DISQUALIFICATION OF JUDGES AND PRE-JUDICIAL ADVICE

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ABSTRACT

This article explores the circumstances in which a judicial officer may be required to recuse himself or herself on the basis of an opinion provided in the course of practice as a legal practitioner, prior to appointment to judicial officer, particularly where that opinion was on a matter of law only (including the constitutional validity of legislation). We suggest that questions concerning disqualification of judicial officers in such circumstances might be better approached by considering broader concepts of fairness, in addition to asking whether the provision of the pre-judicial opinion gives rise to considerations of apprehended bias. We also explore possible developments of the law to avoid the undesirable situation where the disqualification of a particular judicial officer may depend upon whether one party to the litigation chooses to disclose the existence or the content of advice that it has received.

I INTRODUCTION

In Australia, judges are appointed from the legal profession. Accordingly, before their appointment most judges will have had a practice in which they will have provided opinions on various legal questions. Given this reality, it is perhaps surprising that little judicial or academic attention has been paid to the question of whether, or in what circumstances, advice provided on questions of law by judges prior to their appointment ('pre-judicial advice') will disqualify them from sitting in a matter in which that question arises for decision. Recent decisions of Justice Stephen Gageler of the High Court not to sit in a number of cases have demonstrated that the current law on apprehended bias and waiver is difficult to apply to the particular issues that pre-judicial advice raises. Where pre-judicial advice has been provided only in respect of a matter of law — for example, where the advice has considered the constitutional validity of legislation subsequently in question before the court — questions remain as to whether and when the judge, or the party to whom the advice was provided, can and should disclose its existence, whether a judge who provided such advice should disqualify himself or

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herself and, if so, on what basis.

Often, questions of whether the provision of pre-judicial advice disqualifies a judge from sitting on a case will need to be determined expeditiously. Moreover, the effect of pre-judicial advice may be most acute in the case of a judge who has been recently appointed, perhaps directly from the legal profession rather than from another judicial office, and who may lack prior judicial experience. The current practice is for questions of disqualification and recusal to be determined solely by the judge concerned,[1] although in practice judges may informally consult their colleagues for advice.[2] There is some material available to judges that offers assistance in making determinations about recusal,[3] but none that specifically addresses the particular issues raised by pre-judicial advice. The relatively common practice of judges declining to sit without providing reasons exacerbates the lack of guidance available. Thus, while it is a question that may arise only relatively infrequently, it is one that merits more sustained attention.

This article commences by tracing two controversial High Court cases in which the question of disqualification on the basis of pre-judicial advice arose but was unsatisfactorily resolved: Gageler J's recusal in *Unions NSW v New South Wales*[4] and Callinan J's in *Kartinyeri v Commonwealth*.[5] The article then briefly explains the relevant legal principles that govern disqualification, before turning to an analysis of their application to cases that raise issues concerning pre-judicial advice. We develop an argument that the provision of a pre-judicial opinion on a question of law should not necessarily constitute grounds for disqualification on the basis of bias or even broader grounds relating to fairness between the parties. Provided the law allows the judge to give a public account of this advice or the 'gist' of the advice (and we argue that it does, or should), there is little to distinguish pre-judicial opinions on matters of law from judicial comments in obiter dicta, or extra-judicial writings and speeches that express opinions on the law. We conclude with a brief consideration of the application of the law of waiver of legal professional privilege in circumstances where the *existence*, but not the *content*, of a pre-judicial opinion has been revealed.

II PRE-JUDICIAL ADVICE IN AUSTRALIA

In the last 15 years, disqualification on the basis of pre-judicial advice has arisen twice

1 See further discussion of this practice in Sir Anthony Mason, 'Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review' (1998) 1 *Constitutional Law and Policy Review* 21.

2 There is no formal judicial ethics advisory board, such as exist in some States in the United States, eg, the Colorado State Judicial Ethics Advisory Board, <http://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=15>.

3 See, eg, Melissa Perry, *Disqualification of Judges: Practice and Procedures: Discussion Paper* (Australian Institute of Judicial Administration, 2001); James Burrow Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009); Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009); John Tarrant, *Disqualification for Bias* (Federation Press, 2012).

4 (2013) 252 CLR 530 ('*Unions NSW*').

5 (1998) 195 CLR 337 ('*Kartinyeri*').

in the High Court in constitutionally important and high profile matters. Both cases suggest that the legal principles governing disqualification in these circumstances remain insufficiently developed.

On 5 November 2013, seven judges of the High Court sat ready to hear the first day of argument in *Unions NSW*.[6] The case proved to be an important decision involving the application of the implied freedom of political communication to the New South Wales Parliament's campaign finance reforms. As the hearing was set to commence, counsel for the Attorney-General of the Commonwealth (an intervener in the proceedings) drew the Court's attention to the fact that advice had been provided by a justice of the Court that, counsel said, 'touched on' the constitutional validity of one of the challenged provisions.[7] The opinion was not provided to the other parties in the case. The Court adjourned. More than an hour later, the Court returned. Counsel for the Commonwealth clarified that it had no application to make. No other party made an application, or provided submissions on the issue of whether Gageler J ought to be disqualified from hearing the case. Gageler J then proceeded to give brief reasons for recusing himself. He explained that, in his former capacity as Commonwealth Solicitor-General, he had provided signed legal advice to the Commonwealth Attorney-General that touched on the validity of provisions challenged in the proceedings. Gageler J said that, before the announcement by counsel for the Attorney-General, he had been unable publicly to disclose the fact that he had given the advice. He had previously carefully considered the question of whether the provision of the advice gave rise to any apprehension of bias, but was not satisfied that it did and thus considered that it was his duty to sit as a member of the Court. However, since the *existence* of the advice, but not the *content* of the advice, had now been disclosed, he felt obliged to recuse himself 'to dispel any apprehension of bias'.[8]

In the six months following, Gageler J did not sit on further important constitutional cases. In each case it appears that his reasons for not sitting may have been connected with his providing pre-judicial advice. In *Commonwealth v Australian Capital Territory*,[9] in which the Commonwealth challenged the validity of the *Marriage Equality (Same Sex) Act 2013* (ACT), Gageler J did not sit. Unlike in *Unions NSW*, Gageler J provided no reasons for this. It was widely thought that it was because he had previously provided a joint opinion concerning the validity of an earlier proposed civil union scheme in the Territory.[10] The Territory had made that advice publicly available.[11] In *Williams v*

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6 (2013) 252 CLR 530.

7 Transcript of Proceedings, *Unions NSW v New South Wales* [2013] HCATrans 263 (5 November 2013), lines 23–30.

8 Ibid, lines 53–77.

9 (2013) 250 CLR 441 ('*Same Sex Marriage Case*').

10 See, eg, Jeremy Gans, 'Same-Sex Marriage Hearing Ins and Outs', *Opinions on High* (online), 3 December 2013, <https://blogs.unimelb.edu.au/opinionsonhigh/2013/12/03/news-same-sex-marriage-hearing-ins-and-outs>; Frank Brennan, 'High Court Leaves Same Sex Marriage Door Ajar', *Eureka Street* (online), 15 December 2015, <http://www.eurekastreet.com.au/article.aspx?aeid=38637#.VbyipEtN3wJ>.

11 David Jackson QC and Stephen Gageler SC, 'Re *Civil Partnerships Bill 2006;* Ex parte

Commonwealth (No 2),[12] in which Ron Williams brought a second challenge to the federal funding of school chaplains, Gageler J did not sit, but provided no reasons. As Solicitor-General, Gageler had acted for the Commonwealth, against Mr Williams, in *Williams v Commonwealth*.[13] It was also possible that he had been involved in advising on the constitutional validity of the Commonwealth's response to that initial litigation. In *Plaintiff S156/2013 v Minister for Immigration and Border Protection*,[14] Gageler J again did not sit and provided no reasons. The case included a challenge to the constitutional validity of two provisions of the *Migration Act 1958* (Cth), which were inserted as a legislative response to *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.[15] Gageler J had appeared as counsel for the Commonwealth in that case during his time as Solicitor-General, and had subsequently provided advice to the government (which was publicly released).[16]

Immediately before his appointment, Gageler J was the Commonwealth Solicitor-General. The Commonwealth is one of the most frequent parties to appear before the High Court and, at least in recent times, is usually represented by its Solicitor-General. The Commonwealth Solicitor-General will also frequently be asked to provide advice to the government on the constitutional validity of policies and legislation, and may often be involved in providing constitutional advice on the formulation and drafting of proposed policies.[17] The seniority of the office, the nature of its practice and the calibre of officeholders mean that Solicitors-General will tend to be appropriate candidates for judicial appointment.[18] In Australia, the only previous appointment of a Commonwealth Solicitor-General to the High Court occurred when Anthony Mason was appointed in 1972, although he had spent three years as a member of the New South Wales Court of Appeal prior to his elevation.[19] Given the nature of the Solicitor-General's modern practice, and the unprecedented appointment of Gageler J directly from the office, it is perhaps unsurprising that the question of disqualification based on

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Australian Capital Territory' (Joint Opinion, 5 May 2008).

12 (2014) 252 CLR 416.

13 (2012) 248 CLR 156.

14 (2014) 309 ALR 29.

15 (2011) 244 CLR 144 ('*Malaysian Declaration Case*').

16 Stephen Gageler SC, Stephen Lloyd SC and Geoffrey Kennett SC, 'In the Matter of the Implications of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* for Offshore Processing of Asylum Seekers under the *Migration Act 1958* (Cth): Opinion' (SG No 21 of 2011, 2 September 2011) <http://resources.news.com.au/files/2011/09/04/1226129/101737-solicitor-general-advice.pdf>.

17 See further discussion of the role in Gabrielle Appleby and John M Williams, 'Public Sentinels' in Gabrielle Appleby, Patrick Keyzer and John M Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014) 12.

18 Elevation of State Solicitors-General to State and federal courts occurs more frequently. These appointments raise similar issues.

19 Sir Charles Powers had been the Crown Solicitor for the Commonwealth immediately prior to his appointment to the High Court in 1913, before the office of Commonwealth Solicitor-General was created.

pre-judicial advice has arisen more frequently following Gageler J's appointment than in respect of any previous justice.

