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Australian Law Reform Commission

BACKGROUND PAPER **JI1**

JUDICIAL IMPARTIALITY

The Law on Judicial Bias: A Primer

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This primer on the law on judicial bias is the first in a series of background papers to be released by the Australian Law Reform Commission as part of its Review of Judicial Impartiality ('the Inquiry').

These background papers are intended to provide a high-level overview of key principles and research on topics of relevance to the Inquiry. While the law on actual and apprehended bias is central to the Inquiry's Terms of Reference, the Inquiry will also necessarily consider broader notions of judicial impartiality. Further background papers will be released in early 2021 with more detail on some of the topics covered in this paper, and addressing other issues including theories of judicial impartiality, and specific critiques of law and practice.

The background papers will be followed by the publication in April 2021 of a Consultation Paper containing questions and draft proposals for public comment. A formal call for submissions will be made on its release. Feedback on the background papers is, however, welcome at any point by email to impartiality@alrc.gov.au.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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Introduction

> Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'[1]

1. Any person before a court has the fundamental right to a hearing by a judge who is independent and impartial.[2] In Australia, judicial independence and impartiality[3] are seen as fundamental to the common law system of adversarial trial,[4] to the exercise of judicial power under the Australian Constitution,[5] and to upholding public confidence in the administration of justice.[6] Ensuring impartiality also promotes the important values of treating parties to litigation with equal respect and dignity, which may also enhance litigants' perceptions of the fairness of the process and their sense of 'justice'.[7]

2. A counterpart of this — the rule against bias — is one of the two pillars of natural justice.[8] Australian courts have long recognised that '[t]he public is entitled to expect that issues determined by judges and other public office holders should be decided, among other things, free of prejudice and without bias'.[9] The rule applies to judges, juries, administrative officials and elected officials in their decision-making (although its content can vary in these differing contexts).[10]

3. Impartiality may be conceptualised in different ways and defining bias can be difficult.[11] However, as Professor Groves explains, for the purposes of administrative law

> the hallmark of bias is insufficient impartiality. The notion of insufficient impartiality reflects an acceptance that no decision-maker is a blank canvas. Judges, tribunal members and administrative officials are a product of their own personal history. They inevitably carry life experience, predispositions and other personal qualities that influence their attitudes, conduct and the decisions they make. The bias rule does not require decision-makers be devoid of those qualities. In fact, many argue that the

1 *Metropolitan Properties Co (FGC) Ltd v Lannon* (1969) 1 QB 577, 599 (Lord Denning MR).

2 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."). See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art. 14.

3 Which are, as Professors Aronson, Groves and Weeks point out, "linked, but different": Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 716 citing *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] 1 All ER 731 [25] (Lady Hale): "[I]mpartiality is the tribunal's approach to deciding cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public". See also the Hon Michael Kirby AC CMG, 'Grounds for Judicial Recusal Differentiating Judicial Impartiality and Judicial Independence' (2015) 40 *Australian Bar Review* 195.

4 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also Aronson, Groves and Weeks (n 3) 644.

5 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [79]–[80] (Gaudron J). See also *South Australia v Totani* (2010) 242 CLR 1 [62] (French CJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 [119]–[120] (Gageler J).

6 *R v Magistrates Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 126 (McInerney J).

7 See further Aronson, Groves and Weeks (n 3) 644; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) [1.85]; Sharyn L Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 7–10.

8 The other being the hearing rule: Aronson, Groves and Weeks (n 3) 643. As Professor Groves points out, "[t]he two rules can intersect, such as when excessive judicial intervention is claimed to have caused both unfairness (by precluding a party from adequately presenting its case) and an apprehension of bias (because the interventions are made only to one party)": Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44 *Melbourne University Law Review* (forthcoming).

9 *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [53] (Nettle and Gordon JJ), citing *Webb v The Queen* (1994) 181 CLR 41, 53 (Mason CJ and McHugh J).

10 Aronson, Groves and Weeks (n 3) 650–51. See further *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [55] (Nettle and Gordon JJ).

11 On different conceptions of impartiality see, eg, Roach Anleu and Mack (n 7) 8–10.

> experience and predispositions that can lead decision-makers to hold preconceptions and opinions which could affect their impartiality, especially if that requirement was applied strictly, are also the very qualities that make people suitable for judicial and other such positions. On this view, experience can inform and assist decision-making, rather than obscure or impede it. These general principles are a key reason why the bias rule requires sufficient rather than absolute impartiality.[12]

4. In other words, 'the bias rule is best understood to require an open mind but not an empty one'.[13]

5. This background paper provides an introductory summary and overview of key aspects of the law on judicial bias as it relates to the Australian federal judiciary, but is not intended to survey the law comprehensively. It draws heavily, although by no means exclusively, from the work of Professors Aronson, Groves and Weeks in *Judicial Review of Administrative Action & Government Liability* (6th ed, 2017), and readers may wish to consult Chapter 9 of that text for further detailed information.

Actual and apprehended bias

6. In Australia, including in relation to the federal judiciary, the law on bias is predominantly found in common law.[14] Two different types of bias may be alleged: actual or apprehended, reflecting the imperative that justice must both be done, and be seen to be done.

