NATURAL JUSTICE AND THE CONSTITUTION OF TRIBUNAL MEMBERSHIP

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Introduction

This paper focuses on natural justice as it applies to the constitution of tribunals, in particular, on the natural justice limb dealing with bias. I propose to cover three main areas:

(a) actual bias;

(b) ostensible or reasonable apprehension of bias; and

(c) a third category, a special creature, which has developed *outside* the field of natural justice in relation to the constitution of tribunals upon a remitter from a court on a successful appeal.

On the assumption that this third category is less well known, I propose to focus on how it operates to require the reconstitution of a tribunal when a matter is remitted to the tribunal after an appeal. I will also consider the various circumstances and factors which may assist a court in determining whether to order that a tribunal be differently constituted.

Philosophical basis

The rule against bias is derived from a long line of cases recognising the need to maintain public confidence in the administration of justice. It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[1]

Another way of putting this is that no person should be a judge in his or her own cause. As with the hearing rule, the content of the rule against bias is flexible and varies with the factual and legal circumstances in any particular case. Some of the administrative law texts dealing with the topic suggest that the rule is most demanding when applied to the judiciary and is least demanding in the context of domestic tribunals.[2] In discussing the application of the rule against bias in the context of administrative tribunals, I have drawn on authorities dealing with the judicial end of the spectrum.

Actual bias

Pecuniary interest

For the purpose of establishing actual bias, a distinction is made between allegations of a pecuniary interest as distinct from all other interests. Where a tribunal member has a *direct* pecuniary interest in the outcome of the decision, that person is clearly and automatically disqualified. One judge has explained the automatic nature of the disqualification as

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arising because as a matter of juristic policy, a court should be reluctant to investigate whether or not the tribunal was in fact biased. A pecuniary interest therefore raises an irrebuttable presumption of bias.[3]

However, the automatic disqualification for pecuniary interest does not arise where the tribunal member has no beneficial interest in the subject matter. Therefore, if the pecuniary interest belongs to someone other than the decision-maker, no matter how close that person is to the decision-maker, there is no irrebuttable presumption of bias. For example, it does not matter that the decision-maker's spouse[4] or father[5] had the pecuniary interest.

Such is the strength of this rule that where that tribunal member is one member constituting the tribunal in a particular case, the whole tribunal as so constituted is disqualified from acting.[6] It makes no difference that the decision-maker was not influenced by his or her interest in the remotest degree. Nor is the size of that person's interest of any relevance.

There is no bias by way of pecuniary interest where that interest is remote, contingent or purely speculative.

Other actual bias

In relation to actual bias arising from other, non-pecuniary involvement, there are very few reported cases. This is because, as one text book writer has warned:

> One risks judicial wrath and encounters evidential hurdles of considerable magnitude if one attempts to lead evidence in Court showing that a [decision-maker] departed from the normal standard of judicial behaviour.[7]

In my view, the paucity of cases considering what would constitute actual authority is largely due to the existence of the second method of disqualifying a decision-maker namely, on the grounds of reasonable apprehension of bias. It is much more dignified for that test to be applied because it is all about appearances of bias as distinct from bias in fact.

However, due to some statutory developments at the Commonwealth level, it is my view that the ground of actual bias will receive further elaboration. This arises in the migration field. Amendments to the migration legislation which came into effect in 1994 have the effect of limiting the basis upon which decisions of the Refugee Review Tribunal (RRT) and Immigration Review Tribunal (IRT) may be judicially reviewed by the Federal Court of Australia. Paragraph 476(1)(f) of the *Migration Act 1958* (Cth) (Migration Act) provides that the decision of the RRT or the IRT may be the subject of an application for review by the Federal Court on the ground that the decision was induced or affected by fraud or by "actual bias". Some recent cases have considered the meaning of "actual bias" in that context. They usually focus on bias in the nature of prejudgment as distinct from other types (such as personal animosity towards a party).

In the case of *Murillo-Nunez v Minister for Immigration and Ethnic Affairs*,[8] Justice Einfeld of the Federal Court considered the meaning of paragraph 476(1)(f) of the Migration Act. He noted that for a considerable time a distinction has been drawn between actual bias and what is known to lawyers as apprehended bias. He also pointed out that in the explanatory memorandum, the legislature explained its intention behind the use of the phrase "actual bias" by stating that it would be necessary to show that the decision-maker was actually biased and not that there was simply a reasonable apprehension of bias.

