IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M19 of 2015

BETWEEN:

TANIA ISBESTER
Appellant

and

KNOX CITY COUNCIL
Respondent

RESPONDENT'S SUBMISSIONS

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PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The Appellant's statement of the issues in this appeal is pitched at a level of generality that obscures the central question.

3. That question is whether a decision of a delegate of the Respondent (the **Council**) to destroy a dog, being a decision made pursuant to s 84P of the *Domestic Animals Act 1994* (Vic) (the **Act**), involved a denial of procedural fairness because an officer of the Council who was not the decision-maker participated[1] in the decision in circumstances where that officer had been the informant in the criminal proceedings against the owner of the dog that resulted in the conviction that enlivened the power under s 84P of the Act.

4. Both the trial judge and the Court of Appeal correctly applied settled principle in holding that, having regard both to the statutory context and to the particular facts of the case, the decision of the delegate of the Council was not vitiated by apprehended bias (that being the only ground upon which the relevant decision is now challenged).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

5. The Council has considered whether notices should be given pursuant to s 78B of the *Judiciary Act 1903* (Cth). It considers that no such notices are necessary.

PART IV FACTS

6. The Council does not accept the Appellant's summary of the relevant facts. That summary, and the Appellant's chronology, reflect the case that the Appellant advanced at trial, but in various respects do not reflect the findings of fact made by the trial judge, being findings that were not challenged in the Court of Appeal. Further, in some cases they omit reference to findings of fact adverse to the Appellant's case.

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1 As to which see paragraph 23 below.

7. It is not open to the Appellant to seek to bypass the trial judge's findings simply by referring directly to the evidence given at trial.[2] For the purposes of this appeal, the relevant facts comprise only those facts found in the courts below. Those facts are relevantly as follows.

8. The Appellant was the owner of three Staffordshire Terrier dogs, being Jock, Izzy and Bub.[3] Various combinations of those dogs were involved in three attacks on other dogs and their owners. It is the dog Izzy that was the subject of the decision under consideration in this appeal.

9. On 4 August 2012, the dogs Jock and Izzy were involved in an attack on a four month old dog and that dog's owner, Ms Jennifer Edward and her daughter, Ms Emily Edward. The attack occurred outside a shopping centre near the Appellant's home.[4] The Appellant was not present at the time of that attack, and therefore did not witness the attack.[5]

10. On 29 May 2013, the dogs Jock and Bub were involved in an attack on another dog and its owner.[6] Those dogs were subsequently seized and impounded by the Council, but they were later released to the Appellant. The dog Izzy was not involved in this incident.

11. On 9 June 2013, the dogs Jock, Izzy and Bub again escaped from the Appellant's residence and "were involved in two vicious attacks on small dogs, in the course of which their owners were badly bitten and required hospitalization".[7] Later that day, at the Appellant's request, the dog Jock was destroyed.[8] The Council seized the Appellant's other two dogs, but the dog Bub was subsequently released. The dog Izzy is still impounded.[9]

12. The attacks on 29 May 2013 (not involving the dog Izzy) and 9 June 2013 (which involved all three dogs) were investigated by Ms Williams, who was a Council officer.[10] On 23 June 2013, a criminal proceeding was commenced in

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2 See, for example, the Appellant's submissions (**AS**), [27]-[28].

3 *Ibester v Knox City Council* [2014] VSC 286 (**Trial judge**), [2].

4 Trial judge, [7(a)] and [27]-[45].

5 Trial judge, [7(a)].

6 Trial judge, [7(b)]. Cf. the Appellant's chronology.

7 Trial judge, [7(c)] and [141]-[142]. Cf. the Appellant's chronology and AS [8].

8 Trial judge, [7(c)].

9 Trial judge, [2].

10 Trial judge, [8]. The Appellant's chronology incorrectly states that the charges the subject of the criminal proceeding commenced on 20 June 2013 related to, among other things, the attack on 4 August 2012.

the Magistrates' Court of Victoria charging the Appellant with 23 offences in respect of those two attacks. Ms Williams was the informant.

13. The next day, 24 June 2013, a separate proceeding was commenced in the Magistrates' Court concerning the attack on 4 August 2012. In that proceeding, the Appellant was charged with six offences. The Council's Local Laws Co-Ordinator, Ms Hughes, was the informant for those six charges.

14. At trial, part of the Appellant's case involved allegations of bad faith against Ms Hughes, who was alleged to be "on a course seeking to have the dog [Izzy] destroyed", and that there "seemed to be a determination on [Ms Hughes'] part to get a conviction that would enliven the [Council's] jurisdiction".[11] The submission was based in part on an allegation (repeated at AS [9]), that Ms Hughes directed the officer who was investigating the 4 August 2012 attacks (Mr Martonyi) to obtain additional evidence because the existing evidence "was considered to be insufficient to sustain one of the charges against the Appellant in respect of 'Izzy'".

