HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

HOT HOLDINGS PTY LTD APPELLANT

AND

MARK GARETH CREASY & ORS RESPONDENTS

Hot Holdings Pty Ltd v Creasy [2002] HCA 51
14 November 2002
P58/2001

ORDER

1. *Appeal allowed.*

2. *Set aside the whole of the order made by the Full Court of the Supreme Court of Western Australia on 4 August 2000 dealing with the appeal to that Court and in place thereof order that the appeal to that Court is dismissed with costs.*

3. *Set aside paragraphs 2, 3, 4 and 5 of the order made by the Full Court on 4 August 2000 dealing with the return of the order nisi and in place thereof order that:*

   a) the order nisi granted by Heenan J on 23 June 1999 is discharged;

   b) the applicants in the Full Court pay the respondents' costs in that Court.

4. *The first named first respondent pay the costs of the appellant and the second respondent of the appeal to this Court.*

On appeal from the Supreme Court of Western Australia

Representation:

M J Buss QC with C G Colvin SC for the appellant (instructed by Lawton Gillon)

M J McCusker QC with C P Stevenson for the first named first respondent (instructed by Mallesons Stephen Jaques)

No appearance for the second and third named first respondents

G T W Tannin with J C Pritchard for the second respondent (instructed by Crown Solicitor's Office for the State of Western Australia)

CATCHWORDS

Hot Holdings Pty Ltd v Creasy

Administrative law – Procedural fairness – Minister of Crown – Apprehension of bias – Ministerial decision pursuant to Statute – Content of duty of procedural fairness in administrative decision-making – Pecuniary interest of an officer in Minister's Department – Whether apprehension of bias on account of pecuniary interest – Whether fact that final decision made by Minister personally cures appearance of bias in officials – Relevance of Codes of official conduct – Whether certiorari should lie to quash Minister's decision.

Mining Act 1978 (WA), s 57.

1 GLEESON CJ. Section 57 of the *Mining Act* 1978 (WA) ("the Act") provides that the Minister for Mines ("the Minister") may, on the application of any person, and after receiving a recommendation of a mining warden, grant to that person an exploration licence on such terms and conditions as the Minister may determine. In the exercise of that power, after receiving a recommendation of a mining warden, the Minister granted an exploration licence to the appellant.

2 The proceedings before the mining warden were held in public. The warden heard argument from the competing applicants, and published his recommendation, and the reasons for it. One of the main issues concerned the priority to be accorded to the various applicants. The warden conducted a ballot, in which the appellant was successful. The warden recommended that the appellant's application be given priority. No challenge is made to that recommendation. After the Minister received the warden's recommendation, he took submissions on the merits of the respective applications from all interested parties, including competing applicants. He also took advice from within his Department.

3 The Departmental advice was contained in a minute, dated 30 June 1998, signed by Mr Ranford, the Director General of the Department of Minerals and Energy of Western Australia ("the Department"). The minute canvassed the issues raised in the submissions of interested parties, and concluded by recommending that the Minister follow the warden's recommendation, and that an exploration licence be granted to the appellant.

4 The minute was considered by the Minister over a period of six weeks. During that period, the Minister had two meetings with Mr Burton, the General Manager, Policy and Legislation in the Mineral Titles Division of the Department to discuss the matter. At the first of those meetings, a Senior Assistant Crown Solicitor was present. The Minister also met separately with the Senior Assistant Crown Solicitor on another occasion. On 10 August 1998, the Minister approved the Director General's recommendation. The exploration licence was granted.

5 The first respondents, who were competing applicants for the licence, sought an order of certiorari quashing the Minister's decision. The ground of present relevance, which failed before Heenan J at first instance in the Supreme Court of Western Australia, but succeeded on appeal to the Full Court of that Court, was that "the decision of the Minister gives rise to a reasonable apprehension of bias".

6 There was an allegation in the motion for an order nisi which could have been taken to mean that the Minister had merely rubber-stamped the recommendation of the Director General, and had not brought an independent mind to bear on the decision. That was demonstrated by the evidence to be incorrect. No such allegation was pursued in argument.

7 The form of bias alleged was bias through pecuniary interest. However, it was not alleged that the Minister had any pecuniary interest in the matter. Nor was it alleged that the Director General, or Mr Burton, or the Senior Assistant Crown Solicitor, had any such interest. They were the only people consulted by the Minister about his decision.

8 The pecuniary interest said to have given rise to the alleged bias was that of two officers of the Department who were said to have been "involved" in the "process" within the Department leading up to the Director General's advice to the Minister. In each case, the interest concerned the holding of shares in a listed public company which had an option to purchase an interest in the exploration licence if it were granted to the appellant. One of the officers in question, Mr Miasi, held shares in the company. The other officer, Mr Phillips, did not; but his independent, adult son held such shares.

9 The nature of the involvement of Messrs Miasi and Phillips was as follows. Mr Phillips, who was the Director of the Mineral Titles Division of the Department, held a meeting with Mr Burton at which the two of them considered what advice should be given to the Minister by the Director General. They agreed that they would propose to the Director General that he should recommend to the Minister that the Minister should follow the warden's recommendation, and should grant a licence to the appellant. They concluded that a draft minute to that effect should be prepared for consideration by the Director General. Mr Burton's evidence was that the basis of the conclusion was that there was no compelling reason to depart from the warden's recommendation. Mr Miasi, who was the Manager, Tenure Branch of the Department, was present when Messrs Phillips and Burton discussed the matter. He made no contribution to their decision-making. He was requested by them to prepare a draft minute to give effect to their decision. Mr Miasi then asked a subordinate, Mr Hicks, to prepare a draft minute supporting the warden's recommendation. Mr Hicks did so. Thereafter, changes were made to the contents of the draft minute, but the substance of the recommendation embodied in it remained the same. In its final draft form, the minute ultimately reached the Director General, who considered it, agreed with it, signed it, and sent it to the Minister.

10 There is no suggestion that the Minister knew of the shareholdings of Mr Miasi, or of Mr Phillips' son, or that he was in any way seeking to advance their interests, or that any reasonable person could have suspected such a thing. Nor is there evidence that the Minister knew what, if any, role Mr Miasi had in the matter, except that, at the foot of the minute, beneath the signature of the Director General, there were typed the initials of Messrs Burton, Phillips, Miasi and Hicks, as well as the initials of the typist, and the Departmental file number.

11 Heenan J found that Mr Miasi did not play any part in forming the decision of Messrs Burton and Phillips that the draft minute should support the warden's recommendation, and that the only contribution by Mr Miasi to the preparation of the draft minute was (with the assistance of Mr Hicks) to express in writing the decision of Messrs Burton and Phillips to adopt the recommendation. That finding is slightly elliptical. It was not for Messrs Burton and Phillips to decide to adopt anything. Their function was to put a proposal to the Director General as to the advice that the Director General should give the Minister. What they were considering was the substance of a draft of a communication from the Director General to the Minister. The only legally operative decision was that of the Minister. It was the Minister who adopted the warden's recommendation. There was no statutory obligation on the Minister to seek the advice or assistance of his Departmental officers, although as a matter of practical convenience, and proper administrative practice, he did so[1].

12 The impugned decision was that of the Minister. But the decision-maker, the Minister, had no pecuniary interest such as might give rise to a reasonable apprehension of bias on his part; he had no knowledge of the shareholdings of Mr Miasi or Mr Phillips' son; and there is no ground to apprehend that he might have been influenced by a desire to promote their interests.

13 The first respondents sought in argument to overcome this difficulty by de-personalising the act of decision-making. Sheller AJ, whose judgment was agreed in by the other members of the Full Court, said:

> "In my opinion, the holding by an officer in the Department who had taken part, albeit at the periphery, in the giving of advice to grant an exploration licence on which advice the Minister acted, of an undisclosed share interest in a company with a direct interest in the grant of the exploration licence must give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public *that the Minister, acting on or taking account of such advice, which he believed was impartial, but which it could fairly be suspected was not, had himself for this reason not acted impartially*." (emphasis added)

14 The concluding words appear to attribute a form of vicarious partiality to the Minister. That approach has far-reaching implications. Decision-makers, whether administrative or judicial, often act on, or take into account, information or advice that comes to them from sources that are not impartial. It was not argued in this Court that the Minister took into account an irrelevant consideration, or failed to take account of a relevant consideration. That might

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1 *Local Government Board v Arlidge* [1915] AC 120 at 133.

sometimes be the consequence of receiving advice that is partial; but it is not this case.

15 Two paragraphs later, his Honour expressed his conclusion in a slightly different way:

> "In my opinion, those circumstances give rise to a reasonable apprehension or suspicion on the part of that member of the public *that the Minister's decision was not an impartial one*." (emphasis added)

16 A fair-minded member of the public, informed of all the facts set out above, would know that the Minister was personally impartial. Such a person would have no reason to apprehend that the Minister was seeking to do anything other than his statutory duty. But the reasoning proceeds on the footing that a decision-maker may act with partiality, or that a decision may be not impartial, although the decision-maker is personally impartial.

17 Before examining that assumption more closely, it is necessary to refer to two further aspects of the reasoning of Sheller AJ.

18 First, he accepted that even if Mr Phillips had been the decision-maker, he would not have been disqualified simply because of the shareholding of his son. That is consistent with authority[2]. The conclusion was not challenged in argument in this Court. However, the interest of the son was said to "strengthen the suspicion". This involves an inconsistency. It also suggests that the kind of suspicion said to be at work is not reasonable. Mr Phillips had no pecuniary interest in the matter. If, as is accepted, the interest of his son would not have disqualified him from making the ultimate decision, then it should be disregarded. It is the interest of Mr Miasi that should be the focus of attention.

19 Secondly, Sheller AJ said that Heenan J's finding that Mr Miasi did not play any part in forming the opinion of Messrs Burton and Phillips was irrelevant. It is, his Honour said, the appearance that counts. But what exactly is it that appears? Since the Minister, who made the decision, had no pecuniary interest in the matter, and the allegation of bias is directed towards the Departmental process leading up to the decision, then it must be relevant to understand the part, if any, that the person with the pecuniary interest played in the process. Suppose that the person with the pecuniary interest had been the typist. Would it have been irrelevant that he or she performed a purely mechanical function? Or suppose that the person with the interest had been the Director General. Would it have been irrelevant that he was the person on whose

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2 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Dovade Pty Ltd v Westpac Banking Group* (1999) 46 NSWLR 168.

advice the Minister acted? What is challenged is the Minister's decision, following and in conformity with the warden's recommendation, to grant an exploration licence to the appellant. If that decision can be set aside on the ground that an officer in the Department, with a personal pecuniary interest, had something to do with the process leading up to the making of the decision, then the role of the officer in the process is material, and may be critical. And if, as the respondents contend, what is determinative is the apprehension of a fair-minded observer, what fair-minded observer would shut his or her eyes to that aspect of the facts?

20 In order to resolve the problem presented by this case, it is not necessary to define comprehensively the circumstances which an administrative (or judicial) decision may be impugned upon the ground that some person, other than the decision-maker, associated with the process of decision-making, had a personal interest in the outcome of the process. That is a large question; and it may not have a single answer. At the same time, it is not sufficient to address the issue, at a high level of generality, by reference to ethical standards of public servants. The possibility that Mr Miasi's conduct may have been improper does not necessarily lead to a conclusion that the Minister's decision was invalid. It might expose him to disciplinary action, but the question is whether it exposes the appellant to the loss of its licence. Legal rights and interests are at stake, and the intermediate steps leading from the premise to the conclusion require scrutiny. Nor is it sufficient to characterise the "process" as "tainted", and note that an observer who knew some of the facts, but not others, might be suspicious about what had gone on. What is required is an identification, and application, of the principle upon which the challenge to the Minister's decision must rest.

21 If the first respondents have a case for setting aside the Minister's decision, it is on the ground that the making of the decision involved procedural unfairness. The Minister was exercising a statutory power that affected rights or interests. He had a duty to act fairly, in the sense of according procedural fairness[3]. One of the incidents of that duty was "the absence of the actuality or the appearance of disqualifying bias"[4].

22 Procedural unfairness can occur without any personal fault on the part of the decision-maker[5]. But if the form of unfairness alleged is the actuality or the

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3 *Kioa v West* (1985) 159 CLR 550 at 563 per Gibbs CJ, 584 per Mason J.

4 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367 per Deane J.

5 *R v Home Secretary; Ex parte Al-Mehdawi* [1990] 1 AC 876 at 895; *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330 at 345; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

appearance of disqualifying bias, and that is said to result from the conduct or circumstances of a person other than the decision-maker, then the part played by that other person in relation to the decision will be important.

23 In *Baker v Canada (Minister of Citizenship and Immigration)*[6], the Supreme Court of Canada set aside an administrative decision partly upon the ground that a subordinate of the decision-maker exhibited disqualifying bias. The decision concerned was a denial by an immigration officer of an application for exemption from a certain requirement. The officer who made the decision acted on the basis of a recommendation of a subordinate officer, who examined the case, made detailed notes and comments, and expressed opinions strongly adverse to the applicant. The notes and comments were found to give rise to an apprehension of racial and other forms of bias. L'Heureux-Dubé J, giving the opinion of the Court, said[7]:

> "Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J was correct to find that the notes of [the subordinate officer] cannot be considered to give rise to a reasonable apprehension of bias because it was [the superior officer] who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition … the notes of [the subordinate officer] constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself."

