

Natural justice: New South Wales cases in a Commonwealth context

1 In *Annetts v McCann*¹ the High Court observed that many interests were now protected by the rules of natural justice than had been the case 30 years previously.² Those expanded areas of interests include:

- The protection of legitimate expectations: *Haoucher v Minister of State for Immigration and Ethnic Affairs*;³ *Heatley v Tasmanian Racing and Gaming Commission*⁴. In *Kioa v West*⁵ Mason J explained that legitimate expectations extend beyond enforceable legal rights provided that they are reasonably based. His Honour added:

“The expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision ... 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 ... or from the existence of a regular practice which the person affected can reasonably expect to continue ... 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.”⁶

- The conduct of public inquiries whose findings of their own force could not affect a person’s legal rights of obligations: *Mahon v Air New Zealand*;⁷ *National Companies & Securities Commission v News Corporation Ltd.*⁸

¹ [1990] HCA 57; 170 CLR 596

² *Annetts v McCann* per Mason CJ Deane and McHugh JJ at 599

³ [1990] HCA 22; 169 CLR 648 at 679-680

⁴ [1977] HCA 39 137 CLR 487

⁵ [1985] HCA 81; (1985) 159 CLR 550

⁶ *Kioa v West* at 583, 29

⁷ 1984 AC 808 at 820

⁸ [1984] HCA 29; (1984) 156 CLR 296 at 315-316; 325-326

- The right of parents to be heard in child neglect cases: *J v Lieschke*.⁹
- Coronial inquiries: *Annetts v McCann*^{10 11}: (where parents were held to be entitled to be heard at the coronial inquest to protect the reputation of their deceased son). In that case, Mason CJ, Deane and McHugh JJ commented that:

“It simply would not have occurred to anyone in the legal profession in 1920 that the common law rules of natural justice applied to an inquiry whose findings could not alter legal rights or obligations.”¹²

- 2 Against the background of this historical development, the High Court noted it was settled law that when a statute conferred a power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words.¹³

Source in the common law or statute?

- 3 *Kioa v West* was decided towards the end of the period to which the High Court referred *Annetts v McCann*. In *Kioa*, Mason J said that the law in relation to administrative decisions:

“... 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

⁹ [1987] HCA 4; (1987) 162 CLR 447

¹⁰ In *Annetts v McCann* the interest sought to be protected was the reputation of the Annetts’ deceased son. This was not a new concept. The protective requirements of natural justice have long extended to the interests of reputation: see *Fisher v Keane* (1879) 11 Ch D 353 at 3362-363.

¹¹ In *Ainsworth v Criminal Justice Commission* the Supreme Court of Queensland had rejected an argument FN natural justice. However, Mason CJ, Dawson, Toohey and Gaudron JJ observed, at 57, that “*the law proceeds on the basis that reputation itself is to be protected*”.

¹² *Annetts v McCann* at [6]

¹³ *Annetts v McCann* at [2]

which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.”¹⁴

4 Brennan J considered that there was “*no free-standing common law right to be accorded natural justice by the repository of a statutory power*”.¹⁵

5 The difference in these two approaches may be of some importance. On Mason J’s approach, where administrative decisions affect rights, interests and legitimate expectations, the question to be asked is not whether the principles of natural justice expand an existing statutory right, but whether the rules of natural justice are excluded by statute. On Brennan J’s view:

“There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power”¹⁶

6 There remains debate as to which of these two approaches is correct. Most judicial references are to the obligation being sourced in the common law. However, in *McGovern v Ku-ring-gai Council*,¹⁷ Spigelman CJ found it unnecessary to consider the:

“... longstanding debate as to whether the requirements of procedural fairness constitute a principle of the common law engrafted, subject to statutory modification, on the exercise of public power or whether the requirements emerge by reason of the proper interpretation of the statute conferring the power. On either basis an impartial and unprejudiced mind is required.”¹⁸

What determines the existence of the obligation, the nature of the proceeding or the nature of the power?

¹⁴ *Kioa v West* at 584 [31]

¹⁵ *Kioa v West* at 610 [11]

¹⁶ *Kioa v West* at 610 [11]

¹⁷ [2008] NSWCA 209; 161 LGERA 170

¹⁸ *McGovern v Ku-ring-gai Council* at [10]

7 The correct answer to this question is that neither necessarily determines whether there is an obligation to accord procedural fairness. However, in more recent caselaw there has been an emphasis on the nature of the power exercised by the decision maker.

8 In *Kioa* Mason J said:

“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, and the rules under which the decision-maker is acting ...”¹⁹

9 However, in *Ainsworth v Criminal Justice Commission*²⁰ Mason CJ, Dawson, Toohey and Gaudron JJ stated that it is the nature of the power which determines whether there is an obligation to accord natural justice. Their Honours said:

“It is now clear that a duty of procedural fairness arises, if at all, because the power involved is one which may ‘destroy, defeat or prejudice a person's rights, interests or legitimate expectations’. Thus, **what is decisive is the nature of the power, not the character of the proceeding which attends its exercise.**”²¹
(Emphasis added)

10 Whether there is a difference in the “*nature of the inquiry*” as stated by Mason J in *Kioa* and the “*character of the proceedings*” is not entirely clear.

11 In *Waqa v Technical and Further Education Commission*,²² Basten JA (Beazley and Giles JJA agreeing) stated that it may be unhelpful to separately determine whether an obligation to accord procedural fairness existed. Rather, it may be appropriate, and sufficient, in a particular case:

¹⁹ *Kioa v West* at 584-585 [32]

²⁰ [1992] HCA 10; (1992) 175 CLR 564

²¹ *Ainsworth v Criminal Justice Commission* at [24] (citation omitted)

²² [2009] NSWCA 213

“... to have regard to the nature of the interests which may be affected, viewed in the light of the relevant statutory scheme, in order to determine the nature and extent of any procedural obligation.”²³

12 Basten JA, in an earlier paragraph, had pointed out that:

“The expanded operation of procedural fairness has depended upon the abandonment of fixed rules, in favour of flexible principles, in three respects:

- (a) the acceptance of ‘interests’ as a sufficient threshold of affectation;
- (b) departure from the requirement that the decision have a final and operative effect on rights, and
- (c) allowing the obligation to have a variable content.”²⁴

13 These principles are well established.^{25 26} Indeed, the words of Mason J in *Kioa v West* continue to toll resoundingly. His Honour said:

“... 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.”²⁷

²³ *Waga v Technical and Further Education Commission* at [49]

²⁴ *Waga v Technical and Further Education Commission* at [46]

²⁵ *R v Commonwealth Conciliation & Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546 at 552-553, where the Court said:

“But it must be borne in mind that these principles are not to be found in a fixed body of rules applicable inflexibly at all times and in all circumstances. Tucker LJ said in *Russell v Duke of Norfolk*: ‘The requirements of natural justice must depend on 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.’ This passage was approved by the Privy Council in *University of Ceylon v Fernando*, and was used by Kitto J in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*. There his Honour observed: ‘What the law requires in the discharge of a quasi-judicial function is judicial fairness ... What is fair in a given situation depends upon the circumstances.’ We agree with the foregoing statements of the relevant law.” (Citations omitted)

