



# WAIVER OF THE RULE AGAINST BIAS

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*The bias rule requires that decision-makers approach their task impartially and with an open mind. This article examines the common law basis of the bias rule and considers whether the rule has or should have a constitutional foundation. The article analyses the main exception to the bias rule, namely waiver. It considers the three key issues that must be established before a possible claim of bias will be held to have been waived – which are that a party must make an informed, timely and unequivocal decision. The article also considers how the courts approach claims of waiver in cases where the parties are represented or unrepresented and the influence of the agency rule in cases where the parties are represented.*

## I INTRODUCTION

The rule against bias requires that decision-makers approach a matter with an open mind so that they may consider each case fairly rather than by reason of any preconceptions, interests or other influences that may affect a fair consideration of the case or decision at hand. Bias may take two forms – actual or apprehended. A claim of actual bias involves an allegation that a judge or other decision-maker was influenced in some way by a pre-existing state of mind and was unwilling or unable to undertake a proper consideration of the evidence or other material that might be offered for the case at hand.<sup>1</sup> Claims of actual bias against a judge or other decision-maker are rarely made and even more rarely upheld.<sup>2</sup> The bias rule is

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1 See, eg, *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 134 (North J); *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87, 104 (French J); *Li v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 125, 133 (Drummond J); *Gamaethige v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 424, 442 [79] (Stone J); *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, 711 [37]-[39] (CA).

2 The different forms of bias may involve different standards of proof. It has been suggested that actual bias requires proof to a standard of 'probability' as opposed to the 'possibility' required for apprehended bias: *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425, 434-5 [28] (Gleeson CJ, Gaudron and Gummow JJ). The reluctance of courts to uphold claims of actual bias is almost certainly due in part to the serious implications of such findings against a decision-maker. Some judges have also acknowledged that there is little incentive for a party to assume the heavy onus in proving a claim of actual bias if a claim of apprehended bias, and its seemingly lesser standard of proof, is sufficient to make good a claim of bias. See, eg, *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 541 [111] where Kirby J stated that: 'A party would be foolish needlessly to assume a heavier obligation' ('*Ex parte Jia*').



most commonly invoked in the form of a claim of apprehended bias, by which it is claimed that a fair-minded observer who was informed of the facts alleged 'might reasonably apprehend that the judge [or other decision-maker] might not bring an impartial and unprejudiced mind to the resolution of the question'<sup>3</sup> at hand.

The bias rule is far from absolute. The courts have made clear that the rule requires a decision-maker to have an open mind rather than a blank one.<sup>4</sup> According to this principle, the important point is that a decision-maker is open to persuasion and prepared to consider a matter on its merits rather than being governed by preconceived views or other influences.<sup>5</sup> Decision-makers may, therefore, have some knowledge of or association with the parties, the facts of a case or the wider milieu within which the case has arisen, but knowledge or connections of this nature may not alone support a claim of bias. The question is often a subtle one of degree, which can make it difficult to determine the precise nature and extent of the bias rule.

Determining the content of the bias rule is also difficult because the exact requirements of the rule depend greatly on the context in which it arises. In particular, the character of a decision-maker will influence the content of the bias rule. Although most of the bias cases arise in the courts,<sup>6</sup> it is clear that the principles developed in these cases will not always apply to other decision-makers. The standards of impartiality and the procedures to raise and determine a claim of bias devised in the courts for judicial decision-making will be adjusted when

3 *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point) ('*Johnson*'). Apprehended bias has been described in other ways that distinguish it from actual bias, such as 'imputed' or 'apparent' or 'suspected' bias: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411, 414; *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, 711 [38]. Apprehended bias is the most appropriate term because the test involves establishing an *apprehension* on the part of the fair-minded and informed observer.

4 The point was well explained in *Wentworth v Rogers* [2002] NSWSC 1198 (Unreported, Barrett J, 16 December 2002) [24] where Barrett J stated: 'every judge has a past. The question ... is whether something in that past would be seen by the reasonable or fair-minded observer as having the potential to divert the judge from deciding the case on its merits'. See also *Vakauta v Kelly* (1989) 167 CLR 568, 570 where Brennan, Deane and Gaudron JJ acknowledged that a judge who regularly heard personal injuries claims would inevitably 'form views' about medical witnesses who regularly gave evidence in those cases. Their Honours reasoned that it 'will be all but impossible to put such preconceived views entirely to one side ... That does not, however, mean that the judge is disqualified ... [because the] requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation'. The same principles would no doubt extend to non-judicial decision-makers.

5 Minnow has explained that a decision-maker should have 'the ability to be surprised': Martha Minnow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201, 1214.

6 The application of the bias rule to the courts has long included juries. Accordingly, the decision of a jury may be overturned if one or more jurors is subject to a successful claim of bias: *R v Gough* [1993] AC 646; *Webb v The Queen* (1993) 181 CLR 41; *R v Abdroikov* [2008] 1 All ER 315.

applied to tribunals,<sup>7</sup> government ministers,<sup>8</sup> local councils<sup>9</sup> and administrative officials<sup>10</sup> to take account of the differing character of those decision-makers and the wider institutional structures within which they operate. The contextual nature of the bias rule means that its application can vary greatly according to the scheme of decision-making and the characteristics of the particular decision-maker to which it is applied.

The difficulties in determining the scope of the bias rule are also increased by the existence of three exceptions, namely necessity, statutory modification and waiver. The necessity exception is typically relied upon when the decision-maker against whom a claim of bias has been established is the only one reasonably available to determine the issue at hand.<sup>11</sup> The exception of statutory modification arises when the legal authority under which a decision is established allows, either clearly or by necessary implication, for the decision-maker to continue to act despite the existence of facts that would otherwise support a claim of bias.<sup>12</sup> In each instance a claim of bias may be defeated by factors beyond the control of the party who makes that claim.

The waiver exception to the bias rule is different because its operation depends on the conduct of the person, or an agent of the person, who seeks to invoke the bias rule. Parties may be held to have waived the right to invoke the bias rule if they were fully informed of the facts that could support a claim of bias but failed to raise the issue in a timely manner.<sup>13</sup> This article considers when and how a party must raise a claim of bias. It also considers when and why a party may be bound by the conduct of an advocate and when courts will deem the failure of a lawyer

7 Though the extent to which the standards devised for the courts may be varied when applied to tribunals will depend in large part on the qualifications and experience of the tribunal member, particularly whether the tribunal member is legally qualified. See, eg, *Bohills v Friedman* (2001) 110 FCR 338, 349–50 [31] where Gray J distinguished between the legally qualified Deputy President of the Commonwealth Administrative Appeals Tribunal and the non-legally qualified members of a public service disciplinary committee.

8 *Franklin v Minister of Town and Country Planning* [1948] AC 87, 104 (Lord Tankerton); *Ex parte Jia* (2001) 205 CLR 507, 541–2 [101]–[102] (Gleeson CJ and Gummow J, Hayne J agreeing); *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 [50] (Gaudron, Gummow and Hayne JJ), 460 [70] (McHugh J).

9 See, eg, *Porter v Magill* [2002] 2 AC 357, 466 where Lord Bingham accepted that when the bias rule was applied to local councils it should take account of the elected nature of councils because political practice required councillors (and those seeking election) to make statements and adopt positions that might otherwise raise questions of prejudgment. Lord Bingham reasoned that the bias rule should be adjusted to reflect the context of local councils because '[t]he law would indeed part company with the realities of party politics if it were to hold otherwise'.

10 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 460 [70] (McHugh J).

11 The necessity exception is explained in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4<sup>th</sup> ed, 2009) 705–9.

12 The bias rule may be completely excluded by statute but it is much more often modified rather than wholly excluded. Legislative modification of the bias rule usually occurs by implication. The classic example is legislation which invests a decision-maker with functions that would otherwise offend the bias rule, such as the power to both investigate and adjudicate an issue. The principles governing the grant of such differing functions are considered in *Metropolitan Fire and Emergency Services Board v Churchill* (1998) 14 VAR 9, 27–9 (Gillard J).

13 See, eg, *Smits v Roach* (2006) 227 CLR 423, 439–40 [43] (Gleeson CJ, Heydon and Crennan JJ); *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ).

to raise a claim of bias to constitute waiver on the part of a client. It also considers whether different principles ought to apply to waiver by unrepresented parties. But first it is useful to explain the basis of the rule against bias and how this has been invoked by some to argue against the very existence of the waiver exception.

## II THE COMMON LAW FOUNDATION OF THE RULE AGAINST BIAS

The exact origin of the rule against bias is unclear but there is longstanding common law authority to support the proposition that judges might not be permitted to preside, or that the decisions of courts could be set aside, if the judge was thought not to be impartial.<sup>14</sup> The more recent analysis of these older cases has been directed to the origins of the rule of automatic disqualification for pecuniary interest rather than the origins of the bias rule itself.<sup>15</sup> For present purposes it is sufficient to note two points. One is that the possible origin of the principle of automatic disqualification on the ground of pecuniary interest is of relatively little importance in Australia since the High Court disavowed a separate principle of automatic disqualification.<sup>16</sup> The other is that the focus in recent times on the origins and value of a principle of automatic disqualification has distracted attention from the basis of the wider rule against bias, of which any principle of automatic disqualification is but one example.

The principle upon which the bias rule has been anchored in modern times may be traced to Lord Hewart's often cited statement that 'justice should not only be done, but should ... be seen to be done'.<sup>17</sup> According to this view, justice must not only be fair, it must appear to be so. The importance of the appearance of impartiality

14 *Dr Bonham's Case* (1610) 8 Co Rep 113b; 77 ER 646; *Earl of Derby's Case* (1613) 12 Co Rep 114; 77 ER 1390; *Day v Savadge* (1614) Hob 85; 80 ER 235.

15 See, eg, Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review* (6<sup>th</sup> ed, 2007) 501-2. Those authors suggest that the early bias cases are explicable on several grounds, including automatic disqualification for pecuniary interest, but conclude that a firm rule of automatic disqualification was not established until the middle of the 19<sup>th</sup> century. See also Abimbola Olowofoyeku, 'The *Nemo Jurex* Rule: The Case against Automatic Disqualification' [2000] *Public Law* 456, 456-8. Olowofoyeku argues that the rule of automatic disqualification for pecuniary interest was not well settled until early in the 20<sup>th</sup> century.

16 In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 ('*Ebner v Official Trustee*'). The majority essentially reasoned that earlier authority had been wrongly interpreted to support an inflexible rule of automatic disqualification for pecuniary interest: at 351-8 [38]-[56] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan agreeing). Kirby J flatly rejected this reasoning as an 'ahistorical' interpretation of the law: at 373-6 [118]-[125]. There are tentative signs that the New Zealand courts may adopt the Australian approach. See *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495, 504-5 [40]-[42] where the New Zealand Supreme Court considered but did not decide whether to adopt *Ebner v Official Trustee*. The Supreme Court did, however, note that there were 'powerful reasons' in support of a simple single test. The position in the wider Commonwealth is explained in Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (2009) 19-32.

17 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259. Aitkin LJ made a very similar but less well known statement in the same year in *Shrager v Basil Dighton Ltd* [1924] 1 KB 274, 284 when his Honour stated that 'next to the tribunal being in fact impartial is the importance of its appearing so'. See also *Shrager v Basil Dighton Ltd* [1924] 1 KB 274, 282 (Bankes LJ), 293 (Younges J). It is useful to note that the other judges in that case held that the possible claim of bias had been waived.

has become increasingly linked in the common law world to public confidence in the courts, judicial decision-making and other forms of decision-making to which the bias rule applies such as the exercise of discretionary power by administrative officials.<sup>18</sup> This rationale of the bias rule also sits comfortably with the objective test by which it is now governed because the mythical fair-minded and informed observer, upon whose judgment a claim of bias is determined, is clearly a member of the general public rather than the judge who decides the claim.<sup>19</sup> It may therefore be argued that the views attributed to the general public inform both the content of and justification for the rule against bias.

