# BRITISH AMERICAN TOBACCO AUSTRALIA SERVICES LIMITED V LAURIE (2011) - APPLYING THE APPREHENDED BIAS RULE

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This article provides a critical analysis of the recent High Court decision in *British American Tobacco Australia Services Limited v Laurie* (2011). It considers the application of the apprehended bias rule in the context of the case.

## I INTRODUCTION

In *British American Tobacco Australia Services Limited v Laurie*[1] (*BATAS v Laurie*) the High Court overturned a 2:1 majority decision of the New South Wales Court of Appeal. The High Court held that a reasonable fair-minded lay observer would have cause to apprehend that Curtis J would bring with him a biased mind to further matters of the Laurie proceedings.[2] The apprehended bias

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1 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 282.

2 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 282 [145] (Heydon, Kiefel and Bell JJ).

rule is the key legal argument considered in *BATAS v Laurie*. *BATAS v Laurie* is of legal significance as it further strengthens and binds the established legal principle of the apprehended bias rule, and has subsequently been applied to a number of recent cases.[3] In *BATAS v Laurie*, the court agreed on the formulation of the apprehended bias rule, but there was disagreement of the court about the level of knowledge of the hypothetical fair-minded lay observer. It is important to consider the disagreement of the court along with the bare majority[4] decision, because it suggests that in future High Court decisions concerning the apprehended bias rule, the legal principle might be departed from.

## II THE APPREHENDED BIAS RULE

The apprehended bias rule is well recognised in Australian legal jurisdictions.[5] The apprehended bias rule applies to the courts, tribunals and other administrators.[6] It has been considered in a number of past cases,[7] and most recently in *BATAS v Laurie*. The apprehended bias rule places the emphasis on the objective, reasonable fair-minded lay person.[8] The test considers whether the hypothetical person, who has been well informed of the background

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3 *Maher v Adult Guardian* [2011] QCA 225; *Rowell v Keogh* [2011] FamCAFC 74; *Iphostrou v Iphostrou (No 4)* [2011] FamCA 220.

4 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 282 [145] (Heydon, Kiefel and Bell JJ, French CJ and Gummow J dissenting).

5 John Griffiths 'Apprehended Bias in Australian Administrative Law' (2010) 38 *Federal Law Review* 354, 354.

6 Margaret Allars 'Procedural Fairness: Disqualification Required by the Bias Rule' (1999) 4 *The Judicial Review* 269, 298; see also *Secretary, Department of Social Security v Jordan* (1998) 83 FCR 34, 46 (Hill J); *Minister for Immigration, Local Government and Ethnic Affairs v Mok* (1994) 55 FCR 375, 397 (Sheppard J).

7 *Johnson v Johnson* (2000) 201 CLR 488 [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Webb v R* (1994) 181 CLR 41 [67] (Deane J); *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 [294] (Mason, Murphy, Brennan, Deane and Dawson JJ); *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ), 575 (Dawson J).

8 Chris Finn 'Ruling on Bias (Part II)' (2002) 24 *Law Society of South Australia* 34, 34.

of the case, might apprehend that a judge might not bring with them an unbiased mind. The apprehended bias rule is concerned with the removal of conflict of interest on behalf of the judge or decision maker,[9] and requires the judge or decision maker to bring with them an unbiased mind, and to consider cases without prejudice.[10]

Key concerns of the apprehended bias rule are that justice is done, and is seen by the public to be done.[11] The apprehended bias rule is perceived as crucial in order to maintain the public's confidence in the independence of the courts.[12] As established in *Ebner v Official Trustee in Bankruptcy*, of key concern is that decision makers are, and are perceived by the public to be, independent and unbiased in their decision-making.[13] The apprehended bias rule therefore, is focused on the possibility, rather than the probability that a decision maker might not bring with them an unbiased mind to the case.[14]

It should be noted that simply because a party involved in a proceeding suggests an apprehension of bias exists, this does not automatically mean that there is a reasonable apprehension of bias. In *R v Simpson; Ex parte Morrison*[15] the court held that judges should not automatically cease hearing a case because the apprehended bias rule has been evoked. In *Raybos Australia Pty Ltd*

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9 Allars, above n 6, 298.

10 Griffiths, above n 5, 354; Sally Sheppard, Apprehended Bias outside the Courtroom (Paper presented at the Commercial Court Seminar, 17 August 2011), http://www.commercialcourt.com.au/PDF/Publications/Sally%Sheppard_Commercial%20Court%20Seminar_Aug%202011_Speaking%20Notes.pdf.