24 In the present case, far from having "a central role" akin to that of the subordinate officer in *Baker*, Mr Miasi had an involvement in the decision-making process that was correctly described by Heenan J as peripheral. He made no significant contribution to the Minister's decision. That is a sufficient reason for concluding that his financial interest did not deprive the Minister's decision of the appearance of impartiality.

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6 [1999] 2 SCR 817.

7 [1999] 2 SCR 817 at 849 [45].

25 It is not enough that an observer who knew some of the facts about the decision-making process, and did not wish to know others, might have entertained a suspicion that the decision was influenced by the pecuniary interest of Mr Miasi. 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.

26 The appeal should be allowed and consequential orders made as proposed by Gaudron, Gummow and Hayne JJ.

27 GAUDRON, GUMMOW AND HAYNE JJ. The issue in this appeal was said to relate to the application of rules of procedural fairness, and in particular the aspect of the rules which concern bias on account of interest, when a public servant "involved" in the preparation of a minute to be considered by a Minister making a decision under statute had a pecuniary interest that may be affected by the Minister's decision. In fact, the "involvement" of the public servant in the preparation of the minute in this case was, at most, peripheral. For that reason, there was no sufficient factual basis for the submission that certiorari should issue to quash the Minister's decision. Whether, or how, the rules concerning bias (whether as bias on account of interest or association, or in some other way) could be engaged if the person having a financial interest in the decision had played a greater role in preparing material to be considered by the decision-maker raises questions which were not the subject of detailed argument on the hearing of this appeal. These reasons, therefore, do not examine the validity of some of the assumptions that underpinned the submissions that were made.

The facts and the Act

28 Several applications for an exploration licence under the *Mining Act* 1978 (WA) ("the Act") and two applications for a mining lease were lodged within less than one minute, each of them relating to substantially the same area. The appellant, Hot Holdings Pty Ltd ("Hot Holdings"), applied for an exploration licence; Mr M G Creasy, the first of the respondents in this Court, made five applications for exploration licences. Others (not party to the present appeal) applied for exploration licences or mining leases. Some days later, Arimco Mining Pty Ltd ("Arimco Mining") and Oresearch NL ("Oresearch") (respondents to the appeal in this Court who took no active part in the argument) applied for an exploration licence. A mining warden concluded, under s 105A(3) of the Act, that there should be a ballot to determine priority between the various applicants for the form of mining tenement which each sought. Considerable litigation ensued, of which the appeal to this Court is the latest chapter. It is not necessary to describe more than a few aspects of the history of the litigation.

29 Several of the applicants for mining tenements, including both Hot Holdings and Mr Creasy, made separate applications for certiorari to quash the decision of the mining warden to hold a ballot. The applications relied on various grounds but it is not necessary to notice them now. The Full Court of the Supreme Court of Western Australia held that certiorari would not go to quash a mining warden's decision to hold a ballot. On appeal to this Court, it was held that certiorari did lie to challenge the warden's decision[8]. The matter was

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8 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

remitted to the Full Court. On remitter, the Full Court discharged the orders nisi in so far as they challenged the decision to hold a ballot but made an order absolute for certiorari to quash a decision by the warden to include in the ballot some applicants who are not parties to the present appeal[9]. A ballot was held, and Hot Holdings, being drawn first, was determined to have priority.

30 Under the Act, the decision to grant an exploration licence to an applicant is the Minister's[10]. The Act does not require that the Minister consider, or grant, applications in order of their priority. After the ballot was held, but before the Minister decided which application should be granted, all of the applicants for mining tenements were invited to make submissions to the Minister and they did so.

31 Officers of the Minister's Department prepared a minute for the chief executive officer of the Department (the Director General) to place before the Minister. That minute reviewed the events that had happened, including the litigation that had taken place and the submissions that had been received. Attached to the minute were various supporting documents which dealt in more detail with matters summarised in the minute. The minute that was submitted recommended that the Minister give notice to the parties of his intention to grant the application that had been made by Hot Holdings and, in addition, to grant the application by Mr Creasy for a mining tenement relating to a small area of land not the subject of application by Hot Holdings or other applicants.

32 Six weeks after the minute and its attachments were submitted to the Minister and after a number of meetings between the Minister, a Senior Assistant Crown Solicitor, and the General Manager, Policy and Legislation in the Mineral Titles Division of the Department, the Minister approved the recommendations made in the minute.

The proceedings below

33 Mr Creasy, Arimco Mining and Oresearch again applied to the Supreme Court of Western Australia this time for prohibition prohibiting the Minister from proceeding with his decision to grant an exploration licence to Hot Holdings, and mandamus, requiring the Minister to consider the applications of Mr Creasy, Arimco Mining and Oresearch according to law. Prohibition was sought on

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9 *Ex parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy* (1996) 16 WAR 428.

10 s 57.

grounds that included that "the decision of the Minister … was affected by bias [or] gives rise to a reasonable apprehension of bias".

34 The primary judge (Heenan J) held that it was arguable that the Minister had made an error of law in deciding to grant the application of Hot Holdings notwithstanding what was alleged to be its non-compliance with s 118 of the Act. Accordingly, on this ground he granted an order nisi, returnable before the Full Court, for prohibition, mandamus and certiorari. The application for order nisi on grounds of bias or apprehension of bias was dismissed. From this decision Mr Creasy, Arimco Mining (by now, in liquidation) and Oresearch appealed, contending that the primary judge should have held that the grounds alleging bias or apprehension of bias were arguable.

35 This appeal, and the return of the order nisi that had been granted, came on for hearing before the Full Court (Wallwork and Steytler JJ and Sheller AJ). The Full Court was unanimously of the opinion that the appeal should be allowed and the order nisi for certiorari and prohibition made absolute, on the ground that the circumstances gave rise to a reasonable apprehension or suspicion that the Minister's decision was not an impartial one. The ground alleging error of law was held not to have been established. Special leave to appeal against that aspect of the Full Court's decision was refused. Two orders were taken out, one dealing with the appeal and one dealing with the return of the order nisi.

36 Sheller AJ, with whose reasons the other members of the Full Court agreed, said that:

> "the holding by an officer in the Department who had taken part, albeit at the periphery, in the giving of advice to grant an exploration licence on which advice the Minister acted, of an undisclosed share interest in a company with a direct interest in the grant of the exploration licence must give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the Minister, acting on or taking account of such advice, which he believed was impartial, but which it could fairly be suspected was not, had himself for this reason not acted impartially."

The "advice" to which his Honour was referring was the departmental minute to the Minister.

37 It is necessary to notice the findings that were made about the preparation of that minute for it is those findings that reveal the degree of "involvement" of those who, it was alleged, had a relevant pecuniary interest. These findings, made at trial, were not disturbed on appeal to the Full Court and were not challenged in this Court.

38 Principal attention was directed in argument in this Court to the position of Mr Victor Miasi who, at the relevant times, was the Manager, Tenure Branch of the Department. Mr Miasi owned 40,000 shares in AuDAX Resources NL ("AuDAX"), a company which had entered an option agreement to buy an 80 per cent interest in the exploration licence, if Hot Holdings' application for that licence succeeded. Argument proceeded on the basis that, as a result of his shareholding, Mr Miasi had a pecuniary interest in the outcome of the Minister's decision although there was no evidence below which did more than reveal the fact that Mr Miasi held the stated number of shares. There was no evidence about the worth of that shareholding, or the possible consequences for its worth if the licence were granted. Argument proceeded in the courts below on the assumption that an "interest" in the outcome was demonstrated by proving that the person concerned owned shares in a company which had agreed to acquire an interest in the relevant mining tenement. It is unnecessary to examine the validity of that assumption[11].

39 Mention was also made of a shareholding in AuDAX held by an adult son of another officer of the Department (the then Director, Mineral Titles Division – Mr William Phillips). Mr Phillips' son was 29 years old when the Minister made his decision. Two years earlier, the son, then aged 27 and living independently, had told his father that he had bought shares in AuDAX. As a result of an inquiry made by the solicitor then acting for Mr Creasy, Mr Phillips asked his son, about two months before the minute was submitted to the Minister, whether the son still held shares in AuDAX and was told that he did. Nonetheless, it is necessary to bear steadily in mind that the evidence stopped far short of showing that Mr Phillips senior had any pecuniary interest in the outcome of the Minister's decision; all that was shown was that the son may have had such an interest.

40 In the Full Court, Sheller AJ said that the interest of Mr Phillips' son (an interest that was not disclosed to the Minister) "strengthen[ed] the suspicion" on the part of a fair-minded and informed member of the public that the Minister had not acted impartially. How or why this should be so was not spelled out and it is a proposition that should be rejected. A decision-maker's *ignorance* of the existence of an interest held by another in the outcome of a decision that was to be made cannot, standing alone, support a conclusion that the decision-maker has or may have sought to further that interest. The relationship between Mr Phillips and his son provides no sufficient basis for reaching some different conclusion. The holding of shares by Mr Phillips' son should be put to one side.

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11 cf *Ebner v Official Trustee* (2000) 205 CLR 337 at 357 [55].

41 The General Manager, Policy and Legislation in the Mineral Titles Division of the Department, Mr R W Burton, gave unchallenged evidence before the trial judge that after the mining warden had decided that there should be a ballot between the competing applicants for mining tenements, he had discussed the procedure that was then to be followed on several occasions with Mr Phillips. In accordance with what Mr Burton described as "the usual practice" of the Department a minute from the Director General to the Minister had to be prepared which would deal with the details of the hearing in the Warden's Court, the recommendation of the mining warden, other court proceedings that had been taken by the parties, and any submissions to the Minister that were lodged by the parties. Mr Burton swore that he and Mr Phillips decided that "subject to issues raised in submissions and legal advice being obtained in the future" the minute that was to be prepared should "support the Warden's recommendation". As a result, Mr Phillips asked Mr Miasi to prepare a draft minute that would reflect the position that Mr Burton and Mr Phillips had tentatively reached. Mr Burton swore that he believed that Mr Miasi was present when he and Mr Phillips discussed the matter, and decided that the draft minute should support the warden's recommendation, but that "Mr Miasi did not influence our decision".

42 No doubt it was on this evidence that the trial judge founded his conclusion that "Mr Miasi did not play any part in forming the decision of Messrs Burton and Phillips that the draft minute should support the warden's recommendation". This finding was not challenged in the appeal to the Full Court. Given that Mr Burton had not been cross-examined on his affidavit, that is hardly surprising. Although additional evidence was adduced before the Full Court, including evidence on affidavit from Mr Phillips, this further evidence did not touch the question of what role Mr Miasi had played in the preparation of the minute that went to the Minister.

43 In fact, following the direction from Mr Burton and Mr Phillips, Mr Miasi wrote a draft of the minute that reflected the instructions he had been given. Considerable additions were later made to that draft by others, before the Director General signed it, but some parts of Mr Miasi's original draft were contained in the finished document.

44 The "involvement" of Mr Miasi in the preparation of the minute was, therefore, very limited and is properly described as peripheral. In accordance with instructions given to him he prepared a draft which faithfully reflected the instructions he was given. Although present when there were discussions about what instructions were to be given to him, the unchallenged (and unchallengeable) finding is that he did not play any part in forming the decision to issue the particular instructions that he was given. Thereafter, he played no further part in the preparation of the document. In fact, the document underwent considerable change before it was put before the Director General. So far as the

evidence reveals, the Director General may have made an entirely independent choice about whether to submit the minute to the Minister in the form in which it stood when it was submitted to him. No less importantly, the minute which went to the Minister was no more than a recommendation by the Department.

45 In the courts below it was submitted that the Minister had adopted the recommendation without independently considering the question for his decision or the various matters to which reference was made as affecting that question in a minute which, without its supporting papers, occupied more than ten pages of single-spaced printing. That submission failed at trial and on appeal to the Full Court and it was not pursued in this Court. Accordingly, the submissions that were made in this Court must be considered on the premise that the Minister did not simply rubber stamp the departmental recommendation but gave the matter independent consideration.

46 The Full Court held that "the apparent connection between Mr Miasi and the recommendation of the Department which went forward to the Minister is such as to give rise to a reasonable apprehension of bias". It was said that Mr Miasi had "taken part, albeit at the periphery, in the giving of advice to grant an exploration licence on which advice the Minister acted". This, it was said, "must give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the Minister, acting on or taking account of such advice, which he believed was impartial, but which it could fairly be suspected was not, had himself for this reason not acted impartially". There are several aspects of that reasoning to which reference should be made.

47 To say that Mr Miasi had "taken part" in the giving of advice does not sufficiently identify the part that he played. What was found at trial reveals that his part was no more than to prepare a document reflecting a decision made by others. That being so, it could not be said that a fair-minded and informed member of the public, who knew what Mr Miasi had done, could fairly suspect that the content of the departmental advice recorded in the minute was influenced, or affected in any way, by Mr Miasi or the interest which he had in AuDAX. That is reason enough to hold that the Full Court was wrong in its conclusion and that the appeal should be allowed. But there are more deep-seated difficulties in the reasoning adopted in the Full Court than this factual difficulty to which we have pointed. Those difficulties centre upon identifying who, or what is said may appear to have been biased.

48 It was said in the Full Court that the Minister's decision was "infected, even though he acted unwittingly on … tainted advice" and that the circumstances were such as to give rise to a reasonable apprehension or suspicion that "the Minister's decision was not an impartial one". It would, of course, be

wrong to place too much emphasis on metaphorical references to "infection" or "taint". But it is apparent that in the Full Court the relevant question was understood as being whether the *decision* was impartial or affected by reasonable suspicion of bias. This was the approach to the matter which the first respondent sought to support in this Court. Indeed, the first respondent expressly disavowed any contention that the Minister was biased, or could reasonably be suspected of having been so, or that the Minister had made, or could reasonably be suspected of having made, the decision he had in order to further the interests of Mr Miasi.