²⁶ In *National Companies & Securities Commission v News Corporation Ltd* Mason, Wilson and Dawson JJ observed, at 320, that this statement of Tucker LJ had been adopted in subsequent cases: *Wiseman v Borneman* [1971] AC 297; *Furnell v Whangarei High Schools Board* [1973] AC 660 at 679; *Salemi v MacKellar* [No 2] [1977] HCA 26; (1977) CLR 396

²⁷ *Kioa v West* at 584-585 [33]

- 14 The emphasis on the nature of the power being exercised was of importance in *Waqa v Technical and Further Education Commission*. That case involved a teacher at a TAFE College who became subject to “*remedial action*” as a result of certain deficiencies in the performance of her duties. “*Remedial action*” was of a lower order than disciplinary action and included mentoring and monitoring of a person’s conduct and performance.
- 15 The trial judge had held that because there was a statutory requirement that procedural fairness be accorded prior to disciplinary action being taken, but no such statutory obligation in relation to remedial action, there was no requirement to accord procedural fairness prior to remedial action being implemented. The New South Wales Court of Appeal held that approach was erroneous.
- 16 A similar error had been committed by the appellate court in *Heatley v Tasmanian Racing and Gaming Commission*.²⁸ In that case, Aickin J remarked:

“The judgments of the majority in the Court below err in my opinion in placing too much emphasis upon the administrative and non-judicial character of the Commission and its functions and in drawing from the presence in other parts of the Act of express procedures with respect to hearings and the like in relation to the licensing of bookmakers, clubs and racecourses, an inference that where other powers are given to the Commission no such requirements are to be implied.”²⁹

- 17 I referred earlier to myths and mistakes. Trial judges are frequently led into false territory by parties seeking either to bring themselves within or without the relevant principles. The ‘error’ made by the trial judge in

²⁸ [1977] HCA 39; (1977) 137 CLR 487

²⁹ *Heatley v Tasmanian Racing and Gaming Commission* at 512-513 [36]

*Castle v Director General State Emergency Service*³⁰ was a finding that natural justice only needed to be accorded where the exercise of a power would potentially affect the rights, interests or legitimate expectations “*in a direct and immediate way*”. That language derives from the qualification to the obligation to accord procedural fairness, made by Mason J in *Kioa v West*, where his Honour said:

“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.’³¹

18 Of this qualification, Basten JA said:

“This statement of principle must be applied with due regard to the underlying concepts. Thus, one limitation on the operation of the duty to accord procedural fairness arises from the need to identify the obligation by reference to an individual or class of persons. The obligation must be capable of identification and fulfilment, in a reasonable and practical sense, prior to the making of the decision. Some guidance may be obtained by asking whether it was reasonable to expect the officer exercising a particular power to identify, in advance, the applicant as a person whose rights or interests may be affected and the way in which the proposed affectation would occur. The larger the class of persons reasonably expected to be affected, the less the likelihood that procedural fairness will be attracted and, if it is, the lower the likely content of the duty. Similarly, even though the class of those affected may be small, the duty is less likely to be attracted if membership of the class is variable and not readily ascertained: see, eg, *Comptroller-General of Customs v Kawasaki Motors Pty*

³⁰ [2008] NSWCA 231

³¹ *Kioa v West* at 584

Ltd (No. 1) [1991] FCA 519; 32 FCR 219 at 240-241 (Hill and Heerey JJ).³²

- 19 Although the character of the proceedings may attract less emphasis in determining whether there is an obligation of procedural fairness, it still has relevance in relation to determining the content of the obligation. This is particularly true of the content of the obligation as it applies to court proceedings.
- 20 Campbell JA (Giles and Hodgson JJA agreeing) adverted to this in *Adamson v Ede*³³ when he observed that High Court discussion of Chapter III of the Constitution had emphasised the fundamental role of natural justice in exercising judicial power.^{34 35}
- 21 The end served by procedural fairness in the judicial system is the entitlement of a person to a fair trial.³⁶ In *Adamson v Ede* Campbell JA noted that many of the procedural rules of courts are founded in procedural fairness. He instanced the system of pleadings;³⁷ and rules requiring service of process.³⁸

³² *Castle v Director General State Emergency Service* AT [6]

³³ [2009] NSWCA 379

³⁴ *Adamson v Ede* at [55]

³⁵ See *Harris v Caladine* (1991) 172 CLR 84 at 150 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 per Gaudron J; *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ, 502 per Gaudron J; *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 76 [63]-[64] per Gummow, Hayne and Crennan JJ; *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51 at 116 per McHugh J.

³⁶ *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141

³⁷ *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517 per Isaacs and Rich JJ; *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-7 per Mason CJ and Gaudron J, 293 per Dawson J.

³⁸ *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J (approved in *Taylor v Taylor* (1979) 143 CLR 1 at 4 per Gibbs J, with whom Stephen J agreed); *Craig v Kanssen* [1943] KB 256 at 262. So is the rule in *Browne v Dunn* (1894) 6 R 67; *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 16 per Hunt J; *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [188] per Basten JA; *Archer v Richard Crookes Constructions Pty Ltd* (1997) 15 NSWCCR 297 (NSWCA) at 303-4 per Mason P and Beazley JA (with whom Meagher JA agreed); *Raben Footwear Pty Ltd v Polygram Records Inc* (1997) 75 FCR 88 (FC) at 101 per Tamberlin J (applied in *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 (FC) at 244 per Northrop, Ryan and Merkel JJ); *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR

- 22 The issue in *Adamson v Ede* was whether the appellant was entitled to be warned by the trial judge prior to an adverse credit finding being made. That argument was dismissed by the New South Wales Court of Appeal, as was an application to adduce further evidence that the appellant said he would have tendered, had he been aware that an adverse credit finding was to be made. However, it is the trial process itself which fulfils the obligation of procedural fairness. There is no “*second go*” where an adverse finding is made. The position is different, however, if the trial judge has denied a party the benefits of procedures to which the party is entitled in the ordinary course of the proceedings.³⁹
- 23 It is convenient at this point to also refer to *Commissioner of Police v Tanos*,⁴⁰ a case involving the *Disorderly Houses Regulations* 1943. The Regulations provided that a judge could make a declaration immediately and ex parte upon reasonable grounds having been shown by the affidavit of a police officer; or, if the judge considered an opportunity to be heard should be given to those who own or run the disorderly house, the affidavits should be served and an opportunity to be heard should be given. The High Court held that in such a case, other than in exceptional or special circumstances, the proper approach was to adopt the procedure that accorded procedural fairness.

Natural justice and bias

- 24 “*Bias*” as a breach of the obligation to accord procedural fairness is well established. Bias has two facets, actual bias and apprehended bias. The

551 at 556 per Clarke JA (with whom Priestley and Meagher JJA relevantly agreed); *Government Insurance Office (NSW) v Foot* (1990) 12 MVR 455 (NSWCA) at 458 per Kirby P (with whom Priestley and Meagher JJA agreed).