11 Chris Finn 'Ruling on Bias' (2002) 24 *Law Society of South Australia* 33, 33; Fyfe Strachan 'Keeping up Appearances: Apprehended Bias in *Antoun v The Queen'* (2007) 29 *Sydney Law Review* 175, 176; see *The King v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).

12 Margaret Allars 'Citizenship Theory and the Public Confidence Rationale for the Bias Rule' (2001) 18 *Law in Context* 12.

13 *Ebner v Official Trustee in Bankruptcy* (2000) 63 ALD 577 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

14 *Ebner v Official Trustee in Bankruptcy* (2000) 63 ALD 577 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

15 *R v Simpson; Ex parte Morrison* (1983) 154 CLR 101, 104 (Gibbs CJ).

*v Tectran Corp Pty Ltd*[16] the court held that the subjective element of the apprehension of bias rule is inadequate to satisfy the court of a reasonable apprehension of bias. Therefore, the apprehension of bias must be 'firmly established',[17] through an objective test. The apprehended bias test is intended to be an objective test, in order to accurately determine whether there exists a reasonable apprehension of bias.[18] The objective application of the apprehended bias rule must also establish the reasonable apprehension of bias throughout the entirety of the trial.[19] In situations where apprehended bias is raised, most often the decision will be perceived as invalid, and the case will be recommenced.[20]

The reasonable apprehension of bias does not always need to be raised in circumstances where tribunal members provide provisional perspectives on an issue prior to the final decision being made.[21] It has been noted that only in unusual circumstances a decision maker's expression of an early opinion on an issue will result in their disqualification from the trial.[22] It has also been suggested that the timing in which the party involved in a proceeding raises the apprehended bias rule is important. A party involved in a proceeding should raise the apprehension of bias against a trial judge at the earliest opportunity, so as to allow the judge to consider the allegation and provide feedback.[23]

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16 *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd* (1986) 6 NSWLR 272, 272 (Hope, Glass, Priestley JJA).

17 See *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553-554 (Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer, Owen JJ).

18 Allars above n 6, 277; see *S & M Repairs and Others v Caltex Oil (Australia) Pty Ltd and Another* (1988) 91 FLR 175, 177 (Kirby J).

19 Allars above n 6, 284.

20 Sheppard, above n 10.

21 Allars above n 6, 292; see also *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 18 ALD 230, 231 (Morling J); *R v Lusink; Ex parte Shaw* (1980)32 ALR 47, 53 (Murphy J).

22 Allars, above n 6, 292; see *Kaycliff Pty Ltd v Australian Broadcasting Tribunal and Another* (1989) 18 ALD 782, 783 (Lockhart, Pincus, Gummow JJ).

23 Allars, above n 6, 280; see also *In the Marriage of Murphy and Armstrong* (1978) 35 FLR 482, 488 (Watson, Ellis SJJ, Joske J); see also *Wentworth v Rogers (No.12)* (1987) 9 NSWLR 40, 422 (Kirby P, Hope, Priestley JJA).

The apprehended bias rule can present challenges particularly to tribunals where there are limited members, and the tribunal members have existing knowledge on issues and cases.[24] In these situations it would be impractical to apply the apprehended bias rule too liberally. Suggestions have also been made that some litigants may misuse the apprehended bias rule, by suggesting bias where there is not a reasonable ground for such a suggestion.[25] Key commentators have also noted that the apprehended bias rule creates challenges for the judicial system, which might result in the slowing of court efficiency.[26]

Despite the emphasis on the objective elements, the apprehended bias test is not necessarily an easy one to apply.[27] The apprehended bias rule creates challenges when applied to the law,[28] because of the differences in judicial interpretation of the hypothetical fair-minded lay observer.[29] In *BATAS v Laurie*, French CJ[30] reflects on the comments of Aickin, J who states that the apprehended bias rule 'strike[s] different minds in different ways'.[31] The subjective elements of the apprehended bias rule arise when the individual judges and decision makers consider the characteristics of the hypothetical fair-minded lay observer. Indeed, in *BATAS v Laurie* the subjective elements of the apprehended bias rule created disagreement among the court. This will be discussed in the remaining sections of this article.

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[24] See for discussion Allars, 'Procedural Fairness', above n 6, 291; see also *Re Polites; Ex parte Hoyts Corp Pty Ltd* (1991) 100 ALR 643, 640 (Brennan, Gaudron, McHugh JJ).