In 1998, Callinan J found himself in a similar position to that which arose in *Unions NSW*, due to advice he had provided whilst in practice at the private bar. In *Kartinyeri*,[20] a submission was made by the plaintiffs calling for Callinan J not to sit as a member of the Full Court. Apprehension of bias was alleged on the grounds of prejudgment and the closeness of the Judge's relationship to a Commonwealth Minister. Callinan J, while at the private bar, had provided a joint opinion to a parliamentary committee on the Bill that became the *Hindmarsh Island Bridge Act 1997* (Cth). The advice expressed the view that the Bill, if passed, would be valid. The Act was passed and its validity was challenged in *Kartinyeri*. Callinan J initially decided not to recuse himself, primarily on the basis that the opinion he provided related to a legal matter, not a matter going to facts or involving the credibility of witnesses.[21] The decision was made under enormous time pressure and was one of Callinan J's first judicial acts: he had taken office directly from the bar on 3 February 1998, heard argument on 4 February 1998,[22] and delivered his decision not to recuse himself on the morning of 5 February 1998.[23] The Full Court sat to hear the case the same morning.[24] After the Full Court hearing in *Kartinyeri*, but before the delivery of judgment, the plaintiffs applied, in the original jurisdiction of the High Court, for review of Callinan J's refusal to stand down.[25] All seven judges who had heard argument in the matter were listed as respondents: the alleged apprehended bias was said to affect the Court as constituted for the hearing, even though Callinan J alone had made the decision that he should sit. Before the application for review came on for hearing before the Full Court, more information about the opinion provided by Callinan J emerged, and he voluntarily withdrew from the case before judgment was handed down. No reasons were provided for his eventual recusal.

III BASIS FOR DISQUALIFICATION

Before turning to the particular issues raised by pre-judicial advice, it is necessary to explain the general principles that apply to disqualification. In this part, we outline the potential bases for disqualification for bias and apprehended bias that seem most likely to arise in relation to pre-judicial advice. In the next part, we consider how these general principles might apply to pre-judicial advice concerning the constitutional validity of legislative provisions when that very issue subsequently comes before the court.

A Current Bases for Disqualification: Bias and Apprehended Bias

It is now a well-established principle of Australian constitutional and administrative law

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20 (1998) 195 CLR 337.
21 *Kartinyeri v Commonwealth* (1998) 156 ALR 300.
22 Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 10 (4 February 1998).
23 Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 12 (5 February 1998).
24 Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 13 (5 February 1998).
25 Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 43 (18 February 1998).

that courts must both be and appear to be impartial and exercise their powers in accordance with the rules of natural justice or procedural fairness.[26] The High Court has recently confirmed that the objective that underlies the rules of procedural fairness is the need to avoid 'practical injustice'.[27] In the words of Gleeson CJ:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.[28]

According to the rules of procedural fairness, judges must determine cases that come before them unaffected by either actual bias or any reasonable apprehension of bias ('apprehended bias'). The rationale behind this rule has been described by the High Court as resting on principles of natural justice as well as being 'referable to the need to maintain confidence in the judicial process.'[29] The modern Australian test for determining disqualification on the basis of apprehended bias was stated by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Johnson v Johnson*:

> [W]hether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.[30]

The word 'might' in this expression refers to 'possibility (real and not remote), not probability'.[31] In *Ebner v Official Trustee in Bankruptcy*, Gleeson CJ, McHugh, Gummow and Hayne JJ also explained that the process for determining bias involved two steps: 'the identification of what it is said might lead a judge (or juror) to decide the case other than on its legal or factual merits', and 'an articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits'.[32]

In applying the general test for disqualification for apprehended bias, it may often be helpful to consider 'categories' or 'grounds' justifying disqualification, but care must

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26 See, eg, *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71–2 [67]–[68] (French CJ), 102 [167], 103 [169] (Hayne, Crennan, Kiefel and Bell JJ), 105–8 [180]–[188] (Gageler J); Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash Law Review* 248, 252; Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of its Own' (1998) 73 *Australian Law Journal* 72, 76–8.

27 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99 [156] (Hayne, Crennan, Kiefel and Bell JJ), 108 [188] (Gageler J).

28 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37].

29 *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425, 426 [5] (Gleeson CJ, Gaudron and Gummow JJ).

30 (2000) 201 CLR 488, 492 [11]. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344–5 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

31 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ). The law also makes provision for circumstances where considerations of waiver or necessity dictate that a judicial officer may, or must, sit in situations in which a judge might otherwise be disqualified for apprehended bias: at 344 [6], 359 [63] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

32 Ibid 345 [8].

be taken so as not to apply these too rigidly.[33] It may prove useful, as a step in analysis, to identify patterns or kinds of cases that may support disqualification. In this article, for example, we will refer to various categories of bias, including 'prejudgment', but these should not be regarded as endorsing a rigid taxonomy.

The other generally accepted rule of procedural fairness requires that a person receive a fair hearing, that is, that they be provided with notice of a decision affecting them, disclosure of the case or material against them, and an opportunity to present evidence and/or submissions before the decision is made. Disclosure of the case against them facilitates the individual's opportunity to present a case; it ensures they know the evidence, facts and argument to which they must respond.[34] The hearing rule is not usually considered a basis for disqualification but rather disclosure. In Part VI of this article, we consider whether the principles of fairness associated with the hearing rule may also give rise to a ground of disqualification in particular circumstances.

B Competing Imperatives

A tension may arise between the imperatives of safeguarding judicial impartiality and the fairness of the judicial process, on the one hand, and the principle that it will ordinarily be desirable that judges should sit and determine cases assigned to them in accordance with the ordinary arrangements for disposing of the business of the court, on the other. The High Court in *Livesey v New South Wales* explained:

> [I]t would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party to do so on the grounds of a possible appearance of pre-judgment or bias …[35]

There is a presumption that the judge — or in the case of a multi-member judicial panel, each of the judges — provisionally assigned to hear a case will sit unless disqualified.

In trial and intermediate appellate courts, the presumption may be applied flexibly and pragmatically. In cases where it is uncertain whether a reasonable apprehension of bias exists — that is, cases where there is, at first glance, at least a reasonable argument that a judge should be disqualified — a court may adopt administrative arrangements which reduce the likelihood that such judges will be provisionally assigned to hear a trial or appeal in the first place.

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33 See comments to this effect, and a discussion of four categories of apprehended bias, in *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J). These are: interest, conduct (including prejudgment), association and extraneous information. Prejudgment has been considered by some to involve such numerous and discrete issues as to justify treatment as a separate category: Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 5th ed, 2013) 632 [9.120]. See also John Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) 38 *Federal Law Review* 353, 357.

34 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

35 (1983) 151 CLR 288, 294 (Mason, Murphy, Brennan, Deane and Dawson JJ).

An example of such a practice is that which is presently applied in relation to appeals to the Full Court of the Supreme Court of South Australia. When an appeal is set down for hearing, and before a quorum has been provisionally assigned to the appeal, each party is required to fill out an 'information sheet' identifying any judges who 'may be disqualified from hearing the appeal' and briefly stating the reason for the possible disqualification.[36] While there is no strict guarantee that a judge so identified will not be provisionally assigned to an appeal panel, in most instances a case is provisionally assigned in such a way as to avoid the need for a hearing on the question of recusal.

Moreover, trial and intermediate appellate courts are typically comprised of more members than apex courts. Trials are usually conducted by a single judicial officer while intermediate appellate courts usually sit three, or occasionally five, member benches. The number of judges sitting on any one case thus typically represents a smaller proportion of the court's entire judiciary. Further, in the case of State courts it is sometimes expedient to appoint or assign an acting judge (who will usually be a retired judge or a judge of an interstate court).[37] In general, these considerations tend to mitigate the impact of the recusal of any particular judge, and correspondingly may diminish the force of arguments against judges recusing themselves on 'prudential' or 'pragmatic' grounds.[38]

However, the imperative for available judges to sit is particularly strong in relation to an apex constitutional court, where 'prudential' or 'pragmatic' recusals may change the composition of the bench significantly, and thus are more likely to affect the outcome of a case, and where no appeal from the decision is available.

IV DISQUALIFICATION AND PRE-JUDICIAL ADVICE

The test applied to determine whether apprehended bias arises requires that regard be had to all the circumstances of a particular case. For that reason, every decision concerning disqualification will necessarily turn on its own facts. Factors that assume importance in some cases may be relatively unimportant or non-existent in others. Sometimes relevant competing considerations will pull in different directions. Differences in the *nature of the question* addressed, and the *nature*, *extent* and *disclosure* of the pre-judicial advice may all impact on the character and resolution of the question of disqualification.

A Nature of the Question in Pre-Judicial Advice

Conduct that suggests that a judge may have prejudged a case — that is, that he or she

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36 *Supreme Court Supplementary Civil Rules 2014* (SA), r 242(3)(d).

37 For example, in 2012, the former Chief Justice of the Northern Territory, Brian Ross Martin QC, was appointed as an acting judge of the Western Australian Supreme Court to preside over a murder trial where the deceased and the accused were both prominent members of the Western Australian legal profession: Christiana Jones, 'The Judge: Brian Martin', *The West Australian* (online), 13 July 2012 <https://au.news.yahoo.com/thewest/a/14225053/>.

38 A full analysis of whether this pragmatic approach is desirable is beyond the scope of this article.

may have predetermined or preconceived views about the issues in a case — may give rise to apprehended bias. The question in such a case is whether there is 'a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented'.[39] Prejudgment must be 'firmly established', and must go beyond 'inclinations of mind' that may develop over the course of a professional career.[40]

Usually, questions of prejudgment arise in relation to findings of fact or credit in previous or related proceedings.[41] Historically in common law jurisdictions, where trial by jury prevailed, there was no right to challenge judges to disqualify themselves except on narrow grounds related to conflict of interest. On the other hand, jurors, as finders of fact, were subject to challenge.[42] In civil jurisdictions, where judges were responsible for both fact and law, their impartiality has long been subjected to challenge.[43] Chris Finn has argued that prejudgment on a question of law should be viewed differently from prejudgment on a question of fact or credit because it is not particularised to the case and individual parties before the judge.[44] Prejudgment of facts or credit may impact on a judge's capacity to assess the facts in the case before him or her impartially. In contrast, we *expect* a judge to come to a case with an understanding of the law to be applied. This understanding may be assisted by the parties, who will provide the judge with authorities and arguments about ambiguity in the legal position. But we do not expect the judge to undertake a fresh assessment of the law in every case.[45]

In *Kartinyeri v Commonwealth*, two of the factors relied upon by Callinan J in his initial decision refusing to stand down were that there were no issues of fact or credibility

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39 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 100 (Gaudron and McHugh JJ). See also *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Mason J), 359–60 (Wilson J), 371 (Dawson J); *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 531–2 [72] (Gleeson CJ and Gummow J).

