SUPREME COURT OF QUEENSLAND

CITATION:	*Aurizon Network Pty Ltd v Queensland Competition Authority & Ors* [2018] QSC 246
PARTIES:	**AURIZON NETWORK PTY LTD ACN 132 181 116** (applicant) **v** **QUEENSLAND COMPETITION AUTHORITY** (first respondent) **and** **ANGLO AMERICAN METALLURGICAL COAL PTY LTD ACN 076 059 679** **BM ALLIANCE COAL OPERATION PTY LTD ACN 096 412 752** **BHP BILLITON MITSUI COAL PTY LTD ACN 009 713 875** **CORONADO CURRAGH PTY LTD ACN 009 362 565** **GLENCORE COAL PTY LTD ACN 082 271 930** **IDEMITSU AUSTRALIA RESOURCES PTY LTD ACN 010 236 272** **JELLINBAH MINING PTY LTD ACN 052 251 000** **LAKE VERMONT RESOURCES PTY LTD ACN 114 286 841** **PEABODY ENERGY AUSTRALIA COAL PTY LTD ACN 001 401 663** **YARRABEE COAL COMPANY PTY LTD ACN 010 849 402** (second respondents)
FILE NO:	SC No 4539 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	30 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 and 23 October 2018
JUDGE:	Jackson J

ORDER: **The order of the court is that:**

1. **The application is dismissed.**
2. **The applicant pay the first respondent's costs of the proceeding.**
3. **Reserve the question of costs between the applicant and the second respondents.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – where draft decision made on draft access undertaking under *Queensland Competition Authority Act* 1997 (Qld) in relation to central Queensland coal network rail infrastructure – where chair of authority about to be appointed chair of Port of Newcastle – where Port of Newcastle might benefit from reduction in throughput of central Queensland coal network rail infrastructure – where investigation being conducted and draft decision issued –where application for judicial review for apprehended bias – where applicants submit that interest in appointment as chair of Port of Newcastle might cause the fair-minded lay observer to reasonably apprehend that the authority might not bring an impartial mind to the conduct of the investigation of the draft access undertaking and 'decision' to issue the draft decision – whether hypothetical lay observer is taken to be aware of certain facts – whether facts known to hypothetical lay observer give rise to apprehension of bias

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – SUPERVISION – OTHER BODIES – where applicants submit that chair of first respondent did not disclose alleged conflict of interest in accordance with *Queensland Competition Authority Act* 1997 (Qld) s 219 – whether chair of first respondent had a direct or indirect interest in an issue being considered by the authority – whether contravention of s 219

Judicial Review Act 1991 (Qld), s 21
Queensland Competition Authority Act 1997 (Qld), s 173(1)(d), s 219

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, cited
Baker v Palm Bay Island Resort Pty Ltd (No 2) [1970] Qd R 210, cited
Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008) 39 WAR 1, cited
British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283, cited
Ebner v Official Trustee (2000) 205 CLR 337, applied

Ford v Andrews (1916) 21 CLR 317, cited
Grand Enterprises Pty Ltd v Aurium Resources Ltd [2009] FCA 513, cited
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, cited
Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438, cited
Isbester v Knox City Council (2015) 255 CLR 135, considered
Johnson v Johnson (2000) 201 CLR 488, cited
Livesey v New South Wales Bar Association (1983) 151 CLR 288, cited
McGovern v Ku-Ring-Gai Council (2008) 72 NSWLR 504, cited
Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165, cited
Webb v The Queen (1994) 181 CLR 41, considered
Wilson v London Midland and Scottish Railway Co [1940] Ch 169, cited

COUNSEL: D Clothier QC and E Goodwin for the applicant
S Doyle QC and M May for the first respondent
P O'Shea QC and M Trim for the second respondents

SOLICITORS: Quinn Emanuel Urquhart & Sullivan for the applicant
Johnson Winter & Slattery for the first respondent
Herbert Smith Freehills for the second respondents

JACKSON J:

[1] This is an application for judicial review of conduct of the first respondent during an investigation of a draft access undertaking by the applicant relating to the railway network known as the Central Queensland Coal Network ("CQCN").

CQCN

[2] The CQCN is a railway network for the transport of coal. It services approximately 40 coal mines in central Queensland that are producers of either metallurgical or thermal coal. Coal is transported from the various mines over the CQCN to five coastal terminals at three ports. From north to south, the terminals are Abbot Point Coal Terminal, Dalrymple Bay Coal Terminal, Hay Point Coal Terminal, Wiggins Island Coal Export Terminal and RG Tanna Coal Terminal. Set out below is a map of the relevant area showing the location of the mines, the CQCN and the coal terminals.

[3] The applicant is a subsidiary of Aurizon Holdings Limited, a listed company, whose overall business includes the operation of the CQCN and train services that transport coal upon it. The applicant's part of the business is concerned with the part described as the "below rail" operations. The applicant leases the land comprising the relevant rail corridors from the State and is the proprietor and operator of the rail infrastructure utilised in the CQCN up to the point of the top of the rails.

[4] The applicant enters into access agreements with railway operators (and others) for the railway operators to operate rolling stock on the CQCN. In effect, to that extent, the applicant's business operates as a monopoly. Another subsidiary of Aurizon Holdings Limited, Aurizon Operations Limited, is a railway operator, utilising its own locomotives, rolling stock and other assets to provide trains services to, inter alia, coal mines. Aurizon Operations is not a monopoly. There are other railway operators.

[5] Thermal and metallurgical coal are transported on the CQCN to one or other of the coastal bulk handling coal terminals, from where it is shipped to the buyers.

[6] The second respondents are companies who supply thermal and metallurgical coal into the "seaborne coal market" as the applicant calls it. Their coal is transported over the CQCN to the coal terminals for shipping. In that way, the CQCN constitutes part of the supply chain from coal producers to buyers. There are constraints within the CQCN relating to the loading of trains, train capacity, scheduling of trains and unloading of trains between the mines and the coal terminals.

Background to the Draft Access Undertaking

[7] Use of the CQCN for providing transportation by rail is taken to be a service declared by the Ministers under Part 5, Division 2 of the *Queensland Competition Authority Act* 1997 (Qld) ("QCA Act").[1] Part 5 of the QCA Act establishes a third party access regime. Under Division 7 of Part 5, the Authority may give a written notice to an owner or operator of a declared service requiring the owner or operator to give the authority a draft access undertaking for the service.[2] Where the Authority is given a draft access undertaking, it may conduct an investigation for approving the draft access undertaking.[3] Part 6 applies to an investigation.[4] In conducting the investigation, the Authority is expressly obliged to comply with natural justice.[5] The Authority may either approve the draft access undertaking or refuse to approve it and give notice of the way in which the Authority considers it is appropriate to amend the draft access undertaking.[6]

[8] At all material times to this proceeding, there has been an approved access undertaking in place, known as "UT4". UT4 was due to expire on 30 June 2017.

[9] On 11 May 2016, the Authority issued an "Initial Undertaking Notice" to the applicant requiring it to give a "Draft Access Undertaking" for the period commencing 1 July 2017.

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1 *Queensland Competition Authority Act* 1997 (Qld), s 250(1).

2 *Queensland Competition Authority Act* 1997 (Qld), s 133(1).

3 *Queensland Competition Authority Act* 1997 (Qld), s 145.

4 *Queensland Competition Authority Act* 1997 (Qld), s 147.

5 *Queensland Competition Authority Act* 1997 (Qld), s 173(1)(d).

