

JUDICIAL RECUSAL AND REMOVAL — A COMPARATIVE STUDY OF THE NEW ZEALAND WILSON SAGA

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Abstract: This article provides a critical and comparative analysis of the saga involving Justice Wilson of the New Zealand Court of Appeal. The saga provides a backdrop for a discussion of judicial bias and judicial recusal, as well as the complaints and removal system, in Australia and New Zealand. Reference is made to selected episodes involving recusal applications in Australia and the United States. The article also explores whether a register of pecuniary interests of judicial officers should be mandated by statute.

Keywords: *bias; judicial recusal; Justice Wilson; judicial complaints; judicial removal; register of pecuniary interests*

I. Introduction

This article is a study of a controversial episode which occurred in New Zealand in 2010, and uses that episode as the foundation for a comparative analysis of the problems recusal raises for the judicial branch of government. The episode concerns a senior judge, Justice Wilson of the New Zealand Court of Appeal, who was sucked into the eye of a storm resulting ultimately in his resignation. The impact of this episode and its ramifications are explored within the context of the recognition accorded to an impartial judiciary as a vital aspect of the rule of law in a democratic polity. The rule against bias, which is one of the twin pillars of “procedural fairness” endorsed by the highest courts in most common law countries, is examined, as well as the practice of judicial recusal undertaken in deference to that rule. It will consider whether the common law system of self-regulation can be considered to be more effective than the system of statutory regulation of recusal procedure used in the United States, as well as the desirability of judicial review. It will also engage in a comparative analysis of the complaints and removal system of judicial officers in Australia and New Zealand.

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II. The Importance of an Impartial Judiciary

The exercise of the “judicial power” has been described as “the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process”.¹ In Australia, a robust trend has emerged in the constitutional jurisprudence of superior courts, which mandates that the essential features of the judicial process be respected, and not impaired, by the legislative and executive branches of government. The Australian courts have accepted that one essential feature of the judicial process is that it provides parties the opportunity “to present their evidence and to challenge the evidence led against them”.² French CJ of the High Court of Australia has said:

“At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities. Decisional independence is a necessary condition of impartiality. Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process”.³

It has been said: “Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system”.⁴ In *Vakauta v Kelly*, Brennan, Deane and Gaudron JJ stressed that the “requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation”.⁵ According to Olowofoyeku, the right to a fair hearing before an independent, impartial and unbiased tribunal is “a standard of modern constitutions”.⁶ The requirements of impartiality and the appearance of impartiality originated as common law

1 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359, [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

2 *Ibid.*

3 *South Australia v Totani* (2010) 242 CLR 1, [69]. French CJ added:

“The open-court principle, which provides, among other things, a visible assurance of independence and impartiality, is also an ‘essential aspect’ of the characteristics of all courts, including the courts of the States. The text and structure of Ch III of the Constitution postulate an integrated Australian court system for the exercise of the judicial power of the Commonwealth with [the High Court] at its apex. There was no distinction, so far as concerns the judicial power of the Commonwealth, between State courts and federal courts created by the parliament”.

4 *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 205 CLR 337, [80] (Gaudron J). Gaudron J also remarked that:

“[I]mpartiality and the appearance of impartiality throughout the Australian court system are mandated by Ch III of the Constitution: *Ebner* (2000) 205 CLR 337, at 363 [82]”.

Kirby J in *Smits v Roach* [2006] HCA 36, [121] expressed his agreement with this statement.

5 *Vakauta v Kelly* (1989) 167 CLR 568, 570.

6 AA Olowofoyeku, “Regulating Supreme Court Recusals” (2006) Singapore Journal of Legal Studies 60.

requirements stemming from the “need to maintain the rule of law”.⁷ That a matter will be decided impartially is an essential aspect of natural justice and has traditionally been understood as a fetter on the exercise of state power.⁸

The fundamental importance of the need for courts to be impartial is accorded universal recognition by international instruments. Among these instruments, the UN Basic Principles on the Independence of the Judiciary proclaims that:

“The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”.⁹

The fundamental importance for a fair and public hearing to be conducted by “an independent and impartial tribunal” is recognised in many international instruments.¹⁰

Given the apparent constitutional significance of judicial impartiality, it is appropriate that it be underpinned by the doctrine of judicial recusal. This doctrine is a product of the common law; but in Australia, a significant minority consider it to have been elevated to constitutional status, underpinning in part the giving of effect to a constitutional separation of judicial power. As Gaudron J has said:

“Impartiality and the appearance of impartiality are so fundamental to the judicial process that they are defining features of judicial power. And because the only power that can be conferred pursuant to Ch III of the Constitution is the judicial power of the Commonwealth, that Chapter operates to guarantee that matters in federal jurisdiction are determined by a court constituted by a judge who is impartial and who appears to be impartial”.¹¹

In the United States, judicial impartiality is recognised as an aspect of the right of all citizens to expect due process enshrined in the fifth and fourteenth Amendments of the United States Constitution. As was expressed in *In re Murchison*:

“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our

7 See *Ebner v Official Trustee in Bankruptcy* (n.4), [103].

8 Chief Justice RS French, “Procedural Fairness Indispensable to Justice?” Sir Anthony Mason Lecture at The University of Melbourne (7 October 2010) pp.9–14.

9 This instrument was adopted in 1985 by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders (Milan) and endorsed by the United Nations General Assembly.

10 See HP Lee and Enid Campbell, *The Australian Judiciary* (Port Melbourne: Cambridge University Press, 2nd ed., 2012) pp.7–9.

11 See *Ebner v Official Trustee in Bankruptcy* (n.4), [80], [103]. See also, *Baker v Commonwealth* [2012] FCAFC 121, [51]–[52] (Keane CJ, Lander and Perram JJ). In Australia, “independence” and “impartiality” are often cited by the High Court as “defining features” of courts.

system of law has always endeavoured to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome".¹²

Like the United States, art.25(a) of the New Zealand Bill of Rights Act 1990 expressly recognises that an impartial (and independent) judiciary is constitutionally indispensable to criminal procedure, and, more generally, recognises judicial impartiality as an incident of the requirement that tribunals observe justice as enshrined in art.27(1).¹³ Like Australia and the United States, albeit to a far weaker degree,¹⁴ the independence and impartiality of New Zealand's judiciary is also guaranteed by the separation of powers enshrined by the Constitution Act 1986.¹⁵

III. Recusal and the Reasonable Apprehension of Bias Test

The doctrine of recusal has existed in the common law long before Sir Edward Coke gave his famous judgment in *Thomas Bonham v College of Physicians*,¹⁶ reiterated by Lord Campbell in *Dimes v Proprietors of Grand Junction Canal*.¹⁷ "that no man is to be a judge in his own cause".¹⁸ It is vital that the public accept that courts will impartially determine questions about their rights and interests. As was remarked in *Johnson v Johnson*,¹⁹ "if fair minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision".²⁰ Some characterise inquiries directed to impartiality as being concerned with the integrity of "specific instances of decision-making", as contrasted with inquiries directed to independence, which is concerned with the integrity of an institution as a whole.²¹ Both inquiries are related, however, insofar as their ultimate purpose is to guarantee the public's confidence in the overall institutional integrity of the

12 349 US 133, 136 (1955) (Black J). See also, *Aetna Life Insurance Co v Lavoie* 475 US 813, 821–826 (1986).

13 That article provides:

"Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law".

See also, *Drew v Attorney-General* [2002] 1 NZLR 58 (CA); Sir Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Oxford: Hart Publishing, 2009) p.48.

14 W John Hopkins, "New Zealand" in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press, 2011) p.429.

15 The Rt Hon Sir Geoffrey Palmer, "The New Zealand Constitution and the Power of Courts" (2006) 15(2) *Transnational Law and Contemporary Problems* 551, 562.

16 8 Co Rep 114 (1610) (Court of Common Pleas).

17 (1852) 3 HL Cas 759.

18 *Ibid.* (Lord Campbell).

19 (2000) 201 CLR 488.

20 *Ibid.*, [2].

21 Matthew Groves, "The Rule against Bias" (2009) 39 HKLJ 485, 489.

judicial system. In *Webb v The Queen*,²² Mason CJ and McHugh J said that it was important to keep in mind that “the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice”.²³ They added that both the parties to the case must be satisfied that “justice has not only been done but that it be seen to be done”.²⁴

The High Court of Australia’s decision in *Ebner* enunciated the Australian contemporary approach towards judicial recusal. *Ebner* is a landmark decision, which has been extensively cited in Australia and in other overseas jurisdictions.²⁵ The decision concerned two cases on appeal to the High Court of Australia, which were heard together by the Court. The cases involved judges whose pecuniary interests were affected by the outcome of the cases they were hearing. *Ebner* involved a trial judge, Goldberg J, who disclosed that he had possessed under a family trust 8000 shares in a bank that was a creditor in the bankruptcy proceedings he was hearing.²⁶ Despite the fact that the shares would have their value unaffected by the proceedings, there was an objection made by a creditor of the bankrupt.²⁷ In *Clенае*, the trial judge, Mandie J, inherited 2400 shares in the ANZ bank after a trial had completed but before he had delivered judgment. The judge did not disclose his interest.²⁸ Further complicating the case was the fact that a major witness had died, meaning his recusal would place strains on evidence in the event of a retrial.²⁹

The High Court of Australia held in *Ebner* that there is only a single test to determine impartiality in the Australian judicial process, namely “whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide”.³⁰ In effect, the High Court rejected the submission that there was a “free standing rule of automatic disqualification which applies where a judge has a direct pecuniary interest, however small, in the outcome of the case over which the judge is presiding”.³¹ It is stated that the application of the test of reasonable apprehension of bias requires two steps. The first step is the identification of “what it is said might

22 (1994) 181 CLR 41.

23 *Ibid.*, 50.

24 *Ibid.*

25 See eg, *Aylett v Peter Rowland Catering Pty Ltd* [2008] VSC 467; *Abraham as Tutor for Abraham v St Marks Orthodox Coptic College (No 4)* [2008] NSWSC 1031; *Margarula v Northern Territory of Australia* [2009] FCA 90; *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2009] FCAFC 8; *O’Neill No 2 v Her Majesty’s Advocate (Scotland)*; *Lauchlan (AP) v Her Majesty’s Advocate (Scotland)* [2013] UKSC 36, [50] (Lord Hope); *HLB Hodgson Impey Cheng v Hong Kong Institute of Certified Public Accountants* [2013] HKEC 1163, [78] (Gleeson NPJ).

26 See *Ebner v Official Trustee in Bankruptcy* (n.4), 338.

27 *Ibid.*, 337, [14].

28 *Ibid.*, 346, [18].

29 *Ibid.*, 347, [17].

30 *Ibid.*, [6]. See also, *Johnson v Johnson* (2000) 74 ALJR 1380, [11].

31 See *Ebner v Official Trustee in Bankruptcy* (n.4), [54]. The submission invoked the decision of the House of Lords in *Dimes v Proprietors of Grand Junction Canal* (n.17) and (1852)10 ER 301.

lead a judge (or juror) to decide a case other than on its legal and factual merits". The second step requires "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits". It is not sufficient simply to assert that a judge (or juror) has an "interest" in litigation, or an interest in a party to it. The "nature of the interest" and the "asserted connection with the possibility of departure from impartial decision making" must be established in order that "the reasonableness of the asserted apprehension of bias" can be assessed.³²

Gleeson CJ, McHugh, Gummow and Hayne JJ recognised that "fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal".³³ However, the majority subsumed the automatic disqualification test for pecuniary interests enunciated in *Dimes* into the reasonable apprehension of bias test.³⁴ They held that the reasonable apprehension of bias test must be flexible; it "admits the possibility of human frailty. Its application is as diverse as human frailty".³⁵ They raised the difficulty of satisfying the test by holding that a mere pecuniary interest in litigation "will be of no assistance [to establishing apprehended bias] until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated".³⁶

The contemporary approach set out in *Ebner* was applied in *Smits v Roach*,³⁷ in which the respondent and his former lawyers (the appellants) were involved in suing the law firm Freehills. The respondent had retained a new lawyer and a dispute arose between the respondent and the appellant as to the terms of his retainer.³⁸ When the case came to trial, McClellan J disclosed that he had played golf with Roach on several occasions.³⁹ Neither of the parties objected to this relationship and the case proceeded. When McClellan J provided both parties with his draft decision, it emerged that his brother was the chairman of partners at Freehills.⁴⁰ McClellan J then refused to recuse himself upon the request of the plaintiff, who argued that the suit against Freehills was an important aspect of the dispute between Smits and Roach, as the counsel of the applicant was informed of the relevant facts, even if the applicant himself was not.⁴¹

32 *Ibid.*, 345, [8].

