HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN: **QYFM**

Appellant

AND:

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES PRESENTED BY THE APPEAL

2. **Ground 2** of the appeal raises three issues. ***First***, was Bromwich J disqualified from sitting as a member of the Full Court of the Federal Court of Australia on the basis of his previous role as Commonwealth Director of Public Prosecutions (**CDPP**) in criminal proceedings involving the Appellant? The First Respondent (the **Minister**) contends that the answer is "no". Neither Bromwich J's formal statutory responsibility for "carry[ing] on"[1] the prosecution of the Appellant, nor his appearance seven years previously to oppose an appeal by the Appellant against conviction, might cause a fair-minded lay observer reasonably to apprehend that his Honour might not bring an impartial mind to the determination of the Full Court appeal. (See [26]-[39] below)

3. ***Secondly***, is Bromwich J's recollection of the conviction appeal relevant to whether he was disqualified from sitting by reason of apprehended bias? The Minister submits that Bromwich J's statements concerning his recollection of the conviction appeal is relevant, as something the hypothetical observer may consider. (See [40]-[42] below)

4. ***Thirdly***, if Bromwich J was disqualified from sitting by reason of apprehended bias, should the judgment of the Full Court be set aside? This Court's decisions in the context of administrative and domestic tribunals, and international case law, support the view that if one judge of a unanimous three-member court is disqualified by reason of apprehended bias, the decision of the whole court is affected. (See [43] below)

5. **Ground 1** may not need to be decided. If it is decided, the Minister contends that Bromwich J was entitled (particularly in the absence of any submission by the Appellant below that a different procedure should be followed[2]) to follow the long-standing practice in Australia that the judge in respect of whom actual or apprehended bias is alleged determines whether they are disqualified from sitting, including when sitting on a multi-member court. (See [46]-[54] below)

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

6. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

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1 *Director of Public Prosecutions Act 1983* (Cth) (**DPP Act**), s 6(1)(b).
2 See **Appellant's Book of Further Materials** (**ABFM**) **49 line 25**.

PART IV MATERIAL FACTS IN CONTENTION

7. Subject to the matters identified in [8]-[14] below, the Minister agrees with the summary of the material facts set out by the Appellant (**AS [6]-[18]**).

8. As to **AS [6]**, the Appellant's visa was granted on 5 July 2011 (not December 2011) (**ABFM 39; Core Appeal Book (CAB) 112 [34]**; cf **CAB 106 [1]**).

9. As to **AS [7]**, footnote 4 does not support the fact asserted. The true position is that the material before the Full Court did not disclose the date on which Bromwich J was appointed as CDPP. The Minister accepts that his Honour must have known that date (which was 17 December 2012) (the **appointment date**). On that basis, the Minister does not oppose the Court proceeding on the basis that the appointment date was part of the evidential foundation upon which the apprehended bias application was determined. If that is accepted, that would provide a factual foundation for the Appellant's argument that a reasonable apprehension of bias arose from the CDPP's formal responsibility for "carry[ing] on" prosecutions (the actual prosecution having been carried on through counsel[3]). If, however, in the absence of any overt reference to the appointment date in the Federal Court, this Court does not consider the appointment date to have formed part of the evidence below, then it cannot be considered in this appeal (notwithstanding the Minister's concession as to the date, for that concession would itself constitute fresh evidence that is not admissible in an appeal under s 73(ii) of the Constitution).[4] In that event, the Appellant's argument must be confined to the alleged significance of Bromwich J's appearance as counsel in the Appellant's appeal against conviction.

10. **AS [8]** implies that Bromwich J was the CDPP at the date that the indictment against the Appellant was filed (although fn 5 acknowledges that the date of the indictment was not disclosed in the material before the Full Court). There being no evidence of the date of the indictment, or as to who signed it, those matters cannot be raised in this appeal. Nor can any inference be drawn as to those matters, particularly in the absence of evidence as to whether or when the Appellant was committed for trial.[5] In those circumstances, the Appellant should not be permitted to argue that a reasonable apprehension of bias arose because Bromwich J was responsible for the decision to prosecute him.

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3 DPP Act, ss 15(1)(a)(i) and 15(1)(e); Reasons of sentencing judge, **ABFM 5 [5]**, stating that counsel appeared on behalf of the prosecution at the trial.

4 *Mickelberg v The Queen* (1989) 167 CLR 259 at 271-272 (Mason CJ, Deane J agreeing at 289-290), 274 (Brennan J); cf 300-301 (Toohey and Gaudron JJ).

5 There being no evidence as to which option in s 5 of the *Criminal Procedure Act 2009* (Vic) was relevant.

11. In relation to **AS [9]**, the written opening was an amended opening (**ABFM 5 [3]**), implying the existence of an earlier written opening. The last line should refer to the Minister's being satisfied that "cancellation" (not "refusal") was in the national interest.

12. As to **AS [10]**, the appeal was dismissed by the Victorian Court of Appeal on 21 November 2014 (not 12 November 2014) (**ABFM 16**).

13. As to **AS [11]**, the requirement to cancel a visa under s 501(3A) also relevantly depended on the fact that the person was serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth.

14. As to **AS [13]**, the notification letter implies that its author was not the delegate who made the cancellation decision (**ABFM 39**). Further, the non-revocation decision was made on 1 February 2019 (not 4 February 2019) (**CAB 106 [5]**).

PART V ARGUMENT

A. GROUND 2

15. It is convenient to deal with Ground 2 first, which alleges apprehended bias in the Full Court below. That is consistent with the principle that an appeal court should deal with a ground alleging apprehended bias in the court below before all others.[6]

16. By Ground 2, the Appellant alleges that the Full Court erred in hearing the appeal with Bromwich J as a member because a fair-minded lay observer might reasonably have apprehended that Bromwich J might not bring an impartial mind to the resolution of the question the Full Court was required to decide (**CAB 181**). The essence of the Appellant's allegation is that Bromwich J was disqualified from sitting because his previous role as CDPP in the Appellant's criminal proceedings – particularly (a) "carry[ing] on"[7] through counsel the prosecution of the Appellant; and (b) appearing in person in the Appellant's appeal against conviction – was incompatible with his hearing and determining the Full Court appeal (**AS [33], [51]**).

17. To the extent that the Appellant urges the Court to infer that Bromwich J "instituted" the prosecution against him (**AS [8]**), there is no factual foundation for such an inference (see [10] above). There is similarly no basis to infer that Bromwich J had any actual (as distinct from titular or formal) role in the Appellant's criminal prosecution (as distinct

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6 See ***Concrete*** *Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [117] (Kirby and Crennan JJ, Gummow A-CJ agreeing at [3]); ***Charisteas*** *v Charisteas* (2021) 95 ALJR 824 at [10] (the Court).

