoria carried out in private a Google search of the qualifications of a particular person whose expert opinion was relevant to some of the allegations made against the doctor. During the course of the hearing, the panel disclosed the fact of the search, which prompted an application that the panel should recuse itself. It refused to do so. On judicial review, the Court rejected the claim of apprehended bias. It viewed as significant that, having disclosed the fact of the search, the panel subsequently told the parties that its search had confirmed the expert's credentials, which had reassured the panel. This reassurance was seen to be of a positive nature as far as the doctor's rights and interests were concerned. The fact that the disclosure had been made was critical.

55 The importance of a party having their day in "court" cannot be overstated. Bear in mind that in most cases the private individual will not have had prior face to face contact with the primary decision-maker. That relationship will invariably have been conducted by correspondence or over the telephone. That relationship significantly changes if the party has a right to appear before an administrative decision-maker. Then the party has the opportunity to see and engage with the Tribunal decision-maker. The likelihood of a litigant in person accepting that they have had their day in "court" is enhanced if you take the time and effort to ensure that he or she understands the nature of the proceeding and how it is to be conducted. The Full Court of the Federal Court has held that this is an aspect of procedural fairness.[12]

56 How do you handle a litigant in person who either swamps you with voluminous evidence, some or much of it irrelevant to the matter, or who takes up an undue

[11] *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193; 21 VR 29.
[12] See *Shrestha v Migration Review Tribunal* [2015] FCAFC 87; 229 FCR 301.

amount of time in presenting their case orally? One technique is to require the party to put on a concise written statement of their case, limited to say three or five pages, with cross-references to supporting materials. Whether this is permissible will depend upon the relevant legislation applying to your Tribunal. For example, under the PIC's enabling legislation, it is made explicit in s 42 that the guiding principles in matters of practice and procedure is "to facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 42). But it also requires the PIC's practice and procedure to be implemented so as to facilitate the resolution of the issues in a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings (s 42(4)).

57 As to unduly lengthy and unhelpful oral submissions, at the outset of oral addresses I set reasonable timeframes and explain that that is to ensure that all the parties (and other litigants) get a fair go. I then give a ten and five minute warning before the allocated time expires. Do not lose sight of the fact that the fair hearing rule requires the person to be given a **reasonable** opportunity to present their case, not an open-ended one. Your enabling legislation may contain provisions which modify common law fair hearing requirements.

58 Although there may be some circumstances in which it is both appropriate and necessary to assist a litigant in person to understand their procedural rights, it is important to avoid undue interference[13]. Thus in *Edmonds*, in the context of reviewing an arbitrator's conduct in a lengthy telephone conference which resulted in the arbitrator making a substantive determination as to the relevant date of injury, McColl JA said at [109]:

> 109 … It is important in such circumstances that an arbitrator be attuned to the inherent limitations of that medium and ensure that each participant is comfortable with the manner in which the hearing is progressing. It is apparent from the transcript of the March hearing

[13] See *Sullivan v Department of Transport* (1978) ALR 323, 343 per Deane J.

> which I have set out at length earlier in these reasons that both parties were uncertain about the way the Arbitrator was dealing with the matter; indeed that both "felt" they were being steam-rolled, a sentiment which is now manifest in their joinder in common cause on the appeal.

59 What if a litigant in person seeks your recusal based upon the fact that the party has been unsuccessful in earlier proceedings determined by you? As Campbell J's decision in *Banos* illustrates, much will depend upon the basis for the earlier determination. If it relies upon adverse credibility findings against the self-represented person, it would be most unwise for you to hear a subsequent matter. Absent such a finding, however, there is generally no sound basis for recusing yourself merely because you have rejected the earlier case on its merits.

60 Can I say something briefly about conduct in the hearing room? In my experience humour is best avoided altogether or should only be used after appropriate reflection. It can often be counter-productive and suggest that you are not taking the matter seriously. It is also desirable to avoid banter with representatives of a party, particularly a representative of a Government agency. Such banter can give the impression that there is an exclusive club operating from which the unrepresented person is excluded.

61 I now switch to conduct outside the hearing room which can affect impartiality. One issue in the Federal Court, which operates a docket system under which the same judge who hears the matter will normally have case managed it, concerns communications outside the Courtroom with litigants in person. My invariable practice was to require any contact about a matter in which there is a litigant in person to be with the Registry and not directly with my Chambers. Otherwise there is a risk of misunderstanding or miscommunication which can lead to unnecessary and time consuming recusal applications. No doubt some such applications are appropriate, but at other times one has the impression that they are used by some litigants in person, together with an array of other interlocutory

applications, with a view primarily to having the final hearing postponed for as long as possible. Some litigants in person use all available processes to frustrate the important objective of finality in decision-making. The challenge for the decision-maker is to manage and control such conduct while maintaining impartiality and fairness.