7. A claim of actual bias

> requires proof that a decision-maker approached the issues with a closed mind or had prejudged them and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[15]

8. This requires 'cogent evidence that the decision-maker was in fact biased', and is for that reason difficult to prove.[16]

9. Apprehended bias looks instead to perceptions, and considers the matter from the perspective of how it may *appear*. This 'does not require such strong or clear evidence',[17] and does not require any conclusion 'about what factors actually influenced the outcome'.[18] However, 'the courts frequently stress that a claim of apprehended bias will not be upheld lightly'.[19]

12 Matthew Groves, 'Bias by the Numbers' (2020) 100 *AIAL Forum* 60, 61.
13 Aronson, Groves and Weeks (n 3) 645. See further the discussion at 644–46.
14 Although a number of statutory provisions also criminalise judges exercising jurisdiction in matters in which they have a personal interest: see, eg, *Crimes Act 1914* (Cth) s 14, in relation to the exercise of federal jurisdiction.
15 Aronson, Groves and Weeks (n 3) 652, citing *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 [37]–[39].
16 See further ibid 653.
17 Ibid 654.
18 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing).
19 Aronson, Groves and Weeks (n 3) 654.

The legal test for apprehended bias

10. The test for apprehended bias is

> whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts 'might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question'.[20]

The focus on the reaction of a fictional member of the public, rather than the court's own view of the situation, was a deliberate choice justified as best aligned with promoting public confidence in judges and the legal system — a key rationale of the rule.[21]

11. In *Ebner v Official Trustee* ('*Ebner*'), the High Court of Australia held that two steps are involved in determining that question.[22] In a recent High Court case, those steps were summarised as follows:

> First, one must identify what it is that might lead a decision-maker to decide a case other than on its legal and factual merits. What is said to affect a decision-maker's impartiality? Partiality can take many forms, including disqualification by direct or indirect interest in the proceedings, pecuniary or otherwise; disqualification by conduct; disqualification by association; and disqualification by extraneous information. … Second, a logical connection must be articulated between the identified thing and the feared deviation from deciding the case on its merits. How will the claimed interest, influence or extraneous information have the suggested effect?[23]

12. The authority of this test has been described as 'not in doubt',[24] however its application to particular facts can be 'far from clear'.[25] Application of the bias rule is 'acutely context sensitive',[26] and there may often be 'limited value to be gained from the facts of other cases'.[27]

The hypothetical lay observer

13. To answer the question of what the 'fair minded and reasonably well informed observer'[28] would think of the situation, the courts use what has been described as a

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20 *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [33] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

21 *Webb v The Queen* (1994) 181 CLR 41, 51; *Johnson v Johnson* (2000) 201 CLR 488 [12] (Gleeson CJ, Gaudron, Mchugh, Gummow and Hayne JJ); Enid Campbell and HP Lee, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 154.

22 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ): 'First, it 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. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. 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'.

23 *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 [57] (Nettle and Gordon JJ).

24 See, eg, *Antoun v The Queen (*2006) 80 ALJR 497 [82] (Callinan J). Although note the suggestion that the test may be strengthened by a third step as suggested by Gaegler J in *Isbester v Knox City Council* (2015) 255 CLR 135 [59]. See also Groves, 'Clarity and Complexity in the Bias Rule' (n 8). For a similar proposal in the Canadian context see Julia Hughes and Philip Bryden, 'Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification' (2013) 36 *Dalhousie Law Journal* 171.

25 *Kirby v Centro Properties Ltd* (No 2) (2008) 172 FCR 376, 382 (Finkelstein J).

26 Aronson, Groves and Weeks (n 3) 656.

27 Ibid.

28 Aronson, Groves and Weeks point to other terms used, including "fair minded people", a "fair-minded observer", a "lay observer", a "reasonable or fair-minded observer", a "reasonable person" and a "fair-minded, informed lay observer": Ibid 665.

'kind of thought experiment'.[29] As former Family Court Judge Professor the Hon Richard Chisholm AM explains:

> Since the court determining the bias question has no evidence about what the public actually thinks – and the public does not in fact know about the situation – it has to guess.[30]

14. Professor Chisholm continues: '[t]o make this sort of thought experiment workable, we have to make some assumptions, about the people envisaged'.[31] The Hon Justice MD Kirby AC CMG described the hypothetical observer's qualities as follows:

> Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.[32]

15. More recently the hypothetical observer has been described as, among other things:

> (1) taken to be reasonable; (2) does not make snap judgments; (3) knows commonplace things and is neither complacent or unduly sensitive or suspicious; (4) has knowledge of all the circumstances of the case; and (5) is an informed one who will have regard to the fact that a judicial officer's training, tradition and oath or affirmation, equip the officer with the ability to discard the irrelevant, the immaterial and the prejudicial.[33]

16. Professor Groves has argued that this hypothetical observer is 'clearly an ideal rather than an ordinary or typical person'. In his view

