The Hon Justice SC Derrington
President
Australian Law Reform Commission
PO Box 12953
George St Post Shop
Queensland 4003

15 July 2021

Dear President

Re Consultation Paper: Judicial Impartiality

The Australian Bar Association (ABA) is grateful for the opportunity to comment on this consultation paper.

We have consulted with State and Territory Bar Associations and provide the attached submission.

Yours sincerely

Matthew Howard SC
President

Judicial Impartiality

1. This submission addresses issues raised in the ALRC's Consultation Paper (**CP**) entitled "Judicial Impartiality" dated April 2021.

Transparency of Law and Process

2. The CP observes that initial consultations have raised issues with the apprehension of bias principle, including that it is difficult to understand and unpredictable in its application ([18] p 9).

3. The CP does not specifically propose that the test should be altered. The annexed examination of the authorities indicates that the law relating to actual bias and apprehended bias in Australia has developed into a considered set of principles which, although they may, on occasion, be difficult to apply in practice, do not call for substantive alteration.

4. Instead, the CP invites consideration of a range of mechanisms so as to ensure that the test is both well understood and capable of being applied in a practical way. Thus:

   (a) CP 2 (p 14) proposes the promulgation of practice notes and practice directions to clarify procedures for the making of recusal or disqualification applications, whether an affidavit in support is required, how reasons should be delivered and mechanisms for appealing or reviewing decisions.

   (b) CP 3 (p 15) proposes the development and publication of an accessible guide to recusal and disqualification for members of the public.

   (c) CP 4 (p 16) proposes a judicial-officer led project to identify more comprehensively the circumstances in which apprehended bias will and will not arise.

   (d) CP 5 (p 17) proposes that Commonwealth courts should publish information on their respective websites to support the independence and impartiality of judges and mechanisms to ensure judicial accountability.

5. There would be utility in promulgating practice notes and directions which provide more consistent guidance regarding the applicable procedures for making recusal or disqualification applications.

6. It is also appropriate that the websites of federal courts provide as much information as possible to assist members of the public to better understand the role and function of judges, the importance of the need for independence and impartiality, and mechanisms available to ensure

adherence to these concepts. Such information would appropriately include the concepts of natural justice and bias (actual and apprehended), which underpin the hearing rule.

7. That said, the ABA has reservations about going beyond the generally applicable principles and seeking to identify more comprehensively the circumstances in which apprehended bias will and will not arise. Both the case law and practical experience tell against an attempt to codify the circumstances in which a judge should or should not disqualify him or herself on the basis apprehended bias. In *Ebner* the plurality stated:[1]

> It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly decline to sit. Circumstances vary, and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted….

8. To the extent that the education of the profession and members of the public and, for that matter, the judiciary, could be improved in relation to the operation and application of the principles of apprehended bias, this educative function would probably be assisted by the formulation of (non-exhaustive) examples in the material identified in [6] above. It may also be assisted by the creation of a federal Judicial Commission.

Procedures for Determining Disqualification Applications

9. CP 6, 7, 8 and 9 are concerned with procedures for determining applications for judges to disqualify or recuse themselves on the basis of actual or apprehended bias. CP 6 and CP 8 invite consideration of whether applications should be determined by judges other than those affected by the alleged bias or apprehension of bias. CP 7 concerns interlocutory appeals from judgments determining applications. CP 8 asks whether Commonwealth courts should adopt additional systems of practices to screen cases for potential issues of bias at the time that the cases are allocated.

10. CP 8 appears both impractical and liable to create problems of its own. It appears to contemplate that it is possible, with foresight, to identify or codify the circumstances in which particular judicial officers are likely to have to disqualify themselves for bias or apprehended bias. This approach may pre-empt the proper application of the important principle that judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and are not at liberty to decline to hear cases without good cause.

11. In relation to CP 6 and 8, the ABA does not support changes to procedures that would involve disqualification applications being automatically referred to judges other than those to whom the

[1] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [21] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

application relates. Such procedures are likely to have a number of disadvantages, including necessitating the use of affidavit evidence and prolonging the proceedings, in a manner that is not consistent with case management principles.[2] Applications for disqualification need to be determined before any other issues are disposed of, given "actual and apprehended bias strike at the validity and acceptability of the trial and its outcome".[3] Automatic referral is likely to fragment the hearing process and contribute to unnecessary and avoidable delays and inefficiencies.

12. As to CP 7, the ABA agrees that, to the extent necessary, the facility for an expeditious interlocutory appeal, with leave, should be available from the determination of a disqualification application. Expedition is consistent with the need to accord priority to hearing and determining disqualification applications. The ALRC does not appear to suggest that the leave requirement should be dispensed with, nor would this be the position of the Bar Association. Questions of leave require consideration of the particular facts of each case. That said, recognition of the importance of the need for independence and impartiality may, in many cases, militate in favour of a grant of leave.

