A reasonable apprehension of bias?

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VICTORIA'S Chief Justice, Marilyn Warren, should review the role of Justice Stuart Morris in deciding four recent poker-machine appeals. Both from a popular and a legal perspective there is reason to think that Morris J has acted, at best, imprudently. At worst his decisions in the four cases might be unsafe.

Morris J, as President the Victorian Civil and Administrative Tribunal, has overruled decisions by the Victorian Commission for Gaming Regulation to limit poker-machine numbers in Drouin,[2] Ocean Grove,[3] Romsey[4] and Ringwood.[5] These communities have expressed their outrage at the effect of Morris J's findings against them. I share their views, but that is not why Justice Warren should review the cases.

Rather Justice Warren should be guided in general by the legal principle of apprehension of bias. This principle not only concerns financial interests and associations such as shareholdings but also a judge's other associations, relationships and conduct. More specifically the question of 'disclosure of interest' arises at section 19 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). This indicates that the Chief Justice does have a role to play:

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[1] Victoria University, Melbourne. I am grateful to Harry Glasbeek for reading and commenting on an earlier version. Of course, responsibility for the content is mine entirely.

[2] [2005] VCAT 2606.

[3] [2006] VCAT 1921.

[4] [2007] VCAT 1.

[5] [2007] VCAT 2.

19. Disclosure of interests

(1) This section applies to a member who constitutes, or is to constitute, the Tribunal for the purposes of a particular proceeding … and who has or acquires an interest, pecuniary or otherwise, that could conflict with the proper performance of the functions of the member in relation to that proceeding.

(2) The member—

(a) must not take part in the proceeding or exercise any powers in relation to it, unless all parties to the proceeding agree otherwise; and

(b) if not the President, must disclose the nature of the interest to the President; and

(c) if the President, must disclose the nature of the interest to the Chief Justice.

Let me set out some circumstances that might lead a fair-minded lay observer to be worried about bias in these cases (or, at least, that Morris J did not appropriately disclose an interest). Note that the legal issue is not whether actual bias exists. It is whether a reasonable person who is aware of relevant facts might doubt impartiality.

Before the Victorian Government appointed him to the Supreme Court, Morris J was an eminent Queen's Counsel in the planning field. In this role he led big cases on behalf of the poker-machine industry. Given this association alone a layperson might think Morris J should have stood aside from poker-machine cases. Any decision of his would inevitably be contentious and arouse suspicions, especially if they favoured appellants from the industry he formerly represented. He did not step aside. As

President, he instead took it upon himself to hear all four gaming appeals to come before VCAT, and his decisions did favour the side he used to represent.

However, before we go further into the issues, it is necessary to make a qualification. The High Court has said that sitting in proceedings to which a former client is a party is not by itself sufficient cause for a judge to disqualify herself or himself. In *Bienstein v Bienstein* HcHugh, Kirby and Callinan JJ noted:

> 33. … In *Re Polites; Ex parte Hoyts Corporation Pty Ltd*[6], this Court held that even a prior relationship between a legal adviser and client does not generally disqualify the legal adviser, on becoming a member of a court or tribunal, from sitting in proceedings in which the client is a party. In the normal case (of which this is an illustration), it is only when advice given by the legal adviser is an issue in the proceedings that a reasonable apprehension of bias can arise.[7]

Furthermore the clients Morris J had represented were not exactly the same as the appellants who appeared before him as VCAT President. In poker-machine cases the 'client', strictly speaking, is an individual hotel or club. Different hotels and clubs from those Morris J had as clients brought the appeals. Are *Bienstein v Bienstein* and a narrow definition of client sufficient then to justify Morris J *allocating* these cases

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[6] (1991) 173 CLR 78.