> the observer does not represent judicial conceptions of a normal or reasonable person, but instead the kind of person who judges feel is suitable to make key decisions about the bias rule. This creature of virtuous reason is clearly one we would like … to make decisions which are important to the parties and the community.[34]

17. There is criticism in the case law and literature of the artifice of the hypothetical observer and/or the degree of specialist knowledge and confidence in the impartiality of judges that is attributed to her or him.[35] According to Justice Kirby, deciding a case almost fifteen years ago, the observer had been 'stretched virtually to snapping point', and it was a fiction to consider that it provides an objective standard in place of the views of the judge making the decision.[36] It has been suggested that the circular reasoning often involved does little to enhance public confidence in judges and the legal system,

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29 Richard Chisholm, 'Apprehended Bias and Private Lawyer-Judge Communications: The Full Court's Decision in *Charisteas*' (2020) 29 *Australian Family Lawyer* 18, 30. Professor Chisholm draws parallels to the "pub test" used in political and public commentary.

30 Ibid.

31 Ibid 31.

32 *Johnson v Johnson* (2000) 201 CLR 488 [53].

33 *Martin v Norton Rose Fulbright Australia (No 2)* [2020] FCAFC 42 [21] (Besanko, Flick and Abraham JJ).

34 Groves, 'Bias by the Numbers' (n 12) 69.

35 For a summary of some of these criticisms see Aronson, Groves and Weeks (n 3) 670–71. See further Abimbola A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68(2) *Cambridge Law Journal* 388; Anna Olijnyk, 'Apprehended Bias: A Public Critique of the Fair-Minded Lay Observer', *AUSPUBLAW* (3 September 2015) <https://auspublaw.org/2015/09/apprehended-bias/>; Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928; Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38 *Civil Justice Quarterly* 376, 380–81; Groves, 'Bias by the Numbers' (n 12).

36 *Smits v Roach* (2006) 227 CLR 423 [96]-[97]. See also Groves, 'Bias by the Numbers' (n 12) 69.

as intended.[37] Some have suggested returning to the earlier position where apprehended bias was explicitly decided by reference to the views of the court.[38] Others have urged partial codification of the law 'to identify circumstances where judges should and should not sit', determined by reference to *actual* public perception as measured by empirical methods, the science on decision making and legal policy considerations.[39]

18. On the other hand, while acknowledging the limitations of the hypothetical observer, others see the construct as retaining value.[40] Among them is the Hon Chief Justice RS French AC, who said in *British American Tobacco Australia Services Ltd v Laurie* that the

> interposition of the fair-minded lay person could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim. … However, the utility of the construct is that it reminds the judges making such decisions of the need to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers. In so doing they will not have recourse to all the information that a judge or practising lawyer would have. It requires the judges to identify the information on which they are to make their determinations. While it is necessary to be realistic about the limitations of the test, in my opinion it retains its utility as a guide to decision-making in this difficult area. [41]

Circumstances that may give rise to allegations of bias

19. In *Webb v The Queen*, the Hon Justice WP Deane AC KBE identified four categories of case in which a reasonable apprehension of bias may arise: interest, conduct, association and extraneous information.[42] This categorisation, while involving some potential overlap, and not considered completely comprehensive, has been acknowledged as 'a convenient frame of reference' for determining whether an apprehension of bias has arisen.[43] A separate sub-category, 'prejudgment', although part of 'conduct', is increasingly seen as a useful addition to this list.[44]

20. Professor Simon Young has suggested that, in trying to navigate the difficulties faced by the hypothetical lay observer discussed above, the Courts are increasingly developing 'somewhat tailor-made principles' for different sub-categories of bias, including 'prejudgment'.[45] In his view, although this creates certain challenges (among them increasing 'intricacy and variability in the application of the rules'),

> the principled guidance offered by the new tools of 'calibration' can help to make the tiring lay observer test more predictable and sustainable — in a sense they allow the courts to carefully tailor the lay observer's brief to help them navigate the contemporary contests.[46]

37 Groves, 'Bias by the Numbers' (n 12) 69. See also Higgins and Levy (n 35) 380–81.
38 Olowofoyeku (n 35).
39 Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for the Law of Apprehended Bias' (2019) 38 *Civil Justice Quarterly* 376, 394.
40 See, eg, Young (n 35) 955; Aronson, Groves and Weeks (n 3) 675; Campbell and Lee (n 21) 157.
41 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [48] (French CJ).
42 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
43 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [24].
44 Young (n 35) 949–51; Aronson, Groves and Weeks (n 3) 672, 687–705.
45 Young (n 35) 954.
46 Ibid 954–55.

Interest

21. The first category of bias is enlivened when a judge has an interest, whether direct or indirect, in the outcome of a decision.[47] As the court explained in *Ebner*, the mere existence of an interest will not result in automatic disqualification; a party alleging bias must articulate a logical connection between the interest of the judge and the prejudicial outcome.[48] This would certainly include where the judge is a party to the case, either directly or through an alter ego.[49] Other potentially disqualifying interests include business, professional or other commercial relationships, such as shareholdings in litigant companies, and even a 'strong commitment to a cause relevant to a party or a case'.[50]

22. While 'interest' is not limited to financial interests,[51] it arises most commonly in this context. For an economic interest to result in disqualification, it must be 'a not insubstantial, direct, pecuniary or proprietary interest'.[52] In *Ebner*, a minor shareholding in a litigant corporation was insufficient to give rise to a reasonable apprehension of bias, as the outcome of the litigation had no logical impact on the financial value of the shares.[53]

Conduct

23. Apprehension of bias may also be derived from the behaviour of a judge, whether in the course of or outside of proceedings.