33 *Ibid.*, 343, [3].

34 Matthew Groves, "The Rule against Bias" in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Port Melbourne: Cambridge University Press, 2007) pp.319–320.

35 See *Ebner v Official Trustee in Bankruptcy* (n.4), 345.

36 *Ibid.*, 345.

37 (2006) 227 CLR 423.

38 *Ibid.*, 424.

39 *Ibid.*, 432.

40 *Ibid.*, 433–434.

41 *Ibid.*, 434.

The High Court held that the parties had waived their right to object due to the counsel's knowledge,⁴² but nonetheless considered the application of the reasonable apprehension of bias test in order to restate it definitively. Citing *Ebner*, the majority held that the applicant had waived recusal, but if he had not, the finding of apprehended bias by the Court of Appeal was in error, as the probability that the finances of McClellan J's brother would be significantly affected was "doubtful".⁴³ Kirby J agreed that the applicant had waived recusal, but if he had not, recusal would have been necessary in order to preserve the tenets of impartiality and independence enunciated in the common law and Chapter III of the Constitution.⁴⁴

In *Webb and Hay v The Queen*,⁴⁵ Deane J of the High Court of Australia identified four broad categories of cases involving disqualification by reason of appearance of bias. The first category is disqualification by interest ("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"). The second category pertains to "disqualification by conduct, including published statements". That category consists of cases in which conduct ("either in the course of, or outside, the proceeding") would give rise to an apprehension of bias. The third category deals with disqualification by "association": 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 involved in, the proceedings". The fourth category covers disqualification by "extraneous information": where "knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias". The third category often overlaps with the first category and with the fourth category.

The test of reasonable apprehension of bias is based on the notion of a hypothetical observer, with the judges imputing varying degrees of knowledge to such an entity. There are many problems with how the reasonable, hypothetical observer has been characterised by courts. As one commentator has observed:

"[C]ritics argue that the reasonable observer inquiry is so unguided and standardless that the reasonable observer essentially becomes a stand-in for the judge and her own predilections—especially when one considers the unusually high degree of knowledge imputed to the reasonable observer".⁴⁶

Nevertheless it has been argued by commentators as providing "the best way for judges to analyse claims of bias that challenge an issue so close to the judicial

⁴² *Ibid.*, 439, 442.

⁴³ *Ibid.*, 439–440.

⁴⁴ *Ibid.*, 465.

⁴⁵ (1994) 181 CLR 41, 74.

⁴⁶ B Jessie Hill, "Anatomy of the Reasonable Observer" (2014) 79 *Brooklyn Law Review* 1407, 1410.

heart as impartiality”.⁴⁷ It is suggested that the availability of judicial review over decisions to recuse can have beneficial effects on the way the reasonable observer test is applied.

A great concern with the rule against bias is that it can be used to undermine the authority and finality of a court’s judgment with which a party is unsatisfied but has no way of setting aside. To preclude disqualification by apprehension of bias being used as a tactic to have a “second bite of the cherry”, the courts apply the waiver doctrine. According to Brennan, Deane and Gaudron JJ in *Vakauta v Kelly*,⁴⁸ where comments are likely to convey to a reasonable and intelligent lay observer an impression of bias “a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment”.⁴⁹ The judges added that by standing by the right subsequently to object has been waived and elaborated on the “obvious” reason for applying the waiver doctrine:

“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”.⁵⁰

It follows that the doctrine of waiver ensures that the finality of judgments is respected, because it operates to constrain parties from challenging a decision when by their conduct they have indicated that no objection was considered at the time the apprehension of bias arose.⁵¹ In this way the rule against bias takes into account “the public interest in the efficiency and finality of the judicial processes”.⁵²

Similarly, the doctrine of necessity is ultimately designed to preserve the authority of the court, albeit in the face of somewhat different circumstances. In

47 Matthew Groves, “The Imaginary Observer of the Bias Rule” (2012) 19 Australian Journal of Administrative Law 188, 202.

48 See *Vakauta v Kelly* (n.5).

49 *Ibid.*, 572.

50 *Ibid.*

51 See also, Matthew Groves, “Waiver of the Rule against Bias” (2009) 35(2) Monash University Law Review 315, 322.

52 See *Smits v Roach* (n.37), [46]–[48].

short, judges must of necessity hear a case “where no other judge has jurisdiction”.⁵³ In *Clenae*, the judge’s refusal to recuse was seen as necessary because a crucial witness had died.⁵⁴ A form of doctrine of necessity is writ large into the decisions of an apex court — apex courts are invariably constitutional courts deciding questions of unparalleled social and political significance. So, the argument goes, it is politically untenable for the judges of such a court, who have been tasked with answering these important questions, to recuse themselves in any but the most self-evident examples of apprehended bias.⁵⁵

It is important that procedural conditions on the exercise of judicial power are confined in such ways, because respect for the finality of judgments is a fundamental attendant to the exercise of judicial power. As has been noted in the context of the United States, “the need to resolve disputes ‘finally and authoritatively’ underlies the creation and continued existence of the judicial system”.⁵⁶ To act inconsistently with that principle is to deprive the successful party of rights to which it would ordinarily be entitled. Further, “to say a judgment is void is to deny its existence and a fortiori to deny that the underlying dispute has been resolved”.⁵⁷ Generally speaking, this is controversial because: the system’s signal of finality is the judgment of one of its component courts, and if those judgments may be attacked after they have ostensibly become final — after the system has announced that the underlying dispute is settled — then the system is not settling disputes, it is offering tentative suggestions.⁵⁸

IV. The Wilson Saga

There is a commonality between New Zealand and Australia in the test to be applied in the face of a bias allegation against a presiding judge. The test of a reasonable apprehension of bias as articulated by the High Court of Australia is also applicable in New Zealand. The Wilson saga provides a salutary lesson regarding the need for a judge subject to a disqualifying challenge to articulate fully all relevant information to satisfy the parties to the litigation that there is no basis for any reasonable apprehension of bias.

The controversy which arose in New Zealand involved Justice William “Bill” Wilson when he was then a member of the Court of Appeal of New Zealand.

53 *Serjeant v Dale* (1877) 2 QBD 558, 567; see also, John Tarrant, *Disqualification for Bias* (Leichhardt: Federation Press, 2012) pp.227–230.

54 *Serjeant v Dale* (1877) 2 QBD 558, 359. Kirby J opposed the abandonment of the automatic disqualification rule where a judge has a “direct pecuniary interest in the outcome of the proceedings”, [162].

55 See the discussion below on “recusal of an apex court justice” and “embodying grounds for recusal in statute”.

56 Note, “Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments” (1977) 87(1) Yale Law Journal 164, 192.

57 *Ibid.*, p.164.

58 *Ibid.*, p.198.

Wilson J was later appointed a member of the Supreme Court of New Zealand. On 21 October 2010, the acting Attorney-General of New Zealand, Judith Collins, announced the resignation of Wilson J of the Supreme Court of New Zealand. Wilson J had offered his resignation after successfully challenging the legality of a referral of his conduct to a Judicial Conduct Panel. The impugned conduct was the manner in which, while a judge of the New Zealand Court of Appeal, Wilson J had disclosed certain financial debts he owed to counsel for the appellant appearing in the *Saxmere* litigation heard before that Court. The manner in which these events unfolded have subsequently been described as having “inadvertently wounded as collateral damage” the “cachet and prestige of the Supreme Court itself”.⁵⁹

The financial debts in question were owed by Wilson J to a Mr Alan Galbraith QC. The two had long been friends and were the co-owners and joint directors of Rich Hill Ltd, a company which owned a horse stud property located in Waikato. Mr Galbraith had agreed as a director that Rich Hill Ltd would guarantee a bank loan taken out by Wilson J to pay shareholder contributions to the company so it could pay its debts. The difficulty in the arrangement was that, without Mr Galbraith’s agreement, Wilson J would have had to substantially increase the amount of funding which came directly from his own pocket. As it was, Wilson J had still in his personal capacity made a shareholder contribution of roughly 6% less than Mr Galbraith. It gradually emerged that this arrangement had in effect left Wilson J in significant debt to Mr Galbraith — to the amount of \$250,000, as the Supreme Court found.⁶⁰ This arrangement potentially created an apprehension of bias.

Mr Galbraith represented the Wool Board Disestablishment Co Ltd in the *Saxmere* proceedings before Wilson J, then a judge of the Court of Appeal. Mr Galbraith’s acting in the *Saxmere* proceedings, described elsewhere as a “somewhat mundane dispute about funding”,⁶¹ triggered Wilson J’s judicial obligation to disclose his financial arrangements with Mr Galbraith so as to avoid an appearance of bias of the kind described by the Federal Court of Australia in *Aussie Airlines v Australian Airlines*.⁶² As Merkel J observed in that decision, “a long-standing personal, professional and financial association”⁶³ between a judge and counsel does not necessarily give rise to an apprehension of bias. Rather,

“[t]here must be something in the nature or the extent of the association which leads that bystander to conclude, whether for friendship, love, money, fear, favour or otherwise, that the adjudicator might be influenced by it”.⁶⁴

59 Gerard McCoy, “Judicial Recusal in New Zealand” in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge, UK: Cambridge University Press, 2011) p.335.

60 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC Trans 36.

61 See McCoy, “Judicial Recusal in New Zealand” (n.59) p.328.

62 (1996) 135 ALR 753.

63 *Ibid.*, 755.

64 *Ibid.*, 760.

The judge must, however, disclose those facts “that might found or warrant a bona fide application for disqualification”.⁶⁵ In addition, “the failure to disclose, of itself, can be one of the circumstances which together with others may give rise to a reasonable apprehension of bias”.⁶⁶

Whether Wilson J had satisfied his obligation to disclose, and the consequences thereof, became the central concern of these proceedings. Prior to the initial hearing before the Court of Appeal, Wilson J had telephoned Saxmere’s counsel and spoken to him about his mutual business association with Mr Galbraith. What exactly was disclosed in that conversation was unclear.⁶⁷ No objection was raised by counsel and the proceedings were resolved in favour of the Wool Board, the lead judgment having been written by William Young P with which Wilson J concurred.⁶⁸ Saxmere sought leave to appeal the Court of Appeal’s decision to the Supreme Court. That application was refused, however, because the Supreme Court was “satisfied that the proposed appeal raises no question of public or general importance”; the Wool Board had been dissolved; the legislation with which the substantive appeal was concerned had been repealed; and no obvious error was apparent in the decision of the Court of Appeal which gave rise to a miscarriage of justice.⁶⁹

Saxmere then alleged that a reasonable apprehension of bias had arisen with respect to Wilson J and made a second application for leave to appeal. The Supreme Court gave leave so as to avoid the possibility of a miscarriage of justice, but found that there was no reasonable apprehension of bias and dismissed the appeal.⁷⁰ The Court had been supplied with a statement from Wilson J outlining his interests. The statement noted the mutual participation of Wilson J and Mr Galbraith in the Rich Hill venture, and their equal shareholding.⁷¹ Although unusual, permitting Wilson J to submit the memorandum was consistent with the rule set out in *Man O’ War Station Ltd v Auckland City Council*.⁷² That decision, following the approach of the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd*,⁷³ permits judges to make a written statement when an allegation of bias is made against them. As the Court observed in *Locabail*, it is acceptable for such statements to be provided to the court because the cogency of such statements, like any evidence, is capable of being assessed at face value by a reasonable observer.⁷⁴

It subsequently became clear, however, that Wilson J had not fully disclosed the features of the arrangement that were capable of suggesting that they might exert an improper influence on his mind — specifically, the unequal nature of

65 *Ibid.*

66 *Ibid.*, 758.

67 See McCoy, “Judicial Recusal in New Zealand” (n.59) p.329.

68 *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2007] NZCA 349.

69 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2007] NZSC 88, [1].

70 *Saxmere Co Ltd v Wool Board* [2010] 1 NZLR 35 (*Saxmere No 1*).

71 *Ibid.*, 47, [16].

