Week 1 Introduction to Administrative Law

Within admin law are 5 core elements:

1. Admin law rules poor decision makers and decision makers must follow procedural fairness.
2. The decision and the reasons for the decisions.
3. Notification of review rights – ie appeal
4. Admin law review bodies mechanisms and remedies
5. Information and access.

Hierarchy of admin law bodies

Commonwealth HC – FC – AAT – specialist tribunals (eg refugee tribunal, taxation Privacy CoM)
State – HC – Civil and Admin Tribunal (highest NSW tribunal) – state specialist tribunals (police etc).
Principles of admin law apply also outside of govt to professional admin tribunals (eg Law Society.

5 ways by which a person can directly test a government decision (from top)

1. JR - sole purpose to test legality of decision – s5 of Admin ADJR
2. Merits review – I.e. by review body, usually tribunal – was it the correct and preferable decision
3. Admin investigation – Comm Ombudsman undertakes investigation of defective decision making.
4. Internal review = where the original agency which makes the original decision reviews.
5. Damages = compo for defective decision making that can be applied in v limited scenarios.

Craig and McMillan– suggests two major perspectives on admin law accountability:

1. Protect individuals and corps in dealing with govt agencies to safeguard their rights and interests
2. Define the rights and principles which admin law is designed to protect = often described as "openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality"

However, forms of accountability differ although are complex and interrelated:

1. Political accountability of the government occurs primarily through the parliamentary system in accordance with the principles of responsible government. Control of executive departments and agencies rests with ministers (i.e. the executive).
2. **Financial accountability** as a major function of government is to raise and expend money. .
3. Administrative Law Accountability - see above.

Creating the Legislative Framework and Administrative Law Development

The elements of the Kerr report were largely implemented by Parliament in three Acts below.

- The *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) established the AAT as overriding tribunal to undertake merit review of a general range of Commonwealth decisions.
- The *Ombudsman Act 1976* (Cth) established an Ombudsman to investigate complaints of maladministration by Commonwealth government agencies.
- The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) conferred upon the newly-created FC a jurisdiction to undertake judicial review of Commonwealth decisions.

However, after these Acts there was debate about how the judiciary would implement them:

- *R v Mackellar:* (1977)– held no obligation to give reasons and apply natural justice.
- *Salemi v Mackellar (No 2)* (1977) –argued that natural justice at least allowed him to be heard and have reasons for him to stand his case. HC split - 3 judges said did have right to be heard as legit expec due to amnesty but other 3 said minister was not under such an obligation and minister had discretion, and as chief justice sat in this 3, this view prevailed.
- *Kioa v West* HC decide for the first time that natural justice applied to immigration decision-making, a majority referred to this change as the most important development that warranted a change to the common law principles as to when natural justice applies.

Then there was the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth).
In summary, administrative law which is now underpinned by three broad principles of *administrative justice*, *executive accountability*, which is the aim of ensuring that those who exercise the executive can be called on to explain and *good administration*.

Accountability across the public private divide

Much harder to draw line between the public and private sectors, but the accountability issues still apply as admin law mechanisms apply to private sector bodies, so need to maintain accountability:

1. Privatisation – where function wholly taken on by body under private ownership (eg Telstra)
2. Commercialisation - where private sector business structure is imposed on public
3. Contracting out of Government services.

Week 2 Rule Making

Sources of Law – Quasi legislation as done through rules and regs

The idea behind delegated legislation is convenience and expediency as is impractical for the legislature to make all legis. Leg empowers executive agency to make their own subordinate leg:

- The authority to make subordinate laws is usually contained towards the end of a statute
- Delegated legislation is always subordinate to the real legislation under which it was made
- Generally deal with specific details, whereas the original Act provides the general framework.

An issue with delegated legislation is that it goes against the idea of the separation of powers. However, *Victorian Stevedoring and General Contracting v Dignan* that Parliament does have the power to delegate certain powers to the executive as a feature of the Australian system.

Subordinate or Delegated Legislation Types

- Regulations
- Statutory Rules
- Disallowable Instruments
- Ordinances
- Local laws
- By-laws
- Declarations
- General Orders
- Directions and Policy Directions
- Operational Plans
- Program Standards
- Codes of Practice
- Guidelines
- Taxation rulings from the Taxation Commissioner. However, the ATO has consistently stated that they are not a law and do not have the force of law and each is made on its own facts.

In NSW, the term "statutory rule" is used to describe regulations, by-laws, rules or ordinances.

