IN THE MATTER OF APPLICATIONS BY THE LIBERAL PARTY OF AUSTRALIA AND THE NATIONAL PARTY TO CHALLENGE A DECISION OF A DELEGATE OF THE AUSTRALIAN ELECTORAL COMMISSION TO REGISTER THE NEW LIBERALS AS A POLITICAL PARTY

AN APPLICATION FOR THE RECUSAL OF MR TOM ROGERS FROM SITTING TO CONSIDER THOSE APPLICATIONS AS PART OF THE THREE-PERSON ELECTORAL COMMISSION

AND

AN APPLICATION TO HAVE CONSIDERATION OF THE SUBSTANTIVE MATTER ADJOURNED UNTIL A DECISION HAS BEEN MADE IN THE RECUSAL APPLICATION

INTRODUCTION

1. This is an application by The New Liberals (**the TNL application**) seeking the recusal of Mr Tom Rogers from the Three-Person Electoral Commission (**the Panel**) which is to be constituted to hear the applications (**the LNP applications**) of the Liberal Party of Australia and the National Party (**the LNP**) to have the decision of the delegate refusing their applications to prevent the registration of The New Liberals, overturned. The recusal is sought on the basis of reasonable apprehension of bias.
2. Mr Rogers was appointed to his current position of Australian Electoral Commissioner by the Abbott government in 2014 for a five-year term, which government was a coalition government consisting of the two parties which now seek to make the LNP applications. He was re-appointed by the Morrison Government in 2019 for a further five-year term, which government was a also a coalition government consisting of the two parties which now seek to make the LNP applications.[1]
3. As such, Mr Rogers owes his position and his livelihood to the parties which now seek to make the LNP applications. Furthermore, as his position is for fixed terms only, should the LNP still be in power in 2024, he will need a further appointment from them to remain in his position.
4. It is at the core of the LNP case that the continued existence of The New Liberals as a political party, will threaten their ability to stay in power. Thus, it is crucial to the LNP that Mr Rogers (as part of the Panel) finds in their favour. And it is crucial to Mr Rogers that he also finds in their favour so that they remain predisposed to re-appoint him, and so that they remain in power so that they are able to do so.
5. With respect, his position as a member of the Panel is therefore untenable.

[1] https://www.aec.gov.au/About_AEC/commissioner.htm

6. It is a fundamental of our system of administrative justice that justice should not only be done, but be seen to be done. Therefore, an administrative decision maker, like Mr Rogers, who holds office under the gift of the LNP, and whose continued office holding depends on the continuation of that gift, should not be seen to be deciding a matter in which the LNP is involved.
7. Indeed, impartiality and the confidence it engenders, are regarded as essential to the successful and proper operations of the public service.[2] It serves the values of treating the parties with equal respect and dignity, and enhancing the institutional legitimacy of government agencies.[3] It is an inhering requirement of the exercise of state power.[4]
8. It is important to make the distinction between the Commonwealth of Australia and the political party or parties which constitute the government of that Commonwealth. Mr Rogers was strictly appointed by the Commonwealth of Australia, but those within the Commonwealth responsible for the decision to make that appointment were members of the LNP.
9. If it were the Commonwealth itself which was the party opposing The New Liberals, then no objection could be made to Mr Rogers being able to hear the matter. The Commonwealth is an impersonal creature which has obligations to make administrative and judicial claims, but which has no personal interest, ipso facto, in the decisions made on those claims. By contrast the LNP is vitally interested in the outcome of these proceedings, a matter of which Mr Rogers is acutely aware.

THE LAW

10. The test for a reasonable apprehension of bias is satisfied if a fair minded and informed lay observer *might* conclude that the decision maker *might* not be impartial or approach the issue with an open mind.[5]
11. The question is one of possibility not probability.[6] Indeed it has often been said that the double 'might' in the formulation sets a low threshold.[7]
12. In circumstances where the LNP sees its vital interests as being threatened, and where the decision maker owes his livelihood to the LNP, that threshold is easily cleared. A fair minded and informed observer indeed *might* think that Mr Rogers *might* not bring an impartial mind to his decision making.
13. The applicant for recusal must nonetheless satisfy a two-step analysis. First, they must identify what might lead a decision maker to decide a case other than on its legal and factual merits. Then there must be a logical connection between