72 [2001] 1 NZLR 552.

73 [2000] QB 451 (*Locabail*).

74 *Ibid.*, 477, [19].

the contributions and the resulting indebtedness of Wilson J to Mr Galbraith. The situation was so extraordinary that, on application by Saxmere, the Supreme Court took the step of recalling its judgment and setting aside the orders it had made dismissing the appeal. The Court also permitted Wilson J to provide it with a further statement, in which Wilson J acknowledged that he had not fully disclosed his interests to the Supreme Court prior to the first hearing.⁷⁵

Revisiting a previous order in this way is in itself extraordinary, although apex courts have held they have the power to do so in extraordinary circumstances.⁷⁶ This is because, as the High Court has repeatedly observed, “a central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances”.⁷⁷ That counsel for Saxmere did not object during the trial may have, in other circumstances, justified the invocation of the waiver doctrine; however, in revisiting its judgment the Supreme Court recognised that counsel cannot waive an objection to circumstances that he or she did not fully appreciate.

The Court noted the various circumstances in which a judgment the orders of which have been unperfected can be recalled and orders set aside. These included a “special reason” in which “justice requires that the judgment be recalled”.⁷⁸ The decision generally proceeds on the assumption that the law on recalling an unperfected judgment was an exhaustive statement of the applicable law. Yet the Supreme Court went on to state that “it was not suggested that there is any impediment to recall arising from perfection of our judgment”.⁷⁹ If this statement is taken to mean that the judgment had been perfected but that this raised no impediment to recall,⁸⁰ it sits even more uncomfortably with the principle of finality and further indicates the gravity assigned to these events by the Court. In various jurisdictions, the doctrine of *res judicata* has been consistently operated to prevent a court from varying or setting aside its own orders once those orders have passed into the record,⁸¹ those orders generally only being subject to displacement on appeal,⁸² where an error has

75 *Saxmere Co Ltd v Wool Board (No 2) (Saxmere No 2)* [2010] 1 NZLR 76, 78 [6] (Blanchard, Tipping, McGrath and Anderson JJ).

76 See eg, *De L v Director-General Department of Community Services (NSW)* (1997) 190 CLR 207.

77 *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [34]; *Burrell v The Queen* (2008) 238 CLR 218, [15]; *Achurch v The Queen* (2014) 306 ALR 566, [14].

78 See *Saxmere No 2* (n.75), 77–78 [2] (citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632).

79 *Ibid.*

80 As opposed to giving the sentence a somewhat tortured meaning, namely that it was not suggested that the orders had been perfected and thereby posed an impediment to recall. See also, McCoy, “Judicial Recusal in New Zealand” (n.59) p.332.

81 See ie, *In re Suffield and Watts, Ex parte Brown* (1888) 20 QBD 693; *Meier v Meier* (1948) P 89; *Bailey v Marinoff* (1971) 125 CLR 529, 530 (Barwick CJ); *R v Billington* [1980] VR 625 (Young CJ, Kaye and Jenkinson JJ).

82 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 376, [129] (Hayne, Crennan and Kiefel JJ); see *Horowhenua County v Nash (No 2)* (n.78), 633 (Wild CJ); *R v Smith* [2003] 3 NZLR 617.

been made that is understood to vitiate that decision.⁸³ The rationale for this is that the act of perfection signifies the intention of the court to give orders a final status to ensure that the rights and obligations of the parties are truly settled and not subject to contest.⁸⁴ This preserves the authority of the court.⁸⁵

In the case of an apex court from which there exists no avenue of appeal, such as the Supreme Court of New Zealand, the jurisdiction to set aside and reconsider the making of a perfected order has been accepted in some jurisdictions,⁸⁶ but is only exercised in utterly exceptional circumstances. Whether such a power inheres in the High Court of Australia is a matter of some uncertainty. As the majority in *DJL v Central Authority* observed, “there is, as yet, no decision of this Court which turns upon the position after entry of its final orders”,⁸⁷ and that remains true. However, Mason and Wilson JJ’s *dicta* in *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd (No 2)*, is highly suggestive of the existence of such a power:⁸⁸

“There may be little difficulty in a case where the orders have not been perfected and some mistake or misprision is disclosed. But in *other cases* it will be a case of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation. The circumstances that will justify a rehearing must be quite exceptional”.

Similarly, the majority in *University of Wollongong v Metwally (No 2)*⁸⁹ observed that:

“It may be assumed, without deciding, that the court has power to vacate its order . . . notwithstanding that it has been perfected. If such power exists, it must be exercised with great caution, after weighing what might otherwise be irremediable injustice against the public interest in maintaining the finality of litigation”.

83 That is, in a manner contemplated by statute: *Grierson v The Queen* (1938) 60 CLR 431, 436 (Dixon J); or in a manner understood to enlive a superior court’s inherent supervisory jurisdiction: *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 568, [59], such as a failure to comply with the hearing rule, thus denying a party procedural fairness: *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd [No 2]* [2013] HCA 44, [13]–[15]. Australia has not followed the United Kingdom and New Zealand in that it has not abandoned the distinction between jurisdictional and non-jurisdictional errors when considering the reviewability of an error of law, following a refusal to follow *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6.

84 *Lockyer v Ferryman* (1877) 2 AC 519, 530 (HL); see *Burrell v The Queen* (n.77), 224.

85 *Coulton v Holcombe* (1986) 162 CLR 1, 7; see *D’orta-Ekenaike v Victoria Legal Aid* (n.77), 17–18, [35]. See also, Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Leichhardt: Federation Press, 2012).

86 *Rajundernarain Rae v Bjai Govind Sing* (1836) 2 Moo Ind App 181; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, 132; *Taylor v Lawrence* [2002] EWCA Civ 90, [54].

87 (2000) 201 CLR 226, 247–248, [44].

88 (1982) 150 CLR 29, 38 (emphasis added); *Patel v Minister for Immigration and Citizenship (No 4)* (2012) 208 FCR 128, [38]–[45].

89 (1986) 60 ALR 68, 70 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

It follows that the setting aside by the Supreme Court of New Zealand of its own orders, particularly if perfected, indicates recognition that the strong interest in favouring the finality of litigation is overborne by the need to prevent an “irremediable injustice”. Based on the reasoning in *Saxmere (No 2)*, the Australian approach to the reopening of a perfected order by an apex court would appear to be consistent with the law of New Zealand.⁹⁰

The judicial approaches in New Zealand and Australia regarding the test to be applied to determine bias appear to have converged. It is apparent from a comparison of the first and second judgments of the Supreme Court that the decision of *Ebner*, as endorsed in New Zealand by the Court of Appeal in *Muir v Commissioner of Inland Revenue*,⁹¹ was central to the reasoning. In particular, the *Wilson* Court placed great emphasis on the requirement, previously stated in *Ebner*, that it must be demonstrated how the matter giving rise to an apprehension of bias was connected to the judge’s capacity to decide a case on the merits. Before the full extent of the nature of the arrangement between Wilson J and Mr Galbraith emerged, there was general agreement amongst the judges that the friendship between Wilson J and Mr Galbraith had persisted through a range of circumstances, including their acting as opposing counsel, and that there was nothing in the business arrangement that would cause the reasonable observer to perceive that relationship as having become one of coercion.⁹² It was only after it became clear that Wilson J in effect owed Mr Galbraith a great deal of money, and that the expansion of the stud farm was reliant upon preserving Mr Galbraith’s cooperation, that the Court held the test in *Ebner* to be satisfied. The investment was not “passive”, which presumably means an agreement on an equal financial footing and in respect of which no claim could be made on the judge, but rather involved a financial dependency sufficient to “raise a question in the mind of the observer about the Judge’s ability to address the issues raised by the appeal without being unconsciously affected by this ongoing aspect of his business relationship with counsel”.⁹³

V. Recusal of an Apex Court Justice

Wilson J was a judge of the Supreme Court of New Zealand, an apex court. However, the allegation of bias related to Wilson J when he sat as a member of the court below — the Court of Appeal. This raises a key tension; if a judge of an inferior court, when an application is made to disqualify the judge, rules that he or she is not

90 See also, *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2013] 1 NZLR 804, 812–813 [2]–[6], 820–822, [28]–[34], for a general discussion of the principles applicable to the reopening of orders in New Zealand.

91 [2007] 3 NZLR 495 (CA).

92 See *Saxmere No 1* (n.70), 51, [30] (Blanchard J), 54, [44] (Tipping J), 55, [50] (McGrath J), 75, [124] (Gault J), 75, [126] (Anderson J).

93 See *Saxmere No 2* (n.75), 81, [18].

disqualified, there is recourse to a superior court. What if a recusal is sought from a judge of an apex court, for example the Supreme Court of New Zealand, and he or she refuses?

Two difficulties attend such a situation. An apex court is a “special” court; it generally acts as a final court of appeal and a court for which the most important constitutional questions are reserved. To deprive an apex court of a crucial vote is, more than any other court, bound to have significant political and social (let alone legal) ramifications. Does it follow that a different standard of review should be applied? Further, no appeal lies from an apex court to a higher court, and so the only judges available to consider the correctness of an apex court judge, are his or her peers. Does it follow that no review mechanism should be available? The fundamental question is this: if the events precipitating the Wilson saga had occurred while Wilson J was a judge of the Supreme Court of New Zealand, why should the response of the court be any different?

In *Siemer v Heron [Recusal]*,⁹⁴ in which a self-represented litigant sought an interlocutory order that two sitting members of a five judge bench of the Supreme Court should recuse themselves because there was a reasonable apprehension that they were biased, a process was adopted whereby the remaining three judges considered that application. That apex court judges may sit in judgment of the apparent bias of other members of that court (whether the conduct occurred after their appointment to the apex court or during their time on another court) appears to have been accepted in principle in *Siemer* and during the Wilson saga, which indicates that this will be the accepted approach in New Zealand.

In Australia, however, it remains unresolved whether a member of the apex court who refuses to recuse himself or herself from a court proceeding can be disqualified by the remaining members of the court. The ambiguities in this process go somewhat to the scope of an apex court’s jurisdiction to restrain its own members.⁹⁵ When a superior court reviews a decision of a judge of an inferior court not to recuse, conceptually the appeal does not lie from the mere refusal of the judge to recuse, but from the order made, the legality of which is tainted by the denial of natural justice.⁹⁶ The modern approach to the rule would appear to extend jurisdiction to interlocutory orders dealing with an allegation of apprehended bias.⁹⁷ Indeed, in recent years the High Court has exercised its appellate jurisdiction over an intermediate appellate court considering an interlocutory decision by a trial judge refusing to recuse — a decision that took the form of an authenticated order.⁹⁸

What if, as during the Wilson saga, the relevant facts came to light only after the decision not to recuse had been made? There is no avenue of “appeal” per se

94 [2012] 1 NZLR 293.

95 Enid Campbell, “Review of Decisions on a Judge’s Qualification to Sit” (1999) 15 Queensland University of Technology Law Journal 1, 2.

96 *Barton v Walker* [1979] 2 NSWLR 740.