Kirby P drew support from this rationale of public confidence in his Honour's first attack on the waiver exception. Kirby P questioned the waiver exception on the ground that it diminished the very public confidence that the wider bias rule sought to maintain. In *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*<sup>20</sup> his Honour suggested that the 'entitlement' of a party to an impartial judge was 'not simply a private right which may be waived. It inheres in the public as well as to the individual litigant. It is not for the individual litigant to waive the public's rights'.<sup>21</sup> His Honour did not explain in any detail precisely why this right was a public one but when he affirmed his objection to the waiver exception in a later case he relied squarely on the need to maintain public confidence in the judicial process. Kirby P reasoned:

If the litigant can waive (or, by omission to object, lose the right to complain of) a reasonable apprehension of bias on the part of the hypothetical representative of the community, what is the result? The confidence of

18 See, eg, *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 263 (Barwick CJ, Gibbs, Stephen and Mason JJ); *Webb v The Queen* (1994) 181 CLR 41, 72 (Deane J); *Johnson* (2000) 201 CLR 488, 492-3 [12] (Gleeson CJ, McHugh, Gaudron, Gummow and Hayne JJ); *Ebner v Official Trustee* (2000) 205 CLR 337, 363 [81] (Gaudron J); *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425, 426 [5] (Gleeson CJ, Gaudron and Gummow JJ); *Forge v ASIC* (2006) 228 CLR 45, 77 [66] (Gummow, Hayne and Crennan JJ). Similar remarks have been made by other courts of final jurisdiction. See, eg, *R v Gough* [1993] AC 646, 659 (Lord Goff, with whom the other Law Lords agreed on this point); *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187, 196 [21] (HL); *Meerabux v A-G of Belize* [2005] 2 AC 513, 527 [22] (PC); *Wewaykum Indian Band v Canada* [2003] 2 SCR 259, 292 [67] (Supreme Court of Canada); *Saxmere Co Ltd v Escorial Co Ltd* [2009] NZSC 72 (Unreported, Blanchard, Tipping, McGrath, Gault and Anderson JJ, 3 July 2009) [55], [92] (McGrath J, Anderson J agreeing).

19 The decisive case on this issue was *Webb v The Queen* (1994) 181 CLR 41, 71 (Deane J). See also *Johnson* (2000) 201 CLR 488, 492 [11] (Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ, Callinan J agreeing on this point). This objective test has been criticised on the basis that judges attribute so much specialist knowledge about the legal system and the case at hand to the reasonable well informed observer, by whose judgment claims of bias are gauged, that they often tacitly apply a subjective test based on the judge's assessment of the claim. See *Johnson* at 506 [49], where Kirby J noted that 'it would be a mistake for a court simply to impute all that was eventually known to the court to an imaginary reasonable person because to do so would be only to hold up a mirror to itself'. Kirby J made similar but more detailed remarks in *Smits v Roach* (2006) 227 CLR 423, 457 [96]. Such comments highlight the inherent tension between the objective nature of the fair-minded and informed observer and the subjective basis upon which judges ultimately determine the views of that fictional observer. Some have argued that the inherent tension between these factors is such that the fictional observer should be abandoned: Abimbola Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68 *Cambridge Law Journal* 388.

20 (1988) 12 NSWLR 358.

21 *Ibid* 373.

the community in the impartiality of the judicial system is, by inference, damaged yet the appellate court must simply ignore the complaint.<sup>22</sup>

The High Court took a contrary view in *Vakauta v Kelly*.<sup>23</sup> In that case a party to a workers' compensation case did not make a claim of bias when a trial judge made strong adverse comments about several specialist medical witnesses an insurer had called. Counsel for the insurer did not raise a claim of bias when these remarks were made. The High Court held that the failure to raise a claim of bias did not amount to waiver because the full implications of the judge's remarks were not apparent until the judge delivered his decision.<sup>24</sup> But the Court had no doubt that waiver could be found in an appropriate case. All members of the High Court accepted it was important that justice 'be seen to be done' but offered various reasons why the appearance of justice was not threatened or harmed when a party chose not to exercise a right to raise a claim of bias.<sup>25</sup> Toohey J suggested that the public interest in the appearance of justice would not be adversely affected 'by a doctrine which refuses a party to litigation the opportunity to resile from a position he has taken'.<sup>26</sup> Brennan, Deane and Gaudron JJ similarly reasoned that:

It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her.<sup>27</sup>

This reasoning does not simply suggest that public confidence in the appearance of justice is not damaged if waiver is found in an appropriate case but also that it may be enhanced. There are several reasons why this might be. One is that the public might believe that parties should accept the consequences of their own decisions, particularly if those decisions are informed ones. Another is that the circumstances of possible waiver should take account of other parties. Opposing parties could be subject to enormous expense and delay if the circumstances in which waiver could be claimed were not limited by the constraints of the waiver exception. Such outcomes would be the antithesis of the appearance of justice.

22 *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684, 687. See also *Najjar v Haines* (1991) 25 NSWLR 224, 229.

23 (1989) 167 CLR 568.

24 *Ibid.* Brennan, Deane and Gaudron JJ held that the remarks made by the judge during the hearing were 'effectively revived' by similar statements made in the judge's reasons for decision: at 573. Dawson J reached a similar conclusion: at 579. Toohey J held that the remarks made during the hearing by the judge were sufficient to support a finding of bias but also accepted that, if there was any doubt about the effect of remarks made during the hearing, this could be resolved by reference to statements subsequently made in the reasons for decision: at 588.

25 Dawson J similarly concluded that there would be 'little danger of the appearance of injustice' in such cases: *Vakauta v Kelly* (1989) 167 CLR 568, 577.

26 *Ibid* 588.

27 *Ibid* 572. The Court of Appeal of England was mindful of similar issues when it concluded that a party cannot 'have the best of both worlds' by receiving all the salient facts but postponing any decision on waiver: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 491 [69].

Although Kirby J finally conceded that his objections to the existence of a waiver exception to the bias rule are at odds with the clear weight of authority,<sup>28</sup> the exception continues to be questioned on conceptual grounds.<sup>29</sup> Malleon criticised waiver in terms similar to those first raised by Kirby J when she argued that the possibility of waiver was ‘difficult to reconcile with a principle which prioritises the need for justice to be seen to be done’.<sup>30</sup> She reasoned that the continued acceptance of a right of waiver ‘effectively places the decision about what may or may not shake public confidence in the integrity of the administration of justice with the parties’.<sup>31</sup> These criticisms have particular force in England where a rule of automatic disqualification still prevails.<sup>32</sup> Malleon noted that the rule of automatic disqualification deems the effect of some interests to be so grave that they ‘must *inevitably* shake public confidence in the integrity of the administration of justice’<sup>33</sup> if decisions deemed to be affected by them are not set aside.<sup>34</sup> At the same time, however, cases which have affirmed the rule of automatic disqualification, and stressed the seriousness of the interests which will trigger it, have also upheld the right of parties to waive the bias rule.<sup>35</sup>

The idea that some interests can necessarily or inevitably be presumed to have a particular effect was implicitly rejected by the High Court in *Ebner v Official Trustee*.<sup>36</sup> In that case the Court disavowed the principle of automatic disqualification and stressed that the effect of any interest must be explained rather than assumed. ‘Only then’, the High Court concluded, ‘can the reasonableness of the asserted apprehension of bias be assessed’.<sup>37</sup> The circumstances that might support a finding of waiver would surely influence any assessment of the reasonableness of an apprehension of bias. A common example is when a party is aware of the circumstances that might support a claim of bias but does not raise the issue until the hearing has concluded and a decision is delivered. Any possible apprehension on the part of the fair-minded and informed observer, by whose judgment a claim of apprehended bias is determined, would surely be influenced by the fact that the person most affected by the issue chose not to raise it. The

28 See *Smits v Roach* (2006) 227 CLR 423, 466 [125] where his Honour acknowledged that the waiver exception to the bias rule was ‘settled law’ in the High Court.

29 See, eg, *Rothesay Residents Association Inc v Rothesay Heritage Preservation & Review Board* (2006) 269 DLR (4<sup>th</sup>) 127, 141-2 [25] where the Court of Appeal of New Brunswick accepted that waiver was a settled exception to the bias rule but one that still could be queried from a public policy perspective.

30 Kate Malleon, ‘Safeguarding Judicial Impartiality’ (2002) 22 *Legal Studies* 53, 58.

31 *Ibid.*

32 The rule of automatic disqualification was both affirmed and expanded by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet (No 2)* [2001] 1 AC 119 (*‘Pinochet (No 2)’*). This expansion of automatic disqualification has been widely criticised. The Privy Council appeared mindful of those criticisms when it stated that the application of the principle of automatic disqualification in *Pinochet (No 2)* was a ‘highly technical one’: *Meerabux v A-G of Belize* [2005] 2 AC 513, 526 [21].

33 *R v Gough* [1993] AC 646, 661 (Lord Goff) (emphasis added). Very similar language was used in *Pinochet (No 2)* [2001] 1 AC 119, 146 (Lord Hutton).

34 Malleon, above n 30.

35 See, eg, *Pinochet (No 2)* [2001] 1 AC 119, 137. Lord Browne-Wilkinson noted that waiver was not raised on the facts but expressed no doubt on the existence of the exception.

36 (2000) 205 CLR 337.

37 *Ibid* 345 [8].

same considerations support the requirement that claims of bias be made in a timely manner. If a point is genuine, the fair-minded observer might ask, why not raise it in a timely fashion? The scepticism of the fair-minded observer would almost certainly rise in accordance with the time taken to raise a claim of bias.

From a more theoretical view, waiver could be argued to empower and accord respect to parties by granting them the autonomy to decide whether to raise the issue.<sup>38</sup> It has long been argued that the principles of natural justice and the procedural requirements that doctrine may entail are explicable by non-instrumental values, such as fostering respect towards, and participation by, the parties to decisions that affect them.<sup>39</sup> Waiver of the bias rule is not simply consistent with those values, it may enhance them. The notion of granting respect to parties, and the wider dignitarian thesis from which it is drawn, may be fostered by providing the parties the autonomy to decide whether to claim or waive their right to invoke the rule against bias. The ability to waive a claim of bias may also enhance the underlying imperative of participation, which is to increase the involvement of parties within the decision-making processes that affect them, by enabling parties to decide if they wish to invoke the bias rule.<sup>40</sup> The Privy Council appeared mindful of such considerations in *Millar v Dickson*<sup>41</sup> where it acknowledged that the ability of parties to waive the right to a public hearing before an independent and impartial tribunal in European law was well accepted in many forms. Lord Hope noted that waiver was widespread and observed:

In practice waiver ... is not uncommon, as in the case where the parties agree to the resolution of their dispute by private arbitration or the payment of a fixed penalty is tendered in composition of a criminal charge. The legal system would be unduly hampered if the right to a public hearing by an independent and impartial tribunal were to be incapable in any case of being waived.<sup>42</sup>

There are other more practical reasons why public confidence might be enhanced by the operation of a waiver exception to the bias rule. Waiver may promote finality in legal proceedings, by preventing a party who was sufficiently informed of the facts that could support a claim of bias and chose not to raise a timely objection from doing so at a later time. If it were otherwise, parties could rest on a potential

38 There are many cases in which the courts have stated that the apparent wishes of the parties ought to be given weight. See, eg, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 489 [59] where the Court of Appeal of England stated: 'In a case in which before or during the trial the facts relating to the alleged bias have been disclosed to the parties, it seems to us right that attention should be paid to the wishes of the parties'.

39 See a good exposition of these arguments in Denis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996).

40 It is also useful to note that there is clear authority for the proposition that parties can waive the hearing rule which, like the bias rule, is one of the pillars of natural justice. Parties may waive the right to a hearing, or specific procedural rights in the course of a hearing, if they make an informed and voluntary decision to do so. See, eg, *MH6 v Mental Health Review Board* [2009] VSCA 184 (Unreported, Redlich JA and Hargrave AJA, 20 August 2009) [51]-[53]. The common theme in cases of waiver of the hearing and bias rules is that each occurs after an informed decision by the waiving party.

41 [2002] 1 WLR 1615.