In describing what was meant by "actual bias" in this context he pointed out that it is possible that bias may be found by evidence that the body or individual

concerned has allowed itself to become affected by prejudgment, preconception or prejudice and that this was difficult to prove. He accepted that if there is a perception of bias to the requisite standard of proof, bias is established and it is unnecessary to go to the point of proving that a judge or tribunal was in fact actually biased.

There must be a clear connection between the proven bias and the decision, in other words, that the bias procured or assisted to procure the decision. There must be a serious case of bias, not one that was remote or required a series of difficult inferences or the construction of a series of disparate facts. The legislature was likely to have meant that the actions of the tribunal under consideration must be so tainted by provable events that a conclusion should be drawn that the decision was affected by bias.

Similarly, in *Wannakuwattewa v Minister for Immigration and Ethnic Affairs*[9], Justice North stated that an allegation of actual bias of a tribunal member involves demonstrating that the tribunal did not, in fact, bring an unbiased mind to the issues before it. It means that the applicant must show that the tribunal had a closed mind to the issues raised and was not open to persuasion by the applicant's case.

In the recent case of *Singh v Minister for Immigration and Ethnic Affairs*,[10] Justice Lockhart considered in some detail what was meant by "actual bias" in paragraph 476(1)(f) of the Migration Act. He confirmed that actual bias has rarely been established. Such cases include those in which the member of the relevant tribunal had an interest in the outcome of the proceedings, but which fell short of a direct pecuniary interest.[11] Justice Lockhart stated:

> It is always difficult to explore the actual state of mind of the person said to biased. Evidence to establish actual bias may consist of actual statements made by the person said to be biased, and of objective facts and circumstances from which an inference of bias may properly be drawn. Bias is not synonymous with absence of good faith; a person may in all good faith believe that he was acting impartially, but his mind may nevertheless be affected unconsciously by bias.[12]

Where it is alleged that the tribunal prejudged the matter before the conclusion of the hearing, the transcript of the proceeding before the tribunal will be important to determine the actual statements made by the tribunal, the nature of the exchanges between the tribunal and the parties or their legal representatives, and the context in which those statements were made.[13] In the *Singh* case, Justice Lockhart consulted a transcript of the evidence as well as the tapes from which the transcript was derived so that he could understand the context, the tone and the manner of the remarks of the tribunal member in question.

It is a question of fact in each case to determine whether or not the tribunal member has been so biased that the decision cannot be allowed to stand. When actual bias is alleged, the matters upon which reliance is placed to establish it must be considered in the context of the whole of the hearing before the decision-maker. A tribunal member may form a preliminary conclusion about a particular issue involved in an inquiry. That is not sufficient to establish actual bias and to disqualify a tribunal member from hearing a matter. Even where a decision-maker is shown to have expressed or otherwise formed views about an issue involved in an inquiry prior to the giving of evidence, actual bias will be established only where the evidence shows that these views were incapable of being altered because the decision-maker had unfairly and irrevocable prejudged the case.[14] The distinguishing line between comments made by a tribunal with a view to identifying the real issues in a particular case and the expression of preconceived views, such as about the reliability of particular witnesses, are what bias cases

are all about. It is the ill-defined nature of that line which creates the difficulty in the determination of bias cases.

Where a tribunal has prejudged a matter before the conclusion of the hearing, that may amount to actual bias.[15] In the case of *Khadem v Barbour, Senior Member of the Administrative Appeals Tribunal and Anor*[16] it was argued that remarks made by the tribunal member gave rise to a reasonable apprehension of bias. Justice Hill of the Federal Court was at pains to point out that the case was run as a reasonable apprehension case and that at no time was it suggested, nor could it be, that Mr Barbour was personally biased against the applicant.

He then grappled with the different expressions of the reasonable apprehension of bias tests and found that it was unnecessary to determine what the correct test was. This was because it was clear in that case that an objective observer would conclude that the tribunal had indicated by its remarks that no matter what further evidence was called, the tribunal had made up its mind at the conclusion of the applicant's evidence and prior to any further evidence being presented. Justice Hill stated:

> I do not think that any different result should follow merely because Mr Barbour was acting as an administrative tribunal rather than exercising judicial power. Although, as indicated earlier, it may be the case that a different test should be applied to an administrative tribunal having a policy function, the Administrative Appeals Tribunal does not have any policy function ... In [performing its function] it must act impartially and be seen to have acted impartially. Although it may be said that judges and members of tribunals are able to put out of their minds preconceived ideas or views formed after they have heard other evidence (and there is no empirical evidence that this is necessarily so), I think that an objective observer would find it difficult in the present case to accept, after the comments which Mr Barbour made, that he would or could change his mind after hearing further evidence from Mr Khadem or his family.[17]

Justice Hill remitted the matter to the tribunal to be heard again by a differently constituted tribunal.