40 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553–554. See also *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 116 (Dixon CJ, Williams, Webb and Fullagar JJ); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 261–2 (Barwick CJ, Gibbs, Stephen and Mason JJ).

41 See, eg, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Vakauta v Kelly* (1989) 167 CLR 568; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427. See discussion in Aronson and Groves, above n 33, 643–4, 652.

42 Charles Gardner Geyh, 'Why Judicial Disqualification Matters. Again.' (2011) 30 *Review of Litigation* 671, 678.

43 Ibid 677, tracing the right to challenge to 530 AD and the *Codex Justinianus*.

44 Chris Finn, 'Extrajudicial Speech and the Prejudgment Rule: A Reply to Bartie and Gava' (2014) 34 *Adelaide Law Review* 267, 279.

45 Cf *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 564 [187] (Hayne J). This is consistent with the language employed in the *Universal Declaration on the Independence of Justice* ('*Montreal Declaration*') § 2.02: 'Judges individually shall be free, and it shall be their duty, to decide matters impartially, in accordance with their *assessment* of the fact and their *understanding* of the law … ' (emphasis added).

involved in the advice, and that the issues raised in the case were 'exclusively legal ones'.[46] A similar distinction has been drawn in the 2002 *Guide to Judicial Conduct*.[47] And in *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation*, Hayne J considered that:

> The bare fact that a judicial officer has earlier expressed an opinion on questions of law therefore seldom, if ever, warrant a conclusion of appearance of bias, no matter how important that opinion may have been to the disposition of the past case or how important it may be to the outcome of the instant case.[48]

It is true that questions of law may often be bound up with, and difficult to distinguish from, questions of fact. However, in the field of constitutional law, in which these questions have arisen at the High Court level, the delineation is often relatively straightforward. Many, indeed probably most, constitutional issues arise purely as legal questions, distinct from any question of disputed fact.[49] Constitutional questions may arise entirely in the absence of any factual controversy, such as occurred in the *Same Sex Marriage Case*,[50] where the validity of the Territory legislation was challenged by the Commonwealth on legal grounds alone, before it even came into operation. Cases are often heard as a 'special case' or 'case stated' for the consideration of the Full Court upon an agreed set of facts.

Where pre-judicial advice on constitutional validity considers *only* a question of law that subsequently arises for determination by the court, it is difficult, from the point of view of 'prejudgment', to see any distinction between such advice and constitutional interpretation undertaken by judges in previous decisions, whether in *ratio* or *obiter dicta*. Consistency in the interpretation and application of the law is fundamental to the common law system of precedent, as well as rightly being regarded as a desirable quality and as essential to our conception of the rule of law. Prior judicial rulings on points of law have not been held to give rise to a ground of disqualification.[51]

Pre-judicial advice on constitutional validity that considers *only* a question of law is also difficult to distinguish from views on the law expressed by judges in extra-curial and pre-judicial academic writings and speeches. It is not uncommon for persons appointed to judicial office to have been leading commentators in their respective fields of expertise prior to their appointment. Many judges continue to write and speak about the interpretation and development of the law following appointment to the bench.

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46 *Kartinyeri v Commonwealth* (1998) 156 ALR 300, 301 [8].

47 Council of Chief Justices of Australia, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration, 2002) 23; see also discussion in John M Williams, 'Judges' Freedom of Speech: Australia' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 153, 169.

48 (1999) 166 ALR 302, 306 [11].

49 Infrequently, the constitutional validity of legislation will turn, at least partly, on questions of fact because the constitutional validity of Commonwealth legislation may depend upon 'constitutional' or 'legislative' facts.

50 (2013) 250 CLR 441.

51 *Gascor v Ellicott* [1997] 1 VR 332, 348 (Ormiston JA); *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302, 307 [12] (Hayne J). See also *Kartinyeri v Commonwealth* (1998) 156 ALR 300, 303 [19]–[22] (Callinan J).

Susan Bartie and John Gava argue that extra-judicial writing by serving judges creates a danger that 'the judge is tied to an answer to the legal problem and holds a stake in the intellectual outcome',[52] or that through extra-judicial writing the judge 'signals' to litigants and lawyers that they wish to see a particular issue litigated.[53] They further argue that legal opinions expressed in the course of a judgment should be distinguished from opinions expressed extracurially because judicial opinions are formed with the benefit of adversarial argument from competing sides.[54]

Pre-judicial advice as to legal issues could conceivably give rise to a form of 'prejudgment' by inhibiting the judge from being persuaded by the parties of the most legally meritorious position.[55] Numerous psychological studies concerning 'confirmation bias', 'motivational cognition/reasoning' and 'cultural cognition'[56] have concluded that individuals have a subconscious tendency to process information in a manner that conforms to a pre-conceived view or belief.[57] This tendency, it has been said, 'leads to unwarranted perseverance of beliefs'.[58]

If more proof, beyond the aesthetic, were needed that judges are human, there are now empirical studies that have concluded that judges are 'influenced by the same cognitive decision making processes and, therefore, make the same systemic errors in judgment that plague the rest of us'.[59] Judges who come to the bench with pre-existing views on questions of law, including views previously committed to writing in the form of pre-judicial advice, may subconsciously process information in a way that accords with those views. There may be a subliminal partiality towards resolving a question of law in a way that is consistent with views on a legal position that they have previously reached and/or expressed. They may not impartially consider fresh arguments or re-evaluate their previous views.[60]

Confirmation bias forms part of a larger concept of 'self-serving bias', that is, the

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52 Susan Bartie and John Gava, 'Some Problems with Extrajudicial Writing' (2012) 34 *Sydney Law Review* 637, 637.

53 Ibid 638. See also Enid Campbell, 'Judges' Freedom of Speech' (2002) 76 *Australian Law Journal* 499; see also *MZWCL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 635 (20 July 2006) [47] (Finn J).

54 Bartie and Gava, above n 52, 655.

55 Joe McIntyre, *The Nature and Implications of the Judicial Function* (PhD Thesis, University of Cambridge, 2012) 145.

56 See, eg, Yale Law School's Cultural Cognition project: <http://www.culturalcognition.net>.

57 Dale W Griffin and Lee Ross, 'Subjective Construal, Social Inference and Human Misunderstanding' (1991) 24 *Advances in Experimental Social Psychology* 319, 321; David Krech and Richard S Crutchfield, *Theory and Problems of Social Psychology* (McGraw Hill, 1948) 94.

58 Emily Pronin, Thomas Gilovich and Lee Ross, 'Objectivity in the Eye of the Beholder: Divergent Perceptions of Biases in Self Versus Others' (2004) 111 *Psychology Review* 781, 296.

59 Melinda A Marbes, 'Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform' (2013) 32 *Saint Louis University Public Law Review* 235, 249, citing Chris Guthrie et al, 'Inside the Judicial Mind' (2001) 86 *Cornell Law Review* 777, 780–83.

60 McIntyre, above n 55, 166.

desire to see oneself in a positive light.[61] Applied to judges, it may be that there is a status-driven incentive for individuals to confirm their previous reasoning and conclusions, which might reinforce that they had employed objective and rational reasoning processes. Richard Posner has presented the hypothesis that judges are motivated by a desire to be a *good* judge, acting in 'conformity to the accepted norms of judging.'[62] It has been observed that lawyers may be loath to make applications for judges to disqualify because of a perception that the application is a 'slight' to the 'honesty and integrity' of the judicial officer.[63]

Interviews conducted by Alan Paterson with past and present Law Lords in Britain have revealed that judges themselves recognise that they are reluctant to change their position once they have formed a preliminary view (for example, in the pre-hearing meeting). Lord Neuberger explained that '[t]here is a slight tendency if somebody has expressed a strong view for them to feel that somehow they are going to lose face if they change their minds …'.[64] Other Law Lords described people as 'on the whole … reluctant to change their position', that '[o]nce you've expressed a provisional view the general tendency is for people to stick with that provisional view'.[65] Changing of position could occur,[66] but it was perceived of as rare. Lord Hope said 'it can be quite awkward but it does happen'.[67]

However, to accept that the formulation and expression of views in pre-judicial advice may influence a judge's decision-making, consciously or unconsciously, does not necessarily mean that it is an improper influence, or one that can, or should, be avoided. To the contrary, in the United States, the United Kingdom and Australia, it has generally been held that the prior expression of legal views by a judge will not give rise to grounds for disqualification.[68] The judicial method and substantive law are not improper influences on a judge.[69] Indeed, expert knowledge of the law and legal principle is a desirable, if not essential, attribute for all holders of judicial office.[70] The formation of views, even firm views, in relation to questions of law by such persons within their areas of expertise is to be expected. Indeed, it seems inevitable and, at least to some extent, desirable. There is considerable artificiality in a principle that would preclude the public

61 Emily Pronin, Daniel Y Lin and Lee Ross, 'The Bias Blind Spot: Perceptions of Bias in Self Versus Others' (2002) 28 *Personality and Social Psychology Bulletin* 369.

62 Richard A Posner, *How Judges Think* (Harvard University Press, 2008) 61 and ch 2 more generally.

63 Geyh, above n 42, 700.

64 Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) 75.

65 Ibid 176–7.

66 Paterson's empirical research revealed that it occurred more often than the Law Lords themselves perceived: ibid 195.

67 Ibid 177.

68 See discussion below and also that in Matthew Groves, 'Public Statements by Judges and the Bias Rule' (2014) 40(1) *Monash University Law Review* 115, 122–30.

69 T D Marshall, *Judicial Conduct and Accountability* (Carswell, 1995) 1819.

70 See also discussion in Matthew Groves, 'Empathy, Experience and the Rule Against Bias in Criminal Trials' (2012) 36 *Criminal Law Journal* 84, 100.

expression of views by judges, in the interests of maintaining an *appearance* of impartiality, when the prospect of judges privately *actually holding* such views is patently probable or inevitable. Indeed, we think that most people would expect judges to hold pre-existing views on the law, and would be surprised if a judge did not.

