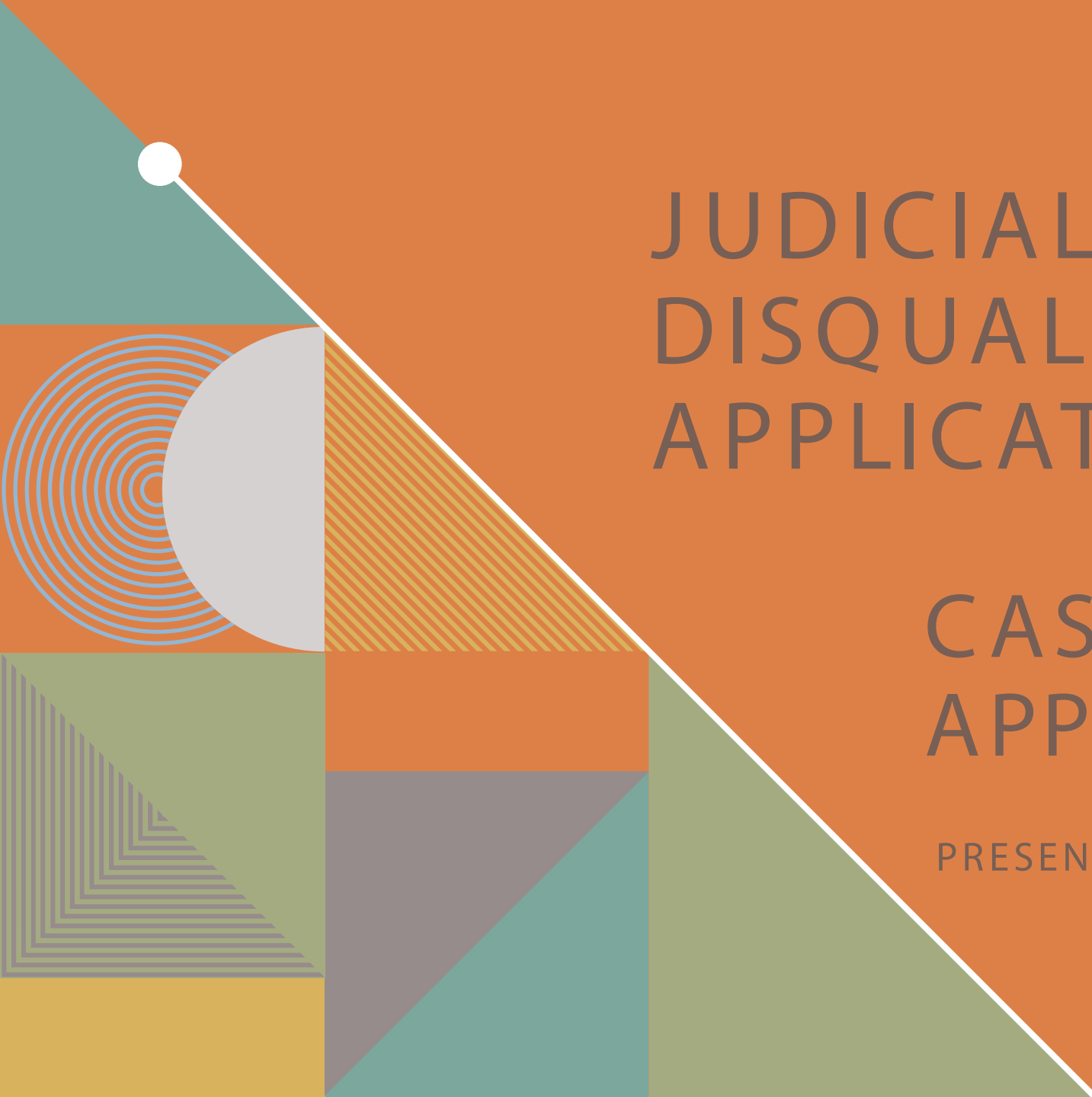


Judicial Bias/Disqualification Applications: Case Law and Application

PRESENTED BY THE HON. JUSTICE SIMPSON

