

WHEN TO SIT IN JUDGEMENT

1. The title for the topic is a little obscurely expressed.
2. I propose addressing the circumstances in which a judge should recuse himself or herself from sitting and why. But as importantly when and why the judge should refuse to recuse himself or herself and sit. Both decisions serve the same objective, and the too ready acceptance of one over the other will diminish the public confidence in our legal system.
3. I shall touch on three broad themes.
4. *First*, to discuss two broad situations where it is proper and indeed required that a judge be recused.
 - a. Situations of actual bias;
 - b. Cases of apprehended bias;
5. *Second*, to touch on the emerging additional basis – namely one founded on proper case management.
6. *Thirdly*, and as something of a reaction to the case management foundation and to some extent to arguable apprehension of bias situations, to deal with why judges have a duty to sit and decide cases assigned to them unless a proper reason is established not to and that this is essential to the public confidence in our legal system.

The Body Politic explanation

7. Behind each of these is the one unifying principle.
8. Alexander Hamilton, rightly conscious of the separation of powers between the legislature, the executive and the judiciary, wrote in his discussion of the judiciary:

“The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.” *The Federalist No 78*.
9. The functioning of our society, peacefully and in a law abiding way (with some exceptions), is based on acceptance by the public that the same rules apply to all and will

be applied to all equally and fairly by the judiciary. This is what is often called public confidence in the judiciary but really is a reference to public acceptance of judicial decisions. And not acceptance as meaning everyone agrees with or even likes some decisions – but acceptance that they represent the outcome of the same rules being applied to all equally and fairly by the judiciary. And that confidence exists without the courts having “sword” or “purse”.

10. In order for courts to have and preserve public confidence requires a number of things of judges: a degree of competence; probity of behaviour of judges in and out of courts; and for present purposes: independence and impartiality.
11. It is easy to see these factors at work in the first of the topics I will discuss but they will also be important to the other two.

First: Actual and Apprehended Bias

12. Judges exercise judicial power of the State (or the Commonwealth). That judicial power requires an independent judicial officer impartially deciding cases on their merits without fear favour or affection. That is the oath taken when sworn in.

“... all times and in all things do equal justice to all persons and discharge the duties and responsibilities of the office according to law to the best of my knowledge and ability without fear favour or affection.”

13. Actual bias exists when a judge is not able to do that – not able to bring an impartial mind to the resolution of the matter before the judge. This can be based on firmly held prejudices or beliefs, or fixed animosity, financial or familial reasons and so on. Mostly it is urged on the basis that the judge has prejudged the matter such that the judge is so committed to a conclusion already formed as to be incapable of alteration, whatever the evidence or arguments may be presented: *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [72].
14. Actual bias will be established “where the accusations are distinctly made and clearly proved” such that they are “firmly established”,¹ necessitating an assessment of the judge’s state of mind.²

¹ *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 546 [127] (Kirby J).

² *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 438 [33] (Gummow ACJ and Hayne, Crennan and Bell JJ). See more recently, *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148, 186 [115] (Edelman J).

15. Such cases are rare in our State indeed our country in relation to judicial officers.
16. That in part is because of some powerful institutional safeguards in our system which are outside the scope of this paper.
17. But we cannot be complacent about this. We do not have to look very hard to see courts overseas whose members are identified by reference to their political allegiances or their cultural or religious background.

Apprehended Bias

18. It has long been recognised that not only must the judge be independent and impartial, deciding cases without fear favour or affection, but the public must accept that it is the case.
19. That is why a judge is to recuse himself or herself if there is established a relevant apprehension of bias.
20. Bias is something of a loaded term – but it is too late to change it now.
21. The test was authoritatively stated in this country in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]. Gleeson CJ, McHugh, Gummow and Hayne JJ said:

“[6] ... the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity... a judge is disqualified if a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.”