42 *Ibid* [53].

claim of bias and reserve it until the delivery of an unfavourable decision. This possibility would cause considerable unfairness to other parties, in the form of cost, delay and stress.<sup>43</sup> The same considerations support an argument that waiver of the bias rule enhances public confidence in the legal system. The expense and inconvenience that would arise if a party with knowledge of facts that might support a claim of bias was able to rest on that claim until a relatively late stage, such as towards the end of a long hearing or after a decision was delivered, would greatly damage public confidence in the legal process.<sup>44</sup> The impact on public confidence would be much greater if the party that rested on a claim of bias was represented because such behaviour would very likely be viewed as a cynical and costly manipulation of the legal system by a sly lawyer.<sup>45</sup>

These considerations extend beyond the waiver exception to encompass the bias rule more generally. Sir Louis Blom-Cooper drew attention to this wider connection when he recently cautioned that Lord Hewart's aphorism – justice must be both done and be seen to be done – could be taken too far.<sup>46</sup> Sir Blom-Cooper suggested that placing too much emphasis on the appearance of justice might distract attention from the substantive question of whether what had actually occurred was fair. This suggestion has particular force in England, where the number of claims of apprehended bias made against judges and jurors has risen dramatically in recent years.<sup>47</sup> These claims often take considerable time and expense to resolve and appear to do little more than complicate and lengthen the proceeding in which they are raised. Such considerations indicate that an overly technical approach to the bias rule or the waiver exception might

43 The Court of Appeal of England noted the possible unfairness that could be caused to others if a party was not required to raise a claim of bias in a timely way: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 481 [26]. See also *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA (Civ) 1071 (Unreported, Ward, Waller and Hale LLJ, 24 July 2003) [38] where the English Court of Appeal noted that fairness to the other party was a relevant issue when determining claims of bias.

44 Similar issues were cited in *Ebner v Official Trustee* (2000) 205 CLR 337, 359 [65]. Gleeson CJ, McHugh, Gummow and Hayne JJ, with whom Callinan J agreed on this issue, rejected a claim of bias but made clear that, if the claim had been established in principle, the necessity exception to the bias rule would have applied. Their Honours noted both cases under appeal were lengthy, complex, costly, and that it would be extremely difficult to order new trials. They concluded that a rigid adherence to the bias rule in such cases 'would not promote public confidence in the administration of justice. It would have the opposite effect'.

45 It is useful to note that the Supreme Court of New Brunswick has suggested that claims of bias raised for purely 'tactical reasons' should perhaps be viewed quite differently to others: *Rothesay Residents Association Inc v Rothesay Heritage Preservation & Review Board* (2006) 269 DLR (4th) 127, 142 [26].

46 Sir Louis Blom-Cooper, 'Bias: Malfunction in Judicial Decision-making' [2009] *Public Law* 199, 200.

47 The surge in bias claims against judges has followed *Pinochet (No 2)* [2001] 1 AC 119 where the House of Lords extended the principle of automatic disqualification beyond cases of pecuniary interest to cases where the judge was associated with a cause that was somehow related to the case at hand. This finding has led many parties to claim bias by reason of a judge's membership or connection with an organisation. The rise in claims of bias against jurors in England has occurred after the longstanding prohibitions against police officers and other officials serving on juries were abolished. Since this legislative change many police officers and public servants involved in law enforcement serving as jurors have faced claims of bias because they have some sort of current or past professional connection with someone involved in the case at hand. Several Australian jurisdictions are currently conducting reviews of eligibility for jury service, which may lead to changes in the law similar to those adopted in England.

undermine rather than enhance public confidence in the legal process and should, therefore, be avoided.<sup>48</sup>

### III IS THERE A CONSTITUTIONAL BASIS FOR THE BIAS RULE AND HOW MIGHT THIS AFFECT THE WAIVER EXCEPTION?

There is some Australian authority to support the proposition that the bias rule may also rest on constitutional foundations but this point is far from settled.<sup>49</sup> Much of that uncertainty may be traced to the longstanding acceptance by the High Court that the concept of judicial power may not be capable of precise definition.<sup>50</sup> It is within this context that any discussion of the constitutional dimension of the bias rule must be considered. The constitutional position of the bias rule often arises in cases concerning the requirements governing judicial independence under Ch III of the *Constitution*, where concepts of judicial independence and impartiality are frequently referred to in a compendious sense. It is common for judges to simply refer to ‘independence and impartiality’ with no explanation of the possible connection or distinction between the two.<sup>51</sup> There are, however,

48 Sir Blom-Cooper’s caution is also consistent with several Australian cases in which courts have emphasised that fairness is ultimately a practical rather than an abstract concept. The most widely cited instance was made by Gleeson CJ when he stated that: ‘Fairness is not an abstract concept. It is essentially practical. ... [T]he concern of the law is to avoid practical injustice’: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 13-14 [37]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 69 [31] (Gleeson CJ and Hayne J); *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511, 525 [58] (Lee, Hill and Carr JJ). The implications of this practical emphasis in the requirements of fairness are considered in Aronson, Dyer and Groves, above n 11, 507-8.

49 It could be argued that the bias rule is constitutionally entrenched indirectly by the remedies available under s 75(v) of the *Constitution*. The High Court has made clear that the jurisdiction to grant remedies under s 75(v) is constitutionally protected and cannot be diminished by legislation. See, eg, *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476, 513-14 [104] (Gaudron, McHugh, Gummow, Kirby Hayne JJ). A breach of the bias rule is one of the many grounds of review upon which relief may be issued under s 75(v) against decisions of officers of the Commonwealth. There are several reasons why the availability of such relief does not provide a de facto form of constitutional entrenchment of the bias rule. One is that the High Court applies the common law grounds of judicial review in their common law form to claims under s 75(v). The common law doctrine of bias clearly includes a waiver exception. Another reason is that the issue of relief under s 75(v) is discretionary. See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 89 [5] (Gleeson CJ), 106-7 [53] (Gaudron and Gummow JJ), 135-7 [144]-[149] (Kirby J), 143-4 [171] (Hayne J). If a claim of bias included facts sufficient to support a finding of waiver, those same facts would provide a strong basis for a submission to refuse relief sought under s 75(v) on discretionary grounds.

50 See, eg, *Precision Data Holdings Ltd v Willis* (1992) 173 CLR 167, 188-9 (per curiam); *Brandy v HREOC* (1995) 183 CLR 245, 267-8 (Deane, Dawson, Gaudron and McHugh JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 256 (McHugh J); *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 592 [151] (Crennan and Kiefel JJ); *Forge v ASIC* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ). See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 532 where Mason CJ described judicial power as an ‘elusive concept’.

51 See, eg, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 [3] (Gleeson CJ), 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (‘*Bradley*’); *Forge v ASIC* (2006) 228 CLR 45, 68 [43] (Gleeson CJ), 76-7 [64]-[65] (Gummow, Hayne and Crennan JJ). See also *Grollo v Palmer* (1995) 184 CLR 348, 394 where Gummow J declared that the principles governing the bias rule as they applied to the courts had ‘at their root, the doctrine of the separation of the judicial from the political heads of power’.

some instances in which judges have made clear that they regard the requirement of judicial impartiality to be a separate constitutional principle.<sup>52</sup>

Many other cases point to the subtle but clear differences between any requirement of independence and impartiality. In *Ebner v Official Trustee*<sup>53</sup> a majority of the High Court reasoned that '[b]ias, whether actual or apprehended, connotes the absence of impartiality'<sup>54</sup> but cautioned that bias 'may not be an adequate term to cover all cases of the absence of independence'.<sup>55</sup> The same Justices later explained that:

the fundamental principle to which effect is given by disqualification of a judge is the necessity for an independent and impartial tribunal. Concepts of independence and impartiality overlap, but they are not co-extensive.<sup>56</sup>

It is important to note that this approach is not one dependent upon, or limited to, Australian constitutional doctrine. In *Gillies v Secretary of State for Works and Pensions*<sup>57</sup> ('*Gillies*') Baroness Hale distinguished impartiality and independence in a similar fashion to the High Court in *Ebner v Official Trustee* when her Honour reasoned:

Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public.<sup>58</sup>

The underlying point of such statements is that impartiality is a concept generally directed to specific instances of decision-making, while independence is an institutional concept directed to the wider structures within which a decision-maker acts.

Professor Lucy has suggested that impartiality and independence cannot be neatly separated because impartiality is typically embedded in both the attitude of a decision-maker and the wider institutional process within which that person acts.<sup>59</sup> On this view, impartiality cannot simply be an attitude on the part of the decision-maker. It must have an institutional dimension. Lord Hope appeared attracted to this view in the *Gillies*<sup>60</sup> case when his Honour explained that '[i]mpartiality consists in the absence of a predisposition to favour the interests of

52 *Ebner v Official Trustee* (2000) 205 CLR 337, 363 [81] (Gaudron J), 373 [116] (Kirby J). These passages were cited with apparent approval, but not elaborated upon, in *Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *Smits v Roach* (2006) 227 CLR 423, 464-5 [121]-[122] (Kirby J).

53 (2000) 205 CLR 337.

54 *Ibid* 348 [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point).

55 *Ibid*.

56 *Ibid* 358 [60] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point).

57 [2006] 1 All ER 731.

58 *Ibid* 744 [38]. Lord Hope made similar remarks: at 348 [23]. The connection between independence and impartiality has also been noted in many Canadian cases. See Lorne Sossin, 'The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law' in Grant Huscroft and Michael Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (2006) 50, 51-6.

59 William Lucy, 'The Possibility of Impartiality' (2003) 25 *Oxford Journal of Legal Studies* 3.

60 [2006] 1 All ER 731.

either side in the dispute. Therein lies the integrity of the adjudication system'.<sup>61</sup> Gummow, Hayne and Crennan JJ reached a similar conclusion in *Forge v ASIC*<sup>62</sup> when they cautioned that the principles derived from bias cases should not be transposed to support a claim that legislation sought to invest a court with non-judicial powers of a kind that are incompatible with the exercise by that court of judicial powers conferred according to Ch III of the *Constitution*.<sup>63</sup> Gummow, Hayne and Crennan JJ explained:

The apprehension of bias principle has its application in particular cases. No unthinking translation can be made from the detailed operation of the apprehension of bias principle in particular cases to the separate and distinct question about the institutional integrity of a court. But the apprehension of bias principle is one which reveals the centrality of considerations of both the fact and the appearance of independence and impartiality in identifying whether particular legislative steps distort the character of the court concerned.<sup>64</sup>

Such reasoning supports Lucy's argument that the personal impartiality of a decision-maker may be inextricably linked to a wider institutional framework. It also lends support to the proposition that the constitutional requirements which secure judicial independence also serve to foster judicial impartiality by creating an institutional climate within which judicial impartiality may be both cultivated and protected. In my view, this connection does not itself provide a sufficient reason to anchor the bias rule, or any similarly expressed requirement of impartiality, within the *Constitution*. The fact that constitutional and common law principles sometimes bear similar features, or may achieve similar outcomes, does not itself provide a clear reason to transpose the latter into the former. These similarities do, however, illustrate the fundamental principle that the 'common law and the requirements of the *Constitution* cannot be at odds'.<sup>65</sup>

There are several reasons why it might be undesirable to rest the rule against bias or a specific requirement of judicial impartiality, as opposed to one of independence, upon constitutional foundations. One is that a constitutionally based bias rule would have a very limited scope. It would extend to the courts and judges to which Ch III of the *Constitution* applies but not bodies that operate outside Ch III, such as tribunals, local councils and administrative officials.<sup>66</sup> The

61 Ibid 740-1 [23].

62 (2006) 228 CLR 45.

63 This is the so-called incompatibility principle established in *Kable v DPP (NSW)* (1996) 189 CLR 51. This principle is explained in Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216; Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15; H P Lee, 'The *Kable* Case: A Guard-dog that Barked but Once?' in George Winterton (ed), *State Constitutional Landmarks* (2007) 390; Brendan Gogarty and Benedict Bartl, 'Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts Following *Kable v DPP (NSW)* and Why It Matters' (2009) 32 *University of New South Wales Law Journal* 75.

64 *Forge v ASIC* (2006) 228 CLR 45, 78 [68].

65 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566.

