

## DISQUALIFICATION OF JUDGES FOR PECUNIARY OR PROPRIETARY INTERESTS IN THE OUTCOME OF LITIGATION

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### Abstract

*In Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd, a majority of the High Court abandoned the rule of automatic disqualification which had applied where a judge had a direct pecuniary interest in a party or the outcome of the case and adopted instead, a reasonable apprehension of bias principle of general application. This article considers the application of the reformulated reasonable apprehension of bias test in the context of direct shareholdings in a litigant corporation. By assessing the test against its rational foundations and taking into account practical considerations, it argues that the test is problematic. Against these conclusions, the benefits of the test of automatic disqualification are assessed. Furthermore, two important qualifications to this rule are examined: the doctrines of necessity and waiver. Using the underlying rational foundations of the rule, these doctrines are assessed and the proper scope of their exercise delineated. In light of this analysis, this article looks to reforms that could be made to clarify this area and concludes that given the need for the public confidence in the impartial administration of justice to be maintained, prevention of these cases is imperative. In this context, Canadian guidelines are examined and the recent Australian judicial guidelines entitled 'Guide to Judicial Conduct' published for the Council of Chief Justices of Australia in June 2002 are reviewed. Finally, this article concludes that for the rule against bias to function properly, all change must be consistent with the underlying need to preserve public confidence in the impartial administration of justice.*

### Part 1—Introduction

Unquestionably central to the preservation of public confidence in the administration of justice is the perception of judicial impartiality. As Lord Denning aptly stated, '[j]ustice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking "that judge was biased."<sup>1</sup> But do 'right-minded people' go away thinking that a judge was biased when he or she holds shares in a company which is a party to or connected with litigation before the court?

This is one of the issues concerning pecuniary interests that faced the High Court in the recent decision involving the joint appeals of *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*.<sup>2</sup> In this case, a majority of the Court<sup>3</sup> took the

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opportunity to abandon the rule of automatic disqualification which had applied where a judge had a direct pecuniary interest in the outcome of the case and adopted instead, an apprehension of bias principle of general application.

It is against this background that this thesis will examine the English and Australian approaches to pecuniary interest and automatic disqualification, and assess whether the High Court's reformulation of the test is consistent with the rational and doctrinal foundations of preserving public confidence in the administration of justice. This question will be approached in the following way. Part 2 will analyse the tests emerging from the cases against the rationale of the rule against bias. In light of these doctrinal foundations, Part 3 will examine the role of necessity, waiver and disclosure. Part 4 will examine the role of judicial codes of conduct, which have been adopted in Canada and recently in Australia. It will consider the extent to which these codes contribute to the maintenance of public confidence in the administration of justice.

Bias can present itself in two broad forms, actual bias and the appearance of bias.<sup>4</sup> Cases of actual bias seldom arise.<sup>5</sup> It is undesirable to make such an allegation because of the difficulty of proving actual bias and the potential damage to the integrity of the system by pursuing such a case.<sup>6</sup> For these reasons, it is usually the approach that allegations of actual bias are not pursued and instead, applicants argue that there is an appearance of bias.<sup>7</sup>

However, the issue that remains is determining the most appropriate test to be employed when assessing cases of apprehended judicial bias. In order to fully understand the implications of *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, it is important to first examine the approaches taken to the doctrine leading up to the case. Where there is an appearance of bias, historically, the application of the doctrine has resulted in a distinction being made between pecuniary and non-pecuniary interests.

### ***Direct Pecuniary or Proprietary Interest***

Arising from the maxim *nemo debet esse iudex in propria sua causa*, no man is to be a judge in his own cause, in *Dimes v Proprietors of Grand Junction Canal*,<sup>8</sup> Lord Campbell held that the existence of bias is effectively presumed where the judge is shown to have an interest in the outcome of the case they were to decide, thereby resulting in automatic disqualification. In *Dimes*, the decision of the Lord Chancellor was set aside on the ground that he had a substantial shareholding in the respondent company.<sup>9</sup> Pursuant to Deane J's influential judgment in *Webb v R*,<sup>10</sup> Australian courts have confined the application of this rule of automatic disqualification to cases where there is a direct pecuniary interest. Conversely, in England, in *R v Bow Street Magistrate, Ex parte Pinochet Ugarte (No 2)*,<sup>11</sup> the House of Lords took the opportunity to extend the rule of automatic disqualification to non-pecuniary interests.

#### *Pinochet (No 2)*

The highly publicised chain of events surrounding the attempted extradition of General Pinochet, former President of Chile, from England are well documented.<sup>12</sup> Generally, interest was elicited due to the importance of the proceedings for international and human rights law, matters which do not concern this paper. However, it is out of these circumstances that arose the bias allegation against Lord Hoffmann and it is therefore necessary to briefly outline the background to the case.

In October 1998, Pinochet was visiting England to seek medical treatment when he was arrested pursuant to s 8(1) of the *Extradition Act 1989* (UK), in relation to warrants alleging various gross violations of human rights committed whilst in office.<sup>13</sup> Pinochet argued against

the validity of his arrest and in the Divisional Court succeeded in having the warrants quashed.<sup>14</sup> The prosecuting authorities appealed the decision and it was the issue of his immunity as a former head of state that brought this case before the House of Lords.<sup>15</sup> Before the commencement of the hearing, Amnesty International, among other human rights bodies, obtained leave to intervene in the appeal.<sup>16</sup> The majority consisting of Lords Steyn, Nicholls and Hoffmann upheld the appeal, ruling that Pinochet did not enjoy immunity in respect of the crimes alleged.<sup>17</sup> The restoration of one of the warrants was made subject to a decision being made by the Home Secretary as to whether to issue an authority to proceed.<sup>18</sup>

However, after the judgment was given, it became known of two possible connections Lord Hoffmann had with Amnesty International.<sup>19</sup> First, it became known that Lord Hoffmann's wife, Lady Hoffmann, had worked with the international secretariat of Amnesty International since 1977.<sup>20</sup> The connection this might have with Lord Hoffmann was not pursued. The more important allegation was that Lord Hoffmann was a director and chairperson of Amnesty International Charity Limited which carries out the charitable work of Amnesty International.<sup>21</sup> Pinochet's solicitors brought the Home Secretary's attention to these matters, however it appears no weight was given to them and on 9 December 1998, the Home Secretary issued an authority to proceed.<sup>22</sup> Pinochet argued that Lord Hoffmann's connection with Amnesty International created an appearance of bias and thereby requested that the order be set aside or have no effect.<sup>23</sup>

Upon Lord Hewart's dictum that 'justice should not only be done, but should be manifestly and undoubtedly be seen to be done',<sup>24</sup> the House of Lords rejected, or at least modified the distinction between pecuniary and non-pecuniary interests. Their Lordships sought to promote the wider policy consideration of maintaining confidence in the judicial process by expounding notions of causes, interests and favour.<sup>25</sup>

The uncertainty possibly generated by this movement away from the traditional dichotomy may be limited by the Court of Appeal's statements in *Locabail*, where the Court expressed its reticence to further expand the rule of automatic disqualification beyond cases involving pecuniary interests and the particular facts of *Pinochet (No 2)*.<sup>26</sup>

### **Non-Pecuniary Interests**

In cases involving non-pecuniary interests, the reasonable apprehension of bias test has operated in Australia. As formulated in *Livesey v New South Wales Bar Association*,<sup>27</sup> and adopted by Deane J in *Webb*, the test is:<sup>28</sup>

[W]hether 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.

In contrast, in *R v Gough*,<sup>29</sup> the House of Lords adopted the test of whether there was a 'real danger' of bias in cases involving non-pecuniary interests.<sup>30</sup> The currency of this test was affirmed and guidance given in *Locabail*.<sup>31</sup> However, it is important to acknowledge article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>32</sup> Jurisprudence under this article has found that impartiality is to be determined:<sup>33</sup>

[A]ccording to a subjective test, that is on the basis of a personal conviction of a particular judge in a particular case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

This test has two limbs, a subjective and objective limb. Jurisprudence under this Convention generally indicates for the objective limb, tests more in tune with a reasonable apprehension of bias test.<sup>34</sup> The Convention came into force in England on 2 October 2000 under the *Human Rights Act 1998* (UK) and possibly foreshadows a movement towards a reasonable apprehension of bias test.

### ***Unified Test for Australia***

In *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, the High Court received the opportunity to re-evaluate the question of which test to apply in cases involving pecuniary interests.