15. The trial judge rejected those allegations as being contrary to the facts.[12] Her Honour found that there "is nothing to suggest that Ms Hughes is a zealous destroyer of dogs".[13] With respect to the allegation that Ms Hughes directed the investigator to obtain further evidence to support the charge with respect to the dog Izzy, the trial judge found that, an issue having been raised by the Appellant's solicitor about the charges concerning the 4 August 2012 attack, Ms Hughes directed Mr Martonyi to clarify "which dog did what".[14] This was "unsurprising and perfectly proper".[15]

16. Prior to the hearing of the criminal charges in the Magistrates' Court, the Appellant's solicitor sought an assurance from the Council's lawyer that the Council would not seek an order from the Court pursuant to s 29(12) of the Act for the destruction of the dog Izzy.[16] In response, the Council's lawyer obtained instructions from Ms Hughes that:

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11 Trial judge, [70].
12 Trial judge, [71].
13 Trial judge, [76].
14 Trial judge, [115].
15 Trial judge, [75].
16 Trial judge, [9]-[10] and [50].

(a) the Council would not seek orders from the Court in relation to destruction of the dog Izzy; but

(b) the Council would be having "a panel hearing in relation to the fate of Izzy" and the Appellant would be notified of this hearing "shortly after the Court case".[17]

17. Contrary to the Appellant's case at trial (and to the implication in the last sentence of AS [13]), the trial judge found that the Appellant's solicitor was told about the proposed "panel hearing" in relation to the future of the dog Izzy prior to the hearing in the Magistrates' Court.[18] Further, her Honour also found that the Appellant's solicitor was aware that it was possible that the Council would exercise its power under s 84P even though the Council had not sought an order from the Court for the destruction of the dog, and that the Appellant's solicitor had advised the Appellant of this possibility.[19]

18. On 12 September 2013, following a plea of guilty, the Appellant was convicted in the Magistrates' Court of 20 charges in relation to the attacks on 4 August 2012, 29 May 2013 and 9 June 2013.[20] Those convictions included a conviction for an offence against s 29(4) of the Act with respect to the dog Izzy as a result of the attack on 4 August 2012.[21]

19. The trial judge found that "it is clear that he [the Magistrate] would have made a destruction order if asked by the council to do so" and that the Magistrate "was very keen to make a destruction order".[22] Nevertheless, on Ms Hughes' instructions, no such order was sought.

20. On 13 September 2013, and consistently with the indication given to the Appellant's solicitor prior to the Magistrates' Court hearing, the Council informed the Appellant that it intended to consider whether to exercise the power in s 84P of the Act to have the dog Izzy destroyed.[23] The Council invited the Appellant to make written submissions and to attend a "panel hearing" on 30 September

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17 Trial judge, [9] and [50].
18 Trial judge, [55].
19 Trial judge, [56].
20 Trial judge, [11]-[12].
21 Trial judge, [11] and [41]-[42]. See also Trial judge, [56]-[65].
22 Trial judge, [74].
23 Trial judge, [13]; Court of Appeal, [6].

2013.[24] It stated that, in making any decision, it would consider, among other things, "the potential future risk to the community" posed by the dog Izzy.[25]

21. On 30 September 2013, a "panel" comprising Mr Angelo Kourambas (the Council's Director of City Development), Mr Dickson (the Council's Manager of City Safety and Health), and Ms Hughes convened.[26] Each of those individuals held a delegation from the Council for the purposes of s 84P of the Act.[27] Nevertheless, the Appellant's submission (AS [17]) that "[t]he panel comprised three delegates appointed by the Respondent for the purposes of section 84P" is misleading, because the trial judge rejected the Appellant's submission that the decision under s 84P with respect to the dog Izzy was made by the panel. The finding of fact is that the decision was made by Mr Kourambas, not the panel.[28] The trial judge found that the fact that the other members of the panel held delegations did not meant that they acted as delegates in this instance.[29]

22. At the panel hearing, various interested persons gave evidence or made submissions.[30] But, contrary to the assertion in the Appellant's chronology, Ms Hughes did not make "both oral and written submissions to the panel". The evidence went no further than revealing that Ms Hughes provided the Appellant with her notes from the Magistrates' Court hearing, and read out parts of those notes (apparently in response to some confusion on the Appellant's part as to whether her criminal convictions specifically concerned the dog Izzy).[31]

23. After the hearing, Mr Kourambas discussed the matter with Mr Dickson and Ms Hughes. He then decided to destroy the dog Izzy.[32] After Mr Kourambas made this decision, Ms Hughes drafted the reasons for the decision in accordance with the directions of Mr Kourambas.[33]

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24 Trial judge, [13]; Court of Appeal, [6].

25 Trial judge, [13], [126]; Court of Appeal, [6].

26 Court of Appeal, [9]; Trial judge, [15].

27 Trial judge, [15].

28 Trial judge, [104]-[105]. The Court of Appeal did not disagree with that finding, although it did not rely upon it in making its decision: Court of Appeal, [65], [68].

29 Trial judge, [104].

30 Trial judge, [16].

31 Court of Appeal, [9] (quoting Ms Hughes' affidavit at [47], apparently in response to the matters recorded at [40]-[41] and [46]). See also Trial judge, [41], quoting evidence that showed that the Appellant's solicitor explained to her that she was pleading guilty to a charge that the dog Izzy caused serious injury.

