SUPREME COURT OF QUEENSLAND

CITATION:	*Abbott v Qld All Codes Racing Industry Board* [2016] QSC 162
PARTIES:	**JUSTIN ABBOTT** (applicant) v **QUEENSLAND ALL CODES RACING INDUSTRY BOARD** (respondent)
FILE NO:	BS2258/16
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	27 July 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 June 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** 1. **The decision of the panel of stewards made on 4 February 2016 that the applicant be disqualified for a period of two years for a breach of rule 231(1) of the *Australian Harness Racing Rules* is quashed and set aside.** 2. **The charge that the applicant breached rule 231(1) of the *Australian Harness Racing Rules* in that on 23 January 2016 the applicant did assault Racing Queensland's stipendiary steward Paul Zimmerman in the vicinity of the wash bay at the training premises at 1714 Stockleigh Road, Stockleigh, by physically making contact with Mr Paul Zimmerman in the area of the head region is referred to a differently constituted panel of stewards for further hearing and consideration.** 3. **The parties may make submissions in writing as to costs in not more than five pages within 14 days of this order.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the applicant allegedly assaulted one of two stewards conducting an inspection at private stables, and also made derogatory remarks about the deputy chair of

stewards – where the version of events, particularly as to the assault, was disputed – where the chief steward was phoned by one of the stewards both before and immediately after the alleged assault – where the chief steward made a third phone call to scratch a horse on the basis that the applicant assaulted one of his stewards – where a stewards' inquiry was convened and chaired by the chief steward, at which the applicant was charged with breaches of the *Australian Harness Racing Rules* – where at the stewards' inquiry the first two phone calls, but no details of their contents, were mentioned by witnesses – where the third phone call was mentioned only once in passing by a witness – where the applicant was found guilty and disqualified for two years in respect of the alleged assault and disqualified for three months in respect of the derogatory remarks – where the applicant sought judicial review of the decisions – whether the chief steward was disqualified from being able to sit on the panel on the ground of apprehended bias because of his involvement in the events – whether the failure to disclose the chief steward's involvement, or to disclose that involvement fully, gave rise to an apprehension of bias or was a breach of the rules of natural justice – whether to quash both the decision relating to the assault and the decision relating to the derogatory remarks

Judicial Review Act 1991 (Qld), ss 20(2)(a), 30(1)
Racing Act 2002 (Qld), ss 78, 79, 81

Freedman v Petty [1981] VR 1001, cited
Hall v New South Wales Trotting Club Ltd [1977] 1 NSWLR 378, cited
Howe v Rosier [2001] NSWSC 1194, cited
Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20, applied
Kioa v West (1985) 159 CLR 550; [1985] HCA 81, cited
R v Brewer; ex parte Renzella [1973] VR 375, cited
Re Media, Entertainment & Arts Alliance; ex parte Hoyts Corporation Pty Ltd (1994) 119 ALR 206; [1994] HCA 66, cited

COUNSEL: S Farrell for the applicant
T Ryan for the respondent

SOLICITORS: O'Connor Ruddy & Garett for the applicant
Fowler Lawyers for the respondent

[1] **Jackson J**: This is an application for judicial review of a decision made for the respondent by a panel of stewards.

[2] On 4 February 2016 the panel decided that:

(a) the applicant be disqualified for a period of two years for a breach of r 231(1) of the *Australian Harness Racing Rules* ("first decision"); and

(b) the applicant be disqualified for a period of three months for a breach of r 231(2) of the *Australian Harness Racing Rules* ("second decision").

[3] Both decisions relate to an incident that occurred after 7:30 am on 23 January 2016 between the applicant and two stewards at private stables situated at 714 Stockleigh Road, Stockleigh. The applicant was present at the stables attending to a horse, Sparking Collect. He was the owner of the horse. Travis Mackay was the registered trainer of the horse.

[4] Paul Zimmerman and Michael Ross were the stewards. They attended the stables that morning for the purpose of conducting an inspection. The object of the inspection included another horse, Mista Mara, that was trained by Mr Mackay and was entered for a race on that evening.