6 *Queensland Competition Authority Act* 1997 (Qld), s 134(2) and 136(5).

[10] In July 2016, the Authority issued a "Statement of Regulatory Intent" as to how it proposed to manage the process of assessment and approval. Among other things, it stated that the Authority would conduct an investigation into the Draft Access Undertaking and would publish a "Draft Decision" to provide stakeholders with an opportunity to comment on the Authority's positions before making the final decision whether or not to approve the Draft Access Undertaking.

[11] On 30 November 2016, the applicant provided the required Draft Access Undertaking to the Authority in response to the Initial Undertaking Notice. It provided an accompanying submission.

[12] On 2 December 2016, the Authority issued a "Notice of Investigation".[7]

[13] During 2017, a number of stakeholders made submissions to the Authority in respect of the Draft Access Undertaking.

[14] On 22 September 2017, the applicant submitted four consultants' reports to the Authority.

[15] On 29 September 2017, the applicant submitted three consultants' reports to the Authority.

[16] On 15 December 2017, the Authority issued the Draft Decision.

[17] The Draft Decision stated that it set out the Authority's preliminary assessment of the Draft Access Undertaking and the reasons why the Authority did not consider it appropriate to approve the Draft Access Undertaking. The Authority invited submissions from interested parties by 12 March 2018.

[18] On 15 February 2018, the Authority released a statement described as a "Stakeholder Notice" in relation to the Draft Decision. The Stakeholder Notice contained a statement from the chair of the Authority, Professor Green, that the Authority was "considering all information received throughout the consultation process and remains open to relevant new evidence and arguments".

[19] On 12 March 2018, the applicant provided a response submission to the Draft Decision.

Draft Access Undertaking

[20] The Draft Access Undertaking is a lengthy document that follows the broad structure of the existing approved access undertaking, UT4, but with significant differences, intended to operate from 30 June 2017. The Draft Access Undertaking is divided into 13 parts in 310 pages, with ten schedules, from Schedule A to Schedule J, in a further 156 pages. The parts are organised as follows:

(a) Part 1: Preamble;

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[7] *Queensland Competition Authority Act* 1997 (Qld), s 146.

(b) Part 2: Intent and Scope;

(c) Part 3: Ringfencing;

(d) Part 4: Negotiation framework;

(e) Part 5: Access Agreements;

(f) Part 6: Pricing principles;

(g) Part 7: Available Capacity allocation and management;

(h) Part 7A: Baseline Capacity;

(i) Part 8: Network development and Expansions;

(j) Part 9: Connecting Private Infrastructure;

(k) Part 10: Reporting, compliance and audits;

(l) Part 11: Dispute Resolution and Decision Making;

(m) Part 12: Definitions and Interpretation.

[21] Clause 6.6.3 defines the Maximum Allowable Revenue ("MAR") to mean the aggregate of the maximum amount of the Expected Access Revenue attributable to a section of Rail Infrastructure for the relevant Train Services using that section of Rail Infrastructure over the Evaluation Period.

[22] The amount of the MAR is calculated such that the net present value of the cashflows associated with providing access for the relevant Train Services over the Evaluation Period is zero, in accordance with the equation expressed in clause 6.6.3(c).

[23] Factors in that equation, simplified, include:

(a) "C" defined to mean the capital expenditure for assets reasonably expected to be required;

(b) "M" defined to mean the Efficient Cost including operating and maintenance costs etc, reasonably expected to be incurred;

(c) "ROA" defined to mean the relevant rate of return commensurate with the commercial and regulatory risks involved in nominal post tax terms (with the cost of debt expressed on a before tax basis) as agreed or failing agreement as determined by QCA;

(d) "T" defined to mean the tax expense assessed by applying the tax rate to the taxable income reasonably expected to be earned; and

(e) "AV" defined to mean the value of assets reasonable expected to be required.

[24] In other words, the MAR is a function of, inter alia, the value of the assets expected to be required, the forecast capital expenditure, the forecast maintenance costs and the rate of return assessed by reference to the Weighted Average Cost of Capital ("WACC") to be applied.

[25] By clause 6.6.3(e), the value of the assets is to be determined by either the Regulatory Asset Base ("RAB") as maintained in accordance with Schedule E or the Depreciated Optimised Replacement Cost method.

[26] MAR is deployed in the Draft Access Undertaking as a limit on the amount of the Access Charges that the applicant may receive.

[27] In broad terms, if the applicant were to make a significant capital expenditure on an expansion of the CQCN, the method by which it would be able to recover Access Charges within the MAR for that expenditure is for it to be included in the RAB, so that the MAR equation includes it and the MAR is increased by reference to that expenditure. Alternatively, the Authority may be able to obtain an agreement with a user for the payment of fees under approved Access Conditions, outside the scope of any applicable tariff and the Access Fee limits under the MAR.

[28] The consultants' reports provided by the applicant to the Authority supported the applicant's position in the Draft Access Undertaking that the WACC should be 6.78 percent. Those reports contained the consultants' opinions as to the risk-free rate, the estimate of market risk premium and the required return for infrastructure assets of the applicant for those inputs to the Capital Asset Pricing Model. Detailed subject matters over which the reports extended included gamma, inflation, credit rating and risk comparison.

[29] The MAR proposed in the Draft Access Undertaking was calculated by applying the applicant's assessment of the appropriate WACC to the applicant's values and forecast of costs or expenditures.

[30] WACC and maintenance costs are key elements of the building block model used for deriving the MAR under any approved Access Undertaking.

[31] Supported by its reports, the applicant proposed in the Draft Access Undertaking:

(a) WACC of 6.78 percent;[8]

(b) maintenance costs of $921 million;[9] and

(c) MAR of $4.892 billion.[10]

Draft Decision

[32] The Draft Decision is also a lengthy document. It is divided into an introductory section of 19 pages and 21 further sections, followed by 15 appendices from Appendix A to Appendix O, in total 530 pages. The structure of the parts is as follows:

(a) Section 1: Risk, Revenues and Reference Tariffs – Overview;

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8 Affidavit of JD Powell filed 27 September 2018, Exhibit JDP-1, page 256 of the Draft Access Undertaking.

9 Affidavit of LK Burton filed 30 April 2018, Exhibit LB-2, referred to at page 255 of the Draft Decision.

10 To be calculated in accordance with clause 6.6.3 of the Draft Access Undertaking.

(b) Section 2: Risk and the Regulatory Framework;

(c) Section 3: The Regulatory Asset Base and Depreciation;

(d) Section 4: Inflation Forecast and RAB Indexation;

(e) Section 5: Rate of Return;

(f) Section 6: Volume Forecasts;

(g) Section 7: Operating Cost Allowance;

(h) Section 8: Maintenance Cost Allowance;

(i) Section 9: Schedule F – Reference Tariffs and Take or Pay;

(j) Section 10: Draft Access Undertaking Provisions – Overview;

(k) Section 11: Preamble and Intent & Scope;

(l) Section 12: Ring-Fencing;

(m) Section 13: Negotiation Framework;

(n) Section 14: Access Agreements;

(o) Section 15: Pricing Principles;

(p) Section 16: Available Capacity Allocation & Management;

(q) Section 17: Capacity and Supply Chain Management;

(r) Section 18: Network Development & Expansions;

(s) Section 19: Connecting Private Infrastructure;

(t) Section 20: Reporting, Compliance and Audits;

(u) Section 21: Dispute Resolution and Decision Making.

[33] There are many points of agreement and disagreement between the terms of the Draft Access Undertaking proposed by the applicant and the views of the Authority expressed in the Draft Decision.