Supporting Judicial Impartiality

13. Proposals 14-19 in the CP appear to be directed towards avoiding the risk of bias and apprehended bias by supporting and improving the qualities of the federal judiciary. The ALRC proposes a more transparent process for the appointment of federal judicial officers that has regard to the diversity in the community (CP 14, 15, 16). It also proposes improving the provision of judicial education (CP 17, 18, 19).

14. The ABA is supportive of improved transparency in judicial appointment processes, as well as the provision of judicial education that better ensures that judges have an appreciation of issues that may be relevant to or impact upon the performance of their functions, by way of one example only, the risk of an unconscious bias against a particular group including indigenous Australians.[4] However, any serious consideration of strengthening the procedures regarding judicial impartiality needs to be accompanied by consideration of establishing a federal judicial commission. Absent a federal judicial commission, there is no readily available, independent of the court recourse for improper behaviour on the part of the federal judiciary; appeals are not a complete answer.

15. The ABA firmly supports the establishment of a federal Judicial Commission, not only to assist in the provision of judicial education programs but also to provide a forum for dealing with complaints against members of the federal judiciary.

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2 See eg *Federal Court of Australia Act 1976* (Cth), s 37M(1).

3 *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; [2006] HCA 55 at [117] per Kirby and Crennan JJ.

4 ALRC, Background paper JI6, *Cognitive and Social Biases in Judicial Decision-Making*, April 2021, [37].

16. The current federal complaints schemes are deficient, principally for three reasons:

    (a) they lack formality and provide too much discretion to the head of jurisdiction;
    (b) they may place a head of jurisdiction in an invidious position when dealing with a judge who is also a colleague;
    (c) there is uncertainty around how to deal with less serious complaints; and
    (d) there is no permanent administration support.

17. These processes suffer from a lack of transparency, which undermines public confidence in the judiciary. The current processes at a federal level also do not provide any mechanism for disciplining a judge, other than by referral to parliament.

18. The ABA considers that the Judicial Commission of NSW offers a useful model for consideration and replication at a Commonwealth level. In the 2019-2020 year, 68% of all complaints received by the NSW Judicial Commission involved allegations of failure to give a fair hearing or apprehended bias.[5] Such complaints are "dealt with on their merits" (p 52) but because there are usually appeal or review rights, the complaints are often summarily dismissed.

19. There is no apparent reason why the situation at a federal level should be any different from that in New South Wales. The frequency of complaints to the NSW Judicial Commission that involve a perception of bias or lack of a fair hearing, suggests that a not insignificant number of litigants before the federal courts may feel sufficiently dissatisfied to lodge a complaint, if a suitable mechanism was available. While the remit of a Federal Judicial Commission, like the NSW Judicial Commission, may be limited in terms of its ability to deal with complaints of bias or apprehended bias due to the availability of appeal or review mechanisms, the ability of a Commission to receive complaints would be an important accountability mechanism.

20. In the ABA'Ss submission, a federal Judicial Commission should have the following broad features:

    (a) The Commission should be independent of the Executive. It should fairly and impartially investigate complaints within its remit; and it should provide judicial officers with a fair opportunity to respond to complaints. The complaints-handling role of the Commission should be protective of the public and the principles fundamental to the Australian judicial system, including the independence and impartiality of the judiciary, rather than disciplinary in nature. As with the Judicial Commission of NSW,[6] where a complaint does not justify the attention of the Commission, there should be scope for it to be referred to a relevant head of jurisdiction where it appears to be wholly or partly substantiated.

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5 Judicial Commission of NSW, *Annual Report 2019-2020*, p 53.
6 *Judicial Officers Act 1986* (NSW), s 21(2).

(b) The Commission's jurisdiction should encompass all members of the federal judiciary, including federal judges, former judges, members of federal tribunals and justices of the High Court.

(c) The Commission should be accessible to all members of the public.

(d) The Commission should be transparent. Its membership and processes should be clearly stated and created by legislation. Complainants should be advised of the outcome of their complaints and reasons provided. A federal judicial Commission could follow the practice of the Judicial Commission of NSW, by publishing anonymous case studies about the outcome of complaints.

(e) In addition to handling complaints against judicial officers, the Commission should, as indicated above, assist in the provision of education and training.