7 DPP Act, s 6(1)(b).

from in his appeal following his conviction before a jury) (see [25.2] below). As the principles of apprehended bias are essentially functional in nature,[8] distinguishing the actual from the formal is important.[9]

(a) Apprehended bias principles

18. The principles that apply to allegations of apprehended bias are well established.[10] A judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".[11] That test, which is an aspect of wider principles of natural justice,[12] gives effect to the requirement "that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal".[13]

19. The application of the apprehended bias test involves two steps.[14] First, "it requires the identification of what it is said might lead a judge … to decide a case other than on its legal and factual merits". Secondly, "[t]here must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits."[15] Once those steps are taken, "the reasonableness of the asserted apprehension of bias can then ultimately be assessed".[16]

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8 ***Ebner*** *v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [32]-[34] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

9 In the United States it has been suggested that "there is no impropriety where the judge's role as prosecutor has been largely formal, as in the case of Attorneys General, who have only theoretical responsibility for minor cases in their departments", such that it would be permissible for a judge to hear an appeal from a prosecution they were formally responsible for commencing: see Frank, "Disqualification of Judges" (1947) 56(4) *Yale Law Journal* 605 at 624. It seems that United States courts have adopted differing approaches to cases raising the question whether a person who had a formal role in a prosecution can sit as a judge in a subsequent appeal concerning the same prosecution, but they have fairly consistently held that the fact that a judge was involved as a prosecutor in an unconnected previous prosecution does not warrant disqualification: see Zitter, "Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case" (2001) 85 *American Law Reports* 5th 471 at § 3[a] - § 4[b], § 7[a], § 14 and the cases cited. In ***Wewaykum*** *Indian Band v Canada* [2003] 2 SCR 259 at [84], the Canadian Supreme Court said that "a reasonable apprehension of bias could not rest simply on Binnie J's years of service in the Department of Justice", noting that "[i]n his capacity as Associate Deputy Minister, Binnie had responsibility for thousands of files at the relevant time".

10 *Charisteas* (2021) 95 ALJR 824 at [11] (the Court).

11 *Ebner* (2000) 205 CLR 337 at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

12 ***Isbester*** *v Knox City Council* (2015) 255 CLR 135 at [23] (Kiefel, Bell, Keane and Nettle JJ).

13 *Charisteas* (2021) 95 ALJR 824 at [11] (the Court).

14 *Ebner* (2000) 205 CLR 337 at [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Charisteas* (2021) 95 ALJR 824 at [11] (the Court).

15 *Ebner* (2000) 205 CLR 337 at [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

16 *Charisteas* (2021) 95 ALJR 824 at [11] (the Court). See also *Isbester* (2015) 255 CLR 135 at [59] (Gageler J), describing consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way as a third step.

20. "[T]he duty of the judge to disqualify [themselves] for proper reasons is matched by an equally significant duty to hear any case in which there is no proper reason to disqualify [themselves]".[17] As recognised in *Ebner*,[18] it would be intolerable "if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case". For that reason, a conclusion of apprehended bias must be firmly established;[19] it is not reached lightly.[20] It is not sufficient that the fair-minded lay observer "has a vague sense of unease or disquiet".[21] That said, if there is real doubt, the prudent course may be for the judge to disqualify themselves, to avoid the expense and delay if an appeal court takes a different view.[22]

10 21. The plurality in *Ebner*[23] endorsed Deane J's identification in *Webb v The Queen*[24] of four distinct, though overlapping (and possibly not comprehensive), categories of case involving disqualification by reason of apprehended bias, being: (1) "disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise gives rise to a reasonable apprehension of prejudice, partiality or prejudgment"; (2) "disqualification by conduct", which "consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias"; (3) "disqualification by association", which "consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise
20 involved in, the proceedings"; and (4) "disqualification by extraneous information", capturing "cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias". While the test for apprehended bias is the same for each category, the context in which the test falls to be applied, and the different sets of circumstances that may arise within the different categories, will affect the application of the test.[25]

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17 *Western Australia v Watson* [1990] WAR 248 at 264 (the Court). See also ***Livesey*** *v New South Wales Bar Association* (1983) 151 CLR 288 at 294 (Mason, Murphy, Brennan, Deane and Dawson JJ); *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 (Mason J).

18 (2000) 205 CLR 337 at [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

19 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553 (the Court).

20 ***CNY17*** *v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [56] (Nettle and Gordon JJ).

21 *Minister for Immigration and Multicultural Affairs v* ***Jia Legeng*** (2001) 205 CLR 507 at [135] (Kirby J).

22 *Ebner* (2000) 205 CLR 337 at [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

23 (2000) 205 CLR 337 at [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

24 (1994) 181 CLR 41 at 74 (emphases added).

25 See ***British American Tobacco*** *Australia Services Ltd v Laurie* (2011) 242 CLR 283 at [39] (French CJ); ***GetSwift*** *Ltd v Webb* (2021) 283 FCR 328 at [37] (the Court).

(b) The hypothetical observer

22. The fair-minded lay observer (the **hypothetical observer**) is a "reasonable member of the public" who "is neither complacent nor unduly sensitive or suspicious".[26] They have "a broad knowledge of the material objective facts",[27] including facts regarding "the nature of the decision, the circumstances which led to the decision and the context in which it was made".[28]

23. As the hypothetical observer is a legal construct used to identify what may appear to members of the public to be departures from standards of impartiality and independence which are essential to maintenance of public confidence in the judicial system,[29] they are not to be assumed to have a "detailed" knowledge of the law,[30] nor awareness of "all" relevant aspects of court practice and procedure.[31] Nonetheless, the hypothetical observer is "neither … wholly uninformed and uninstructed about the law in general or the issue to be decided".[32] Rather, they are "properly informed as to the nature of the proceedings or process"[33] and, where the statutory context in which the decision is made is complex, they "at least must have knowledge of the key elements of that scheme".[34]

24. The hypothetical lay-observer also knows something of the roles of the participants in the judicial process. This Court has explained that such an observer would recognise that a judge is a professional decision-maker "whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial".[35] Further, "the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice".[36] The hypothetical lay observer is likewise aware

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26 ***Johnson*** *v Johnson* (2000) 201 CLR 488 at [53] (Kirby J), endorsed in *CNY17* (2019) 268 CLR 76 at [19] (Kiefel CJ and Gageler J).

27 *Webb v The Queen* (1994) 181 CLR 41 at 73 (Deane J), endorsed in *CNY17* (2019) 268 CLR 76 at [58] (Nettle and Gordon JJ).

28 *CNY17* (2019) 268 CLR 76 at [58] (Nettle and Gordon JJ), citing *Isbester* (2015) 255 CLR 135 at [23] (Kiefel, Bell, Keane and Nettle JJ); see also ***Laws*** *v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87 (Mason CJ and Brennan J).

29 *Charisteas* (2021) 95 ALJR 824 at [21] (the Court).

30 *Johnson* (2000) 201 CLR 488 at [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

31 *British American Tobacco* (2011) 242 CLR 283 at [33] (French CJ).