[5] An exchange occurred between Mr Zimmerman and the applicant. Mr Ross was a witness. There was heated language and some physical contact. Apart from that altercation, the applicant also made remarks regarding the deputy chair of stewards.

[6] On 25 January 2016, the applicant received a letter from the chief steward directing him to attend a stewards' inquiry into the alleged incident.

[7] On 4 February 2016, the stewards' inquiry convened. At the conclusion of the inquiry, the panel charged the applicant:

(a) with a breach of r 231(1) of the *Australian Harness Racing Rules*. The particulars were that "on 23 January 2016 [the applicant] did assault Racing Queensland stipendiary steward Paul Zimmerman in the vicinity of the wash bay at the training premises of 714 Stockleigh Road, Stockleigh, by physically making contact with Mr Paul Zimmerman in the area of the head region"; and

(b) with a charge of breaching r 231(2) of the *Australian Harness Racing Rules*. The particulars were that "on 23 January 2016 [the applicant] did misconduct [himself] in the presence of stipendiary stewards Michael Ross and Paul Zimmerman by making derogatory remarks regarding the deputy chair of stewards..."

[8] The applicant entered not guilty pleas to both charges. The panel found the applicant guilty of both charges.

[9] They then made the decisions from which this application is brought.

[10] Although the grounds of the application are stated in different ways, the substance is that there was a breach of the rules of natural justice because of the undisclosed involvement of the chief steward in the events of 23 January 2016. The chief steward was the chairman of the panel who made the decisions. In particular, the applicant submits that the chief steward was disqualified from sitting on the panel in the circumstances because of apprehended bias.

[11] On 23 January 2016, the chief steward was involved in the events at three points.

[12] First, before the altercation, Mr Zimmerman telephoned the chief steward from the stewards' car. Mr Zimmerman said that he did so to inform the chief steward of his

initial observations. I infer that he was also seeking either instructions or confirmation as to how to proceed ("first conversation"). The altercation which resulted in the alleged assault took place fairly shortly after that call.

[13] Second, after the alleged assault Mr Zimmerman telephoned the chief steward. The purpose of the call was to inform the chief steward what had happened ("second conversation"). Following that, as instructed by the chief steward, Mr Zimmerman and Mr Ross left the stables, attended at a police station and made a complaint to police.

[14] Third, not long after these events during that morning, the chief steward telephoned the trainer, Mr Mackay. The chief steward informed him that his horse, Mista Mara, was scratched from the race that evening ("third conversation").

[15] At the hearing of the inquiry and the charges against the applicant, the chief steward did not himself disclose or inform the applicant of any of the conversations, although reference to them was made by the witnesses.

[16] However, the applicant had some awareness by the time of the hearing that Mr Zimmerman had called the chief steward or another of the stewards on the panel. From p 32 of the transcript of the hearing the applicant described the events as he recalled them. On the applicant's version, when Mr Zimmerman asked whether the applicant had worked Mista Mara, he said that he had not. The applicant told Mr Zimmerman to ring Mr Mackay, as he was the trainer. The applicant said that Mr Zimmerman grabbed him by the shoulder and told him not to go anywhere. (This was a matter in dispute.) At p 32 of the transcript he said that Mr Zimmerman then got on the phone and continued: "I'm assuming he rang you or you. One of you he rang."

[17] Subsequently, the applicant described a point at which Mr Zimmerman was on the phone to Mr Mackay, when the applicant says Mr Zimmerman came at him having put the phone down and having taken his glasses off. (This too was a matter in dispute.) On the applicant's version, that is when the contact took place.

[18] At that point, members of the panel asked the applicant detailed questions about the order of events and the time period for each of the points raised by the applicant. No mention was made that Mr Zimmerman had called the chief steward immediately after the alleged assault.

[19] Mr Ross gave evidence at the hearing, in effect after both Mr Mackay and the applicant had given their versions of events. At p 40 of the transcript, Mr Ross referred to a point at which Mr Zimmerman had photographed the brand of the horse which was Sparkling Collect. Mr Zimmerman turned around and walked back to their car. Mr Ross then said "I think he made a phone call to yourself [chief steward]".

[20] The chief steward replied "Yes".

