SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2014 0070

TANIA ISBESTER — Appellant

v

KNOX CITY COUNCIL — Respondent

JUDGES:	HANSEN and OSBORN JJA and GARDE AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	4 September 2014
DATE OF JUDGMENT:	10 September 2014
MEDIUM NEUTRAL CITATION:	[2014] VSCA 214
JUDGMENT APPEALED FROM:	*Isbester v Knox City Council* [2014] VSC 286 (Emerton J)

ADMINISTRATIVE LAW – Review of decision by statutory review panel – Power to destroy dog under s 84P(e) of the *Domestic Animals Act 1994* following conviction in Magistrates' Court of breach of s 29(4) – Panel appointed by Council to conduct a hearing and review submissions prior to exercise of discretionary power – Ultimate discretion delegated to a single officer – Whether panel composition and decision-making process complied with statute – Extent of requirements of natural justice – Whether reasonable apprehension of bias in member of panel who acted as accuser in prosecution in Magistrates' Court – Whether conflict of interest – Whether apprehended prejudgment – *Domestic Animals Act 1994*, ss 29(4), 84P, 84P(e) – *Gubbins v Wyndham City Council* (2004) 9 VR 620, *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr R Kendall QC with Mr H Forrester	Phoenix Legal Solutions
For the Respondent	Mr R C Knowles	Maddocks

HANSEN JA:
OSBORN JA:
GARDE AJA:

Introduction

1 Section 84P of the *Domestic Animals Act 1994* ('the Act') empowers a council to destroy a dog which has been seized pursuant to the Act in a series of specified circumstances. One of those circumstances arises if the dog's owner has been found guilty of a specified offence under the Act with respect to the dog. The power to destroy is discretionary.

2 In the present case, the respondent ('the Council') determined on 15 October 2013 by its delegate to destroy a Staffordshire Terrier ('the dog') owned by the appellant.

3 It did so in pursuance of its power under s 84P(e) in circumstances where the appellant had been convicted in the Magistrates' Court of a breach of s 29(4) of the Act. Section 84P relevantly provides:

> The Council may destroy a dog which has been seized under this Part at any time after its seizure if—
>
> ...
>
> (e) the dog's owner has been found guilty of an offence under section 28, 28A or 29 with respect to the dog; ...

4 In turn, s 29(4) of the Act as it then was provided:

> If a dog that is not a dangerous dog or a restricted breed dog, attacks or bites any person or animal and causes death or a serious injury to the person or animal, the owner of the dog, if not liable for the offence under subsection (3), is guilty of an offence and liable to a penalty not exceeding 40 penalty units.[1]

5 The appellant pleaded guilty to the charge in question on the basis that her dog had bitten a person causing serious injury as defined by the Act,[2] namely a

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1 *Domestic Animals Act 1994*, s 29(4)

2 Ibid s 3:

> ***serious injury*** means—

laceration to the victim's hand.

6 Immediately following the conviction, the Council wrote to the appellant to inform her that it intended to consider whether to exercise the power under s 84P to have the dog destroyed and invited the appellant to attend a 'panel hearing'. The letter stated in part:

> On 12 September 2013 you pleaded guilty at the Ringwood Magistrates' Court to charges in relation to a serious attack by your dog Izzy on a person on 4 August 2012 at The Basin.
>
> Under Section 84P(e) of the Domestic Animals Act 1994 (the Act) Council may consider the destruction of a dog if the dog's owner has been found guilty of an offence under section 29. You were found guilty of a charge under section 29 of the Act.
>
> If a destruction order is not made, Council will consider whether it would be appropriate, in the circumstances, to declare your dog dangerous.
>
> Under section 34(1)(a) of the Act a Council can declare a dog to be dangerous if the dog has attacked or bitten a person or animal that has caused a serious injury or death to the person or animal.
>
> Knox City Council will be holding a panel hearing on **Monday 30 September 2013 at 2 pm** at the Knox Civic Centre at 511 Burwood Highway, Wantirna South.
>
> The panel consists of three Council officers who will consider all the information prior to making any decision. The chairperson of the panel will be Steven Dickson, Manager City Safety and Health, who is delegated to make the decision in relation to your dog. The second panel member is Kirsten Hughes, Coordinator Local Laws. The third panel member will be an officer of Council who has not had any involvement in the matters, to provide assistance in the decision making process. The officer involved in the investigation may be present but they will not be involved in the decision making.
>
> You are invited to attend this panel hearing and provide a written and/or verbal submission to assist Council in making a decision with respect to your dog. In making a decision, Council will consider the seriousness of the attack, the potential future risk to the community as well as the Court proceeding, any response from the victim and your submission.

(a) an injury requiring medical or veterinary attention in the nature of—

(i) a broken bone; or

(ii) a laceration; or

(iii) a partial or total loss of sensation or function in a part of the body; or

(b) an injury requiring cosmetic surgery;

You should note that the decision will not be made on the day. You will receive the outcome of the decision with reasons, in writing.

In making your submission you should address both issues of the potential destruction order and the potential dangerous dog declaration.

I have enclosed information about dangerous dog requirements, so that you can fully consider the implications of a declaration.

If you have any question with respect to this letter please contact Kirsten Hughes, Coordinator Local Law on 9298 8152 during normal office hours.

7 The appellant's solicitor, Mr Melke, prepared a written submission for the appellant to use at the panel hearing. The submission included information about the proposed future living arrangements for the dog. It addressed the basis of the Council's power, the severity of the injury actually inflicted, the proposition that the dog was not 'human aggressive', the proposition that the evidence relating to alleged attacks by the dog upon other dogs involved no proof that it caused any injury, arrangements for the future safe-keeping of the dog, and the question of whether the dog was actually a danger to persons or other dogs. The submission appended a report from an animal behaviourist, Ms Mornement.

8 The appellant attended the panel hearing and made submissions to it.

9 The essential course of the panel hearing is described in an affidavit sworn by Ms Hughes:

> 38. The panel hearing was held on 30 September 2013 at 2 pm at the offices of the Council. The panel consisted of Mr Steve Dickson (Chairperson), Mr Angelo Kourambas (Director of City Development) and myself.
>
> 39. The Plaintiff attended at the panel hearing with her partner, Mr Otto, a neighbour, Ms Denise Drew and her five children. At the beginning of the hearing Mr Dickson introduced the panel members and other persons present. Mr Dickson explained the process and informed the Plaintiff that two of the victims, Ms Emily Edward and Mrs Jennifer Edward, would be attending the hearing.
>
> 40. Mr Dickson read out a summary of events from the incident on 4 August 2012. The Plaintiff said in response that there is a difference between a bite and a scratch, inferring that the dog "Izzy" scratched rather than bit. The Plaintiff also said that there was no evidence that it was "Izzy".