32 Trial judge, [17] and [104]-[105].

33 Trial judge, [103].

PART V LEGISLATION

24. The version of the Act in force at the time of the delegate's decision was version 60. This version of the Act was in force from 10 July 2013 until 30 November 2013. The Annexure to these submissions includes several legislative provisions that may be relevant in addition to those set out in the Appellant's annexure.

PART VI ARGUMENT

The statutory framework

25. The Act was originally enacted as the *Domestic (Feral and Nuisance) Animals Act 1994* (Vic). It was re-named as the *Domestic Animals Act 1994* (Vic) in 2007.[34]

26. The general purposes of the Act include "to promote animal welfare, the responsible ownership of dogs and cats and the protection of the environment".[35] This purpose is "protective in character".[36] Councils have a central role in the regime created by the Act in pursuit of that purpose.

27. Part 2 of the Act provides for registration of dogs and cats with the local council.

28. Part 3 of the Act relates to the control of dogs and cats. It contains provisions which create offences applicable to owners and other persons responsible for dogs and cats.[37] Authorised officers of councils have the power to file charge-sheets in respect of those offences: s 92.

29. Part 3 includes s 29(4), which provides (subject to various defences) that:

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

30. Section 29(12) provides that:

> If a person is found guilty of an offence under this section with respect to a dog, the court may order that the dog be destroyed by an authorized officer of the Council of the municipal district in which the offence occurred.

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34 See *Animals Legislation Amendment (Animal Care) Act 2007* (No. 65 of 2007) (Vic), s 3.

35 Act, s 1.

36 Court of Appeal, [22]-[23].

37 In respect of provisions in Part 3 of the Act relating to control of dogs, see *Gubbins v Wyndham City Council* [2004] VSC 238; (2004) 9 VR 620, [37].

31. Authorised officers have powers, amongst other things, to seize dogs if the officer reasonably suspects that a person has committed an offence under s 29 with respect to that dog: s 81(2)(b).

32. Section 84P relevantly provides that:

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

10 33. The power conferred by s 84P(e) is relevantly identical to the power that was conferred when the *Domestic (Feral and Nuisance) Animals Act 1994* (Vic) was enacted.[38] There is no explanation for the introduction of that power in the extrinsic materials to the 1994 Act, notwithstanding the absence of any equivalent power in the legislation that it replaced.[39]

The applicability of the requirements of procedural fairness

34. The Council accepts (and has accepted throughout this proceeding) that a decision-maker acting pursuant to s 84P of the Act is required to comply with the rules of procedural fairness.[40]

35. The Appellant submits that a decision-maker who is required to afford
20 procedural fairness "is as a matter of course required to 'act judicially'."[41] If that submission is intended to inform the content of procedural fairness, it should be rejected. While historically it was common to refer to the duty to observe procedural fairness as a duty to "act judicially",[42] "[t]his formulation has long since been superseded by the development of administrative law over the course of the last half century".[43] Further, the expression is apt to mislead, because it tends to obscure the distinction in ascertaining the content of the requirements of procedural fairness between courts and quasi-judicial tribunals,

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38 The power was originally found in s 80(2), read with s 77(1)(d)(i). Section 80(2) became s 84P as a result of the enactment of the *Animal Legislation Amendment (Animal Care) Act 2007*, which also renamed the *Domestic (Feral and Nuisance) Animals Act 1994* so that it became the *Domestic Animals Act 1994*.

39 Being the *Dog Act 1970* (Vic).

40 Trial judge, [82]; Court of Appeal, [38]; *Gubbins v Wyndham City Council* [2004] VSC 238; (2004) 9 VR 620.

41 AS [45].

42 See *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476, [25].

43 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190; (2010) 78 NSWLR 393, [9] (Spigelman CJ), but see also [10]-[19], [82]-[84] and [260].

on the one hand, and administrative decision-makers on the other. The Court of Appeal was correct to eschew that language.[44] Its statement that the hearing was not required to be a "quasi-judicial" hearing was nothing more than an accurate statement that the content of procedural fairness in this case was not to be equated with a court hearing.

Apprehended bias

36. This Court has recognized the existence of four distinct, though overlapping and possibly not comprehensive, categories of case involving disqualification by reason of the appearance of bias, being: interest; conduct; association; and extraneous information.[45] In respect of all of the four categories, the test for apprehended bias is the same[46] (although, for reasons explored below, the test operates differentially depending upon the category of bias alleged[47]). The settled test in Australia is:[48]

> whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.

In applying that test, the hypothetical fair-minded and informed person is assumed to be aware of the nature of the decision and the context in which it was made.[49] That context includes both the applicable statutory framework,[50] and the particular circumstances of the case.[51]

37. The above test was formulated in the context of judicial decision-making. Nonetheless, the same test is applied with respect to administrative decisions,[52] including decisions by local councils.[53] But:[54]

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44 Court of Appeal, [39].