2026 FAMILY LAW CONFERENCE - 19 AUGUST



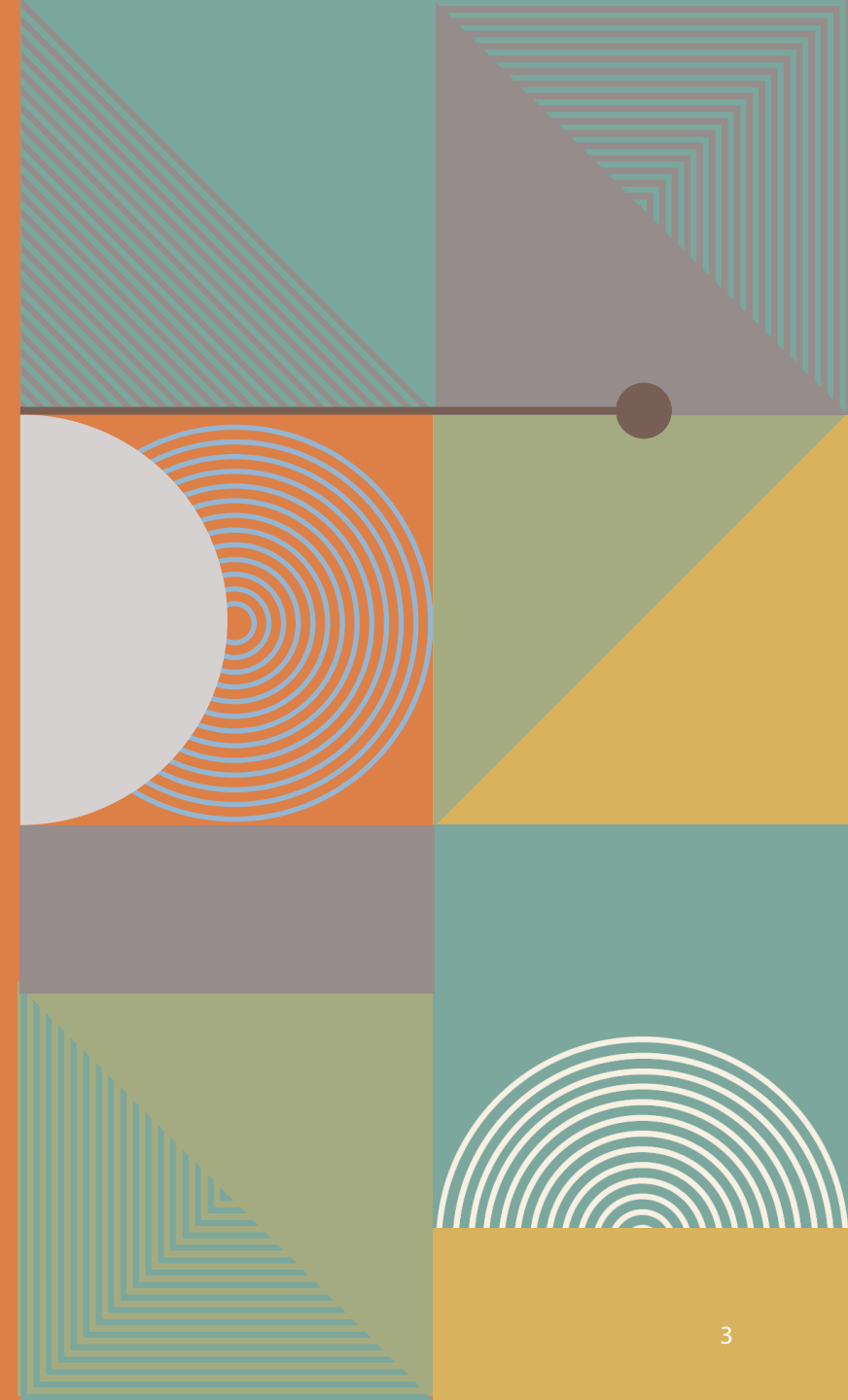
JUDICIAL BIAS / DISQUALIFICATION APPLICATIONS:

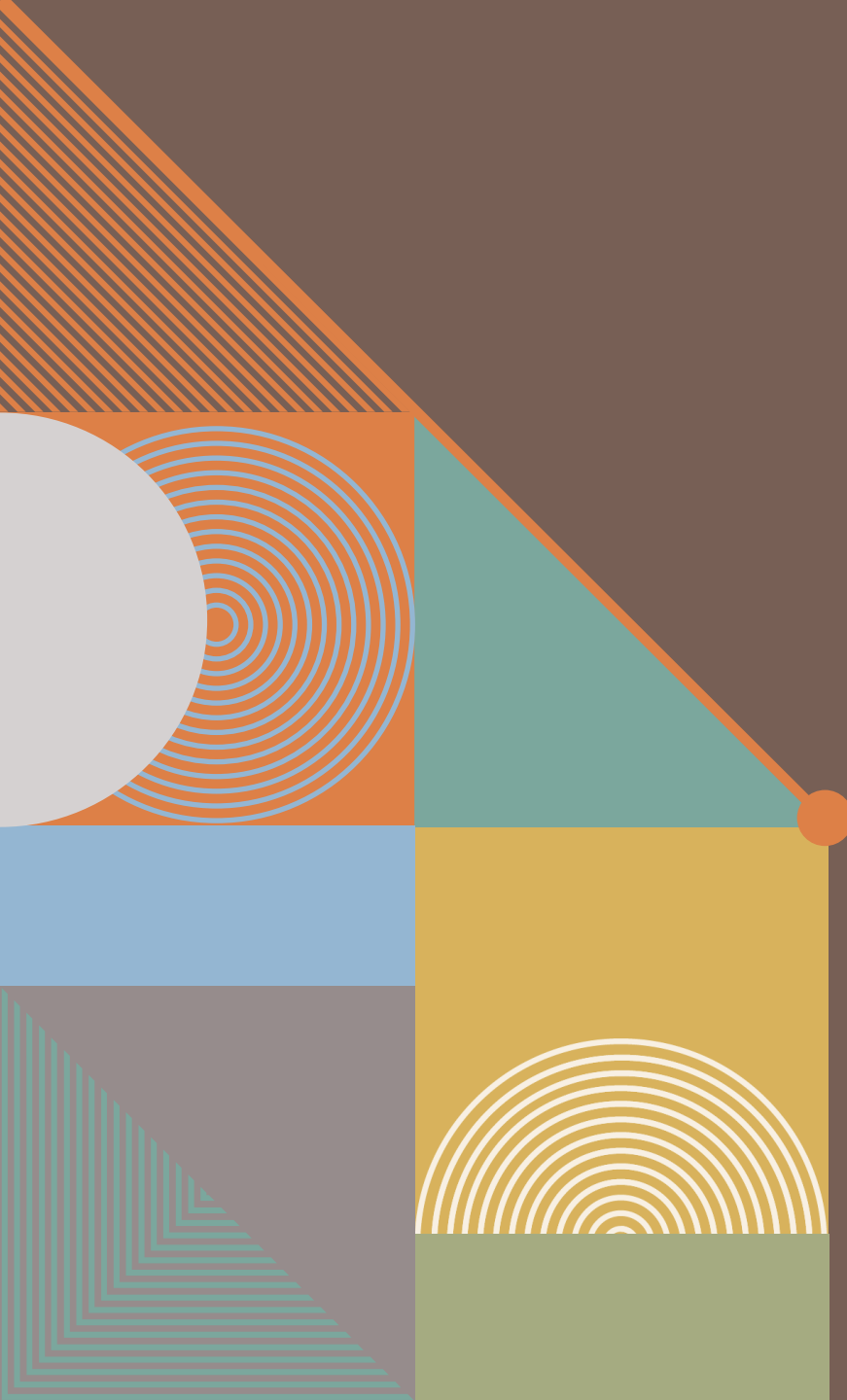
CASE LAW AND APPLICATION

PRESENTATION BY JUSTICE SIMPSON

PRESENTATION OUTLINE

- The principles and realities of seeking judicial disqualification for perceived bias:
 - Actual bias vs apprehended bias.
 - The high threshold for applications.
 - What about the interventionist judge –has the line been crossed?
 - How do you do it?- timing and procedure.





THE DUTY

Oath of allegiance and office, s 16 of the Federal Circuit and Family Court of Australia Act 2021 (Cth):

“ ... that I will well and truly serve in the office of ...
Judge ... of the Federal Circuit and Family Court of
Australia (Division 1) and that I will do right to all
manner of people according to law, without fear or
favour, affection or ill - will.”