41. Mr Martonyi then read out the charges that related to the incident on 4 August 2012 and in respect of which the Plaintiff had entered a guilty plea. Mr Dickson stated to the Plaintiff that the attack on Ms Edward was the basis on which the Council would consider whether or not to exercise its powers under either section 84P of the Act (destruction of the dog) or section 34(1)(a) of the Act (declaration of the dog as a dangerous dog). He informed the Plaintiff that the third option available was to do nothing.

42. Mr Dickson informed the Plaintiff that other relevant history would be considered and summarised by Mr Malcolm Scheele, another Council officer. Mr Dickson stated that that history would help the panel in assessing the risk that a similar incident might occur again. Mr Dickson stated that, if the Council were to consider making a dangerous dog declaration, the panel would need to be confident that the Plaintiff would have the capability to build appropriate housing and to ensure compliance with relevant restrictions on the dog.

43. The Plaintiff responded by saying words to the effect that, if "Izzy" were to be declared a dangerous dog, then "Izzy" could not come home. This effectively ended the panel's consideration of whether or not the Plaintiff's dog could be declared a dangerous dog as the Plaintiff had ruled out this option herself. The Plaintiff was given a further opportunity to speak and stated that she did not believe the dog was dangerous and should not be declared dangerous as she would not bet (sic) a nasty dog near her five children.

44. The Plaintiff provided a letter from the butcher near where the incident occurred and that letter was read out. The Plaintiff provided a letter from her neighbour and that was also read out.

45. Mr Scheele read out a summary of the events that occurred on 9 June 2013 and 29 May 2013.

46. In response the Plaintiff stated that it was not known which dog injured the people and other dogs but that her dogs were involved. The Plaintiff continued to talk and the panel listened to her talk about the fact that she did not think the dog was charged so could not understand why this was about the dog "Izzy". Mr Dickson only continued to speak after she had finished.

47. Mr Dickson provided a copy of my notes that I had taken during the Court hearing on 12 September 2013 to the Plaintiff to read. The Plaintiff asked that the panel not read out anything too inflammatory as one of her children had behaviour issues and was likely to get upset. I read out the notes but did not read out all comments that Magistrate Cashmore had said, because I did not want to upset the children. However, the notes were provided to the Plaintiff.

48. The Plaintiff explained what she had done to contain the dogs since the incidents. She stated that she had done work in the backyard to ensure the dogs could not get out. Mr Dickson asked the Plaintiff how can we be sure this will not happen again? The Plaintiff stated that the dog "Izzy" was not a dangerous dog and did not do any attacking.

She stated that she could not bring "Izzy" home as she would be evicted. She said that the Department of Human Services had stated that they do not want the dog on the property and produced a copy of an email to this effect.

49. Mr Otto spoke to the [p]anel stating that he was sorry for the victims and that accidents happen when dogs are fighting. He said that the dogs are not aggressive.

50. I asked the Plaintiff whether she had taken "Izzy" to undergo any training. The Plaintiff replied "no".

51. I read out the report from Ms Kate Mornement, which report was obtained by Mr Melke on behalf of the Plaintiff. The Plaintiff stated that she would not keep a dog that was dangerous.

52. At this time the panel heard from Ms Emily Edward and Mrs Jennifer Edward. At the start of the panel process, the Plaintiff was advised that the Edwards would be in attendance and at that time the panel would take a break to listen to them. She was told this again when the panel did take a break and that we would provide her with the details as to what they said when the panel resumed. She did not object to this and appeared to be quite understanding of the fact that the Edwards as victims did not want to speak in front of her.

53. Ms Edward spoke to the panel about the incident on 4 August 2012 and what impact that had had on her and her mother, Jennifer Edward. I am informed by Mr Dickson and believe that he made notes of what Ms Edward had said. Mr Dickson has given me a copy of the notes which he made and which are as follows:

- victim can still not walk her dog in the community
- saw dogs wandering after the attack
- hunted her dogs out — ran past to initiate the attack — no chance to even scream
- people involved and the dogs would not stop — total frenzy
- both dogs attacked — the same ferocity
- not a dog they want in the local community
- their 8 month old pup had to be given away — for retraining
- child still affected — won't walk in area and scared of dogs

54. After the panel hearing resumed with the Plaintiff in attendance, the above matters were put to the Plaintiff and she was given an opportunity to respond to each of the points and she did so. The order that the points were read out were as follows, to reflect the sequence

of events:

- hunted her dogs out — ran past to initiate the attack — no chance to even scream
- people involved and the dogs would not stop — total frenzy
- both dogs attacked — the same ferocity
- saw dogs wandering after the attack
- their 8 month old pup had to be given away — for retraining
- child still affected — won't walk in area and scared of dogs
- victim can still not walk her dog in the community
- not a dog they want in the local community

55. In relation to the first two dot points, the Plaintiff stated that she was not there and could not comment. In relation to dot point 3 the Plaintiff stated that she did not think that would be the case. In relation to dot point 4 she stated that there are a lot of dogs in the area and doubted the dogs would have been hers. In relation to dot point 5 she stated that she thought the puppy was 4 months old. I clarified with the Plaintiff that it was 4 months old at the time of the attack and 8 months old when it was re-homed. In relation to dot point[s] 6 and 7, the Plaintiff stated that she could not comment. In relation to dot point 8 the Plaintiff stated that she did not believe her dog to be dangerous or she would not have it with her kids.

56. Ms Drew then spoke to the panel about "Izzy" and how she was good with her cats. The written submission received from Mr Melke was also read and considered.

57. Mr Dickson asked the Plaintiff if she had anything further to say. The Plaintiff asked one of her children to speak to the panel.

58. At the end of the panel hearing the Plaintiff was informed by Mr Dickson that the panel would make a decision and that she would be notified of the decision.

59. During the panel hearing the Plaintiff did not show any remorse or say that she was sorry for the conduct of her dogs.

60. After the conclusion of the hearing the panel discussed the seriousness of the incident, the likelihood of re-offending, that nothing had been done between the two attacks to restrain and kerb aggression, the description from the victim and the terror they experienced.

61. On that day after a detailed discussion with the members of the panel members (sic), Mr Kourambas made the decision that the dog "Izzy"

should be destroyed. Mr Kourambas provided this instruction to myself and Mr Dickson so that the decision could be drafted for his approval and signature.

10 After this process, the Council officer delegated to make a decision on behalf of the Council pursuant to s 84P, determined that the dog should be destroyed and gave written reasons for that decision. Contrary to the indication given in the letter sent prior to the hearing, the decision-maker was Mr Kourambas who was the senior council officer sitting on the panel but nothing turns on this point.

11 The appellant then instituted proceedings in the Common Law Division of this Court challenging the validity of the Council's determination. The grounds of review pursued to trial were as follows:

(a) The delegate's decision is affected by apprehended bias because Ms Hughes was one of the members of the panel and because of the nature of the evidence on which the delegate relied in his decision (the 'apprehended bias ground').