Annexure: Actual and Apprehended Bias — Existing Law

1. As the ALRC has pointed out in its background papers,[7] the tests for actual bias and apprehension of bias derive from and form part of the common law of Australia.[8]

2. Actual bias involves prejudgment. The form of prejudgment "is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence of arguments may be presented".[9] The test is stringent and unlikely to arise in most cases.[10]

3. The test for apprehended bias (the apprehension of bias principle) is set at a lower level.[11] The principle was authoritatively stated by the High Court in ***Ebner*** *v Official Trustee in Bankruptcy* (2000) 205 CLR 337 in the following terms (at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ):

> Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide.

4. This statement of the apprehension of bias principle drew on Deane J's formulation of the test in ***Webb*** *v The Queen* (1994) 181 CLR 41. His Honour stated (at 67-68, footnotes omitted):

> In a series of cases, the Court has formulated the test to be applied in this country in determining whether a judicial officer ("a judge") is disqualified by reason of the appearance of bias, as distinct from proved actual bias. That test, as so formulated, 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" in issue. The quoted words in that statement of the test are taken from the judgment of the Court in *Livesey v NSW Bar Association*. In that case, and in a number of other cases, the test was stated in terms of an apprehension on the part of the "parties or the public". So stated, the test directly reflects its rationale, namely, that it is of fundamental importance that the parties to litigation and the general public have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice….

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7 See eg ALRC, *The Law on Judicial Bias: A Primer*, Background Paper JI1, December 2020, [10].

8 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [9] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

9 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17 at [72] per Gleeson CJ and Gummow J (Hayne J agreeing).

10 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; [2008] NSWCA 209 at [73] per Basten JA.

11 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; [2008] NSWCA 209 at [73] per Basten JA.

5. The plurality in *Ebner* observed that the apprehension of bias principle "gives effect to the requirement that justice should both be done and be seen to be done".[12] This requirement, in their Honours' opinion, "reflects the fundamental importance of the principle that the tribunal be independent and impartial".[13] So important is this principle "that even the appearance of departure from it is prohibited lest the integrity of the judicial system is undermined".[14] In this way, the apprehension of bias principle is fundamental to the Australian judicial system.[15] Arguably, also, it is essential to the jurisdiction of Chapter III courts.[16]

6. The apprehension of bias principle does not involve predicting how the judge (or juror) will actually decide the matter. Rather, the relevant question "is one of possibility (real and not remote), not probability". Where the matter has already been decided, such as where evidence emerges after a judgment giving rise to an apprehension of bias, "the test is one which requires no conclusion about what factors actually influenced the outcome".[17]

7. Where the possibility of a fair-minded observer apprehending that a judge might not decide the case impartially is not real and too remote, the judge has a duty to hear the matter. On the other hand, where the circumstances are such that there is "real doubt" about whether there can be a reasonable apprehension that the judge can discharge his or her obligations impartially, a "prudent" approach is desirable and the judge should recuse him or herself. The plurality in *Ebner* explained as follows:[18]

> Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

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12 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ; see also *Webb v The Queen* (1994) 181 CLR 41 at 47 per Mason CJ and McHugh J, citing with approval from *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 351-35.

13 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

14 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

15 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [3] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

16 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [79]-[82] per Gaudron J.

17 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

18 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [19]-[20] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

> This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. 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 on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead to a judge to decline to hear or decide a case, the system would reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.

8. As indicated by Deane J in *Webb*, the current formulation of the apprehension of bias principle, derives from a series of cases in the High Court considered over a not insignificant period of time. Prior to *Webb* and *Ebner*, these cases included: *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; and *Vakauta v Kelly* (1989) 167 568.

9. Together with *Webb* and *Ebner*, these authorities considered alternative approaches towards dealing with apprehension of bias. In England, for example, in *Reg v Gough* [1993] AC 646, the House of Lords held that the appropriate test was whether in the circumstances of the particular case, it appeared to the appellate court (or trial judge) that there was (or is) "a real danger", in the sense of a real possibility, of bias. In that matter, the Lord Goff of Chieveley stated that it was "unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time".[19] In relation to the test itself, Lord Goff "prefer[red] to state the test in terms of real danger rather than real likelihood, ensure that the court is thinking in terms of possibility rather than probability of bias".

10. Deane J analysed the difference between the English and Australian tests in *Webb*, concluding that he was "of the firm view that the 'reasonable apprehension' test should continue to be accepted in this country".[20] His Honour reasoned that "adoption of a 'real likelihood' or 'real danger' test, with the appellate court (or the trial judge) itself as the reference point, would, in my view, go a long way towards substituting, for the doctrine of disqualification by reason of an appearance of bias, a doctrine of disqualification for actual bias modified by the adoption of a new standard of proof (ie, a real likelihood or possibility rather than probability in the sense of more likely than not)".[21] Deane J perceived a risk that adverse findings of apprehended bias may damage reputations and public confidence in the judiciary. Arguably, also, the English formulation, may not be in keeping with the principle that justice should both be done and be seen to be done.