[34] The Draft Decision would allow:

(a) WACC of 5.41 percent;[11]

(b) maintenance costs of $817 million;[12] and

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11 Affidavit of LK Burton filed 30 April 2018, Exhibit LB-2, page 62 of the Draft Decision.

12 Affidavit of LK Burton filed 30 April 2018, Exhibit LB-2, page 256 of the Draft Decision.

(c) MAR of $3.983 billion.[13]

[35] These are major points of disagreement between the terms of the Draft Access Undertaking proposed by the applicant and the views of the Authority expressed in the Draft Decision.

Authority's internal process

[36] At the material times there were three members of the Authority, including Professor Green who was the chair.

[37] In February 2017, the members of the Authority received a board discussion paper which proposed the framework and approach to assess the Draft Access Undertaking.

[38] In March 2017, the members of the Authority considered and gave "in principle" approval to a board paper concerning the averaging period to be used, among other things, for determining time variant WACC parameters, subject to overall assessment of the Draft Access Undertaking.

[39] Before 7 April 2017, members of the Authority received a board paper which contained a preliminary review of matters raised in collaborative stakeholder submissions, outlined indicative project timing and milestones towards a Draft Decision and sought approval for an information request to the applicant.

[40] On 7 April 2017 the Authority resolved to issue the information request.

[41] Before 24 May 2017, members of the Authority received a discussion paper about the investigation, including the applicant's progress in responding to the information request and information received from the applicant comprising a report about recent evidence on the market risk premium.

[42] On 24 May 2017, the Authority resolved to advise all stakeholders of its intention to consider the report as a late submission.

[43] Before 13 July 2017, members of the Authority received information papers.

[44] On 28 July 2017, members were provided with a working draft of part of the Draft Decision.

[45] On 14 September 2017, members were provided with a working draft of a chapter of the Draft Decision concerning WACC, together with the consultant reports from Capital Financial Consultants Ltd and Incenta Economic Consulting.

[46] On 24 September 2017, Professor Menezes sent an email to other members and some staff, attaching his marked up version of the draft. Professor Green replied stating that he would accept those mark ups.

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[13] Affidavit of LK Burton filed 30 April 2018, Exhibit LB-2, page 4 of the Draft Decision.

[47] On 5 October 2017, a discussion paper concerning the newer information contained in recent reports was provided to members of the board for consideration at the next meeting.

[48] On 12 October 2017, there was a meeting of the Authority but no substantive discussion or queries were raised by members.

[49] On 9 November 2017, there was a meeting of the Authority but Professor Green did not attend.

[50] On 7 December 2017, members were provided with a final version of the Draft Decision. That version added a section on maintenance costs that had not previously been included. The draft chapter regarding rate of return had no material changes from the earlier draft. Professor Green sought Professor Menezes' views on the rate of return chapter and adopted them. Professor Green did not make any comments relating to the maintenance costs section.

[51] On 14 December 2017, there was a meeting of the Authority. Professor Green advised that he proposed to declare that he had been invited to join the Port of Newcastle as the chair of its board. He said that he would ask the Authority to investigate whether there was any real or perceived conflict of interest.

[52] Also at the 14 December 2017 meeting, the Draft Decision was tabled with minor changes suggested by Professor Menezes. It was approved by all three members of the Authority.

Professor Green's potential conflict of interest or incompatibility of roles

[53] The applicant alleges that Professor Green had a conflict of interest (or, as it is sometimes called, incompatibility of roles) stemming from his negotiation for and imminent appointment as the chair of the Port of Newcastle during the process of the applicant's Investigation and publication of the Draft Decision.

[54] On 20 May 2017, Dr Richard Denniss, a consultant to the trustee of The Infrastructure Fund ("TIF"), a shareholder of the Port of Newcastle, contacted Professor Green.

[55] An email exchange between Professor Green and Jonathan van Rooyen, General Manager of Investments of the TIF, followed.

[56] On 19 June 2017, Professor Green followed up Mr van Rooyen.

[57] On 5 September 2017, Mr van Rooyen responded that:

> "We have… now cleared the way for a long-term discussion about the future direction of the Port of Newcastle."

[58] On 20 September 2017, Professor Green met with Mr van Rooyen who told him that there was a prospect that the chair of entities associated with the Port of Newcastle would become vacant and that Dr Denniss had recommended Professor Green for that role. Coal was discussed at the meeting.

[59] On 21 September 2017, Mr van Rooyen informed Professor Green that his objective was to have key stakeholders to the Port of Newcastle decision over his appointment in agreement by the end of the first week of October. He said that the final decision would be made by 16 October.

[60] On 2 October 2017, Professor Green met Mr van Rooyen and Andrew Agnew, the chair of the Nominations & Remuneration Committee for the trustee of the TIF. Afterwards, Professor Green sent an email to Mr van Rooyen, copied to Mr Agnew, saying:

> "Jonathan, Andrew
>
> Thanks for the lunch and overview of Gardior and NPC today. My takeaways are as follows:
>
> - With Gardior and Hastings successfully managing the transition to private ownership, NPC operational strategy has been reasonably effective but limited in scope and ambition
> - However, NPC strategy is now seriously challenged in three areas:
>   - Adani Carmichael mine undercutting coal export price in zero sum market
>   - …
> - NPC strategy must now be recalibrated to address these challenges…"

[61] On 4 October 2017, Professor Green met Mr van Rooyen and Bob Lette, the chairman of the trustee of the TIF, for an interview. Following that meeting, Professor Green sent an email to Mr van Rooyen and Mr Lette saying:

> "Thanks Jonathan, Bob
>
> Greatly enjoyed meeting you earlier today Bob. Let me check that I've understood your brief for an incoming NCP chairman –
>
> - With Gardior and Hastings having successfully managed the transition to private ownership, NPC operational strategy may have been viable in the short term, but limitations in scope and ambition mean 'business as usual' is now challenged in at least three key areas:
>   - Damaging prospect of Adani Carmichael mine with subsidised rail infrastructure undercutting coal export price in both Queensland and NSW in zero sum market
>   - …"

[62] On 29 November 2017, Mr van Rooyen sent an email to Professor Green copied to Dr Denniss referring to having a good dinner with "your 'new PON board members'" a few days earlier and to everyone being highly engaged and focused on the path ahead.

[63] On 6 December 2017, Professor Green signed a consent to act as director of the Port of Newcastle.

[64] On 7 December 2017, Professor Green negotiated for an increase in his proposed remuneration, on the basis that his role at the Port of Newcastle would be strategic and closer to that of an executive chair.

[65] On 18 December 2017, Professor Green was formally appointed chair of the companies that own and operate the Port of Newcastle.

Apprehended Bias

[66] Simplifying to a degree, the applicant submits that:

(a) coal is transported via the CQCN for sale in the seaborne coal market;

(b) coal is shipped through the Port of Newcastle for sale in the seaborne coal market;

(c) the Authority's Investigation and views expressed in the Draft Decision relating to the appropriate allowances for WACC and the maintenance costs, and the resultant MAR, may have an effect on the maintenance or expansion of the CQCN; and

(d) there was and is a real and sensible possibility that the Authority's views, if adopted in the decision to approve an access undertaking, might:

(i) decrease the sales of coal transported via the CQCN into the seaborne coal market; and

(ii) thereby increase "throughput" of coal sold into the seaborne coal market using the Port of Newcastle, to its financial and strategic benefit.