(b) The delegate's decision is affected by bad faith because the Council misled the plaintiff by stating that it would not seek an order from the Magistrates' Court to have Izzy destroyed, thus inducing the plaintiff to plead guilty to certain charges, whilst at the same time failing to disclose that it intended to have a panel hearing to consider whether Izzy should be destroyed (the 'bad faith ground').

(c) The delegate's statement of reasons is inadequate because it does not show whether the Council considered whether a dangerous dog declaration ought to be made (the 'inadequate reasons ground').

(d) The plaintiff was denied procedural fairness at the panel hearing because:

(i) the panel heard from Emily and Jennifer Edward in the absence of the plaintiff;

(ii) the plaintiff was denied an opportunity to respond to the Council's stated belief that she had failed to take steps to restrain her dog; and

(iii) the plaintiff was not informed that, as a result of her not being permitted to keep Izzy at her home, the Council considered the making of a dangerous dog declaration to have been ruled out.

(the 'procedural fairness ground')

(e) The delegate's decision was manifestly unreasonable because:

(i) it was made on the basis of a finding for which there was no

evidence, namely that Izzy bit Jennifer Edward; and

(ii) even if the evidence showed that a bite was inflicted by Izzy, the exercise of the Council's discretion was disproportionate and therefore unreasonable.

(the 'unreasonableness ground').[3]

12 Following a six day hearing, Emerton J rejected each of these grounds and dismissed the proceeding on 17 June 2014.

13 The appellant now seeks to appeal that decision on the basis that her Honour erred in rejecting the appellant's case insofar as it was founded upon apprehended bias. The grounds of appeal to this Court are:

1. The learned judge erred in holding (reasons at [108] to [117]) that the decision of the respondent was not affected by apprehended bias.

2. The learned judge ought to have found and held that the decision of the respondent was affected by apprehended bias on the basis that it raises the real possibility of apprehended bias, in that the Panel appointed by the respondent was constituted by a member, namely the informant Kirsten Hughes, who, having being involved in the investigation of the matter and the formulation of the prosecution case against the appellant was neither impartial nor disinterested in the outcome of the matter.

14 For the reasons which follow, we would dismiss the appeal.

The basis of the allegations of apprehended bias

15 Ms Hughes holds a law degree and is qualified to practice as a legal practitioner. There is no dispute that she was professionally involved in the bringing of the prosecution in the Magistrates' Court and in making enquiries as to whether the Ministry of Housing would permit the dog to be accommodated at the appellant's home after the appellant's conviction. She was also involved in various procedural steps associated with the panel hearing. The trial judge summarised these matters as follows:

> In support of the submission that the mere presence of Ms Hughes on the panel gave rise to an apprehension of bias, the plaintiff alleges that Ms

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3 *Isbester v Knox City Council* [2014] VSC 286 ('Review Reasons'), [21].

> Hughes held 'a strong professional interest' in the outcome of the panel hearing, evidenced by her involvement in the Magistrates' Court proceedings (including making the decision to lay charges, authorising the charges, and acting as informant in relation to some of the charges), the inquiries that she made of the housing commission concerning the future accommodation of the dogs, her direction to Mr Martonyi to obtain sufficient proof to sustain the charges that were laid in respect of the 4 August 2012 incident, and the instructions she gave to Ms Walsh as to the plea bargain (which allegedly involved concealing the Council's intentions in respect of a future panel hearing). In addition, the plaintiff points to Ms Hughes' evidence that she drafted the letter of invitation to the panel hearing and the notice of seizure of Izzy,[4] and wrote or assisted in writing the Reasons.[5]

16 The trial judge found as a fact that Ms Hughes did not have any predisposition towards the destruction of the dog.

> 114 Ms Hughes gave instructions to Ms Walsh in respect of the criminal proceedings against the plaintiff and, as a result of those instructions, a number of charges against the plaintiff were withdrawn or downgraded. All of the charges, bar the single charge against Izzy, were attributed to an unidentified dog, so that neither Izzy nor Bub was expressly implicated in the very serious attacks that took place on 9 June 2013, despite the fact that statements obtained by the Council from witnesses to the attacks identify all three dogs as having been involved. In my view, the plea bargain negotiated on instructions given by Ms Hughes was generous towards Izzy. This, in itself, indicates that Ms Hughes did not have any predisposition towards the destruction of Izzy.
>
> 115 On the evidence before me, Ms Hughes did no more than to diligently carry out her responsibilities as the Local Laws Co-ordinator, which involved managing the Magistrates' Court prosecutions on behalf of the Council. Although Ms Hughes instructed Mr Martonyi to obtain further evidence in respect of the incident on 4 August 2012, I am satisfied that she did so with a view to clarifying 'which dog did what'.[6]

17 These findings are not the subject of direct challenge to this Court, although counsel for the appellant emphasised in argument that during the course of the evidence at trial Ms Hughes said the usual practice of the Council was not to seek an order for destruction from a magistrate pursuant to s 84P in cases such as the present. We do not see that this fact materially advances the matter. It does not

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4 Dated 17 September 2013.

5 Review Reasons [106] (citation in original).

6 Review Reasons [114]-[115].

invalidate or call into question the trial judge's factual conclusions.

18 The appellant contends that nevertheless the procedure adopted involved a want of procedural fairness because:

(a) Ms Hughes was the guiding mind of the Council in its prosecution of the appellant and, in consequence, there was a necessary apprehension of pre-judgment by her of the question of whether the dog should be destroyed; and

(b) Ms Hughes was in a position of apparent conflict of interest giving rise to a realistic apprehension that she might be biased.

19 Before addressing each of these contentions, it is necessary to say something more about the statutory context in which the relevant power falls to be exercised and to address the requirements of procedural fairness in that context.

The scheme of the Domestic Animals Act 1994

20 The procedural obligations of the Council conditioning the exercise of its power pursuant to s 84P fall to be understood within the scheme of the Act.

21 The common law recognised the owner of domestic animals as having an absolute property right, as with personal and movable chattels. The owner could maintain actions for conversion, or detinue or trespass to goods in respect of domestic animals, even if they strayed or were lost.[7] In Victoria, the common law is modified by the Act in important ways.[8]

22 The general purposes of the Act are protective in character,[9] and are 'to promote animal welfare, the responsible ownership of dogs and cats and the protection of the environment' by providing for:

(a) a scheme to protect the community and the environment from feral

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7 Halsbury's Laws of Australia [20-50] referring to *Saltoon v Lake* [1978] 1 NSWLR 52.

8 The legislative history commencing from the *Dog Act 1864* is traced by Bell J in *Johnson v Buchanan* (2012) 223 A Crim R 132, 140-1 [35]-[41].

9 Ibid 141 [43].

and nuisance dogs and cats; and

(b) a registration and identification scheme for dogs and cats which recognises and promotes responsible ownership; and

(c) the identification and control of dangerous dogs, menacing dogs and restricted breed dogs; and

...