32 *Johnson* (2000) 201 CLR 488 at [53] (Kirby J).

33 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [68] (McHugh J); see also *Isbester* (2015) 255 CLR 135 at [23] (Kiefel CJ and Gageler J).

34 *CNY17* (2019) 268 CLR 76 at [59] (Nettle and Gordon JJ).

35 *Johnson* (2000) 201 CLR 488 at [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), quoting *Vakuata v Kelly* (1988) 13 NSWLR 502 at 527 (McHugh JA), adopted in *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585 (Toohey J). See also *British American Tobacco* (2011) 242 CLR 283 at [140], [144] (Heydon, Kiefel and Bell JJ); *CNY17* (2019) 268 CLR 76 at [27]-[28] (Kiefel CJ and Gageler J), [136] (Edelman J).

36 *Johnson* (2000) 201 CLR 488 at [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Charisteas* (2021) 95 ALJR 824 at [12] (the Court).

that a barrister, in fulfilment of their duties to their client, "may urge a particular interpretation of the evidence or argue for a particular conclusion of law", but, in doing so, they should not be taken to have expressed any personal view of the case.[37] That is all the more true of prosecution counsel, who "appear[] not just as counsel but as a 'minister of justice'".[38]

25. Applying that approach here, the hypothetical observer should be taken to be aware of the following matters.

25.1. By reason of holding the office of CDPP, Bromwich J's functions included "carry[ing] on"[39] prosecutions for indictable offences against the laws of the Commonwealth, although (knowing of the CDPP's ability to be represented by a variety of persons,[40] and the existence of an associated office with staff[41]) that would not mean that he was personally engaged in, or even aware of, each of those prosecutions.

25.2. In 2013, counsel acted for the CDPP in the prosecution of the Appellant for the charge of importing a marketable quantity of a border controlled drug, namely, cocaine, into Australia contrary to s 307.2(1) of the *Criminal Code* (Cth) (**ABFM 5 [1], [5]; CAB 138 [4]**).

25.3. On 27 October 2013, a jury found the Appellant guilty (**ABFM 5 [1]**).

25.4. On 12 August 2014, Bromwich J personally appeared in the Appellant's appeal against his conviction on a point of legal principle of general importance (**ABFM 16; CAB 158-159 [61(1)]**). That reflected his general practice as CDPP of appearing in defence appeals only when they raised points of principle (**CAB 156 [54], 158 [61(1)]**). His appearance in the appeal involved contending that particular evidence was not inadmissible, and so was properly before the jury.

25.5. On 8 November 2017, as a consequence of the Appellant's conviction and sentence of imprisonment, and the subsequent enactment of s 501(3A) of the *Migration Act*

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37 *R v Garrett* (1988) 50 SASR 392 at 404 (von Doussa J); see also *R v Pinkstone* (2001) 125 A Crim R 44 at [72] (Roberts-Smith J). See also *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW), r 44.

38 *HT v The Queen* (2019) 269 CLR 403 at [59] (Nettle and Edelman JJ). As to the hypothetical observer's awareness of the special duties of prosecution counsel see, eg, ***Eastman*** *v Chief Executive Officer of the Department of Justice and Community Safety (No 2)* [2010] ACTSC 13 at [64] (Refshauge J).

39 DPP Act, s 6(1)(b).

40 DPP Act, s 15.

41 DPP Act, s 5.

1958 (Cth),[42] the Appellant's visa was cancelled by a delegate of the Minister (a member of the Executive Government) (**CAB 138 [5]**).

25.6. That visa cancellation decision set in motion the following sequence of events.

(a). The Appellant made representations seeking revocation of the cancellation decision (**CAB 13 [19], 106 [4]**). A delegate of the Minister decided, pursuant to s 501CA(4) of the *Migration Act*, not to revoke the cancellation decision (**CAB 8 [1]**).

(b). The Appellant sought merits review of the non-revocation decision in the Administrative Appeals Tribunal (the **Tribunal**) (**CAB 8 [1]**). In his evidence to the Tribunal, the Appellant accepted that he had committed the offence of which he was convicted (**CAB 31 [68]-[69], 94 [202]**). He did not say anything about the circumstances in which he had been questioned at the airport on his arrival in Australia (that being the factual foundation for the legal question concerning the admissibility of evidence that was raised in his criminal appeal). As such, his revocation application did not raise any factual question concerning his conviction or appeal. Instead, it focused on why he should be permitted to remain in Australia despite his past offending (addressing matters such as his claimed fear of harm in Burkina Faso (**CAB 39-40 [95]-[98]**), and claims concerning his family relations (**CAB 32-35 [75]-[81], 58 [124]**) and employment prospects (**CAB 60-61 [126(b)]**)). Those claims were examined in detail by the Tribunal (whose written reasons run to 93 pages). On 9 July 2020, the Tribunal affirmed the delegate's decision (**CAB 96 [211]-[212]**).[43]

(c). The Appellant applied for judicial review of the Tribunal's decision (**CAB 98-102, 107 [15]**). On 18 December 2020, a single judge of the Federal Court (Kerr J) dismissed that application (**CAB 119**).

(d). The Appellant appealed to the Full Court of the Federal Court from the decision of the single judge (**CAB 121-134**). That appeal concerned whether Kerr J had erred in holding that the Tribunal had not made a jurisdictional error in upholding the non-revocation decision. The appeal did not raise any

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42 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), s 2 and Sch 1, item 8.

43 An earlier decision of the Tribunal made on 16 April 2019 was set aside and the matter remitted back to the Tribunal to determine according to law (**CAB 106 [10]**).

issue concerning the circumstances of the Appellant's conviction, or his questioning at the airport, and therefore did not overlap with the issues raised in his criminal appeal (or indeed with the issues raised in the prosecution more broadly, the Appellant having admitted his offending before the Tribunal).

(c) Bromwich J's prior role as CDPP did not give rise to apprehended bias

(i) Allegations of bias based on a prior role in proceedings involving a litigant may fall in any (or multiple) of the categories of apprehended bias

26. Where there is an allegation that a judge is disqualified from sitting in a case by reason of the judge's role in earlier proceedings involving one of the litigants (**cf AS [33]**), the allegation could be characterised as falling within any (or potentially more than one) of the categories of apprehended bias identified by Deane J in *Webb v The Queen*[44] (discussed at [21] above) depending on how the allegation is framed and the circumstances of the case. By way of example:

26.1. *Isbester*[45] concerned an allegation of bias regarding a council officer involved in a criminal prosecution of the owner of a dog in respect of a dog attack, who was then a member of a panel that decided the dog should be destroyed (as a result of the same incident that led to the prosecution). The plurality approached the case by considering whether "it might reasonably be apprehended that a person [in the position of the council officer] would have an interest in the decision which could affect her proper decision-making".[46]

26.2. In *Setka v Gregor*,[47] which involved an allegation of apprehended bias on the ground that Tracey J had examined Mr Setka before a Royal Commission as Senior Counsel Assisting that Commission, the alleged apprehension of bias was considered by reference to whether "by reason of past conduct, [the judge] might prejudge issues in controversy".

