Australian Judicial Officers Association

SUBMISSION FROM THE AUSTRALIAN JUDICIAL OFFICERS ASSOCIATION TO THE AUSTRALIAN LAW REFORM COMMISSION ON JUDICIAL IMPARTIALITY

30 JUNE 2021

INTRODUCTION

1. The 'Primer' and background provide a good analysis of the issues and the existing state of the law and academic research.
2. The law was also recently visited by the Full Court of the Federal Court of Australia in *GetSwift Limited v Webb* [2021] FCAFC 26 (5 March 2021), relevant parts of which are attached as Annexure A.

ISSUES

3. The issues we see arising from the Primer and the Consultation Paper and on which we would seek to have input are -
    a. Should the issue of actual or apprehended bias be addressed by statute or court guides or should the common law continue to develop the appropriate rules? If by court guides, should that material be public?
    b. In a case where actual or apprehended bias is raised, should a judge other than the judge against whom the contention is raised, deal with the contention?
    c. Specifically on courts of more than one member, how should the issue of actual or apprehended bias be addressed?
    d. Is judicial bias compounded by the appointment process? Would greater diversity on the bench aid in minimizing both the actuality and appearance of judicial bias?

OVERVIEW

4. It is not the intention of this submission to discourage reform. However, the principles of the law pertaining to judicial bias and apprehended bias have been painstakingly developed and modernised over centuries by the most senior courts in Australia and the United Kingdom. Practitioners and judges alike understand those principles and are reminded of them in new cases and in ongoing reinforcement educational programs within courts and related institutions. In the vast majority of cases the rules thus developed are conscientiously observed. To the extent exceptional or borderline cases occur, there are suitable mechanisms to correct error.

5. All systems may be improved. There is merit in courts being encouraged to review and update the content and mechanisms of both reminding judicial officers of the law and practical approaches to addressing issues which may arise – such as the benefits of peer communication. But how this is carried out and whether it is carried out should be left to each individual court so that the suggestions in that court can be shaped to the needs and circumstances of that court.

6. Recusal applications in some courts may be used as a convenient tactical tool, particularly in highly discretionary areas of law. Abuse of such applications may impose real hardship on the party wishing to get on with its dispute resolution.

SUGGESTIONS

Statute, common law or court management?

7. This is an area addressed by the common law for centuries. Apparent or actual bias is a question resolved by those who are intimately acquainted with the nature of the complaints which may be raised and the reality of how a judge is trained to and should in fact discharge his or her sworn duty.

8. The nature of the sworn duty cannot be over emphasized. It is a matter of singular concern to any responsible judge for it to be suggested that there is a departure from the judicial oath which is *to do right by all persons, without fear or favour, affection or ill-will.* Judges understand that the impartial administration of justice according to law is a power and a duty of government. The judges to whom that responsibility is given must be free of any external influence other than the law itself. They understand that the values of impartiality and independence are closely related.

9. As Gleeson CJ has said, judges' '*capacity to honour their oath does not rest only upon their individual consciences. It is supported by institutional arrangements. Citizens are not required to have blind faith in the personal integrity of judges; and judges are not required to struggle individually to maintain their impartiality. The Constitution, written or unwritten, of a society provides for the means of securing the independence and impartiality of judges.'*

10. The understanding of the judges' role and the principles of bias are quintessentially part of the common law and those principles should continue to develop organically through the nation's highest custodian of the common law, the High Court of Australia.

Should a judge other than the judge against whom the contention is raised, deal with the contention?

11. The general view of this association is that such an instance would be rare. The work of the courts would be severely handicapped if every single bias application had to be referred to another judge. It would be a very convenient tactical mechanism by which a litigant could engineer delay. Those who advocate such a course may not fully understand the seriousness with which any judge faced with a bias application should and almost always would treat it even if it is manifestly groundless. The authorities recognise that if an apprehended bias assertion is made to the presiding judge at an early stage that judge has the opportunity to consider and respond to a litigant's concern and address the real

or perceived difficulty. Ultimately, this tends to save a lot of time and avoid angst without unduly disrupting the efficient management of a hearing.