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19 *R v Gough* [1993] AC 646 at 670, cited in *Webb v The Queen* (1994) 181 CLR 41 at 70 per Deane J.
20 *Webb v The Queen* (1994) 181 CLR 41 at 71.
21 *Webb v The Queen* (1994) 181 CLR 41 at 71.

11. Since *Ebner* was decided, its formulation of the apprehension of bias principle has been applied in a further series of judgments, including: *Smits v Roach* (2006) 227 CLR 423; [2006] HCA 36; *British American Tobacco Australia Services Limited* (2011) 242 CLR 283; [2011] HCA 2; *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; (2011) 244 CLR 427; and *Isbester v Knox City Council* [2015] HCA 20; (2015) 255 CLR 135.

12. Applying the apprehension of bias principle requires two steps. The plurality in *Ebner* explained the process as follows:[22]

> … 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….

13. It is not possible to state in an exhaustive or comprehensive way the circumstances in which a fair-minded observer might reasonably apprehend that a judge might decide a case otherwise than on its merits. As their Honours in *Ebner* observed:[23]

> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty….

14. In *Webb*, which concerned whether a fair-minded observer would have had a reasonable apprehension of a lack of impartiality on the part of a juror in a murder trial who gave a bunch of flowers to a person requesting that they be given to the mother of the deceased, Deane J "identified four distinct, though overlapping, categories of case involving disqualification by reason of the appearance of bias: interest; conduct; association; and extraneous information".[24] His Honour described the categories in the following way (omitting footnotes):[25]

> … The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias. The third category is disqualification by association. It will often overlap with the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will

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22 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

23 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

24 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [24] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

25 *Webb v The Queen* (1994) 181 CLR 41 at 74.

commonly overlap the third and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstances gives rise to the apprehension of bias.

15. In relation to the first of these categories – disqualification by an interest in the proceedings – Deane J stated that "the general rationale underlying the doctrine is reinforced by the principle expressed in the maxim that nobody may be judge in his own case".[26]

16. In *Ebner*, the issue was whether the holding of shares in a bank by two trial judges in circumstances where the bank was, in one matter, a party to the litigation and, in another matter, had an interest in the outcome, constituted an interest justifying the judges being disqualified due to a reasonable apprehension of being interested in the proceedings. Each of the shareholdings was small. One of the judges was a "contingent beneficiary" under a family trust that owned 8,000 to 9,000 shares. The other judge became a direct shareholder after inheriting a parcel of 2,400 shares after the trial and before judgment was delivered.

17. In *Webb*, Deane J had expressed an opinion that "in cases in which the judge, juror or statutory officer has a direct pecuniary interest in the outcome of the proceedings", disqualification should be "automatic without there being any 'question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case'".[27]

18. The Court in *Ebner* rejected the notion that "there is a separate and free-standing rule of automatic disqualification which applies where a judge has a direct pecuniary interest, however small, in the outcome of the case over which the judge is presiding".[28] Rather, in the opinion of the plurality, disqualification in shareholding cases depends on "whether there is a realistic possibility that the outcome of the litigation would affect the value of the shares".[29] If such a possibility exists, "the judge is disqualified, not automatically, but because, in the absence of countervailing consideration of sufficient weight, a fair-minded observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case".[30] Where "a judge has a not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation", the ordinary result will be disqualification.[31] As this circumstance did not obtain in either case, the apprehension of bias principle did not operate to disqualify either of the judges.

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26 *Webb v The Queen* (1994) 181 CLR 41 at 74.
27 *Webb v The Queen* (1994) 181 CLR 41 at 75.
28 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [54] per Gleeson CJ, McHugh, Gummow and Hayne JJ.
29 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [37] per Gleeson CJ, McHugh, Gummow and Hayne JJ.
30 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [37] per Gleeson CJ, McHugh, Gummow and Hayne JJ.
31 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [58] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

19. Like Deane J in *Webb*, the plurality considered that the applicable underlying principle was that, subject to the doctrines of necessity and waiver, a judge should not sit in his or her own case.[32] This is so whether or not the judge has a pecuniary interest in the outcome of the litigation.

20. The other categories of apprehended bias identified by Deane J in *Webb* (conduct, association and extraneous information) have been considered by the High Court in a range of other cases. For example, in *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283; [2011] HCA 283, the High Court held that finding a by a judge at an interlocutory stage to the effect that the appellant had adopted its document retention policy for the purposes of fraud, was such that a reasonable observer might possibly apprehend that at trial the judge might not move his mind from the position reached before the trial even if different material were presented at trial.

[32] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [60], [63] per Gleeson CJ, McHugh, Gummow and Hayne JJ.