

# ALRC Case Review – Instructions for Coding

## Step 1: Screening for relevance

Case classification **IRRELEVANT** where

- Reference relates to recusal or disqualification of an administrative decision-maker (Coded – **Administrative decision-maker**)
  - Example: *Toma v Workforce Recruitment and Labour Services Pty Ltd* (2020) FCA 1102 (relating to recusal of a member of the Fair Work Commission).
- Reference relates to recusal or disqualification otherwise not concerned with raising issue of bias in relation to a Commonwealth judicial officer (**Coded – Other**)
  - Example: concerns reference to recusal or disqualification of a judicial officer in a non-Commonwealth jurisdiction (*Walsh v Registrar, Supreme Court of Norfolk Island* (2018) FCA 1075 (relating to recusal of the Chief Justice of the Supreme Court of Norfolk Island)).
  - Example: Concerns reference to recusal or disqualification of a legal representative (*Lorde & Chu (ICL Discharge)* (2016) FCCA 1156 (relating to an application for disqualification of the Independent Children’s Lawyer)).

Otherwise case is **RELEVANT** – where:

- Reference to recusal or disqualification relates to bias issue being raised about Commonwealth judicial officer

Includes where bias issue raised for first time on appeal (noting that this will not be comprehensive of all cases where bias raised for first time on appeal).

## Step 2: Coding of relevant cases

<b>A. Court</b>
<i>Prefilled</i>
<b>B. Date</b>
<i>Prefilled</i>
<b>C. Key Bias Reference</b>
<i>How is the issue of disqualification or recusal raised in this judgment? Note – some may have multiple references – in which case complete ‘n’ for multiple references (Column T) and create a new case for each additional reference. Code the initial judgment to each new case.</i>
<b>Consider in following order:</b>
<b>i. Appeal/leave (refusal to recuse)</b>
<i>Include finalised application for leave to appeal and appeals where they specifically refer to a refusal to recuse below (where the appeal is ongoing, or it is a reference to an earlier appeal see xii and following, below)</i>

*Include cases where informal request was made but appeal court refuses to consider appeal on basis that no formal application for disqualification was made: eg. Lietzau v Lietzau [2018] FamCAFC 167.*

**ii. Judicial Review (refusal to recuse)**

*Include finalised judicial review applications where they specifically refer to a refusal to recuse below: eg, ALA15 v Minister for Immigration and Border Protection (2016) FCAFC 30.*

**iii. Appeal/leave - raising bias below (no recusal request)**

*Include appeal, application for leave to appeal, judicial review applications where party raises issue of bias of the judge below, but no recusal request (formal or informal) was made of the judge below*

➔ NOTE if it is coded to this attribute click on the case icon for the judgment (\*not file\*) **reclassify the case as Relevant – appeals (no recusal request) and stop coding**

**iv. Recusal request to judge seised**

*Where judgment references a recusal request made to a judge involved in delivering the judgment. Include reference to bias issue being raised and treated as a request to recuse*

*Example: include case referring to application in a case to recuse/disqualify; include case referring to oral application to recuse; include case referring to bias issue raised in email to the judge that is treated as a request to recuse. Also include references made by the litigant themselves to recusal requests (for example in emails from the litigant extracted in the judgment, eg, Sande & Darwin (2020) FamCA 1087). **NOTE:** if it is an appeal of/application for leave to appeal such a decision code as (i) above.*

**v. Bias raised with judge seised – but not pressed**

*Where a party raises a bias issue with a judge but it is ‘not pressed’ or the party specifically declines to make a formal application for disqualification, eg. Acres v Cannon (2016) FamCA 1.*

**vi. Judicial disclosure - no recusal sought**

*Where a judge makes a disclosure in relation to bias but the party does not seek disqualification, eg, BWE18 v Minister for Home Affairs [2019] FCCA 1523.*

**vii. Recusal - on own motion**

*Where a judge has made a decision to recuse without a request from a party, eg, Ambrose v Badcock [2021] FCA 881.*

**viii. Recusal - unclear if application or own motion**

*Where there is a reference to a judge recusing themselves, but not clear if it was on the request of a party or not. (Example: Duarte & Morse [2017] FamCA 350, [8], Ding & Ding & Ors [2017] FamCA 206, [1]).*

**ix. Reference to recusal request made to other judge**

*Reference to a recusal request involving a judge who is not on the court delivering the judgment (where otherwise does not fit into categories (i) – (viii)) – eg, Bahar v Sohrab (No 2) (2017) FamCA 343.*

**x. Recusal or request for recusal by Registrar**

*Reference to recusal or request for recusal by registrar, eg, Firmer v Britton [2017] FamCA 896.*

**xi. Other - raising bias of another Cth judge (no recusal request)**

*Reference to a bias issue involving another federal judge, but no actual request for recusal made, eg, Picos v Servcorp Limited (No 2) [2015] FCA 343.*

*Where there is a reference that refers to an application for leave/appeal in relation to a disqualification, but is not the final judgment in relation to the application/appeal, code using the most relevant category below:*

**xii. Appeal/leave (refusal to recuse) – expedition**

**xiii. Appeal/leave (refusal to recuse) – stay application**

**xiv. Appeal/leave (refusal to recuse) – Application for extension of time**

**xv. Appeal/leave (refusal to recuse) – reference to**

**xvi. Appeal/leave (refusal to recuse) – security for costs**

**D. Reasons on Recusal - only relevant for ‘Recusal request to judge seised’**

- Not applicable – choose this where Key bias reference is not ‘Recusal request to judge seised’

- Yes – other judgment

*Document contains reasons on recusal - in a judgment that is not disposing of the matter, or a separate costs judgment.*

- Yes – judgment on merits

*Document contains reasons on recusal – in a substantive judgment disposing of the matter.*

- No

*Document does not contain reasons on recusal, but only reference to recusal request.*

**E. Date of Recusal Request**

*This is to assist in identifying primary references.*

- Not applicable – choose this where Column B is coded
- Date of most formal request (D/MM/YYYY) – if unclear put ‘unclear’.