[67] The applicant submits that real and sensible possibility gives rise to an apprehension of bias on the part of Professor Green, and thereby the Authority, in conducting the Investigation and publishing the Draft Decision.

Provisions of the QCA Act

[68] There is no dispute between the parties that the Authority was required to observe the principles of natural justice during the course of the Investigation and in making any "decision" upon the Draft Access Undertaking.

[69] Section 173(1) provides:

> "(1) In an investigation, the authority—
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> (a) must act with as little formality as possible; and
>
> (b) is not bound by technicalities, legal forms or rules of evidence; and
>
> (c) may inform itself on any matter relevant to the investigation in any way it considers appropriate; and
>
> (d) must comply with natural justice."

[70] Section 219 provides:

> "(1) This section applies to a member if—
>
> (a) the member, or a person who, under a regulation, is related to the member, has a direct or indirect interest in an issue being considered, or about to be considered, by the authority; and
>
> (b) the interest could conflict with the proper performance of the member's duties about the consideration of the issue.
>
> (2) However, this section does not apply to the member if the interest consists only of the receipt of goods or services that—
>
> (a) also are available to members of the public; and
>
> (b) are made available on the same terms as apply to members of the public.
>
> (3) As soon as practicable after the relevant facts come to the member's knowledge, the member must disclose the nature of the interest to a meeting of the authority.
>
> (4) As soon as practicable after the nature of the interest is disclosed, the authority must give written notice of the disclosure to the Minister.
>
> (5) Unless the Minister otherwise directs, the member must not—
>
> (a) be present when the authority considers the issue; or
>
> (b) take part in a decision of the authority on the issue.
>
> (6) If, because of this section, a member is not present at a meeting of the authority for considering or deciding an issue, but there would be a quorum if the member were present, the remaining members present are a quorum for considering or deciding the issue at the meeting.
>
> (7) A disclosure under subsection (3) must be recorded in the authority's minutes."

Principles

[71] The parties made detailed submissions as to the applicable law to decide whether a decision maker is affected by apprehended bias. In the relevant area of legal discourse, none of the cases relied on by the parties is a close analogue to the present case.

[72] Whilst acknowledging the value of the submissions made by the parties in identifying the issues necessary to decide the case, it would not make the basis of these reasons clearer to summarise all of them. It is appropriate, however, to record some points.

[73] The logical starting point is *Ebner v Official Trustee*.[14] There are two reasons. First, *Ebner* is treated as refining the test for the application of the "apprehension of bias principle", as discussed in prior and subsequent cases, relied upon by the applicant in this case. Second, in the application of that principle, *Ebner* was an "interest" case, not a "pre-judgment" case,[15] meaning an interest held by the decision maker is said to give rise to the conflict of interest that raises the alleged apprehension of bias. The majority said:

> "Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer **might** reasonably apprehend that the judge **might** not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle."[16] (footnotes omitted) (emphasis added)

[74] In applying the apprehension of bias principle, *Ebner* also formulated a two-step analysis as follows:

> "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."[17]

[75] Among the later cases in the High Court, the applicant placed reliance on *Isbester v Knox City Council*.[18] That case considered a conflict between the interest or role in an earlier proceeding in prosecuting the appellant for an offence relating to an attack by the appellant's dog, and the person's later role to decide, as a member of a panel of delegates of a local government, whether the appellant's dog should be destroyed. It was held that the fair-minded lay

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14 (2000) 205 CLR 337.

15 For example, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288.

16 (2000) 205 CLR 337, 344-345 [6].

17 (2000) 205 CLR 337, 345 [8].

18 (2015) 255 CLR 135.

observer might reasonably apprehend that the panel member might not bring an impartial mind to the decision. The plurality said:

> "The interest which the appellant alleges existed in this case is akin to that which a person bringing charges, whether as a prosecutor or other accuser, might be expected to have in the outcome of the hearing of those charges. It is generally expected that a person in this position may have an interest which would conflict with the objectivity required of a person deciding the charges and any consequential matters, whether that person be a judge or a member of some other decision-making body. In *Dickason*, Isaacs J referred to cases of this kind as instances of 'incompatibility'."[19] (footnote omitted)

[76] The applicant submits that the step from an identified matter that might lead to a conclusion of reasonable apprehension that the decision maker might make the decision other than on its merits, based on a conflict of interest, is more readily taken than it is in a case of pre-judgment.[20] In my view, although an analogy may be drawn between one case and another, the required "logical connection" of the identified matter to the feared outcome is not truncated because the case is characterised as one that involves a possible "conflict of interest". The postulated logical connection must be one that gives rise to the reasonable apprehension that must be found before the ground of breach of natural justice is proved.

Knowledge of the hypothetical lay observer

[77] There is a great deal of evidence tendered by the applicant in support of its case, and by the Authority in response. Much of that evidence is said to go to whether the hypothetical lay observer would have the alleged reasonable apprehension. Some of it would go to the further question whether, in any event, relief of the kind applied for should be granted.

[78] The applicant made written and oral submissions as to the facts of which the hypothetical lay observer would be aware, as relevant to finding the reasonable apprehension. Having regard to both the volume and expert technical nature of much of the evidence, in my view, it is counterintuitive to suggest that all of it would have been known to the hypothetical lay observer. In particular, no basis was suggested for attributing knowledge of the expert opinions contained in reports obtained for the purposes of advancing one side or another as to matter going to the strength of the logical connection postulated by the applicant in support of its case. No argument was advanced on either side as to the basis on which a lay observer would know of these private expert opinions.

[79] The extent of the relevant knowledge to be attributed to the hypothetical lay observer is a contextual finding to be made, having regard to the circumstances of the case.

[80] It was considered in *Webb v The Queen*, a pre-judgment case, by Deane J:

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19 (2015) 255 CLR 135, 149 [34].

20 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 509-510 [25].

> "The fair-minded observer is a hypothetical figure. While the question is not settled by any decision of the Court, it appears to me that the knowledge to be attributed to him or her is a broad knowledge of the material objective facts as ascertained by the appellate court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court."[21] (footnotes omitted)

[81] The plurality judgment in *Johnson v Johnson*,[22] a pre-judgment case, said of the lay observer's knowledge of facts relating to the context in which the Judge made the statements said to amount to an apprehension of bias that:

> "Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice."[23] (footnote omitted)

[82] The plurality judgment in *British American Tobacco Australia Services Ltd v Laurie*, a pre-judgment case, said:

> "In *Johnson v Johnson*… [i]t was accepted that the lay observer must be taken to have some understanding that modern judges, responding to the need for active case management, are likely to intervene in the conduct of the proceedings and in doing so may well express tentative opinions on matters in issue."[24]

[83] In the plurality judgment in *Isbester*, an "interest" case, it was said that:

> "The hypothetical fair-minded observer assessing possible bias is taken to be aware of the nature of the decision and the context in which it was made as well as knowledge of the circumstances leading up to the decision."[25] (footnotes omitted)

[84] The analysis in *Ebner* and other cases where a conflict of a financial interest is raised also gives some insight to the extent of the knowledge to be attributed to the hypothetical lay observer. In a relatively common case, such as where a Judge holds shares in a listed company, say a bank, that is a party in the case, the analysis proceeds at an inductive or intuitive level as to the degree of that interest. It does not descend, on the decided cases, to any quantitative assessment of whether success for the bank might have a measurable effect on the bank's trading performance, that might be reflected in its profitability, or whether it might have any

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21 (1994) 181 CLR 41, 73.

22 (2000) 201 CLR 488.