97 Anna Olijnyk, “Apprehended Bias and Interlocutory Judgments” (2013) 35 Sydney Law Review 761.

98 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

from an final order made by a full court of an apex court, whether it is alleged to have been made in breach of procedural fairness or not. The only course of action available to an apex court would be that taken by the Supreme Court of New Zealand during the Wilson saga; namely, to recall its judgment and set aside its own orders. The Chief Justice of an apex court would then have to convene a new bench (without the judge who refused to recuse) to decide whether to set aside the judgment on the basis of irremediable injustice (which would involve, presumably, an assessment of whether there is an apprehension of bias)⁹⁹ and, if so, to re-determine the relevant legal questions. The High Court has accepted it could take this approach when confronted with other breaches of procedural fairness.¹⁰⁰

This is cumbersome and undermines the principle of finality. However, it is not clear as to what the High Court could do to formally restrain a judge from sitting before final orders have been made. This problem almost arose in the 1998 High Court case of *Kartinyeri v Commonwealth*.¹⁰¹ The full bench of the Court comprising all seven members of the Court was required to consider the constitutionality of a piece of federal legislation. The plaintiffs, on 4 February 1998, sought to have Callinan J, who had been sworn in as a Justice of the High Court the day before, disqualified from participating in the case. The ground for the application of recusal was that Callinan J, as a barrister, had provided advice on the constitutionality of the legislation in Bill form. Following the challenge Callinan J issued a statement of reasons as to why he was of the view that there was no reasonable apprehension of bias and he was therefore not disqualified. Callinan J had communicated with Chief Justice Brennan and was informed that this was a decision for him to make in the first instance. Arguments were heard on the substantive issues in the case and judgment was then reserved. The plaintiffs gave notice of motion to seek an order that Callinan J take no further part in the case. They were thus asking the Court to review the decision by Callinan J that he was not disqualified and the application for review was listed to be heard by a Bench not including Callinan J. A few days before the actual hearing, Callinan J voluntarily withdrew from the case. This was because of new information which came to light. The shadow Attorney-General (Nick Bolkus) had written to Callinan J “informing him that the Senate standing committee was to consider the release of correspondence in which Justice Callinan as a barrister had stated that his opinion on the Hindmarsh Island Bridge was an opinion to the responsible Minister and not a submission to the Senate”.¹⁰² It was

99 See Campbell, “Review of Decisions on a Judge’s Qualification to Sit” (n.95) p.6.

100 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, in respect of the hearing rule (although the orders in that decision were unperfected). See also, *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd (No 2)* (2013) 303 ALR 84, 86–87. For other examples consider the UK Court of Appeal’s consideration of the rule against bias in light of its status as a court of “quasi-final” appellate jurisdiction in *Taylor v Lawrence* (n.86).

101 (1998) 195 CLR 337.

102 Haig Patapan, “The Howard Government and the High Court” in Gwynneth Singleton (ed), *The Howard Government* (Sydney: University of New South Wales Press Ltd, 2000) pp.37, 41.

said: “This was apparently at variance with [Callinan J’s] earlier statement that suggested the opinion was provided to the Senate committee”.¹⁰³

The High Court can review the mere refusal by a High Court judge to recuse him or herself when exercising judicial power as a single judge. In *Bienstein v Bienstein*,¹⁰⁴ McHugh, Kirby and Callinan JJ refused an application for special leave made substantially on the basis that Hayne J had failed to properly recuse himself. Hayne J had refused an interlocutory application¹⁰⁵ and the applicant applied for special leave. Hayne J had not made final orders disposing of the rights and duties of parties, and so the appeal was interlocutory¹⁰⁶ and required leave under s.34(2) of the Judiciary Act 1903 (Cth). Although the application was struck out as incompetent because the applicant had neglected to seek leave in the prescribed way,¹⁰⁷ the bench proceeded to consider *obiter* — and dismiss as meritless — the applicant’s proposition that Hayne J was biased because he had previously been a member of the Victorian Bar (about which the applicant had complained).¹⁰⁸

Whether *Bienstein* advances apex court review of a decision of a judge sitting on a full bench not to recuse, however, is unclear. The orders appealed from included both the orders refusing the interlocutory application and an order to the effect that Hayne J refused to recuse himself. Section 34(2) of the Judiciary Act 1903, reflecting the grant of jurisdiction in s.73(i) of the Australian Constitution, provides that an appeal is only available from a “judgment decree order or sentence” of a High Court justice or justices exercising original jurisdiction. “It is well established that the phrase ‘judgments, decrees, orders and sentences’ is confined to decisions made in the exercise of judicial power”.¹⁰⁹ The phrase therefore obviously includes orders that are dispositive of the rights of the parties, although it also extends to interlocutory orders.¹¹⁰ Although conceptually *Bienstein* is better understood as following the established form of review of orders tainted by procedural unfairness rather than the mere refusal to recuse, there are some indications in *Bienstein* that the refusal of the recusal application was itself hypothetically reviewable under s.34(2) of the Judiciary Act 1903 (Cth) as an interlocutory “judgment decree order or sentence” because it took the form of an order,¹¹¹ s.34(2) allowing an appeal with leave from “an interlocutory judgment¹¹² of a Justice or Justices exercising the original jurisdiction of the High Court whether in Court or Chambers”. It would

103 *Ibid.*

104 (2003) 195 ALR 225.

105 The application was made under s.40(1) of the Judiciary Act 1903 (Cth), which deals with submissions that a matter heard in the Family Court of Australia has constitutional significance and is better dealt with in the High Court.

106 See *Bienstein v Bienstein* (n.104), 231, [28].

107 *Ibid.*, [29].

108 *Ibid.*, [31].

109 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 38 [63] (Gaudron, Gummow and Hayne JJ).

110 *Mellifont v Attorney-General* (1991) 173 CLR 289, 300.

111 See *Bienstein v Bienstein* (n.104), [23]–[28].

112 “Judgment” being defined as “judgment decree order or sentence” in s.2 of the Judiciary Act 1903.

also be consistent with the established approach to the phrase “judgment decree order or sentence”: “For there to be a judgment there must be an order”.¹¹³

This does not get us very far. Even assuming the High Court now accepts that an appeal is available from an order of a single High Court judge refusing to recuse, Callinan J’s decision may not have fallen within the phrase “judgment decree order or sentence” because no order appears to have accompanied his reasons. This is almost certainly because at that stage no formal motion to recuse had been filed.¹¹⁴ Yet it seems beyond the pale that the High Court would not be able to address a threat to public confidence other than by setting aside its own orders. Adopting a practice of making interlocutory orders refusing or allowing an application to recuse may avoid this problem. Otherwise, it would be necessary to characterise the ruling as falling within the range of interlocutory decisions that have been held to fall within the phrase “judgment, decree, order or sentence” notwithstanding the absence of an authenticated order, because they involve a binding and conclusive determination of an aspect of the rights and obligations of the parties to the suit.¹¹⁵ When there are no formal orders from which to appeal, that approach to recusal decisions has not found favour in respect of appellate courts generally.¹¹⁶

Furthermore, despite the wide terms of s.34 of the Judiciary Act — providing that the High Court may “hear and determine appeals from *all judgments whatsoever of any Justice or Justices*” exercising the original jurisdiction of the High Court — this procedure is one that is employed by litigants appealing from the decisions of judges of the High Court exercising the jurisdiction over matters that are expressly capable of being heard by a single judge.¹¹⁷ Accordingly, there is a great degree of ambiguity as to whether s.34, or more fundamentally s.73(i) of the Constitution, would extend to a determination by a judge of a Full Bench, even one given effect by an order. Professor Enid Campbell once observed, without endorsing the proposition, that such an interpretation was open to the High Court.¹¹⁸ In any case, because it is directed at the appellate review of interlocutory decisions made in exercise of the Court’s original jurisdiction, such an approach does not address the many circumstances in which a Full Court, already exercising appellate jurisdiction (an appeal from the decision of a State Court of Appeal dismissing an appeal against conviction, for example), will be asked to consider an allegation of apprehended bias against a judge on that bench,¹¹⁹ unless all decisions to recuse are

113 *Maughan Thiem Auto Sales Pty Ltd v Cooper* [2013] FCAFC 145, [4], [46].

114 *Kartinyeri v Commonwealth (No 2)* (1998) 156 ALR 300, 300 [2].

115 The question of principle put in a variety of contexts in decisions, such as *Commonwealth of Australia v Mullane* (1961) 106 CLR 166; *Mellifont v Attorney-General* (1991) 173 CLR 289.

116 See *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; see *Barton v Walker* (n.96); *Bakarat v Goritsas* [2012] NSWCA 8, [15]–[16] (Basten JA). See also, G Blank and H Selby, *Appellate Practice* (Federation Press, 2008) p.7, fn 19.

117 That is the matters described in s.16 of the Judiciary Act 1903 (Cth).

118 See Campbell, “Review of Decisions on a Judge’s Qualification to Sit” (n.95) p.5.

119 *Ibid.*

characterised as a separate exercise of “original jurisdiction”, which seems both artificial and unlikely.

Yet if such a proceeding did not take the form of a s.73 “appeal”, meaning the statutory process by which a judgment may be reversed, affirmed or modified¹²⁰ is unavailable,¹²¹ the plausibility of this approach may be questioned. In an article, counsel for the plaintiffs in *Kartinyeri* identified two avenues by which the High Court could have reviewed Callinan J’s decision.¹²² The first avenue relies on the assertion that the High Court has an “inherent jurisdiction” to guarantee the fairness of its own proceedings. The second avenue relies on the original jurisdiction of the High Court in matters “arising under the constitution”.¹²³

In short, the High Court would have to accept that on either of these bases it was permitted to (A) intervene, through a hearing, in the decision by a judge of that court to sit on a Full Court; and potentially, and far more controversially, (B) effectively restrain that judge from sitting. (B) is tantamount to the suggestion that (1) there exists a power that (2) permits a judge of an apex court to be restrained from sitting, which is (3) exercisable by his or her peers, and which (4) has an effect on that judge that is equivalent to the writ of prohibition.¹²⁴

The plaintiffs in *Kartinyeri* may not have seen it quite this way — counsel noted that:

“[T]he power to disqualify a member of the High Court from participating in a matter is a specific instance of the court’s jurisdiction to prevent ‘irremediable injustice being done by a Court of the last resort’”.¹²⁵

Such a view was commonly shared at the time. Following Mason J’s judgment in *Autodesk Inc v Dyason (No 2)*¹²⁶ and his extra-curial observations to the same effect,¹²⁷ Professor Campbell suggested that, given the High Court had accepted it had an “inherent jurisdiction” to set aside its own orders where a breach of natural justice had occurred, there was no reason why that jurisdiction should not extend to the review of a decision of a Justice of that Court not to recuse themselves.¹²⁸ Similarly, the Hon. Keith Mason once identified a court’s inherent jurisdiction as

120 Judiciary Act 1903, s.37.

121 See the observations of the Court in *Re Carmody; Ex parte Glennan* (2003) 198 ALR 259, 260–261 [10].

122 Sydney Tilmouth QC and George Williams, “The High Court and the Disqualification of One of Its Own” (1999) 73 Australian Law Journal 72, 73.

123 See s.76(i) of the Constitution read in conjunction with s.30 of the Judiciary Act 1903.

124 Prohibition operating to restrain a judge from sitting when a matter is on foot: *Allinson v General Council of Medical Education and Registration* (1894) 1 QB 750; see *R v Watson* (n.116); *British American Tobacco Australia Services Ltd v Laurie* (n.98). See also, Tarrant, *Disqualification for Bias* (n.53) p.330.

125 See Tilmouth and Williams, “The High Court and the Disqualification of One of Its Own” (n.122) p.76.

126 See *Autodesk Inc v Dyason (No 2)* (n.100), 301–303.

127 Sir Anthony Mason, “Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review” (1998) 1(2) Constitutional Law and Policy Review 21, 26.

128 See Campbell, “Review of Decisions on a Judge’s Qualification to Sit” (n.95) p.6.

being enlivened by the need to remedy breaches of the rules of natural justice.¹²⁹ He cited the observation in *Cameron v Cole* that every court has an inherent jurisdiction “to ensure that trials before it are conducted in accordance with the principles of natural justice”.¹³⁰

These arguments rely to some degree upon the assumption that a clear analogy can be drawn between Australian courts, particularly Australian federal courts, and the English courts of historically general and unlimited jurisdiction. Such a parallel is increasingly cast into doubt, and the existence and scope of the High Court’s “inherent jurisdiction” has been questioned because it, like the Supreme Court of New Zealand, is a court of limited jurisdiction.¹³¹ The powers of such courts are thought to derive from the exercise of the jurisdiction they have been granted, either because those powers are expressly provided for or are “incidental and necessary to the exercise of jurisdiction vested in the Court”.¹³²

Whether the powers are argued to be express or implied, it is nonetheless a difficult road. The idea that the High Court should have powers that are constitutionally implied because of its unique institutional position as a court of ultimate constitutional and appellate jurisdiction has been mooted, although the scope of those powers are not clear.¹³³ It is unclear what the Supreme Court of New Zealand would have done in *Siemer* had it decided an apprehension of bias existed. Although the provision has not previously been so read, given an interlocutory order was sought the source of any power is likely to be s.25(2) of the Supreme Court Act 2003 (NZ), which permits the Supreme Court to make any “interlocutory order ... it thinks fit”.¹³⁴ In contrast, the High Court of Australia has, when exercising its original jurisdiction, a set of powers in the Judiciary Act the outer boundaries and flexibility of which have not been extensively tested,¹³⁵ supplemented by the remedial powers of the State or Territory in which it is sitting.¹³⁶ It was argued by the plaintiffs in *Kartinyeri* that relevant power derived from s.31 of the Judiciary Act,¹³⁷ which permits the High Court to “make and pronounce all

129 Keith Mason, “The Inherent Jurisdiction of the Court” (1983) 57 Australian Law Journal 449, 449–450. See also, Wendy Lacey, “Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution” (2003) 31 Federal Law Review 57, 63–70.