66 This possibility seems implicit in many judicial statements suggesting that impartiality has a constitutional basis. See, eg, *Ebner v Official Trustee* (2000) 205 CLR 337, 363 [81] (Gaudron J), 373 [116] (Kirby J). Both Justices clearly referred to a possible constitutional requirement of *judicial impartiality*.

acceptance of a constitutional requirement of impartiality would not preclude the continued application of the common law principles of bias to these non-judicial bodies, but the development of separate constitutional requirements of impartiality for courts and judges would fragment the law. If the bias rule was a constitutional one (in the form of a requirement of impartiality applicable to Ch III courts), it almost certainly could not be waived by parties in proceedings conducted before the courts to which it applied.<sup>67</sup> But this constitutional principle would not extend to decision-makers that were created outside Ch III, such as administrative tribunals, bureaucrats, government ministers or local councils. These decision-makers would remain subject to the common law principles governing bias, which recognise an exception of waiver. Public confidence in the legal process, to which the bias rule is now commonly anchored, would not be enhanced if the basis or content of any principle of impartiality differed radically between courts and non-judicial decision-makers.<sup>68</sup>

A separate but closely related problem for any constitutionally based principle of impartiality is that undesirable differences might arise between State and federal courts. Gaudron and Kirby JJ, who each favoured the view that there is a constitutional requirement of impartiality, also suggested that this requirement extends to State and Territory courts that may be invested with federal judicial power.<sup>69</sup> Such statements are at odds with considerable authority to the effect that Australia's federal system enables a level of variation between State and federal courts,<sup>70</sup> which means that the relatively inflexible requirements applicable to the latter do not always extend to the former. The extent to which the *Constitution* may allow such differences remains unsettled and appears likely to remain so, at least for the near future.<sup>71</sup>

67 There are some principles arising from the *Constitution* that can be waived or modified. An example is Commonwealth immunity from State legislation, which can be waived by federal legislation: Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3<sup>rd</sup> ed, 2002) 37-8. Although the power of the Commonwealth parliament to enact such legislation indicates that some constitutional protections may be waived in whole or in part, it is unlikely that individual parties to legal proceedings could do the same with requirements such as one of impartiality.

68 A different view is taken in Bridgette Toy-Cronin, 'Waiver of the Rule against Bias' (2002) 9 *Auckland University Law Review* 850, 864. That author argues that bias constitutes a jurisdictional error and is, therefore, incapable of waiver by parties. One difficulty with this argument is that the concept of jurisdictional error is such a malleable one in Australian law that any suggestion that an error of law, whether by reason of bias or another cause, is jurisdictional in character does little to explain why that is so. See Aronson, Dyer and Groves, above n 11, 14-15 where it is suggested that the concept of jurisdictional error in Australian law is a statement of conclusion rather than coherent legal principle.

69 *Ebner v Official Trustee* (2000) 205 CLR 337, 363 [81] (Gaudron J), 373 [116] (Kirby J). See also *Smits v Roach* (2006) 227 CLR 423, 464-5 [121]-[122]. The view of Gaudron and Kirby JJ is supported in Leslie Zines, *The High Court and the Constitution* (5<sup>th</sup> ed, 2008) 278. Zines does not consider the point in detail but suggests that: "The rules regarding bias seem to be at the heart of the judicial process and of the purpose of the separation of judicial power".

70 See, eg, *Bradley* (2004) 218 CLR 146, 152 [3] (Gleeson CJ); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 598 [36] (McHugh J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471, 488 [84] (French CJ), 519 [229] (Kirby J).

71 Support for that proposition may be drawn from *Forge v ASIC* (2006) 228 CLR 45 where Gummow, Hayne and Crennan JJ emphasised that the requirements of Ch III demanded that 'there be a body fitting the description "the Supreme Court of a State"' which cannot be altered so that it ceases to meet the 'constitutional description' of such a court: at 76 [63]. At the same time, however, their Honours cautioned against attempts to devise a 'single all-embracing statement of the defining characteristics of a court': at 76 [64].

At this point it is useful to note that the recognition of a constitutional right to an impartial decision-maker, in some form that is broadly equivalent to the rule against bias, might not necessarily be incompatible with a waiver exception. Some guidance may be drawn from European law, which has recognised that parties may waive their right to a hearing before an independent and impartial tribunal as provided by article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>72</sup> The European Court of Human Rights ('ECHR') has accepted that this right may be waived and has fashioned principles which are remarkably similar to those that govern waiver of the bias rule at common law. The ECHR has accepted that the rights granted under article 6(1) may be waived, either expressly or by conduct,<sup>73</sup> though it is clear that any waiver must be clear and unequivocal.<sup>74</sup> Any decision to waive this right must also be a fully informed one.<sup>75</sup> The acceptance in European law that the rights conferred by article 6(1) may be waived suggests that the recognition of a constitutional principle of impartiality might not necessarily be incompatible with an appropriately crafted waiver exception. These European principles were not considered by Kirby J in his various criticisms of waiver. Kirby J's failure to address this possibility is curious in light of his Honour's many judicial and other statements about the legitimate and valuable role that recourse to developments in other jurisdictions may provide to Australian law.<sup>76</sup>

The argument thus far can be summarised as follows. The bias rule has a common law basis and operates to promote public confidence in the courts and the administration of the law. The waiver exception is a longstanding exception to the rule. This exception may be both consistent with the purpose of the bias rule and may even be argued to foster that purpose. The bias rule has not been recognised as a constitutionally entrenched principle and it may be argued that

72 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

73 See, eg, *Håkansson v Sweden* (1999) 13 EHRR 1, 16 [66]; *Bulut v Austria* (1997) 24 EHRR 84, 93 [34].

74 This point may be inferred from the fairly strict approach that the ECHR has taken to claims of waiver. It is clear, for example, that a mere failure to request a public hearing, according to the requirements of art 6(1), is not itself grounds to find waiver. See *Werner & Szücs v Austria* (1998) 26 EHRR 310 (failure by parties to request public hearing did not lead to waiver because domestic law made any such request futile).

75 Many cases make clear that waiver would not be found if a party did not possess the information required to make a fully informed decision. See, eg, *Oberschlick v Austria* (1995) 19 EHRR 389, 420 [51] (the Court rejected waiver because neither the party nor his lawyers knew of the facts that could support an objection under art 6(1) until well after the hearing). See also *Pfeifer v Austria* (1992) 14 EHRR 692, 713 [38] (judge approached claimant in the absence of his lawyer and asked him a question concerning possible waiver which involved matters of law. The Court found the claimant could not entirely comprehend the question without legal advice and held that an informed decision on waiver was not therefore possible).

76 Cases concerning the bias rule in which Kirby J made recourse to the principles of international law and developments in other jurisdictions, though not on the issue of waiver, include: *Ebner v Official Trustee* (2000) 205 CLR 337, 382-4 [143]-[148]; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 476-7 [123]-[124]; *Smits v Roach* (2006) 227 CLR 423, 459-60 [103]-[105]; *Antoun v The Queen* (2006) 224 ALR 51, 60-2 [37]-[41]. Extra-judicial writings in which Kirby J has argued in favour of recourse to such principles include: Justice Michael Kirby, 'Judges and the Use of International Human Rights Law' (1993) 5(3) *The Sydney Papers* 8; Justice Michael Kirby, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"' (1995) 25 *University of Western Australia Law Review* 30; Justice Michael Kirby, 'Law, Like the Olympics, Is Now International – But Will Australia Win Gold?' (2007) 7 *James Cook University Law Review* 4; Justice Michael Kirby, 'The Growing Impact of International Law on Australian Constitutional Values' (2008) 27 *University of Tasmania Law Review* 1.

such recognition might not be desirable. The next sections of this article examine the elements of waiver and how they are applied in bias cases.

#### IV WHAT ARE THE KEY ELEMENTS OF WAIVER?

Waiver is a difficult concept to define precisely though it can be better understood if distinguished from similar doctrines such as estoppel. Waiver and estoppel may appear similar because each doctrine takes account of issues of fairness, particularly the need to prevent the unfairness that might occur if a party is able to resile from a position or plea that it has taken.<sup>77</sup> In *Vakauta v Kelly*<sup>78</sup> Toohey J reasoned that this superficial similarity between estoppel and waiver did not bear close scrutiny, at least not in cases of bias, because waiver fixed upon the decision of the party entitled to raise an objection rather than any reliance by the other party. His Honour concluded that this focus in waiver cases on conduct of the party who had the right to complain was best characterised as election because '[t]he situation is one in which the law prevents a party to litigation from taking up two inconsistent positions'.<sup>79</sup>

Although the distinction drawn by Toohey J has considerable logical force, the High Court has since acknowledged that waiver 'is a vague term, used in many senses, and ... often requires further definition according to the context'<sup>80</sup> in which it is used. The Court repeated these concerns when it considered contractual waiver in the recent case of *Gardiner*.<sup>81</sup> The extent to which that case might provide more general guidance on waiver is unclear because the High Court appeared to doubt whether the approach taken to waiver in one area of law could be of significant value to others.<sup>82</sup> But some general propositions about waiver may be drawn from the *Gardiner* case. One is that the precise nature and operation of waiver remains unsettled. A separate but related point is that waiver may arise in so many different circumstances that a single or overarching approach to the concept could be difficult to devise and might not be ultimately useful.<sup>83</sup> A final

77 In *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 251 ALR 322, 334 [51]-[52] Gummow, Hayne and Kiefel JJ, with whom Heydon J agreed, noted that waiver was often blurred with estoppel or election and was sometimes said to be indistinguishable from those doctrines ('*Gardiner*'). But their Honours also noted that many cases of waiver were, on close inspection, actually ones of election or estoppel.

78 (1989) 167 CLR 568, 588.

79 Ibid.

80 *Mann v Carnell* (1999) 201 CLR 1, 13 [28] (Glesson CJ, Gaudron, Gummow and Callinan JJ).

81 (2008) 251 ALR 322.

82 See, eg, *ibid* 347 [100] where Gummow, Hayne and Kiefel JJ, with whom Heydon J agreed, noted that waiver was used in many areas that were 'far removed' from contractual rights (the area in issue in that case). Their Honours suggested that those other areas were not useful to their analysis of contractual waiver. It is arguable that cases of contractual waiver may be equally unhelpful to the analysis of waiver in other situations, at least beyond the use of general principles.

83 The High Court did not attempt to devise a single or overarching definition of waiver or consider whether such an exercise was possible but it did note that any conception of waiver should be coherent and take account of apparently similar doctrines such as estoppel: *Gardiner* (2008) 251 ALR 322, 347 [100] (Gummow, Hayne, and Kiefel JJ, Heydon J agreeing). Those Justices also pointedly declined to consider whether waiver could or should be understood by a taxonomy of specific categories: at 335 [54].

point is that a majority of the High Court held that cases of ‘election between inconsistent rights are radically different from some others in which there is said to be a waiver of rights’.<sup>84</sup> It remains to be seen whether this reasoning casts any significant doubt on the approach of Toohey J in *Vakauta v Kelly*,<sup>85</sup> at least if his Honour’s remarks are seen as no more than an analogy.

These uncertainties may be of no great consequence for present purposes because the courts have not followed a rigid doctrinal approach to waiver of the bias rule. They have instead focused on devising the key requirement for a finding of waiver which has been expressed in various ways. Waiver of bias may, for example, be found when ‘a litigant who is aware of the circumstances constituting a ground for such objection fails to object’,<sup>86</sup> or where the conduct of a party is ‘clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not’<sup>87</sup> or where there is ‘voluntary, informed and unequivocal’ conduct ‘by a party not to claim a right or raise an objection which it is open to that party to claim or raise’.<sup>88</sup> The essential features of these and other definitions of waiver in its application to the bias rule are that any decision on waiver must be informed, clear and unequivocal and timely. The next sections of this article examine each of these requirements separately.