12. That said, it may well be that courts should be encouraged to develop their own custom-made Practice Notes or Guidelines to address questions such as these. It may, for example, in some courts, be that the judge against whom a contention is raised but refuses it should almost invariably and even without hearing from the parties, grant leave to appeal. But these policies are best left for development by individual courts as part of their own assessment of the best practice in their court.

13. The contentment of the moving party with the outcome is only one consideration. There will be other parties affected by the process. Often assertions of bias are raised late in the day by the losing party or the party who apprehends a loss. For the system to be tactically manipulated by such actions is a real concern for all.

14. Guidelines should not be made public. There is a plethora of public information on the topic – mainly in the form of case law. If guidelines are adopted they should take the form of an internal bench book style of practical and private suggestion only.

15. These should be 'guidelines' only because judicial independence is a paramount feature of the rule of law. Other than in appellate settings, it should be a rare case where Judge A is invited to rule on whether there is any form of disqualifying bias on the part of Judge B.

Specifically on courts of more than one member, how should the issue of actual or apprehended bias be addressed?

16. If a bias application is raised against Judge A only in a bench of Judges A, B and C, how should it be addressed and by whom?

17. The general experience is that Judge A only should address the question, rule on it and advise the other members of the bench. In practice, the Judge concerned

will often consult with the other members of the bench, but the decision remains that of the Judge the subject of the application.

18. There are problems in departing from this practice. Are Judges B and C to also sit in judgment of judge A on this point? This would also conflict with the notion of judicial independence. It could also give rise to tension in judicial ranks which is to be avoided. If a decision not to 'recuse' is thought to be incorrect, it may be appealed.

19. This issue may also benefit from private (non-public) guidelines on this point.

Is judicial bias compounded by unconscious bias through the nature of the judicial appointment process? Would greater diversity on the bench aid in minimizing both the actuality and appearance of judicial bias?

20. The view of this body has always been that appointment should be on merit alone. There has been increasing diversity of appointments. Issues of unconscious bias are routinely addressed in judicial development programmes.

21. Any suggestion that merit precludes, excludes or is incompatible with diversity should be rejected.

ANNEXURE A

GetSwift Limited v Webb [2021] FCAFC 26 per Middleton, McKerracher and Jagot JJ (5 March 2021)

27. The test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question he or she is required to decide: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 ('***Ebner***') at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ), applied in *CNY17 v Minister for Immigration* [2019] HCA 50; (2019) 375 ALR 47 ('***CNY17***') at [17]-[18] (Kiefel CJ and Gageler J); [50] (Nettle and Gordon JJ); and [132] (Edelman J). The bias rule is concerned as much to preserve the public appearance of independence and impartiality as it is to preserve the actuality: *CNY17* at [18] (Kiefel CJ and Gageler J). It also reflects a precautionary approach: "In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view": *Ebner* at [20]. The application of the rule involves two steps: first, identification of the factor which it is said might lead the judge to decide the case otherwise than on its legal and factual merits; and, second, an articulation of the logical connection between that factor and the feared deviation from the course of deciding the case impartially on the merits: *Ebner* at [8]; *CNY17* at [21]; cf *Isbester v Knox City Council* [2015] HCA 20; (2015) 255 CLR 135 ('***Isbester***') at [59] (Gageler J) where three steps are articulated. The connection must be assessed objectively: see *Michael Wilson & Partners v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 at [67] (Gummow ACJ, Hayne, Crennan and Bell JJ). The conclusion of apprehended bias is "largely a factual one": *CNY17* at [93] (Nettle and Gordon JJ).

28. Whilst a precautionary approach is to be observed, the cases emphasise that an allegation of apprehension of bias must be "firmly established": see, eg, *Reece v Webber* [2011] FCAFC 33; (2011) 192 FCR 254 at [45] (Jacobson, Flick and Reeves JJ) citing *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 ('***Re JRL***') at 352 (Mason J). The reference to "firmly established" originated in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553 (Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ). A conclusion of apprehended bias "is not to be reached lightly": see *CNY17* at 61 [56] (Nettle and Gordon JJ) citing *Re JRL* at 371 (Dawson J).