26.3. In *R v Pinkstone*,[48] Roberts-Smith J described that case, which involved an allegation of bias on the basis that the trial judge had previously acted for a co-accused in a sentence appeal in another matter, as "one of association".

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44 (1994) 181 CLR 41 at 74.
45 (2015) 255 CLR 135.
46 *Isbester* (2015) 255 CLR 135 at [33] (Kiefel, Bell, Keane and Nettle JJ) (emphasis added).
47 [2011] FCAFC 64 at [9] (emphasis added).
48 (2001) 125 A Crim R 44 at [71] (emphasis added). See also Tarrant, *Disqualification for Bias* (2012) at 151-152.

26.4. *Police v Pereira*[49] involved an allegation of apprehended bias on the basis that a magistrate well acquainted with the past criminal proclivities of the accused (that is, extraneous information) had predetermined issues under consideration.

27. That the proper categorisation of a case will depend on the particular circumstances in issue reflects that apprehended bias claims are "acutely context sensitive".[50]

(ii) A person cannot act as prosecutor and judge in same proceeding or cause

28. A person plainly cannot act as both prosecutor (or accuser) and judge within the same proceeding or cause.[51] Indeed, the principle that no person shall be a "judge in [their] own cause"[52] has been recognised for hundreds of years.[53]

10 29. In *Isbester*, the plurality observed that, although it is not a category of automatic disqualification, it is "generally expected" that a person who brings charges (whether as a prosecutor or other accuser) may have "an interest which would conflict with the objectivity required of a person deciding the charges and any consequential matters" such that there is an incompatibility of roles.[54] Their Honours described the relevant "personal interest" of the prosecutor as "a view which they may have of the matter, and which is in that sense personal to them", which may be "the vindication of their opinion that an offence has occurred or that a particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor's view of guilt or punishment".[55] To similar effect, Gageler J observed:[56]

20 > [r]arely could a fair-minded observer not think it appropriate to say of a person: '[i]f he is an accuser he must not be a judge'. That is because a person who has been the adversary of another person in the same or related proceedings can ordinarily be expected to have developed in that role a frame of mind which is incompatible with the exercise of that degree of neutrality required dispassionately to weigh legal, factual and policy considerations relevant to the making of a decision which has the potential adversely to affect interests of that other person.

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49 [1977] 1 NZLR 547 at 557-558.

50 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022) at [10.40].

51 See, eg, *Ebner* (2000) 205 CLR 337 at [61] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Frome United Breweries Co Ltd v Bath Justices* [1926] AC 586 at 617-618 (Lord Carson); *R v Burton; Ex parte Young* [1897] 2 QB 468 at 472 (Lawrance J); ***Australian Workers' Union*** *v Bowen (No 2)* (1948) 77 CLR 601 at 616 (Latham CJ).

52 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte* ***Pinochet*** *Ugarte [No 2]* [2000] 1 AC 119 at 133 (Lord Browne-Wilkinson), 137 (Lord Goff), 140 (Lord Hope). See also Tarrant, *Disqualification for Bias* (2012) at 19-20 and the cases cited.

53 See, eg, *City of London v Wood* (1701) 12 Mod 669 at 687 [88 ER 1592 at 1602] (Holt CJ). See also *Dr Bonham's Case* (1610) 8 Co Rep 113b at 118a, 118b [77 ER 646 at 652, 654].

54 (2015) 255 CLR 135 at [34] (emphasis added); see also at [49] (Kiefel, Bell, Keane and Nettle JJ).

55 *Isbester* (2015) 255 CLR 135 at [46] (Kiefel, Bell, Keane and Nettle JJ).

56 *Isbester* (2015) 255 CLR 135 at [63] (footnote omitted; emphases added).

30. Those observations highlight that the reasonable apprehension of bias that was held to exist in *Isbester* was a consequence of inferences that arose from the direct personal involvement of the accuser in proceedings that were closely related to the subsequent process that was impugned on grounds of apprehended bias. Specifically, in *Isbester* the council officer was personally involved in both: (a) deciding to lay charges, and then obtaining the criminal conviction of the appellant in the Magistrates' Court for an offence under s 29(4) of the *Domestic Animals Act 1994* (Vic) in connection with her dog having attacked a person; and (b) as a member of the relevant panel that made a recommendation that the appellant's dog be destroyed pursuant to s 84P(e) of the *Domestic Animals Act* due to its involvement in the same attack that was the subject of the criminal conviction. In those factual circumstances, the plurality held that it was "not realistic to view [the officer's] interest in the matter as coming to an end when the proceedings in the Magistrates' Court were completed".[57] But that conclusion was reached in circumstances where the two proceedings were closely related: they concerned the same dog attack; the destruction of the dog could have been ordered in the original prosecution;[58] there was substantial overlap in the evidence that could be expected to be relevant to both matters;[59] and the officer personally was the "moving force"[60] not just in the original prosecution, but also in the subsequent proceedings for the dog's destruction (cf **AS [31]**).

31. By contrast, for the following reasons, the Full Federal Court appeal and the Appellant's criminal proceedings were relevantly different "causes".

32. First, the Full Federal Court appeal did not require the making of any decision about how the Appellant should be treated on the merits. It was an appeal against Kerr J's judgment dismissing an application for judicial review of a decision made by a member of the Executive Government not to revoke the cancellation of the Appellant's visa. The question for determination by the Full Court was not whether the Minister's delegate or the Tribunal were correct in deciding not to revoke the visa cancellation (which was a matter "for the repository alone"[61]), but rather whether Kerr J had erred in finding that no jurisdictional error attended the Tribunal's decision. The hypothetical observer would understand that Bromwich J was not concerned with the "merits" of the non-revocation

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57 *Isbester* (2015) 255 CLR 135 at [41]; see also at [42] (Kiefel, Bell, Keane and Nettle JJ).
58 *Isbester* (2015) 255 CLR 135 at [5] (Kiefel, Bell, Keane and Nettle JJ).
59 *Isbester* (2015) 225 CLR 135 at [41] (Kiefel, Bell, Keane and Nettle JJ).
60 *Isbester* (2015) 255 CLR 135 at [43] (Kiefel, Bell, Keane and Nettle JJ).
61 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 (Brennan J).

decision, unlike the officer in *Isbester* (who participated in deciding whether the dog should be destroyed).

33. Secondly, the appeal before the Full Court was not "consequential"[62] or "related"[63] to the criminal proceedings concerning the Appellant. Not only were the proceedings separated by a period of seven years, but the evidence in the two proceedings was substantially different, and the decisions were made under different Acts. Nor was visa cancellation a sentencing option in the criminal proceedings, meaning *a fortiori* that it did not arise on the Appellant's appeal against conviction.[64] Indeed, the provisions of the *Migration Act* concerning visa cancellation and revocation in issue in the Federal Court appeal did not even exist at the time Bromwich J appeared in that appeal.