#### *Ebner v The Official Trustee in Bankruptcy*<sup>35</sup>

This case concerned proceedings brought under the preference provisions of the *Bankruptcy Act 1966* (Cth).<sup>36</sup> Ebner's husband was bankrupt. The ANZ bank though not a party to the proceedings was a creditor and contributed to the funding of the action brought by the Official Trustee. The Official Trustee was seeking a declaration under ss 120 and 121 that the transfer of property from Ebner to his wife was void.<sup>37</sup> The bank thereby had a financial interest in the outcome of the case. The case came before Goldberg J, who at the outset disclosed that he was a contingent beneficiary under a family trust which owned approximately 8000 shares in the bank and that he was also a director of the trustee company of the trust.<sup>38</sup> An objection was made to the judge hearing the case. This was overruled by Goldberg J who held as there was no possibility of any significant impact on the share price of the ANZ bank, he did not have a real pecuniary interest in the case and therefore no person could entertain a reasonable apprehension of bias.<sup>39</sup> The decision was appealed and came to the High Court upon the principle in *Dimes*, the appellant having conceded that it could not establish a reasonable apprehension of bias.

#### *Clenae Pty Ltd v ANZ Banking Group Ltd*<sup>40</sup>

This case concerned litigation between borrowers of a foreign currency loan and the ANZ bank.<sup>41</sup> The trial was heard before Mandie J and lasted 18 days. Mandie J reserved judgment for 18 months and during that time both a key witness and the judge's mother died.<sup>42</sup> Upon the death of the judge's mother, Mandie J acquired 2400 shares in the bank. Mandie J did not disclose his inheritance and gave judgment in favour of the bank. An appeal was made regarding the issue of bias and whether even if it did apply, necessity required he give judgment anyway.

In deciding these two cases, the majority of the High Court decided to abandon the automatic disqualification rule, opting for a general reasonable apprehension test in cases concerning both pecuniary and non-pecuniary interests. Whilst this reformulation presents issues for the various manifestations of bias, the scope of this paper is confined to evaluating the appropriateness of this test in cases involving pecuniary interests in the form of shareholdings.

## **Part 2—Automatic disqualification or reasonable apprehension of bias?**

### ***Rationale of the rule against bias***

According to Sir Thomas Bingham, 'the administration of justice is one of the cardinal functions of civil society'.<sup>43</sup> Indeed, the fundamental importance that we place upon the administration of justice in contemporary society gives rise to the ancillary or implicit need to preserve public confidence in the judicial system. This public confidence can only be

achieved if judges, as the guardians of the administration of justice, are seen to be impartial and independent. As L'Heureux-Dubé J remarks:<sup>44</sup>

Impartiality implies, and demands, that all parties before the courts be equal, and equal under the law, and deserve to have their individual claims resolved with this basic and fundamental notion in mind.

It is to these ends that the rule against bias operates, as merely one pillar amongst others supporting the preservation of public confidence in the judicial system.<sup>45</sup> Furthermore, in line with the concept that justice must be seen to be done, the purpose of the rule is not to inquire into whether *in fact* a judge is biased but to preserve the appearance of impartiality, thereby guarding against a possibility of bias rather than a probability of bias.<sup>46</sup> If this is the rationale of the rule, to what extent do the particular tests uphold this rationale?

### ***Reasonable apprehension of bias test***

In *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, the majority adopted a reasonable apprehension of bias test that should be applied uniformly to cases involving pecuniary interests. According to the majority, the application of this test requires two steps. First, it must be identified what is said that might influence the decision-maker to judge a case on a basis other than its legal or factual merits.<sup>47</sup> Secondly, there must be a clear articulation of the 'logical connection between the matter and the feared deviation from the course of deciding the case on its merits ... Only then can the reasonableness of the asserted apprehension of bias be assessed.'<sup>48</sup>

In a case involving a judge holding shares in a company in litigation before the court, the shareholding would be identified as the basis upon which a judge might be influenced in their decision-making. In relation to the second step, the majority suggests that a practical way of assessing the logical connection between the matter and the feared deviation (and thereby determining whether there is a reasonable apprehension), where it is not suggested the judge has any other connection to the litigation, is to ask the question 'whether there is a realistic possibility that the outcome of the litigation would affect the value of the shares'.<sup>49</sup>

### ***Why did the court depart from precedent?***

The reformulated test represents a significant departure from the principle in *Dimes* of automatic disqualification for judges holding a direct pecuniary interest in a litigant or the outcome of a case. It has been asserted the principle in *Dimes* reflects the notion that pecuniary interests are different in kind from other types of interests and therefore warrant special treatment. According to Allison, there are three key justifications for the law's historical regard of economic interests as a more egregious form of bias. First, it is argued that given an economic interest is usually more objectively recognisable, it renders it more easily proven than other sources of bias.<sup>50</sup> Secondly, it is argued that people have a greater expectation that decision-makers will be free of economic interests in comparison to other forms of bias.<sup>51</sup> Thirdly, it is argued that given the objectively identifiable nature, economic interests are possibly more preventable or able to be remedied in comparison to other forms of bias.<sup>52</sup> Whilst not empirically tested, these justifications appear to be valid observations of economic interests and are to a degree acknowledged by the Court.<sup>53</sup>

However, the majority rejects the traditional justification of *Dimes* that 'in such cases public confidence in the administration of justice requires that there be disqualification regardless of the particular circumstances.'<sup>54</sup> This is because, despite the adverse public perception regarding pecuniary interests, bias is a complex creature requiring an analysis of the particular circumstances of each case. In today's society of trusts and complex financial arrangements, economic interests begin to exhibit their own ambiguities. For instance, the

facts of *Ebner v Official Trustee in Bankruptcy* give rise to arguably a direct or indirect interest. Here Goldberg J was a contingent beneficiary under a discretionary trust, but also a director of the trustee company.<sup>55</sup> The Federal Court found that he had only an indirect interest.<sup>56</sup> However, it was validly argued that his status not only as a beneficiary but also as a director gave him an element of control that imbued his interest with the requisite element of directness.<sup>57</sup> However, such a line of inquiry focused on classifying the interest detracts from the real question of whether there is a reasonable apprehension that the judge has an *actual* interest in the outcome.<sup>58</sup> Therefore, according to the majority, 'at the level of purely financial interest, the variety of arrangements under which persons may order their affairs makes a rigid distinction between direct and indirect interests artificial and unsatisfactory.'<sup>59</sup> Hence, the majority argue that there is no 'bright line' distinguishing direct interests from indirect interests and thus a uniform, principled approach should be taken.<sup>60</sup>

***Does the use of a unified test accord with the rationale of the rule against bias?***

*In principle*

The reasonable apprehension of bias test is better suited to preserving public confidence in the public administration of justice as in theory, it operates to identify specifically that which could give rise to the perception of bias rather than merely being an arbitrary rule invoked by technicalities.<sup>61</sup> Further, public confidence in the administration of justice does not only require the perception of impartiality. As Sackville, Finn and Kenny JJ of the Federal Court state in *Ebner v Official Trustee in Bankruptcy*:<sup>62</sup>

Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?

Indeed, it is equally important that judicial officers sit when they are required to and do not become subject to the manipulations of the parties, who seek to improve their chance of winning by bringing such actions so as to influence the composition of the bench.<sup>63</sup>

*In practice*

The intuitive appeal of a single test of uniform application in the area of apprehended bias to a great extent disguises the problems this test can have in practice. As argued in *Webb*, the reasonable person test is an objective test which operates as a touchstone of public perception on any particular situation and is thereby central to the preservation of public confidence.<sup>64</sup> These sentiments are echoed in *Johnson v Johnson*<sup>65</sup> where the majority state 'the hypothetical reasonable observer of the judge's conduct ... is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment of some judges of the capacity or performance of their colleagues.'<sup>66</sup>

Therefore, it is a necessary implication that this test must be able to be properly undertaken. The majority give guidance to how this may be done in a simple case of shareholdings in a litigant by arguing that a relevant factor might be the effect of the outcome upon the share price.<sup>67</sup> It must be noted that whilst the majority did not consider the impact of litigation on share price to be the ultimate test and that the weight to be given to this consideration may vary from case to case, it did identify it as a relevant consideration and therefore requiring some attention. The majority does acknowledge that at times assessing the effect on share value may be a 'matter of serious difficulty'.<sup>68</sup>

However, it is argued that on most occasions this will be a largely problematic and difficult question of causation, in which complex sectoral and economic events must also be taken into account. As McHugh J states in *Gambotto v WCP Limited*.<sup>69</sup>

Sharemarkets are driven by many factors, not all of them rational or fair. Even the share prices of long established and profitable companies may fluctuate as much as 50 per cent in the space of a year ... The 'herd mentality' exists in the stock market as in other areas of life.

Judges should not defer to market prices questions relating to the apprehension of bias. Indeed, the criticism the majority places upon the 'bright line' approach<sup>70</sup> in terms of distinguishing between direct and indirect interests can be similarly levelled at this test, because it is argued there will seldom be a bright line distinguishing outcomes that affect share price against those which are benign.

