

HIGH COURT OF AUSTRALIA

CALLINAN J

DOREEN KARTINYERI AND ANOR

PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA

DEFENDANT

Kartinyeri v The Commonwealth (A29/1997) [1998] HCA 52
5 February 1998

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1 CALLINAN J. The plaintiffs submit that I should not sit as a member of the Court in this case. They contend that aspects of a joint opinion provided by Mr Traves of the Queensland Bar and me, addressed to the Senate Legal and Constitutional Affairs Committee in relation to the *Hindmarsh Island Bridge Bill* 1996 (Cth) prejudices the issues to be determined by the Court in this matter.

2 No formal motion has been filed or is necessary. The defendant has properly taken no adversarial stance on the issue but has made submissions drawing attention to some of the relevant authorities and considerations. I appreciate very much the courteous and helpful way in which the matter has been raised and debated by the parties.

3 At the outset, I should state my recollection of the circumstances in which I came to give the opinion that I did. I have not been able at this stage to locate any documents that I may have had in my possession when I gave the opinion. I must however have had a copy of each of the proposed pieces of legislation (the *Hindmarsh Island Bridge Bill* and the Opposition amendment) referred to in the opinion.

4 I believe that events occurred in this way. Senator the Honourable John Herron, the Minister responsible for Aboriginal Affairs informed me orally that the Government wished to pass the *Hindmarsh Island Bridge Bill*; that the Opposition proposed an amendment to the Government's Bill; and that a Senate Committee was considering the validity of the Government's Bill. The Minister asked me whether I was prepared to provide a submission to the Committee. The specific matters to which he referred are identified in the first paragraph of the opinion which I quote:

"If passed, the Hindmarsh Island Bridge Act exempts the Hindmarsh Island bridge and pit area as defined in the bill from further action under the **Heritage Protection Act** by the Senate Legal and Constitutional Affairs Committee. We are asked to advise whether the Government may so legislate to remove any further obstruction to the building of the Hindmarsh Island bridge: whether, if the Act is capable of being construed as to give rise to racial discrimination it might on that account be successfully challenged, and, if the Act has retrospective effect, whether it might on that ground also be successfully challenged."

5 My best recollection is that I told the Minister that I was under some pressure from other work but that I could, in collaboration with junior counsel, provide an opinion. Although of course I appreciated that the Minister would certainly hope that my opinion would support the Bill, I told him that I could not predict then, what conclusion I would reach.

- 6 When Mr Traves and I completed the opinion, I sent the original of it, as requested by the Minister, to the Committee. I do not doubt that I also sent a copy of it to the Minister.
- 7 It is relevant that I gave no further advice whether as to amendments or any other matter pertaining to the legislation.
- 8 The plaintiffs first formulated their objection in written submissions on two bases:
1. The expression of an opinion on the very issues before the Court does suggest to a fair minded lay observer or party that a judge may not be impartial, and;
 2. The relevant apprehension is compounded by the circumstances that the opinion was sought by a Minister of the Commonwealth, a party to these proceedings.
- 9 I interpolate that the opinion was to be provided for the assistance of a Committee which I understood to be politically bipartisan although I was unaware of its exact constitution.
- 10 Mr Spigelman QC who represents the plaintiffs has expanded upon those written submissions in light of some further facts that I thought I should bring to the attention of the parties.
- 11 I have known the Honourable Ian McLachlan, Minister for Defence, for many years. He was, I think, President of the National Farmers' Federation ("the Federation") when I represented the respondent in the *Mudginberri Farm Case*¹. The Federation supported the respondent. It was then that I first met him. When Mr McLachlan was a member of the Federal Opposition in 1995, at his request, I provided some draft terms of reference for an inquiry to be established by the State Government of South Australia. I have given the parties a copy of the terms of reference. Mr Spigelman QC has confirmed that although a Commission of Inquiry was in fact appointed, the terms of reference which were adopted bear no resemblance to my draft.
- 12 I also informed the parties that I advised Mr McLachlan on another occasion when he was in Opposition, with respect to the return of some misdirected documents, which included documents the subject of other proceedings in which the plaintiffs were interested, but which I had no occasion to see, and of which I have no knowledge.