Some support for this view is to be found in United States case law. In *Laird v Tatum*,[71] where an application was made against Rehnquist J on the basis of expert testimony he had provided to a Senate committee, Rehnquist J said:

> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the *Constitution* and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.[72]

In *Republican Party of Minnesota v White*,[73] Scalia J explained that in the judicial context, 'impartiality' has a traditional meaning, in which it is used to denote a 'lack of bias for or against either party to the proceeding'.[74] According to this meaning, a predetermined view of a legal issue does not raise an issue of bias. A predetermined view of the law will be applied equally to all parties that appear before the judge. Scalia J then considered a second possible meaning of 'impartiality' in the judicial context, one which, he said, 'is certainly not a common usage', namely 'lack of preconception in favor of or against a particular legal view.'[75] Acceptance of this understanding of the requirement of impartiality would change the focus of impartiality from guaranteeing the equal application of the law to guaranteeing parties 'an equal chance to persuade the court on the legal points in their case.'[76] Scalia J dismissed this as an issue of improper bias, observing that 'it is virtually impossible to find a judge who does not have preconceptions about the law'.[77]

Scalia J went onto consider a third possible meaning of 'impartiality', again not common, but a potentially desirable judicial attribute. This is impartiality as, in Scalia J's terms, 'openmindedness':

> This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.[78]

The public expression of a judge's preliminary or tentatively held views on a question of law will provide transparency and thus sometimes serve to *enhance* fairness to the parties. There are obvious benefits for the standard of the law, the legal profession and

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71 409 US 824 (1972).
72 Ibid 835.
73 536 US 765 (2002).
74 Ibid 775.
75 Ibid 777.
76 Ibid.
77 Ibid.
78 Ibid 778.

the administration of justice in allowing judges who are experts in particular legal fields to express their ruminations extra-judicially.[79]

Case law in the United Kingdom suggests that extra-judicial writing will not generally give rise to apprehended bias for prejudgment but that, at the same time, a judge should be careful not to give the impression that the position held by them on a question of law is 'long-standing and deep-seated'.[80] For example, the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* explained that '[t]here is a long established tradition that the writing of books and articles or the editing of legal textbooks is not incompatible with holding judicial office and the discharge of judicial functions.'[81] However, the Court warned:

> Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicate that he has preconceived views which are so firmly held that it may not be possible for him to try a case with an open mind.[82]

In Australia, there is some precedent at the intermediate appellate level following this position.[83] It appears to reflect the desirability of 'openmindedness' in the sense employed by Scalia J.

Consistently with these authorities and principles, we consider that a fairly robust view ought generally to be taken in relation to the expression of opinions concerning questions of law by judges and those suitable for appointment to judicial office. Whether the expression of such opinions gives rise to a reasonably apprehension of bias may ultimately depend largely upon the tone and manner of expression employed.[84]

B Extent and Nature of the Advice

The extent and nature of the advice provided — that is, the centrality of the impugned provision to the advice provided and the issues considered in pre-judicial advice — will also be relevant to determining whether a judge should recuse in a particular case.

Most directly, a judge, as counsel prior to appointment, may have advised a party on

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79 See also Matthew Groves, 'Public Statements by Judges and the Bias Rule' (2014) 40 *Monash University Law Review* 115.

80 *Hoekstra v HM Advocate (No 2)* [2000] SLT 602, 612 (Lord Rodger, Lord Sutherland and Lady Cosgrove).

81 [2000] QB 451, 495 [85].

82 Ibid. Also in the United Kingdom, to maintain perceptions of impartiality on legal issues, a convention developed during Lord Bingham's time that the Law Lords would not speak during substantive parliamentary debates: Paterson, above n 64, 317.

83 *Newcastle City Council v Lindsay* [2004] NSWCA 198 (22 June 2004), [36] (Tobias JA, Giles JA and McClellan AJA agreeing), where it was indicated that mild criticism of the legal position in extra-judicial writings will not give rise to questions of impartiality, provided those views are not 'vehemently or trenchantly expressed'.

84 For example, an opinion which is expressed as a prediction of what a court, or courts in general, would be likely to do might be less likely to give rise to a reasonable apprehension of bias than an opinion expressed in terms of the judge's own view of the law. See also discussion in John M Williams, 'Judges' Freedom of Speech: Australia' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 153.

the likely result in a particular case that subsequently comes before the Court of which he or she is a member.[85] In a case of that kind, we consider that the connection between the subject matter of the advice and the proceeding itself is so direct that it would be likely to give rise to a reasonable apprehension that the judge in question might not bring an impartial mind to the resolution of the dispute. It seems to us that the strongest ground for supporting that conclusion is probably that the provision of advice to a party in a particular matter so identifies the judge with that party, in relation to that particular matter, that a reasonable apprehension of bias arises.[86]

In some cases, the judge may also have advised on the framing of the legislation subsequently under challenge in the Court. In *Kartinyeri*, Callinan J explained that his position was different from someone 'who, before coming to the bench, has been directly involved in the preparation of legislation that has to be construed by the court'.[87] One of the key factors in his initial decision not to recuse himself was that he had 'played no part at all in drafting, advocating or in any way implementing the legislation that the court has to consider'.[88]

In *Re Polites; Ex parte Hoyts Corporation Pty Ltd*, Brennan, Gaudron and McHugh JJ considered that where a judge had not merely expressed a legal view, but also advised on a course of conduct, this would give rise to a reasonable apprehension of bias:

> [I]f the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate.[89]

Certainly one would expect those judges who have held positions as Solicitor-General to a government to have been involved not merely in providing opinions on the constitutional validity of proposed legislation, but, at least occasionally, providing proactive advice on how to ensure or maximise the prospects of a finding of constitutional validity in relation to proposed policies and laws. So, for example, it is reasonable to suppose (without knowing) that Gageler J may have provided advice to the Commonwealth after the initial decision in *Williams v Commonwealth* striking down the national school chaplaincy program, on how it might go about drafting remedial legislation to support the reinstatement of the program.

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85 This occurred, for example, in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, when Dawson J did not sit because he had advised the Victorian government on the likely outcome of the proceedings when he was the State Solicitor-General, before his appointment: Sydney Tilmouth, 'Disqualification of Justices' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 214. See also *Isbester v Knox City Council* (2015) 320 ALR 432, 445–6 [62]–[65] (Gageler J).

86 So this arises as an instance of apparent bias by 'association', which is the third category of bias identified in *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).

87 *Kartinyeri v Commonwealth* (1998) 156 ALR 300, 304 [29], referring to the position of Murphy J in the preparation of legislation subsequently before the Court in *Victoria v Commonwealth* (1975) 134 CLR 81.

88 *Kartinyeri v Commonwealth* (1998) 156 ALR 300, 305 [38].

89 (1991) 173 CLR 78, 87–8.

Even if the judge had not advised on the particular case, the pre-judicial advice may have directly considered the particular constitutional question that is raised before the Court (for example, the constitutional validity of a particular legislative provision that is under challenge), and expressed a view as to either the best answer to that question or the answer likely to be given by the Court to the question. Apprehended bias might arise in this circumstance based on the perceived closeness of association between the judge and the party. That is, the fair-minded lay observer might consider the proposition at a fairly abstract level: the judge had previously acted for a party in the proceedings and provided advice on an issue that had arisen for decision in the case. Framing the issue at this level of abstraction brings with it difficulties, particularly for the judge who was either frequently or exclusively retained by a particular client which was a frequent litigant, such as a former Commonwealth or State Solicitor-General. Indeed, if this approach were taken, it would risk creating a disincentive for governments to appoint Solicitors-General to the bench.[90]

As the English cases (in relation to extra-judicial writings) discussed above demonstrate, legal views might be expressed with varying levels of commitment or confidence and the particular language and tone adopted may be critical to an assessment of whether apprehended bias based on prejudgment arises. Accordingly, we believe the resolution of the question ought to rest on a combination of whether the advice directly considered the legal question raised in the proceedings, and if it did, whether the views of the judge were expressed in such a way as to give rise to an apprehension of bias. This conclusion raises questions about whether Gageler J could or should have sat on the same-sex marriage case.[91] It is widely supposed that he did not sit (solely) because he had provided a pre-judicial joint advice to the Australian Capital Territory as to the validity of the Civil Partnerships Bill 2006 (ACT). The advice considered the extent to which that Bill, if enacted into law, might have been 'inconsistent' with the *Marriage Act 1961* (Cth) within the meaning of s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). In the course of that advice, Gageler J and his co-author expressed opinions in relation to several issues that were considered by the High Court in the same-sex marriage case. For example, the joint opinion found that the 'better view' was that the federal marriage power (s 51(xxi) of the Constitution) extended to regulating same-sex marriage, but noted that the view was expressed 'without seeking to be definitive'.[92] The opinion also stated that the 'better view' was that the Commonwealth Parliament, in the *Marriage Act*, intended to define, exhaustively, the means by which a union of individuals can be accorded the status of or equivalent to 'marriage'.[93] None of these views were expressed 'vehemently' or 'trenchantly' so as to indicate a closed mind, that is, a firm view from which Gageler J would not be moved.

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90 This may also impact on the quality of candidates willing to accept appointment as Solicitor-General. It might also impact on when governments seek the advice of their Solicitors-General, which would also be undesirable: see also text accompanying below nn 130–32.

91 *Same Sex Marriage Case* (2013) 250 CLR 441.

