The pot calling the pot black: **Problems with the current approach to apprehended bias**

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In recent months the usually esoteric legal concept of apprehended bias has rocketed into public consciousness, so much so that one hears spirited conversations on the issue in cafés from Parap to Potts Point. The cause for this explosion in public interest was a slew of high-profile cases in which judicial decision makers were asked to recuse themselves on the basis of an appearance of bias.

The then Chief Justice of Queensland's Supreme Court, Tim Carmody, was the first casualty when, in May of this year, he reluctantly fell on his sword and withdrew from determining the appeal proceedings concerning the killing of schoolboy Daniel Morcombe. This came after revelations that the Chief Justice had met privately with outspoken child protection advocate Hetty Johnston after hearing the appeal but before any decision. Johnston had previously publicly commented on the case, saying that people like the accused should be imprisoned indefinitely. The apprehended bias applications in that case were particularly comprehensive, as Carmody CJ articulated them:

> "There are allegations that I am disqualified by reason of bias in respect of the substantive appeal. There are also suggestions that I am disqualified from determining whether I am disqualified by reason of bias. There are even further suggestions that I am disqualified from determining the procedure governing my own disqualification for bias."[1]

Interestingly, Carmody CJ denied that there was any merit in the applications yet recused himself for reasons of prudence and expediency—a way of playing it safe that is sometimes referred to as 'prudential disqualification.'

A month later Justice Southwood of the NT Supreme Court was required to determine his own fate in *Lawrie & Anor v Lawler* [2015] NTSC 40. The applications for apprehended bias against His Honour related to whether he could properly hear a costs application in light of his wife's involvement in the proceedings in the normal course of her employment in the Attorney-General's Department. Denise Southwood, in her professional capacity, helped procure legal representation for one of the parties and had been in further contact with the lawyers for that party during the proceedings proper. Southwood J rejected the applications. It is understood that there is currently an appeal concerning, in part, Southwood J's determination on the question of apprehended bias. Chief Justice Riley has indicated that the appeal is likely to be heard by interstate judges as each judge of the Supreme Court would feel conflicted in one way or another.[2]

Finally, in August, four unions subject to investigation in the Trade Union Royal Commission made applications to disqualify the Commissioner Dyson Heydon. The applications, for those who have been living under a rock, were founded upon Heydon's agreement to give a speech at an event organised by two branches of the New South Wales Liberal Party at a time when he was spearheading a Royal Commission into the trade unions—the bedrock supporters of the Australian Labor Party. Heydon's encyclopaedic written reasons are almost bewitching in their transmogrification of what most lay people would consider a Liberal Party fundraiser into what Heydon would have us believe is a politically impartial occasion for dinner and a history lecture. Journalist David Marr responded in cynical awe:

1 Carmody CJ, "Mention Remarks," Banco Court, Level 3, 7 May 2015, 11:15am at page 5.

2 Riley CJ quoted in Felicity James, "Northern Territory judges too conflicted to hear Delia Lawrie appeal, Supreme Court Chief Justice says," ABC News Online, 17 September 2015.

> "And it was a wonder to watch the mighty machinery of his mind reach the conclusion that the dinner was not even a Liberal Party event. Though organised by two branches of the Liberal Party made up of lawyers; though described to Heydon as the flagship even of those branches; though the invitation came with advertising for the party and invitations to make political donations to the party; it could not be called a Liberal party event "in any substantively useful sense," because it was also open to the public. […] Not being exclusively Liberal, the event was not Liberal at all."[3]

Whatever one's position on Heydon's ultimate finding, the reasons are interesting for the recognition contained therein that perhaps the party accused of apprehended bias is not the most appropriate person to make a final determination of the issue. Heydon describes this 'procedural curiosity' in the following terms:

> "To some minds, including those of fair-minded lay observers, it might seem strange that a person complaining about the bias of a Royal Commissioner should make application for disqualification not to a court, but to the person accused of bias."[4]

The problem with the current framework for apprehended bias applications, and their determination, is that much of the case law stems from decision makers trying to save their own skin, or at least that is how it would appear to the fair-minded lay observer. This procedure falls foul of one of the Latin maxims at the root of our conception of natural justice: *nemo judex in causa sua* (nobody can be a judge in their own cause). That a decision maker accused of apprehended bias is the most appropriate person to make a decision as to the merits of that accusation is a paradoxical departure from the rationale underlying this area of law—namely to *preserve the appearance of impartiality in the mind of the public*. Some members of the legal profession may well believe that judges and quasi-judicial decision makers are perfectly capable of determining applications of bias made against them but what really matters is the public's perception of such a process, and if the tenor of conversation in cafés and news columns is anything to go by then the public is less than impressed.

It is only when such cases are appealed to a truly independent decision maker, often at great financial risk to the appellant, that the public have confidence in the result. We have had such a case in the NT this year in *Hagen Corporation Pty Ltd v Bikes Top End Pty Ltd* [2015] NTSC 23. Here Justice Kelly was called upon to determine whether an apprehension of bias attached to a magistrate who made a suggestion in private conversation, after determining the substantive proceedings but before hearing the parties as to costs, as to how any costs orders might fall. Not only did Kelly J find that the utterance called for the magistrate's disqualification in the costs proceeding but Her Honour also found that it retrospectively cast a shadow of apprehended bias back onto the trial proceedings. Kelly J stated:

> "a fair minded observer with knowledge of the confidential communication might suspect that His Honour was attempting to favour the defendant by encouraging the defendant to make an application for indemnity costs, and might accordingly, suspect that his Honour may not have been impartial as between the plaintiff and the defendant during the trial."[5]

Kelly J's refreshing equanimity in this judgment shows how much more desirable it is to have a judicial officer at arm's length from the proceedings determining these difficult questions. It is at the peril of our legal system that we ignore the public concern about the peculiarities of the current model of hearing apprehended bias applications. If the model needs to change so that justice is seen to be done, then change it must.

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3 David Marr, "Faction Man: Bill Shorten's Path to Power," Quarterly Essay, Issue 59, 2015, page 89.

4 Commissioner Dyson Heydon, "Reasons for Ruling on Disqualification Applications," 31 August 2015, at [30].

5 At [64].