³⁹ *Ex parte Fealey* (1897) 18 NSWLR (L) 282 at 288

⁴⁰ (1958) 98 CLR 383 at 39 per Dixon CJ and Webb J (with whom Taylor J agreed)

long-accepted test in Australia of apprehended bias is found in *Livesey v New South Wales Bar Association*⁴¹ where the High Court said:

“[The] principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public **might** entertain a reasonable apprehension that [the judge] **might** not bring an impartial and unprejudiced mind to the resolution of the question involved in it.”⁴² (Emphasis added)

25 Most cases of bias relate to apprehended bias, because of the singularly lower threshold that needs to be established.

26 In *Minister for Immigration v Jia Legeng*⁴³ a question arose whether the Minister’s decision to cancel Mr Jia’s visa was vitiated due to apprehended bias. The case had been conducted in the Federal Court on the basis of actual bias. The bias arose out of statements by the Minister in a radio interview. It was an agreed fact in the Federal Court that the Minister held the following opinions:

- “1. That ‘most Australians would find it difficult to reconcile a six and a half year jail sentence for rape with a finding by a Deputy President of the [Tribunal] that the person concerned is of good character’.
2. That ‘this latest [Tribunal] decision has essentially rejected the court’s finding of culpability by finding Mr Jia’s behaviour leading to the offences justifiable because of the rape victim’s conduct towards him and his own reasonable or unreasonable feelings of jealousy’.
3. That ‘the government is concerned about the emerging trends for tribunals to discount the importance the government attaches to character issues’.”⁴⁴

27 This case is notable for the clear distinction drawn between bias as it affected judicial decision-making and administrative decision-making. In this regard, Gleeson CJ and Gummow J referred to the High Court’s

⁴¹ [1983] HCA 17; (1983) 151 CLR 288

⁴² *Livesey v New South Wales Bar Association* at 293-294

⁴³ [2001] HCA 17; (2001) 205 CLR 507

⁴⁴ *Minister for Immigration v Jia Legeng* at [15]

statement in respect of procedural fairness and apprehended bias in *Ebner v Official Trustee in Bankruptcy*.⁴⁵

28 Their Honours concluded:

“There was a measure of artificiality about categorising the complaint against the Minister as bias. There is an even greater measure of artificiality about treating the rules of natural justice, and the legislation, as requiring the Minister, in exercising his powers under ss 501 and 502, to avoid doing or saying anything that would create an appearance of a kind which, in the case of a judge, could lead to an apprehension the subject of the apprehended bias rule.

The Minister was obliged to give genuine consideration to the issues raised by ss 501 and 502, and to bring to bear on those issues a mind that was open to persuasion. He was not additionally required to avoid conducting himself in such a way as would expose a judge to a charge of apprehended bias.”

Natural justice: New South Wales cases in a Commonwealth context

A discussion of common themes and issues, and a consideration of the resonance which exists in terms of natural justice principles across Australian administrative law as a whole

29 The purpose of these (somewhat lengthy) introductory remarks is to refresh our collective memories as to some basic principles and to perhaps remind ourselves, as was apparent in *Waga v Technical and Further Education Commission*, that old myths and errors still abound. A review of the intermediate appellate case law around Australia indicates that questions of procedural fairness continue to arise in what now might be referred to as “*traditional areas*”: that is, in respect of the obligations on courts, tribunals and statutory authorities and, in particular, what the content of the rule requires in particular circumstances. The cases

⁴⁵ [2000] HCA 63; (2000) 205 CLR 337 at 343-344 [4]

referred to in the appendix provide a brief overview of the types of issues that have arisen and the decision-making body concerned.

- 30 For today's purposes, however, I propose to focus on two cases that are of particular interest: *Stewart v Ronalds*⁴⁶ and *McGovern v Ku-ring-gai Council*.

Stewart v Ronalds

- 31 *Stewart v Ronalds* arose out of an allegation of misbehaviour by a Minister of State. Such allegations are not new and tend to be sprayed around all forms of media for days, if not weeks, to the titillation of the general public. New South Wales has had its fair share of such matters. Lawyers, of course, are above the scuttlebutt, concerned only with the serious principles of law that such matters eventually engage. *Stewart v Ronalds* was such a case.
- 32 A staff member of the Hon Anthony Stewart made an allegation that, at a Garvan Institute of Medical Research fund raising dinner, the Minister had berated her; told her she was "not up to" her job as a policy adviser for cancer; told her she was going to be demoted and placed his hand on her knee for a few moments as she attempted to leave the table.
- 33 The staff member subsequently complained to the Department of the Premier and Cabinet. Mr Stewart denied the allegations of improper conduct and the Premier decided to have an inquiry conducted into the allegations.
- 34 Chris Ronalds SC, an expert in discrimination and employment law, was appointed to conduct the inquiry. Neither her retainer nor what she was

⁴⁶ [2009] NSWCA 277

retained to do was founded in statute. It was a purely private engagement of a barrister to inquire into the allegations and report to the Premier. In the performance of that private task, Ms Ronalds interviewed Mr Stewart and the staff member. She accepted as true the allegations made by the staff member and reported to the Premier that the incident as alleged had occurred; that the conversation Mr Stewart had initiated about the staff member's work performance was inappropriately raised in a social context; and that he had physically restrained the staff member against her will, albeit only for a few moments. Mr Stewart was subsequently removed from his Ministerial position.

- 35 Mr Stewart brought proceedings seeking declaratory relief to the effect that he was both entitled to be afforded, and was denied, natural justice: (i) by the first defendant, before making any findings for the purposes of her report; and (ii), the Premier and the Lieutenant-Governor, before withdrawing Mr Stewart's commissions as a Minister of State. There was also a claim against Ms Ronalds in negligence.
- 36 The proceedings were transferred to the Court of Appeal for determination of the following questions of law:
1. Whether the decisions of Ms Ronalds, the Premier and the Lieutenant-Governor could be subject to judicial review?
 2. If so, was Mr Stewart owed a duty of natural justice by Ms Ronalds, the Premier or the Lieutenant-Governor?
 3. Did Ms Ronalds owe the Mr Stewart a duty of care at common law?

4. Do the claims impermissibly seek to call into question the contents of the report of Ms Ronalds in a manner inconsistent with parliamentary privilege and Article 9 of the Bill of Rights 1688?

37 The questions were answered as follows:

1. The decisions of the Premier and the Lieutenant-Governor were not amenable to judicial review.
2. It followed that the Premier and the Lieutenant-Governor did not owe a duty of natural justice to Mr Stewart.
3. The proceedings against Ms Ronalds were remitted to the Administrative Law list for hearing.