22. From this statement and later cases these principles have emerged.
23. *First*, it involves two ‘mights’ and imaginatively has been called the double might test.
 - a. “[A] fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to” the decision.
 - b. It is based on possible effects or conclusions not limited to probable ones: *QYFM* (2023) 279 CLR 148 at [37] (Kiefel CJ and Gageler J); [68]-[70 per Gordon J; [118] per Edelman J.

24. *Second*, it is an objective test – that of the notional fair-minded lay observer. This recognises the importance to our system of justice that the public have confidence in the impartiality and independence of the judiciary, not how the group of well-informed lawyers or experienced litigants might view events.
25. *Third*, the fair-minded lay observer is not apathetic or a conspiracy theorists. The measure is of someone “neither complacent nor unduly sensitive or suspicious”: *CNYI7 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [19]. And that lay observer’s apprehension needs to be **reasonable**.
26. We are reminded by Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 353:
- “...that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind...”
27. *Fourth*, that person is taken to be aware of the nature of the decision and the context in which it was made: *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at [72] (Kiefel CJ and Gageler J. This includes having attributed to the lay observer an appreciation that judges are legally trained and subject to an oath or affirmation to decide a case fairly and impartially. But is not a lawyer and not to be visited with a lawyer’s perspective on judicial conduct.
28. *Fifth*, in its application it requires the consideration of a least these three steps: *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at [38] (Kiefel CJ and Gageler J):
- “Application of the criterion was identified in *Ebner*, and has been reiterated, logically to entail:
- (1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits;
 - (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and
 - (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.”

29. *Sixth*, it involves imposing on the judge an obligation to disclose matters to the parties: *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at [319]. It might be thought something of a paradox that there may be no appearance of bias unless and until the judge discloses something but the objective in doing so is to then adjudicate on the merits of the basis for the recusal and perhaps the parties will explicitly waive any concern. It is in one sense a compounding concern if the disclosure is only squeezed out of the judge later.
30. All of this is easily stated but can be hard to decide.
31. I wanted to illustrate this by reference to the circumstances that were under consideration a very recent case in the federal court. The High Court has heard the appeal in the matter but judgment is reserved – so that the answer awaits.

***ASIC v Sunshine Loans Pty Ltd* (2025) 308 FCR 541**

32. As its name suggests Sunshine Loans was a credit provider and ASIC commenced proceedings against it alleging contraventions of the Credit Act seeking amongst other things pecuniary penalties
33. The primary judge decided that the trial of liability should proceed first ahead of the penalty issue. There is nothing unusual in that.
34. In the end ASIC succeeded in establishing contraventions; and the issue of penalty was then to proceed to a hearing.
35. At that stage Sunshine Loans applied to have the judge recuse himself on the basis of apprehended bias.
36. The basis for this was: that in his reasons on liability the primary judge had expressed findings adverse to the credit of one of the directors of Sunshine Loans who had given evidence. His evidence was variously described as ‘unsatisfactory’; given by someone ‘schooled to advance a particular theory’; preposterous’; ‘not credible’ and as not someone ‘who tried to give his evidence in an honest manner’.
37. In relation to penalty, Sunshine Loans (surprisingly) proposed relying on an affidavit to be sworn by the same director. It was common ground that he was to be cross examined and that his credit would be in issue. Sunshine Loans urged that “a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question the judge is required to decide.”