29. There is a variety of ways in which the impartiality of a court may be or may appear to be compromised. In *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41 at 74, Deane J, who was not dissenting on this point, identified four of them as "distinct, though sometimes overlapping, main categories of case". They were:

(1) interest – where the judge has an interest in the proceedings, whether pecuniary or otherwise, giving rise to a reasonable apprehension of prejudice, partiality or prejudgment;

(2) conduct – where the judge has engaged in conduct in the course of, or outside, the proceedings, giving rise to such an apprehension of bias (including prejudgment);

(3) association – where the judge has a direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings; and

(4) extraneous information – where the judge has knowledge of some prejudicial but inadmissible fact or circumstance giving rise to the apprehension of bias.

30. We are primarily concerned with the fourth category of extraneous information.

31. It is convenient to make some observations on the extent of the knowledge attributable to the hypothetical observer for the purpose of determining whether that observer would reasonably apprehend bias. That knowledge does not extend to a knowledge of the law or any detailed knowledge of the evidence relied upon or to be relied upon by the fact-finding judge.

32. The question was discussed in *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 ('***Johnson v Johnson***'), where the plurality (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) said at [13]:

> Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of

> cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.
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> (Footnote omitted.)

Justice Kirby also discussed the attributes of the fictitious bystander at [53]:

> 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.
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> (Footnotes omitted.)

And further at [53]: "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious." (Footnote omitted.)

33. It is probably fair to conclude that the hypothetical observer today is more aware of the court processes than, say, a few decades ago. Knowledge about courts has become more accessible through the media, and the courts are more accountable in the conduct of judicial functions. It is also appropriate to conclude that the hypothetical observer would, before forming a view about the existence of a reasonable apprehension of bias, take the trouble to inform himself or herself to the extent necessary to make a fair judgment of what might occur in the process confronting a fact-finding judge.

34. The hypothetical observer is to be attributed with knowledge of the nature of the decision, the context in which it is made, and the circumstances leading to it: *Isbester* at [23] (Kiefel, Bell, Keane and Nettle JJ). Nevertheless, it is always to be kept in mind that the observer is a layperson and not a lawyer.

35. The hypothetical observer is taken to understand how a judge is capable of putting irrelevant and immaterial matters to one side as part of the assumed abilities of a judge. In this regard a number of observations have been made by the courts:

(a) a judge as a professional decision-maker can ordinarily be expected to be capable of discarding "the irrelevant, the immaterial and the prejudicial": see *CNY17* at [28] (Kiefel CJ and Gageler J) citing *Johnson v Johnson* at [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) quoting *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527;

(b) a judge is "equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in evidence": *British American Tobacco Australia Services Ltd v Laurie & Ors* [2011] HCA 2; (2011) 242 CLR 283 ('***BAT v Laurie***') at [140] (Heydon, Kiefel and Bell JJ)); and furthermore is aware of "the possibility of the evidentiary position changing": *BAT v Laurie* at [145] (Heydon, Kiefel and Bell JJ); *Centro (No 2)* at [20] (Middleton J); *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Limited* [2013] FCAFC 150 at [38] (Allsop CJ, Middleton and Katzmann JJ);

(c) "[a] judge will be assumed to have a capacity to put from his or her mind evidence of a prejudicial kind which has been heard or seen but is not relevant to the determination of the question before the Court": see *R v Burrell* [2007] NSWCCA 79; (2007) 175 A Crim R 21 at [7] (McClellan CJ at CL, Sully and James JJ agreeing). See also *State of Victoria v Australian Building Construction Employees and Builders Labourers Federation* [1982] HCA 31; (1982) 152 CLR 25 at 58 (Gibbs CJ), 76 (Stephen J); and

(d) judges are capable of impartially reconsidering matters which have previously been considered or which may even have been pronounced upon by that particular judge – subject always to the nature of the findings: see, eg, *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 554 (Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ); *Reece v Webber* [2011] FCAFC 33; (2011) 192 FCR 254 at 272 [52] (Jacobson, Flick and Reeves JJ); and *Centro (No 2)* at [57] and [60] (Middleton J).