49 What then emerges is that rules which focus upon decision-makers, but acknowledged to have no operation in relation to the decision-maker in question, are sought to be applied to the "decision" as if it could have a personal characteristic described as "bias" which would be revealed by considering both the information given to the decision-maker and who it was who provided it.

50 It is evident that a proposition stated in that form is couched too widely. Those who place information before decision-makers will often have an interest in the outcome and it will not always be the case that the nature or extent of that interest will be fully revealed to the decision-maker. It would be wrong to say, as a general rule, that in *every* such case the decision must be considered to be legally infirm. Further, the proposition is one which may mask the making of important assumptions about what are the interests which a particular decision-maker may properly take into account in reaching a decision. There may be cases in which a decision-maker, especially a Minister, may properly have regard to a wide range of considerations of which some may be seen as bearing upon such matters as the political fortunes of the government of which the Minister is a member and, thus, affect the Minister's continuance in office. It has been said that "the whole object" of a statutory provision placing a power into the hands of the Minister "is that he may exercise it according to government policy"[12]. It would be wrong to assume that in every case a decision-maker can act only if he or she has the same level of independence and security as a judge and, in that sense, has nothing to gain or lose from the decision made.

51 That is not to deny, of course, the importance or application of the well-established ground for the grant of certiorari for "fraud"[13], a ground in which "fraud" is to be understood in a broad sense and as encompassing matters such as acting for an improper purpose. It is evident that there will be cases in which that, rather than "bias" or apprehension of bias, will be the better characterisation of why certiorari will lie.

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12 Wade and Forsyth, *Administrative Law*, 8th ed (2000) at 464.

13 *Craig v South Australia* (1995) 184 CLR 163 at 175-176.

52 Reference was made, in the course of oral argument, to the "process" of decision-making being affected by those who participate in that process having some interest in its outcome. Reference was also made to the important part played in administration by briefing papers and the like, and the possibility that the decision may be affected by slanting what is said in such a paper. Whether the grounds on which certiorari lie do, or should, extend to cases where a person other than the decision-maker has engaged in some conduct which is "conduct for the purpose of making a decision"[14] (but not itself a decision) and has some interest in the outcome which, if an interest held by the decision-maker, would engage the rules about apprehension of bias, is a large question. It is not necessary to decide it in this case. It is enough to say that there was not here any sufficient factual basis for exciting suspicion of the kind referred to by the Full Court.

53 The appeal should be allowed. The first named first respondent should pay the costs of the appellant and the second respondent. The orders of the Full Court dealing with the appeal to that Court should be set aside, and in their place there should be orders that the appeal to that Court is dismissed with costs. Paragraphs 2, 3, 4 and 5 of the orders of the Full Court dealing with the return of the orders nisi should be set aside, and in their place there should be orders that the orders nisi granted by Heenan J on 23 June 1999 are discharged and the applicants in the Full Court pay the respondents' costs in that Court.

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14 cf *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 6; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341-343; Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 39-51.

54 McHUGH J. After considering a Minute of Advice prepared by Departmental officers, the Western Australian Minister for Mines accepted a recommendation made by a mining warden and granted an application for an exploration licence to the appellant, Hot Holdings Pty Ltd. Unbeknown to the Minister, one officer who had assisted in preparing the Minute owned shares in a company that had an option to purchase 80% of the licence if Hot Holdings obtained it. The adult son of another officer who had participated in the preparation of the Minute also owned shares in the company that had the option. The issue in this appeal, brought by Hot Holdings against an order of the Full Court of the Supreme Court of Western Australia, is whether the Full Court erred in holding that the decision of the Minister should be set aside on the ground of reasonable apprehension of bias. In my opinion, the Full Court erred in holding that the parts played by the two officers gave rise to a reasonable apprehension that the Minister's decision was affected by bias.

Statement of the case

55 Mark Creasy, the first respondent to this appeal, applied to the Supreme Court of Western Australia for orders nisi for writs of prohibition, *mandamus* and *certiorari* and a declaration that the decision of the Minister to grant the licence was void. He claimed that the conduct of officers employed in the Minister's Department gave rise to a reasonable apprehension that the Minister had not brought a fair and unprejudiced mind to the determination of the application. In the Supreme Court, Heenan J found that a Departmental officer, Mr Miasi, owned shares in AuDAX Resources NL, a company that had an option to purchase the 80% of the exploration licence granted to Hot Holdings. But his Honour found that, although Mr Miasi had assisted in preparing the Minute, he "did not play any part in forming the decision of [two other officers] that the draft Minute should support the warden's recommendation." Accordingly, Heenan J held that a fair-minded and informed member of the public would not have a reasonable apprehension or suspicion that the decision of the Minister was actuated by bias.

56 Mr Creasy appealed to the Full Court. On the appeal, he tendered further evidence that established that Mr Phillips, the other Departmental officer, knew at the relevant time that his adult son had a shareholding in AuDAX. The Full Court unanimously concluded that the decision of the Minister gave rise to a reasonable apprehension or suspicion that the decision was not an impartial one.

57 Sheller AJ, who gave the leading judgment, held that the connection between Mr Miasi and the recommendation given to the Minister by the Department gave rise to a reasonable apprehension of bias. His Honour said that the undisclosed interest of Mr Phillips' son strengthened the suspicion of bias.

The material facts

58 In October 1992, the government of Western Australia released land for mining and exploration purposes. Two applications for mining leases and eleven applications for exploration licences were lodged with the office of the Mining Registrar. Section 57 of the *Mining Act* 1978 (WA) empowered the Minister to grant an exploration licence on such terms and conditions as the Minister determined after considering the recommendation of a mining warden. In June 1993, a mining warden, after holding a public hearing, determined that five applications complied with the requirements of the Act. In accordance with s 105A of the Act, he decided that a ballot should be held to determine their priority. After extensive legal challenges by a number of applicants for the licences, the warden held a ballot in December 1997. Hot Holdings' application was the first drawn. In January 1998, the warden reported to the Minister. He recommended that the application of Hot Holdings be granted "in priority" to the other applications.

59 After receiving the warden's report, the Minister called for, and received, submissions from all the applicants for the mining tenements. As part of the determination process, the Minister had Departmental officers prepare a Minute for the Director General of the Department of Minerals and Energy. The Minute was prepared after a meeting between Mr Burton, the General Manager, Policy and Legislation, of the Mineral Titles Division of the Department and Mr Phillips, the Director of the Mineral Titles Division at which Mr Miasi, Manager of the Tenure Branch of the Department was present.

60 The Minute summarised the various submissions of the applicants and the decision of the warden, attaching various supporting documents. It concluded by recommending that the Minister follow the recommendation of the warden and grant a mining tenement to Hot Holdings. After going through a number of drafts, a final version of the Minute was presented to the Director General for his signature. The Minute, dated 30 June 1998, was then presented to the Minister for his consideration.

61 Over a period of six weeks, the Minister considered the Minute and the submissions. During this period, he had two meetings with Mr Burton. A Senior Assistant Crown Solicitor was present at the first meeting. The Minister also had a further private meeting with the Senior Assistant Crown Solicitor. In August 1998, the Minister granted Hot Holdings' application for the mining tenement ahead of the Creasy, Arimco Mining Pty Ltd and Oresearch NL applications (the first respondents – Arimco and Oresearch took no part in the appeal to this Court).

62 Throughout the period from January 1998 to August 1998, Mr Miasi had a shareholding in AuDAX, a publicly listed company that had an option to purchase 80% of the exploration licence that Hot Holdings was seeking. During

the same period, Mr Phillips knew that his 27 year old son, who was not living with him, had purchased shares in AuDAX. Neither the Minister nor the Director General were aware of Mr Miasi's shareholding or that of Mr Phillips' son.

Preparation of the Minute and the role of Mr Miasi and Mr Phillips

63 After the decision of the mining warden, Mr Burton and Mr Phillips discussed the preparation of a Minute for the Minister's assistance in accordance with the usual practice. They concluded that, subject to issues raised in the submissions and legal advice, the Minute should support the warden's recommendation. They also decided that Mr Miasi should be responsible for preparing the draft Minute. Mr Burton said in evidence that they agreed that there "was no compelling reason to depart from [the warden's recommendation]". Mr Miasi was present during the discussions between Mr Burton and Mr Phillips, but he did not influence their decision in any way.

64 Mr Miasi then arranged for Mr Hicks, an officer in the Mineral Titles Division, to prepare the draft Minute. Mr Hicks prepared the draft in consultation with Mr Burton and then passed it on to Mr Burton. Mr Miasi's involvement ceased at this point. He had nothing further to do with the preparation and content of the final Minute that was given to the Director General. Mr Phillips reviewed the draft Minute and made amendments, before Mr Burton prepared the final Minute, which had little resemblance to the draft. A number of the amendments made by Mr Burton were brought about as a result of legal advice, comments from Mr Phillips and consideration of fresh submissions from the competing applicants.

65 The final Minute contained the initials of Mr Miasi along with Mr Burton, Mr Phillips and Mr Hicks. However, Mr Burton said that this was done not because Mr Miasi made any contribution to the final Minute but because it was the practice of the Mineral Titles Division for the initials to be recorded of the writers on any Minutes including and preceding the final Minute.

66 As Gleeson CJ points out in his judgment[15], the decisions below refer to the decision of Mr Burton and Mr Phillips. However, that is misleading. No person, other than the Minister, had to decide anything. The Departmental officers had to provide the Minister with the relevant material, and the Director General had to make a recommendation to assist the Minister. There was no evidence that suggested that the Minister did not turn his own mind to the matters relevant to determining the grant of the mining tenement. At first instance there was a claim made that the Minister did not weigh up or consider the merits of the

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15 Reasons of Gleeson CJ at [11].

applications but rather simply "rubber stamped" the recommendation of the Director General. Heenan J dismissed this submission. It was not pursued on appeal to the Full Court or in this Court.

Was there an apprehension of bias?

67 In my opinion, neither the role played by Mr Miasi nor by Mr Phillips could be said to make a hypothetical fair-minded lay person conclude that there was any reasonable apprehension of bias in the decision-making process.

68 The rules of natural justice require that any decision of a Minister that affects a person's rights, interests or legitimate expectations must be unbiased and free from any reasonable apprehension of bias. Where an administrative decision is made in private, the test for apprehended bias is whether a hypothetical fair-minded lay person, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision[16]. In deciding the issue, the court determines the issue objectively.

69 Neither bias nor the reasonable apprehension of bias is inferred merely because a Minister or an adviser has a pecuniary interest in the outcome of the decision made by the Minister. In *Ebner v Official Trustee in Bankruptcy*[17], this Court held that the Australian common law does not recognise a rule that a judge is automatically disqualified from hearing a case because the judge has a pecuniary interest in the outcome of a case that he or she is hearing. The pecuniary interest of the judge gives rise to no conclusive inference that the judge is biased. Nor does the pecuniary interest give rise to any conclusive inference that a well-informed lay person might reasonably apprehend that the judge is biased. A court can only infer bias or the reasonable apprehension of bias after examining the nature of the pecuniary interest that the judge has and how the outcome of the case might affect that interest. The common law rule embodied in *Ebner* applies equally to a Minister of the Crown or an officer who assists in a decision-making process.

70 While the test for a reasonable apprehension of bias is the same for administrative and judicial decision-makers, its content may often be different. What is to be expected of a judge in judicial proceedings or a decision-maker in quasi-judicial proceedings will often be different from what is expected of a

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16 *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 990 [28]; 179 ALR 425 at 434-435.

17 (2000) 205 CLR 337 at 356-358 [54]-[56] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

person making a purely administrative decision[18]. One difference arises when the decision-maker is a Minister who is accountable to the Parliament and the electorate. In *Minister for Immigration and Multicultural Affairs v Jia Legeng*[19], Gleeson CJ and Gummow J, Hayne J agreeing, said that "[t]here are ... consequences that flow from the circumstance that a power is vested in, and exercised by, a Minister". Their Honours noted that, subject to any contrary indication in the legislative grant of power, a Minister would be entitled to act in accordance with governmental policy when making a decision. Thus, it will ordinarily be very difficult to impute bias or the reasonable apprehension of bias to the decision of a Minister who has considered all applications on their merits but made it clear that preference would be given to applicants who complied with government policy. However, it is unnecessary to determine in this appeal whether the application of the test for apprehended bias was affected by reason of the decision-maker being a Minister granted a broad discretion under the *Mining Act*. Hot Holdings did not rely on the width of the ministerial discretion, the Minister's political accountability or his government's policy in respect of mining leases and exploration licences.

71 The evidence established that neither the Minister nor the Director General of the Department had any interest in the decision or any knowledge of the interest of Mr Miasi or the interest of Mr Phillips' son. There was no allegation or evidence that the Director General did not turn his own mind to the contents of the Minute before signing it. Furthermore, Mr Burton, who was primarily responsible for preparing and supervising the Minute and who drafted the final version had no interest in the decision. Nor was he aware of the interest of Mr Miasi or Mr Phillips' son. Accordingly, the major participants in the process that culminated in the Minister's acceptance of the warden's recommendation were disinterested and independent and turned their minds to the issues that arose for consideration. These are matters that the hypothetical fair-minded person should be taken to know.