(g) other related matters.[10]

23 Part 2 of the Act provides for dogs and cats to be registered with the council of the municipal district in which the dog or cat is kept, if the dog or cat is over three months old.[11] Dangerous dogs may be registered subject to conditions.[12] Apart from dogs registered under prior legislation, restricted breed dogs may not be registered at all.[13] Municipal councils have control over the registration process. Authorised officers of councils are given a range of powers by pts 7 and 7A of the Act, including powers to seize dangerous dogs, restricted breed dogs, and dogs urged or trained to attack, or that have attacked. Part 7A gives councils the power to destroy dangerous dogs, restricted breed dogs, or dogs that are dangerous to the public subject to meeting the applicable statutory requirements.[14]

24 The powers given by the Act to councils and authorised officers are limited and are defined in the Act.

25 Both the Magistrates' Court and the Victorian Civil and Administrative Tribunal ('VCAT') have significant roles to play in decision making under the Act, and offer a safeguard to ensure that dogs are not impounded or put down unless the requirements imposed by the Act are met. In turn, both jurisdictions are subject to appeals to,[15] and judicial review by, the Supreme Court.[16]

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10 Section 1 of the Act.

11 Ibid s 10.

12 Ibid s 17(1).

13 Ibid ss 17(1AA)-(1A)..

14 See generally *Gubbins v Wyndham City Council* (2004) 9 VR 620 ('*Gubbins*'), 632-3 [36]-[40].

15 A decision of the Magistrates' Court can also be appealed to the County Court.

16 *Gubbins* (2004) 9 VR 620, 633 [39].

26 Dog attacks or bites, particularly attacks or bites causing death or injury to persons or animals may constitute offences on the part of the owner, or person in apparent control of the dog at the time of the attack or biting.[17] Prosecutions are heard and determined in the Magistrates' Court. VCAT has power under pt 7D of the Act to review decisions by councils or authorised officers to declare dogs to be dangerous, menacing dogs or restricted breed dogs.[18]

27 Part 7A of the Act gives councils the power to seize, keep in custody, and dispose of dogs subject to meeting the requirements described in that part. In the event that a dangerous dog is not able to be registered or have its registration renewed by the council or by order of VCAT, or if the owner has been found guilty of an offence under div 3 of pt 3 with respect to the dog, or is reasonably suspected by an authorised officer of committing an offence in respect of the dog, the dog can be seized by an authorised officer.[19] In like circumstances, restricted breed dogs or dogs reasonably believed to be restricted breed dogs, may also be seized by an authorised officer.[20] Dogs urged or trained to attack, or which have attacked, or where owners have, or are reasonably suspected of having committed offences in relation to attacks by dogs may also be seized by authorised officers.[21] A dog or cat can also be seized in a variety of other circumstances, eg where unregistered, or non-compliant with registration requirements, or where the dog or cat is abandoned, or found in an unregistered breeding domestic animal business, or where the owner is guilty of an offence under various provisions of the Act.[22]

28 In some circumstances, where the owner of a lawfully seized animal has paid the relevant council's reasonable costs and expenses, and satisfied the requirements of the Act and the regulations placed on the owner with respect to that animal, the

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17 Section 29 of the Act.

18 Ibid s 98(2) and (2AA).

19 Ibid s 78.

20 Ibid s 79-80.

21 Ibid s 81.

22 Ibid ss 78-84D.

animal can be recovered by the owner.[23] Restricted breed dogs capable of registration, or dogs where a restricted breed dog declaration has been set aside by VCAT can also be recovered by the owner.[24]

29 Where owners do not recover dangerous dogs, restricted breed dogs, or other dogs, councils must destroy or sell the animal in accordance with the Act.[25] If a veterinary practitioner certifies that a dog or cat should be immediately destroyed on humane grounds, or is diseased or infected with disease, an authorised officer may destroy a dog or cat seized under pt 7A.[26]

30 Under s 84P, councils may destroy a dog which has been seized under pt 7A at any time after its seizure where the dog is a dangerous dog, or a restricted breed dog not able to be registered, or where the owner has been found guilty of an offence under div 3 or 3B of pt 3 with respect to that dog.[27] Councils are also given power to destroy a dog where the dog's owner has been found guilty of an offence under ss 28, 28A or 29 with respect to the dog.[28]

31 Section 28 relates to wilfully setting on or urging a dog to attack, bite, rush at or chase any person or animal, while s 28A relates to training a dog to attack, bite, rush at, chase or in any way menace persons, animals or anything worn by persons other than in an authorised domestic animal business. Section 29 relates to dogs which have in fact attacked or bit or rushed at or chased a person or animal. Following a finding of guilt in relation to such an offence, the Magistrates' Court may order the dog to be destroyed by an authorised officer of the council of the municipal district in which the offence occurred.[29] Even if the Magistrates' Court does not order the dog to be destroyed, the council nonetheless has power to order

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23 Ibid s 84M.

24 Ibid s 84N.

25 Ibid s 84O(2)-(3).

26 Ibid s 84O(4).

27 Ibid s 84P(a)-(d).

28 Ibid s 84P(e).

29 Ibid s 29(12).

the dog to be destroyed at any time after its seizure.[30]

32 It is significant that the council's power to destroy a dog (not being a dangerous dog or a restricted breed dog) under ss 84P(e) and (f) only arises where the dog has been lawfully seized by an authorised officer of the council under pt 7A of the Act, and where:

(a) the dog's owner has been found guilty of an offence under s 28, 28A or 29 with respect to the dog; or

(b) a person other than the dog's owner has been found guilty of an offence under s 29 with respect to the dog.

33 Before this power to destroy a dog (other than a dangerous dog or restricted breed dog) can arise, the owner or another person must already have been found guilty of an offence such as we have described. The offence must have been proved in the Magistrates' Court beyond reasonable doubt. It is a defence to any such prosecution if the incident occurred because the dog was being teased, abused or assaulted, or a person was trespassing on the premises on which the dog was kept, or another animal was on the premises on which the dog was kept, or a person known to the dog was being attacked in front of the dog.[31]

34 It follows that at the time when destruction of the dog is being considered under s 84P(e) or (f), the underlying facts relating to the offence under s 28, 28A or 29 will already have been established beyond reasonable doubt by the council in the Magistrates' Court proceeding.[32] It will not ordinarily be open to the owner of a dog to maintain or renew any dispute as to the underlying factual circumstances which are to be taken to have been conclusively decided by the Magistrates' Court.

35 Consideration of the exercise of the council's power under s 84P will principally address the extent of the risk to the community or to other animals if the

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30 Ibid ss 84P(e)-(f).

31 Ibid s 29(9).

32 *Gubbins* (2004) 9 VR 620, 633 [39].

dog is not destroyed, having regard to what has already been demonstrated to the council or VCAT or found to have occurred in the previous proceeding. It will ordinarily be a persuasive consideration if the council is of the view in the circumstances that there is an ongoing risk of physical injury to others, particularly children, or a continuing risk of menacing or unacceptable behaviour by the dog when in the presence of persons or other animals. Other considerations are whether the council is of the view that there is a risk to persons or animals, having regard to the past conduct or omissions of the owner, the past training or lack of training of the dog, and the security reasonably required by members of the public and other animals near to the location where the dog is to be housed or exercised. The level of risk that future offences or contraventions of the Act may occur having regard to any proposed arrangements for the ongoing management of the dog will also be a significant consideration, in deciding whether the dog should be destroyed.