38 The concern of this paper is with the natural justice question.

The natural justice question

Decision of the Premier and the Lieutenant-Governor

39 The question whether the Premier and the Lieutenant-Governor owed an obligation of procedural fairness before removing Mr Stewart as a Minister, it depended upon whether the decision was judicially reviewable. That required identifying the source of the power that was exercised. The authorities have recognised that the exercise of a power under statute by a representative of the Crown may in some circumstances be reviewable.⁴⁷

⁴⁷ In *Stewart v Ronalds* the Court of Appeal did not consider the place of judicial review of decisions outside the exercise of statutory power: at [40]

⁴⁸ In this case, the removal of Mr Stewart from office was pursuant to statute: the *Constitution Act 1902*, ss 35C and 35E.⁴⁹

40 The source of the power having been identified, the task then became to determine the indicia that made the exercise of a power under statute reviewable. In that regard, Allsop P identified as the central consideration the suitability of the subject for judicial assessment. In particular, his Honour observed that it was necessary to ascertain whether the legitimacy of the decision depended on legal standards, or whether the decision was made by reference to political considerations.⁵⁰ That task involved an identification of the controversy and, in particular, the character and the limits of the controversy. Allsop P provided two examples of potentially justiciable controversies: (i) where proprietary or other vested rights on an individual are affected by the decision sought to be impugned; and (ii) where the presence of standards are capable of being assessed legally. His Honour observed that, however, no general principle is discernable.⁵¹

41 Allsop P characterized the complaint made by Mr Stewart as being directed to how the Premier came to the personal view that he had lost confidence in Mr Stewart to continue as a Minister in the Government. So

⁴⁸ See *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; 151 CLR 170; *FAI Insurances v Winneke* [1982] HCA 26; 151 CLR 342; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

⁴⁹ The *Constitution Act 1902*, provides:

“35C Members of the Executive Council

- (1) The Executive Council shall consist of such persons as may be appointed by the Governor, from time to time, as members of the Executive Council.
- (2) The members of the Executive Council shall hold office during the Governor’s pleasure.
- (3) The Governor may appoint one of the members of the Executive Council as Vice-President of the Executive Council.

...

35E Appointment of Ministers

- (1) The Premier and other Ministers of the Crown for the State shall be appointed by the Governor from among the members of the Executive Council.
- (2) The Premier and other Ministers of the Crown shall hold office during the Governor’s pleasure.”

⁵⁰ *Stewart v Ronalds* at [42].

⁵¹ *Stewart v Ronald* at [43]

identified, the matter was political. It was not for the courts to scrutinise the substance of the Premier's advice to the Lieutenant-Governor in respect of the composition of the Ministry. That was a function of Parliament and through it the people of New South Wales. Allsop P considered that this view was reinforced by the notion that a Minister held office "*at the Governor's pleasure*".

- 42 As the decision was not reviewable, there was no obligation to afford procedural fairness.

Was Ms Ronalds, as the person conducting the inquiry, required to afford procedural fairness?

- 43 The following propositions are to be discerned from the judgment in the Court's consideration of this question:
1. The requirement to afford procedural fairness is sourced in the common law. (This, in effect, is an adoption of Mason J's view in *Kioa*.)
 2. Notwithstanding that the source of the obligation is sourced in the common law, the obligation to afford a party natural justice, as found in the caselaw, depends upon a statutory exercise of power, or upon the rules of the organisation exercising a power affecting rights.⁵²
 3. The common law does not impose any general obligation of natural justice before publishing material which is defamatory. Defamatory publications are the province of the law of defamation.
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4. However, where a person has been given a power, by or under statute, or by contract or consensual compact, an obligation to give natural justice will arise, where the exercise of the relevant power may prejudice “a person’s rights, interests or legitimate expectations”. A person’s reputation is a right for this purpose.⁵³
 5. In circumstances where a person does not owe a duty of care, but nonetheless the outcome of the task undertaken (such as the inquiry here) is likely to have an adverse effect on the person concerned, the person may have a public law remedy.⁵⁴
 6. Such a duty may be owed notwithstanding that the person is not acting pursuant to a statutory authority or any rules that could be interpreted as requiring natural justice to be afforded.⁵⁵
- 44 Hodgson JA considered that support for this last proposition might be found in *Fisher v Keane*⁵⁶ (which involved an expulsion from a private club), where Jessel MR said:

“... according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, [they ought not] to blast a man’s reputation for ever – perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.”

(This passage was cited with approval by Mason, Dawson, Toohey and Gaudron JJ in *Ainsworth v Criminal Justice Commission*.)

⁵² *Stewart v Ronalds* per Handley AJA at [131]-[132]

⁵³ *Ainsworth v Criminal Justice Commission* at 578

⁵⁴ *Chapman v Luminis (No 4)* [2001] FCA 1106; 123 FCR 62; *Stewart v Ronalds* per Hodgson JA at [109]

⁵⁵ *Stewart v Ronalds* per Hodgson JA at [111]

⁵⁶ (1879) 11 Ch D 353 at 362-363

- 45 Hodgson JA also suggested that support was to be found for the proposition (in (6) above) in the judgment of Mason J in *Kioa v West*,⁵⁷ where his Honour stated that there was a common law duty to act fairly in the making of administrative decisions which affect rights, subject only to a clear manifestation of a contrary statutory intention.
- 46 The Court did not reach a concluded view on the question whether Ms Ronalds was required to afford procedural fairness to Mr Stewart before reporting to the Premier. The arguments against any requirement of procedural fairness were these:
- The inquiry and reporting were an investigatory function to inform a decision-maker (the Premier) who owed no duty of procedural fairness.
 - The inquiry and reporting were not founded on any statutory provision, thus, there was no source to give rise to the legal doctrine.
 - Mr Stewart held high office, at the Governor's pleasure, in effect subject to his fate in the ebb and flow of politics.
 - There was no factual or legal basis to conclude that any "*legitimate*" or "*reasonable*" expectations might give rise to a duty to afford procedural fairness.
 - To investigate the operation of procedural fairness in the conduct of the inquiry would involve, or risk involving, the Court in the weighing

⁵⁷ The question whether natural justice should have been accorded to a party is sometimes addressed in terms whether there was duty to do so. That was the language used in *Ainsworth v Criminal Justice Commission* and *Stewart v Ronalds*.

on truly political questions, a process which the Court should avoid, as not part of its function.⁵⁸

47 The emphasis in these arguments put on behalf of the State (representing the interests of the Premier and the Lieutenant-Governor) on the need for the existence of a statutory provision to attract the principles of procedural fairness was a reflection of Brennan J's view in *Kioa v West*, referred to earlier.⁵⁹ However, each of the members of the Court preferred the approach that the obligation was founded in the common law.

48 A case such as *Stewart v Ronalds* might be an example where the source of the obligation is relevant, contrary to the view expressed by Spigelman CJ in *McGovern v Ku-ring-gai Council*. That this might be so is apparent from the observation of Allsop P, where his Honour said:

“The place of the common law as the source of the principles of procedural fairness and the role of the declaration can provide real protection to individuals against the exercise of functions or powers which have the capacity to injure reputation and standing.”⁶⁰

49 His Honour then posed the question for determination in a case such as that brought against Ms Ronalds:

“... to what extent should such principles bind a private individual conducting a retainer in the absence of public power or of any contractual or associative obligations between the individual and the person whose reputation could be harmed?”⁶¹

⁵⁸ *Stewart v Ronalds* at [61]-[66]

⁵⁹ His Honour maintained this view, see for example, *Annetts v McCann* at 605 and *Ainsworth v Criminal Justice Commission* at 583-586.

⁶⁰ *Stewart v Ronalds* at [74]

⁶¹ *Stewart v Ronalds* at [74]

- 50 In the result, the Court did not express a view, let alone determine the question, as it considered the staff member who made the complaint had a possible interest and she was not a party to the proceedings.