38. The judge agreed and recused himself.
39. An instinctive reaction might be that this seems pretty right. I would not want a judge who had just found me to be a witness not trying to give evidence honestly, to be adjudicating on my next affidavit.
40. But is that instinctive impression correct, and is that the test?
41. We regularly have trials split where the judge who decides the first tranche will also decide the second. Criminal judge-only trials followed by sentencing (an everyday occurrence in the lower courts and more often now in the superior courts); any liability/quantum divisions of a civil matter; other trials where the precise form of relief is deferred are all examples of this.
42. These will and in some instances must involve findings of discreditable conduct by a person, either related to his or her conduct or their evidence or both, where that person is to give evidence in or be subject to the ruling in the second hearing.
43. ASIC appealed to the Full Federal Court and by majority succeeded. It was held that the primary judge ought not to have recused himself. It was sent back to the original primary judge to hear.
44. All members of the Court agreed that the mere fact that the judge had formed adverse views as to credibility of a witness at the liability hearing and the same witness is to be called to give evidence again *did not itself* give rise to the apprehension of bias. So my instinctive impression was perhaps not so right.
45. The reasons expressed in that case for this view differed slightly. But each of them attributed to the lay observer an appreciation, perhaps a sophisticated appreciation of the legal nature of the case and the court practice of often separating the trial of liability from penalty.
46. First, Justice Bromwich held there was no apprehension of bias. Justice Bromwich put significance in the statutory regime which at the penalty phase requires in some respects or permitted as to other respects the judge to have regard to the substance of the prior adverse findings made at the liability phase: s 167 (3) of the *National Consumer Credit Protection Act 2009* (Cth). That was the case before the primary judge.
47. Justice Colvin attributed to the fair-minded lay observer the knowledge that the second hearing is not to be conducted as a separate and fresh adjudication unaffected by what

has occurred in the first. The due performance by the judge of his role during the first hearing could not it was said found a basis for recusal from conducting the second hearing.

48. The lay observer of proceedings in the Federal Court plainly is a keen student of Commonwealth statutes and the court's practices. No doubt the lay observer in the State courts is at least as well informed and interested in our processes.
49. In effect this reasoning is that the trial judge is to hear one controversy and of course if it is bifurcated it must follow that in the second stage the judge will have formed views about a range of matters including the conduct or credit of a party or witness. The process itself is just splitting into two parts that which would take place in the judge's chambers when writing the judgment if it had all been decided in one trial. A fair-minded lay observer would not view a judge as not impartial merely because in the process of deciding a case his or her mind fell decidedly against the credit or conduct of one party or witness.
50. In dissenting, Justice Perram based his view on the vehemency with which the findings were expressed at first instance, as giving rise to the apprehension of bias.
 - a. He too would have attributed to the lay observer an appreciation that the court practice extended to deciding liability before penalty in such cases. His Honour would have held that there would be no **reasonable** apprehension of bias merely if in accordance with ordinary judicial practice, which included that courts often divide liability and penalty phases of litigation the same judge decided both even if expressing views contrary to one side or its witness.
 - b. But Justice Perram said that judicial practice carried with it the need for judicial restraint if possible in the manner of expression of findings in the first phase.
 - c. The primary judge could have expressed his conclusions with more moderate language and had he done so, Perram J seemingly would probably have joined in the appeal being allowed.
 - d. But the form of expression was such that the fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question the judge is required to decide."

51. Sunshine Loans sought and received a grant of special leave and now has argued the matter in the High Court.
52. Hopefully that Court will tell us just what level of knowledge or appreciation of the terms of the *National Consumer Credit Protection Act 2009* or of court practice is to be attributed to the lay observer; and how that affects the third of the three steps which arise from *Ebner* in assessing the reasonableness of the apprehension from the perspective of the fair-minded lay observer.
53. For the moment, at least this much would seem to follow:
 - a. the mere fact that the judge had formed adverse views as to credibility of a witness at the liability hearing and the same witness is to be called to give evidence again *did not itself* give rise to the apprehension of bias; but
 - b. it may be prudent if judicial restraint is shown in the expression of credit or similar findings in phase one of bifurcated proceedings. However, I have a degree of discomfort in a test which encourages the primary judge (even for sound reasons) to withhold reasons that fully represent his or her views justifying the findings.

Second: Case Management Power

54. Perhaps it was always the case, but modern rules and case management practices recognise that judges should have a role to play in ensuring the efficient and timely disposition of disputes. A raft of processes have been put in place to achieve this.
55. But case management practices also have been referred to as a source of power of a judge to not hear a matter or part of a matter in circumstances which fall outside the established categories of bias or apprehended bias.
 - a. This is not often used;
 - b. But before it gains greater currency we need to understand what that means, not only for the progress of cases under management but the public confidence in the judicial system.