[25] Griffiths, above n 5, 354.

[26] For further discussion see Strachan, above n 11, 182.

[27] Allars, above n 6, 277.

[28] Griffiths, above n 5, 354.

[29] Griffiths, above n 5, 358; Michael Wheelahan, Apprehended Bias After British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283 (Paper presented at the Commercial Court Seminar, 17 August 2011) http://www.commercialcourt.com.au/PDF/Publications/Michael%Wheelahan%20SC_Commercial%20Court%20Seminar_UG%202011_Apprehended%20Bias.pdf.

[30] *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [3] (French CJ).

[31] *Re Lusink; Ex parte Shaw* [1980] 32 ALR 47 [54] (Aickin J).

# III BATAS v LAURIE PROCEDURAL HISTORY

In 2006, Donald Henry Laurie commenced action in the Dust Diseases Tribunal of New South Wales against Amaca Pty Ltd, the Commonwealth of Australia and British American Tobacco Australia Services Pty Ltd (BATAS). Following the death of Mr Laurie, his widow continued the legal action on his behalf. Mrs Laurie also took action in her own right, alleging that each defendant was liable for Mr Laurie developing lung cancer.[32] With regard to BATAS, Mrs Laurie alleged that BATAS had a company policy of destroying sensitive documents that might be prejudicial to their legal interests. She asked the tribunal to consider the allegation that BATAS destroyed these sensitive documents. Curtis J was allocated to the pre-trial management and to preside over the trial. Curtis J conducted a number of hearings and took evidence from Mr Laurie, prior to his death.[33]

Curtis J had also presided over an unrelated interlocutory proceeding commenced by the widow of Mr Mowbray against his former employer Brambles Australia Ltd (Brambles).[34] Mowbray claimed that her husband had developed lung cancer as a result of being exposed to asbestos while undertaking his work as employee of Brambles. During the interlocutory hearing, Brambles made a cross claim against BATAS (regarding the deceased having smoked BATAS products). Curtis J sought discovery from BATAS in November 2002,[35] then further discovery in May 2006.[36] During the further discovery process, Gulson a former Company Secretary and solicitor for BATAS, gave evidence. Initially Curtis J said that the statements made by Gulson were on initial appearances covered by

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[32] *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283, 284.

[33] *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [4] (French CJ).

[34] *Brambles Australia Ltd v British American Tobacco Australia Services Ltd* (2006) NSWDDT 15.

[35] *Brambles Australia Ltd v British American Tobacco Australia Services Ltd* (2006) NSWDDT 15 [7].

[36] *Brambles Australia Ltd v British American Tobacco Australia Services Ltd* (2006) NSWDDT 15 [14].

lawyer-client privilege. However, Brambles argued that Gulson's statement could be submitted as evidence according to section 125 (1)(a) of the *Evidence Act 1995* (NSW), that evidence could be cited which had been created in the furtherance of the commission of a fraud. In his statement Gulson alerted the tribunal to the Document Retention Policy used by BATAS, in which selective documents prejudicial to BATAS were destroyed.[37] In his interlocutory findings, Curtis J determined that BATAS had created a document retention policy for the purposes of fraud. However, Curtis J also acknowledged that Gulson's testimony had not been cross-examined, and that the issue of BATAS's selective document destruction remained an issue for the trial.[38]

In 2009, BATAS requested that Curtis J remove himself from further proceedings of the Laurie case, upon the basis of the apprehended bias rule. BATAS asserted that the reasonable observer would apprehend that Curtis J would be unable to remain unbiased in any proceedings involving BATAS, following his findings during the interlocutory proceedings in the Mowbray case. Curtis J dismissed the request.[39]

BATAS then applied to the New South Wales Court of Appeal to appeal Curtis J's decision according to section 32(4)(a) of the *Dust Diseases Tribunal Act 1989* (NSW). BATAS also appealed Curtis J's decision to not remove himself from the Laurie proceedings. In a 2-1 majority,[40] the Court of Appeal refused both the appeals on the basis that the fair-minded lay observer would not apprehend that Curtis J would be biased. BATAS then appealed to the High Court of Australia, French CJ, Hayne and Bell JJ granting leave for the appeal on 28 May 2010. Therefore, the key legal argument

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37 *Brambles Australia Ltd v British American Tobacco Australia Services Ltd* (2006) NSWDDT 15 [19].

38 *Brambles Australia Ltd v British American Tobacco Australia Services Ltd* (2006) NSWDDT 15 [81].