Furthermore, even if factors in a case indicate with some degree of certainty that the outcome will affect share price, the facts of *Clenae Pty Ltd v ANZ Banking Group Ltd* demonstrate it is uncertain against what evidentiary standards such factors will be assessed. In this case, a report was published in *The Age* newspaper. The report described the judge's decision as 'a ground breaking judgment for 1750 foreign currency loans arranged by the ANZ bank in the mid-1980s'<sup>71</sup> and asserted that the plaintiff's success could have prompted many other similar claims to be brought.<sup>72</sup> It is certainly arguable such media reporting could have affected share price and clearly its nature as a possible test case is a relevant consideration. Yet, Charles JA rejected the article as evidence of its being a test case in the absence of any other evidence.<sup>73</sup> The conclusion that there was no effect on share value is accepted by the High Court. However, the speculative nature of the market as described by McHugh J demonstrates that the market does not always act merely on substantiated evidence (as is required by Charles JA), but can also act on lesser sources, even rumour.<sup>74</sup> It is argued that it is beyond the role of judges to apply legal standards so as to second guess how the market will in fact process information and use this as a means of assessing a perception of bias.

Indeed, since the purpose of using the reasonable person test is to gauge public perception of the situation, requiring the ascertainment of the effect on share price could add an unrealistic layer of complexity, as the mere identification of the interest may in fact create the perception of bias. As Galligan argues, 'since public perception can be fickle, it might be that the slightest hint of bias will be enough to dint public confidence'.<sup>75</sup> In an area that must remain sensitive to public perceptions of impartiality in the justice system, as Field comments:<sup>76</sup>

[I]t is difficult to escape thinking that the ordinary person in the street might not have come to the same view as did the High Court in its construction of the reasonable person regarding the question of a judge holding shares in a party to a matter before the court.

### ***Does automatic disqualification meet these issues?***

The advantage automatic disqualification has in this particular context is that it avoids the nebulous issue of effects on share price. By focusing on the interest to determine disqualification, it appears to be a more certain test. However, *Dimes* itself provides little guidance as to how the principle should be used.

#### *The Scope of the Test*

Pursuant to *Dimes*, automatic disqualification has been invoked where the judge has a direct pecuniary interest in a litigant or the outcome of the case. Traditionally, Australian courts

have maintained this position.<sup>77</sup> However, in *Pinochet (No 2)*, Lord Browne-Wilkinson argues that there is 'no good reason in principle for so limiting automatic disqualification.'<sup>78</sup> The expansion of automatic disqualification to cover non-pecuniary interests appears to be an extraordinary step by the House of Lords in *Pinochet (No 2)*, especially given that no arguments relating to the extension of automatic disqualification were presented by counsel.<sup>79</sup>

So what triggered this extension? The answer to this may lie in the problems associated with the real danger of bias test used in England for non-pecuniary interests. As Deane J outlines in *Webb*, the difficulty with the real danger test is that it inherently requires an assessment of whether in fact the judge was affected by the interest, and thereby can be potentially very damaging to the judge involved.<sup>80</sup> Furthermore, such an investigation is clearly unnecessary when it is remembered that the purpose of the rule is to guard against the appearance of bias. In light of these problems, it can be seen why the House of Lords may have been hesitant to make such adverse conclusions about one of their fellow judges.

#### *Narrow test for automatic disqualification*

It is argued that *Dimes* should be applied only in cases where there is a direct pecuniary interest in a litigant or the outcome of the case.<sup>81</sup> Upon four premises, Kirby J in dissent, in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, supports this strict approach. First, it is argued the principle in *Dimes*, as a well established authority in this area does provide a 'bright line' principle which relieves parties from inquiring into what could otherwise be intrusive and embarrassing matters.<sup>82</sup> Further, the longevity of the principle and influence it has had upon legal practice mitigates against change.<sup>83</sup> Secondly, drawing upon fundamental notions of human rights, it is argued that at a normative level, judicial independence requires forbidding a judge having a direct pecuniary interest in a party to a case.<sup>84</sup> Thirdly, it is highlighted that the trend in jurisdictions such as New Zealand,<sup>85</sup> Canada<sup>86</sup> and South Africa<sup>87</sup> has been to maintain a separate rule to deal with disqualification for pecuniary interests. Fourthly, analogies are made with fiduciary law. This is because the prophylactic nature of the rule is acknowledged. In the preservation of public confidence, there is a greater need for a strict rule to prevent the appearance of bias.<sup>88</sup> This together with its practical utility as a standard that promotes judicial integrity leads Kirby J to conclude that the principle in *Dimes* should be retained.

To mitigate against the principle of automatic disqualification being invoked for the merest of shareholdings, a *de minimis* exception should operate. However as Kirby J argues, given the prophylactic nature of the rule, it should only operate in cases which are truly *de minimis* and not those simply concerning small interests.<sup>89</sup> The pecuniary interest involved would need to be 'trivial and insubstantial'<sup>90</sup> before this exception could be invoked.

The benefit of invoking the narrow principle in *Dimes* can be seen for instance, in cases involving substantial shareholdings. Charles JA in *Clenae Pty Ltd v ANZ Banking Group Ltd* argues that in cases where a judge holds a substantial shareholding in a litigant, the benefit of the reasonable apprehension of bias test is that, despite the fact that there is no direct effect on share value, a judge may still be disqualified.<sup>91</sup> The majority in their judgment, in espousing a uniform test, do not make particular comments on this matter. It is possible to argue that such comments were not made because it was concluded that in neither case were the shareholdings seen as considerable. However, in this regard, it is argued that Gaudron J's qualification at least recognises this issue. According to Gaudron J, 'a substantial shareholding or financial interest automatically results in a judge's disqualification if the company concerned is a party to litigation or has an interest in its outcome.'<sup>92</sup> This is because the substantial nature of the shareholding would raise the reasonable apprehension that the judge's close association with the company would lead him or her to not bring an impartial mind to the resolution of the question in issue.<sup>93</sup>



However as Cranston argues, the problem lies in assessing when the shareholding becomes large enough so that partiality may be questioned.<sup>94</sup> To simply examine the ratio of the shareholding to the company's total issued share capital would not go far enough.<sup>95</sup> It would also be necessary to assess the value of the shares in comparison with the judge's total assets.<sup>96</sup> However, this is clearly an inappropriate invasion of the judge's privacy.<sup>97</sup> The rule of automatic disqualification avoids these problems.

The strength of automatic disqualification is that if strictly confined to cases involving direct pecuniary interests such as *Clenae Pty Ltd v ANZ Banking Group Ltd*, it is possible to introduce more certainty into this area. The court has greater experience in dealing with issues of directness and indirectness (such as in torts analysis) and is better equipped to draw such a distinction in comparison with share price issues. It is acknowledged that in instances involving indirect interests, the reasonable apprehension of bias test should be used. It is argued that in this instance, given the *indirect* nature of the interest, it is appropriate if not necessary to draw upon all relevant factors which may give rise to the perception of bias, the effect of the litigation on share price being merely one factor that allows the court to draw the relevant inference about the nature of the interest and its connection to the judge.

Overall, it can be seen that the general reasonable apprehension of bias test, whilst intuitively appealing, can be problematic in the context of direct pecuniary interests in the form of shareholdings. Therefore, in order to minimise these problems, it is argued that the narrow principle in *Dimes* should be applied in such cases.

### **Part 3—Necessity and waiver**

Operating alongside the reasonable apprehension of bias test are the doctrines of waiver and necessity. Currently, these doctrines function as exceptions to disqualification. Given the underlying values at stake, it is therefore important to assess their role in this context.

#### ***Necessity***

A finding of a reasonable apprehension of bias usually results in disqualification and any judgment given rendered voidable. However, the ultimate decision still lies within the discretion of the court.<sup>98</sup> The doctrine of necessity can be invoked to displace disqualification 'so as to enable the discharge of public functions in circumstances where, but for its operation, the discharge of those functions would be frustrated with consequent public or private detriment.'<sup>99</sup> Therefore, as articulated in *Dimes*, in certain circumstances a judge with a disqualifying interest may still be required to hear a case where no judge without such an interest is available to sit.<sup>100</sup>

*How does the doctrine of necessity sit within the broader rationale for the rule against bias?*

The doctrine of necessity has traditionally been justified as preventing a 'failure of justice.'<sup>101</sup> In part, public confidence in the administration of justice stems from access to justice and fair trials. Whilst ostensibly these goals require the absence of reasonably apprehended bias, in certain circumstances it may cause a greater injustice to the parties involved if they are denied the opportunity to have their case heard or the ability to put forward their case in the best possible manner.<sup>102</sup> According to the majority in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, the facts of *Clenae Pty Ltd v ANZ Banking Group Ltd* demonstrate an example of where the doctrine was required. In this case, the trial lasted 18 days and a key witness had died. Therefore, in such circumstances, it would have been unfair to have set the judgment aside and a retrial ordered.<sup>103</sup> Such an act, of itself, could undermine public confidence in the administration of justice.