[7] [2003] HCA 7; (2003) 195 ALR 225. McHugh, Kirby and Callinan JJ cite *Dickason v Edwards* (1910) 10 CLR 243; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *Vakauta v Kelly* (1989) 167 CLR 568; *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11], 498-499 [31]-[35]; and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345 [6]-[8], 363 [83], 397 [184]. See also *Webb v R* (1994) 181 CLR 41 at 74; Wheelahan, M, *Bias* (2005), [online] www.vicbar.com.au/pdf/CLE_Seminar14092005.pdf [accessed 7 February 2007].

to himself and sitting in them? (The stress on volition in the previous sentence is to discount the point of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy* that judges 'are assigned to cases … do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases …'[8])

While it is necessary to recognise the force of *Bienstein v Bienstein*, there exist two preliminary reasons for hesitation. In the first place, the single-hotel or club identity in this industry in Victoria is a fiction. Behind single hotels sit chains or 'key account' owners of a number of venues. Behind all venues and 'key accounts' sit the licensed operators of all Victorian non-casino poker machines, Tattersall's and Tabcorp.[9] Secondly, HcHugh, Kirby and Callinan JJ in add the proviso to the normal case that 'it is only when advice given by the legal adviser is an issue in the proceedings that a reasonable apprehension of bias can arise'. Again, we might narrowly define 'advice' as we might narrowly define client. However, such a technical move in the present circumstances would rather more excite fears about apprehended bias than allay them.

The following will show that the opinions of Stuart Morris QC expressly were issues in the four appeal proceedings before Morris P. It will also point out a troubling association and reasons for concern regarding prejudgement. Both these factors contribute to a set of objective grounds for determining that a lay observer's

[8] (2000) 205 CLR 337 at 348.

[9] See Livingstone, C (2006) *The Changing Electronic Gaming Machine (EGM) Industry and Technology* [online] http://www.latrobe.edu.au/aipc/cdih/projects/egm.pdf [accessed 7 February 2007].

subjective apprehension of bias might be reasonable. This, of course, is the test applicable in Australian law.[10]

On two significant occasions of which I am aware on which Stuart Morris QC represented poker-machine interests Mr Nick Tweedie assisted him as junior counsel. They were the Chelsea Heights and Roxburgh Park hotels cases of 2001.[11] Mr Tweedie now leads cases on behalf of the poker-machine industry. In fact Mr Tweedie argued three of the four VCAT appeals to Morris J, his former senior counsel (Drouin, Ocean Grove and Romsey).[12]

In his seminal Drouin decision of December 2005 (*Branbeau*[13]) Morris J summarised 'previous studies concerning the social and economic impacts of gaming'. Yet he cited three studies only, all dated 2000 and before.[14] These, he noted, all 'provide general support for the' appeal by the gambling interests.[15] Moreover his

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[10] See Wheelahan, above n 3, [11]; *R v. Grassby* (1989) 168 CLR 1 at 20 per Dawson J; *Webb v R* (1994) 181 CLR 41.

[11] [2001] VCGA *Chelsea Heights Hotel Decision and Reasons for Decision* [online] http://www.vcgr.vic.gov.au/CA256F800017E8D4/WebObj/9FB395862DEB3844CA25701D00451484/$File/ChelseaHeights.pdf [accessed 7 February 2007]; [2001] VCGA *Roxburgh Park Hotel Decision and Reasons for Decision* [online] http://www.vcgr.vic.gov.au/CA256F800017E8D4/WebObj/C26145276A70AF9ECA25701D00451485/$File/RoxburghPk.pdf [accessed 7 February 2007].

[12] Mr M Wheelahan SC and Mr J Larkins argued the Ringwood appeal.

[13] [2005] VCAT 2606 [5].

[14] Productivity Commission, *Australia's Gambling Industries* (1999); National Institute of Economic and Industry Research, *The Economic Impact of Gambling* (2000); Deakin Human Services Australia and the Melbourne Institute of Applied Economic and Social Research, *Social and Economic Effects of Electronic Gaming Machines on Non-Metropolitan Communities* (1997).

[15] Above, n 13 [67].

Drouin reasons were eerily similar to the arguments he had presented as a QC in the Chelsea Heights and Roxburgh Park cases. I believe this not least because he cross-examined me at length in the Roxburgh Park case. In both cases I was a witness and presented evidence to the effect that the local economic impact of poker machines was more harmful than it was beneficial.

Of course, now that I have made this disclosure, readers might reasonably question my impartiality. Perhaps they also will apprehend some bias on my part against Morris J. After all we were on opposite sides then, and now I believe that he has not fairly summarised all previous social and economic impact studies, including my own.