45 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, 348-349 [24] (***Ebner***), citing *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41, 74 (Deane J).

46 *Ebner*, 349 [28] and 350 [33].

47 See *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209; (2008) 72 NSWLR 504, 517 [71] (Basten JA) (***McGovern***). See also 510 [26]-[30] (Spigelman CJ).

48 See *Ebner*, 344 [6], and the cases there cited.

49 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438, 460 [70] and 480 [134] (***Hot Holdings***); *McGovern*, [7]-[13], [71]-[79] and [234].

50 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152, [26]; *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57, [30]-[32]; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475, 504.

51 *McGovern*, [7]-[13]; *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328; (2004) 214 ALR 264, [19].

52 See, e.g., *Re Refugee Review Tribunal; ex parte H* [2001] HCA 28; (2001) 179 ALR 425, [27]-[32].

53 *McGovern*, [1], [32], [71]-[79] and [234]; *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50, [138]-[142].

> [w]hile the test for a reasonable apprehension of bias is the same for administrative and judicial decision-makers, its content may often be different. What is to be expected of a judge in judicial proceedings or a decision-maker in quasi-judicial proceedings will often be different from what is expected of a person making a purely administrative decision.

38. Accordingly, the content of the test for apprehended bias when applied to administrative decision-making is generally less exacting than when applied to courts or quasi-judicial tribunals.[55] The precise way in which the test is to be applied is affected by the statutory function that is being performed, and by the nature and identity of the decision-maker. "The content of what the test requires varies from one context to another by a process involving, and usually determined by, statutory interpretation".[56]

39. In determining the stringency with which the apprehended bias rule should be applied in the context of s 84P, one important factor is that that power is vested in a democratically-elected council exercising a discretionary power that is expressed in broad terms.[57] In *McGovern v Ku-Ring-Gai Council*[58] (***McGovern***), Basten JA (with whom Spigelman CJ and Campbell AJA relevantly agreed) held that in that context the fair-minded observer will expect little more than:[59]

    a. an absence of personal interest in the decision; and

    b. a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers.

40. This Court refused special leave to appeal from *McGovern*.[60] The approach taken in that case appropriately captures the way in which the apprehended bias test should generally be applied to decisions by a local council. The Court of Appeal and the trial judge were correct to apply that approach.[61]

41. Perhaps the most critical factor in assessing the impact of the statutory scheme summarized above on the content of the apprehended bias principle as it applies with respect to the decision in issue in this appeal is that the power

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54 *Hot Holdings*, 460 [70] (McHugh J).

55 *McGovern*, [32]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507, [71]-[72], [102] and [181] (***Jia***).

56 *McGovern*, 507 [7], 508 [10].

57 Court of Appeal, [36(e)], [44]; *McGovern*, [13]. Cf. AS [56].

58 [2008] NSWCA 209; (2008) 72 NSWLR 504.

59 *McGovern*, 519 [80].

60 *McGovern v Ku-Ring-Gai Council* [2009] HCA Trans 48.

61 Court of Appeal, [48]-[49]; Trial Judge, [110].

s 84P(e) confers is available only in circumstances where there has first been a finding of guilt in a criminal proceeding. Both courts below recognized the importance of that fact.

42. The trial judge[62] relied upon *Gubbins v Wyndham City Council*,[63] where Hansen J had observed, in the context of the predecessor to s 84P(e), that the council's power to destroy arose only on a finding of guilt in the Magistrates' Court. His Honour then observed:[64]

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

43. The Court of Appeal likewise emphasized that before the power to destroy a dog (other than a dangerous dog or restricted breed dog) can arise under s 84P, the owner or another person must already have been found guilty of an offence, which must have been proved in the Magistrates' Court beyond a reasonable doubt.[65] The Court recognized that it follows from this that it is no part of the function of a council considering a possible exercise of power under s 84P to decide whether the dog has, in fact, attacked or bitten a person or animal and caused death or serious injury, because that fact has already been established by the conviction in the Magistrates' Court.[66]

44. The matters that are relevant to whether a council should order the destruction of a dog under s 84P are not expressly identified in the Act. The section clearly confers a wide discretion, albeit one bounded by any implications properly drawn from the subject matter, scope and purposes of the Act.[67] Plainly enough, the power is properly exercised for the purpose of protecting the public

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62 Trial judge, [96]. This passage was approved by the Court of Appeal, [43].

63 [2004] VSC 238; (2004) 9 VR 620.

64 *Gubbins v Wyndham City Council* [2004] VSC 238; (2004) 9 VR 620, [38]-[39].