130 (1944) 68 CLR 571, cited in Mason, “The Inherent Jurisdiction of the Court” (n.129) p.450.

131 See Lacey, “Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution” (n.129) pp.65–70.

132 *Bahr v Nicolay (No 1)* (1987) 163 CLR 490 (Toohey J); see *DJL v Central Authority* (n.87), 241, [27]; *United Mexican States v Cabal* (2001) 209 CLR 165; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601.

133 See *MZXOT v Minister for Immigration and Citizenship* (n.132), 621–622, [32]–[33] (Gleeson CJ, Gummow and Hayne JJ), Kirby J generally. See also, Rosara Joseph, “Inherent Jurisdiction and Inherent Powers in New Zealand” (2005) 11 Canterbury Law Review 220, 233–234.

134 Section 25(2) provides in full that “in any proceeding, the Supreme Court can make any ancillary or interlocutory orders (including any orders as to costs) it thinks fit”.

135 See Judiciary Act 1903, ss.31–33.

136 *Ibid.*, ss.79–80.

137 See *Tilmouth and Williams*, “The High Court and the Disqualification of One of Its Own” (n.122) p.75.

such judgments as are necessary for the doing of complete justice in any cause or matter pending before it”. This seems tenable, given the fact that there is some indication that s.31 performs a function broadly similar to s.25(2) of the Supreme Court Act 2003 (NZ).¹³⁸

However, when the broader application of this position is considered, it can be said to suffer from four flaws. The first flaw is that ss.31–33 of the Judiciary Act confer no jurisdiction additional to that conferred upon the High Court by the Constitution, but are merely powers that supplement an already-existing, original jurisdiction.¹³⁹ The significance of this problem is highlighted by the second flaw, which is operational: s.31 attends an exercise of the High Court’s original jurisdiction, and so, like the appellate jurisdiction described in s.34 of the Judiciary Act, could not be relied upon by a Full Bench already exercising its appellate jurisdiction. Further, and this third flaw also attends s.25(2) of the Supreme Court Act 2003 (NZ), s.31 can be repealed or have its terms altered by the federal Parliament. So, without some deeper constitutional underpinning, the power of the High Court to protect its processes in this way is vulnerable, or at least of varying application.

Against flaws two and three, one should consider the suggestion that the powers conferred by the Judiciary Act are “declaratory of an attribute of the judicial power of the Commonwealth which is vested in [federal courts] by s.71 of the Constitution”.¹⁴⁰ It may be that an argument about s.31 actually affects our underlying understanding of the inherent, constitutionally conferred powers of the High Court (and thus opens up the possibility for their general application).

However, any power that accrues to a court, whether in consequence of s.71 or as a power otherwise incidental and necessary to the proper exercise of jurisdiction, would rely in significant part on historical analogy,¹⁴¹ which does not support the making of an order against a judge of the same court. This is the fourth flaw, and it is why the plaintiffs in *Kartinyeri* expressly did not rely on the court’s

138 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 91 (Gaudron and Gummow JJ). Specifically, Gaudron and Gummow JJ suggested that the meaning of the phrase “necessary for the doing of complete justice” in s.31 could be understood with reference to the decisions of *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 and *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380. Those decisions concern the limitations on granting an equitable injunction under s.23 of the Federal Court Act 1976 (Cth), which provides that court the power to make “orders of such kinds, including interlocutory orders ... as the Court thinks appropriate”. The judges must have considered that the two provisions had similar properties. Generally speaking, s.31 has been used to make interlocutory orders in decisions, such as *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

139 See ie, the discussion of certiorari in *Pitjield v Franki* (1970) 123 CLR 448; *Re Jarman; Ex parte Cook (No 1)* (1997) 188 CLR 595.

140 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, [16] (Gleeson CJ and Gummow J) (referring to the power of contempt conferred by s.24 of the Judiciary Act). See also, *X7 v Australian Crime Commission* [2013] HCA 29, [18] (French CJ and Crennan J).

141 Although not entirely: see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 631 (Toohey J).

original jurisdiction under s.75(v) of the Constitution.¹⁴² Section 75(v) enlivens the High Court's jurisdiction in any matter "in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth", that term including judicial officers of superior federal courts other than the High Court.¹⁴³ As counsel recognised,¹⁴⁴ prerogative relief is not traditionally thought, as a matter of basic principle, to lie against a fellow judge of a court.¹⁴⁵ The issuing of declaratory relief is now considered similarly unintuitive,¹⁴⁶ and for that reason it is likely that the principle applies to the injunctive relief described in s.75(v), although the latter is intended to be "available in a wider range of circumstances than the constitutional writs".¹⁴⁷ This principle is also probably part of the reason why the federal court judges considered to be "officers of the Commonwealth" have not been understood to include High Court judges, precluding an action under s.75(v).¹⁴⁸

Interestingly, s.75(v) has come to be understood as an irreducible means by which the High Court may secure the rule of law by ensuring that officers of the federal judiciary and executive exercise power within their jurisdictional boundaries. Gaudron and Gummow JJ have observed that:

"[P]rocedural fairness is a concomitant of the vesting of the judicial power of the Commonwealth in that federal court and s.75(v) operates to maintain s.71 of the Constitution".¹⁴⁹

It is worth considering whether, at least in respect of Australia, in the face of necessity, any historically-grounded reluctance to apply writs to judges of the same court will fade in light of the High Court's recent willingness to distinguish the constitutional writs from their English prerogative counterparts. As Kirby J noted in *Re Refugee Review Tribunal; Ex parte Aala*:¹⁵⁰

"Conceiving of the constitutional writs as 'prerogative writs' is liable to lead those who make that error to the mistake of burdening an important Australian constitutional remedy, needlessly, with all the limitations,

142 See Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (n.127) p.22.

143 See the discussion of Kirby J (dissenting) in *Re McBain* (2002) 209 CLR 372, 437–440, [165]–[177].

144 See Tilmouth and Williams, "The High Court and the Disqualification of One of Its Own" (n.122) p.73.

145 See eg Dawson J's judgment in *Ex parte Cook No 1* (n.139), 610: "For a court to grant prerogative relief against one of its own judges is for it to grant relief against itself in the exercise of the same jurisdiction as that exercised by the judge, a situation which has been described as 'rather ludicrous'", citing *R v Justices of the Central Criminal Court; Ex parte London County Council* [1925] 2 KB 43.

146 *Harmer v Oracle Corp Australia Pty Ltd* (2013) 299 ALR 236, [33].

147 Charles Noonan, "Section 75(v), No-Invalidity Clauses and the Rule of Law" (2013) 36(2) UNSW Law Journal 437, 451.

148 See *Ex parte Cook No 1* (n.139), 603–604 (Brennan CJ).

149 See *Ex parte Aala* (n.138), 101, [42].

150 *Ibid.*, 133, [138] (Kirby J), 91–93 (Gaudron and Gummow JJ), 138–142 (Hayne J).

restrictions and procedural convolutions found in the history of English prerogative writs ... It was never a function of the prerogative writs in England to provide relief directed to a judge of a superior court. Yet that was inherent in the writs contemplated by s.75(v) of the Australian Constitution once it was determined that such judges were ‘officers of the Commonwealth’.

Yet it seems unlikely that s.75(v) would serve as the jurisdictional vehicle by which orders could be made restraining a High Court judge from sitting. For starters, such a reading of “officer of the Commonwealth” would potentially leave judges of the High Court exposed to peer review in respect of all errors that could be characterised as “jurisdictional”. This would be greatly threatening to the principle of finality and the apex status of the High Court.

An interesting possibility is raised by the *Kartinyeri* plaintiffs’ alternative submission, that Callinan J’s refusal to recuse went to the interpretation of the constitution because it concerned the essential conditions which must attend the exercise of federal judicial power.¹⁵¹ They rely on a protean account of what has become a flourishing Australian jurisprudence about the “essential characteristics” and “institutional integrity” of courts.¹⁵² If this alternative submission was ultimately accepted, it would create a separate basis of original jurisdiction permitting the review of breaches of procedural fairness in federal courts, additional to s.75(v), and presumably grounded in s.76(i) of the Constitution.¹⁵³ Given such jurisdiction is original there is no reason why the powers described in ss.31–33 could not be used. This would, for better or for worse, transpose a doctrine that concerns the constitutional validity of legislation that impairs a court’s essential characteristics into a condition of legality with respect to the composition of federal court benches.¹⁵⁴ It would cement “the inherent power of federal courts to protect the judicial process in the administration of justice”.¹⁵⁵

As Matthew Groves has observed, “the fact that constitutional and common law principles sometimes bear similar features, or may achieve similar outcomes, does not itself provide a clear reason to transpose the latter into the former”.¹⁵⁶ However, it may be that, in the face of no other plausible alternative, the High Court is given a reason to treat the rule against bias as having a constitutional dimension

151 See Tilmouth and Williams, “The High Court and the Disqualification of One of Its Own” (n.122) pp.76–78.

152 See also HP Lee and Michael Adams, “Defining Characteristics of ‘Judicial Power’ and ‘Court’ – Global Lessons from Australia” (2013) 21(2) *Asia Pacific Law Review* 167.

153 See works referred to n.123.

154 See the discussion in Matthew Groves, “Exclusion of the Rules of Natural Justice” (2013) 39(2) *Monash University Law Review* 285, 285–286; see also, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 78, [68] (Gummow, Hayne and Crennan JJ).

155 See Lacey (n.129) p.59.

156 See Groves, “Waiver of the Rule against Bias” (n.51) p.326.

for the purposes of asserting jurisdiction over the decision of a High Court judge not to recuse. After all, “the rule that a judge may not sit to hear a case if it might reasonably be considered that he could not bring a fair and unprejudiced mind to the decision applies to every court in Australia”.¹⁵⁷

There is no doubt that, as Sir Grant Hammond has noted, if pursued in *Kartinyeri* proposition (B) “would ... have raised a major jurisdictional issue”.¹⁵⁸ Although it suffers from the problem that the determination not to recuse must be characterised as an exercise of original jurisdiction, the adaptation of s.73 contemplated by Professor Campbell does conform with the view that:

“[H]istorically, all common law courts sat *en banc*. Judgments of a court are judgments of the whole court and the concept of an appeal to judges of the same court (or, on one view, at all) is a statutory invention”.¹⁵⁹

As has been demonstrated, without such a statutory procedure it is uncertain what order could issue from such a proceeding, and such an order would be unlikely to restrain a recalcitrant judge.

The value of such a proceeding may not be in its legal, but rather its symbolic, force. In *Ebner*, Callinan J supported the general proposition that the question of recusal, when it arose, should be decided at first instance by a judge other than the one alleged to suffer from bias or prejudgment.¹⁶⁰ Callinan J suggested that the value in such a review was that:

“[A]lthough the judge in a particular jurisdiction could hardly order that another judge of it not sit on, or decide a matter the procedure would better serve the general public interest and the litigants in both the appearance and actuality of impartial justice”.¹⁶¹

Gleeson CJ, McHugh, Gummow and Hayne JJ disagreed with this view:

“Adopting such a procedure would require examination of the power of that other judge to determine the question and the way in which that other judge’s conclusion would find its expression. In particular, is the question of possible disqualification to be treated as an issue in controversy between the parties to the proceeding and is it to be resolved by some form of order”?¹⁶²

157 See *R v Watson* (n.116), 263 (Barwick CJ, Gibbs, Stephen, Mason JJ).

158 See Hammond, *Judicial Recusal: Principles, Process and Problems* (n.13) p.113.

159 *R v Jones; R v Hili (No 2)* (2010) 79 NSWLR 143, 146, [19] (Rothman J).

160 See *Ebner v Official Trustee in Bankruptcy* (n.4), [185].

161 *Ibid.*

162 *Ibid.*, [74].

They described the approach of the sitting judge in deciding the matter himself as “both the ordinary, and the correct, practice”.¹⁶³ In the end, therefore, it is cultural as much as jurisdictional limitations that may divide the approaches of apex courts to this problem.