A moment's reflection, however, shows that this is precisely my point. Morris J *qua* Stuart Morris QC was the main protagonist in articulating the central legal and evidentiary arguments in pivotal poker-machine cases. This fact inevitably colours perceptions of his adjudication of the four appeals as VCAT President. Indeed this perception is reinforced by the fact that Morris J's judgement in the Drouin case (*Branbeau*) copies extensively – i.e. cuts and pastes – from his own unsuccessful 'Outline of Submission on behalf of Chelsea Heights Hotel Pty Ltd' of 21 March 2001. The submission, to the then Victorian Casino and Gaming Authority, was co-prepared by himself and Nick Tweedie: the same Nick Tweedie who, as I noted above, argued the Drouin, Ocean Grove and Romsey cases before Morris J on behalf of the appellants. I will concentrate on the Chelsea Heights submission below.

When above I said that Morris J's Drouin 'reasons' were similar to his and Nick Tweedie's 'arguments' as a QC in the Chelsea Heights and Roxburgh Park cases I was being coy. What would a reasonable lay observer make of the following, regarding no less a matter than the legal 'test in section 3.3.7(1)(c) of the [*Gaming Act*

2003] that the net economic and social impact of approval will not be detrimental to the well-being of the community of the municipal district in which the premises are located'?

Net impact

'45 The use of the word "net" recognises that there may be both positive and negative impacts on the well-being of the local community and that a balancing process is required.' (Drouin reasons)

'7.1 …

- 'The use of the word *net* recognises that there may be both positive and negative impacts on the well-being of the local community and that a balancing process is required.' (Chelsea Heights submission, original emphasis)

Economic and social impacts

'46 Although there is a distinction between economic impacts and social impacts, there is likely to be such an overlap between the concepts that it will generally be more helpful, and more convenient, to consider these impacts together.' (Drouin reasons)

'7.1 …

- 'Although economic impacts are conceptually different than social impacts social impacts there is likely to be such a large degree of overlap that it will generally be more convenient to consider these impacts together.' (Chelsea Heights submission)

Marginal impact

'47 The impact of 'approval' should be taken to be the impact that results from the approval of premises as suitable for gaming … The test requires a focus on the

marginal impact that is likely to result from the approval of premises; it is not directly concerned with existing impacts or with the average impact of gaming machines.' (Drouin reasons)

' 7.6 Next it must be observed that the Act requires assessment of the net economic and social impact of *approval*. This is clearly a reference to the impact of the approval for the subject premises as suitable of gaming. Thus the Act requires the focus to be upon the *marginal* impact which results from the approval of the subject premises: it is not concerned with *existing* impacts or with *average* impacts. (Chelsea Heights submission, original emphasis)

The test

'49 The test does not require the Commission (or, on review, the tribunal) to be satisfied that there will be a net *positive* economic and social impact of approval; it is sufficient that the Commission (or, on review, the tribunal) be satisfied that the net economic and social impact of approval will be either neutral or positive.' (Drouin reasons)

'7.7 … the Act does not require the Authority to be satisfied that there will be net economic and social benefits from the approval of a venue. Rather, the statutory test requires the Authority to be satisfied that the net economic and social impact of approval will be either positive or neutral ...' (Chelsea Heights submission)

Intentions of Parliament

'50 … Given the statutory framework, it would be illogical for the tribunal to conclude that the net economic and social impact of the approval of premises as suitable for gaming will always be detrimental to the well-being of the community of a municipal district in which the premises are located.' (Drouin reasons)

‘7.5 Further, as a matter of statutory interpretation, it would be inconsistent to apply section 12D(1)(c) of the Act in such a manner that all venues, or all EGMs, were held to have a net economic and social impact which was detrimental to the well-being of the community generally …’ (Chelsea Heights submission; see also Morris, Chelsea Heights transcript of proceedings, p.46 ll. 1-6)

Other remarkable similarities exist in the manner and words Morris J used to consider economic impact in his Drouin reasons as VCAT President and his submissions in the Chelsea Heights and Roxburgh Park cases as poker-machine industry advocate. In both he relies, to some extent, upon the Productivity Commission’s 1999 *Australia’s Gambling Industries* report. In both he relies more on a 2000 report by the National Institute of Industry and Economic Research (NIEIR) called *The Economic Impact of Gambling*, and a 1997 report, *Social and Economic Effects of Electronic Gaming Machines on Non-Metropolitan Communities*, by Deakin (University) Human Services Australia and the Melbourne (University) Institute of Applied Economic and Social Research.