As the approach of the majority shows, the present approach to the doctrine of necessity appears to have moved away from the concept that it be invoked only where there is no judge without such an interest available to sit. In *Clenae Pty Ltd v ANZ Banking Group Ltd*, although inconvenient, it was not strictly 'necessary' for Mandie J to hear the case as another judge without a shareholding could have been available. It appears the Court is moving towards a far more pragmatic approach and this must be examined in light of the underlying principles. If there was truly a reasonable apprehension of bias (and not as in *Clenae Pty Ltd v ANZ Banking Group Ltd* where it was held one did not exist), it could be argued that the invoking of such a qualification out of practicality could undermine public confidence. As Gaudron and McHugh JJ state in *Laws*:<sup>104</sup>

Whatever the precise scope of the doctrine of necessity in the natural justice context, it seems contrary to all principles of fairness, that on the ground of necessity, a person should have to submit to a decision made by a person who has already prejudged the issue.

Indeed, the appropriateness of judges hearing a case after such an allegation has been made and they are aware of the fact the appearance of impartiality has been questioned is doubtful.<sup>105</sup>

### *Constitutional problems?*

In addition, there may be constitutional reasons why this qualification may be unacceptable. Flowing from the High Court decisions led by Chief Justice Mason in the 1990s, Chapter III of the *Constitution* has begun to be regarded as a source of rights, with a greater emphasis on implications being made on the *manner* in which federal courts exercise judicial power.<sup>106</sup> This was first recognised in *Polyukhovich v Commonwealth*.<sup>107</sup> For instance, Deane J argues one of the purposes of the separation of powers is to prevent arbitrary decision-making.<sup>108</sup> Therefore, in order to achieve this, judicial power must be exercised in accordance with 'the essential attributes of the curial process'.<sup>109</sup>

This reasoning was supported by Toohey and Gaudron JJ.<sup>110</sup> Whilst the content of such statements may appear uncertain,<sup>111</sup> the Court has given some direction as to their meaning. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,<sup>112</sup> Gaudron J states that 'impartiality and the appearance of impartiality are defining features of judicial power'.<sup>113</sup> More specifically, it has been stated that due process requires the observance of natural justice. According to Gaudron J in *Harris v Caladine*:<sup>114</sup>

Judicial power is usually defined in terms of its subject matter, but it is a power that, for complete definition, requires description of its dominant and essential characteristic, namely, that it is exercised in accordance with that process which is referred to as 'the judicial process'. Thus, in general terms, it is a power which... involves the application of the *rules of natural justice*.

Similarly, Mason CJ, Dawson and McHugh JJ in *Leeth v Commonwealth*<sup>115</sup> state:<sup>116</sup>

It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.

Whilst the activism of the Mason era does not appear to be a feature of the current High Court, this idea of judicial process was recently affirmed in *Bass v Permanent Trustee*<sup>117</sup> and may indicate an area of development. Indeed, some commentators believe there is a constitutionally protected right to natural justice.<sup>118</sup>

*What does this mean for the doctrine of necessity?*

If the rule against bias, as a pillar of natural justice, is an essential part of a curial system, any attempt to make a Chapter III court or a state court vested with federal jurisdiction<sup>119</sup> to act in conflict with these principles would be unconstitutional. It must be noted that whilst all previous expressions of this idea have been in the context of the legislature enacting legislation in conflict with these concepts,<sup>120</sup> there would appear no reason why the common law would not be bound by the same principles. This is because the underlying purpose of protecting judicial impartiality and public confidence in the administration of justice overarches both areas. As Gummow J states in *Grollo v Palmer*.<sup>121</sup>

An objective of the exercise of the judicial power in each particular case is the satisfaction of the parties to the dispute and the general public that, by these procedures, justice has both been done and been seen to be done. Accordingly, the rules as to reasonable apprehension of bias in their application to the courts have, at their root, the doctrine of the separation of the judicial from the political heads of power...Their Lordships somewhat understated the position when observing in the *Boilermakers' Case* that the fundamental principle which makes a combination of actor and judge appear contrary to natural justice 'is not remote from that which inspires the theory of the separation of powers'.

Therefore, it would certainly appear a broad approach to the doctrine of necessity is undesirable. While the majority refrains from entering this dialogue in their judgment in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, both Gaudron and Kirby JJ drew upon these notions to reject the viability of necessity as a widespread exception.

According to Gaudron J, based on her previous statements, impartiality and the appearance of impartiality are key features of judicial power and are guaranteed by the *Constitution*.<sup>122</sup> Therefore, as impartiality is a constitutional requirement, necessity should only be invoked where, if the particular judge does not sit, a court cannot be constituted to hear the case.<sup>123</sup> Furthermore, her Honour adds that since constitutional requirements are not simply required to maintain the rule of law but also public confidence in the judiciary, which itself has a key role in maintaining the federal nation as articulated in the *Constitution*, this qualification must be limited.<sup>124</sup>

Similarly, Kirby J acknowledges the constitutional requirement of due process.<sup>125</sup> However, his Honour does not use these ideas to specify in what way the qualification should be applied. Instead, he merely argues that necessity does not apply to the facts of *Clenae Pty Ltd v ANZ Banking Group Ltd*. According to Kirby J, despite the inconveniences attracted by a new trial in these circumstances, '[r]etrial is the price that is paid by our system of law for upholding fundamental legal and civil rights.'<sup>126</sup> Indeed, it appears to be a price that should be paid if it promotes public confidence by showing that judges who have an interest in a party do not participate in the case.<sup>127</sup>

These approaches show a better appreciation of the principles of impartiality which underlie the rule against bias and what is required to preserve public confidence in the administration of justice. Gaudron and Kirby JJ recognise the problematic nature of the doctrine of necessity and therefore sensibly restrict its application so that if another judge can hear the case, a retrial is required.

***What does this mean for waiver?***

Despite having the opportunity to make some obiter comments on this issue, the High Court has refrained from considering the waiver exception in either *Ebner v The Official Trustee in*

*Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd or Johnson v Johnson*. However, it may be possible to extrapolate from the comments made on necessity to this area.

*Doctrine of waiver*

In the well known case of *Vakauta v Kelly*,<sup>128</sup> the High Court clearly stated the need for the doctrine of waiver. The court stated that in a situation where there is a reasonable apprehension of bias, it would be unfair for a party who is legally represented to stand by and wait until judgment is given, then, because the judgment is unfavourable, attack the decision on the ground of bias.<sup>129</sup> This is because it gives that party an unfair choice as to accepting or rejecting the decision.<sup>130</sup> Therefore, in such a situation, the party is deemed to have waived any objection they have on this ground.

In England, this exception has received attention in *Pinochet (No 2)* and *Locabail*. In *Pinochet (No 2)* tacit approval was given to the exception. In this case, the House of Lords rejected the argument mounted by counsel for the prosecuting authorities that by raising with the Home Secretary the possibility of bias, Pinochet had chosen the Home Secretary as the arbiter of the dispute and had thereby waived his right to seek redress from the House of Lords.<sup>131</sup> However, the House of Lords rejected this argument on the facts, not on the basis that waiver is an unacceptable ground of review.<sup>132</sup>

The currency of the exception was subsequently affirmed in *Locabail* where the Court of Appeal invoked the waiver exception to dismiss an appeal made. In this case, the Court clearly stated that the law did not allow the parties involved to sit and do nothing and thereby their inaction was taken to have been a waiver of their rights to complain about the relevant issue of bias.<sup>133</sup> However, in neither of these cases did the English courts have to consider the position under a written constitution that preserves judicial impartiality.<sup>134</sup>

*Should the waiver exception continue to operate in Australia?*

According to the principles of natural justice said to be constitutionally entrenched via Chapter III, the waiver exception falls foul of the same problems as the doctrine of necessity.<sup>135</sup> First, if *Pinochet (No 2)* is considered, which was a highly publicised case, confidence in the administration of justice is likely to be undermined if a party can waive their objections. This is because the source which causes the apprehension of bias is not addressed but merely pushed aside for convenience, and still remains in the public eye. Therefore, such a situation leaves it open for the public to perceive that fundamental concepts of impartiality are secondary to notions of expedience. While not all cases will attract as much attention as *Pinochet (No 2)*, a factor like media attention should not determine whether the waiver exception should be invoked. Rather, a principled approach should be taken regardless of the nature of the case.

Furthermore, the effect of waiver on the parties involved must be acknowledged. In a situation described in *Commentaries on Judicial Conduct*,<sup>136</sup> a court official had written a letter to counsel describing the judge's shareholding in the litigant corporation in the case and requested that counsel consent to the judge sitting on the case. The uncomfortable position counsel is placed in is effectively described. The lawyer responded:<sup>137</sup>

I feel that it is unfair to put counsel in this position. I personally felt under pressure to consent and to waive any objection ... or to risk being seen as a troublemaker – one who unreasonably insists on technicalities ... I fear you may form a negative impression of me ... The mere fact that counsel is being asked to waive shows that the court thinks there is no problem; otherwise the judge would automatically decline to sit and the Chief Justice would not have instructed the court official to consult counsel.

Whilst in the majority of cases, counsel may waive without hesitation, this exception does demonstrate the uncomfortable position counsel can be placed in when the issue arises.