36 More fundamentally, in the present context it follows from the nature of the statutory scheme that:

(a) a council's power to destroy the dog has already been determined at the time it considers whether it should, as a matter of discretion, be destroyed;

(b) the Act expressly contemplates a hearing in the Magistrates' Court culminating in conviction as conditioning the establishment of that power but does not expressly contemplate a hearing as a precondition to the exercise of the relevant discretion;

(c) there is nothing in the Act to suggest that the decision as to the exercise of the discretion is to be made other than administratively;

(d) there is nothing in the Act to suggest that prior involvement with the history of the dog automatically disqualifies members of the council or its officers from participating in the discretionary decision concerning the dog's destruction; and

(e) the relevant discretion is reposed in a democratically elected local government body in unqualified terms.

Natural justice

37 In *Annetts v McCann* Mason CJ, Deane and McHugh JJ stated:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.[33]

38 As the trial judge recorded,[34] it was held by Hansen J in *Gubbins*[35] that the common law requirement to accord procedural fairness had not been excluded under the equivalent provisions of the Act's predecessor legislation.[36] *Gubbins*[37] was followed by the Chief Justice in *Tarasinski v Wyndham City Council.*[38] The Council did not dispute that it was required to accord procedural fairness to the owner of a dog before exercising the power under s 84P of the Act.

39 The existence of a duty to accord natural justice does not however mean, as the appellant submits, that the panel was bound to act judicially. It is necessary to resolve what the requirements of procedural fairness were in the relevant statutory context. Indeed, it may be observed in passing that in both *Gubbins*[39] and *Tarasinksi*[40] the informant in the Magistrates' Court proceeding founding the council's power to order that the dog be destroyed, was also the council officer to whom the administrative discretion to make such an order was delegated. In neither case was it contended that that fact alone gave rise to a question of procedural fairness by reason of bias.

40 The nature of the basic enquiry as to the content of procedural fairness in a

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33 (1990) 170 CLR 596, 598.

34 Review Reasons [82].

35 (2004) 9 VR 620.

36 *Domestic (Feral and Nuisance) Animals Act 1994.*

37 (2004) 9 VR 620.

38 [2009] VSC 109 (*'Tarasinski'*).

39 (2004) 9 VR 620.

40 [2009] VSC 109.

particular case was articulated by Mason J in *Kioa v West*:[41]

> Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*,[42] Kitto J pointed out that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on 'the particular statutory framework'. What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting.[43]
>
> In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.[44]
>
> When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case? It will be convenient to consider at the outset whether the statute displaces the duty when the statute contains a specific provision to that effect, for then it will be pointless to inquire what the duty requires in the circumstances of the case, unless there are circumstances not contemplated by the statutory provision that may give rise to a legitimate expectation. However, in general, it will be a matter of determining what the duty to act fairly requires in the way of procedural fairness in the circumstances of the case. A resolution of that question calls for an examination of the statutory provisions and the interests which I have already mentioned.

41 It may also be noted in passing that neither in *Kioa*[45] nor in any another authority to which we have been referred is there is any suggestion that the fact an administrative decision-maker is also involved in investigation of relevant facts

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41 (1985) 159 CLR 550, 584-5 (citations in original) ('*Kioa*').

42 (1963) 113 CLR 475, 503-4.

43 *Reg v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 552-3; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 311, 319-21.

44 Cf *Salemi v Minister for Immigration & Ethnic Affairs (No 2)* (1977) 137 CLR 396, 451 (Jacobs J).

45 (1985) 159 CLR 550.

automatically disqualifies that person from making the ultimate decision.

42 As the trial judge held in the present case, the content of the Council's duty to act fairly fell to be determined having regard to the statutory framework within which the relevant power is found. We would respectfully agree with her Honour's analysis of the leading authorities:

> 83 However, it is necessary to determine the content of the requirement having regard to the statutory framework. In *NCSC v News Corp Ltd*[46] Brennan J stated that:
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> > The terms of the statute which creates the function, the nature of the function and the administrative framework in which the statute requires the function to be performed are material factors in determining what must be done to satisfy the requirements of natural justice.[47]
>
> 84 In *Ebner v Official Trustee in Bankruptcy*,[48] the High Court articulated the test for apprehended bias by reference to the apprehension of a fair minded lay observer. Apprehended bias will be established where the fair minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question he or she is required to decide.
>
> 85 However, in *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[49] the High Court held that the application of the *Ebner* principles will not be the same when a decision is not vested in a judicial officer. The content of administrative law requirements in relation to bias by pre-judgment depends upon the circumstances and that there can be no automatic application of rules developed in the context of judicial decision-making to administrative decisions. Justice Hayne observed that the analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm.[50] His Honour compared decisions taken within the judicial model with other administrative decisions and said:
>
> > It is critical, then, to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of

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46 (1984) 156 CLR 296.

47 Ibid 326.

48 (2000) 205 CLR 337, 344 ('*Ebner*').

49 (2001) 205 CLR 507.

50 Ibid 563.

neutrality (if any) is to be expected of the decision-maker.[51]

86 To similar effect, in *Hot Holdings Pty Ltd v Creasy*,[52] McHugh J said:

> 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 person making a purely administrative decision.[53]

87 The question of apprehended bias, be it in the form of pre-judgment, prior association or otherwise, must therefore be considered by reference to the statutory arrangements for the exercise of the power in s 84P of the Act.[54]

43 As her Honour further reasoned:

96 It is significant for the purposes of determining the content of the natural justice requirements for the exercise of the power under s 84P(e) that its exercise depends upon there first having been a finding of guilt in a curial proceeding. As Hansen J said in *Gubbins v Wyndham City Council*,[55] it is instructive to consider the process that must be gone through before a court makes a finding of guilt:

> The proceeding in the Magistrates' Court will result from the seizure of the dog in question and will involve a hearing as to the circumstances of the alleged offence. The owner of the dog, as defendant in the court proceeding, will have an opportunity to be heard, to examine witnesses, and to say to the magistrate, or judge on appeal, what he might wish to say as to the alleged defence and on the matter of penalty. If then the defendant is found guilty then ipso facto, the council's power to destroy the dog is activated. In other words, the condition upon satisfaction of which the power will become available to the council is a determination of guilt in a judicial proceeding. Further, from such a finding in the Magistrates' Court a defendant has the right of appeal to, and a rehearing in, the County Court, and a right of appeal to the Supreme Court on a question of law. It is not to the point that there was no appeal in this case. The point is that what I have described is the legislative scheme.[56]

97 Because of the requirement in s 84P(e) for a conviction prior to any decision being made to destroy a dog,[57] the owner of the dog will have

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51 Ibid 565.