24. In some cases, a judge who is not disqualified at the outset of a hearing becomes disqualified due to their conduct during the hearing. This may happen, for example, where a judge engages in private communication with one of the parties, a witness or legal representative, without the knowledge or consent of the other party.[54]

25. Conduct in the course of proceedings also extends to a judge's demeanour and tone in court. While occasional displays of impatience, irritation, sarcasm or rudeness are unlikely to be of such a nature and extent that the *Ebner* test is satisfied,[55] excessive, prolonged or particularly harsh interventions may give rise to a reasonable apprehension of bias. In the recent Family Court decision of *Adacot & Sowle*, frequent interventions described as 'cruel, insulting, humiliating and rude' directed at legal counsel were sufficient to give rise to the reasonable apprehension of bias.[56]

26. Apprehension of bias may also arise from judicial conduct outside of proceedings.[57] Judges are advised to carefully consider whether their extrajudicial activities are aligned with the appearance of impartiality. This includes membership of government

47 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
48 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
49 Ibid [60] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
50 Aronson, Groves and Weeks (n 3) 676. See, eg, *Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* (2000) 1 AC 119. See further Aronson, Groves and Weeks (n 3) 672–77.
51 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
52 Ibid [58].
53 Ibid [35].
54 Campbell and Lee (n 21) 159. However, for a recent case where a majority of the Family Court of Australia Full Court found that numerous instances of private contact between a judge and counsel for a party did not give rise to a reasonable apprehension of bias see *Charisteas v Charisteas* (2020) 60 Fam LR 483. The case is currently subject to an application for special leave to appeal to the High Court. For a critique of the majority's reasoning, see Chisholm (n 29).
55 *Galea v Galea* (1990) 19 NSWLR 263, 281; *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] 131 FCR 102.
56 *Adacot & Sowle* [2020] FamCAFC 215 [117].
57 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).

bodies, participation in public debate, political activity, and engagement with community organisations.[58] The actual or apprehended bias test remains the primary consideration.

Prejudgment

27. An apprehension of bias may arise if a judge's comments or behaviour suggest that the matter has been subject to prejudgment. Such a finding will arise where 'an independent observer might reasonably apprehend that the decision-maker might not be open to persuasion'.[59]

28. Judicial decision-makers are not expected to enter proceedings with a blank mind, but they must not be 'so committed to a conclusion already formed as to be incapable of alteration'.[60] This does not mean that a judge must remain silent throughout proceedings. Indeed, to do so is regarded as poor judicial conduct.[61] A judge may express preliminary or tentative views during proceedings, express doubts, or seek clarification without creating an apprehension of bias.[62] These statements should not be peremptory, however, and must not express firm views without allowing counsel to present their arguments.[63]

29. Issues of prejudgment may also arise where a judge has separately determined issues relating to one of the parties. In *British American Tobacco,* the High Court held that a judge who had made strong adverse findings about a party in unrelated proceedings was precluded from hearing further cases involving that party.[64] Similarly, extrajudicial writing may raise issues of prejudgment, if a judge expresses ''preconceived views which are so firmly held' that the hypothetical observer may think it might not be possible for them to approach cases with an open mind'.[65]

30. Predispositions or inclinations to determine a matter in a particular way are not, however, prohibited by the bias rule, unless they are 'sufficiently specific or intense' to amount to prejudgment.[66] Claims of apprehended bias based on a judge's gender or ethnicity (and alleged concomitant unconscious prejudice) have not been upheld.[67] In some cases, litigants have used a judge's prior record of decisions (including by use of statistics) to argue that the judge is predisposed to certain views about particular types of cases or litigants and that it is impossible for the judge to hear the case with an open mind.[68] This was argued, for example, in *ALA15 v Minister for Immigration and Border Protection*, where the applicant provided statistics to show that, out of the 254 migration matters a Federal Circuit Court judge had decided, 100% were delivered *ex tempore*, and

58 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 23–28.
59 Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41 *Melbourne University Law Review* 928, 950 citing *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 [15]–[18] (Spigelman CJ). See also Aronson, Groves and Weeks (n 3) 686.
60 *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 [72]. See *MZZLO v Minister for Immigration and Border Protection (No 2)* [2016] FCA 356 [75].
61 *Vakuata v Kelly (1989)* 167 CLR 568, 571.
62 *Anderson v National Australia Bank* [2007] VSCA 172 [81].
63 *Antoun v The Queen* (2006) 80 ALJR 497 [19]–[24].
64 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.
65 Aronson, Groves and Weeks (n 3) 699, citing *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, 495.
66 Ibid 685; *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 531 (Gleeson CJ and Gummow J).
67 See further Aronson, Groves and Weeks (n 3) 686.
68 See, eg *Vietnam Veterans' Association of Australia (New South Wales Branch Inc) v Gallagher* (1994) 52 FCR 34; *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30; *BDS17 v Minister for Immigration and Border Protection* (2018) 76 AAR 246; *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.