72 In the Full Court, Sheller AJ said that the role played by Mr Miasi and Mr Phillips was not relevant. But with great respect, their roles are not only relevant but their peripheral nature is decisive. A court will not conclude that there was a reasonable apprehension of bias merely because a person with an interest in the decision played a part in advising the decision-maker. The focus must be on the nature of the adviser's interest, the part that person played in the decision-making process and the degree of independence observed by the

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18 *Webb v The Queen* (1994) 181 CLR 41 at 53 per Mason CJ and McHugh J, 76 per Deane J.

19 (2001) 205 CLR 507 at 529 [63], 561 [176]. See also *Bushell v Secretary of State for the Environment* [1981] AC 75 at 95 per Lord Diplock.

decision-maker in making the decision. If there is a real and not a remote possibility that a Minister has not brought an independent mind to making his or her decision, the role and interest in the outcome of his or her officers may result in a finding of reasonable apprehension of bias. It would do so in the present case, for example, if either Mr Phillips or Mr Miasi were biased or their circumstances gave rise to an apprehension of bias and either of them had influenced the Minister's decision. Thus, the role played by an adviser is a critical factor in determining whether the interest of an adviser in the outcome of a decision taints the decision with bias or a reasonable apprehension of bias.

73 In the present case, the evidence showed that neither Mr Miasi nor Mr Phillips influenced the Minister's decision. Because that is so, the only way the first respondents can make out a case of reasonable apprehension of bias is by relying on the principle of bias by association. Again the peripheral role of the two officers is both relevant and decisive.

74 In some cases, a reasonable apprehension of bias may arise simply from the close connection of a decision-maker with a person who may be affected by the outcome of the decision. The relationship of the parties may be so close and personal or the person interested in the outcome so influential or dominant that a fair-minded person might reasonably apprehend that the decision-maker might not make the decision impartially. In *Webb v The Queen*[20], Deane J said that an apprehension of bias could arise from a relationship, or direct experience or contact, with persons interested or involved in the decision. His Honour cited as an example a relationship between a decision-maker and a dependent spouse or child who has a direct pecuniary interest in the outcome of the decision. An inference of a reasonable apprehension of bias in such cases will be easier to draw when the mechanics of the decision-making process are not known. However, whether or not the mechanics of the process are known, no conclusion of apprehended bias by association can be drawn until the court examines the nature of the association, the frequency of contact, and the nature of the interest of the person associated, with the decision-maker. It is erroneous to suppose that a decision is automatically infected with an apprehension of bias because of the pecuniary or other interest of a person associated with the decision-maker. Each case must turn on its own facts and circumstances.

75 Mr Creasy claimed that the Minister's decision gave rise to a reasonable apprehension of bias because Mr Phillips played a part in preparing the Minute and his son was affected by the decision because his son had a shareholding in AuDAX. But both the son's interest and Mr Phillips' relationship with the Minister's decision are too far removed to give rise to any apprehension of bias by reason of Mr Phillips' association with the Minister. Mr Phillips' relationship

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20 (1994) 181 CLR 41 at 74.

with the Minister was no more than that of Minister and public servant. He had no direct pecuniary interest in the decision. It is true that he reviewed the draft Minute and made amendments before Mr Burton prepared the final Minute. But that had little resemblance to the draft. It is also true that some comments made by Mr Phillips went into the Minute submitted to the Minister. But the Minister knew nothing of the son's interest.

76 Put most favourably for Mr Creasy, the question is whether a fair-minded lay person, properly informed as to the nature of the process, might reasonably apprehend that the Minister might not have made his decision impartially because Mr Phillips was an adviser and his son had a shareholding in a company that would benefit from the grant to Hot Holdings. I do not think that any fair-minded person could think that the Minister might be so irresponsible that he would allow *this* association with Mr Phillips to affect his decision. Moreover, in this case, the evidence revealed the decision-making process. It is not a case where an apprehension of bias might be increased by the combination of an interested person being closely associated with the decision-maker or involved in the decision-making process and the mechanics of the decision-making process being unknown to the fair-minded observer. Once the Minister's lack of knowledge of the son's shareholding is taken into account, no fair-minded observer could possibly conclude that the Minister might not have made his decision impartially.

77 Mr Creasy also claimed that the Minister's decision gave rise to a reasonable apprehension of bias because Mr Miasi played a part in preparing the Minute and had a shareholding in AuDAX. The trial judge found that Mr Miasi played a peripheral role in the preparation of the Minute. His Honour also accepted evidence that Mr Miasi did not influence the contents of the recommendations in the Minute in any way. Once those findings were made, a fair-minded person could not reasonably apprehend bias on the part of the Minister by reason of his association with Mr Miasi. The relationship between the Minister and Mr Miasi was simply that of Minister and public servant with Mr Miasi playing no part in formulating the contents of the Minute. Add to this, the fact that the Minister was unaware of Mr Miasi's shareholding and it is impossible to find that any fair-minded observer would reasonably apprehend bias on the Minister's part in granting Hot Holdings' application.

78 In my opinion, the Full Court should have held that the circumstances of the Minister's decision-making process did not give rise to a reasonable apprehension that he was biased in granting Hot Holdings' application.

79 It is unnecessary to determine whether the absence of evidence concerning other matters meant that the respondents' case had to fail. The Creasy interests led no evidence as to the significance of the shareholding of either Mr Phillips' son or Mr Miasi. There was no evidence showing the potential benefit or detriment to them that might flow from a positive or negative decision for Hot

Holdings. Without such evidence, it was difficult – perhaps impossible – to determine whether either Mr Miasi or Mr Phillips' son had an interest that was significantly affected by the Minister's decision.

Orders

80 The appeal should be allowed. I agree with the orders proposed by Gaudron, Gummow and Hayne JJ.

81 KIRBY J. This appeal from a judgment of the Full Court of the Supreme Court of Western Australia[21] concerns an aspect of administrative law. It presents the question whether the exercise by a minister of powers, vested in him by State legislation[22], miscarried because a fair-minded lay observer could reasonably apprehend that the minister might not have brought an impartial mind to the resolution of the matter he was required to decide. The question is said to arise by reason of the submission to the Minister for Mines in the Government of Western Australia of a departmental minute. Officers of his Department, who had undisclosed pecuniary interests in its subject matter, participated in the preparation of the minute. It recommended that the Minister make a decision that was advantageous to those undisclosed interests. The Minister made the decision as recommended. The ultimate question raised by these proceedings is whether the Minister's decision was thereby invalidated.

Two particular features of the case

82 There are two factual features that mark this case off from others concerned with disqualification for bias of repositories of statutory power and the invalidation of their decisions made when so disqualified.

83 First, it is not suggested that the Minister who made the ultimate decision was personally affected by, or even aware of, the alleged disqualification involving the departmental officers. However, his exercise of power involved the signification of his approval to a recommendation in a departmental minute. Each of the affected officers had contributed to the preparation of that minute.

84 Secondly, the degree of involvement of the impugned officers varied. One held shares in a company that had entered into an option agreement to buy an 80% interest in the exploration licence, if the application for that licence succeeded. But he was depicted in the evidence as a mere amanuensis for the decisions of others, not in fact affecting the substance of the recommendation that ultimately went to the Minister. The other officer, although more senior and more directly involved in the formulation of the recommendation in the minute, had no personal interest in the appellant or the associated company. But he was aware that his adult son (who lived separately from him) had bought shares in the company having the option agreement already mentioned. A child is in a personal relationship commonly described as that of the "first degree". For that reason such a relationship enlivens a higher degree of imputed influence than

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21 *Creasy v Hot Holdings Pty Ltd* [2000] WASCA 206 ("*Creasy*").

22 *Mining Act* 1978 (WA) ("the Act"), s 57.

other relationships[23]. Neither departmental officer disclosed the interest or association to their colleagues, still less to the Minister, before the Minister proceeded to approve the recommendation to which, in their differing ways, the officers had contributed.

85 These were the general circumstances in which the Full Court unanimously decided to provide relief to Mr Mark Creasy and companies with which he is involved (the first respondents) against Hot Holdings Pty Ltd (the appellant) and against the Minister (the second respondent). At first instance, Heenan J granted an order nisi for a writ of certiorari upon an alternative ground (non-compliance with s 118 of the Act). The Full Court held that the circumstances proved gave rise to a reasonable apprehension of bias or suspicion of lack of impartiality on the part of the Minister in respect of his decision to grant the appellant's application for an exploration licence. It removed the Minister's decision into the Supreme Court, quashed it, making absolute the order nisi. The matter was referred back to the Minister to be determined according to law.

86 A majority of this Court now reverses the decision of the Full Court. In my opinion no error has been shown to warrant disturbance of the Full Court's conclusions and judgment. Neither an analysis of the facts nor the application of the relevant principles of law justifies the course taken.

Administrative law and accountability

87 The starting point for analysis involves a reminder of the history of the civil service in England that preceded the British settlement of Australia. Originally, most of the clerks and officials of the King were technically "clergy", serving in one of the lowest orders. This permitted those officials to hold benefices, receiving emoluments from the rich revenues of the Church. This was the regular way for making provision for civil servants in the middle ages because the Church was rich and the King comparatively poor[24].

88 After the Reformation, the roles of the Church and the King were largely reversed. However, the manner of securing payment for the civil service remained unsatisfactory and its funding insecure. The significant growth of that

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23 Australian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2002) at 10.

24 Plucknett, *A Concise History of the Common Law*, 5th ed (1956) at 236. Prior to the nineteenth century patronage was rife in public office leading to many reported cases of impeachment: Potter, *The Historical Introduction to English Law and its Institutions*, 3rd ed (1948) at 162-163.

service in the nineteenth century led to the introduction of competitive examinations that helped abolish corrupt and questionable practices and replaced them with a culture of personal integrity and financial probity[25]. Generally speaking, these features of uncorrupted administration became the hallmarks of the civil service of the British Empire, including Australia. They are a precious heritage.

89 The Australian colonies and, after federation, the Commonwealth and the States, inherited this strong tradition. It was reinforced by the enactment of criminal laws for the punishment of persons in public office who misused their offices for personal gain[26]. Quite apart from such statutory offences, a public officer committed an offence at common law if that officer corruptly used his or her official position to obtain any private advantage[27]. Yet for the most part, until quite recently, invocation of the criminal law was comparatively rare and usually unnecessary at least in relation to senior officials who normally conformed to the strong culture of integrity both in the federal and State public services of Australia.

90 The passage by the Congress of the United States of the *Ethics Reform Act* 1989 (US)[28] coincided with a number of inquiries about the integrity of public administration in Australia. Some of these inquiries led to legislation addressed to the perceived problems in the public service, including corruption[29]. Thus,

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25 Holdsworth, *A History of English Law*, (1938), vol 10 at 509-514.

26 eg *Criminal Code* (WA), ss 82, 83, 88, 121, 122, 139; *Crimes Act* 1914 (Cth), s 34; cf Carney, "The Duty of Parliamentarians to Make Ad Hoc Disclosure of Personal Interests", (1991) 2 *Public Law Review* 24 at 42.

27 *R v Boston* (1923) 33 CLR 386 at 392-393, 401-402; *R v Whitaker* [1914] 3 KB 1283 at 1297-1299; Finn, "Public Officers: Some Personal Liabilities", (1977) 51 *Australian Law Journal* 313 at 316.

28 Dal Pont, "An Ethical Framework for Governmental Responsibility to the Electorate", (1994) 10 *Queensland University of Technology Law Journal* 1 at 3; Falvey, "The Congressional Ethics Dilemma: Constituent Service or Conflict of Interest?", (1991) 28 *American Criminal Law Review* 323; Nolan, "Regulating Government Ethics: When It's Not Enough to Just Say No", (1990) 58 *George Washington Law Review* 405.

29 eg *Official Corruption Commission Act* 1988 (WA), now the *Anti-Corruption Commission Act* 1988 (WA); cf *Independent Commission Against Corruption Act* 1988 (NSW).

following royal commissions and other inquiries[30], recommendations were made concerning the need for guidelines or codes of conduct for public servants. For example, in May 1992, the Electoral and Administrative Review Commission of Queensland released a report[31] which considered "the proper relationship between public servants and their Ministers, the need for ethical education and the means whereby good management practices might discourage corruption". At about the same time a number of codes of conduct were adopted for federal[32] and State[33] public servants of various ranks. Such State codes were applicable in the present case.

91 It is always desirable to see a case in its legal and social context. When a court, and particularly this Court, is asked to examine and declare the outer boundaries of the law, it is essential that this be done bearing in mind relevant contextual considerations. In the case of a minister in the Government of Western Australia, these could not overlook the concerns about the conduct of public and corporate officers in the 1980s and 1990s. Such conduct produced demands in that State, as elsewhere in Australia, for higher standards, including in respect of financial probity and the avoidance of conflicts of interest and duty

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30 eg Western Australia, *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, (1992). See Brown, "The Fiduciary Duty of Government: An Alternate Accountability Mechanism or Wishful Thinking?", (1993) 2 *Griffith Law Review* 161 at 175. See now the Western Australian Public Sector Code of Ethics 2002 (WA) gazetted on 19 February 2002 in accordance with s 21(5) of the *Public Sector Management Act* 1994 (WA).

31 Queensland, Electoral and Administrative Review Commission, *Report on the Review of Codes of Conduct for Public Officials*, Report No 92/R1, (1992); see also Dal Pont, "An Ethical Framework for Governmental Responsibility to the Electorate", (1994) 10 *Queensland University of Technology Law Journal* 1 at 2; Coghill, "Updating Ministerial Responsibility – Adapting the Doctrine to a More Complex World", (1999) *The Parliamentarian* 199 at 199.