36. We agree that there is a degree of artificiality about this attribution, and indeed some scepticism has been expressed about its intellectual coherence: see *Commonwealth Bank of Australia v Jackson McDonald (a firm)* [2014] WASC 301 at [24] (Martin CJ). The primary judge himself has made similar remarks including that the test may obscure "normative standards of behaviour determined by the Court itself": *McKenzie v Cash*

Converters International Ltd (No 3) [2019] FCA 10 at [28]. See also J [30]; *Webb v GetSwift Ltd (No 5)* [2019] FCA 1533 at [27].

37. The test for apprehended bias is the same wherever it arises, although the context in which it falls to be applied will clearly affect how the test is applied: *Cabcharge Australia Ltd v Australian Competition and Consumer Commission* [2010] FCAFC 111 (Kenny, Tracey and Middleton JJ) at [25].

38. A reasonable apprehension of bias may arise from the decision-maker receiving extraneous information, including knowledge of some prejudicial but inadmissible fact or circumstance. This ground is not dependent on showing that the decision-maker might have prejudged the issues by making particular findings or rulings on the extraneous information. It is also not necessary to show that the information has in fact worked to the prejudice of the applicant – it is enough that it might do so: *Re JRL* at 349 (Gibbs CJ) citing *Kanda v Government of Malaya* [1962] UKPC 2; [1962] A.C. 322 at 337-338.

39. Importantly, and we think determinatively in this appeal, it is to be recalled that even where a decision-maker has not consciously considered the extraneous information, a reasonable apprehension of bias can arise because of its "subconscious" influence: *CNY17* at [27]-[28] (Kiefel CJ and Gageler); [51], [92], [97] (Nettle and Gordon JJ); [111] (Edelman J). Where there is a risk of subconscious bias "that risk cannot be cured by putting the information aside": *CNY17* at [97] (Nettle and Gordon JJ). Because "reason cannot control the subconscious influence of feelings of which it is unaware [where] there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves": *Public Utilities Commission of the District of Columbia v Pollak* [1952] USSC 69; (1952) 343 US 451 ('***Pollak***') at 466-467. In *CNY17*, Kiefel CJ and Gageler J (at [27]) set out the following extract from *Pollak* (at 466-467):

> ...The fact is that judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do

> not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

40. Chief Justice Kiefel and Gageler J then paraphrased that reasoning as follows (at [24]):

> The fair-minded lay observer would recognise that although the Authority is not a court and although a Reviewer is not necessarily a lawyer, the Authority as constituted by a Reviewer is a professional decision-making body that can ordinarily be expected to be capable of discarding 'the irrelevant, the immaterial and the prejudicial'. But, the fair-minded lay observer must also be taken to recognise that even a professional decision-maker is not a 'passionless thinking machine' and that information consciously and conscientiously discarded might still sometimes have a subconscious effect on even the most professional of decision-making
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> (Footnotes omitted.)

41. In a separate judgment, Edelman J (at [136]) indicated that a "more robust approach" might be taken to the possibility of a judge, as opposed to a member of the executive, being influenced by extraneous information. However, his Honour nonetheless accepted that the principles governing the test for apprehended bias are based on "the recognition of human nature" and "human frailty": at [132] citing *BAT v Laurie* at [139] and *Ebner* at [8]; and the hypothetical observer's presumed knowledge that "in adjudication, as in life generally, the mental plasticity of human decision making is subject to the unconscious": at [133]. In this regard, the difference between a judge or a member of the executive in the mind of the hypothetical observer will be limited.