Control of delegated legislation

Subordinate legislation made by the executive is also not subject to the same control as primary legislation. Alternative methods have been devised to ensure accountability – see detail below

1. Public consultation on proposed rule making
2. Internal executive controls to control how subordinate legislation is prepared and drafted.
3. Publication of subordinate legislation, upon being made, so available for public purchase.
4. Parliamentary oversight/scrutiny.
5. Judicial review to examine whether subordinate legislation was validly made.
6. Other mechanisms of administrative law review: Ombudsman, tribunals etc.

In Commonwealth, the *Legislative Instruments Act 2003* (Cth) applies to "legislative instruments",

- s 5 - Scope: defines 'legislative instruments' as either:

  (1): an instrument in writing that: Is of legislative character; AND Was made in the exercise of a power delegated by the Parliament.

  (2): an instrument is taken to be of a legislative character if: It determines or alters the content of the law, rather than applying it in a particular case; AND It has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or carrying or removing and obligation or right.
- s 7: Instruments declared not to be legislative instruments.

Making Delegated Legislation – Procedural Controls

- Executive oversight: LIA makes the Secretary of the AG's Department responsible for ensuring legis instruments are drafted to a high standard for tabling before Parl, and for maintaining a computerised Federal Register of Legislative Instruments: ss 16, 20.
- Most of this delegated leg comes into place on the day it is passed. However, if someone has acted on the del leg but down the track, Parl disallows it, possible compo can be paid. *Esber v Commonwealth of Australia* (1992) held the proceedings, having been instituted but not completed before the commencing day of the 1988 Act, were to be "continued" as if the 1988 Act had not come into force. The appellant, at the time of the repeal of the 1971 Act, had a substantive right to have his application to the AAT determined pursuant to the Act and this right was not affected by the repeal of the 1971 Act.
- Antecedent publicity–NSW del lg cannot be retrospective but Com can be if is not prejudicial

- Public consultation: s17. When a new leg is being proposed which is likely to substantially impact on certain sectors, a Regulatory Impact Statements has to be prepared setting out 7 key elements that the delegator is meant to have considered:
    - What are the circs that require this leg
    - What is the desired objective
    - What are the options to this objective - ie is there another way
    - Assessment of the impact – costs and benefits analysis on all involved
    - Consultation Statement setting out what consultation has been done, the feedback and how the feedback has been acted on
    - The recommended option
    - Strategy to implement this option and what are the review mechanism down the track.
- Office of Legislative Drafting and Publishing – assists the public servants who draft regs.
- Notification and Publication – an instrument that is not registered on the Register is not enforceable: ss31, 32. Also Watson v Lee (1979) Held:
    - A statutory regulation made under power conferred on Gov-General only becomes operative in accordance with the relevant Interpretation and Publication Acts.
    - To satisfy the relevant Acts the regulation must be published in the Gazette BUT The presumption of regularity applies to the availability of copies of regulations and accordingly regulations will be held to be available unless a party challenging them discharges the onus of proving that they were not so available.
- Sunsetting: The general rule is that legislative instruments are repealed automatically- 'sunsetted'- 10 years after their commencement (s50), though a rule can be remade.

Parliamentary Scrutiny of Delegated Legislation

- s38 has substantially changed this area, as it imposed additional rigour- eg, reducing tabling period before Parl to six sitting days:
- Sentate Standing Committee for the Scrutity of Bills - must report on Bills and whether they
    - Trespass unduly on personal rights and liberties
    - Make rights or liberties unduly dependent on insufficiently defined admin powers
    - Make rights or liberties unduly dependent on reviewable decisions as concerned with:
        - Protecting rights and personal liberties
        - Protecting the right of Parl to make laws as it sees fit
    - Inappropriately delegate leg powers;
    - Insufficiently subject the exercise of leg power to parl scrutiny;
    - Are there mechanisms for reviewing; and
    - Are there inappropriately delegated powers.
- Senate Standing Comm on Regs and Ordinances – standing Order 23 sets out its functions and says committee is appointed at each sitting of Parl with 3 govt senators and 3 others and an independent legal advisor to make recommendations by looking at every Instrument to see
    - if it is in accordance with the original statute.
    - Whether it does not trespass unduly on personal rights and liberties
    - Whether makes rights and liberties unduly dependent on these admin decisions
    - Whether it does not contain matters for more appropriate for Parl enactment
    - Are there mechanisms for reviewing; and
    - Are there inappropriately delegated powers

  BUT Doesn't look at policy issues AND If issue arise with the Instrument, the chair of the Comm writes to the relevant Minister to alert them. Minister then responds and if comm is satisfied with the response, it comes off the alert list, but if not can write back. Comm has powers to call people in to be XM to try to resolve issues. If within 15 sitting days, it hasn't been resolved, the chair will give a motion to disallow the instrument. Once minister agrees to amend the instrument this notice is withdrawn. Ss42(1) of LIA says if still not resolved within the 15 days, this section means the Instrument is effectively repealed.