32 Commonwealth, Guidelines on Official Conduct of Commonwealth Public Servants, (1987).

33 See Dal Pont, "An Ethical Framework for Governmental Responsibility to the Electorate", (1994) 10 *Queensland University of Technology Law Journal* 1 at 3 referring to the Code of Conduct for Public Sector Executives 1989 (NSW); Code of Conduct for Officers of the Queensland Public Service 1988 (Q); Minister's Code of Ethics 1990 (Q)*;* Guidelines for the Financial Management of the Office of the Minister 1990 (Q); Pecuniary Interest Handbook: A Guide for Council Officers and Councillors 1989 (Vic); Rights, Responsibilities and Obligations: A Code for Public Servants (Public Service Commission of Western Australia) 1988 (WA).

by those entrusted to exercise power on behalf of others[34]. Any examination of the problem before this Court in the present appeal which ignored these factors would miss an important contextual consideration with which the law is, and should be, concerned.

92 The maintenance of financial probity on the part of ministers and departmental officials in Australia is one aspect of the wider question of democratic accountability of public officers to the people whom they serve[35]. "[T]o secure accountability of government activity is the very essence of responsible government"[36]. According to Professor Paul Finn (as Finn J then was), the accountability of public officers may take three forms[37]. One form is accountability to official superiors and peers. This is the preferred, but most diluted, method of accountability favoured in Westminster systems. Another is accountability to agencies such as the Auditor-General, the Ombudsman and to Parliament. These agencies act, or should act, for and on behalf of the public. The final form of accountability is to members of the public directly, either as individuals (as through administrative law mechanisms) or as a community (as through elections).

93 When this analysis is kept in mind, it is easier to understand the recent growth of administrative law remedies. In common law countries they have developed to such an extent that Lord Diplock described them as the most significant legal advance of his judicial lifetime[38]. It is not coincidental that this growth in administrative law remedies has occurred at a time when the theory of ministerial responsibility, as an effective means of ensuring public service

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34 cf McCann, "Institution of Public Administration Australia: Some Observations About the Profession of Public Service", (2001) 60 (4) *Australian Journal of Public Administration* 110 at 114.

35 Finn, "Public Trust and Public Accountability", (1993) 65 (2) *Australian Quarterly* 50 at 51, 53; Finn, "Myths of Australian Public Administration", in Power (ed), *Public Administration in Australia: A Watershed*, (1990) 41 at 41-42.

36 *Egan v Willis* (1998) 195 CLR 424 at 451 [42] per Gaudron, Gummow and Hayne JJ citing Queensland, Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees*, (1992), vol 1 at par 2.23; see also *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 ("*Taylor*") at 1479-1480 [217]; 182 ALR 657 at 711.

37 Finn, "Public Trust and Public Accountability", (1993) 65(2) *Australian Quarterly* 50 at 51-52.

38 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 641.

accountability, has been widely perceived as having serious weaknesses and limitations[39].

94 Under Australian constitutional arrangements all public officers who wield power on behalf of the people must ultimately be accountable, directly or indirectly, to the legislature and the Executive of which they are part. But it is also clear that there is a complementary accountability to independent courts and tribunals, as provided by law[40]. Part of that law is the developing field of administrative law. Part of that field is expressed by the common law. It is applied and developed by judges, in Australia as in other countries, to improve the scrutiny of the exercise of power by public officials and to render those who are the repositories of such power accountable to the people for such exercise.

95 It is implicit in the conferral of legislative power that it will be exercised in accordance with the terms of the grant, for the benefit of the people generally[41]. Unless the grant makes it clear that the power may be exercised for the benefit of particular people or interests, any such discriminatory use of the power will be outside the grant. Furthermore, the exercise of the power in a way that personally benefits, directly or indirectly, those who exercise the power, or those who influence such exercise, will ordinarily be outside the grant. The rule against bias and the furtherance of self-interest is therefore, ultimately, to be seen as founded on the doctrine of *ultra vires*[42]. It is reinforced by principles of the

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39 Mulgan, "The Processes of Public Accountability", (1997) 56(1) *Australian Journal of Public Administration* 25 at 31; Thompson and Tillotsen, "Caught in the Act: The Smoking Gun View of Ministerial Responsibility", (1999) 58(1) *Australian Journal of Public Administration* 48 at 50. For similar observations in the context of the United Kingdom see Turpin, "Ministerial Responsibility: Myth or Reality?", in Jowell and Oliver (eds), *The Changing Constitution*, 3rd ed (1994) 109 at 114-115, 144-145; Lewis and Longley, "Ministerial Responsibility: The Next Steps", (1996) *Public Law* 490 at 503-504; Scott, "Ministerial Accountability", (1996) *Public Law* 410 at 415.

40 cf *Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828 at 841 [70]; 188 ALR 353 at 371-372.

41 Dal Pont, "An Ethical Framework for Governmental Responsibility to the Electorate", (1994) 10 *Queensland University of Technology Law Journal* 1 at 7-8 citing *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 137-138 per Mason CJ; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71-72 per Deane and Toohey JJ.

42 cf *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 78 [218].

common law and by legislation enacted to strengthen this basic concept aimed at protecting the ultimate source of all public power – the people.

96 In Australia, the law has adopted stringent rules to ensure that the exercise of public power is lawful and within the grant. The legality of the exercise of power is lost not only when actual bias is shown on the part of the repository but also where there is a reasonable appearance or apprehension of bias. Moreover, such loss of power occurs not only when the reasonable observer *would* apprehend a risk of bias but when that observer *might* apprehend the possibility that the impugned decision may have been influenced by extraneous considerations irrelevant to the grant[43]. Most of the cases coming before the courts in Australia, as elsewhere, have concerned allegations of bias on the part of courts, tribunals, arbitrators and like adjudicative decision-makers[44]. What is distinct about this appeal is that it concerns a different repository of power, namely the Minister and a process of decision-making that involved, in various ways, identified officers of a department of the State Government.

The applicable Code of Ethics and Code of Conduct

97 The officers of the Department of Minerals and Energy were, at all material times, subject to the Western Australian Public Sector Code of Ethics. That Code was promulgated, with effect from 1 July 1996, pursuant to the *Public Sector Management Act* 1994 (WA)[45]. In that Code, there was acknowledged a responsibility to uphold the laws and to "[f]aithfully and impartially carry out lawful decisions and policies". Under the principle of "Respect for persons", a number of ethical values and behaviours to be complied with were specified. First amongst these was honesty. Under that heading were included the following express commitments:

> "We have a responsibility to:
>
> Behave honestly in all our dealings.

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43 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 ("*Jia*") at 548-549 [134], 556-557 [159]; cf *R v Camborne Justices; Ex parte Pearce* [1955] 1 QB 41 at 51; *Porter v Magill* [2002] 2 WLR 37 84-85 [105]; 1 All ER 465 at 508.

44 *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12]-[13], 500-504 [36]-[45], 515-518 [74]-[80]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 ("*Ebner*") at 358-361 [59]-[72], 362-364 [79]-[84], 382-384 [143]-[149]; cf Allars, "Procedural Fairness: Disqualification Required by the Bias Rule", (1999) 4 *The Judicial Review* 269 at 284-285.

45 s 21(5). See *Western Australian Government Gazette*, No 73, 7 June 1996.

> Openly declare matters of private interest that may conflict with the performance of our public duty.
>
> Ensure we do not use our position for personal profit or gain."

98 Later, in 1998, the Director General of the Department issued a Code of Conduct for the Department itself[46]. In this publication he said that it was "based on the Public Sector Code of Ethics" but was designed to address "the many ethical issues we face in our day-to-day business". According to the Director General, the departmental Code of Conduct "embodies the values of [the Department] and embraces those behaviours that will build a better organisation committed to providing the highest levels of customer service". So stated, the departmental Code of Conduct expressed the values of the Department that were already in existence. For the first time, they were collected and written down.

99 The departmental Code of Conduct contains more detail than the Public Sector Code of Ethics. It incorporates a series of policy statements. One of these expressly addresses the issue of potential conflict between the interests of public officers employed in the Department and the duties they owe to members of the public. Relevantly, the policy statement declares[47]:

> "As an employee of the Department of Minerals and Energy you are not permitted to use any information acquired in the course of your duties for personal benefit or gain, either directly or indirectly …
>
> A potential conflict of interest occurs where a person has an interest in a matter under consideration in their working environment. An actual conflict arises where the person fails to disclose a potential conflict, *and participates* in deliberations on the matter, as if the conflict did not exist.
>
> In order to avoid any perceived conflict of interest, it is strongly recommended that all employees divest themselves of any shares in mining and petroleum companies operating in Western Australia."

100 In conjunction with the foregoing policy statement, the departmental Code of Conduct sets out what it describes as the "Supporting Ethical Principles". These include the following assertion of responsibility to:

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46 Western Australia, Department of Minerals and Energy, Code of Conduct, 1998.

47 Western Australia, Department of Minerals and Energy, Code of Conduct, 1998: Corporate Policy No 12; Issue No 1. Effective date 28 July 1998 (emphasis added).

> "… openly declare matters of private interest that may conflict with the performance of our public duty, and avoid making commitments that may bias our judgement or compromise the performance of our public duty."

101 Although the Department's Code of Conduct and the policy statement contained within it, did not formally come into effect until 28 July 1998, it can hardly be suggested that the policy statement or ethical principles were novel or represented the expression of new, different or unexpected standards for officers of the Department. In any case, the Code of Conduct was in force, in the present matter, before the Minister finally approved the minute which he received from the Department and, pursuant to that approval, made his decision under the Act to grant the appellant the exploration licence that it had sought, which is challenged in these proceedings.

The background facts

102 Most of the relevant facts are set out in the reasons of Gaudron, Gummow and Hayne JJ ("the joint reasons")[48]. I wish only to add emphasis to some aspects of the chronicle.

103 The exact date when Mr Miasi, Manager of the Tenure Branch of the Department, purchased his allocation of 40,000 fully paid shares in AuDAX Resources NL ("AuDAX") was not in evidence. However, it was accepted to be before he took part in the preparation of the document that became the minute to the Minister. It is known that Mr Phillips' son purchased his 18,000 fully paid shares in that company in May 1996. It is also known that, some time that year, the son informed Mr Phillips of his shareholding. Neither Mr Phillips, who was the Director of the Mineral Titles Division of the Department nor Mr Miasi gave oral evidence before the primary judge.

104 In the Full Court, an affidavit of Mr Phillips was read. He deposed to the internal arrangements of the Department concerning the preparation of the final minute to the Minister, to the initial request that Mr Miasi arrange the preparation of a draft minute, and to Mr Phillips' subsequent review and amendment of the draft derived by Mr Burton from Mr Miasi's initial document. The affidavit includes a statement "that [Mr Miasi] did not influence my decision to support the Warden's recommendation" and that Mr Miasi, in discussions on the matter, "did not express a view as to the merits of the competing applications". Mr Phillips also set out the circumstances of discovery of his son's shares in AuDAX. These are sufficiently described in the joint reasons[49]. His affidavit

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48 The joint reasons at [28]-[32], reasons of McHugh J at [58]-[62].

49 The joint reasons at [39].

confirms that Mr Phillips had not told anyone in the Department of his son's shares before receiving a letter from the solicitor for the first respondents, after the Minister's decision. The affidavit also asserts that Mr Phillips was unaware in 1998 as to whether his son still held the shares in AuDAX. It denies that he was influenced in his official duties by the knowledge of his son's shareholding. Mr Phillips was not required for cross-examination on his affidavit.

105 The involvement of Mr Miasi in the departmental procedures, is further disclosed by the affidavits of Mr Burton (General Manager, Policy and Legislation) and Mr Hicks (Tenure Officer). According to Mr Burton, Mr Miasi was present when he and Mr Phillips discussed the draft minute that was to be prepared for ultimate transmission to the Minister. It was at that meeting that the decision was made to support the Warden's recommendation. Like Mr Phillips, Mr Burton deposed that Mr Miasi "did not influence our decision". Mr Burton said that, thereafter, Mr Phillips requested Mr Hicks to prepare the draft minute along the lines of a draft prepared in handwriting by Mr Miasi. Mr Miasi gave that handwritten document to Mr Hicks. It contained the recommendation supporting the Warden's decision. It included the critical proposal: "[t]here is no compelling reason why you should not follow the Warden's recommendation in this matter". According to the evidence of Messrs Phillips and Burton, this recommendation simply reflected their instructions to Mr Miasi. But it also reflected a potential financial advantage to Mr Miasi that he did not disclose to the Minister or to his fellow officers. Nor did he explain it in any testimony in the Courts below. The recommendation also afforded financial advantage to Mr Phillips' son, if the Minister accepted it, as he did.

106 An examination of the document that was eventually submitted by the Director General to the Minister indicates that, in the critical passages, it substantially followed Mr Miasi's handwritten draft. It recommended that the Minister give notice to the parties of his intention to grant the application for the exploration licence to the appellant. It concluded with a paragraph indicating: "Should you concur with my recommendations, suggested letters to the parties are attached for your consideration please". The Minister duly signed and despatched the attached letters to the representatives of the parties.

107 In the minute, underneath the signature of the Director General dated 30 June 1998, appears the code "RB/WP/VM/DH". It was agreed that these initials constitute references to Messrs Burton, Phillips, Miasi and Hicks. Adjacent to the Director General's signature appears a stamp bearing the legend "Approved: Minister for Mines". This is inscribed with the Minister's signature and an indication of the date, 10 August 1998.