39 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283, 285.

40 *British American Tobacco Australia Services Ltd v Laurie* (2009) NSWCA 414 [117] (Tobias JA), [150] (Basten JA), [14] (Allsop P dissenting).

considered is whether the reasonable apprehension of bias rule should disqualify Curtis J from deciding on the Laurie proceedings.

## IV THE APPREHENDED BIAS RULE APPLIED TO BATAS v LAURIE

In *BATAS v Laurie,* BATAS raised the apprehended bias rule, and requested that Curtis J remove himself from further proceedings of the Laurie case. BATAS asserted that the reasonable fair-minded lay observer would apprehend that Curtis J would be unable to remain unbiased in proceedings involving BATAS, following his adverse findings against BATAS during the interlocutory proceedings in the Mowbray case. In *BATAS v Laurie* the court agreed that the key issue was of prejudgment, and that judges must not preside over cases in circumstances where the hypothetical observer would apprehend the judge is unable to bring with them an unbiased mind.[41]

The High Court[42] accepted the apprehended bias test as determined in *Livesey v NSW Bar Association,*[43] *Johnson v Johnson,*[44] and *Ebner v Official Trustee in Bankruptcy.*[45] The court agreed with the definition of the apprehended bias rule. French CJ engaged in a lengthy discussion of the apprehended bias rule, including the importance of maintaining the public's perception of the courts independence.[46] However, there was disagreement among the court as to the interpretation of the hypothetical fair-minded lay person, with regard to their level of knowledge of the issues.

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41 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [104] (Heydon, Kiefel and Bell JJ), [43] (French CJ), [78]-[84] (Gummow J).

42 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [104] (Heydon, Kiefel and Bell JJ).

43 *Livesey Respondent, Appellant; and The New South Wales Bar Association Applicant, Respondent* (1983) 151 CLR 288.

44 *Johnson v Johnson* (2000) 201 CLR 488.

45 *Ebner v Official Trustee in Bankruptcy* (2000) 63 ALD 577.

46 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [32]-[48] (French CJ).

French CJ stated that the hypothetical fair-minded lay observer would inform themselves about the background of the case and any issues prior to raising apprehended bias.[47] In contrast, the majority[48] and Gummow J[49] stated that the knowledge of the hypothetical fair-minded lay observer would depend upon the circumstances of each case. The court agreed that the hypothetical fair-minded lay observer would take into consideration later comments made by a judge as providing an insight into their mindset on an issue, which would be taken into account when considering prejudgment.[50] Nevertheless, there was disagreement regarding whether in the current circumstances the hypothetical fair-minded lay observer would have read the statements made by Curtis J with regard to the disqualification motion.

French CJ and the majority stated that the court should not presume that the hypothetical fair-minded lay observer would have considered the disqualification judgment.[51] In contrast, Gummow J believed that the court should assume that the hypothetical fair-minded lay observer would have benefited from reading the statement.[52] Indeed, the situation that arose in *BATAS v Laurie* reinforces the suggestion that as there will always be differences in judicial opinions regarding the hypothetical layperson, the apprehended bias rule will continue to present challenges to the court.

In applying the apprehended bias rule Heydon, Kiefel and Bell JJ

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47 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [47] (French CJ).

48 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [133] (Heydon, Kiefel and Bell JJ).

49 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [70] (Gummow J).

50 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [137] (Heydon, Kiefel and Bell JJ), [52] (French CJ), [70] (Gummow J).

51 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [138] (Heydon, Kiefel and Bell JJ), [52] (French CJ).

52 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [97] (Gummow J).

concluded that the findings of Curtis J in the interlocutory hearing were expressed in such a way to indicate 'extreme scepticism' towards BATAS, creating the impression to the hypothetical layperson that Curtis J would be unable to bring with him an unbiased mind to further proceedings involving BATAS.[53] In their judgment, Heydon, Kiefel and Bell JJ[54] agreed with Allsop P[55] of the New South Wales Court of Appeal about the hypothetical fair-minded lay observer having reason to apprehend that Curtis J was unable to bring with him an unbiased mind to further proceedings involving BATAS because of the decisions made during the interlocutory proceedings. The majority concluded that the apprehended bias rule when applied to the fact situation presented to the court satisfied the reasonable apprehension of bias test.