Further, and unlike Australia, s.23 of the Supreme Court Act 2003 (NZ) provides for a mechanism by which acting judges can be appointed to an apex court bench from which judges have recused.¹⁶⁴ This mitigates the force the principle of necessity may have upon the New Zealand Supreme Court. However, such a mechanism is not available to Australian federal courts due to s.72 of the Constitution.¹⁶⁵ One should bear this in mind when considering the proposition put at the start of this section: that it is constitutionally vital that the judges of apex courts sit absent compelling circumstances.

VI. Embodying Grounds for Recusal in Statute

One response is for the legislature to set out in statute the grounds on which all judges must recuse themselves. The closest Australia has come to codified regulation is by promulgation of the “Guide to Judicial Conduct”. This Guide was developed for the Council of Chief Justices of Australia (which also includes the Chief Justice of New Zealand) by the Australasian Institute of Judicial Administration. It sets out “practical guidance about conduct expected of [members of the judiciary] as holders of judicial office”.¹⁶⁶ The Guide sets out, for example, “disqualification procedure”, and provides that “if a judge considers that disqualification is required, the judge should so decide”¹⁶⁷ and that “the decision should be made at the earliest opportunity”.¹⁶⁸ It contemplates consultation with the judge’s judicial peers and Chief Justice.¹⁶⁹ It discourages acquiescing to trivial objections¹⁷⁰ and advises the judge to “disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge’s own view, there is any objection”.¹⁷¹ The Guide “does not purport to be a code in any sense of that word, or to lay down rules”¹⁷² and does not generate legal obligations

163 *Ibid.*, [74]. See Melissa Perry, *Disqualification of Judges: Practices and Procedures* (2001) Discussion Paper: The Australian Institute of Judicial Administration, xi.

164 Specifically, retired Judges of the Supreme Court or the Court of Appeal who have not reached the age of 75 years.

165 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

166 Chief Justice Murray Gleeson, “Preface” in Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed., 2007) p.ix.

167 *Ibid.*, pp.3.5(a), 15.

168 *Ibid.*

169 *Ibid.*

170 *Ibid.*, pp.3.5(c), 15.

171 *Ibid.*, pp.3.5(i), 16.

172 *Ibid.*, p.2.

that are additional to those enshrined in the common law.¹⁷³ The New Zealand Law Commission has drawn attention to the Guide, describing it as a “protocol”.¹⁷⁴ A similar set of Guidelines has also been promulgated in New Zealand.¹⁷⁵

In contrast, United States Federal district and appellate courts, including the Supreme Court of the United States, operate under the recusal principles set out in Title 28 of the *United States Code*. The relevant sections are ss.144 and 455. Section 144 automatic disqualification, although a decisive procedure, only applies to judges from federal district courts.¹⁷⁶ It has been described by Flamm as having “an extremely difficult burden to satisfy” and “has proven to be nearly impossible to satisfy on review”.¹⁷⁷ He argues that s.144 has been rendered “essentially ineffectual” due to the attitude of United States courts that “s.144 seems to be properly invocable only when s.455 can be invoked anyway”.¹⁷⁸

Should New Zealand and Australia adopt the approach of statutory regulation of recusal procedure and practice of the federal judiciary in the United States? Would this have enabled the Wilson saga to have been avoided? Notwithstanding the occasional — and serious — controversies that arise, we are of the view that no cogent case has been made for altering the current system of self-regulation of judicial recusal in Australia or New Zealand, with the possible exception being a clarification of the system of review.¹⁷⁹ Certainly, the statutory regulation of recusal has not prevented controversies from arising in the United States that pose challenges to public confidence arguably more serious than even the Wilson saga.

Those circumstances have proven to be increasingly limited. Section 455 has two subsections. Sub-section (a) provides that:

“[A]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”.

This is understood to set an objective standard requiring recusal when a reasonable person with knowledge of the relevant facts and circumstances would question the impartiality of the judge.¹⁸⁰ Sub-section (b) outlines a number of specific

173 *Attorney-General (NT) v Director of Public Prosecutions* [2013] NTCA 2, [25]–[26] (Mildren ACJ, Kelly and Blokland JJ); *Gaudie v Local Court of New South Wales* [2013] NSWSC 1425, [16].

174 New Zealand Law Commission, “Towards a New Courts Act – A Register of Judges’ Pecuniary Interests? Review of the Judicature Act 1908” First Issues Paper (NZLC IP21, 2011) p.9, [2.25].

175 “Guidelines for Judicial Conduct” *Courts of New Zealand*, available at www.courtsofnz.govt.nz.

176 Debra Lyn Bassett, “Judicial Disqualification in the Federal Appellate Courts” (2002) 87 Iowa Law Review 1213, 1226.

177 Richard Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* (Berkeley, CA: Banks & Jordan, 2nd ed., 2007) p.696.

178 *Ibid.*

179 See also, HP Lee and Enid Campbell, *The Australian Judiciary* (n.10) pp.169–170.

180 See Flamm, *Judicial Disqualification* (n.177) p.699. See also, *Liljeberg v Health Services Acquisition Corp*, 486 US 847 (1988).

circumstances in which federal appellate judges must recuse themselves. These are the substantial interest provision,¹⁸¹ as well as personal bias,¹⁸² prior involvement in the case as a lawyer or counsel,¹⁸³ possession of a financial interest¹⁸⁴ or other substantial personal interest that could be affected,¹⁸⁵ and familial connections to the case.¹⁸⁶ Notionally, s.455 appears on its face to impose a far more comprehensive mechanism of recusal than *Ebner*.

The purpose of s.455 was to “promote confidence in the judiciary, and the integrity of the judicial process, by commanding judges to avoid even the appearance of impropriety, but federal courts have not been entirely uniform in their interpretation of it”.¹⁸⁷ A narrow interpretation was famously advocated for by Rehnquist CJ, who refused to recuse in application of an earlier iteration of s.455¹⁸⁸ in *Laird v Tatum*.¹⁸⁹ It was alleged that Rehnquist CJ had prejudged the question of whether military surveillance was unlawful, as he had previously testified that he regarded it as constitutional.¹⁹⁰ The situation was therefore roughly equivalent to that faced by Callinan J in *Kartinyeri*. Like Callinan J, Rehnquist CJ refused the application. The Chief Justice was of the view that:

“[N]ot only is the sort of public-statement disqualification upon which respondents rely not covered by the terms of the applicable statute ... but it does not appear to me to be supported by the practice of previous Justices of this Court”.¹⁹¹

This narrow interpretation was applied by Rehnquist CJ to the contemporary iteration of s.455(a) in *Microsoft v United States*.¹⁹² The Chief Justice was asked to recuse himself as his son was at the time representing Microsoft in other, unrelated antitrust litigation. Rehnquist argued that he was not required to recuse as his “son’s personal and financial concerns will not be affected by our disposition of the

181 See Bassett (n.176) p.1221.

182 28 USC s.455(b)(1).

183 *Ibid.*, s.455(b)(2), 455(b)(2)(3).

184 *Ibid.*, s.455(b)(4).

185 *Ibid.*, s.455(b)(5)(iii).

186 *Ibid.*, s.455(b)(4), 455(b)(5).

187 See Flamm, *Judicial Disqualification* (n.177) p.698.

188 It provided that:

“Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein”.

The section was amended in 1974.

189 408 US 1 (1972). The decision not to recuse was reported at 409 US 824 (1972).

190 Debra Lyn Bassett, “Recusal and the Supreme Court” (2005) 56 *Hastings Law Journal* 657, 664.

191 409 US 824 (1972).

192 530 US 1301 (2000).

Supreme Court's Microsoft matters".¹⁹³ Due to this unaffected interest, s.455(a) did not apply as an "objective observer, informed of these facts, would not conclude that [his] participation in the pending Microsoft matters gives rise to an appearance of partiality".¹⁹⁴ Rehnquist CJ held that the above reason also precluded recusal under s.455(b)(5)(iii), which applies when a child stands to gain a substantial interest.¹⁹⁵ This narrow interpretation has been defended by Rehnquist CJ extra-judicially.¹⁹⁶ In part, his justification rested on the proposition that there is a compelling public interest in having a full bench of an apex court decide important questions of constitutional law.¹⁹⁷ Nor is there a formal process of review over the decisions of individual Supreme Court judges not to recuse (as opposed to informal processes of "review").¹⁹⁸

Bassett notes that judges interpreting s.455(a) have tended to follow Rehnquist CJ's narrow interpretation and suggests that the narrow interpretation has contributed to declining perceptions of the impartiality of Supreme Court and Federal appellate judges.¹⁹⁹ Such a decline is exacerbated by the lack of a formal review mechanism over the decision of an individual Supreme Court judge not to recuse. The recusal statute's reliance upon Supreme Court judges exercising the recusal criteria voluntarily and in good faith means that procedural alternatives are not provided for.²⁰⁰ Specifically, the interpretation employed by United States judges post-*Microsoft* has rendered inflexible the disqualification criteria set out in the statute and left "no review mechanism, no opinion or public [confidence] reasoning required, no legal accountability, and no mechanism to handle replacement when recusal occurs".²⁰¹

A neat illustration is provided by Scalia J's decision to sit in *Cheney v United States District Court for the District of Columbia*.²⁰² Scalia J was asked to recuse himself from a matter to which Vice-President Dick Cheney had been joined as a defendant in his official capacity, after it emerged that Scalia J had accompanied Cheney on a hunting trip while the case was in proceeding. The case itself involved a motion to obtain a writ of mandamus by Judicial Watch and the Sierra Club in order to force officials to disclose information pertaining to a report on energy policy after it was found that energy executives became involved in the consultation process. The Sierra Club moved that Scalia J recuse himself "in order to redress an

193 *Ibid.*, 1302.

194 *Ibid.*, 1303.

195 *Ibid.*, 1302.

196 William Rehnquist, "Let Individual Justices Make Call on Recusal" (2004) *Atlanta Journal and Constitution* 15A.

197 See *Microsoft v United States* (n.192), 1303.

198 As has been described by Ross Davies in "The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification" (2006) 10(1) *Green Bag* 2d 79.

199 See Bassett, "Judicial Disqualification in the Federal Appellate Courts" (n.176) p.1232.

200 *Ibid.*, p.1228.

201 Caprice L Roberts, "The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort" (2004) 57 *Rutgers Law Review* 107, 109.

202 542 US 367 (2004); 541 US 913 (2004) (recusal decision).

appearance of impropriety and to restore public confidence in the integrity of our nation's highest court".²⁰³ The argument was, relying on s.455(a), that Scalia J's impartiality might reasonably be questioned in light of his personal friendship with Dick Cheney, his transportation in Air Force Two to the trip, and the subsequent news coverage of the trip.

Scalia J relied heavily on Rehnquist CJ's proposition in *Microsoft* that the hypothetical reasonable observer is held to have in their knowledge "all the surrounding facts and circumstances".²⁰⁴ He argued this required that the facts be ascertained as they existed, not as they were reported. On this basis, he dismissed the news media evidence, most of which condemned the hunting trip and cast aspersions on whether he and Cheney had discussed the case, on the grounds that the evidence was factually erroneous and that the Supreme Court would have its functions distorted by press hysteria if the media speculation formed a basis for recusal.²⁰⁵

Furthermore, Scalia J found that he was not required by s.455(a) to recuse himself because of his friendship with Dick Cheney, as the case was brought against Cheney in his *official* capacity rather than his *personal* capacity; this meant no consequences would accrue to Cheney were he to lose.²⁰⁶ In response to the argument that Scalia J had accepted a gift when he accompanied Cheney to Louisiana on Cheney's private jet, he argued that he did not end up saving money through the vagaries of airplane travel and the cost of the return ticket.²⁰⁷ Scalia J also argued that previous authority of the Court supported the proposition that the reasonable person would question the impartiality of a judge who accepted "social courtesies" from officials acting in their official capacity.²⁰⁸

In adopting a narrow interpretation, Scalia J relied in significant part upon the notion that the Supreme Court has ultimate responsibility for the final resolution of important constitutional questions and as such the consequence of a recusal is "different".²⁰⁹ This responsibility justified reading the mandatory language in s.455(a) as directory. Yet there is a general consensus amongst commentators that Scalia J's interpretation "did not comply with the broad standard set forth in s.455(a) in the *Cheney* case".²¹⁰ One commentator observes that Scalia J adopted a

"trust us rationale" [that] simply undervalues the import of friendship in the recusal calculus and runs roughshod over public perception.²¹¹ It has

203 541 US 913 (2004).