The decision of the Full Court

108 The reasons of the Full Court were given by Sheller AJ. They expressed repeated concern that Mr Miasi did not disclose his interest in AuDAX[50]. The reasons proceeded[51]:

> "[T]he apparent connection between Mr Miasi and the recommendation of the Department which went forward to the Minister is such as to give rise to a reasonable apprehension of bias. Mr Miasi had a direct, though relatively small, pecuniary interest in the outcome of the Hot Holdings application. Had he been the decision-maker, this would have resulted in his automatic disqualification regardless of the particular circumstances."

109 After reference to authority, Sheller AJ turned to the interest of Mr Phillips' son and continued[52]:

> "[I]f Mr Phillips was the decision-maker, he would not be disqualified simply because of his son's interest in the shares in AuDAX. But again this shareholding is significant, when looked at, as it must be, in the circumstance of Mr Miasi's shareholding. These circumstances are assumed all to be known to the informed member of the public and in that sense must be aggregated."

110 It is against the background of these conclusions that Sheller AJ reached the ultimate opinion, extracted in the joint reasons[53]. The undisclosed interests of Mr Miasi and of Mr Phillips' son were held to strengthen the belief that, in the words of Sheller AJ, a fair-minded and informed member of the public would form. This was that the Minister "acting on or taking account of such advice" had not acted impartially because, although unwittingly, he had reached his decision on the basis of advice that, objectively, was "tainted". That is to say, objectively the advice to the Minister, and hence his decision based upon it, was not (or might not appear to be) impartial[54]. It was for that reason that the Full Court quashed the decision.

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50 *Creasy* [2000] WASCA 206 at [78], [83].

51 *Creasy* [2000] WASCA 206 at [83].

52 *Creasy* [2000] WASCA 206 at [90].

53 The joint reasons at [36].

54 *Creasy* [2000] WASCA 206 at [93].

111 The conclusion of the Full Court was, as I have stated, unanimous. It will now be overruled by the majority of this Court. This suggests that the difference between the opinions of the Full Court and the majority of this Court is affected either by different perceptions of the applicable law or by a different analysis of the facts, possibly informed by an unexpressed premise that affects the respective outcomes. It is therefore essential to examine a number of issues in the hope of identifying, and evaluating, the ultimate points of difference.

The issues

112 The following issues are presented for consideration:

(1) Does the decision of the Full Court reflect a now rejected view that a separate rule of disqualification exists with respect to public decision-makers where their decisions are affected by pecuniary interest?

(2) Does the decision of the Full Court reflect an erroneous application to administrative decision-making by the Minister, and within his Department, of more stringent legal rules on bias devised and expressed for the disqualification of judicial and like decision-makers?

(3) Does the decision of the Full Court overlook the fact that the ultimate decision challenged is that of the Minister personally, which decision should be treated as separate from any earlier acts and omissions of officers of his Department, however imperfect?

(4) Whatever may be the law governing the invalidating consequences of the exercise by a minister of powers conferred upon him or her by statute, resulting from the existence of financial interests of a minister's departmental or other advisers, on the facts of this case, did the Full Court err in holding that the decision should be invalidated?

Disqualification for pecuniary interest

113 It is possible to deal briefly with the first issue. It is true that, before the decision of this Court in *Ebner*, it was generally thought that a special principle of disqualification for pecuniary interest applied automatically where the decision-maker in question had a financial interest in the subject of the decision[55]. That principle, at least in the case of judicial decision-makers, was commonly traced to the decision of the House of Lords in *Dimes v Proprietors of*

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55 (2000) 205 CLR 337 at 351-352 [38].

the Grand Junction Canal[56]. The question whether *Dimes* still stated the common law in Australia, as it applied to judges and adjudicative decision-makers, was fully debated in *Ebner*[57]. In that context, the majority in this Court considered that there was no separate principle of disqualification for pecuniary interest. Such cases were to be treated by the "application of the apprehension of bias principle"[58].

114 Both as a matter of adherence to established legal authority and as a matter of legal principle and policy, I disagreed with the decision to depart from the rule in *Dimes*[59]. The decision in *Ebner* overrules longstanding authority[60], which had recently been approved by this Court[61], and which was reflected in the Court's practice[62], recognising the "special class" of disqualification where there is "a direct pecuniary interest in the outcome of the proceedings"[63]. *Ebner*, so far as it concerns the recusal of judges and like decision-makers, puts Australia at odds with the strict law and practice observed, in this regard, in other common law countries[64]. It does so at a time when there are strong reasons of legal policy for adhering to the strict and separate rule[65].

115 Nevertheless, the law as stated in *Ebner* must be applied by Australian courts. Although stated in the context of the disqualification for bias of judicial

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56 (1852) 3 HLC 759 at 793 [10 ER 301 at 315]. See *Ebner* (2000) 205 CLR 337 at 352 [42].

57 (2000) 205 CLR 337 at 351-358 [38]-[58], 364-366 [85]-[91], 373-376 [118]-[125].

58 (2000) 205 CLR 337 at 357 [55].

59 (2000) 205 CLR 337 at 390 [162].

60 *Dickason v Edwards* (1910) 10 CLR 243 at 259 per Isaacs J.

61 *Webb v The Queen* (1994) 181 CLR 41 ("*Webb*") at 75; cf *Ebner* (2000) 205 CLR 337 at 390 [162].

62 In *Bank of NSW v Commonwealth* (1948) 76 CLR 1 as explained in Cranston, "Disqualification of Judges for Interest, Association or Opinion", (1979) *Public Law* 237 at 239; cf *Ebner* (2000) 205 CLR 337 at 377 [128].

63 *Webb* (1994) 181 CLR 41 at 75; *Ebner* (2000) 205 CLR 337 at 390 [162].

64 *Ebner* (2000) 205 CLR 337 at 384-386 [150]-[156].

65 *Ebner* (2000) 205 CLR 337 at 387-390 [161].

officers, it is obvious that (statute apart) no different or at least no stricter rule would be applied to ministers and other public officials.

116 The reasons of the Full Court in the present case were written before this Court's decision in *Ebner* was announced. Some of the reasoning of Sheller AJ, concerning the automatic disqualification of Messrs Miasi and Phillips, may indeed mirror the understanding of the law that existed before *Ebner*. To that extent, such reasoning may now need qualification.

117 However, the passages in which reference was made by Sheller AJ to automatic disqualification are *obiter dicta*. They do not constitute the reasons for the judgment of the Full Court. This is made clear by the statement that Mr Miasi would have been disqualified "regardless of the particular circumstances" had he been the decision-maker[66]; whereas in fact he was not. And that Mr Phillips would not have been disqualified by his son's interest if he had been the ultimate decision-maker[67]; as he was not.

118 It follows that the appellant's suggestion that the Full Court misled itself in a material way on this basis must be rejected.

Disqualification for bias and ministerial decision-making

119 The rules governing disqualification for bias, actual or imputed, originally developed in relation to office-holders wielding public power in the courts[68]. With the growth of tribunals, the principle was extended to them[69] in accordance with Lord Hewart CJ's well-known dictum that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"[70].

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66 *Creasy* (2000) WASCA 206 at [83].

67 *Creasy* (2000) WASCA 206 at [90].

68 As in *Dimes* (1852) 3 HLC 759 [10 ER 301].

69 *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577.

70 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259; see Spigelman, "Seen to be Done: The Principle of Open Justice – Part I", (2000) 74 *Australian Law Journal* 290. The US Supreme Court has adopted a similar formulation "to perform its high function in the best way 'justice must satisfy the appearance of justice'": see *In re Murchison* 349 US 133 at 136 (1955); *Schweiker v McClure* 456 US 188 at 196 (1982) citing *Offutt v United States* 348 US 11 at 14 (1954).

120 By the middle of the twentieth century, attempts were being made in England to extend this principle to the decisions of ministers, acting as the repositories of statutory power. Initially, such attempts were rebuffed[71]. For a time it was confidently said by judges and text-writers that "bias" or "interest" applied "as a vitiating element only to a judicial decision, and where the decision process involves an element of application to policy, this principle of natural justice has no relevance to that element"[72]. However, by the time that *R v Gaming Board for Great Britain; Ex parte Benaim and Khaida* was decided, Lord Denning MR was able to say that the earlier view had become heresy[73]:

> "It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter ... At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge v Baldwin*[74]. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. *R v Metropolitan Police Commissioner; Ex parte Parker*[75] and *Nakkuda Ali v Jayaratne*[76] are no longer authority for any such proposition."

121 In Australia, partly stimulated by the trend of English authority and partly in response to similar social changes, in turn reflected in legislation[77], the wider rule came to enjoy support in this Court. The extension of common law principles of natural justice and procedural fairness into some administrative decision-making, even where it did not follow all the characteristics of adjudication, was noted in *Kioa v West*[78]. The foundation for the authority for

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71 See eg *Franklin v Minister of Town and Country Planning* [1948] AC 87; *Wilkinson v Barking Corporation* [1948] 1 KB 721.

72 Garner, *Administrative Law*, 5th ed (1979) at 137 with reference to *Darlassis v Minister of Education* (1954) 118 JP 452.

73 [1970] 2 QB 417 at 430.

74 [1964] AC 40.

75 [1953] 1 WLR 1150; [1953] 2 All ER 717.

76 [1951] AC 66.

77 Such as the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and legislation for freedom of information and establishing an Ombudsman or equivalent office holder in all Australian jurisdictions.

78 (1985) 159 CLR 550 ("*Kioa*") at 584.

courts, by the process of judicial review, to require compliance by the repository of statutory power with the principles of natural justice was explained by Brennan J in *Kioa* by reference to "the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power"[79]. Subsequently, in this Court, reference has repeatedly been made to this imputed "intention" or "purpose" of the law-maker[80].

122 In deciding exactly what is required in a particular case of an administrative decision-maker acting pursuant to a statutory power the search is for the conditions that may properly be attributed to the particular exercise so as to reflect the implied purpose of the legislature in conferring the power on the nominated repository. Once one leaves the relatively familiar coastline of powers reposed in judges and like decision-makers (who the Supreme Court of the United States said are expected to "hold the balance nice, clear and true"[81]), there is disagreement about obligations of decision-making that will be attributed to particular holders of statutory power.

123 In overseas jurisdictions such as the United States, the requirements may be influenced by constitutional notions of due process that extend beyond judicial decision-makers to some administrative decision-making[82]. In that country it has frequently been held to be implicit in the conferral of a statutory power that the repository must be unbiased in its exercise[83]. In England, recent decisions have

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79 (1985) 159 CLR 550 at 609.

80 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 [91]; cf *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189; *Jia* (2001) 205 CLR 507 at 529 [62].

81 *Tumey v Ohio* 273 US 510 at 532 (1927); *Ward v Village of Monroeville* 409 US 57 at 60 (1972); *Aetna Life Insurance Co v Lavoie* 475 US 813 at 822 (1986); *Concrete Pipe and Products of California Inc v Construction Laborers Pension Trust for Southern California* 508 US 602 at 617-618 (1993).

82 eg *Marshall v Jerrico Inc* 446 US 238 at 243, 247-250 (1980); *Concrete Pipe and Products of California v Construction Laborers Pension Trust of Southern California* 508 US 602 at 618-620 (1993).

83 *Withrow v Larkin* 421 US 35 at 47-48, 57 (1975); *Hortonville Joint School District No 1 v Hortonville Education Association* 426 US 482 at 493-494, 496 (1976); *Schweiker v McClure* 456 US 188 at 195-196 (1982).

been influenced by the European Convention on Human Rights[84]. There is no precisely equivalent consideration at work in Australian law.

124 The analysis most helpful for Australian legal developments in this respect is provided by the Supreme Court of Canada. That Court has acknowledged that the same standards of decision-making cannot be imposed on administrative decision-makers as are expected of the courts[85]. However, it is not suggested in any of the recent Canadian decisions that the mere fact that the decision-maker is classified as "administrative" rather than "judicial" relieves the administrator of the requirement to exercise its powers without bias[86]. In *Baker v Canada (Minister of Citizenship and Immigration)*[87] the Supreme Court of Canada confirmed that the requirement for the absence of a reasonable apprehension of bias attaches to administrative decision-making. The standards and relevant considerations as to what constitutes imputed bias were said to vary "like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker"[88].

125 The notion that an administrative decision-maker, acting under a legislative grant of power, may exercise powers biased against a party that has invoked the exercise, is one to which I could not assent. At least, where the powers in question have been reposed by Parliament in a minister and where their exercise concerns the rights, interests or legitimate expectations of persons affected by the decision, the normal implication would be that the legislature, conferring the powers, expected and intended them to be exercised observing the requirements of procedural fairness[89]. This includes the avoidance of disqualifying (actual or imputed) bias.

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84 *Human Rights Act* 1998 (UK), Sch 1: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389; [2001] 2 All ER 929.

85 *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369 at 385 per Laskin CJ, 394-395 per de Grandpré J; *Idziak v Canada (Minister of Justice)* [1992] 3 SCR 631 at 661; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001] 2 SCR 781 at 794-795 [24].

86 *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 SCR 632 at 638-639.

87 [1999] 2 SCR 817 ("*Baker*").

88 *Baker* [1999] 2 SCR 817 at 850 [47].

89 *Kioa* (1985) 159 CLR 550 at 584, 610; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653.