### A An Informed Decision to Waive the Bias Rule

A party will only be held to have waived a claim of bias if it was aware of the facts or issues relevant to the claim. The information in question almost always comes from the judge or other decision-maker, who will be both the subject of a claim of bias and the person who knows the most (sometimes even the only) information relevant to the claim. Questions of when and how such information should be disclosed have been considered most often in the courts, though the courts have been careful to devise flexible principles to govern disclosure. In *Ebner v Official Trustee* the High Court held that the requirements of disclosure should not be conceived as rights or duties in the strict sense.<sup>89</sup> The Court explained that any such right would be one of ‘imperfect obligation’ and could ‘distract attention from the fundamental question to be answered which is whether the reasonable apprehension of bias test is established’.<sup>90</sup> An important practical consequence of this approach is that a failure to disclose or to make adequate disclosure does not

84 Ibid 335-7 [56]-[62] (Gummow, Hayne, and Kiefel JJ, Heydon J agreeing). It is useful to note that, in the context of waiver of the bias rule, there are many cases in which courts have acknowledged without concern the apparent similarity between waiver and election. See, eg, *Pinochet (No 2)* [2000] 1 AC 119, 136-7 where Lord Browne-Wilkinson rejected a submission that a person facing extradition proceedings had waived or elected not to pursue a possible claim of bias. His Lordship dismissed the submission in brief terms but dealt with waiver and election as one.

85 (1989) 167 CLR 568, 588.

86 *Smits v Roach* (2006) 227 CLR 423, 439-40 [43] (Gleeson CJ, Heydon and Crennan JJ).

87 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 475 [15].

88 *Millar v Dickson* [2002] 1 WLR 1615, 1629 [31] (Lord Bingham).

89 (2000) 205 CLR 337, 360 [70]-[71] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point).

90 Ibid.

provide a disaffected party with the right to seek an order preventing the judge from hearing the substantive case.<sup>91</sup>

The requirement that a party must be ‘fully aware’<sup>92</sup> or have ‘full knowledge’<sup>93</sup> or receive ‘full disclosure’<sup>94</sup> of the relevant issues does not require disclosure of every minute detail. In *Jones v DAS Legal Expenses Insurance Co Ltd*<sup>95</sup> the English Court of Appeal reasoned that when a judge disclosed issues relevant to a possible claim of bias:

A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge’s knowledge which give rise to a possible conflict of interest. The judge must be punctilious in setting out all material matters known to him.<sup>96</sup>

But the Court explained that this obligation was a relative rather than absolute one because:

Waiver would never operate if ‘full facts’ meant each and every detail of factual information which diligent digging can produce. Full facts relevant to the decision to be taken must be confined to the essential facts. What is important is that the litigant should understand the nature of the case rather than the detail. It is sufficient if there is disclosed to him all he *needs* to know which is invariably different from all he *wants* to know.<sup>97</sup>

Several comments can be made about this approach to disclosure. Firstly, the relative nature of the requirement to disclose will not support partial or selective disclosure.<sup>98</sup> The courts have cautioned that partial disclosure should be avoided because it may heighten rather than satisfy the concerns of the parties, particularly if they subsequently become aware of any relevant but undisclosed issues.<sup>99</sup> Secondly, the requirement of disclosure is ongoing.<sup>100</sup> While a decision-maker

91 Ibid.

92 *Vakautu v Kelly* (1989) 167 CLR 568, 587 (Toohey J).

93 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [15].

94 The Australasian Institute of Judicial Administration Inc, *Guide to Judicial Conduct* (2<sup>nd</sup> ed, 2007) cl 3.3.1 (*‘Guide to Judicial Conduct’*).

95 [2003] EWCA Civ 1071 (Unreported, Ward, Waller and Hale LLJ, 24 July 2003).

96 Ibid [35].

97 Ibid [36] (emphasis in original).

98 It is useful to note that the courts have made clear that a partial or selective use of material by a party who claims bias is also inappropriate. See, eg, *Helow v Home Secretary for the Home Department* [2008] 1 WLR 2416, [6]. In that case a Palestinian asylum seeker claimed bias against a Jewish judge because the judge received a journal from an organisation of Jewish lawyers. The claimant argued that the journal contained many extreme or anti-Palestinian articles. The House of Lords acknowledged that a small number of articles were of this nature, but when the contents of the journal were considered as a whole it was clear that they contained a great range of views on many different issues. Lord Hope reasoned that the claimant had provided the court with a ‘one-sided selection of what has been published’ while the reasonable fair-minded observer would have placed the small number of articles that expressed extreme views in this wider context: at [6].

99 *Taylor v Lawrence* [2003] QB 528, 549 [65]. Some of the problems related to partial disclosure are examined in David Mullan and Martha Boyle, ‘Raising and Dealing with Issues of Bias and Disclosure’ (2005) 18 *Canadian Journal of Administrative Law and Practice* 37, 53-7. Those authors note that partial disclosure presents particular problems where the relevant information is confidential or privileged.

100 This view is taken in Mullan and Boyle, above n 99, 44-5.

should disclose relevant issues at the earliest possible time, the obligation does not end. A decision-maker who becomes aware of additional relevant issues should make further disclosure. Thirdly, judges should hear submissions from the parties as to the appropriate course of action but the procedural rights of the parties do not extend to questioning or cross-examining judge on their disclosure.<sup>101</sup> Finally, the adequacy of disclosure may depend on when it is made.<sup>102</sup> It is clear that a judge or other decision-maker who becomes aware of a relevant issue before a hearing begins should take care when preparing the information to be disclosed.<sup>103</sup> The judge may also consult with fellow judges.<sup>104</sup> A judge who becomes aware of a relevant issue during a hearing may not have the same amount of time to consider and prepare a statement of disclosure.

It is important to note that disclosure is not always possible. Decision-makers need not (and indeed, cannot) be expected to disclose issues that they do not know about.<sup>105</sup> This possibility is not as far-fetched as it might sound. A judge could inherit an interest in shares in a company that is a party in a case before the judge, but not know of the inheritance for some time.<sup>106</sup> The judge's partner or other close family member might have a financial interest or very close association with a party in a case before the judge, of which the judge is unaware. In such cases the failure to disclose will not support a claim of bias because a fair-minded and informed observer would not entertain an apprehension of bias about something that is not known.

A judge or other decision-maker is also not obliged to disclose a fact or issue that could not possibly support a claim of bias. It has been suggested that this limitation on the requirements of disclosure may protect public confidence in the courts and the administration of law. The English Court of Appeal has suggested that disclosure of a trivial or unobjectionable fact 'unnecessarily raises the implication that it could affect the judgment and approach of the judge ... [and] unnecessarily undermines the litigant's confidence in the judge'.<sup>107</sup> This principle is consistent with the use of the fair-minded and informed observer to determine claims of bias. That judicial construct would not entertain a reasonable apprehension of bias by reason of a trivial or unexceptional issue and would almost certainly not be troubled if a judge or other decision-maker did not disclose such an issue. It is useful to note, however, that this limit to the requirement of disclosure was not an absolute one.

101 *Guide to Judicial Conduct*, above n 94, cl 3.5(e). See also *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416, [39] where Lord Cullen stated firmly that 'there can be no question of cross-examining the judge'.

102 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 481 [26].

103 See, eg, *Jones v DAS Legal Insurance Expenses Co Ltd* [2003] EWCA Civ 1071 (Unreported, Ward, Waller and Hale LLJ, 24 July 2003) [35].

104 This is suggested by the *Guide to Judicial Conduct*, above n 94, cl 3.5(a). The Guide also suggests that judges may consult the Chief Justice, the lawyers acting for the parties in the case and the person in charge of listing: cl 3.5(b).

105 See, eg, *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, 148; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 477 [18], 481 [26].

106 As occurred in *Ebner v Official Trustee* (2000) 205 CLR 337.

107 *Taylor v Lawrence* [2003] QB 528, 549 [64].

Most notably, it would not apply where ‘the position is borderline’.<sup>108</sup> The Court of Appeal did not explain how a ‘borderline’ case might be identified, though one might question if that was possible. The courts have stressed that claims of bias and the requirements of disclosure depend in large part on the facts of each case.<sup>109</sup> On that view, the line between issues that would not rather than might require disclosure is inevitably a difficult one to express as an exact principle.

The High Court appeared to favour a higher threshold in *Ebner v Official Trustee*<sup>110</sup> when it held that ‘judges should disclose interests and associations if there is a *serious* possibility that they are potentially disqualifying’.<sup>111</sup> Although this statement appears to suggest that disclosure is necessary only if there is a reasonable or even strong chance a claim of bias would succeed, such an approach has not prevailed. The *Guide to Judicial Conduct*,<sup>112</sup> which was devised by the Council of Chief Justices of Australia to provide guidance to judges of all levels, suggests that decision-makers may be wise to err on the side of caution when faced with an issue that they believe would not support a claim of bias. The Guide provides that:

Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge’s own view, there is any objection.<sup>113</sup>

This statement suggests that it might be advisable to sometimes disclose apparently trivial issues because the parties may view an issue quite differently than the judge. It is also possible that the parties may be able to provide further information arising from the case, which is not known to the judge and may affect the view of the judge, the parties and the fair-minded and informed observer.<sup>114</sup> Although the *Guide to Judicial Conduct* was drafted to assist judges, the same considerations would surely be useful for other decision-makers.

<sup>108</sup> *Ibid.*

<sup>109</sup> See, eg, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480 [25] where the Court of Appeal of England stated that: ‘Everything will depend on the facts, which may include the nature of the issue to be decided’.

<sup>110</sup> (2000) 205 CLR 337.

<sup>111</sup> *Ibid* 360 [69] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point) (emphasis added).

<sup>112</sup> See *Guide to Judicial Conduct*, above n 94. The Guide is a non-binding document, though the involvement of every Chief Justice in Australia and the wide ranging consultation undertaken in settling the Guide provides it with considerable stature. A similar code was recently devised in the United States by the American Bar Association. That code is explained in Mark Harrison, ‘The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges’ (2007) 28 *Justice System Journal* 257.

<sup>113</sup> *Guide to Judicial Conduct*, above n 94, cl 3.5(h).

<sup>114</sup> The *Guide to Judicial Conduct* acknowledges the possibility that when a judge discloses information relevant to a possible claim of bias the parties may raise additional relevant matters that the judge is unaware of: cl 3.5(e). This possibility was also acknowledged in *Ebner v Official Trustee* (2000) 205 CLR 337, 345 [71] (Gleeson CJ, McHugh Gummow and Hayne JJ, Callinan J agreeing on this point).

## **B A Timely Decision to Make a Claim of Bias**

There is a strong public interest that claims for bias are made at the earliest possible time.<sup>115</sup> A timely application minimises the expense, delay and inconvenience for the parties and the courts. What may be regarded as timely is closely related to the requirements of disclosure because a party may only make an informed decision when aware of all the relevant issues. When a party is aware of all the relevant issues the time within which a possible claim of bias must be raised, lest it be held as waived, will vary. Sometimes that decision must be made quickly. There is authority suggesting that parties who become aware of issues relevant to a claim of bias in the last stages of a hearing, particularly a long hearing, must act immediately. The classic case is *Shrager v Basil Dighton Ltd*<sup>116</sup> where counsel became aware of a relevant issue on the last day of a 25 day hearing. Lord Atkin acknowledged that the decision was a hard one but held that in view of the lengthy hearing counsel had to make a very prompt decision.

More recent cases have suggested that the requirement to make a timely decision on a claim of bias does not mean that parties must decide their course of action on the spot. The decision of the Court of Appeal of New South Wales in *John Fairfax Publications Pty Ltd v Kriss*<sup>117</sup> (*'Kriss'*) indicates that the courts are willing to provide some latitude to even the most experienced advocate. In that case it was accepted that a claim of bias had not been waived when a very experienced barrister waited for a day in a three day hearing, during which he obtained a copy of the court transcript and conferred with his client. The Court reasoned that this slight delay enabled the barrister and client to make an informed decision on whether to press or waiver a possible claim of bias.