As I have mentioned, it is permissible for judges or decision-makers to make their views known to a party during a hearing so that there may be an opportunity to discuss and ventilate fully the issues in the case. However, as Justice Lockhart pointed out in the *Singh* case:

> It is not sufficient to show that a decision maker has displayed irritation or impatience or even sarcasm during a hearing; regrettable though, these manifestations may be.....[18]

Justice Lockhart continued:

> It is obviously undesirable for decision makers in the course of the hearing before them to be sarcastic or to make fun or mockery of witnesses or to show high personal indignations. In some cases, this may be sufficient to establish actual bias; but generally it would be simply part of the factual matrix that must be taken into account to determine whether a decision maker had such a closed mind to critical issues in a matter that he prejudged the case against the party concerned.

Although on balance he found that the passages alleged to give rise to actual bias did not do so, he did point out some "unfortunate" comments which tended to support the applicant's case. Justice Lockhart did find that "the hearing was somewhat robustly conducted by the Tribunal member". These included comments such as:

- I mean you must think we are stupid or something?;
- So you know, I have just shown that these documents cannot be believed. Either you cannot be believed or they cannot. Or may be both (laughs);
- You have dug your own grave.

As I have suggested, I believe that the law in relation to actual bias in the context of the Migration Act may see some

development given the limited grounds for judicial review from the IRT and RRT.

Reasonable apprehension of bias

In the past there have been some divergent views as to precisely what constitutes the "reasonable apprehension of bias" test. However, for approximately the last twenty years, that test has become more and more certain and the threshold has become less and less severe. It is no longer necessary that there be a "real likelihood of bias".

The test of reasonable apprehension of bias has been recently affirmed by the High Court in the case of *Webb v R*[19]. In that case, the High Court, although dealing with the question of bias of a juror, confirmed that the test is whether, in all the circumstances, a fair minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question in issue.[20] An alternative way of expressing the same test is whether fair-minded people might reasonably apprehend or suspect that the decision-maker has prejudged or might prejudge the case.[21] The test of reasonable apprehension of bias must now be regarded as the prevailing test in this country.[22]

It is clear that this test is equally applicable to judicial officers and to administrative tribunals and enquiries.[23] However, as with any other general rules or principles that are developed, the content of the reasonable apprehension of bias rule fluctuates depending on all the circumstances including the powers of the decision-maker and the form of the bias alleged.

There has been some judicially expressed concern that the acceptance by the High Court of the reasonable apprehension of bias test could have caused an increase in the frequency of applications for disqualification. However, there have been repeatedly endorsed reminders that although it is important that justice must be seen to be done, it is equally important that relevant decision-makers discharge their duty to sit and do not encourage parties to believe that by seeking the disqualification of the decision-maker, they will have their case tried by someone thought to be more likely to decide the case in their favour. Accordingly, they should not accede too readily to the suggestions of appearance of bias raised by the parties.[24]

Although the test is reasonably clear, it is the application of that test to the circumstances of a particular case which proved difficult. As Justice Kirby has pointed out:

> In each case, the judicial officers concerned, whether at first instance or on appeal, must apply the well-worn words. But in the end, the response which each gives may be more instinctive and less deductive than the reasoning of the courts has tended to suggest.[25]

I set out below some recent examples of the application of the reasonable apprehension of bias test. Over the years, a number of categories or classes of case have evolved. However, these are only illustrative and are not an exhaustive list of the types of cases that may arise. Those categories are:

1 prejudgment of the issues or credibility of witnesses arising from:

- prior involvement in the matter to be decided;
- the manner in which proceedings are conducted (for example, stating concluded rather than preliminary views before the finalisation of a hearing);
- holding strong views on the subject matter;

2 improper communications—no communication should take place between a decision-maker and:

- a party; or
- a witness; or
- a representative of a party,

without the knowledge and consent of the other party.

3 improper relationships—these may exist between a decision-maker and:

- a participant in the proceedings;
- the issues in the proceedings.