What are the principle characteristics of good regulation?

- in achieving its goal it brings the greatest **net** benefit to the community - net implies must be judged not only be its beneficial effects but also the costs of achieving these – need to look at
    - Most effective way of addressing the problem with min burden on those effected
    - Min amount of cost and collateral damage to other.
- In order for the above to be met need to have certain design features:
    - Not unduly prescriptive – ie flexible to accom changing circs and with periodic review
    - Clear and concise – ie communicated effectively and readily understood.
    - Consistent with other laws to avoid division, confusion and waste.

What is bad regulation!?

- When doesn't go through all of the above– eg – lack of rigor, consultation, monitoring, etc.
- No mechanisms to ensure oversight by Parl.
- In other juris (not so much Au), del leg has been used to introduce laws which Parl wouldn't. eg Freidrich in 1940s cited Hitler's rule as legal but not legitimate, as had no basis in right and injustice. (eg Act saying jews couldn't be citizens or hold office was del leg).
- *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* 1945 –alleged the Seeds Committee made Orders which were not bona fide for the purposes for which the power was conferred but to conserve the financial interest. Held it is a ground for a subordinate leg, that it was not in fact made bona fide for the purpose for which the power to make orders was conferred, although on the face of the order there was no excess of the authority's power.
- *R v Toohey (Aboriginal Land Commissioner); ex p Northern Land Council* (1981) - held unless Parliament can be seen from the terms of a grant of power by statute to have excluded JR, the courts will examine the exercise of the power so granted and determine whether that exercise is within the scope of the grant.

- **Growth of Del Leg -** Has been huge increase over the years in this type of legislation.
- **Invalidity of Delegated Legislation** See p23 – 33 of textbook if required.

Week 3 - Decision Making Processes

What are Tribunals?

- Different forms of tribunal as some are v court like but others are more informal. However
  - general informality and flexibility makes them more accessible
  - tribunals can be staffed by experts in their area rather than by legally qualified people,
  - From a govt perspective, tribunals allow govts to appoint members more flexibly
- There are 2 main categories of tribunals (see p46 for list):
  - Admin tribunals that determine disputes between govt and private persons; and
  - In states and territories, tribunals have taken over from courts re civil disputes.

Jurisdiction and Powers

- Important distinction between a tribunals juris and its powers, since juris can cover a tribunal's territorial juris (eg NSW) but also the types of matters it decides or the powers it has.
- Not all tribunals are set up by the govt (eg sporting, cultural, professional), which are usually set up by contract and their authority comes by the members agreeing to adhere to the rules
- "May" = discretionary power (must consider relevant criteria and ignore irrelevant and the relevant act may specify the criteria to be considered), but also have duties (ie shall/must).
- Can have extraordinary powers– eg call to tribunal, authorise person to be W, inspect or enter premises, refer qns of fact to expert–depends on the particular tribunal

Competencies that you will likely want in members of tribunals "ARC – Better Decisions: Review of Commonwealth Merits Review Tribunals: Report No. 39, 1995, which said should have following:

- Expectation for members to understand the merits review process and how it is applied
- Expectation will have knowledge of admin review/ law (rules of evidence, procedural fairness).
- Will have analytical skills to interpret and analyse legl
- Interpersonal, gender, cultural awareness and communication skills (verbal and oral).
- Good decision makers

Determination of Preliminary Questions

- Standing- where people expect to be given standing and are not - needs to check this early on
- Whether have or do not have the power under the act to do a certain thing

Timing Issues - Usually decision comes into effect when it is published but can be backdated but:

- Statute may say law needs to be applied as it was at a particular date or at date of decision
- Where there are accrued rights or liabilities.

Delays in Handing Down Decisions can be stressful, so importan tribunals make decision promptly:

- Some statutes give specified timeframe and if don't meet may be way of challenging decision.
- Also decisions are best made when fresh in mind so should be made asap.

Using Tribunal Knowledge/additional material evidence which is not put before the parties

- Tribunal can use general community knowledge in decision making but if going to use specialist knowledge (eg industry or govt experience), they must spell it out as this specialist knowledge may no longer be valid so parties should be able check it and challenge it.
- If relying on previous cases, reports, textbooks, etc, must raise if hasn't been raised before.