There are several reasons why some latitude should be provided to parties who must decide whether to pursue a possible claim of bias. One is that the decision is normally a difficult forensic one that lawyers should be able to make with time for reflection. The allowance in the *Kriss* case, of a day in which counsel can obtain transcript and confer with the client, provides a reasonable minimum period for most cases though an immediate decision could reasonably be expected of a party faced with facts that appear to provide a very strong claim of bias. A related point is that allowing some time to make a decision on waiver enables lawyers to discuss the issue with their clients. Although later sections of this article conclude that, strictly speaking, lawyers need not confer with their clients in order to make a binding decision to waive a claim of bias, it is clearly desirable that the law should allow sufficient time for lawyers to confer with their clients on this issue.

The requirement to make a timely decision on a claim of bias assumes that all of the relevant facts are disclosed or apparent. The point at which this occurs will vary in each case. The decision in *Vakauta v Kelly*<sup>118</sup> indicates that this may occur

115 *ASIC v Lanepoint Enterprises Pty Ltd* [2009] FCA 258 (Unreported, Gilmour J, 21 April 2009) [2].

116 [1924] 1 KB 274.

117 [2007] NSWCA 79 (Unreported, Hodgson and Ipp JJA, Handley AJA, 4 April 2007) [26]-[27].

118 (1989) 167 CLR 568.

after a hearing has ended. In that case a trial judge made harsh remarks about the expert medical witnesses called by a defendant insurance company. The judge complained that these witnesses ‘think you can do a full week’s work without any arms or legs’ and that they invariably gave evidence suited to the case of the defendant. The plaintiff’s counsel did not object to these and other negative remarks the judge made about the defendant and its witnesses. When the judge delivered his reserved judgment, which found in favour of the plaintiff, his reasons for decision included more negative remarks about the defendant’s witnesses. The defendant appealed on several grounds, including bias. The plaintiff argued that any claim of bias had been waived because the judge had made statements during trial similar to those in the reasons for his decision. On this view, the claim of bias was not raised in a timely manner and was therefore waived.

The High Court unanimously rejected that argument but made clear that, in most cases, it would be ‘unfair and wrong’ for a party to raise a claim of bias at such a late stage.<sup>119</sup> Brennan, Deane and Gaudron JJ explained that this case was exceptional because ‘[t]he statements which the learned trial judge had made about his preconceived views ... were ... effectively revived by what his Honour said in his reserved judgment’.<sup>120</sup> According to this view, waiver was not possible because the true extent of the judge’s preconceived views was not apparent until the decision was delivered. Callinan J was mindful of similar issues in *Johnson*<sup>121</sup> when he observed that ‘an apprehension of bias may be created cumulatively, so that its full impact and relevance may really only become apparent when judgment is pronounced’.<sup>122</sup>

This reasoning invites several comments. Firstly, it confirms that reasons for a decision may provide support for a claim of bias even though they are typically issued at the very end of a decision-making process. A separate but related point is that this possibility should not be limited to reasons issued for a decision. There are many ways that a decision-maker could make statements that might give rise to a reasonable apprehension of bias, such as speeches or scholarly publications.<sup>123</sup> Secondly, the cases noted above focused upon statements made in reasons that

119 Ibid 572 (Brennan, Deane and Gaudron JJ).

120 Ibid 573. Dawson and Toohey JJ each reached a similar conclusion: at 579, 588 respectively.

121 (2000) 201 CLR 488.

122 Ibid 517 [79].

123 There are several cases in which statements made during such activities have given rise to a reasonable apprehension of bias. See, eg, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 where the English Court of Appeal upheld a claim of bias by reason of several articles a judge wrote on personal injuries litigation, which strongly criticised the conduct of insurance companies and the expert medical witnesses they employed. The Court acknowledged that scholarly writing by judges was a common and often useful activity but cautioned that judges should exercise ‘considerable care’ when writing to ensure that they did not indicate they held ‘preconceived views which are so firmly held that it may not be possible ... to try a case with an open mind’: at 495. The New South Wales Court of Appeal expressed similar concerns in *Newcastle City Council v Lindsay* [2004] NSWCA 198 (Unreported, Giles and Tobias JJA, McClellan AJA, 22 June 2004) [28]-[36] about extra-judicial writings but concluded that the language of the judge in that case was ‘circumspect and the tone in which she expressed herself was mild’: at [36]. The constraints that the rule against bias might impose upon a judge’s public statements and writings are examined in Enid Campbell, ‘Judges’ Freedom of Speech’ (2002) 76 *Australian Law Journal* 499.

continued or confirmed ones made during the hearing. It is equally possible that prejudicial statements may be made for the first time in the reasons for decision.<sup>124</sup> A different and more difficult problem might arise when the reasons for decision simply repeat prejudicial statements made during a hearing. The passages from the *Vakauta v Kelly* and *Johnson* cases noted above were concerned with statements in the reasons that amplified earlier remarks. The essential point was that the full effect of the statements was only apparent when they were viewed as a whole. One might question whether that would be the case when the reasons for decision repeated earlier remarks but did not include either new remarks or a stronger version of those earlier remarks. A party who failed to object to such remarks when they were first made might be hard pressed to explain why they could provide the foundation for a claim of bias when repeated without any modification in the reasons.

### **C Clear and Unequivocal Conduct Waiving the Bias Rule**

A claim of bias will be held to be waived if the party entitled to raise the issue displays a clear and unequivocal intention not to do so. That intention can be displayed by an express disclaimer of any intention to pursue a claim of bias, which can occur when a decision-maker discloses issues that might give rise to a claim of bias and invites the parties to consider and make submissions on the effect of the issues disclosed. Silence or inaction by a party who is aware of issues that may support a claim of bias may also give rise to waiver because the failure to act may be deemed a deliberate decision not to pursue the issue.<sup>125</sup> In such cases a claim of bias is essentially deemed to be waived by implication. There is, however, some uncertainty as to when and why the courts may be prepared to imply waiver in this manner. Waiver by implication typically occurs in complex or long-running cases, where the parties are represented by skilled lawyers. The courts appear willing to find waiver by implication in such cases because it is reasonable in the circumstances. It also compels the parties to act sooner rather than later and thereby minimises the costs and difficulties that will occur if the claim is upheld. These considerations are of particular importance in complex or long-running cases.

Difficulty may arise when a party raises an objection relevant to a claim of bias but neither pursues the issue nor clearly articulates a claim of bias. It is clear that a failure to take an objection to an issue, such as remarks made by a decision-maker that might give rise to a claim of bias, may amount to waiver. But just as there may be waiver of a claim of bias by implication, a claim of bias may also be raised by implication rather than in express terms. In *Vakauta v Kelly* Dawson J concluded that an objection on an issue of bias may be regarded as

<sup>124</sup> Though there is a clear distinction between statements made in reasons for a decision which could give rise to a reasonable apprehension of bias and statements which are unfavourable, and may be expressed in very harsh terms, as opposed to statements in the course or as a consequence of findings of fact based upon evidence and submissions presented during the hearing.

<sup>125</sup> See, eg, *Vakauta v Kelly* (1989) 167 CLR 568; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142; *Smits v Roach* (2006) 227 CLR 423.

having been made even 'if it is not made in formal or even explicit terms'.<sup>126</sup> The reason, he explained, was that '[t]he circumstances may be such that it is plain, without it being put into words, that a judge is being asked to consider his position having regard to the requirement of impartiality'.<sup>127</sup> Toohey J reached a similar conclusion when he reasoned:

It may be enough that counsel make clear that objection is taken to what the judge has said, by reason of the way in which the remarks will be viewed. It will then be for the judge to determine what course to adopt, in particular whether to stand down from the case.<sup>128</sup>

Although Dawson and Toohey JJ did not expressly suggest that their reasoning was limited to the conduct of experienced advocates, in my opinion they should be. An experienced advocate can be assumed to both be aware of the finer details of the bias rule but also be able to make a judgment on whether and how to pursue a claim of bias. An experienced advocate might also be assumed to have decided whether to pursue a claim of bias in specific terms, or to raise a claim of bias in the most oblique manner by objecting to remarks made by the trial judge in a manner that tacitly makes the point that the objection is actually a claim of bias but one framed with supreme delicacy. The difficulty with this approach is that the presumed subtlety may obscure the issue. Gummow, Hayne and Keifel JJ drew attention to a similar problem in *Gardiner*<sup>129</sup> in the context of election when they explained that '[i]n many cases about election, the central issue is whether an election has been made or only foreshadowed'.<sup>130</sup> The same would be true in claims of bias if too much emphasis was placed on whether an objection made to any remarks of a judge during the course of a hearing was only an objection, a delicately expressed claim of bias, or the first plank of a claim of bias.

Callinan J was mindful of these issues in *Johnson*<sup>131</sup> when he cautioned that applying 'formal, technical principles of waiver to a party upon the basis of the conduct of his or her counsel in not checking inappropriate and judicial conduct, may produce unfairness'.<sup>132</sup> Such concerns have led the courts in some later cases to accept that taking an objection at trial, without making a clear claim of apprehended bias, could be 'sufficient to preserve the right to challenge an unfavourable decision at a later date on the ground of apprehended bias'.<sup>133</sup>

126 (1989) 167 CLR 568, 577.

127 Ibid.

128 Ibid 587.

129 (2008) 251 ALR 322.

130 Ibid 336 [59].

131 (2000) 201 CLR 488.

132 Ibid 517 [79].

133 See, eg, *Bohills v Friedman* (2001) 110 FCR 338, 351 [35].

## V THE ROLE OF LEGAL REPRESENTATIVES IN DECISIONS ABOUT WAIVER OF THE BIAS RULE

### A *Waiver of the Bias Rule by Represented Parties*

There is some authority suggesting that the courts may be more willing to imply waiver through a failure to raise a possible claim of bias if the party concerned was represented. This possibility may be traced to *Vakauta v Kelly*, where Brennan, Deane and Gaudron JJ stated that ‘a party who has legal representation is not entitled to stand by’<sup>134</sup> in the face of comments that might convey a reasonable apprehension of bias. The underlying point is that where facts that may support a possible claim of bias are known to a represented party, that party can be assumed to have discussed the issue with his or her lawyer who would have decided whether or not to pursue the issue. On this view, the failure of lawyers to raise a claim of bias reflects a conscious decision by the client to waive the point.

Callinan J subsequently cautioned that the reasoning in *Vakauta v Kelly* may have ‘the effect of imposing a particular burden upon counsel’<sup>135</sup> which placed a ‘higher and greater responsibility to ensure the conduct of impartial proceedings is imposed upon counsel than the judge trying the case’.<sup>136</sup> These issues were central to *Smits v Roach*.<sup>137</sup> In that case the judge’s brother was the chairman of partners of a large law firm which had been sued for negligence (by Roach). The case before the judge was a related one in which the party suing the law firm had been sued by another firm (Smits) that had given advice in the claim against the large firm. When the judge distributed a draft of his reasons to the parties, which indicated that Smits would lose the case, he disclosed his brother’s position.<sup>138</sup> Junior counsel for Smits then raised a claim of bias. The judge rejected the claim, holding that it did not explain how his brother’s role in a firm that was involved in an earlier proceeding could support a reasonable apprehension that the judge would not approach the case with an open mind.<sup>139</sup> The judge also found that senior counsel for Smits knew of his brother’s position and that the failure to raise this point at an earlier time amounted to waiver.

134 (1989) 167 CLR 568, 569, 572.

135 *Johnson* (2000) 201 CLR 488, 515 [77].

136 *Ibid* 516-17 [79]. Callinan J adhered to these concerns in *Ebner v Official Trustee* (2000) 205 CLR 337, 397 [184].

137 (2006) 227 CLR 423.

138 The judge apparently took the unusual course of distributing draft reasons to the parties because he was concerned that the reasons might inadvertently reveal privileged information: *ibid* 432 [23] (Gleeson CJ, Heydon and Crennan JJ).

139 The basis of this finding was that the judge’s brother was one of 80 or so partners of a large firm named as defendants to the first action by Roach and also that there was no evidence that his brother had taken any personal role in the case. It was held that the party claiming bias had not explained how these facts could lead the judge to decide the case other than on its merits. The requirement that a party claiming bias must articulate the logical connection between the source of alleged bias and its effect arises from *Ebner v Official Trustee* (2000) 205 CLR 337, 345 [8] (Gleeson CJ, McHugh, Gummow Hayne JJ, Callinan J agreeing on this point). A majority of the High Court agreed that this requirement was not met in *Smits v Roach* (2006) 227 CLR 423, 444 [54] (Gleeson CJ, Heydon and Crennan JJ), 445 [58] (Gummow and Hayne JJ).