1 *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1987) 74 ALR 7.

3.

- 13 I accept that Mr McLachlan has been a proponent of the construction of the Hindmarsh Island bridge for a considerable period.
- 14 Mr Spigelman QC puts that I have had an association with "the substratum of the events that have led to this case being before the Court". That rather overstates the position. Many events have obviously occurred which have led the Government to pass the Act. I have had no association with any of these.
- 15 Mr Spigelman QC adds that it is "the cumulative force of all of the different elements that can create in a reasonable observer and particularly 'the party', the first named party", such an apprehension as should lead to my disqualifying myself.
- 16 The principle is not in doubt²:
- "whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts 'might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question'³ in issue".
- 17 This does not mean that a judge should stand aside at a suggestion of prejudgment or apprehended bias. The Court in *Livesey v New South Wales Bar Association* said this⁴:
- "it would be an abdication of judicial function and an encouragement of procedural bias for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court".
- 18 Mason J in *Re JRL; Ex parte CJL* makes it clear that an apprehension that a judge may decide the case adversely to a party does not require that the judge decline to sit⁵:

2 *Webb v The Queen* (1994) 181 CLR 41 at 67-68 per Deane J.

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

4 (1983) 151 CLR 288 at 294 per Mason, Murphy, Brennan, Deane and Dawson JJ.

5 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

"It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established'⁶."

- 19 Indeed, the plaintiffs' own written submissions filed in the Court rely on a fairly explicit statement by Brennan J in *The Tasmanian Dam Case*⁷ which, if adhered to by his Honour who is to preside in this case, would give comfort to them here:

"The approval of the proposed law for the amendment of par (xxvi) by deleting the words 'other than the aboriginal race' was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial."

- 20 Another member of this Court, Gaudron J, has expressed a like view on the matter.
- 21 In *Chu Kheng Lim v Minister for Immigration*, her Honour said⁸:

"In *Koowarta v Bjelke-Petersen*, Murphy J expressed the view – which in my opinion has much to commend it – that s 51(xxvi) only authorizes laws for the benefit of the race concerned, because, in context, 'for' means 'for the benefit of' and not 'with respect to'."

6 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-554; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 14; 32 ALR 47 at 50-51.

7 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 242.

8 (1992) 176 CLR 1 at 56.

- 22 And in *Kruger v The Commonwealth*, again quoting Murphy J in *Koowarta v Bjelke-Petersen*, her Honour, more tentatively perhaps, said this⁹:

"It is however arguable that that power [Constitution, s 51(xxvi), the 'race power'] only authorises laws for the benefit of 'the people of [a] race for whom it is deemed necessary to make special laws'¹⁰."

- 23 Most judges on first appointment to the bench come from active practice as lawyers. In the course of a long career a lawyer is bound to have expressed opinions on the meaning and effect of statutes which will fall for consideration by a court to which such a lawyer is appointed.
- 24 I do not think that the expression of an opinion as to a legal matter, whether as a practising lawyer or as a judge on a prior occasion, will ordinarily of itself give rise to a reasonable apprehension of bias according to the relevant test. Mason J in the passage I have already quoted¹¹ points out that the making of a previous decision by a judge on issues of fact and law, although perhaps generating an expectation of a particular outcome, does not mean that the judge will not be impartial and unprejudiced in the relevant sense.
- 25 The parties here are agreed that there are no issues of fact or credibility to be resolved in this case.
- 26 So too, the draft terms of reference that I prepared, and the opinion, in no way required me to examine any facts or to form any views on the credibility of anybody who is a party to this litigation.
- 27 In my opinion therefore there is no basis for any reasonable apprehension of bias on my part arising out of the opinion that I gave, or the provision of the terms of reference.
- 28 The question then becomes whether all matters, and by this I mean those to which I have referred in the previous paragraph, and, as Mr Spigelman QC puts it, my association with the substratum of the events that have led to this case being before the Court, including my acquaintance with Mr McLachlan, in the circumstances outlined, give rise to a reasonable apprehension that I might not bring an impartial and unprejudiced mind to the resolution of the question in issue.

