

Australian Academy of Law

3 December 2025

Recusal of Judges – Apprehended Bias

When to sit in judgement

Commentary

There has been a noticeable increase in the number of applications for a judge to step aside from a matter on the ground of apprehended bias. It is not that long ago that such an application was a matter for comment because they were rare. Practitioners would give anxious consideration to bringing such an application and the general approach was that it was brought more in sorrow than in anger.

One of the matters which has contributed to the apparent increase in the number of applications, is the growth, as Doyle JA said, of active self-represented litigants with access to on-line guidance. That affects all courts, and it occurs just as much, perhaps more, in tribunals. Within the last month, the President of the Fair Work Commission, Hatcher J, has commented on the increase in matters being filed which come from unrepresented applicants who have clearly relied on a chatbot to generate the material.

The principles, as they have been described by Justice Doyle, apply to non-judicial tribunals. The gist of my remarks is that the duty to sit exists just as strongly in tribunals but that there are some other factors which are peculiar to tribunals.

In this brief discussion I will be talking about tribunals generally and I include in that description bodies such as the Administrative Review Tribunal, the various State and Territory administrative tribunals, the Fair Work Commission, and the various State industrial tribunals. Like judges, members of those tribunals also give solemn undertakings by oath or affirmation to do equal justice. But before they do that, they must have satisfied the requirements for appointment, and it is at this point that there is a divergence from the path leading to the courts.

Judges, speaking generally, only need to have been in practice for a set number of years to qualify for appointment. For the ART that is one basis of appointment – another, which is relevant to my discussion – is that the “Minister is satisfied that the person has at least 5 years’

specialised training or experience in a subject matter relevant to the jurisdiction of the Tribunal.”

For the Fair Work Commission, a person is qualified for appointment if that person has knowledge of, or experience in, one or more of the following fields:

- (i) workplace relations;
- (ii) law;
- (iii) business, industry or commerce.

Please note the reference to “experience” in particular areas as a basis for appointment for both those tribunals.

With that in mind let me take you back to the 1980s. Some of you were present at that time. Cinemas were a much more popular form of entertainment than they are now and, to meet the demand for accessible, low-cost entry to theatres the industry was moving to multiplex cinemas. Those who attended in those times will remember the garish carpets and the overpowering smell of stale popcorn.

The case I will take you to concerned the Hoyts Multiplex Cinema at Chadstone Shopping Centre in Melbourne. It was the focus of a proceeding being heard by a full bench of the Australian Industrial Relations Commission. The hearing commenced in late 1989. Deputy President Colin Polites was a member of that bench. The Australian Theatrical and Amusement Employees Association (the union) was a party to the proceedings, and it represented many Hoyts employees. Polites DP had been a solicitor before his appointment and, in 1986, he had given legal advice to Hoyts. The advice concerned the staffing requirements for multiplex cinemas and the steps available to Hoyts to achieve the staffing levels that it wanted to apply.

At the hearing, he accepted a submission from the union that because he had given legal advice to Hoyts that could give rise to a reasonable apprehension of bias.

Over Hoyts’ opposition, he stood aside. Hoyts then sought a writ of mandamus from the High Court.

The High Court in *Re Polites; ex parte The Hoyts Corporation* (1991) 173 CLR 78 granted a writ of mandamus directing the Deputy President to hear and determine, as a member of a Full Bench, the matter. In doing so the court made the following observations:

- 1 Qualification for membership cannot disqualify a member from sitting. The test for disqualification cannot be pressed too far when the qualifications for membership of the tribunal are such that the members are likely to have some prior knowledge of the circumstances which give rise to the issue for determination or to have formed an attitude about the way in which such issues should be determined or the tribunal's powers exercised.
- 2 A prior relationship of legal adviser and client does not generally disqualify. It will depend on the nature of the advice and the matter being heard.
- 3 And finally, "... when the parties have been engaged in a proceeding for some time, with the inevitable commitment of resources and costs that that entails, a member should not disqualify himself or herself unless there is – not maybe – an issue to which a disqualifying factor is relevant."

One year and four days after that decision was given, the High Court referred to *Polites* in another matter which emerged from the Australian Industrial Relations Commission. It is *Re Finance Sector Union ex parte Illaton Pty Ltd* (1992) 107 ALR 581. The original case arose out of a long-running battle between the Finance Sector Union and Metway bank - formerly known as the Metropolitan Permanent Building Society. Illaton was the employing entity. Deputy President MacBean had been hearing lengthy proceedings – some 45 days – and had made findings which reflected upon the legitimacy of Illaton's objectives in the actions it had taken. MacBean DP refused to accede to Illaton's application that he recuse himself for the next tranche of hearings. The central issue in *Illaton* was whether MacBean DP should be prohibited from further participating in the proceedings on the basis of his findings in earlier cases. There were overlapping factual issues, and the same parties and witnesses were involved.

The High Court emphasised, in refusing the application, that the Commission was not a Court and was not required to reconstitute itself where there had been extensive hearings, and where it was neither unreasonable nor impractical to allow MacBean DP to continue.

The court reiterated the need for caution which it had consistently identified in relation to applications for an order preventing a member of a statutory tribunal from participating in the discharge of the functions of that tribunal. Of importance is what the court said about tribunal and commission members:

“The basis for disqualification is not merely that the member's past decisions, on questions of fact or law, might lead to a reasonable expectation that she or he will decide the case adversely to one of the parties. Nor is it that she or he has had previous contact or experience, as a member of the Commission, with the facts involved in the particular matter, with the context in which the particular matter arises, or with one or more of the parties involved in the particular matter.”

The reasoning in those two cases has been consistently applied as far as tribunals are concerned.

In summary, it requires that we bear in mind what was said by Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 [71]

“The question is not whether a decision-maker’s mind is blank; it is whether it is open to persuasion.”