HOT HOLDINGS PTY LTD V CREASY: COMMENT

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Hot Holdings v Creasy[1] gives rise to two broad and important questions:

1. What are the implications, if any, for public service Codes of Conduct – an issue dealt with by Mr Podger, and to which I will return; and

2. What are the broader implications in terms of public sector decision-making – a question I wish to discuss. When will a decision be invalidated when the conduct or interests of a person involved in the decision-making process, but not the actual decision-maker him or herself, might be said to give rise to a reasonable apprehension of bias. This in a nutshell was the question before the High Court in *Hot Holdings*.

The facts

On 15 October 1992 certain lands in Western Australia were released for mining or exploration, and a number of applications for mining leases and exploration licences in relation to those lands were lodged within minutes of each other. The applications were considered by the Mining Warden and the Warden decided a ballot should be held to determine which of them had priority under the Western Australia *Mining Act 1978* (the Act). After various legal challenges, including an appeal to the High Court, a ballot was conducted in December 1997.

Hot Holdings was the first applicant drawn, the second was Mark Creasy. In January 1998 the Mining Warden reported to the WA Minister for Mines, whose decision it was to grant an application under the Act. The Warden recommended that Hot Holdings have priority to the other applicants. After receiving submissions from the applicants and advice from the Department of Minerals and Energy, the Minister decided to grant Hot Holdings' application.

Mr Creasy and other unsuccessful applicants challenged that decision on various grounds. Only one need concern us – that is the allegation of reasonable apprehension of bias.

To understand that allegation it is necessary to consider the advice the Minister received from his Department. The Department's advice was contained in a Minute from the Director-General dated 30 June 1998. In short the advice was that there was no reason for departing from the Mining Warden's recommendation that Hot Holdings have priority. The Minute was signed by the Director-General, Mr Ranford. It contained the initials of Mr Miasi, Mr Burton, Mr Phillips and Mr Hicks.

Mr Burton was the General Manager, Policy and Legislation, of the Mineral Titles Division of the Department. Mr Miasi was the Manager of the Tenure Branch of the Department.

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Heenan J, at first instance, said that Mr Miasi 'was a substantial shareholder in Audax Resources NL, a company which in November 1993 entered into an option agreement to purchase the exploration licence in question from Hot Holdings.'[2] Mr Miasi's shareholding was not disclosed to the Minister. Mr Phillips was the Director of the Mineral Titles Division. His adult, and independent son, had purchased shares in Audax Resources NL in 1996. Mr Phillips became aware of this in 1998. The Minister was unaware of the interest held by Mr Phillips' son. Mr Hicks was an officer of the Mineral Titles Division. It seems he did not have any shares in Audax.

The Minute was prepared after a meeting between Mr Burton and Mr Phillips. Present at that meeting was Mr Miasi. Mr Burton and Mr Phillips concluded that the Minute should support the warden's recommendation. On the evidence before the Court, Mr Miasi played no role in that decision. He was, however, made responsible for preparing a draft Minute to that effect, which he did. Sometime after the meeting, Mr Miasi gave his draft to Mr Hicks and arranged for Mr Hicks to prepare the Minute. Mr Miasi played no further role in the preparation of the Minute. Mr Hicks prepared a draft Minute in consultation with Mr Burton and in May 1998 he gave the draft Minute to Mr Burton. Mr Burton had carriage of the Minute from that time on.

Mr Creasy contended that because of the pecuniary interest of Mr Miasi in the success of the Hot Holdings application he had been denied procedural fairness. This was rejected at first instance. This decision was reversed on appeal by the West Australian Court of Appeal.

Sheller AJ (with whom Wallwork and Steytler JJ agreed) said:

> In my opinion the holding by an officer in the Department who had taken part, albeit at the periphery, in the giving of advice to grant an exploration licence on which advice the Minister acted, of an undisclosed share interest in a company with a direct interest in the grant of the exploration licence must give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the Minister, acting on or taking account of such advice, which he believed was impartial, but which could fairly be suspected was not, had himself for this reason not acted impartially.
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> Mr Miasi's non-disclosure of his share holding and the interest of Mr Phillips' son, also undisclosed, strengthen the suspicion.'[3]

Further:

> The Minister's decision is infected, even though he acted unwittingly on this tainted advice. The fair minded and informed member of the public must be taken to know that the Minister's decision was likely to have been influenced by the Director-General's minute in the preparation of which one person with a direct pecuniary interest and another, whose son had a direct pecuniary interest, had taken part. In my opinion, those circumstances give rise to a reasonable apprehension or suspicion on the part of that member of the public that the Minister's decision was not an impartial one. All this falls under the umbrella of a reasonable apprehension of bias.4

Hot Holdings appealed to the High Court.

The High Court's decision

The High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) allowed the appeal. Kirby J dissented.