65 Court of Appeal, [33].

66 Court of Appeal, [36].

67 See *Gubbins v Wyndham City Council* [2004] VSC 238; (2004) 9 VR 620, [31].

from dogs that pose a danger because they have attacked.[68] But as the Court of Appeal recognized:[69]

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

45. Four points arise from the statutory framework:

a. First, the Act recognizes that it does not follow from the fact that a dog was involved in an attack that caused serious injury that the dog should be destroyed. The discretions in ss 29(12) and 84P(e) recognize that the question whether a dog was involved in an attack that causes a serious injury and, if so, whether that dog should be destroyed, are distinct questions.[70]

b. Second, in every case where the Council's power under s 84P is enlivened as a result of a conviction of an offence against s 29, it would have been possible for the court that convicted the offender to order the destruction of the dog under s 29(12). Accordingly, the legislative regime confirms that it is not improper for a council to order the destruction of a dog under s 84P notwithstanding the fact that it did not ask the court to make such an order.

c. Third, as the underlying facts relating to the offence that enlivens s 84P(e) will have been established beyond reasonable doubt in the Magistrates' Court, "it will not ordinarily be open to the owner of a dog to maintain or renew any dispute as to the underlying factual circumstances which are to be taken to have been conclusively decided by the Magistrates' Court".[71] Accordingly, to the extent that factual issues arise in relation to a decision under s 84P(e), those factual issues will necessarily differ from the issues in the criminal proceeding. The council should start from the premise that

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68 Trial judge, [92]. See also Court of Appeal, [35].

69 Court of Appeal, [47].

70 Court of Appeal, [58].

71 Court of Appeal, [34]. See also *Minister for Immigration and Multicultural Affairs v SRT* [1999] FCA 1197; (1999) 91 FCR 234, [9], [40]-[41] and [45]-[46].

a dog has been involved in an attack causing serious injury and ask whether, in all the circumstances (obviously including the likelihood that further attacks will occur, and their seriousness if they do), the discretion should be exercised to destroy the dog. As the trial judge succinctly put it, "The question for the council following the successful prosecution is, in substance, whether the dog can live safely in the community and, if so, how".[72] That question is entirely different to the issue in the criminal proceedings alleging an offence against s 29.

d. Fourth, Parliament should not be taken to have intended to require councils to have so many officers involved in the control of dogs within a municipality that they can ensure that the officers who are involved in exercising one power under the Act are not thereafter involved in the exercise of any other power with respect to the same dog. In particular, Parliament should not be taken to have mandated that council officers who have been involved in any prior step under the Act cannot thereafter be involved in decisions about whether a dog should be destroyed. There is "nothing in the Act to suggest that prior involvement with the history of the dog automatically disqualifies members of the council or its officers from participating in the discretionary decision concerning the dog's destruction".[73]

Prejudgment

46. It does not appear that the Appellant any longer contends that apprehended bias arises in this case from prejudgment, as no submissions are directed to that issue.[74] Her submissions now focus on an alleged "conflict of interest".

47. If any argument based on prejudgment is still pressed, the argument should be rejected. Where apprehended bias by way of prejudgment is alleged it must be shown that a fair-minded and informed person might reasonably apprehend the possibility of a closed mind on the part of a decision-maker. The relevant state of mind that must be apprehended is that the decision maker is not "open to

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72 Trial judge, [108], approved by the Court of Appeal, [50].

73 Court of Appeal, [36(d)], [62]. Compare *Builders' Registration Board of Queensland v Rauber* (1983) 47 ALR 55, where this Court held that the scheme of the *Builders' Registration and Home-owners' Protection Act 1979* (Qld) contemplated that members of the Builders' Registration Board might properly exercise its insurance function and then its disciplinary function in respect of the same builder without disqualification, notwithstanding that a close relationship might have existed between the two matters.

74 Cf Court of Appeal, [54]-[65].

persuasion", or has already formed a view that is "incapable of alteration, whatever evidence or arguments may be presented".[75] The Court of Appeal was plainly correct in concluding that the matters relied on by the Appellant did not establish the possibility of any reasonable apprehension of such a state of mind.[76]

Stollery v Greyhound Racing Control Board

48. The Appellant places considerable reliance on *Stollery v Greyhound Racing Control Board* (***Stollery***),[77] which she submits establishes a different test for "apprehended bias by way of conflict of interest"[78] to the test for apprehended bias set out in *Ebner v Official Trustee in Bankruptcy*[79] (***Ebner***).

49. In *Ebner*, Gleeson CJ, McHugh, Gummow and Hayne JJ drew attention to the principle that "a judge must not be a party to the case he or she is deciding", and observed that that principle "may have significance apart from, and where necessary may operate independently of, problems relating to apprehension of bias."[80] Their Honours went on to point out that:[81]

> There is a line of cases where the judicial officer was a party to proceedings either because the name of that officer was on the record as a necessary and proper party to the case [citing *Dickason*], or because effectively or in substance the judicial officer was a moving party to the proceeding (eg, as a member of a body instituting a prosecution) even though not named on the record.

50. Their Honours did not cite *Stollery* as one of the cases in that line. They did, however, cite *Dickason v Edwards*,[82] before expressly noting that in *Dickason* Isaacs J had described the cases in this line as instances of "incompatibility".[83] And, in *Dickason*, Griffith CJ had observed that:[84]

> [I]f he is not merely a formal party but is in substance an individual complaining of an offence against himself, then I think very different considerations apply. Then it becomes his own cause, not in a technical sense, but substantially. He is a person complaining of a grievance.