Structuring Decision Making - sections in statement of reasons must flow:

- Procedure that has gone on before now and what is sought and why
- Statutory test to be applied and does the tribunal have disc
- Identify the matter on which findings of fact need to be made and whether that fact is a material fact and what is the info which is relevant to arrive at that finding of material fact.
- Should identify and analyse each of the issues and arguments in sequence.

Assessing Credibility –

Tribunals need to be aware of consequences if a W is found not credible and how damaging this is:

- Tribunal should probe the W by XM as this is reliable
- If the W is unable to give a coherent analysis, may be qns re their truthfulness
- However, undue reliance should not be placed on observations of a W's demeanour

Evaluating Expert Information - What happens if expertise is on the other side?

- If is evidence of fact, should be treated as any other evidence of fact
- If is evidence purporting to give evidence of opinion it is treated with caution and is only there to assist tribunal but if is flawed/reasoning unconvincing it may not be used
- Therefore tribunal can reflect of the expertise of the expert (i.e. their field and how long etc) and the factual basis of the expert's opinion (ie. if fair and representative, what inference can be drawn from it), whether expert is non-biased,

Weighing Evidence - Has to be done to be fair but following suggestions can be made

- Usual more likely to occur than the unusual
- W whose evidence is consistent is more likely to be reliable than W who is not
- W whose test is consistent with others is more likely to be reliable
- Demeanour should not be relied on
- One lie doesn't mean everything is a lie

Reasons - What are adequate reasons?

- Should be in writing and in statement
- Should contain sufficient information to enable the loosing party to understand why they have lost in particular (eventhough they may not accept) and whether can and should appeal
- Have to be written for the particular audience (eg age) so can be understood. Therefore should be precisely written, logical sequence and plane English.
- Resist temptation to moralise or be too critical or make irrelevant reasons
- Avoid legal terminology and metaphors and judgmental personal language

Week 4 Judicial Review: Procedural Fairness/Natural Justice

- **It comprises the 2 rules below but** whether natural justice is owed will depend on the legis and the material effect that the decision has or proposes to has. If natural justice is owed, will then depend on fairness in the particular circumstances, as is no magic formula.
- *Kioa v West held*
  - for the first time that decision maker is bound to comply with rules of natural justice.
  - procedural fairness requires an opportunity to respond to the case against you and be informed of specific "credible, relevant or significant" adverse factors which the decision may be based upon; and
  - duty is implied as matter of statutory construction whenever the exercise of a power is liable to directly affect your rights, interest, status or legitimate expectations
- Natural justice is now a ground of judicial review under s5(1)(a) of the ADJR Act but this ground does not extend to all decisions, but only those to which the rules would otherwise apply at common law - – *Capello*

1. The right to be heard (the hearing rule)

- Requirements of the hearing rule take into ac a no of factors -:
  - Circs of case including the severity of the decision on the person affected.
  - Rules on which decision maker acts
  - Subject matter being dealt with
- **There are three minimum requirements implicit in the hearing rule:**
  - **Prior notice that a decision will be made** - no formal requirements or prescribed forms but in practical terms it is generally necessary for notice to be in writing.
  - **Disclosure of the substance of the info on which the decision is proposed to be based** - Since *Kioa* , the focus has switched from general disclosure of the case to be met, to the need to disclose specific prejudicial information.
    - At a minimum it will be necessary to alert the recipient of the notice to the subject matter of the decision, the kinds of issues which need to be addressed, the potential legal consequences of the decision and the adverse material under consideration.
  - **Opportunity to comment on that information, and to present the individual's own case.**
- **Following cases demonstrate how the hearing rule that have affected admin decision**
  - Haoucher held that a public decision maker should usually continue to comply with any procedural promise or representation, express or implied or regular practice, unless the proposed change is put to the affected person and they have an opportunity to respond;
  - Annetts v McCann held that a public decision maker should first notify affected parties of defined relevant issues in respect of which there is a possibility that he or she might make findings adverse to them and permit an opportunity for them to respond;
  - Miah (2001) held that: (i) the common law rules of natural justice are taken to apply to an exercise of public power unless expressly excluded; (ii) a decision maker should not make a decision having regard to undisclosed material, being adverse information that is credible, relevant and significant to the decision to be made, without first putting that material to the affected person; and (iii) a decision maker should not mislead a party regarding the importance of a factor to them, either actively or impliedly;
  - *Jarratt v Commissioner of Police for NSW [*2005] - held the obligation to accord natural justice extends beyond decisions made under statute, to exercises of common law prerogative power and natural justice attaches to exercises of public power. Went back to Annetts v McCann and said when statute has such a power, the rules of natural justice regulate this power and there were no words under the Police Act which excluded it.
  - Lam held rules of procedural fairness simply require process that is fair in the circumstances of given case. The concern is with fairness of the procedure adopted rather than the fairness of outcome. However, decision maker should bring attention the critical issue on which the decision is likely to turn, so they have the opportunity to deal;
  - VEAL held that: (i) it is unfair to deny a person whose interests are likely to be affected by a decision, an opportunity to deal with information, which although confidential, is of a kind that creates a real risk of prejudice, albeit subconscious; and (ii) whether information is 'credible, relevant and significant' is not determined by the characterisation given by a public body when expressing their reasons.
  - However, SZBEL held that procedural fairness does not require a tribunal to give a commentary upon what it thinks about the evidence that is given. Public Service Board of *New South Wales v Osmond* also held there is no general rule of the common law or