Gleeson CJ

Gleeson CJ said that the Minister had a duty to act according to the dictates of procedural fairness. 'One of the incidents of that duty was "the absence of the actuality or the appearance of disqualifying bias."'[5] But where it is said that the unfairness arises from the

conduct of a person other than the decision-maker, 'then the part played by that other person in relation to the decision will be important.'[6]

Mr Miasi 'made no significant contribution to the Minister's decision. That is a sufficient reason for concluding that his financial interest did not deprive the Minister's decision of the appearance of impartiality.'[7] Putting it another way, no person with a personal financial interest in the outcome of the matter participated in any significant way in the making of the decision.

Gleeson CJ said it was unnecessary to consider in what circumstances an administrative decision may be impugned upon the ground that a person, other than the decision-maker, but involved in the decision-making process, had a personal interest in the outcome of the process. It is not sufficient, his Honour said, to answer this question by 'reference to the ethical standards of public servants.'

Further:

> The possibility that Mr Miasi's conduct may have been improper does not necessarily lead to a conclusion that the Minister's decision was invalid. It might expose him to disciplinary action, but the question is whether it exposes the appellant to the loss of its licence.[8]

Gaudron, Gummow and Hayne JJ

Gaudron, Gummow and Hayne JJ delivered a joint judgment. Their Honours said that all Mr Miasi did was to 'prepare a document reflecting a decision made by others. That being so, it could not be said that a fair-minded and informed member of the public, who knew what Mr Miasi had done, could fairly suspect that the content of the minute was influenced, or affected in any way, by Mr Miasi or the interest which he had in AuDAX.'[9]

On that basis alone, their Honours, said the appeal should be upheld.

McHugh J

McHugh J said that the peripheral nature of the roles of Mr Miasi and Mr Phillips was decisive.[10] His Honour said:

> A court will not conclude that there was a reasonable apprehension of bias merely because a person with an interest in the decision played a part in advising the decision-maker. The focus must be on the nature of the adviser's interest, the part that person played in the decision-making process and the degree of independence observed by the decision-maker in making the decision. If there is a real and not a remote possibility that a Minister has not brought an independent mind to making his or her decision, the role and interest in the outcome of his or her officers may result in a finding of reasonable apprehension of bias.[11]

Further his Honour said: 'It is erroneous to suppose that a decision is automatically infected with an apprehension of bias because of the pecuniary or other interest of a person associated with the decision-maker. Each case must turn on its own facts and circumstances.'[12]

Kirby J

Kirby J delivered a strong dissent. His judgment has been discussed by Mr Podger. Briefly, his Honour said, on the facts in this case, 'the appearance of integrity has been undermined, whatever may have been the actuality. That is enough to require that the process be performed again, excising the participation of officials who had known but undeclared personal interests.'[13]

And, further:

> Financial probity, and the absence of undeclared pecuniary self-interest, or undeclared but known interests of close family members, are not only attributes of sound public administration. They lie at its heart. This Court should reinforce them. It should not sanction practices that have a tendance to undermine their strict observance.[14]

Comment

It seems to me that what the Court has done is open the door to further litigation to test the bounds of when it might be said that an adviser has played a significant role in the preparation of the advice to the ultimate decision-maker. Further litigation will be needed to clarify the boundaries of what may constitute a significant interest in the decision. When can it be said that an adviser's role is merely peripheral? When is it sufficiently central? What this means, it seems to me, is that even greater attention will be paid to the conduct and interests of public servants in an attempt to establish in the courts that a particular adviser played a significant and not a peripheral role in the decision making process, and thereby invalidating the ultimate decision. Is this an effective use of resources – both public and private? I doubt it. As Kirby J said:

> The question is not one of fine analysis. Instead, it is whether, looking at this decision by the Minister, and the participation in the steps that led to it of the two senior officials of his Department, a reasonable member of the public *might* conclude that there is a *possibility* that the decision could have been affected by the earlier participation in it of officers who, personally or through their intermediate families, had undisclosed interests of which they were aware and these interests would be advanced if the Minister accepted the departmental recommendation.[15]

Finally a brief comment on the decision and its possible impact on public sector Codes of Conduct. What effect do public sector Codes of Conduct have? Are they working? Surely if senior public servants do not feel the need to comply with the Codes of Conduct, should not the public have the right to ask whether Codes of Conduct are effectual in maintaining public sector integrity or whether they are mere window-dressing or rhetoric.

More importantly, it is of little comfort to the parties denied the licence to say that the public servants concerned may be subject to disciplinary action. If the Legislature is serious about Codes of Conduct, if a breach of the Code is so grave as to lead to disciplinary action, it should surely also lead to the invalidation of the ultimate decision.

Endnotes

1 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70; 193 ALR 90.
2 *Creasy v Hot Holdings* [1999] WASC69 (23 June 1999) at [17].
3 *Creasy v Hot Holdings Pty Ltd* [2000] WASC 206 (4 August 2000) at [91]-[92].
4 Ibid, at [93].
5 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70 at 73 ([21])
6 Ibid at 73-74 ([22]).
7 Ibid at 74 ([24])
8 Ibid at 73 ([20]).
9 Ibid at 77 ([47]).
10 Ibid at 81 ([72])
11 Ibid at 81 ([72].
12 Ibid at 82 ([74]).
13 Ibid at 95 ([146]).
14 Ibid at ([156]).
15 Ibid at 93 ([132]).