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75 *Jia*, 531 [71]-[72], 540 [105]: see also 564 [185]; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 100; *McGovern*, 508 [16]-[17], 509 [23], 517 [72].

76 Court of Appeal, [55], [61].

77 [1972] HCA 53; (1972) 128 CLR 509.

78 AS [41]-[42], and see also [39].

79 [2000] HCA 63; (2000) 205 CLR 337.

80 *Ebner*, 358 [59] (emphasis added).

81 *Ebner*, 358 [61] (emphasis added).

82 (1910) 10 CLR 243, 258-259.

83 *Ebner*, 359 [62], citing *Dickason v Edwards* (1910) 10 CLR 243, 259 (Isaacs J).

84 *Dickason v Edwards* (1910) 10 CLR 243, 252 (emphasis added). See also 256 (O'Connor J).

51. In *Dickason*, the District Chief Ranger of a friendly society had presided over (but taken no active part in) a domestic tribunal that heard a charge involving allegations of personal abuse of the District Chief Ranger (amongst others). Unsurprisingly, this Court held that the tribunal hearing was invalid.

52. *Ebner* recognizes that a judge may not decide a case to which he or she is a party, even if the judge has no "interest" in that case.[85] This reflects the fact that the above cases are not (or are not necessarily) concerned with conflicts of interest. They are perhaps better understood as prejudgment cases, on the footing that the accuser is reasonably apprehended to have already formed the view that his or her complaint has substance, or that his or her decision to take interim action or to commence proceedings was properly made (in circumstances where that is the very issue to be decided by a tribunal).[86]

53. *Stollery* falls within that line of authority. In that case Mr Smith, who was both a member of the Greyhound Racing Control Board and the manager of an association that staged greyhound races, had received an envelope from Mr Stollery that contained nominations for two greyhounds for a forthcoming race, together with $200 in cash. Mr Smith formed the view that Mr Stollery had attempted to bribe him to secure the entry of his greyhounds in races to be conducted by the association (such races normally being oversubscribed). Mr Smith was "not unnaturally ... affronted by such an attempt" (at 516, 521). He wrote to the Board to report Mr Stollery, and the Board opened an inquiry in accordance with its rules. In addition to having taken the step that triggered the inquiry, Mr Smith gave a written account of the relevant events to the Board, and that account was read to Mr Stollery at the Board's hearing (at 522). Mr Smith also gave some oral evidence (at 523). The Board also heard from Mr Stollery, who accepted Mr Smith's account of the events, but who sought to characterize the payment as a gift following Mr Smith's recent wedding. Mr Stollery then left the room, but Mr Smith remained while the Board deliberated, decided to lay charges and then, after a brief further hearing, found Mr Stollery guilty of the charge under the rules and disqualified him for 12 months. While Mr Smith was present throughout, he did not participate in the Board's deliberations (at 515).

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85 *Ebner*, 359 [63].

86 See *Re Macquarie University; Ex parte Ong* (1989) 17 NSWLR 113, 134-135; *Tuch v South Eastern Sydney and Illawarra Area Health Service* [2009] NSWSC 1207, [194]-[195], [203]; but cf *McGovern*, 512 [39].

54. The issue in *Stollery* was whether Mr Smith was disqualified from participating in the deliberations of the Board, it being accepted that, if he was so disqualified, then his presence when the Board deliberated rendered the decision void (at 516, 526). The Court unanimously found that Mr Smith was so disqualified. In doing so, it relied in part upon *Dickason v Edwards*.[87]

55. The Court considered that if Mr Smith had participated in the Board's decision he would have been a judge in his own cause. "He was in substance the accuser and therefore was disqualified to act as a judge" (at 517). That followed because he "stood in a very special relationship to the Appellant and to the matter which the Board was called upon to consider", by reason that "he was personally involved in the incident which he reported" (at 516, emphasis added). Mr Smith "was in the position of an accuser, accusing the appellant of having done an act detrimental to the control of the sport" (at 516, 527). He had "given the evidence upon which the charge against the appellant depended" (at 525). He could not have participated in the Board's decision because "he would not have been in a position to have offered entirely objective and unbiased advice" (at 519, emphasis added). It was Mr Smith's "personal connexion with the matter at hand" (at 519), or his "personal interest in the outcome of the proceedings before the Board" (at 525) that meant he was disqualified.

56. *Stollery* has been understood as establishing that a person must not participate in, or be present at, a decision-making process where "[t]he person is the complainant or accuser with respect to the matters the subject of inquiry".[88] The principle does not suggest that, if a person has previously been an "accuser" with respect to a different subject, then that person cannot thereafter participate in a decision that concerns a related subject matter even if the person does not have a personal interest in that subject matter.

57. Consistently with the above, in *Hall v NSW Trotting Club*,[89] the New South Wales Court of Appeal considered a case in which two racing stewards had effectively given evidence before the committee of stewards of which they were members. It was argued that *Stollery* and *Dickason* meant that those stewards were disqualified from participating in the deliberations. However, the Court treated *Stollery* as applying only "where a steward is so directly and personally

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87 *Stollery*, 518 (Barwick CJ, with whom McTiernan J agreed), 521-522 (Menzies J), 527 (Gibbs J, with whom Stephen J agreed).