In his Drouin reasons Morris J says: ‘The NIEIR study alleged that there was a fundamental flaw in the Productivity Commission study. It said that the Productivity Commission compared long run gross benefits from gambling with current social costs of gambling; which had the effect of considerably underestimating the net benefits of gambling.’

In his joint submission with Nick Tweedie, the then Stuart Morris QC submitted in the Chelsea Heights case: ‘The National Institute for Industry and Economic Research has described the Productivity Commission report as being fundamentally flawed, because it compared long run gross benefits with current costs …’

Indeed the content of Morris J's VCAT decisions and reasons in the four appeals track closely his earlier advocacy but not the growing body of knowledge about the social and economic impacts of poker machines. If, as Morris J did, one purports to '*summarise* previous studies concerning the social and economic impacts of gaming' (Drouin reasons, p. 3; my emphasis), one should not summarise selectively. To rely in 2005 on three studies from the late 1990s is at best careless. A considerable body literature on social and economic impact exists and is easy to find.[16]

More worrying is that Morris J's selections are one-sided concerning economic impact. As he notes, 'Certainly these three studies provide general support for the current application' – that is, the gambling industry's appeal to VCAT. Alternative research findings existed at the time of the Drouin appeal and are well known.

Conspicuously Stuart Morris QC had argued against one such alternative (mine, as it happens) in his and Nick Tweedie's Chelsea Heights and Roxburgh Park written and oral submissions. Yet he did not import this knowledge from the submissions into his Drouin judgement, despite importing much else.

My reading of Morris J's Drouin reasons gave me the impression that he was advocating still. Of course, this is my impression only, but it is informed by, for instance, Morris J's gratuitous aside:

[16] See e.g. the searchable Gambling Research Australia Website and Clearinghouse initiated by the Ministerial Council on Gambling, which comprises ministers responsible for regulating gambling in each State and Territory Government and the Australian Government, at http://www.gamblingresearch.org.au/webint/agr/agrbibliographies.nsf/c77dc30ed6f5030fca256da30027766f?OpenForm [accessed 7 February 2007].

> ‘60 For what it is worth, I also believe that people should be free to spend their money as they choose, unless there is an overwhelming reason to the contrary. There will always be critics who will assert that certain people waste their money, whether on cars, large houses, alcohol or the like. But it will rarely be the case that prohibition is the answer. Our society is built upon freedom of choice and its flip-side, individual responsibility.’ (Drouin reasons)

Asides such as this are not decisive, but they are indicative of an attitude brought to a case that might convey ‘the impression that a Judge’s mind is closed to any reasonable argument’.[17] The point is important because, in the absence of immediate objection to a judge sitting in a case or appeal from a judge’s decision, the only possible ground for a subsequent appeal because of apprehension of bias is that the judgement conveys an appearance of bias.[18]

I think a fair reading of the submissions and later judicial reasoning by any independent layperson would find significant conceptual coincidences and, therefore, some significant predisposition. The conceptual coincidences go beyond the literal ‘coincidences’ above. To paraphrase the words of the Johnny Mercer song, the Drouin reasoning accentuates the positive, eliminates the negative, latches onto the affirmative and does not mess with ‘Mister In-between’. It is noteworthy to reiterate that the VCGA decided against Stuart Morris QC and Nick Tweedie’s clients in the Chelsea Heights and Roxburgh Park cases. The Authority refused the Roxburgh Park application outright. The Chelsea Heights Hotel gained only half the number of machines desired – that is, 40 rather than 80.

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[17] Wheelahan, above, n 3, [28].

[18] Ibid [15]-[17].

In none of his four poker-machine decisions as VCAT President, however, does Morris J even refer to the Chelsea Heights and Roxburgh Park cases. He does not discuss the VCGA's decisions or the reasons for those decisions, though those reasons do refer to Stuart Morris QC and the arguments he presented on behalf of his clients. Unacknowledged, those same arguments have now reappeared – conceptually and literally – as 'precedent' to which the successor of the VCGA, the VCGR, now conforms.