126 Two recent decisions of this Court have explored the scope of judicial review of ministerial decisions made under powers conferred by statute. In *Taylor*[90], the Court considered the jurisdictional error that will arise where a repository of power purports to, but does not really, exercise the statutory functions as, for example, where the repository has precluded himself or herself from exercising the power according to law[91]. That question did not ultimately need to be decided in that case, where other issues were paramount. However, in my opinion one such source of preclusion would be disqualifying bias on the part of a minister, as the decision-maker, or the intrusion of such bias in a material way into the process of the making of the decision so that a reasonable observer might consider that it might have affected the decision ultimately made by the minister concerned. To put it another way, it may be concluded that the decision was based on considerations irrelevant to the exercise of the power.

127 More pertinent to the present case is the discussion of the questions relating to bias in *Jia*. That was a case where this Court unanimously reversed a finding by the Full Court of the Federal Court of Australia that Mr Jia had established *actual* bias on the part of the Minister[92]. No one questioned in that case that, if actual bias had been established, it would have invalidated the Minister's decision. The source of the invalidity was not the common law. It was the applicable provision of the *Migration Act* 1958 (Cth)[93]. Nevertheless, having lost the appeal, Mr Jia relied on s 75(v) of the Constitution to seek relief against the Minister on the ground of *apprehended* bias. Under the *Migration Act*, that ground was not available in the Federal Court[94].

128 I dissented from the conclusion of the majority in *Jia* to the effect that relief under the Constitution should be rejected on the ground that the claim of apprehended bias had not been made out. It is proper to observe that, on this point, the majority laid emphasis upon the "political responsibility" of a minister

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90 (2001) 75 ALJR 1439; 182 ALR 657.

91 *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 483; *Taylor* (2001) 75 ALJR 1439 at 1473 [189]; 182 ALR 657 at 703.

92 (2001) 205 CLR 507 at 519 [32], 536 [88], 547 [129], 561 [176], 590 [277].

93 The Minister's decisions under ss 501 and 502 were reviewable on the ground of actual bias by virtue of s 476(1)(f) of the *Migration Act* 1958 (Cth) as it then stood: *Jia* (2001) 205 CLR 507 at 527 [59], 529 [64].

94 *Migration Act* 1958 (Cth), ss 476(1)(f), 476(2): *Jia* (2001) 205 CLR 507 at 541-542 [111]-[112].

in making decisions reposed by law in him or her[95]. Their Honours also pointed out that a minister was to be distinguished from a decision-maker in a court[96]. I did not disagree with these propositions. They are self-evident and are reflected in the Australian constitutional requirement that ministers sit in Parliament[97]. However, I rejected any suggestion (which I did not understand the majority in *Jia* to endorse) that, simply because of the political character of a minister's office and consequent accountability to Parliament, he or she was exempted from compliance with the law against bias or from answering to the courts on that ground, if bias could be established by evidence[98]. I acknowledge that a minister "typically operates in a less formal way [than a court], in a milieu of politics and subject to additional and different forms of public accountability"[99]. But that is not the end of the analysis. It is merely the beginning.

129 In *Jia* I expressed the opinion, which I still hold, that it is "quite wrong to suggest that, because the decision-maker is a Minister, necessarily a politician and an elected official, he or she is exempt from the requirements of natural justice, or enjoys an immunity from disqualification for imputed bias"[100]. This must be so because, in every case, the minister must be able, if challenged, to demonstrate that he or she has exercised the statutory powers in question "by reference only to considerations that are relevant to the grant of power and compatibly with the exercise of that power"[101]. To the extent that a minister departs from the source of the power (or, I would add, is subjected by the process of decision-making to an appearance that his or her decision might have been affected by extraneous or impermissible considerations) the law will have been breached. The link to the source of power will be severed. The decision will be invalid. A party with an interest will be entitled to judicial relief from the purported decision. That party will be able to secure an order quashing the decision and requiring that it be made again, lawfully. In some circumstances,

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95 (2001) 205 CLR 507 at 539 [102] referring to *South Australia v O'Shea* (1987) 163 CLR 378 at 411 per Brennan J.

96 (2001) 205 CLR 507 at 562-565 [178]-[187] per Hayne J (Gleeson CJ and Gummow J concurring at 538 [100]), 592 [284] per Callinan J.

97 (2001) 205 CLR 507 at 545 [123] referring to the Constitution, s 64.

98 (2001) 205 CLR 507 at 545 [124].

99 (2001) 205 CLR 507 at 545-546 [125].

100 (2001) 205 CLR 507 at 549 [137].

101 (2001) 205 CLR 507 at 550 [139].

the party affected may even be entitled to ignore the purported administrative decision as no real "decision" at all[102].

130 So far as the propositions that appeared in *Jia* are concerned, I did not take them to be matters upon which the Court divided. They are basic doctrine. They amount to little more than an elaboration, in the particular case, of what has been said by this Court in many decisions[103].

131 I now reach the point where there may be a difference between the approach of the majority in *Jia* (and in this case) and that which I favour. In *Jia*, where the question was whether the Minister's exercise of a statutory power was invalidated for imputed personal bias, disclosed in a radio broadcast that he had made and a letter that he had written, I said[104]:

> "Other members of the Court set out the texts of the radio broadcast and letter … They have dissected its paragraphs. In my respectful view, this is not how the law of imputed bias operates. Being concerned primarily with the impact of events upon the persons affected and upon reasonable members of the public, what is involved is the general impression derived from the evidence, not a lawyer's fine verbal analysis."

132 This, with respect, is the error that has been made again here. It is not an error made by Sheller AJ and the Full Court. The question is not one of fine analysis. Instead, it is whether, looking at this decision by the Minister, and the participation in the steps that led to it of the two senior officials of his Department, a reasonable member of the public *might* conclude that there is a *possibility* that the decision could have been affected by the earlier participation in it of officers who, personally or through their immediate families, had undisclosed interests of which they were aware and these interests would be advanced if the Minister accepted the departmental recommendation[105].

133 The analysis of authority set out by the Full Court showed that it did not fall into the error of applying to the Minister's decision an "over-judicialised"

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102 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 598 at 606-607 [51]-[53], 624-625 [151]-[155], 626 [163], cf 615-620 [101]-[123]; 187 ALR 117 at 129-130, 154-155, 156-157, cf 141-147.

103 *Annetts v McCann* (1990) 170 CLR 596 at 604-605; cf *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 [91].

104 (2001) 205 CLR 507 at 552 [146] (footnotes omitted).

105 See *Jia* (2001) 205 CLR 507 at 548-549 [133]-[135].

approach to the law of bias[106]. Nor, in my view, did the Full Court fall into the error of giving effect to nothing more than a "vague sense of unease"[107]. In the submissions made to this Court for the Minister it was accepted that the reasonable apprehension of bias test should be applied to the administrative decision-maker, although the standard should vary to take account of the identity of the decision-maker in the particular case and the nature of the decision-making process. This submission was correct. Any suggestion that the Minister and his officials were exempt from the law against bias must be firmly rejected as an attempt to return the law to earlier heresies.

134 Further it is also correct that, by the rules governing apprehension of bias applicable to administrative decision-making, the content of the standards expected of the administrator will depend upon the nature of the function performed[108]. In the particular case the decision was one to grant a valuable licence. In that context pecuniary interests or associations of the officials involved, especially if they are directly linked to the issues in question, assume a greater importance than they would in other administrative decisions. The question of the standard of conduct applicable in the circumstances of this case is one to which I shall return.

135 Officials authorised and required to exercise public power are sometimes said to be the public's trustees[109]. One can perceive an analogy with corporate officers who exercise private power on behalf of the corporation and who are held to owe a fiduciary duty to the corporation as a whole. In the context of corporate decision-making, the rules against conflicts of interest (including indirect ones) and mandatory disclosure of such interests are strictly applied. It is true that in the context of the corporation express law imposes such duties on officers, which is not always the case with public officials. However, there is no reason of principle in a case such as the present to require lesser standards of conduct simply because the officials were exercising public and not private power.

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106 *Jia* (2001) 205 CLR 507 at 551 [141].

107 *Jia* (2001) 205 CLR 507 at 549 [135].

108 See *Jia* (2001) 205 CLR 507 at 564-565 [187]; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Epeabaka* (2001) 206 CLR 128 at 150 [64].

109 Finn, "Public Trust and Public Accountability", (1993) 65(2) *Australian Quarterly* 50 at 52. This of course is a metaphor, rather than a strict legal concept of a trust or fiduciary duty; cf Brown, "The Fiduciary Duty of Government: An Alternate Accountability Mechanism or Wishful Thinking?", (1993) 2 *Griffith Law Review* 161 at 175-176. See also *R v Whitaker* [1914] 3 KB 1283 at 1298-1299.

136 It is desirable that the law on apprehended bias should discourage administrators with direct, and certainly undisclosed, pecuniary interests in a decision from taking part in such deliberations. Otherwise, decisions of this kind will be subject to challenge depending on whether the role of the impugned official is ultimately deemed to be sufficiently "central"[110] or merely "peripheral"[111], words of malleable content and uncertain application.

The ultimate determination by the Minister

137 The appellant then argued that the Full Court had erred in attributing to the Minister any flaws that existed in the processes within the Department before the minute, signed by the Director General, was tendered to him. It was submitted that the Full Court should have found that, in all the circumstances, the hypothetical fair-minded and informed member of the public would not reasonably apprehend that the Minister himself might not have brought an independent and impartial mind to the exercise of *his* power and discretion under the Act. Reference was made to the terms of the discretion reposed in the Minister by the Act, which are large[112], to the evidence concerning attendances on the Minister before he made the impugned decision and to the letters that the Minister then sent to the affected parties.

138 In my view, no error has been shown on the part of the Full Court in reaching the conclusion that it did. Its conclusion was open to it when it approached the matter as one of general public impression, rather than one of detailed analysis and precise lawyerly fact-finding[113]. It was a conclusion that rested on an attitude of realism concerning contemporary public perceptions of

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110 Reasons of Gleeson CJ at [24].

111 The joint reasons at [44], reasons of McHugh J at [72], reasons of Callinan J at [160].

112 The Act, s 59(6) provides relevantly:

> "On receipt of a [warden's] report under sub-section … (5), the Minister may grant or refuse the exploration licence as the Minister thinks fit, and irrespective of whether –
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> (a) the report recommends the grant or refusal of the exploration licence; and
>
> (b) the applicant has or has not complied in all respects with the provisions of this Act".

113 *Jia* (2001) 205 CLR 507 at 552 [146]. See also *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369 at 394 per de Grandpré J.

the administrative process. It was not one based on fictions resting on ideals that the public knows are not always attained.

139 The Full Court was correct to adopt such a realistic approach. Although the separate argument that the Minister had merely "rubber stamped" the recommendation from his Department was not pursued in this Court, it remains the fact that the departmental recommendation contained in the officers' minute was incontestably the recorded basis of the Minister's decision. Most members of the Australian public would, I think, assume that that decision was, at the least, profoundly influenced by the departmental minute and the recommendation expressed in it. One of the officials, who participated in the deliberations leading up to the recommendation, failed to disclose the pecuniary interest of his son who stood to gain from the recommendation. Once it is also established that a crucial part of the minute was actually drafted by another departmental officer with an undisclosed personal financial interest in the recommendation being made, the conclusion reached unanimously by the Full Court was open. I see no error in that conclusion. On the contrary, I believe that it is the conclusion that the impartial observer in the Australian public, with knowledge of the contextual matters that I have mentioned, would similarly draw.

The decision on the facts

140 Finally, the appellant argued before this Court (successfully as it transpires) that whatever the exact content of the applicable law governing disqualification of a minister for imputed bias, the facts established at trial in the present case fell short of giving rise to the invalidation of the Minister's decision[114]. I cannot agree.

141 First, it is important once again to emphasise that, in the approach to the proof of imputed bias, the change to the previous law by this Court must be accepted and applied[115]. The approach in this country is now different from that of England[116], although the law in that country appears lately to have moved in a

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114 See reasons of Gleeson CJ at [24]-[25], the joint reasons at [52], reasons of McHugh J at [78], reasons of Callinan J at [160].

115 *Johnson v Johnson* (2000) 201 CLR 488 at 498-499 [29]-[31]; cf *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116.

116 *R v Gough* [1993] AC 646 at 670.

similar direction[117]. Although this "Spartan" rule of Australian law[118] has so far been expressed in the context of adjudications by judges and like decision-makers I see no reason, subject to any particularities of the relevant legislation or office, why a less stringent test should apply to an administrator, including a minister. If anything, the degree of public anxiety and scepticism that explains, to some extent, the development of this branch of the law as it affects independent adjudicators[119] applies with even greater force to others who are entrusted with discretionary public powers in important matters where there may be "even less reason to expect that [such power] can always be exercised with legal accuracy, fairness and without invalidating unreasonableness"[120]. And it is the capacity of the official and the impugned association, interest or relationship to influence the decision to be made by a minister, rather than the pecuniary interest as such, that may in some circumstances give rise to a reasonable apprehension of bias[121].

142 Secondly, it is critical to an understanding of the reasoning of the Full Court, and my own reasoning, to appreciate the point of distinction that Sheller AJ was at pains to make. This was his Honour's response to the finding by the primary judge that Mr Miasi did not *in fact* play any decisive part in influencing the decision of Messrs Burton and Phillips and the acceptance of the evidence of those two officers that their decisions were not *in fact* influenced by Mr Miasi (or in the case of Mr Phillips by his knowledge of his son's shareholding).