[21] Later in his evidence Mr Ross described a point at which Mr Zimmerman was on the telephone to Mr Mackay, and Mr Zimmerman and Mr Ross were walking over to the wash bay area. Mr Ross gave his account of the altercation resulting in the alleged assault.

[22] Mr Ross then recounted how Mr Zimmerman walked down to somewhere while Mr Ross stayed talking to the applicant, trying to calm him down. That is when the applicant made derogatory remarks about the deputy chair of stewards.

[23] As Mr Ross described it, after that Mr Zimmerman came back and informed him that they were leaving, which they did.

[24] The members of the panel asked detailed questions of Mr Ross about the incident. No mention was made of the second conversation when Mr Zimmerman called the chief steward until p 49 of the transcript when Mr Ross said that "afterwards" Mr Zimmerman told him he made a telephone call to the chief steward.

[25] Mr Ross's version did not accord with the versions given by Mr Mackay or the applicant. Although Mr Mackay was not present, he was on the telephone to Mr Zimmerman when the altercation occurred and heard shouting on both sides. According to Mr Ross, Mr Zimmerman was calm and non-confrontational. For some reason that was not clearly explained, neither Mr Zimmerman nor Mr Ross were operating the recording device or devices provided to them to document a meeting such as the one with the applicant.

[26] In response to Mr Ross's evidence, the applicant admitted that he made a comment to Mr Ross about the deputy chair of stewards being a drug addict. Mr Ross disagreed with the applicant about what the applicant had said, on the footing that the applicant had called her either "whore" or "cunt".

[27] Mr Ross's evidence was followed by that of Mr Zimmerman. As to the early part of his attendance at the stables with Mr Ross, Mr Zimmerman's evidence accorded with Mr Ross's evidence. He said that after speaking to the applicant initially he returned to the car and contacted the chief steward to inform him what his observations were.

[28] Mr Zimmerman said that he then rang Mr Mackay, and was on the phone to him walking back to the stabling area. At that point, the applicant had moved the horse to the wash bay and was about to start hosing it down. Mr Zimmerman then described the altercation and the alleged assault in terms that were consistent with Mr Ross's evidence and not consistent with Mr Mackay's or the applicant's evidence. Mr Zimmerman's evidence was also that the phone line was open to Mr Mackay while this happened and that he asked Mr Mackay afterwards if he had heard what was happening. Mr Zimmerman said that Mr Mackay said that he heard voices and an argument.

[29] Mr Zimmerman said that at that point he returned to the stewards' car and phoned the chief steward again. Although the transcript at p 56 does not read clearly, it most likely refers to him letting the chief steward know what was happening.

[30] On p 57 of the transcript, the chief steward asked Mr Zimmerman about the time at which he arrived. After Mr Zimmerman's response the chief steward said he would be able to establish the time because Mr Zimmerman rang him on his mobile phone and there would be a record of that telephone conversation in his records.

[31] Again, the panel asked Mr Zimmerman detailed questions about the altercation, the alleged assault and events surrounding them. Among those questions, one of the panel members canvassed again the point at which Mr Zimmerman asked the

applicant about the horse which was Sparkling Collect and walked over to the car "to dial [the chief steward]".

[32] There was no further mention of the second conversation. Nothing further was said about its content.

[33] The third conversation was mentioned only once, in passing, by Mr Mackay. During questioning by the chief steward, at p 20 of the transcript, Mr Mackay said "[t]hen I got a phone call from you later and you said that the horse was scratched". Nothing further was said at the inquiry about the contents of that conversation.

[34] The existence of the third conversation is supported and its terms are set out in an affidavit by Mr Mackay. He says that after the altercation he spoke on the telephone to Mr Zimmerman and asked whether he would return to the stables to inspect Mista Mara. That was an object of the inspection in the first place. Mr Zimmerman said he would not. Shortly after that Mr Mackay received a telephone call from the chief steward. The chief steward said that "Mista Mara is going to be scratched tonight". Mr Mackay asked "what happened?" The chief steward replied "Justin Abbott has assaulted two of my stewards". Mr Mackay said "He never told me that."