Aside from these practical issues, it is unlikely that constitutional requirements can be waived.<sup>138</sup> Kirby J, while President of the New South Wales Court of Appeal, expressed his disapproval of the waiver exception. In *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*,<sup>139</sup> Kirby P argued the entitlement to waive should not be regarded as a mere private right as it concerns public confidence in the judicial system.<sup>140</sup> Upon this premise, the private litigant cannot waive the public's rights.<sup>141</sup> Such statements were reiterated in *Najjar v Haines*.<sup>142</sup> However, whilst these sentiments were not specifically reaffirmed in the recent High Court cases,<sup>143</sup> these comments in conjunction with his Honour's statements regarding necessity in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* indicate that a similar position would be taken. Likewise, it is probable that Gaudron J would take the same approach.

### **What does this mean for disclosure?**

At the beginning of a case, it is usual practice for a judge who believes they have a potentially disqualifying interest, to disclose this to the parties. Aside from providing the opportunity of waiver to the parties, it also allows parties to draw attention to potential issues possibly overlooked by the judge. Before the High Court, in relation to *Clenae Pty Ltd v ANZ Banking Group Ltd*, counsel argued that a failure to disclose invoked in and of itself automatic disqualification or a reasonable apprehension of bias.<sup>144</sup> This may have been inspired by Ormiston JA's remarks in *Gascor v Ellicott*<sup>145</sup> that in certain circumstances, a failure to disclose can provide, as a matter of evidence, a basis for the reasonable apprehension of bias.<sup>146</sup> In *Dovade*, the NSW Supreme Court acknowledged this issue but reserved its position on the matter.<sup>147</sup>

In *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, the majority held that whilst a matter of prudence, disclosure is neither a right nor a duty.<sup>148</sup> Further, the majority found that to classify disclosure as a duty generating legal consequences was unhelpful and could detract attention from the real issue of determining bias.<sup>149</sup>

The view of the majority that there is no strict duty of disclosure is a sensible one. First, to require a judge to disclose all personal and fiduciary duties would be difficult to enforce and a failure to disclose would not itself constitute a breach of natural justice.<sup>150</sup> Furthermore, to investigate this issue may involve an inquiry into the judge's actual intentions which is undesirable.<sup>151</sup> Nonetheless, judges should as a matter of prudent practice make every endeavour to be fully informed of their affairs and make the necessary disclosures as promptly as possible.

### **Part 4—Judicial codes of conduct**

The vigorous debate in this area suggests that the current law may be unsatisfactory. On the one hand, the principle in *Dimes* governing pecuniary interests appears draconian and the frequent disqualification of judges would not engender public confidence. On the other hand, using the reasonable person to evaluate appearance of bias is a flexible device, but appears to be uncertain in its application and possibly overly pragmatic. Furthermore, whilst qualifications to the rule such as the doctrines of necessity and waiver are practical devices for minimising instances of disqualification, they do little to preserve the underlying values at stake.

In order to bring greater certainty to this area, Canada and Australia have adopted judicial codes of conduct. This Part will briefly introduce the concept of the judicial code by setting

out the main elements of the Canadian code. It will then evaluate the effectiveness of the Australian code in dealing with the issue of shareholdings of judges. It is proposed that a judicial code should reduce the frequency that perceived conflicts of interest arise and provide a coherent and efficient process for dealing with the issue once it arises that is sensitive to both the impracticalities of these cases and the important need for the appearance of the impartial administration of justice to be preserved.<sup>152</sup> While the Australian code goes some way towards achieving these objectives, it is argued that the code would be more effective if it engaged more thoroughly with some of the broader issues involved and canvassed the usefulness of devices such as restrictive share portfolios, blind trusts, and a disclosure regime.

### ***Judicial codes: The Canadian model***

In governing the substantive law of bias and conflicts of interest, Canada has taken a similar approach to Australia, relying upon the common law to resolve issues of disqualification.<sup>153</sup> There is currently no formal structured regime of reporting conflicts. The Canadian Judicial Council has sought to give clarity to the area via two main works. First, in 1991, the Council produced *Commentaries on Judicial Conduct*,<sup>154</sup> a text which does not issue commandments or provide answers but rather presents generally 'the factors involved in considering the problem and then a discussion, often putting opposing points of view, on how a large number of judges say they react to the practical problems which arise from time to time in the life of any judge.'<sup>155</sup> It is a brief, but useful text that outside the case law context, describes the types of conflicts judges may face and contains general comments about how a judge might approach the matter, drawing attention to the main issues and pertinent cases.

The *Commentaries on Judicial Conduct* is further supplemented by *Ethical Principles for Judges*,<sup>156</sup> which was written as a set of principles to assist judges deal with various issues they might face whilst on the bench. Like *Commentaries on Judicial Conduct*, this is a short document, but it concisely outlines the way in which judges might approach matters. For instance, in the context of pecuniary conflict of interest issues, the document states that owning an insurance policy, having a bank account, using a credit card or owning shares in a corporation through a mutual fund would not normally give rise to a perceived conflict.<sup>157</sup> It is argued that such practical examples are beneficial to both judges, lawyers and the general public about the scope of conflict issues. This is because at the heart of this area is balancing the need to maintain public perceptions in the impartiality of the justice system against the sensible operation of the rule. In normal circumstances, a case alleging an appearance of bias purely because a judge had a bank account with the litigant bank would be absurd, and yet could be argued by a desperate party, resulting in a waste of valuable resources.

*Ethical Principles for Judges* should be applauded for its comprehensive yet succinct nature, demonstrating that useful provisions in this area can be made.<sup>158</sup> Of course, judicial guidelines or codes are not unanimously supported. It is often argued that they are capable of misuse, can be over-general or on the other hand fastidiously detailed and generally unhelpful.<sup>159</sup> A discussion of the general benefits of written guidelines is beyond the scope of this work. However, in the context of pecuniary conflicts of interest, an area in which cases of conflict of interest can be easily foreseen and therefore avoided, guidelines are invaluable. As the Redcliffe-Maud Committee in England stated:<sup>160</sup>

Rules of Conduct cannot create honesty; nor can they prevent deliberate dishonest or corrupt behaviour. Rather, they are a framework for reference embodying uniform minimum standards. Their special value is in situations which are intrinsically complicated, or are new to the individual involved, where they provide a substitute for working out the right course of action from first principles on each occasion.

In an area where there is a real tendency for overly pedantic 'conflict' to arise (for instance where a judge has a bank account), widely accepted guidelines can prevent such inferences arising.

***The Australian code: 'Guide to Judicial Conduct'***

*A) Background*

In June 2002, the Australian Institute of Judicial Administration published for the Council of Chief Justices of Australia a '*Guide to Judicial Conduct*'.<sup>161</sup> This guide was undertaken by two retired Supreme Court Judges, the Hon Sam Jacobs, a former judge of the Supreme Court of South Australia and the Hon Jon Clarke, a former judge of the Court of Appeal of the Supreme Court of NSW, who was subsequently replaced by Brian Cohen, a former judge of the Supreme Court of NSW.<sup>162</sup> The scope of the task was to prepare a brief statement of principles which reflected judicial attitudes to issues of judicial conduct.<sup>163</sup> These principles were to be relevant to particular issues and therefore intended to be of guidance to members of the judiciary.<sup>164</sup>

In order to collate judicial attitudes, a survey was conducted throughout Australia.<sup>165</sup> This survey was based partly on the judges' own experiences but mainly from Thomas' *Judicial Ethics in Australia* and the two Canadian texts: *Commentaries on Judicial Conduct* and *Ethical Principles for Judges*.<sup>166</sup> The survey was completed by three members of each court in each state nominated by the Chief Justice of each respective court.<sup>167</sup> The work in a similar fashion to the Canadian texts seeks to give 'practical guidance to members of the Australian judiciary at all levels', thereby clearly stating its aim to be a positive and constructive source for judges to refer to in particular situations.<sup>168</sup>

Chapter three of the guide, entitled 'Impartiality' specifically addresses the issue of judges' shareholdings in litigant companies or companies associated with litigants. The guide briefly summarises the case law and the need for disclosure and prudently advises that it may be wise to lessen the range of investment in public companies so as to reduce the need for frequent disclosure. Further, it suggests that shareholding in a public investment company or a managed fund might be a sensible alternative.<sup>169</sup>

*B) Effectiveness of the Guide*

*Preventing conflicts of interest*

One obvious way to avoid pecuniary conflicts of interest involving shares is to impose a strict rule that judges may not own shares.<sup>170</sup> Whilst achieving the aim, it seems unduly restrictive and unnecessary and could well deter worthy candidates from accepting positions on the bench. The approach the guide takes is to recommend that judges undertake proper financial planning to avoid such conflicts.<sup>171</sup> The guide is therefore sensible in its approach, but does not detail what 'proper financial planning' might involve. Different devices, such as restricted share portfolios and blind trusts have advantages and disadvantages, which could have been usefully addressed by the guide. Outside the area of financial planning, another possible device for preventing conflicts of interest is a disclosure regime. Again, the merits of this device could have been usefully canvassed in the guide.