The Existence of the Power

56. There is no doubt that a judge has a discretion to decline to sit even if there is no apprehension of bias.

57. The High Court in *Ebner* itself made this clear at [20] per Gleeson CJ, McHugh Gummow and Hayne JJ where their Honours said:

“This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of **real doubt**, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That **would be intolerable.**”

58. Bromwich J in *Sunshine Loans* put this differently at [79] said:

“That is not to say that there are not cases where, as a precaution, it may be appropriate for a judge to recuse herself even if not positively satisfied that the *Ebner* test is met. That will most obviously be the case where an objection is raised early on in a proceeding and where a judge might doubt that the test is met but there is **no practical inconvenience** in its reallocation to another judge: *Ebner* at [20]-[21]. That process is consistent with modern principles of case management. Indeed, **many modern docket allocation systems attempt to pre-empt precisely these issues.** Even in such cases, however, it would be “intolerable” for parties to invoke **some small or trivial** basis for an apprehension of bias to seek a judge’s recusal: *Ebner* at [21].” (emphasis added).

59. The converse is not true – that is the case management power cannot be used for a judge to remain sitting even if satisfied of a reasonable apprehension of bias: *Kirby v Centro Properties Limited (No 2)* (2011) 202 FCR 439 at [10] per Middleton J; *Akiba (on behalf of the Torres Strait Regional Sea Claim) v Queensland* (2018) 263 FCR 409 at [71] per Mortimer J.
60. Justice Bromwich’s reference to ‘no practical inconvenience’ may be understood as setting the bar very low in order to get a judge to recuse himself or herself. In *Olga Day v Humphrey* [2019] QSC 38 at [75] Justice Mullins, in recusing herself despite there being no apprehension of bias, seemed to put the test as whether it is in the interests of justice in the circumstances.
61. In my view a principled approach requires that exceptional circumstances must exist to justify a judge deciding not to sit in a matter assigned to him or her (at least if the judge, to the knowledge of the parties, has been assigned to deal with it and especially if the

judge has embarked on the management or consideration of it) where no apprehension of bias is made out.

62. The Victorian Court of Appeal in *Mandie v Memart Nominees Pty Ltd* [2017] VSCA 177 at [83]-[84] referred to the need for the circumstances to be “exceptional in order to displace the judge’s ordinary duty to sit”.

63. That was also the approach seemingly favoured in *Parbery v QNI Metals Pty Ltd* [2018] QSC 213. Bond J (as his Honour then was) accepted, in obiter dictum based on case management principles that there was a residual discretion not to sit where the recusal application had been unsuccessful. His Honour advanced a number of factors as being relevant to the exercise of this discretion at [40]:

64. The first of them was that:

“(a) Any decision not to sit, after rejecting a recusal application, would involve an **exceptional** departure from the ordinary duty of a judge to sit on a case to which the judge had been assigned.”

65. In that case Justice Bond had been case managing the proceedings on the Commercial List through various interlocutory hearings, including a freezing order, applications to stay or set aside that order and many others.

a. There was he said an expectation of litigants on that list that **he** would see the matter through to a trial and that too was a relevant factor.

b. Plus, by reason of having done so he had a degree of familiarity with the case, its procedural history and the nuances of the issues which arise in it, that would be difficult for another judge to replicate.

66. Other relevant matters were:

“(d) The fact that the Court had made available another judge who was available to take over the management of this proceeding from me, and who was also available on the days presently allocated for the hearing of upcoming interlocutory applications and for the trial.

(e) The possibility that an erroneous rejection of the recusal application might form the basis of a successful appeal, and the risk such an outcome might pose to the Court’s and the parties’ resources which would have been devoted to the continued prosecution of the case before me in the interim.

(f) Whether to exercise a discretion not to sit would promote the public perception of the proper administration of justice.”