McGovern v Ku-ring-gai Council

- 51 *McGovern v Ku-ring-gai Council* involved the intersection of the rules of natural justice and apprehended bias in respect of the planning processes of a local council. The settled principles that govern the question whether there has been apprehended bias were reaffirmed. However, there were two matters of particular interest. The first was what constitutes ‘pre-judgment’ for the purposes of the bias rule. The second was what happens when some, but not all, members of a decision-making body are affected by bias.

- 52 On 11 October 2005, Ku-ring-gai Council (the Council) granted consent by a 7-3 majority to a development application made by Mrs Allan for proposed additions and alterations to her property. The McGoverns, Mrs Allan’s neighbours, objected to the development application. Consent was granted and the McGoverns brought class 4 proceedings in the Land and Environment Court, challenging the validity of the consent. They also sought orders to restrain Mrs Allan from carrying out the development.

- 53 The allegations of bias and breach of the obligation of procedural fairness was pleaded in these terms:

“65A Further or in the alternative two councillors who resolved to approve the 2005 DA were biased and should not have voted at the Council meeting on 11 October 2005.

Particulars

- (i) Councillor A Ryan had unequivocally committed herself to vote in favour of the 2005 DA prior to the meeting

- notwithstanding the merits of any objection that may have been made to the 2005 DA.
- (ii) Councillor N Ebbeck had unequivocally committed himself to vote in favour of the 2005 DA prior to the meeting notwithstanding the merits of any objection that may have been made to the 2005 DA.
- 65B Further and in the alternative, the decision of the Council to approve the 2005 DA involved a breach of the rules of procedural fairness.

Particulars

The Council did not disclose to the applicants and there was otherwise an apprehension of bias arising from:

- (i) the contents of the emails exchanged between Mark Allen and Councillors Ryan and Ebbeck, and Council officer Miocic
- (ii) the communications directed by Mark Allen to Councillor Hall in an endeavour to persuade him to change his vote between 20 September 2005 and 11 October 2005
- (iii) the conduct of a second site meeting involving a number of the councillors on or about 29 September 2005
- (iv) the proposal of Council officer Miocic that the challenge by the applicants to the decision to grant the 2004 DA be rendered otiose by the Second Respondent lodging a new development application which would be dealt with quickly and, as best he could procure, be approved and the 2004 DA then surrendered.”

54 In the Land and Environment Court, Pain J dismissed the application. She also ordered that the appellants pay the respondent’s costs of the proceedings. The appeal was against the costs decision. However, that involved the Court of Appeal determining whether there was any underlying error in her Honour’s principal judgment.⁶²

55 Relevant to the subject matter of this paper, the issues for determination on the appeal were whether:

⁶² The Court of Appeal held that Pain J had applied the wrong test of apprehended bias. Pain J stated the test in terms: ‘The correct test is whether a hypothetical bystander **would** reasonably apprehend that the decision maker **would** not be open to persuasion’ (emphasis added). The correct test is, ‘whether a

- (i) the trial judge committed legal error in imposing too high a test of reasonable apprehension of bias;
- (ii) the conduct of Councillors Ryan and Ebbeck created a reasonable apprehension of bias;
- (iii) if so, whether that invalidated the Council's decision;
- (iv) whether there was a reasonable apprehension of bias on the part of a Council officer, Mr Miodic, who was responsible for a report recommending that the Council give consent to the development application.

56 The Court of Appeal was constituted by Spigelman CJ, Basten and Campbell JJA. Given some difference of emphasis in the judgments, I propose to examine the reasons of each on the question of bias.

57 Before turning to those judgments however, a number of propositions can be (re)stated.

- (a) The test for apprehended bias is as set out above at [*22].
- (b) That test applies to statutory decision makers as it does to judicial decision makers.
- (c) Consent authorities exercising powers under planning legislation are subject to the rule, subject only to the doctrine of necessity and any statutory modification of the rule.⁶³

hypothetical bystander **might** reasonably apprehend that the decision maker **might** not be open to persuasion'.

⁶³ *McGovern v Ku-ring-gai Council* per Spigelman CJ at [2]

- (d) Notwithstanding that the test for apprehended bias is the same for judicial decision makers and statutory decision makers, the approach to the application of the test is not.

58 This last consideration is of fundamental importance. It was dealt with in *Minister for Immigration v Jia Legeng* where Hayne J said:

“[179] Importantly, the rules about judicial prejudice recognise that, subject to questions of judicial notice, judges, unlike administrators, must act only on the evidence adduced by the parties and must not act upon information acquired otherwise. No less importantly, the rules about judicial prejudice proceed from the fundamental requirement that the judge is neutral. That requirement for neutrality is buttressed by constitutional and statutory safeguards. Those safeguards include not only the provisions for security of terms of office and remuneration but also extend to statutory provisions prohibiting interference with the course of justice. A judge can have no stake of any kind in the outcome of the dispute. The judge must not ‘[descend] into the arena and ... have his vision clouded by the dust of the conflict’. The central task and, it may be said, the only loyalty, of the judge is to do justice according to law.

[180] Decisions outside the courts are not attended by these features. Reference need only be made to a body like the Refugee Review Tribunal established under Pt 7, Div 9 of the *Migration Act 1958* (Cth) to show that this is so. The procedures for decision-making by that body are much less formal than those of a court. There is no provision for any contradictor and the procedures are, therefore, not adversarial. The decision-maker has little security of tenure and, at least to that extent, may be thought to have some real stake in the outcome. The decision-maker, in a body like the Refugee Review Tribunal, will bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or formed in the course of deciding other applications. A body like the Refugee Review Tribunal, unlike a court, is expected to build up ‘expertise’ in matters such as country information. Often information of that kind is critical in deciding the fate of an individual's application, but it is not suggested that to take it into account amounts to a want of procedural fairness by reason of prejudice.

[181] 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. It is trite to say that the content of the rules of procedural fairness must be 'appropriate and adapted to the circumstances of the particular case'. What is appropriate when decision of a disputed question is committed to a tribunal whose statutorily defined processes have some or all of the features of a court will differ from what is appropriate when the decision is committed to an investigating body. Ministerial decision-making is different again."⁶⁴

59 Spigelman CJ expressed the same point in *McGovern v Ku-ring-gai Council*:

"Lawyers are, understandably, susceptible to approaching such issues, when they arise in the context of a statutory power, by treating judicial decision-making as some kind of paradigm, departures from which have to be explained or even justified by reason of the particular statutory power or decision-making body. In my view this is an incorrect approach. The case law on judicial decision-making is not a starting point when determining the application of the apprehended bias test in a specific statutory context. The statute must be part of the assessment from the outset and not treated as some kind of qualification of a prima facie approach."⁶⁵

60 His Honour stated that the apprehended bias test as it applies to a statutory decision-maker requires consideration of:

- (a) the statutory functions being performed; and
- (b) the identity and nature of the decision maker.