23 (2000) 201 CLR 488, 493 [13], and see also at 506 [49] and 508 [53].

24 (2011) 242 CLR 283, 329 [132].

25 (2015) 255 CLR 135, 146 [23].

measurable economic effect on the Judge as a shareholder, either through dividends or the share price.[26]

Postulated logical connection

[85] The applicant's identification of the interest that might have led Professor Green to engage in the Investigation and Draft Decision other than on the factual and legal merits of the matters to be considered is that, as set out previously, he was negotiating for and was expecting to be appointed as the chair of the Port of Newcastle.

[86] The required logical connection between that matter and the feared deviation from the proper course of conducting the Investigation and deciding upon the content of the Draft Decision seems to have two bases, each of which is in terms based on a series of suggested logical steps. The first, more general, basis seems to be that:

(a) first, a decision of the Authority to approve an Access Undertaking in accordance with the Draft Decision could have the effect of decreasing sales from mines that transport coal via the CQCN into the seaborne thermal coal market from the levels that those sales would otherwise reach;

(b) second, that decision could increase sales of coal from mines that use the Port of Newcastle to ship coal into the seaborne thermal coal market from the levels that those sales would otherwise reach; and

(c) third, that increase in sales could operate to the advantage of the business of the Port of Newcastle by increasing its coal shipping throughput.

[87] A second, more specific, alternative basis seems to be (impliedly) that:

(a) first, a decision of the Authority to approve an Access Undertaking in accordance with the Draft Decision could have the effect of reducing the applicant's available capital for expansion of the CQCN, in particular for the Adani Carmichael mine in the Galilee basin;

(b) second, failure to so expand the CQCN could have the effect of decreasing sales from mines that ship coal transported via the CQCN into the seaborne thermal coal market from the levels that those sales would otherwise reach, particularly from the Adani Carmichael mine;

(c) third, that decision could increase sales of coal from mines that ship coal through the Port of Newcastle into the seaborne thermal coal market; and

(d) fourth, that increase in sales could operate to the advantage of the business of the Port of Newcastle by increasing its coal shipping throughput.

[88] Might the fair-minded lay observer reasonably apprehend that Professor Green might not bring an impartial mind to the Investigation and Draft Decision on these bases? Whether the lay observer might do so is largely a factual question.

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[26] *Ebner v Official Trustee* (2000) 205 CLR 337, 349-351 [29]-[35] and 366 [93]-[94].

[89] The postulated logical connection requires some significant causal processes:

(a) first, if the MAR for the CQCN as a declared service results in an inadequate revenue stream, the applicant may or is likely to reduce maintenance or capital expenditure for the CQCN from what it might otherwise have been;

(b) second, the expenditure "reduction" will cause a decrease in the level of train services available to mines that are serviced by the CQCN from what they otherwise would have been;

(c) third, a loss of train services will result in a loss of sales of coal that otherwise would be made into the seaborne thermal coal market from the mines that use the CQCN;

(d) fourth, the loss of sales will present the commercial opportunity for mines that ship coal from the Port of Newcastle to increase their sales of coal into the seaborne coal market; and

(e) fifth, the Port of Newcastle might thereby gain an advantage by increasing its coal shipping throughput.

[90] The postulated logical connection is still a step away from acceptance of any reasonable apprehension that Professor Green might be compromised in making the Draft Decision by his expectation of appointment and employment as chair by the Port of Newcastle. It is important to keep steadily in mind that the logical connection must raise to the level of a possible reason for Professor Green not to consider the applicant's Draft Access Undertaking on the merits because of his interest in appointment and employment as chair by the Port of Newcastle.

The knowledge of the hypothetical lay observer in this case

[91] Some matters of knowledge of the hypothetical lay observer as to the Authority, the Draft Access Undertaking and the Draft Decision are uncontentious, including:

(a) the constitution and functions of the Authority under the QCA Act;

(b) the statutory declared service for and the broad identification of the CQCN;

(c) the fact and contents of UT4;

(d) the fact and contents of the Initial Undertaking Notice and the issue of the Statement of Regulatory Intent;

(e) the fact and contents of the Draft Access Undertaking;

(f) the commencement of and the broad parameters for the conduct of the Investigation;

(g) the preparation of the Draft Decision by the executive of the Authority;

(h) the exchanges between the members leading up to the December 2017 meeting;

(i) the resolution of the Authority to make the Draft Decision; and

(j) the communication of the Draft Decision to stakeholders.

[92] From those matters, the hypothetical lay observer knows that the Draft Decision proposes significant reductions from the Draft Access Undertaking in the amounts to be allowed for WACC, maintenance costs and MAR for an approved access undertaking.

[93] As well, the hypothetical lay observer knows that the text of the Draft Decision was prepared and proposed by others than Professor Green,[27] and that none of those persons knew of Professor Green's possible or pending appointment as chair of the Port of Newcastle.

[94] Further, in my view, the hypothetical lay observer knows that although Professor Green was a participant in the process of deciding to form the views of the Authority expressed in the Draft Decision, he was one of three members who made that decision unanimously.

[95] Other matters of knowledge of the hypothetical lay observer as to Professor Green's appointment as chair of the Port of Newcastle also fit into the uncontentious category, in particular:

(a) the initial approaches made to Professor Green about a role within the Port of Newcastle;

(b) the meetings between Professor Green and the representatives of the TIF;

(c) the emails that passed between them about his appointment;

(d) that the proposed role as chair was to be a strategic role, more like an executive director; and

(e) that the Draft Decision was finalised and resolved upon when Professor Green was expecting to be appointed as chair of the Port of Newcastle.

[96] Following publication of the Draft Decision, the hypothetical lay observer knows that:

(a) Professor Green's appointment was announced a few days later;

(b) thereafter, Professor Green did not have any practical involvement in the continuing process of the Investigation or assessment of the decision upon the Draft Access Undertaking; and

(c) the applicant and other stakeholders have made submissions to the Authority having regard to the Draft Decision and further information.

[97] The applicant submits that the hypothetical lay observer knows further facts or matters about the Draft Access Undertaking, as follows:

(a) areas of substantial contention about the Draft Access Undertaking were the WACC to be adopted, the maintenance costs to be adopted, the resultant MAR, "and the effect of

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[27] Who produced the text and what role Professor Green played in it is relevant. In *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 the High Court analysed the role played by the interested person in formulating the recommendation accepted by the decision maker, because that is relevant in deciding whether there is a reasonable apprehension of bias by the decision maker.

any decision on incentivising or disincentivising the maintenance or expansion of the CQCN";

(b) the "rate of return" allowed to a regulated entity like the applicant affects its ability to make capital investments over time to maintain and improve its assets;

(c) the "return on capital" used to approve an access undertaking may over time decrease the amount of capital available to the applicant to maintain and improve its assets;

(d) the applicant was in effect contending that a lower WACC or maintenance costs than those proposed in the Draft Access Undertaking would "disincentivise the maintenance and expansion of the CQCN"; and

(e) that would reduce throughput of coal on the CQCN compared with what it would otherwise be.

[98] I am prepared to act on the basis that the hypothetical lay observer knows:

(a) at a general level, about the areas of contention as to the WACC and maintenance costs proposed by the Draft Access Undertaking and the resultant effect on MAR; and

(b) that the "rate of return" or "return on capital" may affect the ability to maintain and improve assets over time,

but there is no specific evidence that was identified of the applicant contending, in effect, that a lower WACC or maintenance costs than those deployed in the Draft Access Undertaking would disincentivise the maintenance and expansion of the CQCN and I do not accept that the hypothetical lay observer knows that it was so contending or that it would "reduce" the throughput of coal.