34. Thirdly, the issues raised by the Appellant's appeal against conviction did not overlap with those raised in the Federal Court appeal.[65] The revocation application, and hence the application for judicial review of the decision to affirm the delegate's refusal of that application, did not involve any dispute about whether the Appellant had committed the offence of which he was convicted (which he admitted before the Tribunal) (**CAB 31 [68]-[69]**). Instead, it raised other matters, such as the significance of Australia's non-refoulement obligations (**CAB 73-85 [151]-[175]**) and the best interests of the Appellant's minor children (**CAB 64-69 [132]-[143]**) (see further [25.6(b)] above).

35. The above considerations suggest that, even if Bromwich J had been personally involved in the prosecution of the Appellant, that may not have precluded his participation in determining the Full Court appeal. It is not, however, necessary to decide that point, because there is no factual basis to infer that Bromwich J had any personal involvement in, or even awareness of, any aspect of the Appellant's prosecution (as distinct from the later conviction appeal), until after the matter of the Appellant's guilt had been settled by a jury (**ABFM 5 [1]**). There is therefore no evidence from which it could reasonably be inferred that Bromwich J ever had any "opinion" or "frame of mind" concerning the guilt of the appellant that might have been "incompatible with the exercise of that degree of neutrality required dispassionately to weigh legal [and] factual … considerations relevant to the making of" a decision on an appeal concerning the validity of a decision not to revoke the cancellation of the Appellant's visa.[66] To the extent that the Appellant's

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62 Cf *Isbester* (2015) 255 CLR 135 at [34] (Kiefel, Bell, Keane and Nettle JJ).
63 Cf *Isbester* (2015) 255 CLR 135 at [63] (Gageler J).
64 Compare *Isbester* (2015) 255 CLR 135 at [42]; see also [5] (Kiefel, Bell, Keane and Nettle JJ).
65 Compare *Isbester* (2015) 225 CLR 135 at [41] (Kiefel, Bell, Keane and Nettle JJ).
66 Cf *Isbester* (2015) 255 CLR 135 at [63]; see also at [68] (Gageler J).

submissions suggest otherwise,[67] they lack any factual foundation, and must therefore be rejected.

(iii) That a judge previously acted against a party in an unrelated proceeding or cause is not necessarily grounds for disqualification

36. Decisions in Australia and overseas confirm that the fact that a judge has previously had a role (including a prosecutorial role[68]) in an unrelated proceeding or cause against a party to a proceeding before the judge is not necessarily grounds for disqualification.[69] Indeed, so much is implicit in the formulations in *Isbester* that limit the principle stated in that case to a person who has a role in prosecuting "the same or related proceedings" or "consequential" proceedings.[70] As Professor Allars put it, "[t]here is no rule that a judge who has previously appeared as counsel against a party who is now a litigant, or in peripheral litigation, should disqualify [themselves] merely on that account".[71]

37. Intermediate appellate court authority strongly supports the view that Bromwich J's appearance as counsel defending an appeal against conviction would not cause a hypothetical observer to conclude that there was any risk to his impartiality in deciding an appeal some seven years later against an unsuccessful application for judicial review of a decision concerning the Appellant's migration status.[72]

38. Most relevantly, in *R v Garrett*[73] the trial judge had previously appeared as Solicitor-General to defend an appeal against conviction (and a subsequent application for special leave) brought by a person who was subsequently tried in his court. The appeal

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67 By, for example, describing Bromwich J as "not merely [being] involved in the prosecution, but [also] the DPP" (**AS [51]**) and stating that an object of having a DPP is to "ensure independence in the vital task of making prosecutions and exercising prosecutorial discretions" (**AS [55]**).

68 The United States Supreme Court has not "required recusal as a matter of course when a judge has had prior involvement with a defendant in [their] role as a prosecutor": see *Isom v Arkansas* (2019) 140 S Ct 342 at 343 (Sotomayor J). The same approach has been taken in intermediate appellate courts in Australia.

69 *R v Garrett* (1988) 50 SASR 392 at 400 (King CJ); ***McCreed*** *v The Queen* (2003) 27 WAR 554 at [16] (Steytler J); Tarrant, *Disqualification for Bias* (2012) at 145-146; Zitter, "Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case" (2001) 85 *American Law Reports* 5th 471 at § 7[a] and the cases cited; *R v Goodpipe* (2018) SKQB 189 at [12]-[16] (Kalmakoff J) and the cases cited; *R v Baldovi* (2016) MBQB 220 at [69]-[94], [96]-[97], [114] (Joyal CJ).

70 (2015) 255 CLR 135 at [34] (Kiefel, Bell, Keane and Nettle JJ), [63] (Gageler J).

71 Allars, "Procedural Fairness: Disqualification Required by the Bias Rule" (1999) 4 *The Judicial Review* 269 at 289. See also *Baron v Tasmania* (2009) 19 Tas R 216 at [20] (Evans J, Crawford CJ agreeing at [1]); *Amos v Wiltshire* [2016] QCA 70 at [11], [15]-[16] (Gotterson JA); *Precision Fabrication Pty Ltd v Roadcon Pty Ltd* (1991) 104 FLR 260 at 264-265 (Mildren J); *Wintle v Stevedoring Industry Finance Committee* [2002] VSC 39 at [17], [19]-[26] (Ashley J).

72 See, eg, *McCreed* (2003) 27 WAR 554 at [2] (Malcolm CJ), [17]-[18] (Steytler J), [45] (Miller J); *R v Garrett* (1988) 50 SASR 392 at 400 (King J), 403 (Jacobs J), 404 (von Doussa J); ***Muldoon*** *v The Queen* (2008) 192 A Crim R 105 at [25]-[28] (Hodgson JA, James and Price JJ agreeing at [49]-[50]). So too do first instance decisions on the subject: *R v Pinkstone* (2001) 125 A Crim R 44 at [65], [68], [71] (Roberts-Smith J); *Eastman* [2010] ACTSC 13 at [36]-[39], [64] (Refshauge J).

73 (1988) 50 SASR 392 at 404 (von Doussa J); see also at 400 (King CJ).

and special leave application were "principally concerned with a question of law".[74] To adopt and adapt the observations of von Doussa J (with whom Jacobs J agreed) in rejecting a ground of appeal alleging apprehended bias, it is not plausible that the hypothetical observer "might believe that a former [CDPP] who once appeared at the appellate level as counsel for the Crown against a party to the proceedings before him would depart from the duty he had sworn to perform on taking judicial office", especially in circumstances where there is nothing to suggest that the CDPP "held any personal opinion about the appellant or his conduct".[75] Those observations are equally applicable in this case, particularly having regard to the period of seven years since Bromwich J appeared as counsel,[76] and also the fact that the relationship between the facts of the case in which he appeared and those in which he was to sit as a judge was much weaker than was the case in *R v Garrett*.