204 *Ibid.*, 924.

205 *Ibid.*, 923–925, 929.

206 *Ibid.*, 922, 928–929. See also, Jeremy Miller, "Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)" (2006) 33 *Pepperdine Law Review* 575, 578.

207 *Ibid.*, 920–921.

208 *Ibid.*, 917, 921.

209 *Ibid.*, 915.

210 See Bassett, "Recusal and the Supreme Court" (n.190) p.695.

211 James J Sample, "Supreme Court Recusal from Marbury to the Modern Day" (2013) 26 *Georgetown Journal of Legal Ethics* 95, 119.

even been observed that in his approach to the interpretation of s.455(a) Scalia J effectively makes the argument that the legislature's specific wishes should be ignored because the Court has a better understanding of recusal".²¹²

However, because there is no possibility for review under Title 28, Scalia J's decision stood.

A further example of the potential harm wrought to public confidence by the narrow approach to s.455 and the unavailability of review, is the recent refusal of Thomas J to recuse himself from *National Federation of Independent Business v Sibelius*²¹³ after it emerged that his wife had benefited financially from lobbying against the Obama administration's proposals for healthcare legislation, to the sum of \$686,589. Although that interest was not directly affected by the litigation, Thomas J had failed to disclose it prior to the litigation.²¹⁴ Yet an application to the full bench of the Supreme Court to disqualify Thomas J was refused, and no reasons were given. A similar approach was taken by Kagan and Scalia JJ, who had also been asked to recuse themselves.²¹⁵ In the Supreme Court's annual report, Chief Justice Roberts defended the decisions on the basis that, given the apex position of the Supreme Court and the significance of the questions it was called upon to answer, "each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case".²¹⁶ He noted that if the Supreme Court was able to review the decisions of its peers not to recuse, "it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate".²¹⁷

These are compelling arguments. That it is desirable for a full apex court to decide questions of constitutional significance is undoubtedly correct. Yet it is not determinative of the issue. Assuming it is accepted that judicial recusal can be necessary to preserve public confidence in judicial impartiality, as it should be, then the necessity-based arguments put by Roberts CJ must be weighed against the need to take all necessary measures to preserve that public confidence.

Setting aside the idea that judges of an apex court may manipulate the test for recusal so as to exclude those judges not partial to a particular outcome — if accepted as likely, surely itself an existential threat to the notion of judicial impartiality — it must be right to assert that the convening a full bench poses

212 David Feldman, "Duck Hunting, Deliberating, and Disqualification: *Cheney v. U.S. District Court* and the Flaws of 28 USC § 455(A)" (2006) *Public Interest Law Journal* 319, 320.

213 132 S Ct 2566 (2012).

214 Kim Geiger, "Clarence Thomas failed to report wife's income, watchdog says" *LA Times* (22 January 2011).

215 Kagan J, because she had acted as Solicitor-General during the formulation of the legislation, and Scalia J, because he had participated in conservative forums in which the healthcare legislation had been opposed.

216 Chief Justice Roberts, *2011 Year-End Report on the Federal Judiciary*, p.9.

217 *Ibid.*

little risk to an individual judge's capacity to sit on a decision, if that judge is applying the test correctly. Indeed, if a full bench was able to consider the force of an apex court judge's reasons, it could have two beneficial effects. Firstly, the full bench provides an additional veneer of scrutiny and accountability to the practice of recusal. In controversial matters, the public has the benefit of a range of opinions critically evaluative of the reasoning taken by the judge at first instance, and at the very least can be satisfied that the plurality is of the view that their fellow judge should sit. Presumably, if there is nothing to the apprehension its lack of substance will be reflected in the reasons of the full bench. Alternatively, there is great value to a court deciding as a united front on the question of whether the apprehension of bias is so great that it overcomes the unique necessity-based considerations compelling an apex court judge to sit. Secondly, introducing a plurality of opinion may encourage some discussion as to the parameters and correctness of the "narrow interpretation" of what the reasonable observer would apprehend.²¹⁸ The interest in having such a discussion must surely outweigh the notional interest in having a full bench decide constitutional questions. The constitutional legitimacy of such decisions can be called into question, as long as the public is open to doubt that those decisions were impartial.

Australia and New Zealand can learn important lessons from the United States. A particularised approach to recusal through statute does not resolve controversies more effectively than the common law. The particulars addressed in statutory provisions can be read down so as to be ineffective. Further, if there is a lack of formal review even statutory provisions of general application can be effectively ignored or misapplied. This, and to enforce a robust conception of the reasonable observer, is why courts must be willing to review the decisions of their judicial brethren, even using the drastic measures sometimes required in apex courts. Such oversight is far more important than attempting to distil the bases of recusal such that they can be expressed in statute. Yet, in Australia, such a course would have to be undertaken without the capacity to replace the recused with acting judges. As we have seen, New Zealand does not suffer from this problem.

VII. A Register of Pecuniary Interests for Judicial Officers?

In the wake of the Wilson saga, a Member's Bill, the Register of Pecuniary Interests of Judges Bill, was introduced into the New Zealand by Dr Kennedy Graham MP (the Justice Spokesperson for the Green Party) on 27 June 2012, proposing the establishment of a mandatory register of the pecuniary interests of judges. At the First Reading of the Bill, Julie Anne Genter, on behalf of Dr Kennedy, stated that its primary purpose was "simply to facilitate the promotion of due administration of

²¹⁸ Although, this may be unlikely, given that members of the Supreme Court defended the decisions of Thomas, Kagan and Scalia JJ to sit in *NFIB v Sibelius*.

justice by requiring a similar financial return by judges to what is already required by both the legislature and executive of this country”.²¹⁹

The expression “pecuniary interest” was defined in s.5 as:

“[A]ny interest in anything that reasonably gives rise to an expectation of a gain or loss of money for a judge, or their spouse or partner, or child or step-child or foster child or grandchild ... whether or not such an expectation exists in relation to any of those matters in any particular case”.

It was then decided to refer the Bill to the Justice and Electoral Committee of the New Zealand Parliament for further consideration.²²⁰

The New Zealand Law Commission subsequently published an Issues Paper on the question as part of a reference to consolidate “the various statutes affecting judges in the regular courts of law into one Courts Act”.²²¹ In its report, “the Review of the Judicature Act 1908: Towards a New Courts Act” the Commission recommended against the establishment by statute of a register of judges’ pecuniary interests. It said:

“While it could be argued that there is merit in adopting a pre-emptive approach to avoid potential future situations arising, we are not convinced that a register would be effective in revealing actual or even potential conflicts of interest in many cases, and in our view the potential problems it would create outweigh the benefits ... In our view, the best way to deal with potential judicial conflicts of interest is to have clear, robust and well-publicised rules and processes for recusal”.²²²

The New Zealand government expressed its agreement with the stance of the Law Commission and its conclusion that the judiciary should instead be statutorily required to produce rules and processes for recusal.²²³ We are also of the view that it is not necessary to establish a register of the pecuniary interests of judges, given the potential problems and the administrative burden and costs of establishing such a register. Furthermore a register of pecuniary interests covers only one (albeit, as we have seen, significant) aspect of potential conflicts of interest.

219 NZ/PB/Debates/Debates/a/e/4/50HansD_20120627_00000036-Register-of-Pecuniary-Interests-of-Judges.htm.

220 See http://www.parliament.nz/en-NZ/PB/Debates/Debates/b/4/a/50HansD_20120627_00000028-Register-of-Pecuniary-Interests-of-Judges.htm and <http://www.parliament.nz/en-3>. The Justice and Electoral Committee reported back on 25 February 2014 against the Bill.

221 Issues paper at p.47, para.8.65.

222 See paras.6.56 and 6.58. See Hon Justice McGrath, “Accountability of the Judiciary” (2014) 25 PLR 134.

223 See <http://www.justice.govt.nz/publications/global-publications/g/government-response-to-the-law-commissions-report-review-of-the-judicature-act-1908-towards-a-new-courts-act>.

VIII. Judicial Complaints and Removal Processes

The Wilson saga did not end with the decision of the New Zealand Supreme Court. A further avenue was invoked for preserving public confidence that is alternative to review by the courts. A series of complaints were made to the Judicial Conduct Commissioner, the person responsible for administering the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (NZ) (“JCC Act”). The JCC Act is designed to “enhance public confidence in, and to protect the impartiality and integrity of, the judicial system”.²²⁴ To that end, it guarantees that investigation into judicial misconduct shall be “robust” and that the process will protect judicial independence and natural justice.²²⁵ The Commissioner is vested with the discretion, pursuant to s.18 of the JCC Act, to recommend to the Attorney-General that a Judicial Conduct Panel be appointed. The Commissioner’s discretion is quite broad; although every complaint must be examined and have an opinion formed in respect of it,²²⁶ the Commissioner has a range of alternatives available. The Commissioner may take no further action in respect of a complaint if satisfied that further consideration would be unjustified;²²⁷ may dismiss the complaint on a wide variety of grounds;²²⁸ or may refer the complaint to the Head of Bench.²²⁹ The Commissioner may only recommend that a Judicial Conduct Panel be appointed if satisfied that it is “necessary or justified” to consider whether the alleged conduct may warrant that the judge should be removed. Once the Attorney-General receives a recommendation, he may appoint a Panel. Upon receiving the report of that Panel stipulating that consideration of the judge’s removal is justified,²³⁰ the Attorney-General’s discretion to petition the House of Representatives to remove the judge is enlivened.²³¹

The Commissioner did in fact recommend that the Acting Attorney-General appoint a Judicial Conduct Panel. The Attorney-General had recused himself from the decision based on his previous association with Wilson J at a firm in which they had both been partners.²³² Given the publicity surrounding the case, the Commissioner saw fit to explain why he had done so, justifying such an explanation as necessary to carrying out his function to maintain public confidence under the JCC Act and thus in exception to the Act’s requirement that he and his employees maintain confidentiality.²³³ Three complaints had been made to the Commissioner. The first complainant was Mr P E Radford, the sole shareholder and director of

224 JCC Act, s.4.

225 *Ibid.*, s.4(a),(c).

226 *Ibid.*, s.15(1).

227 *Ibid.*, ss.15(1), 15A.

228 *Ibid.*, s.16.

229 *Ibid.*, s.17.

230 *Ibid.*, s.32.

231 *Ibid.*, s.33.

232 See McCoy, “Judicial Recusal in New Zealand” (n.59) p.75.

233 *Decision of the Judicial Conduct Commissioner as to Three Complaints Concerning Justice Wilson J* (7 May 2010), [11]–[12]; see also, JCC Act, s.19(1).

Saxmere;²³⁴ the second complainant was Sir Edmund Thomas, a retired Judge of the Court of Appeal and acting Supreme Court judge,²³⁵ and the author of the third complaint was not disclosed at that time, although the complaint was described as being “brief and not well articulated”.²³⁶

The Commissioner explained that there were three aspects of Wilson J’s conduct that had been referred to the Commission:²³⁷

- (a) the nature and extent of the disclosure that Justice Wilson made prior to the hearing of the *Saxmere* case in the Court of Appeal;
- (b) the fact that he did not recuse himself from sitting on that hearing; and
- (c) his conduct in relation to the later Supreme Court proceedings.

He noted that, unlike the Supreme Court, he was not concerned with what the reasonable observer would make of Wilson J’s behaviour. Rather, his concern was with the manner in which Wilson J had actually conducted himself.²³⁸ Given the nature of the complaints, this concern was potentially with an enormously broad range of matters going to Wilson J’s actual understanding of his behaviour, including whether it was relevant that Wilson J had sat on the *Muir* decision and as such had been well aware of the requirement that judges must fully and promptly disclose their financial arrangements,²³⁹ and whether an unwitting breach of the Judicial Conduct Guidelines was in and of itself sufficient to establish judicial misconduct warranting consideration as to that judge’s removal.²⁴⁰ Further, the Commissioner resolved that he was not only concerned with whether Wilson J’s actions had been dishonest, but whether they “fell so far short of accepted standards of judicial behaviour as to warrant the ultimate sanction of removal”.²⁴¹

The Commissioner had decided to recommend that the matter be referred to a Judicial Conduct Panel. The JCC Act²⁴² requires the Commissioner to identify in his recommendation specific aspects of the complaints that were to be referred

234 *Decision of the Judicial Conduct Commissioner as to Three Complaints Concerning Justice Wilson J* (7 May 2010), [32].