The High Court upheld the finding that any possible claim of bias had been waived but also made clear that the principles of agency would be important in determining the effect of the conduct of lawyers, or lack of conduct in the form of a failure to object, in questions of waiver. Gleeson CJ, Heydon and Crennan JJ, with whom Gummow and Hayne JJ agreed, explained that role of lawyers was crucial because the adversarial system operated on the assumption that 'a party is generally bound by the conduct of counsel, and that counsel has a wide discretion as to the manner in which proceedings are conducted'.<sup>140</sup> Their Honours reasoned that the wide authority normally granted to advocates for the conduct of a case was not limited to positive acts but included what might be categorised as omissions, such as failing to pursue a particular line of questioning or object to evidence.<sup>141</sup> On this view, the failure of counsel to raise a claim of bias would fall within the scope of the discretion to conduct a case and therefore bind the client. It is not something that a lawyer would normally need to seek particular instructions upon in order for the decision of the lawyer, as a matter of law, to be regarded as the decision of the client.

A separate but related question arose on appeal when it was argued that the barrister who knew of the position occupied by the judge's brother did not inform or discuss this issue with his client.<sup>142</sup> This issue drew attention to a recurring question in agency, which is when will the knowledge of the agent be imputed to the principal? Gleeson CJ, Heydon and Crennan JJ reasoned:

Having regard to counsel's role in the conduct of litigation, when a characterisation of the legal nature and quality of counsel's acts and omissions depends upon knowledge of some fact or circumstance, then counsel's clients are affected by that knowledge.<sup>143</sup>

This reasoning settles a novel point on waiver by suggesting that lawyers who are aware of facts that might support a claim of bias are not, strictly speaking, required to inform their clients of those facts in order for the client to be bound by the course the lawyer might take in consequence of that knowledge.<sup>144</sup> But should that always be the case? The issue in *Smits v Roach* was regarded by all members of the High Court as incapable of supporting a reasonable apprehension of bias. One could ask if the High Court would have been so willing to impute the knowledge of a lawyer to the client, and the resulting consequences of the

140 *Smits v Roach* (2006) 227 CLR 423, 441 [46].

141 *Ibid* 441 [47].

142 The High Court did not clearly rule upon this point. The barrister who had appeared in the trial later testified that he had mentioned the relevant facts to his client but admitted his recollection might be mistaken: *ibid* 441 [46] (Gleeson CJ, Heydon and Crennan JJ). When the High Court examined this issue, it made clear it had *assumed* only for argument's sake, that the client's claim was accepted.

143 *Ibid* 441 [47].

144 Subsequent cases have suggested this point is uncontroversial. See, eg, *ASIC v Lanepoint Enterprises Pty Ltd* [2009] FCA 258 (Unreported, Gilmour J, 21 April 2009) [31] where Gilmour J stated that it was 'not to the point to consider whether counsel ... declined to object without instructions being taken ... The Court is generally entitled to rely upon what counsel states on behalf of his or her client on such matters'.

lawyer's failure to pass on that knowledge, if it could have supported an arguable claim of bias.

At this point it is useful to note the different approach taken in *Hot Holdings Pty Ltd v Creasy*.<sup>145</sup> In that case the High Court rejected a claim of bias arising from a Minister's decision to award a mining licence. Several bureaucrats worked on a brief of information to the Minister, including two who held a financial interest in the successful applicant. The Minister did not know of these interests but it was claimed that the knowledge of the bureaucrats could be imputed to the Minister and so could vitiate his decision. A majority of the High Court held that the involvement of the two bureaucrats was too peripheral to support a reasonable apprehension of bias.<sup>146</sup> But the Court also cautioned against any attempt to use the interests of the officials to 'attribute a form of vicarious partiality' to the Minister as this approach would have 'far-reaching implications'.<sup>147</sup> There are obvious practical reasons why the courts would be reluctant to impute all of the knowledge held by every bureaucrat within a large government department of agency to a Minister or senior official. The duty to disclose this imputed knowledge, which would be necessary to satisfy the requirements of procedural fairness, would be an impossible one.<sup>148</sup> That is not the case in the lawyer-client relationship in adversarial litigation.

At one level the issue that arose in *Smits v Roach*<sup>149</sup> could be expressed as one of professional responsibility, namely when should a lawyer make an intuitive professional decision without seeking instructions from the client? The application of agency in *Smits v Roach* was motivated by principles of certainty and finality, which provide benefits to individual parties and the wider legal system by preventing the relitigation of issues that have been determined. But those benefits can come at a cost to the notions of fairness and public confidence in the legal system upon which the bias rule rests. An unyielding application of agency may lead to unfairness, particularly in cases where the client and, perhaps, the general public might believe that a lawyer should have sought instructions. At the same time, however, the bias rule does not operate in an idealistic vacuum. The courts have long held that the fair-minded and informed observer, by whose judgment claims of bias are determined, has some understanding of the legal system and

145 (2002) 210 CLR 438.

146 Ibid 448-9 [24] (Gleeson CJ), 453 [44] (Gaudron, Gummow and Hayne JJ, Callinan J agreeing), 462 [75] (McHugh J). Kirby J dissented, holding that the work of the officials was reflected in critical passages of the brief to the Minister: 471-2 [106]-[107], 482 [139].

147 Ibid 446 [14] (Gleeson CJ). Gaudron, Gummow, and Hayne, with whom Callinan J agreed, similarly thought the issue was 'a large question' which their Honours declined to answer: at 456 [52].

148 A consequence that weighed heavily on the Court of Appeal of Western Australia in *Re Minister for Resources; Ex parte Cazaly Iron Ore Pty Ltd* (2007) 34 WAR 403, [328]-[335] (Buss JA, Wheeler and Pullin JJA agreeing).

149 (2006) 227 CLR 423.

its principles.<sup>150</sup> That approach provides a basis by which to attribute to the fair-minded and informed observer some understanding of agency and its application to legal proceedings.<sup>151</sup>

In *Smits v Roach* the High Court did not suggest that agency or other considerations would *always* operate to bind clients,<sup>152</sup> but the relatively strict approach taken to agency by the Court in a migration case only a year later indicates that exceptions to the agency rule in legal proceedings may be rare. In *SZFDE v Minister for Immigration and Citizenship*<sup>153</sup> the High Court held that the fraudulent actions of a migration agent, who advised his clients they should not attend a hearing of their applications for protection visas, caused a fraud upon the tribunal and vitiated its decision. The fraud of the agent unravelled the entire decision-making process and, in effect, did not bind the clients but the High Court held that this outcome was due largely to the complex procedures of the migration legislation examined in that case. The Court stressed that in most other instances clients would be bound by the ‘bad or negligent advice or some other mishap’ of their agent.<sup>154</sup>

The English Court of Appeal took a different approach in the same year in *Smith v Kvaerner Cementation Foundations Ltd*<sup>155</sup> (the ‘*Smith* case’). In that case a plaintiff arrived at court to find that the judicial recorder listed to hear his personal injuries claim was the head of the chambers shared by counsel for both

150 See, eg, *RDS v R* [1997] 3 SCR 484, [36]-[40] (L’Heureux-Dube and McLachlin JJ) (Supreme Court of Canada). See also *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 635 [177] where Callinan J held that it was ‘axiomatic that the perception of a lay observer will not be as informed as the perception of a lawyer, particularly a litigation lawyer. But the notional lay person should not be taken to be completely unaware of the way in which cases are brought to trial and tried’.

151 But it is important to note that the extent to which the fair-minded observer should be imbued with an understanding (and by implication an acceptance) of legal practices and traditions is controversial. In *Smits v Roach* (2006) 227 CLR 423, 457 [96] Kirby J reasoned that the fair-minded and informed observer had been ‘stretched virtually to snapping point’ by the increasing tendency of the courts to attribute detailed or specialist knowledge to that fictitious person. It has been noted that this increasing tendency is liable to equate knowledge of the legal system with an acceptance of its culture and practices: Simon Atrill, ‘Who Is the “Fair-minded and Informed Observer”?’ *Bias after Magill* (2003) 62 *Cambridge Law Journal* 279, 283.

152 Gleeson CJ, Heydon and Crennan JJ explained that the adversarial system proceeded on the basis ‘that a party is *generally* bound by the conduct of counsel’: (2006) 227 CLR 423, 441 [46] (emphasis added). This statement clearly allows for exceptions.

153 (2007) 232 CLR 189. The case is examined in Matthew Groves, ‘The Surrogacy Principle and Motherhood Statements in Administrative Law’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008) 71.

154 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, [53] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ) citing *Minister for Immigration and Citizenship v SZFDE* (2006) 154 FCR 365, [129] where French J stated that there were ‘sound policy reasons’ why a principal/client should be bound by the conduct and mistakes of a lawyer/agent. His Honour did not explain those policy reasons but similar cases concerning fraud have placed great weight on the need for finality in litigation. See, eg, *R v Home Secretary; Ex parte Al-Mehdawi* [1990] 1 AC 876, 901. Finality was also relied upon by the High Court when it affirmed the immunity of advocates from claims of negligence by clients for the conduct of a case: *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17-19 [34]-[39], 21 [46] (Gleeson CJ, Gummow, Hayne and Heydon JJ). Their Honours stressed that controversies settled during litigation should generally not be reopened.

155 [2007] 1 WLR 370.

parties.<sup>156</sup> The plaintiff was informed that the recorder had acted for defendant insurance companies for many years and was likely to do so again in future cases. When the plaintiff expressed unease his barrister informed him that he might face an adverse of costs for any adjournment sought as part of a claim of apprehended bias. The barrister also explained that he knew the recorder very well and he could be trusted to hear and decide the case without bias. The plaintiff accepted this advice. When the recorder mentioned his association with both counsel at the start of the hearing, neither raised any objection. The recorder rejected key parts of the plaintiff's evidence and dismissed his claim. The plaintiff appealed, claiming that the recorder was biased. The defendant argued that any claim of bias was waived because the counsel discussed the key issues with his client who gave instructions to waive the issue.

The Court of Appeal held that the plaintiff had not been given a 'fair opportunity to reach an unpressured decision'<sup>157</sup> and had not acted voluntarily in the sense required to waive a possible claim of bias. The Court reasoned that lawyers should inform their clients of the facts relevant to a possible claim of bias but leave the ultimate choice to the client. According to this view, the barrister was right to have informed his client of the availability and consequences of an adjournment, the judicial oath and how it was accepted to denote the seriousness with which judges approach their duty, but not the barrister's personal knowledge of the recorder or perception of his personal integrity. The key reason was that advice of such a subjective nature made it very difficult, if not impossible, for the client to disagree. The Court of Appeal concluded that it was not 'part of counsel's duty or appropriate for counsel to seek to influence the decision to be taken by the lay client'.<sup>158</sup> The Court continued:

The choice is the client's and, while it is proper for counsel to inform the client of the implications of the choice, it is not appropriate for counsel to urge the client to waive his right to object to the tribunal.<sup>159</sup>

In my view, the principle devised by the Court of Appeal is too far-reaching. Most clients would not only rely heavily upon the advice of their lawyer – they would expect to be able to do so. A decision to raise or waive a claim of bias normally requires a careful consideration of legal principles and forensic matters, which an experienced lawyer is particularly well-placed to provide. The expertise of lawyers often includes a fair level of familiarity with the judges they appear before which, in turn, can enable a lawyer to provide sound advice on the likely

156 This practice of lawyers sitting in a part time capacity as judicial recorders was common in England until the House of Lords held it could compromise the appearance of impartiality if recorders had a close association with the lawyers who appeared before them: *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 ('*Lawal*'). The practice was phased out in England after the *Lawal* case but not before the trial in the *Smith* case [2007] 1 WLR 370 had occurred.

157 *Smith* case [2007] 1 WLR 370, [29]-[30].

158 *Ibid* [37].