67. The acknowledgement of the need for the circumstances to be exceptional is something with which I, of course, agree. It is the last factor that I would emphasise. The expression proper administration of justice can be understood in a functional way – as to the efficient use of time and resources. It also includes the need to preserve the public confidence. And it is that to which I will now turn.

Third: Reasons to be cautious abouts its exercise.

68. There are powerful reasons to be cautious about the exercise of this discretion.
69. *First*, the due administration of justice requires impartial judges to hear and determine matters, which means not only to disqualify themselves if not impartial but to not allow themselves to be recused if they are impartial.
70. I will give you just two statements of principle from justices of the High Court, separated by a few decades, which make the same point:
71. Mason J observed in *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352:

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”

72. More recently in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 Justice Jagot at [277] expressed a similar view:

“A judge who is subject to a reasonable apprehension of bias in respect of a matter is disqualified from deciding that matter. But a judge who is not so disqualified generally has a duty to hear and decide the matters assigned to that judge (referred to as the ‘duty to sit’). A further part of the judicial oath or affirmation is that the judge must ‘well and truly serve’ the current sovereign, and their heirs and successors. Such service is performed by discharging the functions of judicial office. If, from a judge’s too ready acceptance of spurious or ill-considered applications for disqualification for apprehended bias, a party could influence the constitution of the court, another source of apprehended bias would arise – a prospect which has been described as ‘intolerable’. Accordingly, judges are mindful that ‘[d]isqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers’ and that they must ‘be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately, such as in an attempt to influence the composition of the bench or to cause delay’ .”

73. *Secondly*, this is not something driven by a consideration of workload or ensuring a particular judge does not shirk his or her fair share of it. It has a more fundamental foundation – the one I started with.
74. Our system of justice – and the public’s acceptance of its legitimacy – depends upon confidence that cases will be decided by independent and impartial arbiters. One aspect of that involves recusing judges for bias or apprehended bias. But equally the public confidence in the judicial system **requires** that cases are decided by whomever the litigants are assigned to without some species of judge shopping.
75. It would be a pernicious development if well-funded or strident litigants could bring applications for disqualification of a judge on tenuous or even fairly arguable bases, and as a fall back succeed on the footing that: Really wouldn’t it be more efficient and avoid the cost and delay of an appeal if another judge was assigned to hear the matter? The public confidence in our judicial system is eroded unless it is a system that applies equally to all.
76. The effect of this is not readily measurable in any individual case and so a judge must be conscious that the immediate effects of an exercise of this discretion may in combination with others, dilute that public confidence.
77. *Thirdly*, the scope for challenges being made to particular judges sitting has blossomed in recent years and that is likely to continue. Just why that is so might be hard to fully identify but some things have contributed to it. These are in no particular order:
- a. The growth of case management means that judges take a more active role in the management of cases which can involve more than the judicial detached indifference of days gone by.
 - b. A drive, not yet fully embraced in this State, to identify and decide parts of cases ahead of the final determination of the issues in the proceedings, which again means that a judge may have to deal with a part of a case where he or she has already said things none too favourable to one of the parties or their witnesses.
 - c. A growth of active self-represented litigants with access to on-line guidance which identifies means of seeking to avoid a judge or judges thought to be unsuitable;
 - d. And (perhaps the subject of another talk) something of a growing tolerance to such litigants taking any and all points they may wish; and

- e. A growth in the public personae or presence of judges in social media or business and professional life which exposes them and their hitherto private views to greater scrutiny.

Summary

- 78. While not suggesting exceptional cases might not arise for the exercise of the case management discretion to not sit even though bias or apprehended bias is not made out, it must be tempered to take account of an important aspect of why judges have a duty to sit and decide cases assigned to them.
- 79. That is so that the public can accept judicial pronouncements and have confidence that they reflect the law being applied uniformly to all without fear favour of affection – or perhaps I would add without wanting to be rid of a difficult matter or a problematic litigant.