92 Jackson and Gageler, above n 11, [41].

93 Ibid [43].

Finally, pre-judicial advice may have only indirectly or incidentally considered the constitutional question: for example, in the course of considering the validity of another provision, the impugned provision might have been referred to by way of analogy or distinction, or it might have been noted in passing that questions might arise about the constitutional validity of a provision, without any ultimate legal opinion being expressed on that question. The limited nature of the advice in such a case suggests that pre-judicial advice of that kind ordinarily should not give rise to disqualification on the basis of apprehended bias.[94]

Is considering the extent and nature of the advice in determining the existence of apprehended bias 'asking too much' of the hypothetical lay observer? The concept of the hypothetical observer has been criticised on two interrelated grounds: that judges often attribute too much knowledge to the lay observer, and that (whether intentionally or not) the decision is simply that of the judge masquerading as the hypothetical observer.[95] The difficulties are inherent in the adoption of the fiction of the lay observer and its requirement that the judge attempt to determine the issue by reference to the standard of a hypothetical person with background, experience and knowledge vastly different from his or her own. As French CJ has observed, '[t]he interposition of the fair-minded lay person could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim.'.[96] Leaving to one side the question of whether a judge *can* think like a lay person, judges may also tend (consciously or unconsciously) to impute greater, or selective, knowledge to the fair-minded observer to reduce the likelihood of a finding of apprehended bias.[97]

We have argued that the fair-minded observer should be taken to know whether the advice directly considered the question raised in the proceedings or merely touched upon it, and the tone and manner of its expression. Putting to one side the larger question about whether the fair-minded observer is a useful legal construct, these imputations do not seem unreasonable in the sense of imputing too much detailed legal or factual knowledge to the observer. Rather than imputing detailed technical legal knowledge, they impute general, common sense knowledge about the different species of advice that might be provided by professional advisors. Moreover, they are consistent with the approach applied in respect of views expressed in previous judgments and extra-curial writings, and strike a balance between the requirement that judges appear impartial and the desirability of judges being available to hear cases within their areas of legal knowledge and expertise.

C Disclosure of Advice

In *Unions NSW*, Gageler J considered that the extent of disclosure of pre-judicial advice

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94 See also Note, 'High Court Practice as to Eligibility of Judges to Sit in a Case' (1975) 49 *Australian Law Journal* 110, 112–13.

95 Aronson and Groves, above n 33, 631. See also Simon Atrill, 'Who is the "Fair-Minded and Informed Observer"? Bias after *Magill*' (2003) 62 *Cambridge Law Journal* 279.

96 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 306 [48].

97 For further analysis, see Griffiths, above n 33, 358–61.

was relevant to the question of his disqualification. In some cases, this will not be an issue because both the existence and the content of the advice may be known, such as where a litigant publicly discloses a legal opinion provided by counsel.

Ordinarily, however, a lawyer must maintain the confidentiality of the content of legal advice. Not infrequently, as part of the general obligation to maintain the confidentiality of the client's affairs,[98] the lawyer must also maintain the confidentiality of the very fact that he or she has provided legal advice in relation to particular proceedings or a particular topic. That may be so even if it is publicly known that the lawyer is generally retained to act for a particular client, as is the case with respect to Commonwealth and State Solicitors-General: the publicly known fact of the general retainer will not necessarily identify whether advice was sought or provided on a particular topic. The situation may well be different if the lawyer concerned has appeared publicly as counsel for a party in relation to a particular matter, but even in that case the precise nature of any advice sought or provided may remain confidential. As the events in *Unions NSW* demonstrate, even if the *existence* of particular advice is made public, the lawyer may still have a duty to maintain the confidentiality of the *content* of that advice. The impact of the extent of the disclosure on disqualification requires consideration of a number of related questions, including the extent of knowledge of the fair-minded lay observer, the precise basis for disqualification in this instance, and the operation of duties of confidentiality and legal professional privilege. The remaining parts of this article consider these issues.

V KNOWLEDGE OF THE FAIR-MINDED LAY OBSERVER

Where both the existence and content of pre-judicial advice is undisclosed and therefore are known of only by the party to whom the advice was provided and the judge, grounds for disqualification may arise.[99] Whether they do turns on the question of what 'knowledge' ought to be attributed to the hypothetical 'fair-minded lay observer' posited by the apprehension of bias test. Is the 'fair-minded lay observer' assumed to know that the advice exists? That it touches upon an issue that may arise in the case? The extent to which it touches upon or deals with that issue? The terms in which the issue is addressed? Or must the fair-minded lay observer be presumed only to know such information as is in the public domain? The High Court has not had to consider this question directly. It has, however, noted the 'incongruity' associated with applying the fair-minded lay observer test to proceedings not conducted in public.[100]

If it is assumed that the fair-minded lay observer is taken to know of both the existence and the precise content of the advice, then, for the reasons we have explained

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98 Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 108.

99 If the advice was provided to a non-party, for the reasons above, we would argue that disqualification should not arise either on the basis of reasonable apprehension of bias (provided the advice was not expressed trenchantly or involved findings of fact or credit) or of unfairness (as the content of the advice is not known to either party).

100 *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425, 434 [28] (Gleeson CJ, Gaudron and Gummow JJ).

above, it ought to be a relatively unusual case in which the provision of pre-judicial advice limited to a question of law would lead the judge to recuse himself or herself.[101] Where disqualification is required, complications arise: the judge might not be able to adequately explain his or her decision without revealing to the parties and the public, at the least, the fact of the advice and, possibly, its content. Where a judge is expected to sit, even recusal without the provision of explanatory reasons is likely to give rise to a fairly obvious inference that the judge did provide advice of some kind to one of the parties. If the very fact of the provision of the advice is confidential, and if that confidentiality is to be respected, this seems unsatisfactory.

There is some authority for the proposition that the fair-minded lay observer is to be taken to be privy only to information that is, at the time of consideration, publicly available. This may include public disclosures of facts by the judge, or other facts that are in the public domain. In *Wentworth v Rogers*,[102] Handley JA considered whether he ought to disqualify himself on the basis of an affidavit of a former judge's associate in which she claimed that she had overheard private conversations in which the judge made derogatory remarks concerning the applicant. Handley JA declined to admit the affidavit and to recuse himself, on the basis that the test for apprehended bias, turning on the perception of a fair-minded lay observer, 'is to be applied to the conduct of the Judge in court or otherwise in public'.[103]

Handley JA's position was clarified by the Court of Appeal in *CUR24 v Director of Public Prosecutions (NSW)*.[104] The New South Wales Court of Appeal considered whether statements allegedly made by a sentencing judge gave rise to a reasonable apprehension of bias. The remarks were allegedly made to a solicitor at a morning tea following a swearing-in ceremony to the effect that all paedophiles 'should be put on an island and starved to death' and that 'they're all guilty.'[105] The judge denied that he had made the statements attributed to him. The Court of Appeal held that it did not have to resolve the factual dispute, as 'the objective assessment called for by [the apprehended bias test] should take account of the circumstance that there is a dispute concerning the conduct or statements relied upon.'[106] The test thus turns on appearance based on information in the public domain.[107]

If the test is applied to publicly available evidence, one would not ordinarily expect the apprehension of bias principle to be engaged where neither the existence nor the content of the advice has been publicly disclosed. In such a case, any suggested apprehension of bias would seem to depend upon speculation mounted upon speculation: that advice *might have* been provided and that such advice, if provided, *might have* been expressed in terms and/or related to particular issues such as to give rise to a reasonable apprehension of bias. The situation may arise where confidentiality

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101 Such as where the advice turned on disputed questions of fact or credit, or related to specific litigation such that its disclosure would tend too closely to associate the judge with the party in respect of that particular litigation, or where it was expressed in unusually trenchant terms.

102 [2000] NSWCA 368 (15 December 2000).

103 Ibid [9]; see also [10].

104 (2012) 83 NSWLR 385, and followed in *Fattal v The Queen* [2013] VSCA 276 (2 October 2013).

105 *CUR24 v DPP (NSW)* (2012) 83 NSWLR 385, 394 [32].

106 Ibid 396 [41].

107 Ibid 396 [41]–[42] (Meagher JA, Basten JA and Whealy JA agreeing).

attaches to the content of the pre-judicial advice but not to the fact of the judge having provided that advice, or, as it did in *Unions NSW*, where the party that received the pre-judicial advice revealed the fact of its existence but not its content.

It is suggested that apprehended bias is unlikely to arise in these situations — it would require the fair-minded observer to speculate that the advice provided may have been expressed in trenchant terms or may have involved issues of fact and credibility. In both of these examples, there is an obvious awkwardness in a principle that would require that a judge decline to recuse himself or herself on the basis that certain facts involve mere speculation when in fact the judge personally knows the precise factual situation.

VI AN ALTERNATIVE ANALYSIS: FAIRNESS AND STRATEGIC ADVANTAGE

Situations such as that which arose in *Unions NSW* might better be analysed not as cases of apprehension of *bias* but rather as giving rise to unacceptable unfairness on somewhat different grounds. Perceiving the basis for disqualification in this way may, in some cases at least, alleviate the difficulties associated with determining exactly what knowledge should be attributed to the fair-minded lay observer.

A party to litigation that holds a pre-judicial opinion from a judge is in possession of information that is neither publicly available nor known to the other party or parties in the litigation.[108] There is, therefore, an asymmetry of information between the parties.

Asymmetry of information may give rise to unfairness in a variety of ways. The party in possession of the information might, if it knows that the judge is predisposed to disagree with its position, rely upon the existence of the advice as a basis for an application that a judge recuse himself or herself.

During the hearing, the party holding pre-judicial advice may find themselves at a strategic advantage. By way of example, if a party knows the particular aspect of its submission with which the judge may be predisposed to disagree, the party might focus additional attention on convincing the judge of that particular point (or may seek to obscure the point by approaching the issue from another angle). A pre-judicial opinion might indicate that a judge is likely to approach a particular legal issue from a particular perspective: the party holding such an opinion may gain a privileged insight into what is likely to appeal to the judge's mode of thought.

These circumstances arguably give rise to a form of practical injustice between the parties, because one party is privy to material that might inform the argument they may wish to make and the other is not. In situations such as this, questions might arise about whether disclosure would be required as part of the hearing rule. However, in this case, because of the application of privilege and the judge's apparent obligation to maintain the confidentiality of the advice, disclosure would not seem possible. It is distinguishable from the exception to the general requirements of the hearing rule where

108 This distinguishes a view previously expressed in reasons for judgment or in a public extra-judicial writings.

confidentiality applies,[109] as in this case the obligations do not attach to information required in the proceedings as much as to information known about the individual judge (and their views of the legal position). Where unfairness arises because of asymmetry of information about the judge's views and confidentiality prevents disclosure of that information, disqualification appears to be the most appropriate remedy to avoid the practical injustice.[110]

The capacity of a judge to recuse himself or herself on the basis of the production of unfairness or perceived unfairness between the parties — whether or not that unfairness is characterised as arising due to a reasonable apprehension of *bias* – may be seen to arise as an incident of the court's inherent power and jurisdiction to ensure the fairness of its processes,[111] and the integrity of the institution more generally.