61 His Honour noted that the content of what the test requires will vary depending upon these factors and will often involve a question of statutory interpretation.⁶⁶

⁶⁴ *Minister for Immigration v Jia Legeng* at [179]-[181]

⁶⁵ *McGovern v Ku-ring-gai Council* at [6]

⁶⁶ *McGovern v Ku-ring-gai Council* at [6]

62 Put another way, the question of apprehended bias in the case of a statutory decision maker is context laden. As explained by Spigelman CJ, this requires an understanding of two matters:

- “^o What is the process involved in ‘resolving the question’ that the decision-maker ‘is required to decide’.
- ^o What may constitute an absence of ‘impartiality’ or lack of ‘prejudice’ in the mind of the decision-maker?”⁶⁷

63 This statement, that is, what constitutes “*an absence of impartiality*”, derives from the observation of Hayne J in *Minister for Immigration v Jia Legeng* that it is necessary to inquire as to “*what kind or degree of neutrality (if any) is to be expected of the decision-maker*”.⁶⁸ The question then becomes: what might a “*fair minded lay observer ... reasonably apprehend*” as to the above two matters.

64 As *McGovern v Ku-ring-gai Council* demonstrated, it is important to distinguish between the individuals whose conduct was said to have given rise to an apprehension of bias and the decision maker, who was the collective body of the Council. There were thus two distinct questions to be considered:

1. Whether either of the two councillors whose conduct is in question has committed what is generally referred to as an act of “*pre-judgment*”.
2. The second and quite distinct issue, even if the answer to the first question is yes, is whether the decision-making process is invalidated in circumstances where the votes of those two councillors were not essential to the final decision taken.

⁶⁷ *McGovern v Ku-ring-gai Council* at [9]

⁶⁸ *Minister for Immigration v Jia Legeng* at [187]

65 As Spigelman CJ pointed out, the appellants had to succeed on both, because it is the apprehension of bias in the decision maker which vitiates a decision.⁶⁹ However, in this case, the only relevant conduct was that of the two councillors. In looking at that conduct, his Honour turned his attention to the difference between pre-judgment and conflict of interest.

66 His Honour characterised pre-judgment as a mind not open to persuasion. That did not mean that a decision-maker was required to approach the relevant decision making process without any pre-considered view or position: see *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* where it was said that a “fair and unprejudiced” mind:

“... is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.”⁷⁰

Rather, the inquiry is: was the decision maker capable of being persuaded? Thus, there will be pre-judgment where the already held opinion is of such an “extent” that contrary representations “*would be futile*”.⁷¹ Spigelman CJ considered that a like approach had been taken by the High Court in *Minister for Immigration v Jia Legeng*.⁷²

⁶⁹ *McGovern v Ku-ring-gai Council* at [4]

⁷⁰ *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* at 554

⁷¹ *Old St Boniface Residents Association v Winnipeg (City)* [1990] 3 SCR 1170. Other expressions used in that case were: an ‘*expression of final opinion ... which cannot be dislodged*’ (at 1197f); the position of the person must be ‘*incapable of change*’ (at 1197g).

⁷² See the joint judgment of Gleeson CJ and Gummow J: was the decision-maker ‘*open to persuasion*’ (at [71] and [105]); was the ‘*conclusion already formed [is] incapable of alteration, whatever evidence or arguments may be presented*’ (at [72]); and the judgment of Hayne J where the decision maker will apply the already formed opinion ‘*without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case*’ (at [185]). His Honour went on to refer to the test terms of whether ‘*the evidence will be disregarded*’ (at [186]). See also *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; 170 CLR 70 per Gaudron and McHugh JJ

67 Spigelman CJ concluded that the “*open to persuasion*” test is an appropriate formulation for bias by pre-judgment, to which the dual “*might*” test of apprehended bias must be applied; that is, whether an independent observer might reasonably apprehend that the decision-maker might not be open to persuasion.⁷³

68 His Honour then went on to consider the distinction between pre-judgment and conflicts of interest. He identified two relevant differences:

1. First, there is a different analysis as to the relationship (reasonably perceived) between the interest and the decision. In a pre-judgment case it is necessary to consider the degree of ‘closure’ of the allegedly closed mind. Where a relevant conflict of interest is established the reasonable apprehension follows almost as of course.
2. Secondly, in a conflict of interest case, even where the conflicted person is not the sole decision maker, the statutory requirements of a valid decision-making process have not been complied with or an adverse conclusion of what an independent observer might believe would more readily be drawn.⁷⁴

69 The difference is clearly explained in *Old St Boniface Residents Association* per Sopinka J:

“I would distinguish between the case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory

⁷³ *McGovern v Ku-ring-gai Council* at [23]

⁷⁴ *McGovern v Ku-ring-gai Council* at [27]

or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest ... Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.”⁷⁵

- 70 The importance of drawing this distinction in *McGovern v Ku-ring-gai Council* was that being a case of pre-judgment (arguably) of two of the constituent members of the decision-making body, it was necessary to determine whether there was thereby a reasonable apprehension of bias of the decision maker. The decision maker was the collective body of the elected Council.
- 71 At the heart of the appellant’s case was what Spigelman CJ described as the “*rotten apple in the barrel test*”, that is, where the conduct of one or more of a collective decision-making body gave rise to an apprehension of bias in respect of that individual(s), there was an apprehension that the decision of the whole might be “*infected*”.⁷⁶ Spigelman CJ rejected that approach, notwithstanding finding some support for it in the obiter remarks of Gummow J in *IW v The City of Perth*⁷⁷ and *Halsbury’s Laws of England*.⁷⁸ Rather, his Honour considered that a “*but for*” test should be applied, that is, “*the court should ask whether or not the person(s) reasonably suspected of prejudgment decided the outcome*”.⁷⁹ That inquiry could usually be satisfied by counting the votes.
- 72 By way of conclusion, Spigelman CJ said that there is no deviation from the true course of decision making where one or more members of a

⁷⁵ *McGovern v Ku-ring-gai Council* at [29]

⁷⁶ *McGovern v Ku-ring-gai Council* at [31]

⁷⁷ [1997] HCA 30; 191 CLR 1

⁷⁸ (1989) vol 1(1), *Administrative Law*, 4th ed

⁷⁹ *McGovern v Ku-ring-gai Council* at [45]

collegial body considers the evidence and comes to a firm view in advance of the other members and in advance of the final decision.

- 73 A different approach was taken by Basten JA on this last question. However, he was of the same view as Spigelman CJ in respect of conflicts of interest as compared to allegations of pre-judgment.⁸⁰
- 74 The matter upon which his Honour differed from the Chief Justice was whether the decision of the collective body would be vitiated by an apprehension of bias of one or more of its members. His Honour concluded that the collective decision may be vitiated, even though the vote of the member was not decisive, as the decision-making process **may have been tainted**.⁸¹
- 75 His Honour drew support for this view from Mahon J in *Meadowvale Stud Farm Ltd v Stratford County Council*,⁸² who in turn had cited with approval the comment of Megarry J in *John v Rees*:⁸³

“It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. ‘When something is obvious’, they may say, ‘why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change”⁸⁴

and from the well-known statement of Deane J in *Kioa v West*:

⁸⁰ *McGovern v Ku-ring-gai Council* at [71]

⁸¹ *McGovern v Ku-ring-gai Council* at [103]