An example of a case where there was reasonable apprehension of prejudgment is *A v Crimes Compensation Tribunal*.[26] A magistrate, hearing criminal proceedings based on alleged sexual assaults of around 20 years ago, interrupted a prosecution witness on a number of occasions stating "You can't remember things that happened 20 years ago". At the conclusion of the evidence of the accused's wife, the magistrate stated that he had heard enough and that it would not be necessary to call any further witnesses on behalf of the defence. He then dismissed the charges and emphasised that he did not believe that a person could remember things that happened 20 years ago and that such a person could not be precise about things over that time. He then stated that he would hear the accused's application for crimes compensation. An application was made that the magistrate should disqualify himself on the ground of reasonable apprehension of bias. The magistrate did not do so. Justice Beach of the Victorian Supreme Court found that looking objectively at the facts a reasonable apprehension of bias arose. He ordered that the Crimes Compensation Tribunal constituted by a person other than that particular magistrate hear and determine the application for crimes compensation according to law.

An example of disqualification on the basis of holding strong views occurred in the case of *Dental Board of New South Wales v NIB Healthcare Services Pty Ltd*.[27] In that case, the respondent healthcare fund sought to establish a dental health clinic in Sydney. The Dental Board comprised five dentists including a Chairman and four non dentists. At least five years before the proceeding, the Chairman had campaigned against health funds being permitted to open dental clinics because it would affect the livelihood of dentists in private practice. Previous litigation involving an application by the respondent to open a clinic in Newcastle had been resolved on the basis that the Chairman would not sit on the hearing of a new application. The majority of the New South Wales Court of Appeal held that in the circumstances it would be incongruous of the Board now to contend that a reasonable, fair-minded, informed member of the public might not have a reasonable perception that the decision of the Board, chaired by this particular dentist, might be biased. The majority of the court felt that this went beyond having a strong view on a particular subject matter.

Interestingly, Justice Meagher dissented on this point and stated:

> In my opinion, the ordinary reasonable man, once he realised that the Dental Board was constituted by Parliament in such a way that it would usually be dominated by practising dentists, would find it unexceptionable - and indeed, inevitable - that one or more of its members from time to time had strong views on the matters on which it deliberated. He would not perceive bias if this in fact happened. Maybe the average psychopath, to whose imaginary views modern courts seem to pay so much attention, would think otherwise.

Other recent examples of reasonable apprehension of bias include:

- where an "off the record" briefing had been given to a journalist by the person conducting an inquiry;[28]
- where a magistrate met with a legal officer of the respondent (ASC) at his home and requested that he carry out work sorting exhibits during the trial.[29]

Necessity

In some circumstances, the common law principle of necessity may be invoked to allow an otherwise disqualified decision-maker to hear and decide a case where no other qualified person is available. That principle can only be invoked to the extent that it is necessary to prevent a failure of justice or a frustration of statutory provisions.[30] That principle will only be sparingly invoked and applied and then, only to the extent that necessity justifies. Wherever the rule of necessity is invoked, the reviewing court will probably review the matter with particular intensity.[31]

An example of where a decision-maker has disqualified himself on the basis of apprehended bias is the case of *De Alwis v Healy Stewart*[32]. In that case, a part-time judicial registrar had previously received instructions as counsel from a partner of a particular firm. That partner then set up a new partnership with the respondent firm, Healy Stewart. The case in question was about a solicitor from Healy Stewart who had sought compensation for unreasonable notice given in relation to his termination of employment. The judicial registrar determined that it was not appropriate for him to continue in the proceeding given the proximity of the relationship between himself and the partner of the newly formed partnership (which was a party to the proceeding) and the fact that the financial relationship between him and that partner continued, particularly in circumstances where that partner had a contingent liability to the judicial registrar in his capacity as counsel. The proximity of that relationship and the rational link between the registrar's association with the partner and its capacity to potentially influence his decision in the present case was sufficient to cause him to disqualify himself. This case illustrates some of the difficulties which are faced by decision-makers in determining whether or not to disqualify themselves.[33]

It should be noted that there is no room for the principle of necessity where an alternative tribunal with jurisdiction exists or where multi-member Tribunals exist and a quorum can still be found after the disqualified member or members have been excluded.[34] Inconvenience caused by the need to reconstitute a tribunal is not a good enough reason to invoke the principle of necessity.[35]

Waiver

Where a party knows that circumstances exist from which a reasonable apprehension of bias may be inferred, and being aware of the right to object, that person should make an application for disqualification at the earliest opportunity. If that person fails to do so, it is possible that he or she may be taken to have waived to right to subsequently object.[36] This is based on the view that failure to make a timely objection may deprive the decision-maker concerned of the opportunity to correct the wrong impression of bias, to refrain from hearing the case and to save the time, costs and efforts both of the court and of the other party. Without this principle, a person might seen to gain advantage by staying silent and waiting until the litigious waters had first been tested before deciding to raise the suggested ground of disqualification.[37]

It should be noted that the principle of waiver is not limited to cases where the relevant party is legally represented[38], but it will be necessary to inquire whether the party had the knowledge of the right to object to the decision-maker continuing to hear a matter.