[35] In an affidavit in response to the present application, the chief steward refers to each of the conversations. He says that in the first conversation he was advised by Mr Zimmerman that the applicant was observed participating in harness activity at the property. He says he instructed Mr Zimmerman to identify the horse or horses that the applicant was handling and to take photos of the horses' brands to assist in identifying them. That does not sit consistently with Mr Zimmerman's evidence given at the stewards' inquiry, which was that he called the chief steward and asked him for instructions after he had already taken a photo of the brand of Sparkling Collect. That difference does not matter for present purposes.

[36] As to the second conversation, the chief steward says that he received a call from Mr Zimmerman who informed him that he had just been assaulted by the applicant. The chief steward instructed Mr Zimmerman to leave the property immediately and go to the nearest police station to make a complaint. On the evidence, this was the first occasion when the contents of the second conversation were disclosed to the applicant.

[37] As to the third conversation, the chief steward's version is consistent with that given by Mr Mackay except that he says that he told Mr Mackay that the applicant had "assaulted one of my stewards". The difference does not matter for present purposes.

[38] As appears from the foregoing, at no stage was the subject of that conversation disclosed to the applicant before the inquiry and charges were heard and concluded. The conversation was referred to only in passing at the hearing.

Applicant's submissions

[39] The applicant's first submission is that the chief steward was disqualified from being able to sit as a member of the panel on the ground of apprehended bias because of his involvement on 23 January 2016. The point made most strongly is that the chief steward had relied on the assault by the applicant as a basis for scratching Mista Mara and it followed that he could not sit as a member of the panel.

[40] The applicant's second submission, as it developed in argument, is that the chief steward was required to make disclosure of the full extent of his involvement on 23 January 2016 at the outset of the hearing of the inquiry and his failure to do so raised a question of apprehended bias.

[41] The applicant's third submission is that the extent of the disclosure of the first conversation and also particularly the second conversation was inadequate, and there was no disclosure of the content of the third conversation in any event.

[42] The applicant submits that the failure to disclose the chief steward's involvement or to disclose that involvement fully was a breach of the rules of natural justice that applied to the hearing of the inquiry and the charges in the circumstances of this case.

Respondent's submissions

[43] The respondent's first submission is that, having regard to the statutory context and other circumstances surrounding the hearing of the stewards' inquiry and charges against the applicant, the chief steward was not precluded from being able to sit on the panel on the ground of apprehended bias.

[44] The respondent's second submission is that, having regard to the limited extent of the factual dispute between the applicant and Mr Zimmerman as to who was the aggressor, the chief steward was not required to make any disclosure of the first, second or third telephone conversations.

[45] The respondent's third submission is that the disclosure of the first and second conversations made during the hearing was sufficient to satisfy the relevant rules of natural justice.

[46] The respondent's fourth submission is that any breach of the rules of natural justice related only to the circumstances concerning the first charge of assault and that the second charge of making derogatory remarks regarding the deputy chair of stewards was not affected by it.

Legal basis of the stewards' powers

[47] The stewards' functions in the present case were as a panel assembled to inquire into the applicant's conduct, to charge the applicant with any contravention of the relevant rules of racing, to decide the charge and to impose any appropriate penalty. These are familiar functions for a panel of stewards in the racing industry. Historically, stewards have carried out such functions for many years, originally under the rules of the racing club or clubs by whom they were appointed, as a "domestic" (contractual) tribunal.

[48] However, the respondent does not derive its authority or powers from contract or the rules of a private club. It is constituted and authorised to carry out its functions under statute.

[49] Section 9AA of the *Racing Act* 2002 (Qld) established the respondent. Section 9AB made the respondent the control body for racing codes including harness racing. Section 9AD designated its functions. Section 9AE conferred its powers. Chapter 3 of the Act deals with "the way each control body may perform its function of managing its code of racing". Section 78 provides that the control body must perform

its functions by making policies on various subject matters and rules of racing. By s 79 the policies and rules of racing made by a control body for its code of racing are statutory instruments. By s 81 the policies must provide for decisions "that may be made by stewards, for the control body…"

[50] The respondent has a policy for decision making by stewards that came into effect in 1 May 2013. It requires that in making decisions on integrity-related matters that natural justice is to be observed, that decisions are to be based on merit and that individuals are to be provided an opportunity to respond and comment on any adverse material. Where the subject of the stewards' inquiry is an integrity-related matter it provides that the standard of proof is to be beyond reasonable doubt.