39. The above authorities suggest that in some cases even when a judge has previously appeared as a prosecutor at trial (rather than only at appellate level) a reasonable apprehension of bias may not arise. For example, in *McCreed*,[77] the Court of Criminal Appeal of the Supreme Court of Western Australia held that the trial judge in a sexual assault case had not erred in rejecting an application that he disqualify himself, notwithstanding that he had prosecuted the accused for an unrelated murder charge 11½ years earlier. While Steytler J (with whom Malcolm CJ agreed) recognised that the "prudent course" would ordinarily be self-disqualification in cases where a judge was to preside over a trial involving a person who the judge had previously prosecuted, the factors that his Honour identified in support of that conclusion all involved actual involvement in the prosecution itself (rather than involvement only at the appellate level).[78] Further, the Court recognised that it was necessary to consider matters such as the passage of time, any connection between the cases, and a statement by the judge that he or she had no independent recollection of the prosecution.[79] Having regard to those

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74 *R v Garrett* (1988) 50 SASR 392 at 400 (King CJ).
75 *R v Garrett* (1988) 50 SASR 392 at 404.
76 The delay between proceedings is a weighty relevant factor: see, eg, *R v Pinkstone* (2001) 125 A Crim R 44 at [71] (Roberts-Smith J) ("some seven years" between proceedings); *McCreed* (2003) 27 WAR 554 at [2] (Malcolm CJ), [18] (Steytler J), [45] (Miller J) ("some 11½ years" between proceedings); *Muldoon* (2008) 192 A Crim R 105 at [26(7)], [28] (Hodgson JA) ("over eight years" between proceedings). Regarding the importance of the passage of time, see also *Wewaykum* [2003] 2 SCR 259 at [85]-[90] (the Court).
77 (2003) 27 WAR 554.
78 *McCreed* (2003) 27 WAR 554 at [16].
79 *McCreed* (2003) 27 WAR 554 at [17]-[18] (Steytler J, Malcolm CJ agreeing); see also at [45] (Miller J).

matters, the Court held that disqualification was not required. If that is correct, the same must be true where a person's only involvement is as counsel defending an appeal.

(d) Hypothetical observer may have regard to Bromwich J's stated recollection

40. The Appellant contends that Bromwich J "fell into error" by relying on his subjective recollection of the conviction appeal (**AS [59]**). However, that contention is not reflected in any ground of appeal (**CAB 181**), because the issue raised by Ground 2 is whether this Court should consider Bromwich J's professed limited recollection of the conviction appeal in determining whether he was affected by apprehended bias.

41. That issue may be thought to lack any real significance, given that Bromwich J's statements as to his recollection (**CAB 159 [61(2)-(3)]**) are entirely consistent with what the hypothetical observer would have inferred in any event given the passage of seven years. However, if it does need to be determined, the Court should hold that it may have regard to any overt statement that a judge makes concerning his or her own recollection.

42. There is no doubt that the apprehended bias test involves an objective assessment, and therefore that the application of the test does not depend on the actual thought processes, motivations or opinions of the judge.[80] Nonetheless, justices of this Court have determined apprehended bias applications in part in reliance upon their own publicly stated recollections.[81] Further, intermediate appellate courts,[82] as well as the House of Lords,[83] and the Supreme Court of Canada,[84] have likewise accepted the relevance of a judge's stated recollection of earlier proceedings or other events as a relevant factor that the hypothetical observer may consider, particularly in circumstances where many years have passed since the events said to give rise to the apprehension of bias took place. Such statements may reveal facts that the hypothetical observer would wish to take into account.[85] For that reason, the Court may properly have regard to Bromwich J's recollection of the conviction appeal (cf **AS [59]-[60]**).

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80 *Ebner* (2000) 205 CLR 337 at [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Charisteas* (2021) 95 ALJR 824 at [18] (the Court).

81 See, eg, *Kartinyeri v Commonwealth* (1998) 72 ALJR 1334 at [3] (Callinan J).

82 See, eg, *McCreed* (2003) 27 WAR 554 at [18] (Steytler J, Malcolm CJ agreeing); *Muldoon* (2008) 192 A Crim R 105 at [26(7)] (Hodgson JA, James and Price JJ agreeing at [49]-[50]).

83 *Helow v Secretary of State for the Home Department (Scotland)* [2009] 2 All ER 1031 at [39] (Lord Mance), Lords Hope, Rodger, Walker and Cullen agreeing at [9], [10], [25] and [31]. See also the English and Welsh Court of Appeal's judgment in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65 at [51]-[55] (the Court), which at [51] relevantly relied on the House of Lords' decision in *R v Gough* [1993] AC 646.

84 *Wewaykum* [2003] 2 SCR 259 at [88]-[90] (the Court).

85 That is quite different to giving weight to a judge's statement in dismissing a recusal application that he or she will maintain an open mind: cf *British American Tobacco* (2011) 242 CLR 283 at [136]-[138] (Heydon,

(e) Effect of apprehended bias of one judge of unanimous three-member court

43. If, contrary to the Minister's submissions above, Bromwich J was disqualified from sitting in the appeal by reason of apprehended bias, a question arises as to what effect that had on the decision of the Full Court (**AS [3(4)], [61]**).

44. This Court's decisions in the context of administrative and domestic tribunals,[86] and international case law,[87] support the view that if one judge of a unanimous three-member court is disqualified by reason of apprehended bias, the decision of the whole court is affected. No contrary submission is advanced. But no broader question should be decided.[88]

B. GROUND 1

(a) Procedure for determining disqualification application is not properly a separate ground of appeal

45. If, for the reasons addressed above, this Court concludes that Bromwich J was not affected by a reasonable apprehension of bias, a debate as to the process that was followed in the Court below in reaching that (ultimately correct) conclusion goes nowhere. As the plurality explained in *Ebner*, to focus upon the procedure:[89]

> may distract attention from the fundamental question to be answered which is whether the reasonable apprehension of bias test is established. That question will be litigated on appeal from the substantive decision in the matter or in proceedings for prohibition, certiorari or similar relief. Whatever the process which the person alleging reasonable apprehension of bias may adopt, there will, in those proceedings, be a full opportunity to make whatever case for disqualification of the judge the moving party can. … The

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Kiefel and Bell JJ); see also at [70] (Gummow J, in dissent in the result); and compare at [52] (French CJ, in dissent in the result).

86 See, eg, *Isbester* (2015) 255 CLR 135 at [48] (Kiefel, Bell, Keane and Nettle JJ), [58], [60], [70] (Gageler J); *IW v City of Perth* (1997) 191 CLR 1 at 50-51 (Gummow J); *Builders' Registration Board of Queensland v Rauber* (1983) 57 ALJR 376 at 385 (Brennan J); *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 517-519 (Barwick CJ), 520 (McTiernan J), 525 (Menzies J), 527 (Gibbs J), 528 (Stephen J); *Australian Workers' Union* (1948) 77 CLR 601 at 631 (Dixon J, Starke J agreeing at 619), 639 (Williams J); *Dickason v Edwards* (1910) 10 CLR 243.