no contested cases were decided in the applicant's favour.[69] To date, such arguments have not been accepted, although these decisions have been subject to some criticism.[70]

Association

31. A judge's association with a party may also result in an apprehension of bias.[71] This includes relationships with family members, personal friends, counsel, witnesses or organisations that may suggest a lack of impartiality.[72] Whether a reasonable apprehension of bias arises depends on the nature and extent of the relationship and the application of the *Ebner* test. Ultimately, the question is whether the reasonable observer would consider that the existence of the association might 'divert the judge from deciding the case on its merits'.[73]

32. In examining this requirement, the *Guide to Judicial Conduct* (see further 57–59) suggests that while current business associations may be grounds for disqualification, past professional associations or arms-length relationships are unlikely to provide a compelling reason for disqualification.[74] Similarly, past professional association with counsel is not in itself a sufficient reason for disqualification.[75] Especially in regional jurisdictions, it is common for judicial officers and legal counsel to be acquainted and/or friendly. In most jurisdictions, Bar Rules require a barrister to return a brief if their relationship with the judge might 'give rise to the apprehension that there may not be a fair hearing', which may reduce the necessity for judges to disqualify herself or himself on this basis.[76] Where the relationship between a judge and legal counsel goes beyond general friendship or professional association (such as an intimate relationship), however, a reasonable apprehension of bias is likely to arise.[77]

Extraneous information

33. The last category of bias identified by Deane J arises where a judge or other decision-maker has knowledge of some prejudicial but inadmissible fact or circumstance that prevents them from bringing an impartial mind to the decision.[78] A recent example is the case of *CNY17 v Minister for Immigration and Border Protection*, where irrelevant and prejudicial information about the applicant was provided to the Immigration Assessment Authority during the 'Fast Track Review' of his protection visa application.[79] In that case, the High Court was split as to whether the informed observer would consider there was a realistic possibility that knowledge of the material would play on the subconscious of the Authority, with the majority holding that it could.[80] As such, a fair-minded lay observer might apprehend a lack of impartiality on the part of the Authority.

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69 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [11].
70 For a critique of this and other decisions see Groves, 'Bias by the Numbers' (n 12).
71 *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78, 87.
72 *S&M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1998) 12 NSWLR 358, 396.
73 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [30]. See further *Smits v Roach* (2006) 227 CLR 423 [58] in which the High Court held that the familial relationship between the judge and his brother (who was a partner at a law firm interested in the proceedings) was not sufficient to give rise to a reasonable apprehension of bias).
74 Australasian Institute of Judicial Administration (n 58) 16.
75 Ibid.
76 See, for example, *Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)* s 105(l).
77 *Kennedy and Cahill* (1995) 118 FLR 60.
78 *Webb v The Queen* (1994) 181 CLR 41, 74.
79 *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47, 17.
80 Ibid [97]–[99] (Nettle and Gordon JJ), [111] (Edelman J) cf. [43] (Kiefel CJ and Gageler J).

Exceptions to the bias rule

34. At least two — and perhaps three — exceptions may preclude the application of the bias rule in a particular case.[81]

Waiver

35. A party allegedly injured by bias (or their agent) may waive their right to object where such waiver is 'fully informed and clear'.[82]

36. In terms of the level of knowledge required, parties must have 'full knowledge of all the facts relevant to the decision whether to waive or not'.[83] Professor Groves explains how in some cases, the

> point at which this level of knowledge is reached may be difficult to gauge because the detail in support of a bias claim may accrue slowly during the course of a hearing. Sometimes that tipping point may be difficult, almost impossible, to identify.[84]

37. In one such case, concerning excessive judicial intervention, the Judge on appeal considered that the issue of waiver did not arise because there was no 'inescapable point' at which counsel should have complained.[85]

38. Waiver can be made expressly or — more commonly — impliedly, such as by failing to object. A party (and especially a party with legal representation) certainly cannot 'stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground [of apprehended bias]'.[86] However, courts will adjust their view of whether a failure to object is clear enough to amount to waiver depending on whether or not a party is represented, and are more willing to consider that silence does not amount to waiver where a party is unrepresented.[87]

39. Once the party has sufficient knowledge of the relevant facts, any application must be made promptly, although here a certain degree of flexibility (of a day or two) is given even to experienced counsel.[88]

40. Some commentators and judges have expressed discomfort with the very notion of waiver in clear cases of bias.[89] Kirby J, in particular, was critical of this exception, arguing that allowing waiver requires 'the appellate court [to] simply ignore the complaint', damaging

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81 A third exception applies to bias of non-judicial decision-makers. For such decision-makers, the rule on bias may be modified or abrogated by statute: see further Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285; Aronson, Groves and Weeks (n 3) 724–25. Campbell and Lee (n 21) 165–66.