42. In a recent article by Professor Gary Edmond and Associate Professor Kristy A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82(4), *The Modern Law Review* 633, it was observed (at 646):

> From a cognitive science perspective biases are predispositions and preferences that affect judgment and decision-making. They can be thought of as the cognitive equivalent of a reflexive knee-jerk; they occur quickly, effortlessly and automatically. Biases are strategies that 'are highly economical and usually effective, but

> they lead to systematic and predictable errors'. That is, biases are decision-making styles that do not necessarily incorporate what might be understood as rational (or legally normative) approaches to relevant admissible evidence, and they can influence how information is processed, prioritised and evaluated. Decades of research has identified not only a seemingly endless array of different types of bias, but confirmed their ubiquity and influence irrespective of a person's profession, experience or intelligence.
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> (Footnotes omitted.)

43. In the book *How Judges Judge, Empirical Insights into Judicial Decision-Making* (New York, NY: Routledge, 2021), Dr Brian M Barry said (at pp 68-69):

> Where judges are susceptible to the influence of biasing but inadmissible evidence, is motivated reasoning at play? Wistrich, Guthrie and Rachlinski suggested and speculated other psychological effects may be at work. For example, they referred to *psychological reactance* (a variation on what is commonly known as "reverse psychology"), *ironic process theory* (the difficulty people have ignoring thoughts they are trying to suppress), or *mental contamination* (the idea that misleading information persists in contaminating decision-making, even after someone is aware it is misleading). There is some degree of overlap between these psychological phenomena and motivated reasoning. Whatever the case, results from these studies suggest that judges sometimes seemed motivated to reason towards a particular result relying on inadmissible evidence, even though they knew to suppress and ignore it.
>
> (Footnotes omitted.)

And earlier (at p 16) it was stated that:

> Judges are aware of their obligations to use information cautiously and even-handedly. As far back as 1660, English Chief Justice Matthew Hale drafted a sort of early self-help guide for the judicial profession, which he called "things necessary to be continually bad in remembrance." One of his resolutions was "that I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard." Simply put, judges should consciously resist the urge to prejudge a case

> before all evidence is aired. Nevertheless, research shows that, in fact, judges form impressions and make preliminary decisions on cases at an early stage in proceedings. Two questions arise: are judges susceptible to confirmation bias in how they use information, and if so, what does this mean for judicial outcomes?
>
> (Footnotes omitted.)

44. Whilst then a judge is understood by the hypothetical observer to be able to discard the irrelevant, the immaterial and the prejudicial, and decide cases solely on the material that is in evidence, there still remains the possibility of apprehension of bias in respect of judicial officers seized of extraneous information. Otherwise, there would be no place for the recognition of human frailty and human nature which are accepted aspects of the approach of the fair-minded lay observer in considering apprehension of bias.

45. It follows that there is a need to recognise "human frailty" such that, even where a decision-maker has expressly disavowed consideration of certain material, it may be that the particular nature and relevance of that material can still give rise to the risk of a subconscious influence.

…

60. We accept that there are institutional protections that guard against the risk of a reasonable apprehension of bias and which might be imputed to the reasonable fair-minded lay observer, including the judicial oath and the parties' rights to a subsequent full appellate hearing. However, these matters neither avert the risk of a reasonable apprehension of bias nor the inconvenience of the interested parties being left to the cost and burden of an appellate process to cure error. This is particularly the case where is a real danger of subconscious bias in the way we have described.

61. The contradictor then made the following written submission:

> The absolutist approach is myopic in its focus on only one aspect of justice: the perceived purity of having a fresh judge deal with each separate manifestation of the same controversy. The absolutist approach ignores other fundamental normative priorities, for example: avoiding undue delay, considerations of efficiency and cost, and avoiding inconsistent outcomes on the same or similar questions.

(Footnotes omitted.)

62. This submission introduces notions of case management principles. However, as the primary judge himself recognised, the principle of impartiality will override any case management consideration. Whilst a pragmatic or cost-benefit approach to the work of a judge in both managing cases and making decisions is sometimes to be encouraged, it must be tempered by the rule of law and the importance of upholding confidence in the administration of justice.