[51] Section 91 of the Act provides that a control body must make rules of racing for its code. Those rules must comply with s 4(3) of the *Legislative Standards Act* 1992 (Qld) and must be consistent with the Act and any applicable policy. The Act prevails in the event of inconsistency.

[52] The applicable rules of racing are the Australian Harness Racing Rules.

[53] Rule 181 provides that stewards may "conduct inquiries or investigations in such manner as they think fit into any occurrence or matter … or into anything concerning the administration or enforcement of the rules."

[54] Rule 231 provides as follows:

(1) A person shall not threaten, harass, intimidate, abuse, assault or otherwise interfere improperly with anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it.

(2) A person shall not misconduct himself in any way.

[55] Part 15 of the rules deals with penalties. By r 256(2), the stewards may impose penalties in the form of, inter alia, a fine, or disqualification or cancellation of a licence. By r 259(1), a disqualified person may not, inter alia: associate with persons connected with the industry; enter a racecourse; race, lease, train, drive or nominate a horse; conduct breeding activities, or participate in any manner in the harness racing industry.

Application of the JR Act

[56] Within the meaning of the *Judicial Review Act* 1991 (Qld), the parties agree that both the first decision and the second decision in the present case were decisions of an administrative character made under an enactment and decisions to which that Act applies.[1] The applicant is a person whose interests were adversely affected by each decision and is a person aggrieved by each decision.[2] Accordingly, each decision is subject to an application for a statutory order of review being made.[3]

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1 *Judicial Review Act* 1991 (Qld), s 4.
2 *Judicial Review Act* 1991 (Qld), s 7.
3 *Judicial Review Act* 1991 (Qld), s 20.

[57] The relevant ground of the application is that a breach of the rules of natural justice happened in relation to the making of the decision.[4] The rules of natural justice in this context include the rules relating to apprehended bias. If the ground is made out the court may make an order quashing or setting aside the decision with effect from the day of making the order or before, as well as an order referring the matter to which the decision relates to the person who made the decision for further consideration.[5]

Content of the rules relating to apprehended bias

[58] A leading statement of principle of apprehended bias is that in *Isbester v Knox City Council*:[6]

> "The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.
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> The principle governing cases of possible bias was said in *Ebner* to require two steps to be taken in its application. The first requires the identification of what it is said might lead a decision-maker to decide a case other than on its legal and factual merits. Where it is said that a decision-maker has an 'interest' in litigation, the nature of that interest must be spelled out. The second requires the articulation of the logical connection between that interest and the feared deviation from the course of deciding the case on its merits. As Hayne J observed in *Jia Legeng*, essentially the fear that is expressed in an assertion of apprehended bias, whatever its source, is of a deviation from the true course of decision-making.
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> It was observed in *Ebner* that the governing principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision-making and decision-makers. It was accepted that the application of the principle to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making. The analogy with the curial process is less apposite the further divergence there is from the judicial paradigm. The content of the test for the decision in question may be different.
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> How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision

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4 *Judicial Review Act* 1991 (Qld), s 20(2)(a).
5 *Judicial Review Act* 1991 (Qld), s 30(1).
6 (2015) 255 CLR 135.

> and the context in which it was made as well as to have knowledge of the circumstances leading to the decision."[7] (footnotes omitted)

[59] There are a number of cases that have dealt with stewards' inquiries and the like, for example, *R v Brewer; ex parte Renzella*,[8] *Hall v New South Wales Trotting Club Ltd*[9] and to an extent *Howe v Rosier*.[10]

[60] However, in my view, the analysis in this case should proceed from first principle.

[61] First, the nature of a stewards' inquiry and any hearing of a charge that proceeds from it necessitates that the stewards may have to fulfil different roles: at one point as accuser or complainant; at another point as a witness; and at another point as decision maker. The inquiry and decision must on some occasions be made with speed and a minimum opportunity for a full exploration of the facts in the way that a court or formal tribunal might do. The rules of natural justice that apply must take account of the potential for the proper performance of each role and the need for a quick determination in the context of a relevant hearing.