82 Matthew Groves, 'Waiver of Natural Justice' (2019) 40 *Adelaide Law Review* 25, 651. See further Aronson, Groves and Weeks (n 3) 715; Matthew Groves, 'Waiver of the Rule against Bias' (2009) 35(2) *Monash University Law Review* 315; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 449 (Gummow ACJ, Hayne, Crennan and Bell JJ).

83 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 [15]. See further Groves, 'Waiver of Natural Justice' (n 82) 651; Aronson, Groves and Weeks (n 3) 717–18.

84 Groves, 'Waiver of Natural Justice' (n 82) 651 citing *Johnson v Johnson* (2001) 201 CLR 488 [79] (Callinan J) and *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 [34].

85 *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 [34] (Basten J).

86 *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ). Although the reserved judgment may provide fresh grounds for a fresh apprehension of bias: at 579 (Dawson J).

87 Groves, 'Waiver of Natural Justice' (n 82) 651–2.

88 Ibid 652. See further *Johnson v Johnson* (2000) 201 CLR 488 [517]–[518]; *John Fairfax Publications Pty Ltd v Maurice Kriss* [2007] NSWCA 79 [26]-[27].

89 See, eg, Campbell and Lee (n 21) 171–72. They note that legislation in the United States has limited the circumstances in which federal judicial officers may accept waiver of disqualifying causes.

the community's confidence in the impartiality of the judicial system.[90] Professors Enid Campbell and HP Lee suggested that it was arguable that the common law on waiver had been modified by the Constitution, at least in respect of the federal judiciary, because

> the rule against bias is one of the rules which defines essential elements in the performance of judicial functions, and that in consequence, parties to litigation before courts exercising a federal jurisdiction cannot be allowed, by their agreement, to waive the rule.[91]

41. Nevertheless, the High Court has continued to endorse the exception and considers it 'well established'.[92]

Necessity

42. Another exception to the bias rule is the doctrine of necessity. Although the parameters of the exception remain somewhat unclear, it is generally considered to apply to prevent a failure of justice where there is no alternative decision-maker who can sit (or where any alternative decision-makers would suffer from the same complaint of bias).[93] Such a situation might arise, for example, if High Court judges were required to consider the constitutionality of a statute concerning their own remuneration.[94] Although different judges have favoured different scopes of application, in determining such cases, courts will usually balance a range of factors. In *Metropolitan Fire & Emergency Services Board v Churchill* the Hon Justice EW Gillard surveyed the authorities and said that the factors to be considered and weighed up included

> the qualifications and experience of the adjudicator, the nature of the bias, the degree and gravity of the bias, whether it is pecuniary, actual or perceived, the conduct of the parties, whether there is a right of appeal and the public interest where applicable.[95]

43. If it is possible to appoint another decision-maker the exception of necessity will usually not apply.[96] However, the case law shows that 'this is not an inflexible rule and there may be circumstances where the doctrine should apply because not to do so, would result in enormous cost or substantial delay'.[97]

A further exception: special circumstances?

44. Some cases have suggested that an exception to the bias rule may also be made in 'special circumstances', however this has not been successfully invoked and there is little clarity on what those circumstances may be.[98] It has been suggested that this exception

90 *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684, 687. See also *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358; *Lindon v Commonwealth (No 2)* (1996) 70 ALJR 541.
91 Campbell and Lee (n 21) 172.
92 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 449 (Gummow ACJ, Hayne, Crennan and Bell JJ).
93 Aronson, Groves and Weeks (n 3) 723.
94 Campbell and Lee (n 21) 166.
95 *Metropolitan Fire & Emergency Services Board v Churchill* [1998] VSC 51 [159]. See further Aronson, Groves and Weeks (n 3) 721–24.
96 *Metropolitan Fire & Emergency Services Board v Churchill* [1998] VSC 51 [149].
97 Ibid.
98 *Livesey v NSW Bar Association* (1983) 151 CLR 288, 299–300 (Mason, Murphy, Brennan, Deane and Dawson JJ). See further Aronson, Groves and Weeks (n 3) 725–27.

> if deployed thoughtfully, has the potential to apply where a strict application of the rule against bias would lead to grossly inefficient results, and where the appearance of bias — arising from a tentative finding made on an interlocutory basis — is minimal.[99]

45. However, others have warned against the exception — seen as an alternative to 'the rare and cautiously used exception of necessity' on the basis of 'mere convenience'.[100] Professors Aronson, Groves and Weeks suggest that a number of the cases potentially raising 'special circumstances' can be decided under the doctrine of necessity, while other cases raising particular difficulties may be accommodated by special procedures, rather than by allowing an apprehension of bias to stand.[101]

Procedures for upholding the bias rule

46. Procedures for upholding the bias rule derive from common law, ethical obligations and court practice.

The self-recusal procedure

Judicial disclosure of potentially disqualifying circumstances

47. Judges have an ethical obligation to disclose 'facts which might reasonably give rise to a perception of bias or conflict of interest' to the parties. However, the decision as to whether or not it is appropriate to sit rests with the judge concerned.[102]