52 (2002) 210 CLR 438.

53 Ibid 460.

54 Review Reasons [83]-[87] (citations in original).

55 (2004) 9 VR 620. His Honour's decision related to the equivalent provision to s 84P in predecessor legislation.

56 Ibid 633.

57 That is not a restricted breed dog or a 'dangerous dog'.

had the opportunity to be heard, to examine witnesses and say to the magistrate, or judge on appeal, what he or she might wish to say as to the defence and on the matter of penalty.

98 The content of the rules of procedural fairness in this case must be determined in this context.[58]

44 To this may be added the fact that the statutory scheme grants the relevant discretion to an elected local government body which may properly be regarded as intended to make decisions representing the public interest within its local government area. In this respect, the distinction between the nature of such a body and a court is as fundamental as that identified by Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng*:

> Although it would require some qualification in the light of later developments in the law, Lord Thankerton's speech in *Franklin v Minister of Town and Country Planning*[59] stands as a useful reminder that lawyers usually equate 'bias' with a departure from the standard of even-handed justice which the law requires from those who occupy judicial, or quasi-judicial, office. The Minister is in a different position. The statutory powers in question have been reposed in a political official, a member of the Executive Government, who not only has general accountability to the electorate and to Parliament, but who, in s 502, is made subject to a specific form of parliamentary accountability. The power given by s 502 requires the Minister to consider the national interest. As Brennan J observed in *South Australia v O'Shea*:[60] 'The public interest in this context is a matter of political responsibility.' The powers given by ss 501 and 502, as has already been held, enabled the Minister in effect to reverse the practical consequences of decisions of the Tribunal in the cases of the persons involved, even though no new facts or circumstances had arisen; and even though the Minister had been involved in the proceedings before the Tribunal. As the circumstances of the radio interview demonstrate, the Minister himself can be drawn into public debate about a matter in respect of which he may consider exercising his powers. He might equally well have been asked questions about the cases in Parliament. The position of the Minister is substantially different from that of a judge, or quasi-judicial officer, adjudicating in adversarial litigation. It would be wrong to apply to his conduct the standards of detachment which apply to judicial officers or jurors. There is no reason to conclude that the legislature intended to impose such standards upon the Minister, and every reason to conclude otherwise. [61]

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58 Review Reasons [96]-[98] (citations in original).

59 [1948] AC 87, 104.

60 (1987) 163 CLR 378, 411.

61 (2001) 205 CLR 507, **539** [102] (Gleeson CJ and Gummow J) (citations in original).

45 In *McGovern v Ku-Ring-Gai Council*[62], a case concerning approval by a municipal council of a development application, Spigelman CJ observed:

> Of particular significance in the present case is that the relevant statutory power is vested in a democratically elected Council exercising a discretionary power expressed in broad terms to which multiple considerations apply and with respect to which the range of permissible opinion is extraordinarily wide ...[63]

46 The appellant submits that the circumstances of *McGovern v Ku-Ring-Gai Council*[64] are to be distinguished from the present case because the exercise of a power to destroy a dog involves a destruction of existing property, as distinct from the grant of a development right with respect to future property. We doubt that the distinction is as clear as suggested. Both powers form part of comprehensive systems of regulation of municipal land use including complex licensing schemes and powers to destroy property in the event of breach of both schemes. Whether or not this is so, however, the distinction suggested avoids the point in issue which is the fundamental difference from a court in the nature of the body to which the legislation grants the administrative discretion.

47 In the present case, the discretionary power in issue is not subject to any express statutory conditions, guidelines or fetters but it is vested in a democratically elected council charged with ongoing responsibility for the good government of the relevant local area. It is to be expected that the Council will exercise its powers in the public interest and that its decision will be informed by its knowledge and understanding of the local environment and community, its experience as a body exercising powers under the Act, and its knowledge of any relevant history bearing on the decision in issue. Plainly enough it might reasonably be expected that it would rely on the experience and expertise of its officers in informing itself.

48 The better view is that the essential requirements of procedural fairness in the

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62 (2008) 72 NSWLR 504 ('*McGovern*')

63 Ibid [13].

64 Ibid.

present statutory context are those which the trial judge identified by reference to the judgment of Basten JA in *McGovern*.[65]

49 The real question is what, in the present case, the reasonable observer would expect of councillors or their delegates dealing with the question of whether the power should be exercised under s 84P(e). In our view, her Honour was correct to hold that the reasonable observer would essentially expect that the person or persons involved in making the decision would have no personal interest in the decision and that they would have a willingness to give genuine and appropriate consideration to the matter before them, including any submissions made by the owner of the dog. The trial judge expressed these considerations as follows:

> 108 In my view, having regard to the legislative scheme, natural justice does not require a panel hearing before making a decision under s 84P(e), let alone a hearing by a panel comprising members who have had no involvement in the prosecution that enlivened the power. The Council must decide what to do with a dog that has attacked a person or animal in circumstances where the dog's owner has already been convicted of a relevant offence under the Act. There has been a curial process to establish that the attack took place and what its consequences were. The question for the council following the successful prosecution is, in substance, whether the dog can live safely in the community and, if so, how.
>
> 109 In these circumstances, there is no need for a form of quasi-judicial hearing to consider the future of the dog. In my view, it would be sufficient for any of the officers delegated by the Council to make the decision in question, having given the owner of the dog an opportunity to make submissions in writing as to what should now happen to the dog and an opportunity to respond to any adverse material. It cannot be the purpose of the panel hearing to re-open the factual findings made by the Magistrates' Court. Panel members, including the delegate, need not come to the panel hearing with a 'clean slate' regarding these matters.
>
> 110 Accordingly, a requirement for impartiality exists to the extent necessary to give the persons affected by the decision under s 84P(e) – the owner of the dog and possibly any victim of an attack – a genuine hearing as to whether the dog is capable of living safely in the community. In *McGovern v Ku-Ring-Gai Council*,[66] Basten JA identified the different decision-making expectations in a setting involving a local council compared to a court setting:

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65 Ibid.

66 Ibid.

> The real question is what, with the appropriate level of appreciation of the institution, the fair-minded observer would expect of a councillor dealing with a development application. The institutional setting being quite different from that of a court, the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers.[67]

> 111 The requirement that there be an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the dog owner's submissions can be satisfied even where the delegate has been involved in the earlier prosecution. In my view, a fair minded observer would not apprehend that there might be a disqualifying predisposition from the fact that the decision-maker under s 84P(e) was also involved in the prosecution of the owner for offences under s 29(4) of the Act.[68]

50 We reject the appellant's submissions that there were errors in this reasoning or its conclusions. Nevertheless, it can be seen that her Honour's formulation of the essential aspects of procedural fairness in fact embraces both the requirements postulated by the appellant's notice of appeal, namely a lack of conflict of interest on the part of the decision-maker, and an absence of prejudgment.