Where perceived or actual strategic advantage to one party is a real basis for concern, in some cases, practical injustice might be avoided, or at least acceptably reduced, by the judge expressing, at or prior to the beginning of, or at another appropriate time during, the hearing of argument, the 'gist' of his or her provisional views in relation to legal issues addressed in the advice.[112]

In providing the gist of his or her views, the judge need not necessarily disclose the fact that the issues so raised reflect those recorded in pre-judicial advice (thus maintaining the confidentiality of the content of the advice). If the judge's provisional views are as recorded in the advice, both parties now have the same information. And even if the judge's provisional views have changed since the provision of the advice, the revelation of presently held views might serve to dispel any potential unfairness as effectively as the revelation of the previously held views that find expression in the advice.

VII A DUTY TO DISCLOSE?

It is generally accepted that it is not appropriate for judges themselves to be questioned or cross-examined,[113] including, for example, about whether they had previously

109 *Kioa v West* (1985) 159 CLR 550, 629.

110 Problems of these kinds do not arise exclusively in circumstances where a pre-judicial opinion has been provided to one party and not to the other. In a practical sense, similar insight into the judge's way of thinking might arise if counsel for one party, but not the other, had shared chambers with the judge prior to appointment, or had attended a particular public speech by the judge. But the circumstance that one party holds a pre-judicial opinion while the judge is ostensibly precluded, by reason of confidentiality, from disclosing that fact, seems to raise the issue especially acutely.

111 See further *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 60–1 [41] (French CJ), citing I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 27, cited in *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725, 749–50 [30] (Lamer CJ); *Whan v McConaghy* (1984) 153 CLR 631, 642 (Brennan J); *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476 (McHugh JA); *R v Moke* [1996] 1 NZLR 263, 267.

112 Cf *A v United Kingdom* (2009) 49 EHRR 29, [220].

113 See *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 472 and Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2nd ed, AIJA, 2007) [3.5(e)].

provided legal advice on an issue in the proceeding. A related question arises as to whether a party in litigation, or the party's legal representatives, may come under a duty to disclose either the existence of advice touching upon an issue before the court or its content.[114] The impression that we gain from a perusal of the transcript in *Unions NSW* is that, having become aware of the pre-judicial advice provided by Gageler J to the Commonwealth Attorney-General, counsel for the Commonwealth in that case regarded it as his *duty* to disclose the fact that a justice had provided pre-judicial advice and that the advice touched upon the constitutional validity of the impugned legislative provisions. On the other hand, Gageler J's reasons for recusal may be understood to suggest that he did *not* consider that the Commonwealth Attorney-General had been under any obligation to reveal publicly the fact that he had received advice from a judge touching on issues before the Court and that Gageler J himself was under no such obligation.[115]

The reasons given by Gageler J also indicate that he considered that, even if the Commonwealth Attorney-General did choose to reveal (through his counsel) the *fact* that he had received the advice, he nevertheless had not waived privilege with respect to the *content* of the advice, nor was he otherwise required to disclose the content of the advice. Indeed, even after the revelation of the existence of the advice, Gageler J regarded himself as remaining under a positive obligation not to reveal the content of the advice unless the Commonwealth Attorney-General chose to waive privilege over it.

Gageler J adopted a strict approach to the obligations of confidentiality (including the principles relating to privilege) that arise in a lawyer-client relationship. A duty of disclosure of the existence of pre-judicial advice would certainly go beyond the established exceptions to the legal professional's obligation to maintain confidentiality of communications arising in the context of the lawyer-client relationship. We return to these duties below when we consider possible legal developments in this field.

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114 There may be an issue as to whether the advice is discoverable, at least its existence is discoverable, even if privilege is claimed over its content. However, as we explain above, many constitutional challenges occur in the absence of facts and the discovery process.

115 So much is consistent with what was said in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 360 [69]–[71] (Gleeson CJ, McHugh, Gummow and Hayne JJ). Counsel for the Commonwealth provided no explanation as to why there might be an obligation to reveal the existence of the advice. It might be suggested that such an obligation may be sourced in the government's model litigant obligations: see Gabrielle Appleby, 'The Government as Litigant' (2014) 37 *University of New South Wales Law Journal* 94; Camille Cameron and Michelle Taylor-Sands, '"Playing Fair": Governments as Litigants' (2007) 26 *Civil Justice Quarterly* 497. The courts have previously found that these obligations prevent the government from claiming legal professional privilege where an obligation to disclose documents arises, and to inform the court of the full circumstances of the case: *Queensland v Allen* [2012] 2 Qd R 148, 170 (Fryberg J); *VR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, 175–6 [40]–[42] (North, Logan and Robertson JJ). However, the courts have never gone so far as to require the disclosure of matters properly covered by legal professional privilege. To do so would be to undermine the clear public interest in granting confidentiality to government legal advice: see *Waterford v Commonwealth* (1987) 163 CLR 54, 62 (Mason and Wilson JJ).

VIII DIFFICULTIES WITH THE CURRENT POSITION REGARDING CONFIDENTIALITY

What we have described above reveals an unsatisfactory state of affairs where advice has been provided to a party to litigation, and both the fact and content of the advice are privileged/confidential; it is within the power of one party to the litigation to disclose the *fact* of the advice having been provided, while declining to disclose its *content*; the content of the advice, if publicly disclosed, might not be apt to produce an apprehension of bias or otherwise to produce unfairness; but the disclosure of the fact of the advice having been provided, in the absence of its content also being disclosed (or the gist of the content able to be disclosed), is apt to do so.

There is an argument that this position undermines the integrity of the judicial process. It confers on one party to litigation — the party that had received pre-judicial advice from a judge — the effective capacity to dictate that the judge recuse himself or herself from sitting in a particular case. This raises the spectre of potential abuse by parties to litigation.[116] For example, a party with a pre-judicial written advice from a judge might choose whether or not to disclose its existence, depending on that party's perception of whether the judge concerned is likely to be in favour of or against its position (a perception that may, of course, be influenced by the content of the very pre-judicial advice that is known only to that party). Moreover, a party might potentially choose to reveal the existence of the advice not at the start of proceedings (as occurred in *Unions NSW*), but after argument has been heard — including after, for example, the party had perceived during the hearing that the judge was unfavourably disposed towards the arguments advanced by that party. A position such as this, where 'for practical purposes, individual parties could influence the composition of the bench' was described by the joint judgment in *Ebner* as 'intolerable'.[117]

While we argue that this position appears unsatisfactory and open to abuse, courts in other jurisdictions have nonetheless accepted and acted on similar principles. In the Scottish High Court of Justiciary case of *Bradford v McLeod*,[118] a question arose as to

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116 For discussion of the potential dangers of strategic and over use of applications for disqualification, see Geyh, above n 42, 700; Sarah M R Cravens, 'In Pursuit of Actual Justice' (2007) 59 *Alabama Law Review* 1.

117 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348 [20]. Note also that concern has been expressed about allowing litigants to control or influence listing arrangements: *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352; *Re Finance Sector Union of Australia; Ex parte Illaton Pty Ltd* (1992) 107 ALR 581; *Vietnam Veterans' Association of Australia v Gallagher* (1994) 52 FCR 34, 41–2; *Gascor v Ellicott* [1992] 1 VR 332, 348; *Kwakye v Minister for Immigration and Multicultural Affairs* [1998] FCA 1324 (20 October 1998). We hasten to add that we do not suggest that any tactical decision informed the conduct of counsel in *Unions NSW*: indeed, as noted above, it appears that counsel may well have regarded himself as duty-bound to draw the Court's draw attention to the existence of the advice as soon as he became aware of it. Nor would a deliberate tactical deployment of information in this way appear to accord with the obligations of a model litigant. But, of course, a judicial officer might have provided pre-judicial advice to a party who is not bound to act as a model litigant.

118 [1986] SLT 244.

whether a sheriff was disqualified on the basis of a private statement that he would not grant legal aid to miners, which he made at a social function. The case concerned a number of miners who were represented by a solicitor who had been present when the sheriff had made the remarks. Lord Justice Clerk Ross explained that the resolution turned on the revelation by the solicitor of the private conversation: '[O]nce [the solicitor] had made public what the sheriff had said … the inevitable consequence was that the sheriff was disabled from dealing with any case involving a miner.'[119]

There must always be a risk that either or both the fact of having given advice or the content of the advice may be revealed at a *later* time, whether before or after the determination of the case. Revelation of advice after judgment has been delivered might potentially reveal grounds — known to the judge and to one of the parties prior to the hearing of the case — which, had they been revealed at or prior to the hearing, would have required the judge to recuse himself or herself. This also seems unsatisfactory. The tension between any possible remedy that might be sought in those circumstances[120] and the principle of finality[121] is obvious, although the High Court has accepted in the past that apprehended bias may arise after a decision has been handed down.[122] Nonetheless, the very revelation, even if it could subsequently be remedied, would tend to undermine public confidence in the independence and impartiality of the judiciary. Further, a judge who is subsequently disqualified due to the disclosure of advice during or after the hearing may have influenced the course of argument, or the views of the other judges;[123] that is, they may conceivably have 'tainted' the thought processes of the other judges.[124]

IX POSSIBLE SOLUTIONS

In the United States, the pre-judicial views of judicial nominees to the Supreme Court are often highly controversial. It is now common in that jurisdiction for Supreme Court

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119 Ibid 248.

120 A post-judgment revelation giving rise to apprehended bias was remedied by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, where the Court claimed an inherent jurisdiction to review the original decision on the basis of its inherent jurisdiction to maintain the integrity of the judicial process. It is not clear whether this precedent would be followed in Australia. In New Zealand, the Supreme Court recalled an earlier judgment after additional facts about the judge's relationship to counsel in the litigation were revealed. The Court held that because the additional facts, if disclosed before the hearing, would have led the Court to the conclusion of apparent bias, a 'special reason' existed which would justify recalling the judgment: *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122 (27 November 2009), [19] (the Court), following *Horowhenua County v Nash (No 2)* [1968] NZLR 632, 633 (Wild CJ).