48. To minimise risks of disqualification in particular cases, some courts have developed precautionary administrative practices to listing arrangements. Justice Kirby explained that in the New South Wales Court of Appeal, for example, if

> a judge has had any connection, even indirect, with litigation that comes before the court, he or she will so indicate when the list of sitting arrangements is distributed. A substitution will then be arranged.[103]

49. Once a case is allocated to a judge, if issues of potential bias exist, the judge will usually make disclosure to the parties informally, such as through a letter to the parties, or in court.[104] The judge may consider that she or he should decline to sit, and a substitute will be arranged.[105] Where a judge is uncertain, they are encouraged to discuss the matter with colleagues, and where necessary the head of jurisdiction, person in charge of listing, and the parties.[106] If the judge does not recuse herself or himself, they should give reasons in open court and it will then be open to the party potentially injured by the disclosed circumstances to waive a claim of bias based on those circumstances or to make an application for recusal.[107]

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99 Anna Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) 35 *Sydney Law Review* 761, 779. See, eg, *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411.

100 *Australian National Industries Ltd v Spedley Securities Ltd* (1992) 26 NSWLR 411, 422 (Kirby P).

101 Aronson, Groves and Weeks (n 3) 726–727, referring to *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 and *BHP Billiton Ltd v District Court of South Australia* (2012) 112 SASR 494.

102 Australasian Institute of Judicial Administration (n 58) 12; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [69] (Gleeson CJ, McHugh, Gummow and Hayne JJ); Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) 20(1) *Legal Ethics* 89, 90.

103 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 369.

104 Appleby and McDonald (n 102) 90; Australasian Institute of Judicial Administration (n 58) 17.

105 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 369. See further Australasian Institute of Judicial Administration (n 58) 17.

106 Australasian Institute of Judicial Administration (n 58) 17.

107 Appleby and McDonald (n 102) 90. As to the requirement to give reasons see Australasian Institute of Judicial Administration

50. Though judges must eschew bias, there is a countervailing imperative. Balanced against the risk of cost, delay and reputational damage associated with a possible claim of bias is a 'strong presumption that judges will approach a matter with an impartial mind and not stand aside without good reason'.[108] It has been said that judges should be slow to accept a call for disqualification because of an allegation of bias, as doing so is an abdication of duty and encourages procedural abuse and judge-shopping.[109] However, especially before proceedings have begun, there is support for a precautionary approach where there is an arguable question of bias (subject to particular considerations concerning final courts of appeal).[110]

Deciding applications for recusal

51. If a party believes that a reasonable apprehension of bias has arisen during proceedings, they may make an application for disqualification to the judge.[111] The practice in Australia and throughout much of the common law world is that the judge against whom bias is alleged decides whether or not actual or apprehended bias is made out.[112] This is almost always the case, even on multi-member courts — the judge who is the target of the application determines the question at first instance, rather than the full court.[113]

Appeal and review

52. Some uncertainty remains about the extent to which decisions not to recuse are immediately appealable in superior courts of unlimited jurisdiction such as state Supreme Courts (although bias will form a potential ground of appeal in any interlocutory or final appeal).[114] However, immediate review is available from a recusal decision of a judge of the Federal Court, Family Court or Federal Circuit Court. This is because decisions of inferior courts (including the Federal Circuit Court), and superior courts of limited jurisdiction (including the Federal Court and Family Court) may be challenged by a writ of prohibition to prevent the court hearing and determining the case.[115] Relief in such cases is discretionary. Where an application for judicial review is successful and the court finds a reasonable apprehension of bias, the matter will generally be remitted to the relevant court to be heard by a different judge.[116] Again, alleged actual or apprehended bias may also form a ground of appeal in any interlocutory or final appeal.

53. On the other hand, it is not entirely clear that the High Court, as a final court of appeal, has jurisdiction to review a decision of one of its own members not to recuse herself or himself.[117] It has been argued that jurisdiction for such review can be found in either s 31 of the Constitution or in the inherent jurisdiction of the court to protect its processes

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(n 58) 18.

108 Aronson, Groves and Weeks (n 3) 651, citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [19]–[20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

109 *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376 [17]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [19]–[20]. See further Australasian Institute of Judicial Administration (n 58) 18.

110 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *AWG Group Ltd v Morrison* (2006) 2 WLR 1163 [9]. See further Appleby and McDonald (n 102) 92, 109.

111 *Bainton v Rajski* (1992) 29 NSWLR 539, 544.

112 Appleby and McDonald (n 102) 90.

113 Ibid.

114 See Aronson, Groves and Weeks (n 3) 727–29; Appleby and McDonald (n 102) 91.

115 Appleby and McDonald (n 102) 91, citing *Re Gray; Ex parte Marsh* (1985) 157 CLR 351, 373 (Gibbs CJ), 374 (Mason J), 384–6 (Deane J), 393–4 (Dawson J). See also Enid Campbell, 'Review of Decisions on a Judge's Qualification to Sit' (1999) 15 *Queensland University of Technology Law Journal* 1, 1–2.