principle of natural justice (other than in special circumstances), which requires reasons to be given for adminis decisions, even those made in exercise of a statutory discretion and liable to adversely affect interests, or to defeat legitimate or reasonable expectations.

- BUT s13 of the ADJR Act offsets this where this Act applies, since it includes principle that effective accountability depends on giving reasons for decisions.
- Saeed v Minister for Immigration and Citizenship [2010] re claim that had been denied the right to be heard—Was the hearing rule displaced by Mig Act? Held:
  - (1)Clear and unequivocal statutory language is required to oust the operation of the hearing rule. The rule of law presumes it highly improbable that Parliament would overthrow fundamental principles or depart from the general system of the law without expressing its intention with irresistible clearness.
  - (2)The appellant's application was not governed by the relevant section of the Mig Act . Accordingly, that section did not operate as an exhaustive statement of the hearing rule in her case: the ordinary principles of natural justice not having been displaced, she was entitled to be heard.
  - Note was not re ADJR as concerned natural justice JR so in XM go through.
- Li case (2013)–migration agent had committed fraud so got new one, but new one made errors! Li wanted the assessment of skills put on hold due to this, but was refused - held
  - Was unreasonable that the tribunal could have easily adjourned the matter and give Ms Li the chance to await the assessment.
  - decision need not be totally mad to be reviewable for unreasonableness, and that disproportionality is a good indicator of unreasonableness.

- However, Kiao shows the critical question in usually not whether rules of procedural fairness apply, but what does the duty to act fairly require in the circumstances of the particular case

CONTENT OF THE HEARING RULE

A. Must the Person who Decides Hear?

As a general rule, natural justice does not require that the hearing be conducted by the decision-maker. It is sufficient that the decision-maker is fully aware of everything said.

B. The Hearing

- *Sullivan v Department of Transport* (1978) held tribunal is under a duty to act judicially, with judicial fairness and detachment and must give a party a reasonable opportunity to present his case as one of the requirements of natural justice which it is obliged to observe. A refusal to grant an adjournment can constitute a failure to give the party an opportunity to present his case.
- *NAIS v Minister for Immigration* [2005] Held whether delay will amount to an inordinate delay will depend on the nature and complexity of the case, the facts and issues, the purpose and nature of the proceedings, and whether the applicant has contributed to the delay and other relevant circs.

C Representation

- Legislation is silent re this, but will generally only be issue in an oral hearing BUT is a common law right, where a person is entitled to be present at a hearing for that person to be represented by an agent, which can be excluded by statute. Relevant factors include person's ability to understand nature of the proceedings and importance of the decision to their liberty or welfare.

D Rules of evidence and cross-examination

- Rules re XM are only likely to be an issue in oral proceedings but courts reluctant to allow
- *O'Rourke v Miller (*1985) held principles of natural justice were applicable to the termination of the employment of a probationary constable but in the circumstances of the case, probationary constable was not entitled to an opportunity to XM.

2. The right to be heard before an unbiased decision maker (the no bias rule)

- The no bias rule means you have the right to be heard before an unbiased decision maker.
- Mere possibility of bias (rather than actual bias), is enough to disqualify the decision maker, since *Ebner v Official Trustee in Bankruptcy* held it is enough where a "fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".
- However, the test is objective and the question is of possibility (real and not remote), not probability, although a fair-minded observer is someone with knowledge of the particular facts, not just broad general knowledge (*Webb v The Queen)*
- There are also two steps to the test in Ebner: (i) identification of what it is said that might lead a decision maker to decide a case other than on its merits; and (ii) articulation of the logical connection between the matter and this apparent deviation.