*Restricted share portfolios?*

It is possible for a judge to assess the kinds of companies that often litigate before the court and choose not to invest in those companies. For instance, McHugh J has made the conscious decision not to invest in insurance companies or newspaper companies.<sup>172</sup> However, this is a difficult thing for judges to do as the foreseeability of conflicts in everything but the most obvious of cases is uncertain.<sup>173</sup> Furthermore, the complexity of corporate

arrangements in modern society may make it difficult for a judge who owns shares to actually know that they are financially interested in a litigant corporation because they own shares in an ostensibly unrelated corporation.<sup>174</sup> Judges are extremely busy individuals, for whom it would be an onerous task to monitor and assess all potential conflicts.<sup>175</sup> It would appear, for these reasons Kirby J has chosen not to invest in shares at all.<sup>176</sup> However, it seems unfair to require judges to be deprived from investing in large successful companies, who by their very nature will be involved in litigation.

### Blind trusts?

Upon appointment, judges could divest themselves of all shares and ask for the wealth to be reinvested by a mutual fund or trustee of a blind trust.<sup>177</sup> The key benefit of such arrangements is that it allows judges to continue to reap the rewards of modern commercial investments but by erecting a barrier between a judge and their investments, the central factor of knowledge of which companies have been invested in is eliminated, thereby removing any possibility that judgment can be affected.<sup>178</sup>

The trust is a useful device for specifically addressing the issue which gives rise to the appearance of bias. It is not the ownership of shares itself that causes the problem, but the knowledge that is associated with ownership. Therefore, the blindness feature is essential in avoiding such conflicts.<sup>179</sup>

It is argued that the guide should have specifically canvassed the blind trust as a device for avoiding such conflicts. Furthermore, it should have detailed the problems associated with blind trusts for judges. It is an expensive device and requires the judge to place a large amount of discretion with a trustee.<sup>180</sup> It may be financially imprudent to liquidate all assets before passing that money to the trustee and therefore tax law may need to be amended to provide roll-over relief or an exemption from capital gains tax liability. Further, the trustee has a duty to account and the judge has personal tax liabilities they must be able to truthfully meet.<sup>181</sup> These are not insurmountable problems and could be met by incorporating the use of auditors and other professionals, but these would add to the cost of such arrangements.

### Disclosure regime?

Another issue that is not addressed by the guide is the question of whether Australia should adopt a formalised system of disclosure. If the court as a whole is responsible for the impartial administration of justice, it may be that a court-appointed registrar could alone be informed of the investments of the judges in the court and thereby be responsible for avoiding conflicts.<sup>182</sup> The benefit of such an approach is that the judge's financial affairs remain private, even from other members of the bench, but also allows a degree of planning to avoid conflicts. This would be a further step towards ensuring the accountability the public expects from the judiciary. The guide could have performed a useful function in canvassing the viability of such an idea and assessing what support it might receive.

In general, the guide can be viewed as a welcome addition to this area of debate. It raises the importance of judges considering how their investments interrelate with their judicial office. However, it would have been beneficial if greater analysis had been given to the issues of blind trust and restricted share portfolios and the concept of a formal disclosure system.



*ii) Dealing with the issue of conflicts of interest*

Practical examples

Assuming realistically that financial conflict of interest issues continue to arise, it is equally important for the guide to give some direction as to how such issues should be dealt with. The guide sets out broad descriptions of the issues that might give rise to perceptions of bias, in order to focus judges' attention to these matters. However, it is argued that the guide would have been more useful if it articulated, by using clear examples, circumstances in which a judge should or should not disqualify themselves. For instance, in contemporary society, a spouse's share portfolio should not be seen as source from which to raise the issue of an appearance of bias. However, if it became known that the spouse was not an active owner of those shares, but that the shares were in the primary control of the judge, more suspicion may be aroused. As noted above, the value of guidelines is that they provide an alternative to working from first principles on each occasion.<sup>183</sup> While examples are not a substitute for clear principles, they can perform a useful function, particularly in an area where public perception is so important. Clear examples can give guidance to the court and hopefully ensure that a balance is struck between preventing frivolous arguments being aired by litigants, and judges adopting an overly pragmatic approach.

Who should determine whether a judge should sit? Judge or court?

One issue that is dealt with by the guide is who should in fact determine the issue of disqualification. Traditionally, the practice has been for the judge concerned to hear and decide upon such objections made against him or her. The guide endorses this approach, adding that judges may do so in consultation with judicial colleagues.<sup>184</sup> Where there is uncertainty, the guide recommends that the judge should raise this issue at the earliest time with the head of the jurisdiction, the person in charge of listing and the parties or their legal advisers.<sup>185</sup> However, in taking this approach, the guide has not moved from traditional practice and does not address the problems with this approach.

If one were to step back and evaluate this practice it would appear to be a classic case of being a judge in one's own cause.<sup>186</sup> The validity of this practice publicly gained attention in *Kartinyeri v Commonwealth*.<sup>187</sup> In this case, an appeal was made to the High Court regarding the status of the *Hindmarsh Island Bridge Act 1997* (Cth). Before the case was heard in the Full Court, the plaintiffs sought that Callinan J be disqualified from hearing the case due to his prior involvement as a barrister in giving a joint opinion to the Minister for Aboriginal and Torres Strait Islander Affairs (a party in the case) on the legislation in question, thereby giving rise to the perception of bias from pre-judgment of the issue.<sup>188</sup> At first, Callinan J refused to stand aside. However, shortly after the substantive case had begun in the High Court, the plaintiffs sought review of his Honour's decision to continue to sit in the High Court.<sup>189</sup> The plaintiffs argued that the High Court has jurisdiction to disqualify one of its own members from determining a case in relation to issues of bias from two main sources. First, the statutory jurisdiction of the Court which requires that the principles of natural justice be observed in court proceedings. Secondly, the original jurisdiction of the Court in relation to constitutional matters pertaining to the essential requirements of Chapter III courts so that the Court may be properly constituted.<sup>190</sup>

This appeal was to be determined by the Full Court except Callinan J. However, the High Court did not resolve the question of whether the Full High Court has the power to disqualify a judge *of their own court* from sitting on a case, because shortly after the plaintiffs had sought review, Callinan J decided to disqualify himself.<sup>191</sup> His Honour's explanation for this change of stance was that he had been mistaken about the actual nature of his involvement in the case and now that he was fully aware of the work that he had done, he was of the opinion it was best for him to step aside.<sup>192</sup>

Assuming that the High Court does have the power to disqualify one of its own members,<sup>193</sup> the more interesting practical issue raised by Sir Anthony Mason is whether an appellate or collegiate court *should* determine the issue at first instance.<sup>194</sup> Seemingly based upon this idea and his own experience, Callinan J later said that '[i]f there is no legal inhibition upon it, and if it is convenient for it to be so made, I think it preferable that such a decision be made by another judge'.<sup>195</sup> However, the majority declined to adopt such a view, preferring to endorse the traditional approach that the judge determine the issue themselves.<sup>196</sup> An underlying factor supporting this may be the idea that in allowing the judge to first deal with the issue, it may be that they can easily explain the situation and extinguish any doubt rather than launching into a full scale investigation. However, it is argued that in this instance, neither the majority nor the minority have taken a convincing approach.

The traditional practice does not pay attention to the fundamental issue of addressing and preserving the appearance of impartiality. If the very process which purports to deal with this issue appears partisan, then it needs to be re-examined. On the other hand, requiring another judge to hear the matter is unappealing as it would be undesirable to make one judge assess the conduct of one of his or her peers. It would appear Mason's approach is the most preferable in this area. There is much to be said for requiring the court as a whole to address this issue, as the integrity and impartiality of any of the members of the court is a matter of concern for the whole court. Furthermore, this would also reduce the number of appeals on such decisions.

Again, the guide can be viewed as a welcome addition to this area of debate. However, it would have been beneficial if greater analysis had been given to the issue of the disqualification procedure. There are significant arguments against the current practice of judges themselves determining whether it is appropriate that they sit. Given that the guide recommends the retention of the status quo, it should at least have provided a reasoned approach for this position and addressed the concerns outlined above.

## **Part 5—Conclusion**

The rule against bias plays a fundamental role in preserving confidence in the impartial administration of justice. *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* has provided the High Court with the opportunity to re-examine this rule in the context of judicial disqualification for holding shares in a litigant corporation. At first blush, the majority's position of abandoning the ostensibly draconian and overly strict principle in *Dimes* is intuitively appealing. A reasonable apprehension of bias test of uniform application provides the court with an overarching principle which instead of operating automatically, aims to articulate that which creates the perception of bias and thereby addresses the underlying concerns at issue. However, a closer analysis reveals that in the context of direct pecuniary interests in the form of shareholdings, in practice, this test is problematic. The focus on the effect of the litigation on the value of the shares belies the ease with which public perception can be affected and is an inherently difficult and complex issue. Further, the strength of the rule lies in its prophylactic nature, which requires that it operate strictly and with certainty. On this level, the narrow principle in *Dimes* operating with a *de minimis* exception, provides the necessary strictness and certainty.