*Example: If a request is made by oral application only put the date of the oral application. If a request is raised informally and followed by a written application, put the date of written application.*

**F. Bias raised in relation to (Court)**

Choose the court the bias issue is identified in relation to.

- Family Court
- Family Court (WA)
- Family Court Full Court
- Federal Circuit Court (include issues identified in relation to the former Federal Magistrates Court)
- Federal Court
- Federal Court - Full Court
- Not applicable – do not use

### G. Primary Reference

*Each recusal request or recusal needs one primary reference. The primary reference should be determined depending on availability from the following options (in order of priority):*

- *the judgment concerning the request/recusal*
- *reference in the court the request/recusal relates to with most information*
- *reference in other court (including on appeal or judicial review)*
- Not applicable – where reference to recusal request of Family Court (WA) Judge, or Registrar
- Yes – this is the primary reference to the recusal request/recusal
- No – recusal request/recusal is referred to elsewhere: in this case fill in citation for primary reference in next column

**Example:** If you have an appeal from a decision not to recuse, consider if the request for recusal is reported elsewhere in the database. If it is reported elsewhere choose ‘No’, and insert citation in next column. If it is not reported elsewhere, choose ‘Yes’.

### H. Primary Reference Citation

- Not applicable – Column H is ticked Yes
- If Column H is ticked No – insert citation for primary reference (copy and paste from spreadsheet)
- ➔ If answer to Column H is NO – STOP CODING HERE (unless it is an appeal/application for leave to appeal a recusal decision)

### I. Appeal of interlocutory order

*Only relevant if Column B is Appeal/leave (refusal to recuse) or Judicial review (refusal to recuse)*

- Yes – Appeal of interlocutory order (even if heard at same time as final appeal)
- No – Appeal of final judgment
- Not applicable

### J. Recusal or successful appeal/judicial review?

- Yes – the document references either a decision to recuse, or a successful appeal on bias grounds (where appeal not yet determined, choose ‘no’)
- Part Recusal – the judge recuses themselves from hearing part of a matter on the grounds of apprehended bias, eg, *Budini v Sunnyfield (No 2)* [2020] FCA 988.
- No – the recusal request was dismissed or application for leave to appeal/appeal/judicial review application on bias grounds dismissed (where appeal not yet determined, choose ‘no’)
- Unclear – where it is not clear from the reference is the request was successful or not.
- Withdrawn – where a party withdraws a recusal request before determination, eg, *ABA Australian Bar Association Ltd v Minus (No2)* [2019] FCCA 176. Include where a recusal request is dismissed by consent, eg, *Matson v Secretary, Attorney-General’s Department* [2021] FCA 1027, and where a recusal request or appeal is deemed abandoned, eg, *Jarrah & Fadel* [2015] FamCAFC 161.
- Not determined – where the court determined an appeal in favour of the appellant on other grounds and did not consider the question of disqualification, eg, *Nimmo & Bush* [2017] FamCAFC 69; *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833.
- Not treated as request for recusal – where bias is raised as an issue but it is not treated as a request for recusal by the judge concerned, eg, *Dautry v Wemple* [2015] FCCA 943.
- No recusal sought – where the party did not seek recusal, eg, *Anstey v Mambourin Enterprises Ltd (No 2)* [2020] FCCA 907.
- Not applicable (eg. where recusal application made in relation to judge not listed to hear matter: see, eg. *Dickens & Dickens* [2018] FamCA 1109, [217]–[218]).

#### **K. Self-represented**

*Representation status of litigant at time proceeding identified in Column B initiated.*

- Yes – litigant was self-represented when request for recusal or appeal (as identified in Column B) was initiated
- No - litigant was self-represented when request for recusal or appeal (as identified in Column B) was initiated (even if not represented at time it was heard)
- Unclear

#### **L. Area of law**

For Federal Court check detail at front of judgment for categorisation

- ACLHR – Administrative, Constitutional and Human Rights
- Defamation
- EIR – Employment and Industrial Relations
- Family
- Bankruptcy and Insolvency
- Intellectual Property
- Migration
- Native Title
- Property

- RCP – Regulator and Consumer Protection
- Tax
- Unclear
- Not Applicable
- Unassigned

#### **M. Multiple References**

Code this if more than one primary reference is included in the same judgment. If so, choose the number of primary references and create duplicate copy in database and code additional reference accordingly.

*Example: an appeal raising an issue of bias below also includes a new recusal application against one of the appeal judges (see eg. CPJ16 v Minister for Home Affairs [2020] FCAFC 212)*

*A party brings a separate application for disqualification against each member of an appeals panel (see, eg, Akhtar & Gaber [2021] FamCAFC 22)*

*A party makes repeated applications for recusal in the same hearing, that are dealt with by the judge as separate requests for recusal (see, eg. Brown v State of Queensland [2020] FCA 1614)*

#### **N. Categories of bias raised**

Code 'Yes' for any relevant categories, leave unassigned for others:

- Interest (eg. financial interest or other personal interest in the case)
- Association (eg. knows one of the parties or counsel, or is a member of related organisation, or has worked at a related organisation)
- Conduct and Prejudgment (eg. *ex parte* communication, bullying, intervention in cross-examination, previous credibility finding, statements indicating prejudgment, involvement in previous matters, conduct favourable to one party)
- Extraneous Information (exposure to irrelevant but prejudicial material)
- Other (eg. gender bias, institutional bias)
- Bias alleged unclear