The word 'precedent' above is in scare quotes because VCAT, as a statutory tribunal, 'is not bound to follow its own decisions', as Nick Tweedie explained in the August 2006 *Local Government Reporter*. 'This is so even where the decision is one made by the President of VCAT, currently Justice Stuart Morris (a Supreme Court justice), at least when he is sitting as a VCAT member.' Tweedie then noted that Morris J in 2004 had introduced guidelines for VCAT decisions that address this problem by enhancing consistency and transparency.

This means that Morris J was not obliged to refer to the VCGA's ratio in the Chelsea Heights and Roxburgh Park cases. Doubtless he is even less obliged to refer to decisions of a now extinct lower statutory authority. Yet one cannot help but think that it might have been good practice to have done so in the interests of transparency and consistency. At the very least it would have helped to dispel an apprehension of bias created by him comprehensively recycling as judgements submissions that he and the counsel for appellants currently before him had jointly written.

Was Morris J, to his own mind, just setting things right: correcting past errors in law? If so, why not just say so? Was his injudicious use of earlier arguments, perhaps, a personal form of redress for past slights? As interesting as these questions might be to lawyers and psychologists, they are irrelevant here.

What is not irrelevant, however, is the apprehension that Morris J has brought with him to the bench too much from his role as advocate. The least we can say is that the line between his former and current roles has blurred. The evidence is to be found in his documents from both sides of the line.

At first glance, therefore, the apprehension of bias principle seems to apply. However, it is important to explore the principle further before making that judgement. We should recall first that the apprehension of bias principle seeks to remedy perceptions of bias not bias per se. As Gleeson CJ, together with McHugh, Gummow and Hayne JJ, said in their *Ebner* decision of 2000:

> Where, in the absence of any suggestion of actual bias … the governing principle is that ... 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 …'[19]

The High Court Justices go on to note: 'As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying.' It is common and proper that, for example, 'a judge who owns shares in a company which is involved in a case in which the judge is sitting to inform the parties of that fact and to give them an opportunity to raise an objection should they wish to be heard'.[20]

[19] [2000] HCA 63; 205 CLR 337, at [6].

[20] [2000] HCA 63; 205 CLR 337, at [69].

In at least two of the cases, Romsey and Ringwood, Morris J did not disclose his previous representation of poker-machine interests and give the parties opportunity to object. I am not certain about Drouin and Ocean Grove. The parties' counsel would have known, and did not object, but the High Court in *Ebner* is clear that the onus is on the judge.[21]

Curiously, Morris J only four months ago wrote at length on apprehension of bias. In a paper delivered at the Australasian Conference of Planning and Environment Courts and Tribunals on 14 September 2006, he considered whether the association between a judge and a former client when a barrister would be a sufficient ground for disqualification. He mentions in the paper another matter in which he had been involved as a barrister. However, he does not refer to his representation of gambling interests. This seems odd, since the Ocean Grove case was live at the time. Hearings occurred on 11-12 July and 6 September 2006, and Morris J made his order on 26 September 2006.

Morris J's view in the conference paper was that the High Court, in *Bienstein v Bienstein*, had said that association between a judge and a former client when a barrister was not, by itself, sufficient reason for disqualification. Indeed, as noted above, McHugh, Kirby and Callinan JJ found that 'even a prior relationship between a legal adviser and client does not generally disqualify the legal adviser, on becoming a member of a court or tribunal, from sitting in proceedings in which the client is a party'. However, recall that the Justices added this telling caveat: ' … it is only when advice given by the legal adviser is an issue in the proceedings that a reasonable apprehension of bias can arise'.[22]

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[21] Ibid.

[22] Above n 7.

Did HcHugh, Kirby and Callinan mean very specific advice to a particular client? It is hard to tell from what the Justices have written. Does ‘advice’ extend to the earlier arguments that a barrister presented on behalf of a class of clients upon which, as an appeal judge, he or she will rule? The latter, of course, describes Morris J’s predicament: literally.

As a matter of prudence and professional practice he should have stood aside. ‘Recusal’ is the technical term. Warren CJ might have cause to remind her colleague of its virtues. She might also have cause to think about the consequences of her role under section 19 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and to reconsider the four poker-machine appeals Morris J upheld in favour of the gambling industry.

Given that appeals from VCAT decisions are constrained to points of law, opponents of increased numbers of poker machines in Drouin, Ocean Grove, Romsey and Ringwood might have cause to consider the recourse to judicial review that is available under Order 56 of the Rules of the Supreme Court of Victoria.