Operating alongside the reasonable apprehension of bias test are the considerations of waiver and necessity. Traditionally, these doctrines have functioned to require a judge to sit, despite a finding that he or she ought to be disqualified. However, as notions of procedural fairness have begun to be implied into Chapter III of the *Constitution*, the scope of the validity of these doctrines may be limited. Contrary to these notions, the majority's approach to the issue in *Clenae Pty Ltd v ANZ Banking Group Ltd* demonstrates that the court is moving towards a broader and more pragmatic application of the doctrine of necessity. However, such a relaxed approach to the doctrine disregards the underlying fact that if a

judge continues to sit despite the fact that there is a perception of bias, it is difficult to believe that public perceptions in the impartial administration of justice are maintained. It is for these reasons that the doctrine should only be invoked where there is no other judge that can hear the case.

While the Court has yet to deal recently with the issue of waiver, it is argued again that a strict approach should be taken. This is because a litigant may feel pressured to waive so as to not obstruct the court process, given that the judge has not felt it necessary to recuse themselves. Further, notions of impartiality extend beyond the parties involved and instances may arise in which the public perceive notions of expedience are more important than the appearance of impartiality.

What does this all mean for the Australian judicial process? The main conclusion to be seen from this analysis is that at the heart of preserving impartiality and public confidence in the administration of justice is the need to *prevent* such cases. In this regard, as can be seen from the Canadian context, guidelines can be useful. Australia has taken the step of producing guidelines which will hopefully add some clarity to the debate. However, disappointingly, this guide shies away from interesting practical steps such as canvassing debate regarding devices such as the blind trust, a closed register of interests and restricted share portfolios which are all practical options that need to be explored so as to find the right balance between allowing judges to invest freely and preventing perceived conflicts of interest. Further, once such an issue arises, there is much to be said for adopting the practice that where possible, the court as a whole take responsibility for the issue and collectively address whether the judge should sit.

What must remain at the fore of the analysis is the need to maintain public confidence in the impartial administration of justice. In order for the rule against bias to serve us well, any reform must be motivated by this consideration.

#### Endnotes

- 1 Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1 QB 577, 599.
- 2 (2000) 176 ALR 644.
- 3 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting.
- 4 For a general discussion of the rule against bias see: Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, LBC, Sydney, 2000) Chapter 10; P Craig, *Administrative Law* (3rd ed, Sweet & Maxwell, London, 1994) 326-34; Geoffrey Flick, *Natural Justice: Principles and Practical Application* (2nd ed, Butterworths, Sydney, 1984) Chapter 7; Richard Gordon, *Judicial Review: Law and Procedure* (2nd ed, Sweet & Maxwell, London) 30-3; De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5<sup>th</sup> ed, Sweet & Maxwell, London, 1995) 528-9; B Jones, *Garner's Administrative Law* (7th ed, Butterworths, London, 1989) 170-7.
- 5 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65, 70 ('Locabail')
- 6 *Ibid* 70, Charles Hollander and Simon Salzedo, *Conflicts of Interest & Chinese Walls* (Sweet & Maxwell, London, 2000) 123. However, it should be noted that under Part 8 of the Migration Act 1958 (Cth) bias challenges can only be made for migration decisions on the basis of actual bias. Therefore, this is the only area where actual bias challenges are growing. A recent case where this was argued is *Debnath v MIMA* [2001] FCA 27.
- 7 Aronson and Dyer, above n 4, 454.
- 8 (1852) 3 HLC 759 ('Dimes').
- 9 *Ibid*.
- 10 (1994) 181 CLR 41, 75 ('Webb').
- 11 [2000] 1 AC 119 ('Pinochet (No 2)').
- 12 *Ibid* 276; Nehal Bhuta, 'Justice without Borders? Prosecuting General Pinochet' (1999) 23 *Melb U L Rev* 499.
- 13 *Pinochet (No 2)* [2000] 1 AC 119,125 (Lord Browne-Wilkinson).
- 14 *Ibid*.
- 15 *Ibid*.
- 16 *Ibid* 126.
- 17 *Ibid* 127.
- 18 *Ibid*.

- 19 Ibid.
- 20 Ibid 128.
- 21 Ibid.
- 22 Ibid 129.
- 23 Ibid.
- 24 Ibid 135, citing Lord Hewart, *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259.
- 25 Ibid.
- 26 *Locabail* [2000] 1 All ER 65, 72-3.
- 27 (1983) 151 CLR 288 ('Livesey').
- 28 *Webb* (1993) 181 CLR 41, 67-8 (Deane J), citing *Livesey* (1983) 151 CLR 288, 293-4.
- 29 [1993] AC 646.
- 30 Ibid 670 (Lord Goff).
- 31 [2000] All ER 65, 73-4.
- 32 Opened for signature 4 November 1950, 213 UNTS 221, (entered into force 3 September 1953).
- 33 *Hauschildt v Denmark* (1989) 12 EHRR 266.
- 34 *Hollander and Salzedo*, above n 6 127; *Piersack v Belgium* (1982) 5 EHRR 169.
- 35 (1999) 91 FCR 353.
- 36 Ibid 355.
- 37 Ibid 356.
- 38 Ibid 359.
- 39 Ibid.
- 40 [1999] 2 VR 573.
- 41 Ibid 578.
- 42 Ibid 580.
- 43 Sir Thomas Bingham, 'Judicial Ethics', in Ross Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford, 1995), 35.
- 44 L'Heureux-Dubé J, 'Reflections on Judicial Independence, Impartiality and the Foundation of Equality', *CIJL Yearbook*, Vol VII, 95, cited by Justice D Ipp, 'Judicial Impartiality and Judicial Neutrality: Is there a Difference?' (2000) 19 *Aust Bar Rev* 212, 214.
- 45 Other rules might include the doctrine of separation of powers.
- 46 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 647; Margaret Allars, 'Procedural Fairness: Disqualification Required by the Bias Rule' (1999) 4 *The Judicial Review* 269, 276.
- 47 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 648.
- 48 Ibid.
- 49 Ibid 653.
- 50 John Allison, 'A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest' (1995) 32 *American Bus L Jo* 481, 515.
- 51 Ibid.
- 52 Ibid 516.
- 53 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 652.
- 54 *Webb* (1993) 181 CLR 41, 75 (Deane J).
- 55 *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353, 362.
- 56 Ibid 368.
- 57 *Ebner v The Official Trustee in Bankruptcy; Clenae v ANZ Banking Group Ltd*, High Court Transcript of Proceedings, 14 June 2000, <<http://www.austlii.edu.au>>, [1095]-[1110].
- 58 Ibid [3620]-[3630].
- 59 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 651.
- 60 Ibid 652-3; *Dovade Pty Ltd v Westpac Banking Group* (1999) 46 NSWLR 168, 188 ('Dovade').
- 61 Abimbola Olowofoyeku, 'The Nemo Judex: The Case Against Automatic Disqualification' (2000) *Public Law* 456, 473.
- 62 *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353, 365.
- 63 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 650; *Re JRL; Ex Parte CJL* (1986) 161 CLR 342, 351 (Mason J).
- 64 *Webb* (1993) 181 CLR 41, 67-8 (Deane J).
- 65 (2000) 174 ALR 655.
- 66 Ibid 658.
- 67 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ld v ANZ Banking Group Ltd* (2000) 176 ALR 644, 653.
- 68 Ibid.
- 69 (1995) 182 CLR 432, 458.
- 70 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ld v ANZ Banking Group Ltd* (2000) 176 ALR 644, 653; *Dovade* (1999) 46 NSWLR 168, 188.