121 See, eg, *D'Orta- Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; *R v Carroll* (2002) 213 CLR 635.

122 See, eg, discussion in *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 139 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 153–4 (Kirby J).

123 The influence of individual judges in multi-member courts, particularly final appellate courts, has been chronicled in the judges' own words in Paterson, above n 64, 130..

124 *IW v City of Perth* (1997) 191 CLR 1, 50–1; *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 524 (Basten JA), but cf 511–13 (Spigelman CJ).

nominees to decline to answer some questions in Senate confirmation hearings on the basis that it would be inappropriate for them to comment on issues that might arise for judicial determination.[125]

The issue of pre-judicial advice has also arisen in the United States when serving federal Solicitors-General have been appointed to the Supreme Court. This has been more common in the United States.[126] A more definite rule applies: federal law requires recusal 'where [the judge] has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.'[127] This statute represents an institutional bargain: it recognises the desirability of appointing senior government lawyers to the bench, but, to maintain public confidence that these appointees will act impartially when adjudicating cases involving the state, a wider test for disqualification is statutorily mandated.[128] This bargain is not perfect.[129] It has led to Solicitors-General adopting perverse positions to avoid disqualification from important cases after appointment.[130] In 2012, former federal Solicitor-General Kagan J of the United States Supreme Court declined to recuse herself in *National Federation of*

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125 This is informally known as the 'Ginsburg rule', after Justice Ruth Bader Ginsburg indicated in her opening statement to the Judiciary Committee that she would not respond to questions where it would provide a 'preview', 'hint' or 'forecast' of how she might cast her vote on issues before the Court. See further Denis Steven Rutkus, 'Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue' (Congressional Research Service, 23 June 2010) <https://www.fas.org/sgp/crs/misc/R41300.pdf>.

126 In the history of that Court, three justices have been appointed whilst holding the position of United States Solicitor-General, namely Stanley Forman Reed, Thurgood Marshall and Elena Kagan. William Howard Taft had previously been Solicitor-General (1890–1891) but, before his appointment as Chief Justice of the United States Supreme Court in 1921, also served as a judge of the United States Court of Appeals for the Sixth Circuit (1891-1900), Governor-General of the Philippines (1901–1904), Secretary of War (1904–1908) and President of the United States (1909–1913). Justice Robert H Jackson had previously been Solicitor-General (1938–40) but also served as Attorney-General (1940–41) prior to his appointment to the Supreme Court in 1941.

127 28 US Code §455.

128 In Australia there would be a question as to whether a statute could mandate the test for disqualification because of the protections afforded to judicial independence and impartiality by Chapter III of the *Constitution*.

129 Questions have even been raised as to whether it is constitutional for the legislature to dictate when judges can sit: see, eg, Andrey Spektor and Michael Zuckerman, 'Judicial Recusal and Expanding Notions of Due Process' (2011) 13 *Journal of Constitutional Law* 977, 1004; Louis J Virelli, 'The (Un)constitutional Supreme Court Recusal Standards' [2011] *Wisconsin Law Review* 1181.

130 See further James Sample, 'Conflict in the Court? Supreme Court Recusal from *Marbury* to the Modern Day' (2013) 26 *Georgetown Journal of Legal Ethics* 95; Sherrilyn A Ifill and Eric J Segall, 'Judicial Recusal at the Court' (2011) 160 *University of Pennsylvania Law Review Online: PENNumbra* 331; Ronald D Rotunda, 'Judicial Disqualification when a Solicitor General Moves to the Bench' (2010) *11 Engage: The Journal of the Federalist Society's Practice Groups* 94.

Independent Business v Sebelius,[131] the Court's determination of the constitutional validity of the *Patient Protection and Affordable Care Act*. The Act was passed into law during Kagan's term as Solicitor-General and shortly before she was nominated to the Supreme Court. Kagan J refused to recuse herself from the case, apparently on the basis that she had intentionally not involved herself in advising the government in relation to the Act. So, in an effort to avoid possible future recusal, the Government may have been without advice from its Solicitor-General for one of the most important and controversial pieces of legislation of Barack Obama's presidency.[132]

In Australia, we see four possible ways in which the difficulties which we have identified might conceivably be resolved.

The first is that, if confidentiality prevents the judge from disclosing the existence of pre-judicial advice, but possible future disclosure of its existence might give rise to apprehended bias or unfairness at a later stage (whether after hearing or after judgment), the judge might disqualify himself or herself at the outset so as to pre-empt any possibility of grounds for disqualification arising.

This prophylactic approach seems undesirable because it will tend to result in recusals that may ultimately turn out to be unnecessary, since no issue of unfairness may ever arise if no disclosure is made, or if full disclosure is made. Unnecessary recusals may have a significant impact, particularly at the level of apex courts. Judges are not fungible, and the unnecessary recusal of a judge may change the course of important decisions. Sometimes a judicial recusal will lead to an equally split bench and a case that holds no precedential value.[133] At the High Court level there is, arguably, a constitutional imperative for judges to sit if a reasonable apprehension of bias does not actually arise. Moreover, the very fact of the judge recusing himself or herself may tend practically to reveal what is sought to be kept confidential: that the judge provided advice to one party (and often it may be fairly obvious which party) which touches on the issues in the litigation.

The second possibility is that the judge should be permitted publicly to disclose only the *fact* of his or her having provided the advice, thus enabling all parties, in the knowledge that advice of some kind has been given to one party, to consider whether to apply for the judge to recuse himself or herself. This may be inconsistent with obligations of confidentiality assumed by the judge in his or her pre-judicial role. Further, revelation of only the fact of the existence of the advice also seems undesirable as a matter of principle because, as the course of events in *Unions NSW* demonstrates, once the existence of pre-judicial advice, but not its content, is disclosed, issues of apprehended bias or unfairness may arise and (at least if the approach taken by Gageler J is followed) disqualification may become necessary. The public interest in the judge sitting would be undermined because the judge himself or herself will have produced a perception of bias by disclosing the existence of the advice.

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131 132 SC 2566 (2012).

132 See Eric Segall, 'A Liberal's Lament on Kagan and Healthcare', *Slate* (online) 8 December 2011, <http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/obamacare_and_the_supreme_court_should_elena_kagan_recuse_herself_.html>.

133 *Tasmania v Victoria* (1935) 52 CLR 157, 173 (Rich J), 183–5 (Dixon J); *Re Wakim; Ex parte McNally* (1998), 539–49 [1] (Gleeson CJ), 548 [33] (McHugh J), 570–1 [100]–[101] (Gummow and Hayne JJ, Gaudron J agreeing).

The third possibility is that, if and when the existence of the advice is disclosed, the judge should then be free to disclose the nature and extent of the advice; that is, the judge should be free to disclose so much of its content as it is necessary to disclose in order to dispel any reasonable apprehension of bias or forensic unfairness to opposing parties (but no more). This approach treats the revelation of the existence of the advice as involving an implied waiver over the content or nature of the advice, but only to the extent necessary to dispel any unwarranted apprehension of bias.

If the advice did not directly consider the question in issue, so much could be revealed (without disclosing more about the precise content of the advice itself) and any perceptions of unfairness or apprehended bias would thus be dispelled. If the advice did consider the question but the judge has already disclosed the gist of his or her views in that advice to both sides (as we have suggested above), this could be revealed, again dispelling any perception of unfairness.

For this approach to work, it seems to us that the judge must also be obliged to disqualify himself or herself at the outset if he or she knows that the eventual revelation of the nature and content of the advice would give rise to (or would fail to dispel) a reasonable apprehension of bias. We acknowledge that this may be thought to require a modification of the general principle that the 'fair-minded lay observer' test is to be applied without regard to the esoteric knowledge of the judge, in a situation where the judge is not at liberty to reveal that knowledge (which can be distinguished from the ordinary position where the judge is able, and expected, to reveal the existence of a personal shareholding or relationship of which the parties, or one of them, may not be aware).

Of course, a difficulty with the third approach is that the privilege that attaches to communications between a legal professional and his or her client may preclude a judge from revealing the nature and extent of the pre-judicial advice. However, legal professional privilege is itself an instrumental concept and may give way to competing interests to the extent required. We discuss the interaction between the privilege and requirements of fairness below.

The fourth possibility is that, even if the existence of the advice is not already disclosed, the judge should be able to disclose both the existence of the legal advice and as much of its content as is necessary to dispel any apprehended bias or unfairness. A major advantage of the third approach over the fourth is that it is more consistent with the maintenance of legal professional privilege, as it depends upon conduct by the party holding the advice (ie, revealing the existence of the advice) which — in the circumstances of the adviser being a judge in the case and the twin imperatives to recuse if apprehended bias arises and to sit if not disqualified — can be regarded as inconsistent with the maintenance of the privilege.[134] On the other hand, a possible disadvantage of

134 An argument could be mounted that if the party in possession of advice brings proceedings, or intervenes in proceedings, this itself might be regarded as 'conduct inconsistent with the maintenance of the confidentiality which the privilege is designed to protect' and thus waives privilege in the advice, insofar as is required to dispel any apprehension of bias or perceived unfairness. Such a position might be seen as an extension of the cases where an

the third approach, when compared with the fourth, is that a judge who knows that he or she has provided pre-judicial advice may have to decide (at least provisionally), *unaided by submissions of the parties*, whether the public revelation of the content of the advice would give rise to a reasonable apprehension of bias.

Of all these approaches, we venture to suggest that the third approach may be the most preferable. It ensures that judges are not disqualified prophylactically based on speculation as to the public perception of possible facts, where the actual facts are known by the judge and one of the parties. It seeks to strike an appropriate balance between the various competing interests, including the public interest in recusal when unfairness or apprehended bias arise; the public interest in judges being available to hear cases when the objective facts, if fully known, would not give rise to a perception of unfairness or an apprehension of bias; the interests of the parties and the public in maintaining the confidentiality of legal advice insofar as this is consistent with the avoidance of unnecessary judicial disqualification; and the undesirability of one party to litigation having the capacity, through its own conduct, to affect the composition of the bench.