[99] In my view, the hypothetical lay observer also knows that the final Access Undertaking, when approved by the Authority, will operate over a four-year horizon, from 1 July 2017, and that some of the steps and causal effects of the applicant's postulated logical connection may not have happened within that time.

[100] The applicant submits that the hypothetical lay observer knows further facts about the Port of Newcastle that:

(a) coal was the dominant "trade" at the port, comprising 96 percent by volume of shipments;

(b) coal shipped through the port was sourced from mines in the Hunter Valley and elsewhere in New South Wales and railed over the Hunter Valley Rail Network in New South Wales;

(c) the port planned to increase its coal terminal capacity from 211 million tonnes per annum to 280 million tonnes per annum;

(d) the port's "vision" was to maintain its position as one of the leading and most efficient coal export ports to facilitate continued growth and development in a sustainable manner;

(e) coal handled by the port was exported into the "seaborne coal market"; and

(f) the CQCN was in competition with the Hunter Valley Rail Network in relation to thermal coal in the "seaborne coal market".

[101] With two qualifications I am prepared to act on the footing that the hypothetical lay observer, generally speaking, knows such facts.

[102] The first qualification is that there is no such thing as a single "seaborne coal market" relating to mines shipping coal from the Queensland coal terminals and the Port of Newcastle, unless the difference between the uses of and the lack of substitutability of thermal coal for metallurgical coal are ignored, which they should not be.

[103] The second qualification is that I do not understand how the hypothetical lay observer would know that the CQCN is in competition with the HVRN. They are separate rail networks operating in different States to carry coal from different mines to different ports. Their services are not substitutable. Relevantly, the shippers of thermal coal from the New South Wales mines are in competition with the shippers of thermal coal from the central Queensland mines, but that is a different thing.

[104] The applicant submits that the hypothetical lay observer knows further facts about the Port of Newcastle as follows:

(a) the Port of Newcastle was particularly concerned that the proposed development of the Adani Carmichael mine would adversely affect the amount of coal handled by the Port of Newcastle;

(b) the concern included that the shipper of coal from that source might enjoy subsidised rail costs; and

(c) it is likely that the Adani Carmichael mine would have to use part of the CQCN to transport thermal coal to port.

[105] As to those facts, I find that the hypothetical lay observer knows that representatives of TIF were concerned about the effect of the proposed Adani Carmichael mine on the price of thermal coal and about the effect of that possibility on, inter alia, the Port of Newcastle's handling of shipments of thermal coal, but I am unable to make any finding as to the hypothetical lay observer's knowledge of the degree of that concern.

[106] As to the reference to the possibility of "subsidised rail infrastructure" for coal shipped from the Adani Carmichael mine, a question arises as to what the hypothetical lay observer would understand that reference to mean. The Adani Carmichael project is one that has attracted considerable publicity in the press and electronic media over a number of years. Does one assume, for example that the hypothetical lay observer would have had access to the information so published, including that readily available by an internet search of news using one of the well-known search engines? In my view, one probably should. It was well known at the relevant time that the Adani Carmichael project included a rail project to build a new standard gauge railway from the proposed Carmichael mine to the Abbott Point bulk coal terminal, which it was also well known that Adani owned, having purchased it, in effect, from

the State of Queensland some years ago. Accordingly, in my view, the hypothetical lay observer would not think that the reference to the possibility of "subsidised rail infrastructure" would have had anything to do with the CQCN.

[107] As to the possibility that the Adani Carmichael mine would have to use part of the CQCN to transport thermal coal to port, the applicant relied on two sources of evidence for that knowledge on the part of the hypothetical lay observer. First, in a document described as an "expert report",[28] the author set out information as to the basis of assumptions made by him in an earlier report, including in paragraph 21 that:

> "Initially, Adani had plans for a 388-kilometer standard-gauge railway from the Carmichael mine to the Adani Terminal at Abbott Point port. Under this proposal the CQCN would not have been utilised.
>
> However, **in September 2018**, Adani announced that it would instead build a 200-kilometer narrow gauge link from Carmichael into the existing Aurizon network."

[108] The basis of the second sentence was an article published in the Australian Financial Review on 13 September 2018. It is not a matter of expert opinion. Nor is an assumption or prediction as to whether Adani or any other new mine in the Galilee basin or the Surat basin will or will not link into the CQCN a matter of expert opinion. However, in any event, on the evidence, Adani's stated intention to link in into the existing CQCN is also not a matter that was known before September 2018 and, therefore, it is not a fact that the hypothetical lay observer could know or take into account in considering whether Professor Green was in a position of apprehended bias in the months leading up to mid-December 2017.

[109] Perhaps conscious of this, in oral argument, the applicant sought to rely on another source of evidence as the basis of the hypothetical lay observer's suggested knowledge of the possibility of the Adani Carmichael mine would have to use part of the CQCN. That evidence is an undated document entitled "Aurizon – Network Development Plan: 2016-17" ("NDP").[29]

[110] The NDP is a publicly available document, produced in accordance with the terms of UT4, that contains information as to future growth projects of the applicant, including reference to the Galilee and Surat basins as potential sources of export coal expansion on the Queensland market. It takes a 10 to 15 year view, and provides scenarios over the longer term view that might guide shorter term pre-feasibility study options, broken into the areas of the Newlands system, Goonyella system and Blackwater and Moura systems. The three groups of systems correspond, broadly speaking, to relevant ports. That is, the port for the Newlands system is Abbott Point, for the Goonyella system it is the port for the coal terminals at Dalrymple Bay and Hay Point and for the Blackwater and Moura systems it is the port of Gladstone for the Wiggins Island and RG Tanna coal terminals. The applicant's contention that the Adani Carmichael mine would have to use part of the CQCN to transport thermal coal relates to the Newlands system.

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[28] Expert Report of MR Gresswell filed 3 October 2018.

[29] Affidavit MR Riches filed 20 August 2018, Exhibit MR2-2.

[111] The existing Newlands system and its capacity constraints are described in Figure 6 on page 10 of the NDP. On page 25, a scenario is assumed for the expansion of the Newlands system in four stages, corresponding to future expansion of the Abbott Point coal terminal, as follows:

Stage	Port Expansion	Branch	Tonnage	Years
1	Abbott Point T3	Galilee	30	2020-2022
2	Abbott Point T3	Galilee	30	2023-2025
3	Abbott Point T2	North Goonyella	15	2026
		Blair Athol	15	2027
4	Abbott Point T2	Galilee	30	2028-2029
Total			120	

[112] Figure 23 on page 25 shows the possible point of connection of the possible future Galilee branch at Newlands. The following pages describe the assumptions for different solutions for the hypothetical expansion scenario, including the "2 LOCO" (2 locomotive train configuration) solution on page 26 and the "3 LOCO" (3 locomotive train configuration) solution on page 28. In either case, a possible expenditure of $1.05 billion is allowed to construct the possible future Galilee (branch) railway from Newlands to a mine loop in 2020 and $70 million to construct a second mine loop in 2023.

[113] There is no evidence that the scenario as described in any way contemplated the Adani Carmichael mine. There are other possible coal mining developments in the Galilee basin, including the GVK Hancock proposal at Kevin's Corner and Waratah Coal Pty Ltd's China First coal mining proposal. I decline to draw the inference that the scenario related to the Adani Carmichael mine, or that the hypothetical lay observer would know that fact.