62 As the PIC Codes of Conduct acknowledge, social media and email communication are a trap for the unwary and a potential source of major embarrassment, not only for you personally (including where a member of staff for whom you are responsible uses social media inappropriately), but also for the institution which you represent. Let me illustrate that by what happened in the Federal Court. A litigant in person claimed to be entitled to a disability support pension from an earlier date than that which had been allowed. The matter was fixed for a prompt final hearing. Shortly before the hearing date, the litigant in person contacted the Judge's Chambers and said that she wished to discontinue the proceeding. The proceedings were then discontinued by consent, without a hearing. Shortly thereafter the applicant contacted the Judge's Chambers requesting that the discontinuance be withdrawn because she said her previous request was made when she was recovering from surgery and felt overwhelmed. Behind the scenes, there was an exchange of emails between the Judge, his Chambers staff and the Registry. They included an email from the applicant which the Judge forwarded to the Associate with this observation by the Judge:

> "Sigh".

63 Unfortunately, the Judge hit "reply all" and the applicant saw the Judge's comment. The Judge apologised but declined the applicant's request not to publish reasons for judgment. The applicant sent a further email in which she stated that she did not "appreciate being treated like a fool" and that she regarded the email as revealing that the Judge treated "this serious matter as a joke". In

the interests of open justice, all these matters were then revealed in published reasons for judgment, but in which the applicant was given a pseudonym.

64 A recent decision of the Supreme Court of NSW well illustrates the embarrassing difficulties which can be created by a staff member using social media, including before they even take up a position with a Court or Tribunal[14]. The applicant sought the disqualification of the trial judge on the basis of various Facebook posts which the Judge's tipstaff had posted, and one post made by the tipstaff of another judge. The Judge's tipstaff had published various comments and appeared in posts, some of them many years ago, in support of LGBT+ rights. The litigants had diametrically opposed views on that subject. The Judge declined to recuse himself on the basis of the absence of any connection between the Facebook material and the Judge's independence. The Judge said at [38]:

> An alarming and troubling aspect of the present application is the insidious way in which the personal interests and activities of a member of my court staff have become thrust, without any forewarning, knowledge or permission, into the public arena of these proceedings in the guise of what is alleged to be a concern that there is or may be a reasonable apprehension that I may not be impartial. Some members of the community might struggle to make that connection. I count myself among people in that hypothetical group. The significance of anything revealed by the evidence in this case to any issue I have to determine is about as high as it would be if I were deciding a case dealing with the water allocation example I gave earlier and one of the parties discovered that my tipstaff had done work experience on a cotton farm in the basin or was an enthusiastic supporter of downstream wetlands integrity.

The Judge further noted at [40] that he was unable to understand the relevance to the recusal application of a Facebook post made by another judge's tipstaff as there was no evidence that his tipstaff "'liked', commented upon, or endorsed that post in any way".

[14] *Gaynor v Local Court* [2019] NSWSC 516. See generally, Justice Steven Rares, "Speaking the right social media language" (Speech, Council of Australian Tribunals National Conference, 6 June 2019).

65 Social media is not the only mechanism by which your conduct can give rise to questions about impartiality. The following true event is recorded in the 2010-2011 Annual Report of this State's Judicial Commission. A Judge, who was on circuit, was due to conduct a sentencing hearing arising from a motor vehicle accident in which a person had been killed. The night before the hearing the Judge and his staff were dining in a country restaurant. The Judge made certain remarks about the case which were overheard by the deceased's parents, who were seated at the next table. They complained to the Judicial Commission.

66 The Commission asked the Judge to respond. The Judge acknowledged that he had discussed the case and he agreed that he should not have done so. The Commission determined that there was substance in the complaint and that it should not be dismissed. The complaint was referred to the head of jurisdiction to deal with. In his response, the Judge apologised for his action, which apology was then conveyed to the complainants.

Conclusion

67 As PIC members, you have the authority of the State to make decisions which affect people's lives whether they like the outcome or not. It is an enormous power, which has to be exercised responsibly, fairly, lawfully and with appropriate humility. The requirement of impartiality, both in actuality and appearance, is critical. By being impartial you not only protect yourself from embarrassment but you enhance public confidence in the integrity of the PIC's work and functions.

68 I wish you all well in discharging the important powers vested in you.

Justice John Griffiths AJA