ACTUAL BIAS VS APPREHENDED BIAS

- Litigants have a right to a hearing by a judicial officer who is independent and impartial. They have a right to a fair trial.
- Claiming actual bias is a serious assertion.
- Actual bias - “the state of mind of the decision maker”.
- Focus on the subjective.
- Apprehended bias is about perception - how it may appear.

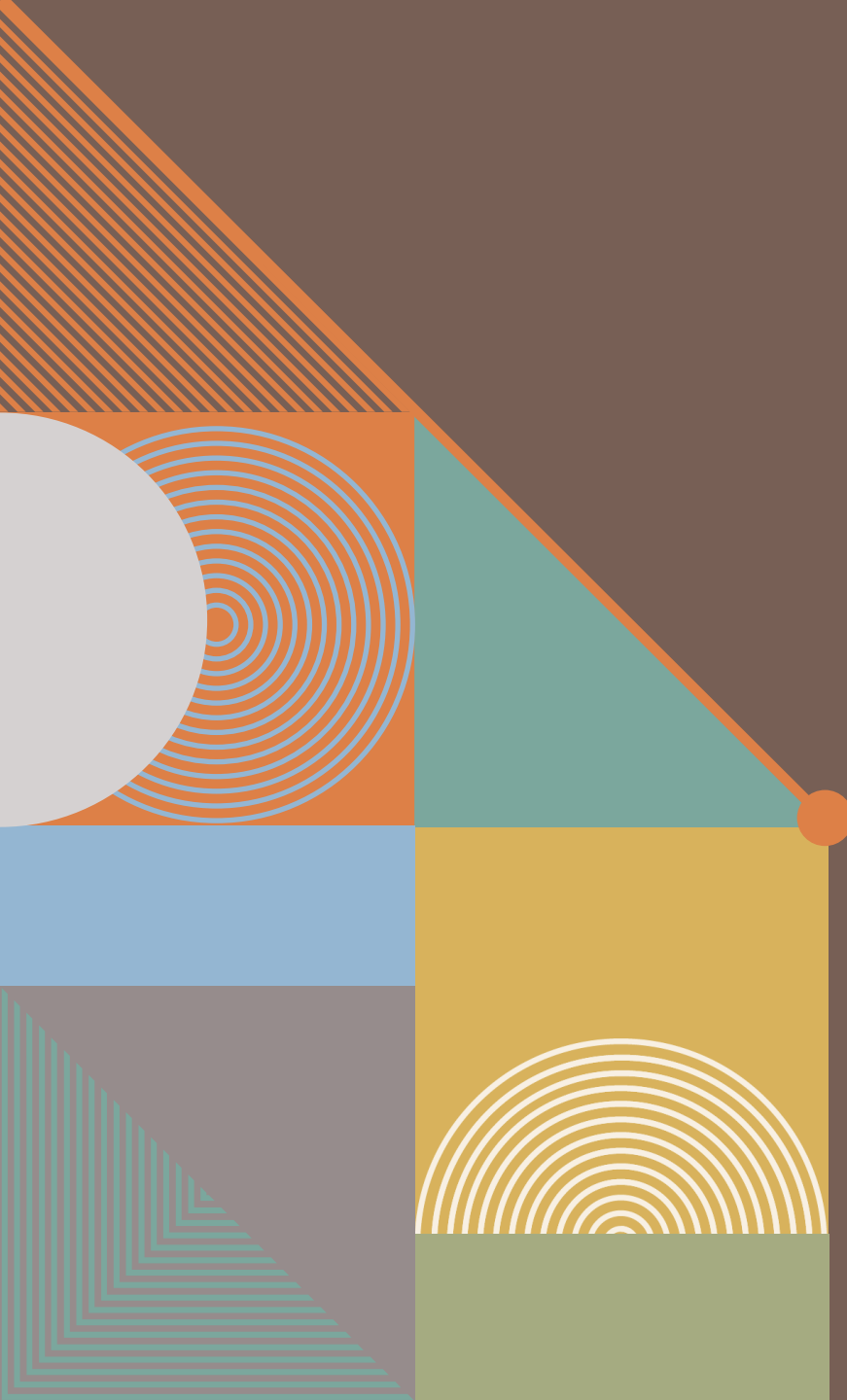


ACTUAL BIAS

Need to establish that the judge's mind was "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented"
(Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507)