In the dissenting judgments, French CJ[56] and Gummow J[57] applied the apprehended bias rule and concluded that the fair-minded lay person would not apprehend that Curtis J would bring with him a biased mind to the further proceedings. French CJ noted that Curtis J had acknowledged that his findings in the interlocutory proceedings had been made upon the evidence presented to him, and also acknowledged that at the trial a different conclusion might be reached.[58] Gummow J also noted that Curtis J acknowledged that at the trial a different conclusion might be reached.[59]

French CJ stated that the hypothetical fair-minded lay person

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53 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [145] (Heydon, Kiefel and Bell JJ).

54 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [145] (Heydon, Kiefel and Bell JJ).

55 *British American Tobacco Australia Services Ltd v Laurie* (2009) NSWCA 414 [13] (Allsop P).

56 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [3] (French CJ).

57 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [98] (Gummow J).

58 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [3] (French CJ).

59 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [101] (Gummow J).

would not have reason to apprehend that Curtis J would be biased towards BATAS in a separate proceeding which would be taking place a number of years later.[60] However, the majority of the court acknowledged the 'unusual' circumstances in *BATAS v Laurie* had created a situation where a reasonable fair-minded lay observer would have reason to raise the apprehension of bias on behalf of Curtis J even in the event that different evidence were presented at the trial.[61] In this decision, the majority distinguished *Johnson v Johnson,*[62] in which the court in that case held that the judge's statement did not create the apprehension of bias. Interestingly, in his dissenting remarks Gummow J made it expressly clear that BATAS was incorrect in raising the apprehension of bias rule, as it was not applicable in the circumstances of the case.[63] It could be suggested that BATAS misused the apprehended bias rule because of fear of adverse findings against the company.

Evidently, in *BATAS v Laurie* there was agreement among the court regarding the formulation of the apprehended bias rule. However, there was disagreement about the interpretation of the hypothetical fair-minded lay person, and the degree of knowledge that the hypothetical person would have about the case. *BATAS v Laurie* demonstrates the challenges that the subjective elements of the apprehended bias rule presents to the judicial system. Nevertheless, the High Court decision in *BATAS v Laurie* further strengthens and binds the established legal principle of the apprehended bias rule.

The decision in *BATAS v Laurie* has since been applied to *Maher v Adult Guardian, Rowell v Keogh* and *Iphostrou v Iphostrou (No*

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60 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [3] (French CJ).

61 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [145] (Heydon, Kiefel and Bell JJ).

62 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [145] (Heydon, Kiefel and Bell JJ); cf *Johnson v Johnson* (2000) 201 CLR 488, 488.

63 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283 [101] (Gummow J).

*4).*[64] However, it should be noted that *Iphostrou v Iphostrou (No 2)*[65]distinguished *BATAS v Laurie.* In *Iphostrou v Iphostrou (No 2)* Cronin J discussed the fact that in *BATAS v Laurie* the majority had described the circumstances as 'most unusual', and upon that basis the decision in *BATAS v Laurie* was distinguishable because the current case did not have unusual circumstances.[66] Instead Cronin J applied the principles of *Johnson v Johnson,*[67] and *Ebner v Official Trustee in Bankruptcy.*[68] Nevertheless, it should be stressed that Iphostrou *v Iphostrou (No 4)* applied the legal principle established in *BATAS v Laurie.*

# V CONCLUSION

The apprehended bias rule is the key legal argument considered in *BATAS v Laurie*. In *BATAS v Laurie,* the court agreed upon the formulation of the apprehended bias rule, but there was disagreement of the court about the level of knowledge of the hypothetical fair-minded lay observer. As discussed, *BATAS v Laurie* demonstrates the challenges that the subjective elements of the apprehended bias rule presents to the judicial system. It is important to consider the disagreement of the court along with the bare majority decision, because it suggests that in future High Court decisions concerning the apprehended bias rule, the legal principle might be departed from. Nevertheless, the decision of the High Court in *BATAS v Laurie* is important as it further strengthens and binds the apprehended bias rule and has since been applied to other cases.

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64 *Maher v Adult Guardian* [2011] QCA 225; *Rowell v Keogh* [2011] FamCAFC 74; *Iphostrou v Iphostrou (No 4)* [2011] FamCA 220.

65 *Iphostrou v Iphostrou&Ors (No 2)* [2011] FamCA 84.

66 *Iphostrou v Iphostrou&Ors (No 2)* [2011] FamCA 84 [13] (Cronin J).

67 *Johnson v Johnson* (2000) 201 CLR 488.

68 *Ebner v Official Trustee in Bankruptcy* (2000) 63 ALD 577.