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[2] Aronson et al: *Judicial Review of Administrative Action and Government Liability*, 6th ed (Thomson Reuters. Sydney, 2017) (**Aronson**), at [9.10]
[3] Ibid.
[4] *SZRUI v Minister for Immigration* [2013] FCAFC 80 at [5], *per* Allsop CJ
[5] Aronson at [9.40]
[6] *Ebner v Official Trustee* (2000) 205 CLR 337 at 345 (**Ebner**)
[7] *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at 508, *per* Spigelman CJ. (**McGovern**)

that matter and the feared deviation from the course of deciding the case on its merits.[8]

14. In this case, the first is satisfied by the fact that Mr Rogers owes his livelihood and continued livelihood to the LNP, and so might be seen as beholden to the LNP for past favour[9], and influenced by the desire for future favour. The second is satisfied by the fact that the LNP depends on a favourable decision in this matter to ward off, as they see it, a threat from The New Liberals.
15. The matter and the feared deviation are further entwined by the fact that as they see it, the LNP must ward off that threat in order to be in government in 2024, and it is in Mr Rogers interests to assist them to be in government when he comes up for re-appointment to his position.
16. It is important to stress that for Mr Rogers to be recused, no adverse finding need be made against him. It is the perception which is important[10]. The fact that the fair-minded lay observer only *might* conclude that Mr Rogers *might* not bring an impartial mind to the matter is enough to satisfy the test of reasonable apprehension of bias. In other words, it is the capability to affect a decision, not the actual affectation, which must be established.[11]
17. Furthermore, a reasonable apprehension of bias can be reasonable even if held by only some rather than all reasonable people.[12]
18. *Isbester v Knox City Council* establishes that a finding of apprehension of bias against a single member of a multi-member body is not overcome by the presence of other members from whom bias may not be apprehended. In other words, the presence of other Panel members in this case does not overcome the apprehension that the involvement of Mr Rogers presence on the panel might affect not only his decision making, but that of others on the Panel[13]
19. Furthermore, in *IW v City of Perth*, Gummow J found that the bias of a member of a multi-member body tainted the others, even if the biased member was outnumbered. He explained this, in part, by the law's unwillingness to examine and take evidence to determine, the degree of influence of the biased member on their colleagues.[14]
20. The circumstances of the case at hand thoroughly establish that the fair-minded lay observer *might* think that Mr Rogers *might* be beholden to the LNP, and that he *might* wish to be further beholden to them in the future, and that those

[8] Ebner at 345.
[9] *Saxmere Co Lt v Wool Disestablishment Board Co Ltd* [2010] 1 NZLR 35 at 49-51.
[10] Ebner at 345
[11] McGovern at 520.
[12] See Aronson at [9.40] and the cases cited therein
[13] (2025) 255 CLR 135, at 151, 153, 156, 158-159
[14] (1997) 191 CLR 1, at 50-51. See also McGovern, *per* Basten JA at 524.

facts *might* cause Mr Rogers to deviate from the normal course of deciding the case on its merits. He must therefore be disqualified from sitting on the Panel.[15]

ADJOURNMENT OF THE SUBSTANTIVE MATTER

21. It is submitted that the consideration of the substantive LNP applications should be adjourned until after a decision in the TNL application is made. It would engender confidence in the system if a matter as delicate as the TNL application, be clearly determined before the LNP applications are considered, lest there be a perception of unfairness arising from the comingling of both sets of applications.
22. Also, if the LNP applications and the TNL application are heard at the same time, there is a risk of unnecessary duplication of proceedings. For example, if the Panel finds against The New Liberals (be that a unanimous or majority decision), but also finds that Mr Rogers should be disqualified for reasonable apprehension of bias, then on the authorities relating to multi-member bodies (above), the matter would have to be re-heard.
23. Furthermore, if the TNL application is heard first, and it is decided that Mr Rogers should be disqualified from sitting, then this gives the remaining Panel the opportunity to decide whether another member should be appointed or the LNP applications should be heard by the remaining two members alone.

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[15] See *Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal* [2004] NSWCA 291 at [29], and *Saxmere Co Lt v Wool Disestablishment Board Co Ltd* [2010] 1 NZLR 35 at 49–51.