87 See, eg, *Pinochet* [2000] 1 AC 119 at 137 (Lord Browne-Wilkinson), 139 (Lord Nolan), 143 (Lord Hope), 146 (Lord Hutton); *Stubbs v The Queen* [2019] AC 868 at [33] (Lord Lloyd-Jones JSC for the Board); *Aetna Life Insurance Co v Lavoie* (1985) 475 US 813 at 827-828 (Burger CJ for the Court), 830-831 (Brennan J concurring), 832 (Blackmun J, with whom Marshall J joined, concurring); *Williams v Pennsylvania* (2016) 579 US 1 at 14-16 (Kennedy J for the Court); *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2010] 1 NZLR 76 at [1]-[3], [19]-[20] (the Court); *President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147 (***SARFU***) at [32] (the Court); *Kenny v Trinity College* [2008] 1 ILRM 241.

88 The Court need not, and therefore should not, determine questions such as: (a) whether an apprehension of bias concerning a judge who ultimately dissents vitiates the decision of the whole court; or (b) whether at some point the number of judges constituting a court, and the internal decision-making processes of that court, mean that the inclusion of one disqualified judge is so numerically insignificant that it does not taint the ultimate decision (as to which see *Wewaykum* [2003] 2 SCR 259 at [92]-[93]).

89 (2000) 205 CLR 337 at [71] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

> question of disqualification can and will be litigated fully in the appeal or application for prerogative or like relief … .

46. As the above passage contemplates, the question whether Bromwich J should have sat as a member of the Full Court will be decided by this Court.[90] If Bromwich J was entitled to sit, it follows that the Full Court was properly constituted when it decided the appeal. Ground 1 would provide no basis to set aside the Full Court's order.

(b) Orthodox practice for impugned judge to determine whether disqualified

47. In any event, in Australia the orthodox practice is that the judge in respect of whom actual or apprehended bias is alleged determines whether they are disqualified from sitting, irrespective of whether that judge is sitting as a single justice or on a multi-member court.[91] The plurality in *Ebner*, in considering the position of single judges, described this as "both the ordinary, and the correct, practice".[92] In respect of judges sitting as members of collegiate courts, it is a practice that has been followed many times (subject to some possible exceptions[93]), including in this Court,[94] federal courts,[95] and State and Territory Supreme Courts.[96] It has been expressly endorsed in the Australasian Institute of Judicial Administration's *Guide to Judicial Conduct*.[97] And it is consistent with the practice in many, although not all, comparable legal systems.[98] Particularly in the absence

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90 See also ***Michael Wilson*** *& Partners Ltd v Nicholls* (2011) 244 CLR 427 at [85] (Gummow A-CJ, Hayne, Crennan and Bell JJ); Mason "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law and Policy Review* 21 at 26-27.

91 See, generally, Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (December 2021) (**ALRC Report**) at [7.1], [7.7], [7.102]; Hammond, *Judicial Recusal: Principles, Process and Problems* (2009) at 109; Tarrant, *Disqualification for Bias* (2012) at 310-311.

92 (2000) 205 CLR 337 at [74] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

93 See, eg, *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 at [50] (Jagot and Griffiths JJ), [76]-[84] (SC Derrington J) where, in response to an allegation of apprehended bias concerning SC Derrington J, her Honour gave reasons for rejecting that application in the usual way. Unusually, the other members of the Full Court expressed agreement with those reasons. See also *Legal Practitioners Complaints Committee v De Alwis* [2006] WASCA 198 at [1], [63].

94 See, eg, *Kartinyeri v Commonwealth* [1998] HCATrans 43; *Unions NSW v New South Wales* [2013] HCATrans 263 at lines 53-77.

95 See, eg, *Setka v Gregor* [2011] FCAFC 64 at [2]-[4] (Tracey J); *Valdez v Frazier (No 3)* [2015] FamCAFC 205 at [8] (Strickland J).

96 See, eg, ***Rogers*** *v Wentworth* [1998] NSWSC 290 (Handley JA); ***Bainton*** *v Rajski* (1992) 29 NSWLR 539 at 540, 544, 546 (Mahoney JA), 547-548 (Cripps JA); *Jackson v The Queen* [2019] VSCA 65 at [5], [34] (Niall JA); *Slaveski v Attorney-General (Vic)* [2013] VSCA 165 at [6] (Weinberg and Priest JJA, referring to reasons of Priest JA at Annexure A) ; *Amos v Wiltshire* [2016] QCA 70 at [1]-[4], [18] (Gotterson JA); *Mann v Northern Territory News* (1988) 88 FLR 194 at 194, 210 (Nader J); *Duke Group Ltd (In liq) v Pilmer (No 3)* [2001] SASC 215 at [71] (Doyle CJ); *Brisciani v Piscioneri (No 2)* [2016] ACTCA 24 at [4] (Refshauge J).

97 See Australasian Institute of Judicial Administration Inc, *Guide to Judicial Conduct* (3rd ed, 2017) at [3.5], cited with approval in *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 at [66]-[67] (Hammond J for the Court).

98 See, eg, Hammond, *Judicial Recusal: Principles, Process and Problems* (2009) at 61, 82, 109; Appleby and McDonald, "Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure" (2017) 20(1)

of any submission below that a different procedure should be followed,[99] it was open to Bromwich J to follow the settled Australian procedure. It remains open to judges on multi-member courts to follow that settled procedure unless and until it is the subject of law reform (as the Australian Law Reform Commission has recommended it should be).

48. It may be accepted that each member of a court constituted to hear a matter has an interest in ensuring that the Court as a whole is properly constituted, having regard to the possible consequences of disqualification of any member on the Court's decision.[100] However, the well-established existing practice has been adopted notwithstanding that interest, no doubt in recognition of the sound reasons for maintaining that practice set out below.

10 49. ***First***, there are practical reasons why it is desirable for a judge to determine actual or apprehended bias applications that relate to them. For example, the judge will often be well placed to understand the factual context in which apprehended bias is alleged. With the benefit of their own subjective knowledge, the judge may immediately appreciate that a fair-minded lay observer might apprehend bias, and therefore that it is inappropriate for them to sit.[101] On the other hand, there may be cases where a judge is able to extinguish or dispel any apprehension of bias by outlining the relevant circumstances to the satisfaction of the parties,[102] such that a foreshadowed application is not made or is not pressed.[103]

50. ***Secondly***, there are serious doubts about how a majority of a multi-member court could
20 give effect to a decision that another judge of the same court is affected by actual or apprehended bias.[104] The following scenarios illustrate the difficulties.