[62] Second, on the other hand, the particular context in the present case was a species of inquiry and hearing that did not engage some of those considerations. There were no expert or personal observations of the stewards who were making the decision that needed to be taken into account. There was no particular need to make a decision quickly. There was no need for the panel of stewards who made the decision to include the chief steward.

[63] Third, the subject of the inquiry and the charges that proceeded from it included an allegation of assault. On any view, this was a serious matter, although the alleged assault was momentary, inflicted no pain and caused no physical injury. Even so, in substance it was an allegation of criminal conduct. The classification of decisions under the respondent's relevant policy recognised this by applying the criminal onus of proof to it under the classification of an integrity-related matter. It also involved an alleged interference with the stewards' performance of their appointed functions.

[64] Fourth, the consequences of a finding of contravention of r 231(1) against the respondent included the possibility of the decision that was ultimately made – that he be disqualified for a lengthy period.

Analysis

[65] The chief steward's involvement on 23 January 2016 took place because of his performance of proper and necessary functions. As chief steward, it was proper for him to give instruction and support to Mr Zimmerman in the first conversation and the second conversation. As chief steward, it was also proper for him to decide to scratch Mista Mara and to advise the trainer, Mr Mackay, of the decision.

[66] I do not accept the applicant's primary contention that because of the chief steward's involvement in those events he was necessarily precluded from being a member of the panel, either because of apprehended bias that he would have pre-judged the

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7 *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [20]-[23].
8 [1973] VR 375.
9 [1977] 1 NSWLR 378.
10 [2001] NSWSC 1194.

question of assault or because of apprehended bias due to his interest as a potential witness in the hearing. That is not, in my view, the apprehension that the fair-minded lay observer would necessarily form.

[67] Simply put, the chief steward has functions and responsibilities that distinguish him or her from the position of a judge, so the same level of disinterestedness is not reasonably expected.

[68] However, where a steward has involvement touching upon the subject matter of an inquiry and complaint of the present kind and proceeds to sit on a panel designated to deal with that subject matter, in my view, there is a corresponding obligation to ensure that the involvement does not cause unfairness to an individual in the applicant's position. Failure to do so may constitute apprehended bias or a failure to accord procedural fairness.[11]

[69] Had the chief steward disclosed his involvement, and the content of the three conversations, a number of things might have proceeded differently. For example, there was close questioning of the applicant during the inquiry of the time sequence relating to when he allegedly changed the status of Mr Mackay as the trainer of Sparkling Collect. Had the applicant known of the first conversation or second conversation at that time, he might have asked the chief steward about the timing of those conversations.

[70] Second, had the applicant known at the outset of the first conversation or the second conversation, he might have asked the chief steward in detail about what had been said by Mr Zimmerman in those conversations in an effort to ascertain whether Mr Zimmerman had said anything consistent with the applicant's version of events or inconsistent with Mr Ross's and Mr Zimmerman's versions.

[71] Third, had the applicant known of the third conversation he might have asked the chief steward whether in deciding to scratch Mista Mara on the grounds given to Mr Mackay the chief steward did not consider that he had committed himself to an acceptance of the version of events given by Mr Zimmerman in a way that would interfere with his ability to bring an unbiased mind to the panel's inquiry.

[72] But the applicant had no opportunity to do any of those things. It is not to the point, in my view, that he might not have had the forensic skills to ask those potential questions or that the answers to those potential questions may not have availed the applicant in the long run, if he had asked them. That is not an answer to the mischief at which the rules of apprehended bias and natural justice are directed. The applicant was entitled to a fair hearing – not to a hearing that was only fair on questions that would have assisted him, judged in hindsight.

[73] In framing his case the applicant relied on the chief steward's failure to disclose his involvement in the three conversations, or the extent of them, as a failure to accord procedural fairness.[12] I accept that the case may be analysed through that principle to some extent. However, in my view, it is preferable in a case like the present, where the principles of natural justice must be moulded to take account of the multiple roles of a steward as a potential accuser or complainant, potential witness and decision

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11 See *Freedman v Petty* [1981] VR 1001, 1019.