⁸² [1979] 1 NZLR 342

⁸³ [1970] Ch 345

⁸⁴ *John v Rees* at 402

“Clearly enough, the mere circumstance that there is no apparent likelihood that the person directly affected could successfully oppose the making of a deportation order neither excludes nor renders otiose the obligation of the administrative decision-maker to observe the requirements of procedural fairness. Indeed, the requirements of procedural fairness may be of added importance in such a case in that they ensure an opportunity of raising for consideration matters which are not already obvious.”⁸⁵

See also *Re Refugee Review Tribunal; Ex part Aala*.⁸⁶

- 76 His Honour’s conclusion that the apprehended bias of some members of a collective decision maker may (not must or will) vitiate the result acknowledged that there may be cases where the apprehended bias could have no bearing on the outcome: see *Stead v State Government Insurance Commission*.⁸⁷ An applicant who agrees he or she could have said nothing if afforded an opportunity, has suffered no material injustice: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*.⁸⁸
- 77 Campbell JA did not reach a concluded view on the question whether, if the two councillors met the legal test for reasonable apprehension of bias, the decision of the Council was thereby vitiated.⁸⁹ Rather, his Honour approached the determination of the case on the assumption that that was so.
- 78 His Honour’s research⁹⁰ took him to an overview of both tribunal and non-tribunal cases. Insofar as tribunal cases are concerned, his Honour observed that there were a multitude of decisions where it was held that

⁸⁵ *Kioa v West* at [63]

⁸⁶ [2000] HCA 57; (2000) 204 CLR 82

⁸⁷ at 145-6

⁸⁸ [2003] HCA 6; (2003) 214 CLR 1; (2003) 195 per Gleeson CJ at [36]-[38], McHugh and Gummow JJ at [106]; Hayne J at [114]-[122]; and Callinan J at [149]

⁸⁹ *McGovern v Ku-ring-gai Council* at [237]

⁹⁰ *McGovern v Ku-ring-gai Council* at [238]-[239]

where apprehended bias was established in respect of one member, the resultant decision was vitiated. The reasoning in those cases was, essentially, that there was a possibility that the other members may have been affected by the member's actual or apparent inability to be fair.

- 79 This may reflect the constraints on a court exercising judicial review. Basten JA referred to this⁹¹ noting that it has been suggested there is strong justification for a court not to refuse relief where procedural unfairness has been established, because to do so would usually require the Court to undertake an assessment of the merits of the case. This is beyond the power of a court exercising judicial review.⁹²
- 80 Basten JA postulated two reasons for this. First, in cases of apprehended bias, the court does not inquire into the question of bias in fact. Secondly, it would effectively cut across the function of a court engaged in judicial review. As Basten JA put it, to enquire into the question whether other councillors knew of any element of partiality on the part of the impugned councillor would subvert "*the attempt by the courts to abstain from such inquiries by adopting an objective test*".⁹³
- 81 Campbell JA's 'non-tribunal' research took him to a consideration of (amongst other areas) the industrial cases, such as cases involving expulsion for unions and the like. Again, the majority of decisions tended to the view that where one member of a body was 'disqualified' from voting because of, for example, apprehended bias, the decision of the collective body was vitiated.⁹⁴

⁹¹ *McGovern v Ku-ring-gai Council* at [97]

⁹² see Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) pp 457-458

⁹³ *McGovern v Ku-ring-gai Council* at [97]

⁹⁴ *McGovern v Ku-ring-gai Council* per Campbell JA at [240]-[250]

- 82 His Honour's reasons for refraining from coming to a concluded view on the "*collective body*" issue was because of the uncertainty, as he saw it, of the standing of the decision in *Steuart v Oliver (No 2)*.⁹⁵ The question in that case was whether a union election that had been conducted in accordance with a special rule was invalid, when the rule in question had been made with the participation of people who were not entitled to be members of the Executive Council who made the rule. The rule was held to be valid. Joske J (with whom Spicer CJ and Smithers J agreed) said:

"There is no general rule that where a person who is not a member of a body, whether this is due to disqualification or lack of qualification or otherwise, is present at a meeting of the body, participates in its proceedings or even votes, this necessarily invalidates either the vote or the whole of the proceedings at the meeting. The circumstances of each particular case have to be considered. Thus the presence of so many unqualified persons at, and their participation in, a meeting may be such that a court would hold that it could not be regarded as a meeting of the particular body. So also, where the presence of the unqualified person is relied upon to constitute a quorum and unless he is counted the meeting is short of a quorum, there is no quorum and no meeting or, in other words, the proceedings at the meeting, if it is held, are ineffectual. The presence of a quorum means a quorum competent to transact and vote upon the business before the meeting. If some of those present are disqualified from voting and there is not otherwise a quorum, no business can be validly done."⁹⁶

- 83 The relevance of the 'quorum' question did not escape the attention of Spigelman CJ. His Honour observed⁹⁷ that the decision of the Council was made by a 7-3 majority and it had not been suggested that it would not have had a quorum if the two councillors had been disqualified from participation in the decision.

⁹⁵ (1971) 18 FLR 83

⁹⁶ *Steuart v Oliver (No 2)* at 84-85. See *Re Greymouth Point Elizabeth Railway and Coal Co Ltd* [1904] 1 Ch 32; *In re Alma Spinning Co* (1880) 16 Ch D 681; *Newhaven Local Board v Newhaven School Board* (1885) 30 Ch D 350; *Old Welshman's Reef Gold Mining Co (NL) v Bucirde* (1881) 7 VLR (Eq.) 115

⁹⁷ *McGovern v Ku-ring-gai Council* at [84]

Conclusion

- 84 An overview of the type provided in this paper can rise no higher than its source topic. It is an overview. However, by way of conclusion I would make the following comments.
- 85 The recent caselaw does not reveal any conceptual change in the principles of natural justice. However, if one was to identify any themes, or perhaps more accurately, emerging issues, they would be the matters that arose for discussion in *Stewart v Ronalds* and *McGovern v Ku-ring-gai Council*.
- 86 In the case of *Stewart v Ronalds* the question, unresolved, is whether a person who conducts a private inquiry which will potentially affect rights, is required to afford procedural fairness to the person whose rights may be affected. As with all questions in this area, there may be no definitive answer. Procedural fairness operates in a context-laden framework.
- 87 In the case of *McGovern v Ku-ring-gai Council*, the question, largely unresolved, is whether a collegial decision maker is affected by the apprehended bias of a minority of its members. I say largely unresolved, because there are circumstances where it can be said that the decision is likely to be vitiated. The “*quorum*” requirement is, perhaps, the best example.
- 88 *McGovern v Ku-ring-gai Council* continues to entrench the language of pre-judgment in the area of bias, including apprehended bias. The use of that language reflects the importance for the judicial reviewer to be conceptually clear as to the bias that is alleged: pre-judgment, or conflict of interest.

- 89 Those cases are, in effect, cases about the reach of natural justice. Indeed, it has ever been. Even the seismic shift involved in recognising legitimate interests was one that tested the reach of the principle. The page obviously remains open.

I would like to acknowledge the contributions to this paper of my researcher, Elan Sasson, and the researcher to the Court of Appeal, William Attoh.

Annexure

***Bresam Investments Pty Ltd v Shmee Pty Ltd* [2009] VSCA 315 at [109]-[113]**

This was a procedural fairness case concerning the judiciary.