[114] Further, there is no evidence that the forecast capital expenditure for the Draft Access Undertaking to be included in the Regulatory Asset Base ("RAB") for the Access Undertaking included any expenditure for the possible future Galilee branch line, for example. Any expansion of that kind would fall to be assessed for inclusion in the RAB as and when made.

[115] The question remains whether the hypothetical lay observer should be taken to know the information in the NDP? The applicant submits that they should, on the basis that it is a publicly available document that had been provided to the Authority. However, it is not suggested that Professor Green knew of it or its contents. In my view, the hypothetical lay observer should not be treated as knowing more than that it was possible that one or more mines in the Galilee basin or Surat basin might at some time in the future connect via railway to the CQCN and ship coal to one of the coastal port terminals.

[116] Accordingly, in my view, at all relevant times the hypothetical lay observer does not know that the Adani Carmichael mine would have to use part of the CQCN network to transport its thermal coal to port.

[117] The respondents submit that the hypothetical lay observer knows that there are many facts as to the CQCN, and the mines that rail coal on the CQCN, that affect the possibility of a

"reduction" (in the sense previously described) in the coal that might be sold by those mines, and any flow-on effect on the coal that might be sold by the mines that ship coal through the Port of Newcastle including that:

(a) it should not be assumed that the applicant is operating the CQCN at capacity;

(b) there is a lack of any dimensioned information as to the timing, nature, extent or duration of any possible decrease in rail services over the CQCN from the disputed areas of WACC and maintenance capital; and

(c) in any event, there are differences among the mines that ship coal over the CQCN that will affect their shipments.

[118] I accept that the hypothetical lay observer would have a general awareness of such matters. In my view, the hypothetical lay observer knows also that;

(a) there is not a single market for seaborne coal from the Queensland coal terminals and the Port of Newcastle (or other ports) because thermal coal is not substitutable for metallurgical coal due to their different uses;

(b) approximately 25 to 30 percent of the coal transported by the CQCN for the seaborne coal market is thermal coal; and

(c) over 80 percent of the coal shipped through the Port of Newcastle is thermal coal.

[119] The respondents submit that the hypothetical lay observer knows that many facts about the mines that ship coal through the Port of Newcastle will affect the possibility of those mines increasing shipments as a result of any decrease in rail services on the CQCN, including that:

(a) there are individual commercial arrangements for the mines;

(b) any increase in sales and shipments from those mines will depend on an increase in production using the coal resources or reserves available to be developed or brought into production; and

(c) there are other competitive sources of supply and competition that may be able to meet any demand for the supply of coal into the same market, such as mines in Indonesia.

[120] I accept that the hypothetical lay observer has a general awareness of those matters. In particular, in my view, the hypothetical lay observer knows that many other factors affect the supply of coal by mines that ship coal using the CQCN or that ship coal using the Port of Newcastle into the seaborne thermal coal market. Each mine will have its own set of circumstances and cost structures. The factors relevant to investment decisions about increasing or decreasing production will vary. The price of coal, a volatile factor in the last few years, will be a critical factor, as will the marginal costs of each mine.

Conclusion on the logical connection and reasonable apprehension

[121] The apprehended bias principle, as applied by reference to the hypothetical lay observer's view, serves important purposes. That it turns on a reasonable apprehension based on a logical connection means both that it is an objective test and that not all possibilities will found

the reasonable apprehension. That it also turns on the knowledge attributed to the hypothetical lay observer means that it is an outsider's apprehension, by reference to the appropriate knowledge of a lay person, not an expert, that is to be considered. It is not the decision maker's actual thinking that is under consideration, as if on a question of actual bias. But it is counterintuitive to apply the test for the apprehension of bias principle on the basis of knowledge attributed to the hypothetical lay observer, not possessed by the decision maker said to be disqualified, and not said to be something that the decision maker should have known.

[122] These points do not undermine that the question is whether the fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the conduct or decision in question, meaning that the standard required is lower than the balance of probabilities as to whether the hypothetical fair-minded lay observer has the requisite reasonable apprehension that the decision maker may deviate from the impartial path.

[123] The respondents submit that having regard to the knowledge of the hypothetical lay observer, the postulated logical connection is insufficient to satisfy the apprehension of bias principle or the facts, taken in their entirety, are insufficient to satisfy the test that the fair-minded lay observer might reasonably apprehend that the Authority might have deviated from the path of an impartial Investigation or Draft Decision.

[124] The applicant submits that the opposite conclusion should be reached. It submits that the fact that Professor Green knew of the TIF's concern about the proposed Adani Carmichael mine is relevant to showing the requisite logical connection between his role in the Investigation of the Draft Access Undertaking and his negotiations in relation to becoming chair of the Port of Newcastle. I do not agree. Once that point is seen in the proper factual context, as set out above, in my view, the argument that the second postulated logical connection should be accepted as satisfying the test falls away. And without that point, the evidence in support of the broader first postulated logical connection is also weaker.

[125] Put at the broader level of the first postulated logical connection, in my view, it should not be accepted that the requisite reasonable apprehension of the possible feared deviation is raised. In my view, the connections urged by the applicant that give rise to the alleged reasonable apprehension in the present case are too tenuous or theoretical.

Section 219 of the QCA Act

[126] The applicant submits that when Professor Green was considering the decision to issue the Draft Decision during September, October, November and December 2017:

(a) he was a member of the Authority to whom s 219 of the QCA Act applied;

(b) he was present when the "issue of" the Draft Access Undertaking was being considered;

(c) the Draft Decision was a decision within the meaning of s 219(5)(a);

(d) he took part in the decision; and

(e) he was in breach of s 219(5).

[127] There are two alleged kinds of breach of s 219(5): first, being present when the Authority considered "the issue" of the Draft Access Undertaking; and second, taking part in the "decision" to publish the Draft Decision.

[128] The applicant submits that, in consequence, it is entitled to a declaration of contravention of s 219 by Professor Green and an order "requiring the 2017 DAU to be considered by the QCA afresh in accordance with law".

[129] I note that the basis of the power to make the second order was not articulated. If the resolution to approve and publish the Draft Decision was invalidated by a contravention of s 219, and the Authority were under a duty to proceed to make a decision whether to approve and publish a Draft Decision, an order in the nature of mandamus might be made, if sought. But none of these considerations was explored in argument.

[130] The alleged contraventions turn on whether Professor Green had "a direct or indirect interest in an issue being considered, or about to be considered" by the Authority.

[131] The Authority is a body corporate[30] that represents and has the rights, privileges and immunities of the State,[31] with limited functions,[32] although to be carried out with the powers of an individual,[33] and in some respects subject to the direction from the Minister.[34]

[132] The Authority is composed of at least three members,[35] with a chair and deputy chair,[36] a panel of associate members,[37] who may be chosen by the chair for a particular investigation or arbitration.[38] The Authority acts by resolution[39] made at a meeting,[40] passed by a majority or the chair's casting vote.[41]

[133] Seen in that context, it follows that the requirement of disclosure under s 219(3) is to a meeting of the Authority constituted in accordance with s 215, the prohibition against being

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30 *Queensland Competition Authority Act* 1997 (Qld), s 8.

31 *Queensland Competition Authority Act* 1997 (Qld), s 9.

32 *Queensland Competition Authority Act* 1997 (Qld), s 10.

33 *Queensland Competition Authority Act* 1997 (Qld), s 11.

34 *Queensland Competition Authority Act* 1997 (Qld), s 12.