51. Scenario 1: a three-member court hears a disqualification application regarding Judge A. Judges B and C consider that Judge A is disqualified by reason of apprehended bias. Judge A disagrees, and considers that she has a duty to sit.[105] In such a case, how does

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Legal Ethics 89 at 90. Cf *Cyfyngedig v Albion Water* [2008] EWCA Civ 97 at [1], [20] (Sir Anthony Clarke MR, Lord Justices Longmore and Richards agreeing at [21]-[22]); *SARFU* (1999) 4 SA 147 at [34] (the Court); ALRC Report at [6.128], [7.110].

99 See **ABFM 49 line 25**.

100 See, generally, Mason "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law and Policy Review* 21 at 26-27.

101 Hughes and Bryden, "From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification" (2016) 53 *Osgoode Hall Law Journal* 853 at 893.

102 *Vakauta v Kelly* (1989) 167 CLR 568 at 572 (Brennan, Deane and Gaudron JJ).

103 See Perry, *Disqualification of Judges: Practice and Procedure* (Discussion Paper, 2001) at [7.8].

104 Olowofoyeku, "Bias in Collegiate Courts" (2016) 65(4) *International and Comparative Law Quarterly* 895 at 910; cf Appleby and McDonald, "Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure (2017) 20(1) *Legal Ethics* 89 at 107.

105 Lester, "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001) 24(3) *Advocates' Quarterly* 326 at 340-341.

the majority ensure compliance with their conclusion?[106] The Court, even by majority, could not, for example, issue a writ of prohibition prohibiting Judge A from sitting.[107] As Jackson J stated in ***Jewell Ridge*** *Coal Corp v Local No 6167 United Mine Workers of America*,[108] "[t]here is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its … Justices from sitting or voting in any case". In an attempt to address this issue, the Constitutional Court of South Africa has taken the view that "if a judge incorrectly refuses to recuse herself or himself the remaining members of a panel should not sit with that judge as the proceeding would be irregular".[109] However, the existence of a "duty to refuse to sit" may be doubted.[110]

10 52. Scenario 2: a three-member court hears a disqualification application regarding Judge A. Judge A determines that they are disqualified by reason of apprehended bias. Judges B and C disagree. Judge A could not be compelled (for example, by a writ of mandamus) to sit notwithstanding the majority view.

53. Scenario 3: a three-member court hears a disqualification application regarding Judge A. Judge A entertains a real doubt as to whether she is qualified to sit, such that, applying the precautionary approach described in *Ebner*,[111] she considers that the prudent course is to disqualify herself. Judges B and C disagree; they consider that Judge A should sit. That appears to leave no room for operation of a prudential approach (including given the approach is not governed by legal rules[112]).

20 54. ***Thirdly***, if disqualification is a question to be determined by the court as a whole, can a single judge recuse themselves when internal listing arrangements are first arranged (as is current practice), or must they wait until the court convenes for it to determine that question, thereby potentially causing great dislocation in the business of the court, and cost to the parties? If the single judge can recuse themselves before the listing arrangements are announced, how is that reconciled with the Appellant's claim (eg **AS**

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106 See *Barton v Walker* [1979] 2 NSWLR 740 at 749-750 (Samuels JA, Reynolds and Glass JJA agreeing at 744).

107 See, eg, *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 603 (Brennan CJ), 610 (Dawson J), 616 (Toohey and Gaudron JJ), 636-637 (Gummow J), 647 (Kirby J). See also Lester, "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001) 24(3) *Advocates' Quarterly* 326 at 340-341.

108 (1945) 325 US 897 at 897.

109 *SARFU* (1999) 4 SA 147 at [32]. See also *SOS – Save Our St Clair Inc v Toronto* (2005) 18 CPC (6th) 286, Ont Div Ct at [20] (Greer and Macdonald JJ).

110 See Olowofoyeku, "Bias in Collegiate Courts" (2016) 65(4) *International and Comparative Law Quarterly* 895 at 908.

111 (2000) 205 CLR 337 at [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

112 Cf *Ebner* (2000) 205 CLR 337 at [68] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[23]) that the determination of this point involves an exercise of the appellate jurisdiction of the court?[113]

55. ***Finally,*** it may be accepted that the long-standing practice of judges determining for themselves whether they are disqualified from sitting has sometimes been criticised.[114] Nevertheless, in *Ebner*, four justices strongly endorsed that practice (albeit with respect to single judges).[115] Whether it is appropriate to adopt a different practice in the context of multi-member courts (or, indeed, in respect of all disqualification applications) raises a question of law reform. Indeed, as alluded to at [46] above, the Australian Law Reform Commission has recently made recommendations concerning that very question (proposing, inter alia, amendments to rules of court to address this issue at the multi-member court level) (cf **AS [29]**).[116] There is no reason for this Court to pre-empt that law reform process.

PART VI ESTIMATED TIME

56. It is estimated that the Minister will require up to 2 hours to present oral argument.

Dated: 28 October 2022

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113 In fact, the plurality in *Ebner* (2000) 205 CLR 337 at [74] appears to have doubted (although left open) whether an allegation of apprehended bias gives rise to an issue in controversy between the parties (as is reflected in the fact that it does not result in an order binding the parties). Further, where such an apprehension is alleged to exist at the appellate level, it obviously does not allege error in the court below. In those circumstances, it is not apparent that the determination of the allegation involves the exercise of appellate jurisdiction. It may be better characterized as a question concerning how the Court should be constituted. If so characterised, an incorrect decision on disqualification does not itself involve the exercise of judicial power (appellate or otherwise), although it will expose any subsequent exercise of judicial power to review: see *Michael Wilson* (2011) 244 CLR 427 at [81] (Gummow A-CJ, Hayne, Crennan and Bell JJ). See also *Bainton* (1992) 29 NSWLR 539 at 548 (Cripps JA); cf *Rogers* [1998] NSWSC 505 (Handley JA).

114 See, eg, Hammond, *Judicial Recusal: Principles, Process and Problems* (2009) at 76, 82, 144, 148; Perry, *Disqualification of Judges: Practice and Procedure* (Discussion Paper, 2001) at [2.40]; ALRC Report at [7.12]-[7.19]. See also *Getswift* (2021) 283 FCR 328 at [4] (the Court).

115 (2000) 205 CLR 337 at [74] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

116 See ALRC Report at [7.103].

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN: **QYFM**

Appellant

AND:

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Respondent

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ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE FIRST RESPONDENT

Pursuant to Practice Direction No 1 of 2019, the First Respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current	s 73(ii)
Statutory provisions			
2.	*Criminal Code* (Cth)	In force 4 April 2012 to 30 June 2012	s 307.2(1)
3.	*Criminal Procedure Act 2009* (Vic)	Compilation No 22 In force 1 July 2012 to 16 July 2012	s 5
4.	*Director of Public Prosecutions Act 1983* (Cth)	In force 5 April 2012 to 30 June 2014	ss 5, 6(1)(b), 15
5.	*Migration Act 1958* (Cth)	Compilation No 136 In force 20 September 2017 to 8 December 2017	ss 501(3A), 501CA
6.	*Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth)	As made	s 2 and Sch 1, item 8