In this case a trial judge of the Victorian Supreme Court allowed the respondent to file an amended statement of claim after the conclusion of evidence in which the respondent pleaded five representations as to future matters. One of those matters was 'That in the future the cost of materials would be 58 per cent of sales'.

The trial judge found that the vendors represented that there was a 90 per cent chance that the cost of materials would be 58 per cent of sales, a representation akin to a contractual warranty. No warning of the new case was given to the appellants. It was only revealed when the reasons for judgment were published.

The Court of Appeal held that the new case found by the trial judge may well have occasioned injustice (at [111]); and that the evidence did not establish the case found by the trial judge either in misleading or deceptive conduct or in contractual warranty (at [113]).

***Dura (Australia) Constructions Pty Ltd v Victorian Managed Insurance Authority* [2009] VSCA 171 at [11] – [20]**

This was a procedural fairness case concerning a tribunal (VCAT)

In this case, an owners corporation made a claim under a policy of insurance to covering defects in the construction of residential units. The

first respondent accepted liability, but there was a disagreement as to quantum, which the second respondent, the Owners corporation, brought before the VCAT.

The appellant was joined to as a defendant to the VCAT proceedings and sought to argue that the order to join them was vitiated by a denial of natural justice, constituted by VCAT's failure to accord Dura a right to be heard before the order was made.

The Court of Appeal found that Dura's contention could not be sustained, stating, at [13], that:

"As a rule, a preliminary decision which forms part of a broader decision-making process will not attract a right to be heard if the opportunity for adequate hearing is available in later stages of the process".

Austwide Institute of Training Pty Ltd v Jeffrey Charles Dalman (In His Capacity as a delegate of the Director of Public Transport) [2009] VSCA 25 at [70]-[79]

This was a procedural fairness case involving the Victorian Department of Transport, the respondent.

The appellant was a training provider. After visiting the appellant's training facility, VTD advised the appellant that it would not accept course graduates trained and assessed by them until the appellant could demonstrate that it had the necessary equipment operational in the training class room and provide an undertaking that it would provide adequate space to train the students.

The appellant claimed that the VTD had denied it natural justice by conducting an unannounced visit to the premises of the appellant; claiming

that this amounted to a breach of natural justice not only in terms of the actions of the VTD in removing the appellant's name from its list of providers and refusing to accept applicant's holding a qualification issued by the appellant, but also, with respect to the lack of notice provided prior to the site visit.

The Court of Appeal held, at [78], that:

“the circumstances of this case indicate that no unfairness is demonstrated by the appellant. The respondent merely required the appellant to make good on the representations it had made in order to secure the VTD's acceptance of its graduates and inclusion of its name on the list of training providers. Even if a denial of natural justice did indeed occur, such a denial is unlikely to have affected the outcome for the appellant.”

***Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 at [34]-[40]**

This case involved a claim of bias against the panel of the Medical Board.

The appellant, Dr Weinstein, is under investigation by the respondent ('the Board') under the *Medical Practice Act* 1994. The Board determined to hold a formal hearing into Dr Weinstein's professional conduct, as a result of six notifications received by the Board from patients of Dr Weinstein in the period August 2000-August 2005.

The appellant argued that by making a Google search of the other party's expert, and by its pre-emptive 'explanation', the panel had acted in such a way that a fair-minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that [the tribunal] might not bring an impartial and unprejudiced mind to the resolution of the question in issue (at [35]).

The Court of Appeal found that the act of conducting a Google search on the OP's expert in the circumstances did not create a reasonable apprehension of bias (in the form of prejudgment).

Reid v DPP (Qld) and Anor [2008] QCA 123 at [28] – [41]

This was a procedural fairness (hearing rule) case involving the judiciary.

The appellant in particular, were taken by surprise by the advice tendered to the Court by Dr Wood and Dr Lawrence, and that because the Court proceeded to deliver its decision immediately, the appellant was denied the opportunity to address the criticisms levelled at Dr Kovacevic's opinion by Drs Wood and Lawrence.

The appellant was charged with two offences: armed robbery with actual violence, and driving without a licence.

The Court of Appeal held that there had been no failure to accord procedural fairness, stating:

“[37] In any event, in my respectful opinion, the appellant's first ground of appeal must be rejected on the footing that the appellant's Counsel, having heard the advice of Dr Wood and Dr Lawrence, which was tendered to the Court in his presence in accordance with the [Act](#), did not suggest that the appellant wished to call Dr Kovacevic to answer the points made by Dr Wood and Dr Lawrence or to call any other evidence or to make any further submissions to the Court. There was no suggestion at all on the appellant's behalf that there was anything further to be said on the appellant's behalf before the Court proceeded to its decision. And there was no reason why the Court should have assumed that Dr Kovacevic or the appellant's Counsel might have had anything further to say in relation to the points made by Dr Wood and Dr Lawrence.

[38] The entitlement to procedural fairness is concerned with ensuring the opportunity to be heard: it does not encompass an obligation on the part of the decision-maker to insist that the

opportunity be availed of. [Section 407](#) of the [Act](#) gave the appellant's Counsel the opportunity to be heard further after the assisting psychiatrists had tendered their advice in open court. There was no denial of that opportunity by the Court. The opportunity which was available was simply not taken up by the appellant's Counsel. The course of the hearing which occurred in this case was what was expressly contemplated by [s 407](#) of the [Act](#)."

Remely v O'Shea and Anor [2008] QCA 78

This was a procedural fairness case concerning the Small Claims Tribunal.

The appellant, a tenant at the second respondents' caravan park, had filed two claims in the Small Claims Tribunal. The first claim sought to set aside the second respondents' "notice to leave without ground" dated 27 November 2005, which required the appellant to leave the caravan park on 28 January 2006. The second claim concerned tenancy disputes about a variety of matters, including the handling of rubbish, electricity charges, bond and rent. The tribunal dismissed the appellant's claims.

The appellant claimed that there was a lack of procedural fairness because the trial judge refused to order one of the respondents, Mr Vandenberg, to appear at the trial of the appellant's application for judicial review pursuant to a subpoena issued by the appellant for that purpose.

The appellant also contended that the primary judge erred in rejecting his argument that he was denied natural justice because he was not provided with copies of three affidavits relied upon by the referee.

The Court held that there had not been a failure to accord procedural fairness and specifically that:

“[35] Although the appellant’s evidence of his ignorance of the contents and the character of the "papers" handed to the referee is not readily reconcilable with Mrs Vandenberg’s evidence of her statements in paragraphs 35 and 36 of her affidavit to the effect that she identified and read out the content of the affidavits, the appellant did not specifically deny those statements. In any case, I can see no basis for the appellant’s contention that the trial judge was obliged to reject Mrs Vandenberg’s version of events to the extent that it conflicted with the appellant’s evidence. Contrary to the appellant’s submission, Mrs Vandenberg’s version of events was not inherently improbable.

[36] ... In light of Mrs Vandenberg’s detailed evidence, the absence of any challenge to it in cross-examination, the absence of any direct denial of her evidence by the appellant, and the difficulty of reconciling the conflict between their versions, it was open to the trial judge to decide, as his Honour did, that he was not persuaded that there had been any breach of natural justice. I am not persuaded that his Honour erred in that decision.”