88 *McGovern*, 511-512 [38] (emphasis added).

89 [1977] 1 NSWLR 378.

involved in the matters under consideration that the only reasonable inference is that he must have an interest in the outcome of the proceedings",[90] and thus where, in substance, if the steward participated he would be a judge in his own cause. On the facts, the conduct the subject of inquiry had not been "directed at either of [the stewards], and it does not appear that the inquiry was initiated only because of what they had themselves observed on the night in question".[91] The Court distinguished *Stollery* and *Dickason* on that basis.

58. The position of Ms Hughes is far removed from that of Mr Smith in *Stollery*. In particular:

a. Ms Hughes was not personally involved in the events that formed the subject matter of either the criminal charges or the panel hearing.[92] She was not, for example, a victim of any of the relevant attacks by the dog Izzy. She was not even a witness to those attacks. Her involvement was solely as part of her professional responsibilities.

b. While Ms Hughes was the informant in proceedings in the Magistrates' Court, those proceedings relevantly concerned the involvement of the dog Izzy in an attack on 4 August 2012 that caused a serious injury. Ms Hughes did not appear to prosecute that matter. Further, the Appellant pleaded guilty to the relevant offence after being provided with statements from witnesses that clearly established the involvement of the dog Izzy. The proceedings in which Ms Hughes was an "accuser" therefore concerned a different issue to the issue under s 84P, and that proceeding had in any case been determined by the Appellant's plea of guilt and her subsequent conviction several weeks before the panel hearing took place.[93]

c. Ms Hughes could have been, but refrained from being, an accuser on the issue of whether the dog Izzy should be destroyed. She could have instructed the Council's legal representatives to seek an order from the Magistrates' Court for the destruction of the dog Izzy. No such order was sought notwithstanding the fact that the trial judge found that "it is clear that he [the Magistrate] would have made a destruction order if asked by

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90 [1977] 1 NSWLR 378, 387 Samuels JA (with whom Hutley JA relevantly agreed).

91 [1977] 1 NSWLR 378, 388.

92 Court of Appeal, [80].

93 Court of Appeal, [70].

the council to do so" and that the Magistrate "was very keen to make a destruction order".[94]

d. There was no evidence, and no finding, that Ms Hughes ever took the position that the dog Izzy should be destroyed. Further, the trial judge found that there "is nothing to suggest that Ms Hughes is a zealous destroyer of dogs".[95]

e. Ms Hughes gave instructions with respect to the criminal proceedings as a result of which a number of charges against the Appellant were withdrawn or downgraded. The trial judge found that "the plea bargain negotiated on instructions given by Ms Hughes was generous towards Izzy", which indicated that Ms Hughes did not have any predisposition towards the destruction of Izzy.[96]

f. The trial judge found that "on the evidence before me, Ms Hughes did no more than to diligently carry out her responsibilities as the Local Laws Co-Ordinator, which involved managing the Magistrates' Court prosecutions on behalf of the Council."[97]

g. In light of the above, there was no logical basis to infer from the fact that Ms Hughes was the informant in a charge alleging the involvement of the dog Izzy in the attack on 4 August 2012 that Ms Hughes was an "accuser" on the quite separate question whether the dog Izzy should be destroyed.

59. In light of the matters identified above, the trial judge and the Court of Appeal were correct to regard *Stollery* as distinguishable.[98] Ms Hughes was not in any meaningful sense a judge in her own cause. She was not shown to have any personal interest in, or "cause" to advance with respect to, the fate of the dog Izzy.

Conflict of interest

60. The Appellant contends that the decision of the delegate was vitiated by apprehended bias because of a "conflict of interest". She submits (AS [39]) that once a conflict of interest is established, no further inquiry is necessary, and the affected person is "automatically prohibited from being a decision-maker". She

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94 Trial judge, [74].
95 Trial judge, [76].
96 Trial judge, [114].
97 Trial judge, [115].
98 Court of Appeal, [76]-[80]; Trial judge, [112].

then seeks to deal with the obvious inconsistency of that submission with *Ebner* by contending that *Ebner* is not relevant to apprehended bias by way of conflict of interest because it is "confined to a consideration of apprehended bias of a pre-judgment kind" (AS [41]).

61. That submission is plainly wrong. *Ebner* cannot be "confined to apprehended bias of a prejudgment kind" because it was not a prejudgment case. It was, in fact, a conflict of interest case, as in both *Ebner* and *Clenae* (which was heard and decided together with *Ebner*) the claim of apprehended bias was based on an asserted conflict of interest arising from the fact that the relevant judges either directly (in *Clenae*) or indirectly (in *Ebner*) held shares in a party to the litigation that was before them. It was in that context that this Court rejected any automatic disqualification principle.

62. Following *Ebner*, it is clear that, even in the stricter context of judicial decision-making, the existence of an "interest" (a protean concept[99]) will not necessarily result in a reasonable apprehension of bias. Instead, Gleeson CJ, McHugh, Gummow and Hayne JJ explained that it is necessary to undertake a two step analysis:[100]

    a. The first step "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".

    b. The second step requires "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits."