Reconstitution on remitter

So far, I have focused on the two traditional limbs of the rule against bias. Namely, actual bias and reasonable apprehension of bias. I will now consider a third broader category of fairness which some authorities have suggested does not spring out of natural justice at all.[39] That third category deals with the constitution of an administrative tribunal when a matter is remitted to it for the reconsideration after a successful appeal to a court.

I will outline the nature of the general principle which has developed and I will attempt to identify some factors considered relevant when a court exercises its discretion in remitting cases to a tribunal.

Where administrative tribunals are established by statute, there is often a provision which enables an appeal to be made to an appropriate court. It is also common for the statute to specify the types of orders which may be made by the court on appeal. One of the types of orders which may be made is an order remitting the matter to the tribunal for reconsideration. Included within this power is a discretion as to whether to order that the tribunal be differently constituted when reconsidering the matter remitted.

A classic example of such a provision is subsection 44(5) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). It relevantly provides that:

> ...the orders that may be made by the Federal Court of Australia on an appeal include:... an order remitting the case to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the Court.

Similar provisions exist in relation to courts or tribunals being able to remit a matter to the original decision-maker.[40] An example of this is paragraph 16(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) which empowers the Federal Court to make an order in relation to a judicial review application:

> ... referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit.

It is in consideration of this latter provision of the ADJR Act from which the general principle springs.

In *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal & Anor*[41] the Australian Broadcasting Tribunal constituted by a particular member had issued a report on an inquiry about the grant of an FM radio licence in the Lismore area. The trial judge set aside the report and referred it to the tribunal for further consideration under paragraph 16(1)(b) of the ADJR Act. In the exercise of the discretion under that section, the judge directed that the tribunal be differently constituted. However, the case was argued, and appeared to have been decided by the single judge on the grounds that the tribunal member should be regarded as disqualified on the ground of reasonable apprehension of bias.

On appeal, the Full Federal Court comprising Justices Davies, Burchett and Foster pointed out that there was no substantive application to prohibit the tribunal member on the grounds of bias. It was solely about the exercise of the discretion under paragraph 16(1)(b) of the ADJR Act.[42] The correct decision had been reached but apparently for the wrong reasons.

The principal judgment of Justices Davies and Foster succinctly stated the general principle about the constitution of the tribunal when exercising the discretion to remit:[43]

> ... when decisions in judicial and administrative proceedings are set aside *in toto* and the matter remitted to be heard and decided again, justice is in

> general better seen to be done if the court or the tribunal is reconstituted for the purposes of the rehearing.

Therefore, the same principle which justifies the rule against bias was used equally to justify this general principle in exercising the discretion to remit to a differently constituted tribunal, namely, that justice is in general better seen to be done.[44]

The judges elaborated on this general principle of ordinary practice as follows:[45]

> If a decision has been set aside for error and remitted for rehearing, it will generally seem fairer to the parties that the matter be heard and decided again by a differently constituted tribunal. This is because the member constituting the tribunal in the original inquiry or hearing will already have expressed a view upon facts which will have to be determined in the rehearing. The aggrieved party may think that a rehearing before the tribunal as originally constituted could be worthless, for the member's views have been stated.... There are, of course, cases where it is convenient for the tribunal as previously constituted to deal with the matter. And occasionally the Court itself expresses such a view,[46] so as to make it clear that it would not be improper for the tribunal as previously constituted to consider the matter again.[47]

The general principle in the *Northern NSW FM* case has been applied many times. In one case an order that the rehearing by the tribunal be by another member was considered not necessary and the *Northern NSW FM* case cited in support.[48] Other cases merely include a reference to the tribunal being differently constituted in the orders made by the court without further discussion of the principle.[49] At least one decision has confirmed that the usual case is that matters remitted to the AAT are heard and decided by a tribunal differently constituted to the one which made the decision the subject of the successful appeal.[50]

The principle has even been applied by an administrative (or quasi-judicial) body where a case has come back to it after a successful appeal. It was not directly remitted. In *Australian Railways Union v Public Transport Corporation of Victoria & Ors*[51] the High Court had held that an industrial award had not validly been made by the Full Bench of the Australian Industrial Relations Commission as the Public Transport Commission had not had an opportunity to make certain submissions. The award was unconstitutional.[52] The Court refused to make a direction that if the matter was to go back before the Commission a different Full Bench should be constituted to hear it. The course to be taken was a matter for the parties and the Commission. It noted that no issue of assessment of the credit of witnesses arose.[53]

Upon the relisting of the matter, the Full Bench of the Commission had submissions made to it about reconstituting itself on the grounds of reasonable apprehension of bias. It noted the High Court's comments and stated:

> However, the Court's refusal [to make a direction] does not obviate the need for the Commission as now constituted to have regard to the principles which it ought itself apply in giving consideration to an application of the kind now made.