235 *Ibid.*, [110].

236 *Ibid.*, [127]. The author was later ascertained to be a Mr CJ O’Neill.

237 *Ibid.*, [18].

238 *Ibid.*, [68].

239 *Ibid.*, [102], although the Commissioner ultimately rejected this ground of complaint on the basis that Wilson J had suggested a distinction based on the perceived lack of connection between his business interests and the subject-matter of the *Saxmere* matter: *Ibid.*, [104]. This reasoning still presupposes, however, that this type of inquiry is a legitimate basis upon which a judge may be found to have engaged in misconduct.

240 *Ibid.*, [99]. The Commissioner noted that the Guidelines described themselves as “advice”. He accordingly noted that “it would be erroneous to regard any divergence from the points set out later in the Guidelines as amounting to a breach. There can be no such thing as a breach of advice. Advice is either followed or not”.

241 *Ibid.*, [30].

242 Section 21 of the JCC Act provides that the investigative mandate of the Judicial Conduct Panel is in respect of that conduct “the subject of a recommendation by the Commissioner under s.18”.

for the Panel's consideration. As described below, whether he did so became a matter of legal controversy. The Commissioner rejected a range of other grounds of complaint: whether Wilson J had actually been biased; whether Wilson J had complied with the Judicature Act 1908 (NZ); the circumstances described above concerning Wilson J's sitting on the *Muir* decision; and his alleged breach of the Judicial Conduct Guidelines.²⁴³ Interestingly, he noted that it was Wilson J's failure to disclose the full range of his interest at the time the matter came before the Supreme Court that justified such a recommendation. If Wilson J had only failed to fully disclose his interest at the time the matter came before the Court of Appeal, the Commissioner would have referred the conduct to the Head of Bench.²⁴⁴ In effect, Wilson J's failure to disclose the full nature of his interest would potentially warrant removal if, for no good reason, it had caused the Supreme Court to be misled.²⁴⁵

Wilson J sought judicial review of the Commissioner's recommendation and the Acting Attorney-General's decision to appoint a Judicial Conduct Panel in the High Court of New Zealand. He alleged that four errors of law vitiated both decisions.²⁴⁶ These errors of law were said to be that (a) the Commissioner had failed to identify the correct standard of misconduct; (b) the Commissioner had failed to apply the correct standard to identified conduct; (c) the Commissioner had failed to comply with natural justice in his investigation; (d) the Commissioner had taken into account information that was hearsay, confidential and subject to legal privilege.²⁴⁷

The High Court allowed Wilson J's appeal. It accepted that the Commissioner had identified the correct standard when he asserted that dishonesty was not an essential component of misbehaviour warranting removal.²⁴⁸ It also accepted that the Commissioner had sufficiently applied that standard when he noted that his decision to recommend turned on Wilson J's failure to fully disclose his interest to the Supreme Court prior to the hearing of *Saxmere (No 1)*. It was not necessary that the Commissioner identify further particulars of conduct.²⁴⁹ It was not for the Commissioner to resolve ambiguities in whether Wilson J had or had not acted in good faith.²⁵⁰ However, the High Court held that the Commissioner had failed to sufficiently identify the conduct that was the subject of the Recommendation and thus the Panel's inquiry.²⁵¹ In other words, it was unclear as to whether all or merely some of the particulars of conduct in respect of Wilson J's failure to disclose were being referred to the Panel. Nor was it clear whether any conduct had occurred after *Saxmere (No 1)* was being referred to the Panel. The Commissioner had referred

243 See works referred to in n.234, [132].

244 *Ibid.*, [133].

245 *Ibid.*, [134].

246 *Wilson v Attorney-General* [2011] 1 NZLR 399, 404 [5] (Wild, Miller and Lang JJ).

247 *Ibid.*, 404, [6].

248 *Ibid.*, 417, [66].

249 *Ibid.*, 424, [92].

250 *Ibid.*, 423, [88]–[90].

251 *Ibid.*, 424, [94].

to such conduct while considering the complaints but failed to deal with it in his conclusion.²⁵² Compounding and illustrating the problem was that the Acting Attorney-General had referred the entire recommendation to the panel, including matters that the Commissioner had expressly stated did not require consideration.²⁵³ These were accordingly errors of law. The other grounds were rejected.²⁵⁴ The fact remained that the Commissioner had identified particulars of Wilson J's conduct that merited the making of a recommendation to the Attorney-General, and so the High Court decided to remit the matter to the Commissioner so that the recommendation could be revised.²⁵⁵ Before that could occur, however, Wilson J resigned.

The circumstances of Wilson J's resignation and the manner in which the judicial complaints process was used are illustrative of the competing threats to public confidence that arise from the investigation of judicial misconduct. B V Harris has observed:

“In providing for the handling of complaints about judges and providing for their discipline, the statutory process has to ensure both that misbehaving judges are held to account, and that the independence of the judiciary is not unduly threatened”.²⁵⁶

Complicating matters is that the decisions of judicial complaints bodies are executive decisions and are thus judicially reviewable, as occurred during the Wilson saga. This creates a situation in which the public is observing the judiciary struggle with the executive over the terms on which one of a court's judges can be censured for their behaviour. Whether this impairs public confidence is a subject for debate.

The New Zealand model may nonetheless be preferable to the traditional practice in Australia. At the federal level in Australia, there is no equivalent of the New Zealand Judicial Conduct Commissioner. The constitutionally prescribed process in 72(ii) of the Australian Constitution states that:

“[A] federal judge [shall] not be removed except by the Governor-General in Council on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity”.

The deficient nature of this removal mechanism was underlined by the protracted Murphy saga.²⁵⁷ This saga stemmed from the publication by The Age newspaper

252 *Ibid.*, 424, [95]–[96].

253 *Ibid.*, 432, [144].

254 *Ibid.*, 428, [119] (in respect of procedural fairness); 430 [135] (in respect of the taking into account of inadmissible information).

255 *Ibid.*, 432, [143].

256 B V Harris, “The Resignation of Wilson J: A Consequent Critique of the Operation of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004” (2011) *New Zealand Law Review* 625, 627.

257 See HP Lee and Enid Campbell, *The Australian Judiciary* (n.10) pp.117–120; G Lindell, “The Murphy Affair in Retrospect” in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks*

of a series of articles based on transcripts of telephone conversations of a Sydney solicitor (Morgan Ryan) who was associated with leaders of organised crime. It was alleged that one of the voices in the taped conversations was that of Justice Murphy. A Senate Select Committee was established on 18 March 1984 to investigate the matter.²⁵⁸ Given its inconclusive findings a second Senate Select Committee was established on 6 September 1984 to inquire into the allegations made before the first committee by the Chief Stipendiary Magistrate of New South Wales (Clarrie Briese) concerning Justice Murphy and whether there was sufficient ground to warrant his removal from office.²⁵⁹ On 31 October 1984, the committee published its report in which a majority of the committee concluded that Justice Murphy had attempted to influence the course of justice in relation to Ryan and that this amounted to “misbehaviour” under s.72(ii). Murphy was tried before the Supreme Court of New South Wales and was convicted. His conviction was quashed on appeal to the New South Wales Court of Appeal, which ordered a retrial. He was then acquitted at the retrial on 28 April 1986. Nevertheless, a Parliamentary Commission of Inquiry was set up under legislation passed by the federal Parliament.²⁶⁰ The Commission was subsequently terminated by an Act of Parliament upon revelation that Murphy had terminal cancer.²⁶¹ All in all, the whole saga that was protracted over two years underlined the weakness of the constitutional removal process, especially when the whole affair had political undertones. It led Justice McGarvie to remark:

“When, on the first occasion of modern time in the country, the machinery designed in an earlier era to determine whether a judge ought to be removed, was put into operation in the case of Mr Justice Murphy, it was found quite inadequate to cope with the conditions of today. In a contested case, with political undertones, the traditional parliamentary procedures were unable in any satisfactory way to ascertain what had occurred or whether what had occurred could warrant removal. It was a good illustration of a system which apparently worked in earlier times, but is ineffective in the conditions of today”.²⁶²

The constitutional process has recently been augmented by the enactment of the Judicial Misbehaviour and Incapacity (Parliamentary Commission) Act 2013 (Cth). The Act empowers the federal Parliament to establish parliamentary commissions to investigate specified allegations relating to misbehaviour or incapacity of federal

(Cambridge University Press, 2003) pp.280–311; HP Lee and V Morabito, “Removal of Judges – The Australian Experience” (1992) *Singapore Journal of Legal Studies* 40; JB Thomas, *Judicial Ethics in Australia* (Chatswood: LexisNexis Butterworths, 3rd ed., 2009) pp.220–231.

258 Senate Select Committee on the Conduct of a Judge.

259 Senate Selective Committee on Allegations Concerning a Judge.

260 Parliamentary Commission of Inquiry Act 1986 (Cth).

261 Parliamentary Commission of Inquiry (Repeal) Act 1986 (Cth).

262 RE McGarvie, “The Foundations of Judicial Independence in a Modern Democracy” (Paper delivered at the Australian Bar Association Conference, Darwin, 8 July 1990) 12.

judicial officers. The commission carries out investigations, gathers evidence and reports back to Parliament its opinion as to “whether or not there is evidence that would let the Houses of Parliament conclude that the alleged misbehaviour or incapacity is proved”. Three members are nominated to the commission by the Prime Minister after consulting the Leader of the Opposition in the House of Representatives. A companion Act, the Courts Legislation Amendment (Judicial Complaints) Act 2013 (Cth), provides a framework to assist a head of jurisdiction to manage complaints about judicial officers that are referred to them. There has been no occasion in which these new procedures have been resorted to but clearly they buttress the operation of the constitutional process of judicial removal in Australia.

IX. Conclusion

The oath (or affirmation) which a judge has to take upon appointment to the Bench requires the judge to “do right to all manner of people according to law without fear or favour, affection or ill-will”. Its significance was given the following elucidation by the Honourable Sir Gerard Brennan:

“It forbids partiality and, most importantly, it commands independence from any influence that might improperly tilt the scale of justice”.²⁶³

In step with the judicial oath the ultimate purpose of recusal is to maintain public confidence in the impartiality of the judiciary.²⁶⁴

Judges constantly stress the relationship between judicial legitimacy and public confidence in the courts. The Honourable Murray Gleeson, a former Chief Justice of the Australian High Court, has argued that the public perception of the judge as an authoritative, impartial administrator of justice is what anoints a judge with such respected status in the community, as evidenced by the constant demand for judges to investigate “controversial and sensitive issues”.²⁶⁵ He also said:

“If the idea of judicial impartiality is consigned to the intellectual scrap heap, judicial authority will soon follow it”.²⁶⁶

263 The Hon Sir Gerard Brennan, “Speech on swearing in as Chief Justice” (1995) 183 CLR ix, x.

264 Andrew Le Sueur, Javan William Herberg, Rosalind English, *Principles of Public Law* (London: Routledge–Cavendish, 1999) p.277.

265 Hon Murray Gleeson AC, “Public Confidence in the Courts”, Canberra (2007) p.5.

266 *Ibid.*, p.10. Former United States Supreme Court Justice Sandra Day O’Connor supports a similar position and has spoken out against declining standards of judicial impartiality: see Arthur D Hellman, “Justice O’Connor and ‘the Threat to Judicial Independence’: The Cowgirl Who Cried Wolf?” (2007) 39 Arizona State Law Journal 845, 845.

The New Zealand Wilson saga has put the spotlight on the role of a judge faced with a claim of a conflict of interest which may generate a reasonable apprehension of bias. Nonetheless we conclude that, instead of going down the path of establishing a register of pecuniary interests or creating a statutory judicial recusal process, the existing process of judicial recusal both in New Zealand and Australia is an ample mechanism to deal with allegations of bias against a judicial officer.²⁶⁷

²⁶⁷ Hon Sir Grant Hammond, 'The Legislature Strikes Back?' (Paper presented at the School of Law at Birmingham City University and Modern Law Review international seminar on "Judicial Recusal: 21st Century Challenges", 26 September 2014).