63. It is only if both steps can be taken that a conflict of interest is "established", such that disqualification follows almost as a matter of course.[101]

64. In *Ebner*, Gleeson CJ, McHugh, Gummow and Hayne JJ explained that:[102]

> 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.

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99 *Ebner*, 349 [25].

100 *Ebner*, 345 [8].

101 See *McGovern*, [26], [44]. The "almost" is necessary to accommodate considerations of waiver or necessity.

102 *Ebner*, 345 [8].

That observation is apposite in this case, because the Appellant attempts to establish that Ms Hughes had a conflict of interest simply by pointing to a number of disparate facts concerning her involvement with respect to the Council's response to the attacks involving the dog Izzy, without explaining any logical basis upon which those disparate facts would give Ms Hughes an "interest" that might lead her not to be impartial.

65. In order to establish apprehended bias, it is not enough that an administrative decision-maker has some prior involvement with a party or issue.[103] The trial judge's finding of fact was that "Ms Hughes did no more than to diligently carry out her responsibilities as the Local Laws Co-Ordinator".[104] When that finding is taken together with the finding that there "is nothing to suggest that Ms Hughes is a zealous destroyer of dogs",[105] and the absence of any evidence that Ms Hughes thought that the dog Izzy should be destroyed (let alone that she actively pursued that outcome[106]), there is simply nothing to suggest that Ms Hughes approached this matter other than on its legal and factual merits. Ms Hughes' position is no different from that of many other administrators who in the discharge of their professional responsibilities perform functions in support of decision-making by others (such as departmental officers preparing submissions to Ministers). The trial judge and the Court of Appeal were therefore correct to conclude that Ms Hughes did not have an "interest" in the decision that was to be made concerning the dog Izzy of a kind that would satisfy the first step in *Ebner*.[107]

66. Alternatively, even if Ms Hughes did have an interest in the decision under s 84P, the Appellant should fail at the second step identified in *Ebner*, because there would be no logical connection between that interest and the possibility of departure from impartial decision-making.

67. A distinction must be drawn between a decision-maker and a person who is involved in the decision-making process, but who is not the decision-maker.[108] A fair-minded observer would not apprehend that a decision possibly involved bias if there was no basis to apprehend bias by the actual decision-maker, simply

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103 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 90.

104 Trial judge, [115].

105 Trial judge, [76].

106 Court of Appeal, [75].

107 Trial judge, [113]; Court of Appeal, [73]

108 *Hot Holdings* at 444 [8], 445 [12], 446 [16], 447 [20] (Gleeson CJ), 455 [50 (Gaudron, Gummow and Hayne JJ), 461 [74] (McHugh J); *McGovern* at [166] - [183].

because another officer of the Council – being a person who was not exercising the delegated power of the Council (and who was junior to the actual decision-maker) – had an interest in the decision to be made by the Council.

68. It is important to recall that the decision that is challenged in this proceeding was not made by Ms Hughes. Nor was it made by the "panel" of which Ms Hughes was a member.[109] The trial judge found that the decision was made by Mr Kourambas.[110] The Appellant can succeed only if a fair-minded and informed person might reasonably apprehend that Mr Kourambas might not have brought an impartial mind to bear on the decision. The Appellant has not identified any mechanism by which a fair-minded and informed person might reach that conclusion, whatever such an observer might have apprehended about Ms Hughes.

PART VII TIME ESTIMATE FOR THE RESPONDENT'S ORAL ARGUMENT

69. The estimated duration of the presentation of the respondent's oral argument is 1.5 hours.

Dated: 24 March 2015

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109 Cf AS [44].

110 Trial judge, [104]-[105]. The Court of Appeal did not disagree with that finding, although it did not rely upon it in making its decision: Court of Appeal, [65], [68].

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M19 of 2015

BETWEEN:

TANIA ISBESTER
Appellant

and

KNOX CITY COUNCIL
Respondent

ANNEXURE TO RESPONDENT'S SUBMISSIONS

Domestic Animals Act 1994 (Vic.) (electronic compilation, version 60)

81 Seizure of dog urged or trained to attack of having attacked

(1) An authorised officer of a Council may seize a dog that is in the municipal district of that Council if—

(a) the owner has been found guilty of an offence under section 28 or 28A with respect to that dog; or

(b) the authorised officer reasonably suspects that the owner has committed an offence under section 28 or 28A with respect to that dog.

(2) An authorised officer of a Council may seize a dog that is in the municipal district of that Council if—

(a) a person has been found guilty of an offence under section 29 with respect to that dog; or

(b) the authorised officer reasonably suspects that a person has committed an offence under section 29 with respect to that dog.

92 Power to file charge-sheets under this Act

A charge-sheet charging an offence under this Act or under the regulations made under this Act, may only be filed by—

(a) a member of the police force; or

(b) an authorised officer appointed under section 71, 71A or 72.

Dated: 24 March 2015

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