- In addition, some circumstances may prevent invalidity including necessity, waiver, consent, statutory modification and possibly special circumstances. predisposition to approach issues otherwise than with an impartial and unprejudiced mind.
- **Actual bias:** when the decision-maker's mind is so closed to persuasion that argument against that view is ineffectual but rarely encountered dye to the difficulty of proving it.
    - *Re Macquarie Univer; ex parte Ong* (1989) held decision by the Council of a university to dismiss the head was void because it had been made contrary to the principles of natural justice by virtue of the participation of the VC (who had actual bias against the head) in the meeting at which it was resolved to declare the office of the head vacant.
    - *Maloney v NSW National Coursing Association Ltd* [1978] - held the validity of proceedings before a domestic tribunal, exercising quasi-judicial functions, is not measured by the strict criteria of a court proper or statutory tribunal, so a member of the domestic tribunal will not be disqualified for suspected, as opposed to actual bias.
- **Apprehended bias (see Ebner above and below):**).

2.1 Principles of bias where will be disqualified -

- **Pecuniary**
- Direct financial (eg by accepting bribe to decide in favour or where has direct financial interest)
- Indirect financial *Ebner* (2000) – judge declared but said will not influence him as the decision will not affect share price – HC agreed and said need to put in place 2 step approach below
- *Hot Holdings v Creasey* decision maker receiving advice fr party with financial interest. Held:
    - Minister had no pecuniary interest, no knowledge of his officers' shareholdings and "no ground to apprehend might have been influenced by desire to promote their interests.
    - possibility that officer's conduct was bias does not necessarily mean the Minister's was.
    - No person with a personal financial interest in the outcome of the matter participated in a significant manner in the making of the impugned decision.
- **Non-financial interest** –
- *R v Bow Street Magistrate; Ex Parte Pinochet (No 2)* [1999] - Lord Hoffman was an unpaid director and chairman of charity arm of Amnesty Int. Held was disqualified, as not about whether Lord H was actually biased but what lay observer thought.
- Interests of family members and friends – *Smits v Roach* [2004] - judge's brother might benefit if decided in particular way. Held fair minded lay observer might have reasonably apprehended that due to brother's interest judge might not bring an impartial mind.
- Gifts – should not accept gifts, although judges can earn income from non-judicial salaries.
- Unilateral contact - Judges should not be in contact where possible with Ws, Counsel and parties, since unilateral contact is almost invariably found to give rise to a suspicion of bias.
- Prior association with other professionals can be inferred from previous conduct/relationship, but what matters is the apparent capacity of the association to affect the decision -Difficult as if was v strict, system would grind to halt as everybody knows everybody
- Behaviour in court – (1) judges must be patient re listening to both sides (2) not allowing legal rep to be heard is contrary to this (3) judicial humour can undermine the seriousness of matter
- Pre-judging where judge has seen the same partiess - *Livesey v NSW Bar Association* (1983) re using same W in second trial but happened to be same 3 judges who had decided W was untruthful in first – HC agreed gave rise to reasonable apprehension of bias.

2.2 Reasonable Apprehension of Bias = TEST FROM EBNER – see start above

- Prejudgement present if in all circumstances there could be a **reasonable apprehension that the judge or decision-maker might not bring an impartial or unprejudiced mind to the issues**
    - See elements of test at start but reasonable apprehension is assessed through the eyes of a reasonable person, rather than those of the reviewing court.
    - Committees or tribunals with members chosen for their specialist knowledge or experience are not biased if they rely on that general knowledge.
- *Laws v Aus Broadcasting Tribunal* re whether allegation of bias against specific members tainting entire membership – Held fair-minded observer would not be led to conclude that members of the tribunal, excepting three who participated in a decision, would bring other than an unprejudiced and impartial mind to the resolution of related matters in an inquiry – see necessity though
- *CF Stollery v Greyhound Racing Control Board* (1972) - S present at but taking no part in deliberations and decisions of board *Held* His continued presence in the board room was inconsistent with the principles of natural justice and invalidated the proceedings,

o *Vakauta v Kelly* (1989) held it is inevitable that a judge who regularly sees the same expert Ws may form opinions about their reliability but this does not disqualify them from hearing matters where the Ws appear. However, Counsel has an obligation to object to apparently bias remarks at the time or they will waive the right to subsequently object.