The Commission applied the *Northern NSW FM* case and determined that the Full Bench should be differently constituted. The file was referred to the President for further allocation for hearing and determination.

The cases have made it clear that it is a general principle. The *Northern NSW FM* case is not limited to the discretion to remit as set out in the ADJR Act but also extends to subsection 44(5) of the AAT Act.[54] The exercise of the discretion is not affected by subsection 44(6) which states that if the court remits the case to the tribunal, "the Tribunal need not be constituted for the hearing by the person or persons who made the decision to which the appeal relates".[55] Similarly, the

principle applies to an exercise by the Federal Court under its rules of the discretion of whether or not to amend orders it had previously made which had not yet been entered and which remitted a case to the AAT.[56]

I think it is safe to say that the *Northern NSW FM* case has given rise to a "well established principle and general practice applicable to administrative proceedings".[57] But I believe it is one that is not so well known in the legal profession.

The main issue which arises in cases where such a remitter has occurred is whether there are circumstances which exist which would justify an order departing from the general principle and practice. This involves a consideration of the factors which have been identified as supporting a decision to apply or depart from the practice. The practice may also vary among jurisdictions as where certain tribunals are concerned, it may be more convenient to have a previously constituted tribunal deal with a matter rather than reconstituting the tribunal.[58]

The cases have suggested that the following factors are relevant in determining whether the tribunal should be reconstituted:

- whether the member or tribunal has expressed a view or made findings on facts to be determined at the rehearing and which would be relevant to the exercise of any discretion;[59]

- whether views on the merits were fully and firmly expressed, adverse to the appellant;[60]

- whether there is evidence of substantially greater costs or delay incurred by the tribunal than as originally constituted;[61]

- whether there is evidence that rehearing by a differently constituted tribunal would be inconvenient or unsuitable;[62]

- whether there are findings on the credibility of a major witness;[63]

- whether there are statements of strong personal views about the applicant[64] or the applicant's evidence;[65]

- whether there was extensive, lengthy and far-reaching consideration of the matter by the tribunal or any inquiry process which was very detailed and protracted;[66]

- whether a particular member has already dealt with the matter twice;[67]

- if the tribunal took a partisan role in the appeal beyond making submissions about interpretation of the relevant legislation and the powers of the tribunal where no exceptional circumstances existed to justify that role;[68]

- whether a reasonable person in the shoes of the aggrieved party may think a rehearing before the original tribunal was worthless.[69]

Some cases have distinguished the *Northern NSW FM* case or at least tried to do so by focussing on the nature and circumstances of the decision set aside or remitted. In *Ragogo v Minister for Immigration and Ethnic Affairs & Anor*[70] the IRT had wrongly found that it did not have jurisdiction to consider an application to it but, nevertheless, proceeded to determine the matter on the merits for the sake of completeness.

On appeal to the Federal Court, Justice Moore set aside the decision made on jurisdiction. However, after noting that the error of law had no bearing on how the IRT went about determining the matter on the merits, he decided not to remit the matter to the tribunal. He stated[71]:

> The principle in [Northern NSW FM] has been applied where the decision that is set aside is the decision that must be made again..... Such is not the case in these proceedings. In my opinion it would not be unfair if no order was made remitting the matter to the Tribunal to be determined by the Tribunal differently constituted. It should be a matter for the Tribunal to determine by whom and by what means the application for review is determined.

In *Siddha Yoga Foundation Ltd v Strang & Anor*[72] an appeal to the Federal Court was made by a third party against a decision of the AAT on the reverse FOI matter. The appeal considered the application of several exemptions under the FOI Act including section 45, the exemption dealing with documents obtained in confidence. The appeal was ultimately successful on the latter ground and was remitted for that exemption only to be reconsidered.