51 The real issues in this appeal are whether the evidence of the facts demonstrated a breach of these obligations. Before turning to those facts however, it is necessary to deal with one further matter.

52 On appeal (but not at first instance) it was submitted that the letter sent to the appellant and her solicitor giving notice of the hearing itself generated an entitlement to an impartial hearing. Reliance was placed upon the decision in *Century Metals & Mining NL v Yeomans*.[69] In that case, the relevant government minister advised the appellant that he would commission an independent enquiry to carry out an impartial assessment of a proposal to recommence mining on Christmas Island. The present case stands in stark contrast. The Council's letter made clear that the panel would not be constituted by independent third parties but include two

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67 Ibid 519.

68 Review Reasons [108]-[111] (citations in original).

69 (1989) 40 FCR 564 ('*Century Metals*').

of its own officers who had had previous involvement in the matter and one who had not. Further, it made clear that Ms Hughes was one of those members and substantial prior involvement by her in the matter was known to the appellant's solicitor.

53 In our view, the letter could not sensibly create a legitimate expectation that the panel members would be independent of the Council. The appellant's legitimate expectation was simply that they would be persons who had no conflict of interest in the matter and had made no prejudgment of the matter.

Apprehended pre-judgment

54 The appellant submitted that Ms Hughes might reasonably be regarded as a person who might be biased against the appellant because she was involved in the investigation of the matter and the formulation of the prosecution case against the appellant at the Magistrates' Court, undertook other inquiries relating to possible accommodation of the dog after its impoundment, and undertook some procedural tasks associated with the panel proceeding.[70]

55 It is submitted that this involvement raised a real possibility of prejudgment by Ms Hughes of the question of whether the dog should be destroyed. In our view, the matters relied on could not lead to the conclusion that there was a real possibility that Ms Hughes prejudged the matter and was not open to persuasion at the time of the panel hearing. It is not enough for the appellant to simply assert the existence of such a possibility. In the *R v Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group*, the seven members of the High Court said:

> The common law principles of natural justice are well understood though they have been variously expressed. It is sufficient here in relation to that aspect of those principles which is called in aid by the applicant to recall the well known passages from *Allinson v General Council of Medical Education and Registration*,[71] as cited and commented upon by Isaacs J in *Dickason v*

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70 See Emerton J's summary of Ms Hughes' involvement extracted at [15] above.

71 [1894] 1 QB 750.

Edwards,[72] and from *R v Sussex Justices; Ex parte McCarthy*.[73] A recent exposition is to be found in the judgment of the Master of the Rolls in *Metropolitan Properties Co (FGC) Ltd v Lannon*.[74]

> Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.[75]

56 In *Ebner v Official Trustee in Bankruptcy*, Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.[76]

57 In the present case, the appellant did not demonstrate a real possibility of prejudgment. First, it is in our view significant that the prosecution culminated in the appellant's plea of guilty and it was upon this plea that the conviction founding the Council's jurisdiction under s 84P rested and not upon contested evidence.

58 Secondly, the fact of participation in the prosecution by Ms Hughes does not of itself demonstrate a predisposition to a particular exercise of the discretion under s 84P. As we have sought to explain, that discretion is consequential upon conviction and its proper exercise raised additional considerations to those agitated

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72 (1910) 10 CLR 243, 258.

73 [1924] 1 KB 256.

74 [1969]1 QB 577.

75 (1969) 122 CLR 546, 533-34 (citations in original), quoted in turn by Barwick CJ, Gibbs, Stephen and Mason J in *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 262.

76 (2000) 205 CLR 337, 345 [8].

before the magistrate.

59 Thirdly, the fact Ms Hughes had obtained information from the Ministry of Housing as to the future possible accommodation of the dog prior to the panel hearing does not demonstrate relevant prejudgment. The Council was bound to investigate this issue if it was to make a proper administrative decision. Moreover, the underlying facts were not in dispute. Indeed, as the summary of the hearing set out above makes clear, they were subject of direct address by the appellant.

60 Fourthly, the fact that Ms Hughes undertook procedural tasks associated with the panel hearing cannot be said to demonstrate any prejudgment of the merits.

61 Fifthly, there was no evidence demonstrating that Ms Hughes had expressed any prior opinion or concluded judgment with respect to the real issues before the panel. The facts in *Century Metals* provide a dramatic contrast[77] illustrating that such evidence may be highly significant.

62 Sixthly, for the reasons we have explained, the legislative scheme did not require a panel hearing before persons who had had no involvement in the prosecution process which preceded it. We respectfully agree with the trial judge's conclusions in this regard:

63 Seventhly, prior to the panel hearing, the appellant and her solicitor were advised by letter that Ms Hughes would participate in the hearing. Indeed, that letter made plain that the panel included persons who had had prior involvement with the history of the matter and one who had not. Although the appellant and her solicitor may not have been aware of the full detail of Ms Hughes' involvement in the prosecution, they were aware of her material involvement. No objection was made to her participation. The obvious inference is that no apprehension of existing prejudgment was drawn by them at that time. In turn, this favours the view that the reasonable observer would also fail to apprehend a real possibility of prejudgment.

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77 (1989) 40 FCR 564, 598.

64 Eighthly, the evidence as to the course of the panel hearing does not pro any basis for the conclusion Ms Hughes had prejudged the matter. Rather, it demonstrates that a series of matters were ventilated before the panel which were potentially significant to the determination of the matter and that Ms Hughes participated in this process. We note in particular that the appellant tendered letters in support of her case together with the solicitor's submission and the report from the animal behaviourist. She addressed what she had done to contain her dog. She responded to questions such as whether she had taken the dog to training. The whole impression given by the evidence is that Ms Hughes participated actively in a hearing which examined the issues afresh.

65 Lastly, in this context, it may be observed that Ms Hughes was not in fact the decision-maker. There is no basis on which it could be suggested Mr Kourambas prejudged the matter. The reasonable observer would not regard any pre-existing views of Ms Hughes as demonstrating that the decision-maker was not 'open to persuasion'[78] at the hearing.

Conflict of interest

66 The appellant further submits that this case should be regarded as one in which there was a reasonable apprehension of bias because Ms Hughes was in effect the appellant's accuser. Such cases are best regarded as conflict of interest cases rather than pre-judgment cases. In *McGovern*, Spigelman CJ addressed this distinction as follows:

> [38] In the context of multi-member decision-making bodies that are not courts, or subject to the same stringent requirements as courts, a disqualifying conflict of interest of a character which the apprehended bias principle would require the person not to participate in, indeed not even be present at, the decision- making process has been held to exist where:
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> - the person is the complainant or accuser with respect to the

78 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 531, 540 [71], [105] (Gleeson CJ and Gummow J), 564 [185]-[186] (Hayne J).

matters the subject of inquiry.[79]

- the person formally opposed an application and made representations to the decision-making body of which s/he was a member, where those representations were required by statute to be taken into account.[80]

- the person opposed the application and instructed a lawyer to appear at the hearing to argue against its acceptance.[81]

- the person otherwise becomes, in substance, a party to the proceedings.[82]

[39] All of these cases appear to me to involve a conflict of interest rather than pre-judgment. The conduct of the particular member(s) of the multi-member decision-maker went well beyond a manifestation that s/he was or they were not open to persuasion.