- 71 Anne Lampe, 'Quick to Fight ANZ Ruling', *The Age* (Melbourne), 16 October 1997, 3; *Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573, 592.
- 72 *Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573, 592.
- 73 *Ibid* 593.
- 74 This is reflected in the insider trading provisions of the Corporations Act 2001 (Cth). Section 1002A(1) refers to information that could affect share price as including matters of supposition.
- 75 D Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedure* (Clarendon Press, Oxford, 1996), 446.
- 76 Andrew Field, 'The Law of Bias Revisited (and clarified by the High Court)' (August 2001) *The Law Institute Journal* 65, 69.
- 77 *Eg Webb* (1993) 181 CLR 41, *Livesey* (1983) 151 CLR 288.
- 78 *Pinochet (No 2)* [2000] 1 AC 119, 135.
- 79 *Pinochet (No 2)* [2000] 1 AC 119, 122-3, 129, 131-2.
- 80 *Ibid* 72.
- 81 *Cf Charles JA in Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573 who argues at 593 that the principle in *Dimes* should apply if at all, only where the judge has a direct pecuniary interest in the outcome of the case. This position is adopted by the English Court of Appeal in *Locabail* [2000] 1 All ER 65, 71. However, it is argued that the better view is to recognise that a perception of bias can manifest itself in either a connection with a litigant or the outcome of the litigation and therefore the broader test that includes both litigant and outcome should be adopted.
- 82 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty v ANZ Banking Group Ltd* (2000) 176 ALR 644, 678.
- 83 *Ibid*.
- 84 *Ibid* 678-9.
- 85 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142; *BOC New Zealand Ltd v Trans Tasman Properties Ltd* [1997] NZAR 49.
- 86 *Ghiradosi v Minister of Highways for British Columbia* [1966] SCR 367; *Sacred Heart v Armstrong's Point* (1961) 29 DLR (2d) 373; *Energy Probe v Atomic Energy Control Board* (1984) 8 DLR (4th) 735.
- 87 *BTR Industries SA (Pty) Ltd v Metal & Allied Workers' Union* [1992] 3 SA 673; *President of the Republic of South Africa v South African Rugby Football Union* [1999] 4 SA 147.
- 88 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 682.
- 89 *Ibid* 686.
- 90 *Ibid*.
- 91 [1999] 2 VR 573, 594.
- 92 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 666.
- 93 *Ibid*.
- 94 Ross Cranston, 'Disqualification of Judges for Interest, Association or Opinion' (1979) *Public Law* 237, 243.
- 95 *Ibid*.
- 96 *Ibid*.
- 97 *Ibid*.
- 98 *Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573, 603 (Callaway J).
- 99 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 96 (Deane J) ('Laws').
- 100 *Dimes* (1852) 3 HLC 759, 787-8.
- 101 R Tracey, 'Disqualified Adjudicators: The Doctrine of Necessity in Public Law' (1982) *Public Law* 628.
- 102 *Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573, 603 (Callaway J).
- 103 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 659.
- 104 *Laws* (1990) 170 CLR 70, 102.
- 105 Thomas McKeivitt, 'The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?' (1996) 24 *Hofstra L Rev* 817, 838.
- 106 *Leeth v Commonwealth* (1992) 174 CLR 455, 490 (Deane and Toohey JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, ANU, 1994) 185, 190; Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process' (1997) 23 *Monash Uni L Rev* 248; Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide L Rev* 341; Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2001) 20 *Aust Bar Rev* 283; Fiona Wheeler 'The Separation of Federal Judicial Power: A Purposive Analysis' Ph D Thesis (Law Program, Research School of Social Sciences, ANU, 1999). The word constraints of this paper prevent an analysis of the merits of implying such rights, for discussion on this issue see, eg, Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melb U L Rev* 677, Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Fed L Rev* 1.
- 107 (1991) 172 CLR 501.
- 108 *Ibid* 607.
- 109 *Ibid* (Deane J).
- 110 *Ibid* 689 (Toohey J), 703 (Gaudron J).

- 111 Eg Henry Burmester in his commentary to Linda Kirk, 'Chapter III and Legislative Interference with the Judicial Process: *Abebe v Commonwealth* and *Nicholas v The Queen*' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, ANU, 2000) 142-7, briefly critiques the discretionary nature of judges articulating the essential attributes of the curial system.
- 112 (1996) 189 CLR 1.
- 113 *Ibid* 25, see also discussion at 23-4.
- 114 (1991) 172 CLR 84, 150 (emphasis added).
- 115 (1992) 174 CLR 455.
- 116 *Ibid* 470.
- 117 (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
- 118 Eg Patrick Keyzer, 'Pfeiffer, Lange, The Common Law of the Constitution and the Constitutional Right to Natural Justice' (2000) 20 *Aust Bar Rev* 87, 92-3.
- 119 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- 120 Eg *Polyukhovich v Commonwealth* (1991) 172 CLR 501 and *Leeth v Commonwealth* (1992) 174 CLR 455 are examples of the situations where this discussion has arisen.
- 121 184 CLR 348, 394.
- 122 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 662.
- 123 *Ibid* 667.
- 124 *Ibid*.
- 125 *Ibid* 670.
- 126 *Ibid* 690.
- 127 *Ibid*.
- 128 (1989) 167 CLR 568.
- 129 *Ibid* 572 (Brennan, Deane and Gaudron JJ).
- 130 *Ibid*.
- 131 *Pinochet (No 2)* [2000] 1 AC 119, 136-7, 141, 143.
- 132 *Ibid*.
- 133 *Locabail* [2000] 1 All ER 65, 87.
- 134 Enid Campbell, 'Waiver of Judicial Disqualification for Bias or Apprehended Bias – a Constitutional Issue', *Constitutional Law and Policy Review Vol 2 (3) 1999*, 41.
- 135 See *ibid* for a discussion of this issue.
- 136 Canadian Judicial Council, *Commentaries on Judicial Conduct*, (Les Editions Yvon Blais, Quebec, 1991).
- 137 *Ibid* 74.
- 138 Campbell, above n 134, 42-3.
- 139 (1998) 12 NSWLR 358.
- 140 *Ibid* 373.
- 141 *Ibid*.
- 142 (1991) 25 NSWLR 224, 229.
- 143 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644; *Johnson v Johnson* 174 ALR 655.
- 144 *Ebner v The Official Trustee in Bankruptcy; Clenae v ANZ Banking Group Ltd*, High Court Transcript of Proceedings, 14 June 2000, <<http://www.austlii.edu.au>>, [2020].
- 145 [1997] 1 VR 332.
- 146 *Ibid* 361.
- 147 *Dovade* (1999) 46 NSWLR 168, 192.
- 148 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 176 ALR 644, 659-60.
- 149 *Ibid*.
- 150 Melissa Perry, *Disqualification of Judges: Practice and Procedure Discussion Paper* (Australian Institute of Judicial Administration, Melbourne, 2001) 89.
- 151 *Ibid*.
- 152 It is interesting to note that this is also the approach taken by the Committee of Inquiry in relation to politicians' interests: see Commonwealth, *Report on Private Interest and Public Duty*, Parl Paper No 353 (1979).
- 153 See *Ghiradosi v Minister of Highways for British Columbia* [1966] SCR 367; *Sacred Heart v Armstrong's Point* (1961) 29 DLR (2d) 373; *Energy Probe v Atomic Energy Control Board* (1984) 8 DLR (4th) 735.
- 154 Canadian Judicial Council, above n 136.
- 155 *Ibid* 5.
- 156 Canadian Judicial Council, *Ethical Principles for Judges*, (Ontario, 1998).
- 157 *Ibid* 42.
- 158 This view is supported by Chief Justice John Doyle, 'Judicial Standards: Contemporary Constraints on Judges – The Australian Experience' (2001) 75 *ALJ* 96, 103.
- 159 *Ibid* 100-1, see also Chief Justice Lamer cited in Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, (Canadian Judicial Council, Toronto, 1995) 144.

- 160 Prime Minister's Committee on Local Government Rules of Conduct (Lord Redcliffe-Maud, Chairman), Report, Cmnd. 5636, London, HMSO, 1974, 6, cited in Commonwealth, Report on Private Interest and Public Duty, Parl Paper No 353 (1979), 29.
- 161 ALJA, Guide to Judicial Conduct (2002, Australian Institute of Judicial Administration Inc).
- 162 Ibid vii.
- 163 Ibid.
- 164 Ibid.
- 165 Ibid.
- 166 Ibid.
- 167 Ibid.
- 168 Ibid 1.
- 169 Ibid 9.
- 170 Thomas White, 'To Have or Not to Have – Conflicts of Interest and Financial Planning for Judges' (1970) 35 Law and Contemporary Problems 202, 208.
- 171 ALJA, above n 161, 9.
- 172 Ebner v The Official Trustee in Bankruptcy; Clenae v ANZ Banking Group Ltd, High Court Transcript of Proceedings, 14 June 2000, <<http://www.austlii.edu.au>>, [410].
- 173 An example of an obvious case might be if a judge is an expert in defamation law and owns shares in a newspaper corporation.
- 174 White, above n 170, 208.
- 175 Ibid.
- 176 Ebner v The Official Trustee in Bankruptcy; Clenae v ANZ Banking Group Ltd, High Court Transcript of Proceedings, 14 June 2000, <<http://www.austlii.edu.au>>, [420].
- 177 White, above n 170, 210.
- 178 Ibid.
- 179 Ibid.
- 180 Ibid 217.
- 181 Ibid 218-19.
- 182 Professor Friedland also endorses the idea of a private system of disclosure: see Friedland, above n 159, 156.
- 183 See above, n 160.
- 184 ALJA, above n 161, 12-13.
- 185 Ibid, 12.
- 186 See eg Perry, above n 150, 90.
- 187 (1998) 195 CLR 337.
- 188 Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of its Own' (1999) 73 ALJ 72, 73, Sir Anthony Mason, 'Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review' (1998) 1 Constitutional Law and Policy Review 21, 22.
- 189 Ibid.
- 190 Ibid.
- 191 Tilmouth and Williams, above n 188, 73.
- 192 Ibid.
- 193 For a detailed discussion of this issue see *ibid*.
- 194 Mason, above n 188, 22.
- 195 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 691.
- 196 Ibid 661