159 *Ibid*.

response of a judge.<sup>160</sup> The difficulty in the *Smith* case was that the barrister and the decision-maker had a close and ongoing professional relationship which made it inappropriate, perhaps even impossible, for the barrister to provide objective advice. In the absence of such unusual circumstances, the relatively strict approach of the High Court to agency in legal proceedings suggests that parties would almost certainly be bound by the advice and actions of their lawyers.

### **B Waiver of the Bias Rule by Unrepresented Parties**

The extent to which the principles governing waiver may be modified in cases involving unrepresented parties is not entirely clear but several issues appear well settled. The suggestion by Callinan J in *Johnson*<sup>161</sup> that experienced advocates would face significant difficulties when considering whether and how to raise a claim of bias draws attention to the delicate skills required to make a claim of bias.<sup>162</sup> It also implies that people who are not trained in advocacy or the law, such as unrepresented parties, may face particular difficulties in raising a claim of bias. Such people are equally likely to face great difficulty in understanding when a claim of bias can or should be raised. These difficulties would be less pronounced where an unrepresented person had some understanding of the requirements and operation of the bias rule, but in most cases it is likely that unrepresented people would not even know the bias rule existed let alone that it required claims of bias to be made in a timely manner.

Whether and how a court might be obliged to assist an unrepresented party in these circumstances has received surprisingly little judicial consideration.<sup>163</sup> A former President of the Court of Appeal of New South Wales has noted that, strictly speaking, a decision-maker is only obliged to try to assist an unrepresented party and can usually do so by providing that party with a chance to present his

160 This statement proceeds on the assumption that judges possess individual personalities and traits and, therefore, may not always react to similar situations in precisely the same way. That assumption is unlikely to be controversial, particularly among those with advocacy experience. One judge has acknowledged (extra-judicially) that many lawyers might acquire views about judges' perceived propensities on many issues but would be extremely reluctant to express those views publicly: Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 681. According to this view, it would not be surprising for a lawyer to be able to draw from experience to advise a client how a judge might manage an issue that gave rise to a possible claim of bias or react to a claim of bias, but it would be most unlikely that the lawyer would express those views in open court.

161 (2000) 201 CLR 488.

162 Ibid 517. Some of these issues are usefully considered in Geoffrey Lester, 'Bias: How and When to Make the Objection' (1997) 3 *Administrative Agency Practice* 49.

163 An exception is *Re F: Litigants in Person Guidelines* (2001) 27 Fam LR 517 (Nicholson CJ, Coleman and O'Ryan JJ). In that case the Full Court of the Family Court explained in detail the issues that it considered judges should address in cases involving unrepresented parties. The problems faced by unrepresented parties, and the difficulties in managing those problems, were considered in Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Final Report No 89 (2000) [5.148]-[5.157], [9.103]-[9.112].

or her case. The decision to take advantage of that chance is another matter.<sup>164</sup> This conclusion was reached in the context of administrative tribunals and it may not be entirely applicable to judges and courts. There is considerable authority suggesting that the different character of administrative proceedings might impose 'a higher burden of explanation and assistance ... upon a member of the Tribunal than would fall upon a judge in a curial proceeding in which the parties are represented by counsel'.<sup>165</sup> The increased obligation of decision-makers in administrative proceedings on this issue is one example of the wider consequence of the inquisitorial model that is adopted by many administrative tribunals.<sup>166</sup>

Some other courts have adopted a similar approach. The Full Court of the Family Court has long accepted that judges can and should provide guidance and advice to unrepresented parties about matters of procedure and case management but has also accepted that any such assistance should be limited by the need to preserve the actual and perceived impartiality of judges.<sup>167</sup> The Court has held that the provision of legal advice by a judge would normally breach the actual and perceived impartiality of judges, though there might be exceptions.<sup>168</sup> The principles developed in the Family Court are consistent with those adopted by other courts which suggests that courts should also take a more active role in helping an unrepresented party to manage a claim of bias.

In *Jones v DAS Legal Expenses Insurance Co Ltd*<sup>169</sup> the Court of Appeal of England explained that, as a possible claim of bias was 'a problem created by the court, the court has to do its best to assist in resolving it'.<sup>170</sup> The Court of Appeal suggested that parties should always have a sufficient opportunity to make a considered decision before electing whether to pursue or waive a possible claim of bias but where a party facing that decision was unrepresented it would normally be appropriate to grant a short adjournment so that the unrepresented

164 Keith Mason, 'The Bounds of Flexibility in Tribunals' (2003) 39 *Australian Institute of Administrative Law Forum* 18. The approach suggested by Mason is consistent with many cases concerning unrepresented parties in which the courts have made clear that judges and other decisions-makers should, and sometimes must, assist an unrepresented party but any assistance will necessarily be limited by other factors. See, eg, *Wade v Comcare* (2002) 69 ALD 602, 607 where Drummond and Dowsett JJ commented that there was 'a clear line between ... persuading a self-represented party as to the appropriateness of a suggested course and ... overriding his or her right to decide'.

165 *Collection House Ltd v Taylor* (2004) 21 VAR 333, [27] (Nettle J).

166 The nature of these obligations for decision-makers who adopt a more inquisitorial rather than adversarial approach is considered in Aronson, Dyer and Groves, above n 11, 591-3.

167 The leading cases of the Family Court are *Johnson v Johnson* (1997) 22 Fam LR 141, [121] (Ellis, Baker and Lindenmayer JJ); *Re F: Litigants in Person Guidelines* (2001) 27 Fam LR 517, [209]-[253] (Nicholson CJ, Coleman and O'Ryan JJ).

168 *Re F: Litigants in Person Guidelines* (2001) 27 Fam LR 517, [224] (Nicholson CJ, Coleman and O'Ryan JJ). In that case the Full Court acknowledged that the provision of legal advice might be appropriate even though it could 'risk the appearance of impartiality'. The same issue has proven controversial in America: see Jona Goldschmidt, 'Judicial Ethics and Assistance to Self-represented Litigants' (2007) 28 *Justice System Journal* 324.

169 [2003] EWCA Civ 1071 (Unreported, Ward, Waller and Hale LJJ, 24 July 2003).

170 *Ibid.*

person could fully consider the issue.<sup>171</sup> The Court of Appeal also noted that an unrepresented party could be advised to consult a legal service or court officials. This possibility implies that, while the court can and should assist an unrepresented party, assistance can also be provided by others. One advantage of assistance from people other than the judge presiding over the case is that it enables the person to seek advice and assistance from someone not directly involved in the case at hand. This form of advice lessens the obvious difficulties that judges face in managing such issues while maintaining their objective position.

There is some authority suggesting that an unrepresented party should not always expect an adjournment of assistance to raise a claim of bias. In *Huang v University of New South Wales (No 3)*<sup>172</sup> Rares J reasoned that judicial conduct might sometimes be 'so obviously questionable ... that the unrepresented party was bound to object then and there rather than chancing to how the ultimate decision may go'.<sup>173</sup> But his Honour concluded that such clear-cut cases would be rare because:

in most cases, unrepresented parties, however intelligent or worldly, will not have a sufficient familiarity with the practice and procedure involved in litigation to know when a judicial officer has gone potentially too far. Not only do unrepresented parties usually feel the ordinary, but very real, stress and nervousness which being in court generates but they are entitled and are likely to assume that the judicial officer is doing his or her job fairly and according to the law. So something which is unusual to a lawyer may not strike an unrepresented party as such. An unrepresented party may think what has occurred is how courts do things, and so not realise immediately that anything legally wrong has occurred, however upsetting the judicial officer's conduct may be.<sup>174</sup>

This reasoning makes clear the latitude that courts may provide to unrepresented people is not unlimited. There is a point at which the facts that might support a claim of bias are so clear that even the most unskilled person could be expected to voice some sort of objection. It seems the type of facts that would mark this outer limit of the latitude that courts might accord to unrepresented parties would be ones that might appear highly unusual to a non-lawyer rather than someone with legal training. That distinction might not always be an easy one for judges and lawyers to appreciate.

A separate but related point is that Rares J did not suggest an unrepresented person must articulate an objection or claim bias in the manner expected of a lawyer. The

171 This possibility might be viewed as a specific instance of the wider principle that procedural fairness may require the grant of an adjournment to a party faced with a difficult or unexpected issue. See, eg, *Touma v Saparas* [2000] NSWCA 11 (Unreported, Powell, Stein JJA, Hodgson CJ in Eq, 17 February 2000) [27]. The appropriate length of any adjournment granted to an unrepresented party will depend on the nature of the issue and the ability of the party to manage it: *L v HREOC* (2006) 233 ALR 432, [21] (Black CJ, Moore and Finkelstein JJ).

172 (2006) 154 FCR 16.

173 *Ibid* [39].

174 *Ibid*.

extent to which a court might be required to detect and elicit a possible claim of bias from an unrepresented person is a difficult issue. According to the approach in *Jones v DAS Legal Expenses Co Ltd*,<sup>175</sup> the court could be expected to provide guidance and an adjournment to an unrepresented party, but is that realistic? Where judicial conduct is so irregular or inappropriate that an unrepresented person could reasonably be expected to make some form of objection, it is less than certain that the judge responsible for that conduct would, at the moment it was called into question, be able to muster the insight and objectivity to assist the unrepresented person. At one level this problem simply illustrates the difficulty all people face when their objectivity is called into question. One judge frankly acknowledged: 'Naturally we find it easier to detect prejudices in others than in ourselves'.<sup>176</sup> The same is surely true of every form of conduct that might support a claim of bias, such as prejudgment. But an added problem would arise in cases where the judicial conduct was, in the words of Rares J, 'so obviously questionable' that it demanded an immediate and almost instinctive response. A judge or other decision-maker who engaged in such conduct might be as reluctant to acknowledge their error as an unrepresented person would be to complain of it.

## VI CONCLUDING OBSERVATIONS

The rule against bias is, along with the hearing rule, one of the two pillars of natural justice. The hearing rule primarily operates to provide parties with a fair hearing, as the circumstances of each case might require. Although the bias rule clearly also takes account of considerations of fairness, an important rationale of the rule is the need to maintain public confidence in the courts and the administration of law. This focus on public confidence is entirely consistent with the wider goals of fairness because the need for justice to be *seen* to be done sits comfortably with the fact that justice *is* done. There is considerable doubt as to whether these goals would be advanced if the bias rule was placed on constitutional foundations. A constitutionally based rule against bias might be inflexible and might, in any event, be subject to a waiver exception. Whatever the foundations of the bias rule, the waiver exception can be supported by reasons of principle and pragmatism. The possibility of waiver can help to ensure fairness between the parties by preventing a party who had a reasonable opportunity to raise a claim of bias from doing so at a much later stage. The waiver exception also provides wider benefits to the legal system and the public by promoting finality in litigation.

The analysis in this article suggests that the courts have not placed great emphasis on the doctrinal foundations of waiver but have instead focused on devising a practical approach to determining cases of waiver. The key ingredients required for a finding of waiver – that the waiving party should make an informed, timely and unequivocal decision – each grant the courts considerable flexibility

175 [2003] EWCA Civ 1071 (Unreported, Ward, Waller and Hale LLJ, 24 July 2003).

176 Mason, 'Unconscious Judicial Prejudice', above n 160, 681.

to determine whether waiver can and should be found in each case. The cases analysed in this article suggest that the courts have not taken a rigid approach when determining whether one or more of those requirements for a finding of waiver have been met. The approach taken to agency appears to be less flexible. The firm approach taken to agency by the High Court in *Smits v Roach*<sup>177</sup> suggests that parties will, as a general rule, be bound by their lawyers' knowledge and also by the failure of those lawyers to act upon that knowledge. While the courts have taken a far more flexible approach in cases involving unrepresented parties, the flexibility is clearly not unlimited. It appears that unrepresented parties may be obliged to raise some form of objection if the basis for a claim of bias is especially clear. The differing approach that the courts take to cases involving represented and unrepresented parties, and the considerable latitude in the key requirements for a claim of waiver, indicate that any possible waiver of the rule against bias will depend heavily on the context in which it arises.

177 (2006) 227 CLR 423.