[40] In such cases, the independent observer might reasonably believe that the influence on the others of the person(s) who manifested bias of that character could well go beyond the usual process of internal debate. Accordingly, an independent observer could reasonably conclude that the entire collegiate body may not bring an impartial mind to the decision-making process. However, the pre-judgment situation is not necessarily, indeed not usually, of that character.[83]

67 We accept entirely the principle stated by Isaacs J in *Dickason v Edwards*:

> If it is incompatible for the same man to be at once judge and occupy some other position which he really has in the case, then *prima facie* he must not act as a judge at all.[84]

68 We also accept that Ms Hughes had a material part in the decision-making process and would not base our decision on this aspect of the matter upon the fact that she was not the decision-maker.[85]

69 Nevertheless, in our view the present case does not involve a conflict of

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79 *Dickason v Edwards* (1910) 10 CLR 243; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

80 *R v West Coast Council; Ex parte Strahan Motor Inn* (1995) 4 Tas R 411.

81 *R v London County Council; Ex parte Akkersdyk* [1892] 1 QB 190; *Frome United Breweries Company Ltd v Bath Justices* [1926] AC 586.

82 See *Cooper v Wilson* [1937] 2 KB 309, 322–324, 344–345; *R v West Coast Council; Ex parte Strahan Motor Inn* (1995) 4 Tas R 411, 427.

83 [2008] 72 NSWLR 504 (citations in original).

84 (1910) 10 CLR 243, 259.

85 Cf *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 449 [27].

interest in the sense identified. We do not accept that the reasonable observer would conclude that the prior involvement of Ms Hughes in the matter gave rise to the real possibility of a relevant conflict of interest.

70 First, the proceeding in which Ms Hughes was in effect the accuser had been determined by the appellant's plea of guilty and her consequent conviction on the basis of agreed facts.

71 Secondly, the question of whether the Council should destroy the dog required the exercise of an administrative discretion turning upon consideration of the fundamental question whether the dog could live safely in the community and, if so, how. This raised different issues from those raised by the prosecution in the Magistrates' Court.

72 Thirdly, the hearing was not required to be, and was not in fact, a quasi-judicial hearing.

73 Fourthly, Ms Hughes had no special personal interest in the matters in issue. Her involvement with the prior history of the dog was no more than that of a council officer carrying out her responsibilities as the Local Laws Co-ordinator.

74 Fifthly, the reasonable observer would regard it as entirely appropriate that the panel might include a person having a practical understanding of what needs to be done to protect the community from dog attacks, having regard to the circumstances of the particular case. The fact that Ms Hughes had professional experience in this regard could not be regarded as giving rise to a conflict of interest.

75 Sixthly, the evidence as to the course of the panel hearing does not demonstrate that Ms Hughes took the position of an accuser at it. She was not in substance a party to an adversary proceeding.

76 The appellant places particular reliance upon the decision of the High Court

in *Stollery v Greyhound Racing Control Board*.[86] In that case, the Greyhound Racing Control Board was charged by statute with regulating greyhound racing in New South Wales. Smith was a member of the Board and was also manager of an association which conducted greyhound races. Stollery owned greyhounds and wished to race them. The opportunities to race were limited and choices had to be made between the greyhounds nominated by owners. Stollery submitted nomination forms to Smith together with $200 in notes. He said this was a gift to Smith in honour of his recent marriage. Smith reported the matter to the Board, which initiated an enquiry. At the enquiry, Smith gave evidence. He was present for the whole of the enquiry and was also present at, but took no part in, its deliberations. The Board determined that there were grounds for charging Stollery with an offence and, after further deliberations, convicted him and disqualified him from the greyhound racing industry for 12 months. Smith was again present during the further deliberations but took no part in them. Stollery sought, and was granted, orders for certiorari and prohibition but this decision was reversed by the Court of Appeal. He then appealed to the High Court. In the course of his reasons, Barwick CJ said:

> It is to my mind quite evident that Mr Smith stood in a very special relationship to the appellant and to the matter which the Board was called upon to consider. He it was who reported the matter to the Board. So far it was his duty so to do. However, he was personally involved in the incident which he reported. The incident, so far as the objective facts were concerned, was not a matter of dispute, but the gravamen of the matter was the purpose or motive with which the appellant had proffered money to Mr Smith and the likely effect of the offer to Mr Smith upon the control and regulation of the sport. There can be little doubt, on the material before the Court, that Mr Smith, at the time he received the money, concluded that there had been an attempt to bribe him. Not unnaturally he was affronted by such an attempt. I am of opinion that in the circumstances Mr Smith was in the position of an accuser, accusing the appellant of having done an act detrimental to the control of the sport. It seems to me, therefore, that he was not in a position to participate either in the discussion or decision of the question whether or not what had occurred was an act detrimental to the control and regulation of greyhound racing, or of the question of what was the appropriate penalty to be inflicted if the first question should be answered unfavourably to the appellant.[87]

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86 (1972) 128 CLR 509 ('*Stollery*').

87 Ibid 516.

77 His Honour went on to conclude that the reasonable inference to be drawn by the reasonable bystander was that Mr Smith was in a position to influence the result of the Board's deliberations adversely to the appellant. Accordingly, in a matter in which the Board was bound to act in a judicial manner, natural justice was denied.[88]

78 In our view the present case is, as the trial judge concluded, plainly distinguishable from *Stollery*.[89] First, the panel hearing was not a quasi-judicial hearing of the type required to be conducted by the Greyhound Racing Control Board. The panel was not 'bound to act in a judicial manner' save in the limited senses we have explained.

79 Secondly, Ms Hughes was not in the position of an accuser at the panel hearing, although she had been in that position at the time of the Magistrates' Court prosecution.

80 Thirdly, Ms Hughes had no special or personal interest in the matters in controversy of the type which Smith had in the case of *Stollery*[90] or the District Chief Ranger had in *Dickason v Edwards*.[91] None of the circumstances in issue involved her personally.

Other matters

81 At first instance, the Council raised but elected not to pursue a submission that the appellant waived her right to object to Ms Hughes participating in the panel hearing by failing to object to such participation after notice was given by letter that Ms Hughes would be a panel member. In the circumstances, we accept that the Council should not now be permitted to re-agitate this issue.

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88 McTiernan, Menzies, Gibbs and Stephen JJ also allowed the appeal.

89 (1972) 128 CLR 509.

90 Ibid.

91 (1910) 10 CLR 243.

Conclusion

82 For the above reasons, the apprehended bias grounds of appeal are not made out and the appeal should be dismissed.