35 *Queensland Competition Authority Act* 1997 (Qld), s 209.

36 *Queensland Competition Authority Act* 1997 (Qld), s 210.

37 *Queensland Competition Authority Act* 1997 (Qld), s 213.

38 *Queensland Competition Authority Act* 1997 (Qld), s 214D.

39 *Queensland Competition Authority Act* 1997 (Qld), s 218(4).

40 *Queensland Competition Authority Act* 1997 (Qld), ss 217 and 218.

41 *Queensland Competition Authority Act* 1997 (Qld), s 217(1)(b) and (c).

present when the Authority "considers" an issue under s 219(5)(a) relates, prima facie, to the Authority considering the issue at a meeting and the prohibition against taking part in a "decision" refers to a decision of the Authority undertaken at a meeting (unless the power to make the decision is delegated).

[134] Professor Green did not participate in the November meeting of the Authority. At the time of the September meeting, the negotiations relating to the prospect of appointment to the Port of Newcastle were preliminary. No detailed argument was put forward as to why they should have been disclosed at that early stage, even if later he may have had an indirect interest.

[135] Did Professor Green have "an indirect interest in an issue being considered" by the Authority in December 2017? The Authority was not considering anything to do with the Port of Newcastle. And Professor Green had no indirect interest in the Draft Access Undertaking, unless the possibility that he may not consider that "issue" on its merits because of his imminent appointment as chair of the Port of Newcastle gave him an indirect interest in that issue.

[136] It seems uncontentious that Professor Green did not have a direct interest in the issue of the approval of the Draft Access Undertaking or the issue of the terms of the Draft Decision. The parties made no detailed submissions as to what might constitute an indirect interest.

[137] There are comparable statutory provisions, in other contexts,[42] but no decision about them was identified by the parties. At a very broad level, the cognate purposes of s 219 and the apprehended bias principle may be seen through a statement about that principle in *Webb v The Queen* by Deane J:

> "The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases **where some direct or indirect interest in the proceedings**, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment."[43] (emphasis added)

[138] There are other possible analogies. For example, a public officer who knowingly holds an indirect interest in a contract made with his or her relevant department may commit an offence.[44] And it is a commonplace that a director of a company, who is an officer who owes the company statutory and fiduciary obligations, may be precluded from acting where the director has a "material personal interest in a matter",[45] or conflict of duty and interest or a

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42 By way of examples only, *Child Protection Act* 1999 (Qld), s 246HK; *Crime and Corruption Act* 2001 (Qld), s 267; *Commonwealth Electoral Act* 1918 (Cth), s 11; *Education (Queensland College of Teachers) Act* 2005 (Qld), s 260; *Queensland Independent Remuneration Tribunal Act* 2013 (Qld), s 17; *Competition and Consumer Act* 2010 (Cth), s 44AY; *Associations Incorporation Act* 2009 (NSW), s 31.

43 (1994) 181 CLR 41, 74.

44 *Criminal Code* (Qld), s 89; *Ford v Andrews* (1916) 21 CLR 317, 335.

45 *Corporations Act* 2001 (Cth), s 191. As to the provision's statutory history see *Austin and Black's Annotations to the Corporations Act*, [2D.191], where the authors opine that "material personal

conflict of duty and duty. As to a disqualifying personal interest, there are conflicting authorities as to the extent to which the interest must be direct[46] or may be indirect.[47]

[139] However, in my view, in a context like the present, the proper construction of "indirect interest" in s 219 does not include all possible or hypothetical connections, and does not include an interest that is too "remote or insubstantial", by analogy with the approach taken in relation to a fiduciary relationship.[48]

[140] In my view, that conclusion is supported by the statutory context that:

(a) section 219(1)(b) requires that the interest must be one that could conflict with the proper performance of the member's duties about the consideration of the issue;

(b) section 219(2) excludes any interest that consists only of the receipt of goods or services that are also available to members of the public and are made available on the same terms as apply to members of the public; and

(c) section 219(5) provides that the existence of an interest disqualifies a member from being present when the Authority considers the issue or taking part in a decision, unless the Minister otherwise directs.

[141] Alternatively, even if a wider view is taken of what can constitute an "indirect interest" within the meaning of s 219(1)(a), s 219 does not apply unless the identified indirect interest is one that "could conflict with the proper performance" of Professor Green's duties about the consideration of the "issue", under s 219(1)(b).

[142] In my view, whether Professor Green's imminent appointment as chair of the Port of Newcastle could do so raises the same considerations, in general, as upon the question whether a reasonable apprehension of bias was raised against Professor Green as a member of the Authority.

[143] In my view, there was no contravention of s 219(5) by Professor Green.

Other matters

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interest" evolved from "a director having a direct or indirect interest in a contract or proposed contract with the company, or by virtue of an office or the possession of property." See also *Crime and Corruption Act* 2001 (Qld), s 267(9) which defines a "material personal interest" by reference to a "direct or indirect interest". As to the application of "material personal interest" see *Grand Enterprises Pty Ltd v Aurium Resources Ltd* [2009] FCA 513, [64]-[81].

46 *Baker v Palm Bay Island Resort Pty Ltd (No 2)* [1970] Qd R 210, 221-222; *Wilson v London Midland and Scottish Railway Co* [1940] Ch 169.

47 *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1, 559-560 [4508]-[4512].

48 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 199 [78]-[79]; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103-104.

[144] If I had found that there was a reasonable apprehension of bias or that there was a contravention of s 219(5), the respondents raised a range of arguments as to why, in any event, the relief sought by the applicant should not be granted.

[145] The application seeks relief that that the Draft Access Undertaking be considered afresh.[49] The respondents submit that relief should be refused, in any event, as a matter of discretion, because Professor Green is no longer a member of the Authority, and no apprehension about his contribution to the decision to be made upon the Draft Access Undertaking is now relevant.

[146] The applicant responded by submitting that the court should direct that process should return to the point immediately before the Draft Decision was made, as something that would mitigate the effect of the apprehension of bias. This contention was never fully explained and no precise form of order was formulated. No practical benefit of such a direction or legal consequence flowing from either making or not making the direction was identified.

[147] The respondents submit that absent a positive order for a direction, a declaration of contravention should be refused, because it would be a bare declaration of a past contravention of the law and would have no other justification, unlike cases where a sufficient reason may exist.[50]

[148] It is unnecessary to resolve these questions.

Extension of time to file the originating application

[149] On the first day of the hearing, after hearing submissions, I made an order extending the time for filing the originating application to 30 April 2018 and announced I would give reasons for that order subsequently.

[150] As now appears, the originating application must be dismissed after hearing. Except for any question of costs, there is no longer any purpose in giving reasons for granting the extension of time, as the party against whose interests the order was made has been successful on the substantive hearing of the originating application.

[151] In the circumstances, I will do no more than record that the principal reasons for granting the extension of time were that: the first respondent did not oppose it; the period of extension required was only approximately two weeks; no prejudice was suffered by the respondents in the delay over that period; the applicant had indicated or given notice of its intention to challenge the Draft Decision before the time expired; some of the delay was due to the time that passed while the applicant inquired of the first respondent as to the circumstances that may have given rise to a reasonable apprehension of bias; and some of the delay was due to the decision to bring the proceeding being taken after due consideration, at the level of the board of directors of the applicant, after the board had previously decided to request an explanation of the circumstances.

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49 *Judicial Review Act* 1991 (Qld), s 30(2)(b).

50 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-582.

Order

[152] The originating application must be dismissed. I will hear the parties on the question of costs.