Justice Jenkinson described the principle as a doctrine or a general precept of what might be thought to be ordinarily a safe and wise course to take; it is not rigidly binding:

> This is a doctrine quite distinct from the doctrines relating to disqualification for bias, actual or apprehended. It is based on an indulgence to the irrational though sometimes quite understandable reactions of persons who are not familiar with the processes of the law or of administration according to law.[73]

Justice Jenkinson found that the AAT had made various conclusions and findings of fact about a particular person's behaviour (relevant to the confidentiality exemption). This included a reference to that person engaging in "tittle tattle".

The respondent, in seeking to distinguish *Northern NSW FM*, had argued that since only one exemption was remitted to the AAT, the whole of the decision had not been set aside and remitted. Justice Jenkinson rejected the argument as the claim for exemption under section 45 of the FOI Act:

> was the remains a whole decision in itself and it is quite separate from the claims for exemption under the other sections which were heard and determined, and involved at the first hearing a determination of questions of fact and required the expression by the Tribunal of views about those facts.[74]

Conclusions

When the constitution of tribunals is in question, it is not enough that one turns his or her mind to the traditional rubrics of actual bias and reasonable apprehension of bias.

One must also consider, in cases of remitter from a court to the relevant tribunal after a successful appeal, whether the tribunal ought be differently constituted. As Justice Jenkinson observed during the hearing of the *Siddha Yoga* case, the tribunal would be differently constituted as a "tenderness for the minds of litigants"[75] in order to provide the "warm feeling that it will be better ....[to] get another tribunal because the parties will feel comfortable".[76]

Endnotes

1 *R v Sussex JJ; Ex Parte McCarthy* [1924] 1 KB 256, 259; *R v Watson; Ex Parte Armstrong* (1976) 136 CLR 248.
2 M Aaronson and N Franklin, *Review of Administrative Action*, (1988), 193.
3 *In Anderton v Auckland City Council* [1978] 1 NZLR 657, 680.
4 *R v Industrial Court* [1966] Qd R 245.
5 *Metropolitan Properties Co (FGC Limited) v Lannon* [1969] 1 QB 577, 598.
6 *R v Hendon Rural District Council; Ex Parte Chorley* [1933] 2 KB 696.
7 Aaranson and Franklin, op cit 192.
8 *Murillo-Nunez v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 1950.
9 Unreported, 24 June 1996, VG 451 of 1994.
10 Unreported, 18 October 1996, Lockhart J, No. G960 of 1995.
11 See *R v Gough* [1993] AC 646, 659.
12 *Singh* at page 6. See also *R v Gough* [1993] AC 646, 659 and *R v Barnsley Licensing Justices; Ex Parte Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, 187 Per Devlin LJ.

13 *Khadem v Barbour, Senior Member of the Administrative Appeals Tribunal and Anor* (1995) 38 ALD 299.
14 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 100.
15 *Re Gooliah and Minister of Citizenship and Immigration* (1967) 63 DLR (2d) 224.
16 (1995) 38 ALD 299.
17 Id 308. Mr Barbour made the following statement:

> *"Mr Khadem, I do not accept your evidence in relation to much of what you have said. I cannot make myself any clearer. I do not accept that you are giving honest evidence. Now, all I am saying to you is this, I want to be sure that you understand what you are doing in proceeding and that you have made that decision in understanding what are the consequences of that."*