12 *Kioa v West* (1985) 159 CLR 550, 615.

maker, to focus on what a fair hearing requires in the context of a proceeding like the inquiry and charges into the applicant's conduct.

[74] The point was put in this way by the High Court in *Re Media, Entertainment & Arts Alliance; ex parte Hoyts Corporation Pty Ltd*:[13]

> "The rule against bias is directed to ensuring that a judge or a member of a tribunal that is bound to act judicially brings and is seen to bring 'an impartial and unprejudiced mind to the resolution of the question' to be decided. One aspect of the rule, and the only one that is relevant for immediate purposes, is that the decision should be made on the basis of the evidence and the argument in the case, and not on the basis of information or knowledge which is independently acquired. That aspect of the rule is similar to but not identical with the rule of procedural fairness which requires that a person be given an opportunity to meet the case against him or her. However, in the case of the rule against bias, the question is not whether there is or was an opportunity to present or answer a case, but whether, in the circumstances, the parties or the public might entertain a reasonable apprehension that information or knowledge which has been independently acquired will influence the decision.
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> As a general rule, a judge or a member of a tribunal that is bound to act judicially should disclose his or her independent knowledge of factual matters that bear or may bear on the decision to be made. In some cases, it may be that he or she should stand down from the proceedings. However, precisely what should be disclosed and what, if any, other action should be taken may involve a consideration of the nature of the tribunal, its composition and organisation." (footnotes omitted)

[75] In my view, the factual conclusion in the present case is that the fair minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made by the chief steward by reason of his undisclosed involvement in the events of 23 January 2016 comprising the first, second and third conversations.

[76] Notwithstanding the respondent's submissions to the contrary, the applicant disputed the version of events according to which he was found guilty of assaulting Mr Zimmerman. Although his statements to the panel indicated his regret that the altercation occurred, and acknowledged that he may have misread Mr Zimmerman's intentions when he approached the applicant immediately before the altercation, the applicant did not resile from his version that Mr Zimmerman was coming towards him and was either shaping up to him or he was under that impression. On his version Mr Zimmerman lunged towards him and came forehead to forehead with him. The applicant said: "Do it. Do it." before he laid any hand on Mr Zimmerman.

Conclusions

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13 (1994) 119 ALR 206, 210.

[77] In my view, it follows that there should be an order that the first decision be quashed or set aside and referred to a differently constituted panel for further hearing and consideration.[14]

[78] However, the same conclusion does not apply to the second decision. The statutory power is one whereby the court "may" make a relevant order.[15]

[79] In *Hall v NSW Trotting Club Ltd*,[16] Hutley JA said:

> "I have not been able to find an authority where the failure to give a hearing during part of the proceedings has been considered. In principle, I can see no reason why, if it can be seen that the rules of natural justice have been broken only in respect of a particular portion of a proceeding and the decisions attached are clearly severable, the whole proceedings should be void."

[80] This seems to be supported by the text of s 30(1)(a) of the *Judicial Review Act* 1991 (Qld), which refers to "quashing or setting aside the decision, *or a part of the decision*…" (emphasis added).

[81] However, it is not necessary to decide whether a principle of severable decisions applies in the present circumstances. The point was not argued by the parties as a question of law.

[82] It is enough, in this case, to conclude that none of the first, second or third conversations was concerned with the applicant's derogatory remarks about the deputy chair of stewards.

[83] Second, there was no finding by the panel in the second decision as to what the applicant did say about the deputy chair of stewards. The applicant's own evidence was in effect that he made derogatory remarks about the deputy chair of stewards, although he apparently disputed Mr Ross's evidence of the extent of those remarks.

[84] Third, the penalty that was imposed by the panel on that charge (without any finding as to which version of events they accepted) has already expired. There would be little or no utility in the present case in referring the second decision for further hearing.

[85] In my view, the court should not quash or set aside the second decision, as a matter of discretion.

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14 *Judicial Review Act* 1991 (Qld), s 30(1)(a) and (b).
15 *Judicial Review Act* 1991 (Qld), s 30(1).
16 [1977] 1 NSWLR 378, 383.