9 (1997) 71 ALJR 991 at 1039; 146 ALR 126 at 193.

10 (1982) 153 CLR 168 at 242 per Murphy J.

11 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

- 29 My position is, I think, quite different from that of a person who, before coming to the bench, has been directly involved in the preparation of legislation that has to be construed by the Court, and who has taken active steps as principal law officer of the Commonwealth to seek to ensure the passage of a bill and to propound to the Governor-General the Senate's failure to pass it as a basis for a double dissolution. These were some of the circumstances that led Murphy J to stand aside in *Victoria v The Commonwealth and Connor*¹². There were other closely related steps taken by his Honour there when he was the Attorney-General concerning that Act¹³.
- 30 Mr Spigelman QC accepts that it is a relevant matter that the case is a constitutional one, and, on that account and others, important. However I do not understand him to say that these factors are such as to call for the application of a different principle.
- 31 There is precedent for the participation by a judge in a case in which he has been directly involved when the issue is a constitutional one. In *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*¹⁴, two members of the Court had, when at the bar, been counsel for opposing parties in the litigation. They sat on the case but confined the hearing in which they participated to the constitutional questions.
- 32 The special circumstance in that case was that unless those two judges did sit, there was a real doubt whether any effective decision could have been given.
- 33 Some members of this Court have come to it directly from a career in politics and in government. Inevitably, in Cabinet and in the Party Room, they must have had a very close association with members of the Government whose legislation they have had from time to time to interpret. Sometimes the legislation may be in implementation of longstanding policy to which the former politician has subscribed and has perhaps even advocated. A particular association of itself, and even a current, proper one which observes the punctiliousness required in respect of a case and issues actually before, or which may be before the Court, should not ordinarily give rise to a reasonable apprehension of bias.
- 34 It is for this reason no doubt, that a member of the Court might feel free to sit notwithstanding even a close family relationship with a person who has urged

12 (1975) 134 CLR 81.

13 See "High Court Practice as to Eligibility of Judges to Sit in a Case", (1975) 49 *Australian Law Journal* 110.

14 (1922) 31 CLR 421.

publicly a view on a particular case or issues before, or likely to be before, the Court.

- 35 A number of the decisions of this Court have been decided by the narrowest of majorities. As recently as last Monday, there was a decision in which the Court was evenly divided on a matter of great importance to the administration of justice throughout Australia¹⁵. It is obviously desirable that the full complement of judges sit on constitutional cases.
- 36 I think that the various other cases referred to by Mr Spigelman QC¹⁶, as helpful as they are as examples, do not conclude the issue here. They all depend on their own particular facts.
- 37 One other case should be mentioned. In *Re Polites; Ex parte Hoyts Corporation Pty Ltd*, Brennan, Gaudron and McHugh JJ said this¹⁷:

"A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depends on the nature of his or her relationship with the client, the ambit of the advice given and the issues falling for determination."

- 38 In the end, I have to decide whether all of the circumstances give rise to a reasonable apprehension that I might not bring an impartial and unprejudiced mind to the resolution of the question in issue. Abstention from sitting in this case,

15 *Gould v Brown* (1998) 72 ALJR 375; 151 ALR 395.

16 Justice Dawson declining to sit in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599; Justice Kirby declining to sit in *Kruger v The Commonwealth* (1997) 71 ALJR 991; 146 ALR 126; and Justice Hayne declining to sit at the hearing of *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280; 152 ALR 1.

17 (1991) 173 CLR 78 at 87-88.

which, whatever the outcome, is bound to excite criticism and controversy, has much appeal. However I must do my duty without reference to any such consideration. Taking all of the factors into account, and accepting for present purposes that there is no exceptional principle applicable to constitutional cases (a principle which I take as not having been firmly established) I have concluded that I should not disqualify myself. The most important factors are that there were no issues of fact or credibility involved in any advice that I gave, that the issues in this case are exclusively legal ones and, that I played no part at all in drafting, advocating or in any way implementing the legislation that the Court has to consider.