18 *Singh* case 9 - 10.
19 (1994) 122 ALR 41.
20 Id 59-60, Per Deane J.
21 Id 44, Per Mason CJ and McHugh J
22 Id 75, Per Toohey J.
23 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310.
24 *Re JRL; Ex Parte* CJL (1986) 161 CLR 342, 352 per Mason J; *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272.
25 *Australian National Industries Limited v Spedley Securities (in liquidation)* (1992) 26 NSWLR 411, 417 (Court of Appeal).
26 Unreported, Supreme Court of Victoria, 1 May 1996, Per Beach J.
27 (1996) 39 NSWLR 369.
28 *Galsford v Hunt & Anor*, unreported, Federal Court, 6 December 1996.
29 *Schreuder v Australian Securities Commission*, unreported, Supreme Court of Tasmania, 14 June 1996.
30 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, Per Deane at 96.
31 *Builder's Registration Board (Qld) v Rauber* (1993) 57 ALJR 376, 386.
32 Unreported, Federal Court, 8 April 1997, Per Ritter JR.
33 Another good example which reviews many of the relevant authorities is *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd & Anor* (1996) 135 ALR 753, Per Merkel J.
34 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.
35 *R v Auctioneers and Agents Committee; Ex Parte* Amos [1985] 2 Qld R 518, 526.
36 *Vakauta v Kelly* (1989) 167 CLR 568, 572.
37 *Lindon v The Commonwealth of Australia (No 2)*, unreported, High Court, 6 May 1996, Kirby J.
38 *Wentworth v Rogers (No 12)* (1987) 400, 421, 422; *Preston v Carmody & Ors* (1993) 44 FCR 1.
39 See *Siddha Yoga Foundation Ltd v Strang & Anor*, unreported, Federal Court, 9 February 1996, per Jenkinson J, pp 4 - 5 (hereafter "**Siddha Yoga**").
40 See Appendix A.
41 (1990) 26 FCR 39 (hereafter *Northern NSW FM*) ;contra *Bleicher v Australian Capital Territory Health Authority* (1991) 101 ALR 17, 18.
42 *Northern NSW* FM 40, 44.
43 Id 43.
44 See also *Repatriation Commission v Bushell* (1991) 23 ALD 13, 16-7 per Davies J; *MA v Commissioner of Taxation* (1992) 37 FCR 225, 229.
45 *Northern NSW FM* 42-3.
46 Davies and Foster JJ referred to the unreported Federal Court case, *Versatile Carpets Pty Ltd v Collector of Customs* (unreported, 21 February 1985, Sweeney, Woodward and Davies JJ).
47 Applied in *Australian Postal Corporation v Lucas* (1991) 14 AAR 487, 496.
48 *Repatriation Commission v Malley* (1991) 24 ALD 43.
49 See for example *Roderick v Australian & Overseas Telecommunications Corporation Ltd* (1992) 111 ALR 355 (Full Federal Court); *Waldron v Comcare Australia* (1995) 37 ALD 471 (per Burchett J); *Kalwy v Secretary, Department of Social Security (No 2)* (1993) 32 ALD 451, 461-2 (although the decision to order a differently constituted tribunal was couched in language reflecting bias: "perceived to have a preconceived idea about it, such that justice may not be seen to be done").
50 *Blackman v Commissioner of Taxation* (1993) 43 FCR 449, 455 (Full Federal Court); *Northern NSW FM.*
51 Unreported, Australian Industrial Relations Commission, Full Bench, 8 December 1993.
52 *Re Australian Railways Union & Ors; Ex parte Public Transport Corporation* (1993) 117 ALR 17
53 Id 25.
54 *White v Repatriation Commission* (unreported, Federal Court, 3 August 1995, per Moore J); *Siddha Yoga.*
55 Ibid.
56 *Siddha Yoga.*
57 *Australian Railways Union v Public Transport Corporation of Victoria & Ors* (Unreported, Australian Industrial Relations Commission, Full Bench, 8 December 1993); See also *K v Cullen* (1994) 36 ALD 37; *Kunz v Commissioner of Taxation* (unreported, Federal Court, 27 February 1996, per Jenkinson J).
58 *Australian Railways Union.*
59 *Northern NSW FM*; *Australian Railways Union*;

60 *Northern NSW FM*; PW Young, "Successful appeal-remission to the trial court", (1994) 68 ALJ 79.
61 Ibid.
62 Ibid. This suggests that a concept similar to necessity (described above) is relevant in this context also.
63 PW Young, op cit; *Australian Railways Union* case, 25.
64 Such as calling the applicant an "idiot" in the Shakespearian sense or referring to the oral evidence of the applicant is not "worth the paper it is written on" and to describe him as "an unmitigated liar whose evidence I cannot accept": *Ma v Commissioner for Taxation* (1992) 37 FCR 225, 230. See also *Dolan v Australian and Overseas Telecommunications Corporation* (1992) 42 FCR 206, 218.
65 Such as concluding that the applicant's testimony was "virtually worthless" and repeating it in various places in the tribunal's reasons: *Kunz v Commissioner of Taxation*, unreported, Federal Court, 27 February 1996, per Jenkinson J.
66 *Northern NSW FM* case; *Riverina Broadcasters (Holdings) Pty Ltd v Australian Broadcasting Tribunal*, unreported, Federal Court, 29 September 1992, per Drummond J.
67 *Kalwy* case.
68 *Riverina Broadcasters* case.
69 PW Young, op cit.
70 (1995) 59 FCR 489. This case was about the decision whether or not to remit, rather than the constitution of the Tribunal.
71 Id 500-1.
72 Unreported, Federal Court, 9 February 1996, per Jenkinson J.
73 Id 4.
74 Id 6.
75 Transcript, p 17.
76 Transcript p 28-9.