143 As Sheller AJ correctly pointed out, such findings "are not relevant to a determination of whether the circumstances gave rise to a reasonable *apprehension* or *suspicion* of partiality"[122]. Unlike *Jia* in the Federal Court, this was not a case where it was alleged that the Minister, or his decision, were

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117 *Porter v Magill* [2002] 2 WLR 37 at 83-84 [102]-[103]; [2002] 1 All ER 465 at 506-507.

118 *Australian National Industries Ltd v Spedley Securities Ltd (In Liq)* (1992) 26 NSWLR 411 at 448 per Meagher JA; *Johnson v Johnson* (2000) 201 CLR 488 at 499 [32].

119 *Johnson v Johnson* (2000) 201 CLR 488 at 503 [44].

120 *Jia* (2001) 205 CLR 507 at 556 [159]; 178 ALR 421 at 459.

121 cf *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215 at 226; *IOOF Australia Trustees Ltd v Seas Sapfor Forests Pty Ltd* (1999) 78 SASR 151 at 180-181 [181].

122 *Creasy* [2000] WASCA 206 at [92] (emphasis added).

affected by *actual* bias. This was not, therefore, a case where the subjective processes of reasoning of the Minister or the officials were determinative. What was at stake here had to be judged by an objective standard. This is so because the purposes of the law are pragmatic. They include the maintenance of the legitimacy of the institutions that exercise public power; the reinforcement of a simple rule that helps avoid investigation of personal conflicts that can generally be assumed not to exist; the strengthening of strict rules of honesty in public administration and of the financial integrity of all those who enjoy power derived from the people; and the maintenance of high standards in public administration in Australia at a time when its integrity is viewed as a precious national asset of high economic as well as moral and civic value[123].

144 Because I believe that the reasonable observer in Australia would share these values with Sheller AJ and the Full Court, I entertain no doubt about the correctness of the conclusion that the Full Court reached.

145 Thirdly, there is the consideration of the proper approach to such problems, that I have already mentioned. As I read his reasons, Sheller AJ dealt with the matter as one of public impression and overall judgment. The reasonable member of the public has neither the time nor the inclination to evaluate the detailed evidence and protestations such as have been made in this case. He or she, as a lay-person, simply sees a ministerial minute in which two senior departmental officials participated without declaring personal or familial pecuniary interests known to each of them. The ultimate decision is to be made by the Minister in the exercise of a largely unguided discretion. When the Minister's decision is based on that minute, and affects the rights, interests and legitimate expectations of another party, and where the standards of the common law, the State Code of Ethics and the departmental Code of Conduct are breached, that observer concludes, alike with the Full Court, that the Minister's decision *might* have been influenced by the bias of self-interest and that, even unconsciously, these considerations *might* have affected the process of decision-making.

146 The appearance of integrity has been undermined, whatever may have been the actuality. That is enough to require that the process be performed again, excising the participation of officials who had known but undeclared personal interests. As Sedley J remarked in *R v Higher Education Funding Council; Ex parte Institute of Dental Surgery*[124]: "In the modern state the decisions of administrative bodies can have a more immediate and profound impact on

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123 *Ebner* (2000) 205 CLR 337 at 387-390 [161]; cf Encel, *Cabinet Government in Australia*, 2nd ed (1974) at 117.

124 [1994] 1 WLR 242 at 258; [1994] 1 All ER 651 at 667.

people's lives than the decisions of courts and public law has since *Ridge v Baldwin*[125] … been alive to that fact". The same is truer still of ministers and senior administrators engaged in the exercise of the powers conferred on them by Parliament in this case.

The nature of the decision required a high standard

147 The Full Court was correct to take into account the nature of the administrative decision involved in this case and particularly as it related to circumstances giving rise to the possible appearance of bias. The officials and the Minister were participating in a decision to grant mining and exploration licences. Such decisions involve the creation of valuable assets virtually out of nothing. In the context of the exercise of such powers, pecuniary interests take on a special relevance. Unavoidably, lack of disclosure raises a high level of suspicion. It is therefore important to apply the rules of apprehended bias prophylactically.

148 A number of the authorities make reference to the fact that the rules on apprehended bias should be capable of being applied *before* the decision-making process takes place[126]. In *Vakauta v Kelly*[127], Brennan, Deane and Gaudron JJ observed that if the issue of the apprehension of bias were raised prior to the hearing and the making of a decision, "the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing". These observations illustrate the importance and utility of prior disclosure that this Court should also reinforce and require in applicable administrative circumstances.

149 Such considerations are specially relevant to the decision-making process impugned in these proceedings. Both of the decision-makers in question had the capacity to influence the Minister's decision. Each of them had an interest (Mr Miasi) or an association (Mr Phillips) that was capable of influencing their approach to the process of deliberations and the recommendation made[128]. This is so at least in so far as the perception of an informed, fair-minded observer is concerned, irrespective of whether or not the interest or association in fact influenced, or could be proved to have influenced, such deliberations once the

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125 [1964] AC 40.

126 See *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 ("*Livesey*") at 293-294 per Mason, Murphy, Brennan, Deane and Dawson JJ.

127 (1989) 167 CLR 568 ("*Vakauta*") at 572.

128 *IOOF Australia Trustees Ltd v Seas Sapfor Forests Pty Ltd* (1999) 78 SASR 151 at 180-181 [181].

officials embarked upon them. Self-interested denials of *actual* influence can only take the matter so far. They do not answer the issue of appearances[129].

150 Whether or not there is an appearance of bias should be capable of determination in advance. Such an approach gives the decision-maker the opportunity to rectify any such impression. If the decision-maker is concerned by an official's disclosure, it allows him or her to make further enquires, which would not be possible in circumstances of the official's silence and non-disclosure. It also ensures that the decision-making process does not occur in the given way if it would be possible later to challenge the decision successfully on the grounds of apprehended bias. Test it this way. If Mr Miasi and Mr Phillips had disclosed their respective interest and association to the Minister, who can doubt that the Minister in such a sensitive area of decision-making would have said – and rightly said – "Well you had better have nothing to do with this matter. And please record that you informed me and that I gave you that instruction".

151 These considerations provide the precise reason for the provision in the Code of Conduct of the Western Australian Department of Minerals and Energy which obliged officials of that Department to completely divest themselves of any interests or shares in mining companies operating in Western Australia, and furthermore to disclose any possible conflicts of interest that might affect (or appear to affect) their deliberations[130]. Given that a Department such as the one in question would need to make numerous decisions of this kind, involving the grant of valuable rights, and given that various concerned parties are unlikely to be aware of the pecuniary and other interests of officials who participate in those decisions in various capacities, such a strict approach can be viewed as the measures adopted to protect the perception of the institutional impartiality of the Department[131].

152 The foregoing illustrates the different factors that need to be taken into account when deciding whether or not an appearance of bias has arisen in a given case, depending on the kind of decision in question and what is said to be the source of the imputed bias[132]. In my respectful view, it points to one important

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129 cf *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 132 per Lord Browne-Wilkinson, at 139 per Lord Goff of Chieveley.

130 See these reasons at [99]-[100].

131 *R v Lippè* [1991] 2 SCR 114 at 140; *Bell Canada v Canadian Telephone Employees Association* (2001) 199 DLR (4th) 664 at 681 [31].

132 *Webb* (1994) 181 CLR 41 at 74.

distinction between a case such as the present and the circumstances considered by the Supreme Court of Canada in *Baker*[133].

153 In that case, the appearance of bias found by the Supreme Court arose out of the conduct[134] of the official in question, namely the comments and notes that he made in the course of deliberations that formed the only basis for the ultimate decision. In such a case, it would not have been possible to have prior disclosure of the issue that gave rise to the impression, and to rectify any such impression so that the ultimate decision was not perceived to be affected by bias. To the extent that, in such a case, the rule cannot be applied prophylactically it may become necessary to examine the actual process in more detail, the conduct which gave rise to the perception and the role of the person whose conduct was impugned.

154 It is otherwise in cases where the apprehension of bias arises out of existing interests or associations. In such a context, while the rule is the same, the considerations relevant to reaching the conclusion will often be different. The nature of the interest or association would be relevant. So would its capacity to influence the approach of the administrator in question, consciously or unconsciously[135], and the administrator's ability to affect the final decision[136]. So will be the fact that the interests and associations were not disclosed in advance which, in itself, may give rise to, or strengthen, the appearance of bias in so far as the independent observer is concerned[137]. I agree with Professor Allars[138]:

> "Disclosure of itself necessarily assists in securing the object that justice is seen to have been done."

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133 [1999] 2 SCR 817.

134 To use Deane J's categories as explained in *Webb* (1994) 181 CLR 41 at 74.

135 *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369 at 394 per de Grandpré J; *Baker* [1999] 2 SCR 817 at 850 [46] per L'Heureux-Dubé J.

136 This issue did not arise in *Jia*, as it was the Minister who made the ultimate decision and it was the Minister's conduct that was alleged to give rise to the perception of bias: *Jia* (2001) 205 CLR 507 at 517-518 [24]-[25], 518-519 [30].

137 *S&M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 374; Allars, "Procedural Fairness: Disqualification Required by the Bias Rule", (1999) 4 *The Judicial Review* 269 at 280.

138 Allars, "Procedural Fairness: Disqualification Required by the Bias Rule", (1999) 4 *The Judicial Review* 269 at 280; see also *S&M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 369.

155 The factors that have influenced judicial pronouncements to the effect that issues of apprehension of bias should be able to be determined and resolved in advance in the context of judicial decision-makers[139] apply equally to many administrative decision-makers. Indeed, they apply even more so where the power reposed in a minister, as the ultimate decision-maker, is largely or completely discretionary as it was here. They rest not only on consideration of the legitimating appearance of proper and impartial decision-making. They also reflect considerations of efficiency and cost[140]. As well, there is an important issue of legal principle involved. The finding of whether or not the decision was affected by perceived bias should not depend on whether or not the administrator(s) involved *in fact* exercised their capacity to influence the decision. Nor should it depend on whether the party that may raise the objection gets an unfavourable decision[141].

Conclusion: upholding manifest administrative integrity

156 In such a long drawn out process of litigation, the result that I favour would be disappointing to the appellant which is individually innocent (as the second respondent also is) of any wrong doing. It would also be costly to the parties. In the final outcome, it might produce no ultimate change in the final decision. But, at least then, the decision would be lawful. It would be made without disqualifying flaw. Moreover, an important principle for the integrity of public administration would have been reinforced that has prophylactic utility, symbolic importance and great economic value. Confirming the Minister's decision, in my view, diminishes that principle[142]. Financial probity, and the absence of undeclared pecuniary self-interest, or undeclared but known interests of close family members, are not the only attributes of sound public administration. They lie at its heart. This Court should reinforce them. It should not sanction practices that have a tendency to undermine their strict observance.

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139 *Livesey* (1983) 151 CLR 288 at 293-294; *Vakauta* (1989) 167 CLR 568 at 572; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 96.

140 *S&M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 369. This refers to the avoidance of making decisions that are thereafter (as in this case) vulnerable to being impugned on grounds of perceived bias in lengthy and expensive litigation impeding the activities of the parties.

141 *Vakauta* (1989) 167 CLR 568 at 572.

142 McCann, "Institution of Public Administration Australia: Some Observations About the Profession of Public Service", (2001) 60(4) *Australian Journal of Public Administration* 110 at 114.

157 Professor Carney has expressed a like opinion in words that I would endorse[143]:

> "Public integrity as an ideal which must be nurtured and safeguarded, describes the obligation of all public officials to act always and exclusively in the public interest and not in furtherance of their own personal interests. … [C]onduct less heinous than that of corruption may … betray this trust. An example of this latter conduct is when a public official acts in the course of carrying out official duties in a way which also promotes his or her personal interests. Acting in this way, in the face of a conflict of interest between one's personal interest and the public interest, constitutes a betrayal of the public trust. But even if no betrayal in fact occurs, it taints the decision and the decision-maker with allegations of impropriety. The dangers posed for the public interest by the existence of conflicts of interest on the part of public officials, whether the conflicts of interests are real or perceived to be real, demand the adoption of mechanisms which prevent such conflicts arising or which resolve them if they do arise."

Orders

158 The appeal should be dismissed. The appellant and the second respondent should pay the costs of the first named first respondent.

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143 Carney, "The Duty of Parliamentarians to Make Ad Hoc Disclosure of Personal Interests", (1991) 2 *Public Law Review* 24.

159 CALLINAN J. In *Minister for Immigration and Multicultural Affairs v Jia Legeng*[144], albeit in a different statutory context from this one, four Justices of this Court[145] drew distinctions between the obligations of members of the Executive in making decisions and the processes by which their decisions are to be made, and those of courts, judges and tribunals.

160 It is unnecessary to decide how much of what was said in *Jia* may be adapted to, and applied in this appeal because I agree with Gaudron, Gummow and Hayne JJ, that the involvement of the official in the preparation of the relevant minute was so far out on the periphery of the process which led to the Minister's decision that no question of bias, actual or apprehended, could possibly arise. This is so no matter how undesirable it may have been that the official who did have a role, even a minor one, to play in the process by which the valuable mining interest was granted, was a shareholder in a company which stood to gain by the grant. I would also regard as irrelevant the fact of the shareholding of the son of another official who was more intimately involved, for the reasons given by Gaudron, Gummow and Hayne JJ with whose proposed orders for the disposition of the appeal I would similarly agree.

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144 (2001) 205 CLR 507.

145 Gleeson CJ and Gummow J at 539 [102], Hayne J at 562-563 [180]-[182] and [187]-[189], Callinan J at 583-584 [244]-[247].