116 See *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 266 (Barwick CJ, Gibbs, Stephen and Mason JJ).

117 Appleby and McDonald (n 102) 110. See also Campbell (n 115).

or uphold the Constitution.[118] It has also been suggested that appellate courts, including the High Court, should determine disqualification objections by all members of the court as constituted, rather than by the judge who is the subject of the application.[119] This would obviate the need for appeal, except where information giving rise to the objection is revealed after judgment is delivered.[120]

Criticisms of the current approach

54. The self-recusal procedure has been subject to considerable criticism.[121] At its most basic, Professors Campbell and Lee suggest that some

> may think it strange that when a party to litigation submits that the judge listed to decide a case is disqualified, that judge should be the one who has to rule on whether he or she is disqualified.[122]

55. In a wide-ranging critique of the procedures, Professor Gabrielle Appleby and Stephen McDonald argue that behavioural psychology research shows how cognitive biases make it particularly difficult for anybody, including judges 'to bring an impartial mind to an application that concerns their own conduct'.[123] It is unlikely that a litigant raising a claim of apprehended bias or an interested member of the public will be satisfied by the same judge ruling on the matter — thereby risking 'undermining one of the underlying objectives of the rules of procedural fairness: to maintain and promote public confidence in the impartiality of the judiciary'.[124] The procedure also presents a dilemma for lawyers, who may be deterred from making applications to disqualify judges, as it can be seen as an insult to the honesty and integrity of the judicial officer.[125] These issues are heightened where the apprehension of bias claim rests on contested facts.[126]

56. Considered at the most fundamental level, former Chief Justice of the High Court of Australia, Sir Anthony Mason, questioned whether the practice of recusal has kept pace with the changing scope of the law on bias. In his view, the current practice of self-recusal was justified when the only question was whether a judge was actually biased, as the judge concerned is best placed to determine that question. However, this justification no longer holds now that the bias rule is concerned equally with appearances, and recusal is also required in cases where a reasonable apprehension of bias exists.[127] Although issues of efficiency and case management are important considerations, it has been argued that alternative procedures may better reflect the scope and rationale of the rule on bias, and contribute to greater public confidence in the administration of justice.[128]

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118 Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of Its Own' (1998) 73 *Australian Law Journal* 72, 73; Anthony Mason, 'Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review' (1998) 1 *Constitutional Law and Policy Review* 21, 27; Campbell (n 115) 1; Appleby and McDonald (n 102) 111–12. Final courts of appeal in the United Kingdom and New Zealand have reviewed their own judgments for alleged apprehended bias of one of their members, based on their inherent jurisdiction: see further Ibid 110–11.

119 Mason (n 118) 27; Appleby and McDonald (n 102) 112.

120 Appleby and McDonald (n 102) 112.

121 See, eg, Appleby and McDonald (n 102); Campbell and Lee (n 21) 167–69; Mason (n 118); Olijnyk (n 35); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [185] (Callinan J). See also Julia Hughes and Philip Bryden, 'From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification' (2016) 53 *Osgoode Hall Law Journal* 853, 894.

122 Campbell and Lee (n 21) 167.

123 Appleby and McDonald (n 102) 95.

124 Ibid 98.

125 Charles, Gardner, Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30 *Review of Litigation* 671, 678. See also ibid 97.

126 Ibid 101–05.

127 Mason (n 118) 24.

128 See, eg. Appleby and McDonald (n 102); Campbell and Lee (n 21) 169–70.

The Guide to Judicial Conduct

57. In addition to guidance given by case law, the judiciary has in the past two decades developed its own *Guide to Judicial Conduct* to assist judges to navigate difficult ethical areas, including in relation to judicial impartiality and perceptions of bias. The Guide, first published under the auspices of the Council of Chief Justices of Australia in 2002, is now in its third edition.[129] The preface to the current edition draws a clear link between judicial conduct and public confidence, stating that the Guide:

> provides principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances. It is by maintaining the high standards of conduct to which the Guide aspires that the reputation of the Australian judiciary is secured and public confidence in it maintained.[130]

58. The Guide emphasises the central role and importance of judicial impartiality (notably without defining it), alongside independence and integrity.[131] A great deal of the Guide provides suggestions on how issues around impartiality and bias may arise and be addressed — including in a judge's private life and by conduct in court.[132]

59. Although published under the auspices of considerable collective authority, the Guide is expressly stated to be generally non-binding.[133] It emphasises that in difficult or uncertain situations, the primary responsibility of deciding which course of action to take rests with an individual judge. However it 'strongly recommends consultation with colleagues in such cases and preferably with the head of the jurisdiction'.[134] This may explain why although some cases look to the Guide as evidence of what may be considered to give rise to an apprehension of bias, many do not consider it directly.[135]

129 Australasian Institute of Judicial Administration (n 58).
130 Ibid ix.
131 Ibid 5.
132 Ibid. See in particular Chapters 3 and 4.
133 Ibid 1.
134 Ibid 2.
135 For a recent case where judges reaching different conclusions on apprehended bias did each refer to the Guide, see *Charisteas v Charisteas* (2020) 60 Fam LR 483 [32]–[34], [135]–[137].