This approach requires an extension of the current law concerning waiver of privilege. However, it is broadly consistent with the underlying principles of the law and other developments in the area. It is also more respectful of legal professional privilege than the fourth approach. The underlying objectives of the law of confidentiality and privilege are to achieve the most orderly and efficient system of justice.[135] One way that privilege is tempered is through the doctrine of waiver due to conduct that is inconsistent with the maintenance of the confidentiality which the privilege is designed to protect. Whether conduct amounts to waiver of legal professional privilege is always a question of fact and degree.[136] Mere reference to legal advice ordinarily does not waive privilege over its content.[137] Waiver of part of a communication may require waiver of the whole if unfairness to the other side would result, although unfairness *per se* is not the touchstone for waiver.[138] In *Osland v Secretary*

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individual waives privilege by bringing proceeding against his or her legal adviser (see, eg, *Goldberg v Ng* (1995) 185 CLR 83). However, such an approach would have the potential to interfere with a party's choice as to whether to bring proceedings, or even whether to seek legal advice. It might also be possible to argue that the appointment of a former Commonwealth Solicitor-General to the bench should be regarded as effecting a waiver of privilege in advice that he or she may have provided while in that position, at least whenever issues touched upon in such advice arise for decision by the judge. We would counsel against such an approach, as it may reduce the willingness of governments to appoint serving or former Solicitors-General to the bench. See further exploration of this issue above n 90.

135 *Greenough v Gaskell* (1833) 1 Myl & K 98, 102; 39 ER 618, 620; Charles Wolfram, *Modern Legal Ethics* (West Publishers, 1986) 243; *Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 153 CLR 52.

136 *Nine Films and Television Pty Ltd v Ninox Television Ltd* Tamberlin J , quoted in *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275, 298–9 [49] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

137 *Assistant Treasurer and Minister for Competition Policy and Consumer Affairs v Cathay Pacific Airways Ltd* (2009) 179 FCR 323.

138 *Prus-Grzybowski v Everingham* (1986) 87 FLR 186, 190.

to the Department of Justice, the Court held that the purpose (or, if there is a difference, the 'evident purpose') of releasing the fact of the existence of legal advice, and in particular whether the purpose was to secure an advantage in legal proceedings, was a relevant factor in determining whether waiver has occurred.[139]

As we have seen, if a party to a proceeding chooses publicly to disclose the existence of advice (it being under no duty to do so), but not its content, a potential advantage in legal proceedings may be gained by that party because the disclosure may have the practical effect of compelling a judge to recuse himself or herself. Under our favoured approach, the revelation of the existence of the advice in this particular circumstance should be regarded as an act inconsistent with the maintenance of confidentiality over the advice and thus as waiving confidentiality and/or privilege over so much (but only so much) of the advice, or information concerning the advice, as is required to be revealed by the judge to address any concerns about unfairness from strategic advantage because of the disclosure of the existence of the advice. The third approach thus precludes a party benefitting from the revelation of the existence of the advice.

The extent of the disclosure required to address unfairness will vary from case to case depending on the circumstances. In some cases, it may be sufficient to reveal that the advice raised the issue but provided no analysis of, or conclusion on it. In other cases, the judge might have to reveal his or her full reasoning and conclusion in relation to the issue.

In the rare circumstance that a party inadvertently discloses the fact of the existence of a piece of legal advice (but not its content), a difficult question may arise as to whether such inadvertent disclosure should be held to amount to waiver of confidentiality and/or privilege: in general, inadvertent and accidental disclosures do not amount to waiver.[140] The alternatives would appear to be (1) to recognise this as an exceptional case of waiver by inadvertent disclosure, or (2) to accept that a judge in such a case may be required to recuse himself or herself, even though disclosure of further (confidential) information might have averted the need to do so.

Conduct may amount to waiver of privilege where the conduct itself was intentional, even though the party did not intend by that conduct to waive privilege.[141] It can be argued that, leaving to one side cases of inadvertent or accidental disclosure, fairness dictates that confidentiality over the content of legal advice should be taken to have been waived by the revelation of the existence of pre-judicial advice, even where it is not done for the purpose of gaining a strategic advantage. In this circumstance, the narrowness of the implied waiver would go some way to protect the interests of the party to whom the advice was given while remedying any potential claims of apprehended bias or unfairness: only so much information as is required to address concerns about unfairness or apprehended bias would be revealed by the judge. It would seem undesirable to require the opposing party to demonstrate that the disclosure of the fact of the advice was done for the purpose of gaining a strategic advantage.

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139 *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275, 298 [48] (Gleeson CJ, Gummow, Heydon and Kiefel JJ), 312 [97] (Kirby J).

140 See, eg, *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303; *Australian Competition and Consumer Commission v Cathay Pacific Airways Ltd* (2012) 207 FCR 380.

141 *Mann v Carnell* (1999) 201 CLR 1, 13 [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

X WAIVER OF APPREHENDED BIAS

There is a further consideration that may, at least in some cases, offer an alternative resolution to the problem raised by the revelation of the fact that one of the judges had provided legal advice to the Commonwealth, but not of the contents of that advice.

In *Unions NSW*, after drawing the Court's attention to the fact that the Commonwealth had received legal advice under the hand of one of the justices, counsel for the Commonwealth stated that '[t]he Commonwealth has no application to make'.[142] We take this statement to have been intended to indicate that the Attorney-General for the Commonwealth made no application for any justice to recuse himself or herself.[143] No other counsel was called upon, and none rose to make an application that any justice recuse himself or herself. There was thus no apparent objection to Gageler J sitting on the case, but also no express waiver of the objection.

In *Smits v Roach*, Gleeson CJ, Heydon and Crennan JJ explained that waiver may occur implicitly:

> It has been held in this Court, on a number of occasions, that an objection to the constitution of a court or tribunal on the ground of apprehended bias may be waived, and that, if a litigant who is aware of the circumstances constituting a ground for such objection fails to object, then waiver will result.[144]

The rationale for recognising implied waiver of apprehended bias was explained by Brennan, Deane and Gaudron JJ in *Vakauta v Kelly*, where the allegation of apprehended bias arose out of comments made by a trial judge in the course of the trial:

> By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. 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.[145]

A desirable course in a future situation like that which arose in *Unions NSW* may be for the Court to indicate which of the justices provided the pre-judicial advice (as Gageler J ultimately did when providing the reasons for his recusal) and then invite counsel for the parties and the other interveners to indicate whether any of them objected to that justice sitting. If no application for recusal were made, any apprehension of bias arising from the revelation of the fact but not the content of the advice might then, in accordance with the authorities referred to above, be taken to have been waived.

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142 Transcript of Proceedings, *Unions NSW v New South Wales* [2013] HCATrans 263 (5 November 2013), lines 48–9 (N J Williams SC).

143 This raises a further issue, as no submissions were made that there was a connection between the pre-judicial advice and the possibility that Gageler J would not be able to engage in impartial decision-making. In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, the High Court emphasised the importance of this step.

144 (2006) 227 CLR 423, 439 [43].

145 (1989) 167 CLR 568, 572, quoted in ibid.

It cannot be assumed that, had this occurred in *Unions NSW*, other parties and interveners would have objected to Gageler J's sitting. Had an objection been raised, Gageler J would then have had an opportunity to dispel any impression of bias (so far as possible consistently with obligations of confidentiality), or decide to recuse himself. The suggested course would maximise the prospect that all available judges may sit on the case.

We acknowledge that it might be contended that considerations of public perceptions in relation to the administration of justice should have a part to play in determining whether a judge should be disqualified, regardless of the attitude of the parties to the particular case.[146] To the extent that they have any force at all, considerations of that kind might be thought to weigh more heavily in cases concerning public law in general (including criminal law)[147] and constitutional law in particular, and in cases to be determined by the High Court. However, this kind of objection was rejected by the High Court in *Vakauta v Kelly*.[148] In that case, Toohey J said:

> [W]hen a party is in a position to object but takes no steps to do so, that party cannot be heard to complain later that the judge was biased. … The situation is one in which the law prevents a party to litigation from taking up two inconsistent positions; he is held to his election. While, of course, the community has an interest in knowing that cases are decided impartially, that interest is not affected adversely by a doctrine which refuses a party to litigation the opportunity to resile from a position he has taken.[149]

We are not here concerned with actual bias, and the very fact that the parties concerned (and any interveners with an interest in the case) raise no objection to a judge sitting, having been given a fair opportunity to do so, is a strong countervailing consideration that tends to reinforce public confidence in the administration of justice. As Matthew Groves has said:

> 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.[150]

Acquiescence of all parties to a case would serve to dispel any apprehension of bias that might otherwise arise as a result of the case being heard by a panel that included a judge who had provided pre-judicial advice touching on the legal issue in dispute.

XI CONCLUSION

When and why should a judge recuse himself or herself on the basis of pre-judicial advice that considered a legal question now raised in litigation before the Court of which he or she is a member? While the question has previously arisen in constitutionally important and high profile High Court cases, it remains unsatisfactorily answered, and under-analysed. It is a question that may have to be answered by the judge alone,[151]

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146 See *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358, 373 (Kirby P); *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684, 687 (Kirby P).

147 See *Vakauta v Kelly* (1989) 167 CLR 568, 577–8 (Dawson J).

148 Ibid.

149 Ibid 588; see also 572 (Brennan, Deane and Gaudron JJ), 577 (Dawson J).

150 Matthew Groves, 'Waiver of the Rule Against Bias' (2009) 35(2) *Monash University Law Review* 315, 321.

151 See Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 43 (18 February 1998) (Brennan CJ).

early in his or her judicial career and under significant time pressure. The appointment of Gageler J to the High Court in October 2012, directly from his position as Commonwealth Solicitor-General, has caused this issue to arise in the last two years with greater frequency than in the past. Given the nature of the practice of Solicitors-General in Australia, there is a reasonable likelihood of more appointments of this kind, both to the High Court and to trial courts and intermediate courts of appeal. It is time to confront the issues raised by pre-judicial advice.

In this article, we have explored the reasons for judicial disqualification that may arise in situations of pre-judicial advice. We suggest that rather than conceiving such disqualification as resting solely upon a possible apprehension of bias (as has previously been assumed), the real concern in some cases may be a more general perception of procedural unfairness between the parties because of the perceived strategic advantage which the receipt of pre-judicial advice may be seen to confer upon the party privy to the advice. By partly reframing the problem to which pre-judicial advice gives rise, we have been able to explore some possible approaches by which the law in this area might develop to avoid the need for judges to disqualify themselves merely because a party has determined to disclose the existence of the advice but not its content.