APPREHENDED BIAS

- "... a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide." (Ebner v Office Trustee in Bankruptcy [2000] HCA 63 ("Ebner") at [6]) (emphasis added)
- What was said that might lead a judge to decide a case other than on its legal and factual merits?
- What is the logical connection between that and the feared deviation from the course of deciding the case on its merits? (Ebner at [8])



OVERLAPPING CATEGORIES

Acheson & Begbie [2023] FedCFamC 1F 704 at [7]:

The doctrine of apprehended bias deals with the circumstances in which a judge may be perceived to decide a case other than on its merits

Four potentially overlapping categories:
Disqualification by interest;
Disqualification by conduct;
Disqualification by association; and
Disqualification by extraneous information.



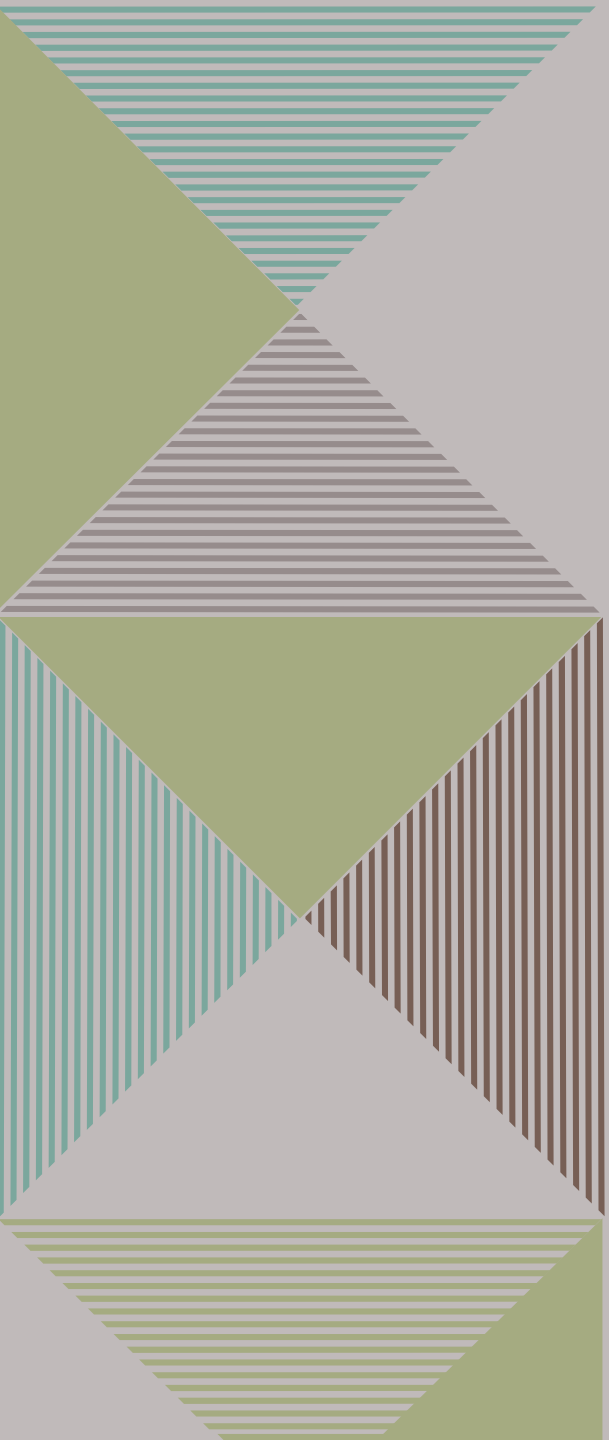
WHO IS THE FAIR-MINDED LAY OBSERVER?

- A hypothetical figure.
- Not a lawyer.
- Not taken to know the law but presumed to know that judges ordinarily act impartially.
- Have common sense.
- They know that judges may make interventionist comments – not because have prejudged but to better understand the case or to efficiently manage the litigation.
- Not complacent nor unduly sensitive or suspicious.
- Not presumed to reject the possibility of pre-judgment of a matter.
- As if they were sitting in the court.
- Taken to know the nature of the decision, the circumstances leading to the decision and the context in which it was made.
- See *Polsen v Harrison* [2021] NSWCA 23 at [46] for a further summary and the relevant citations.

THE HIGH THRESHOLD

Why it exists

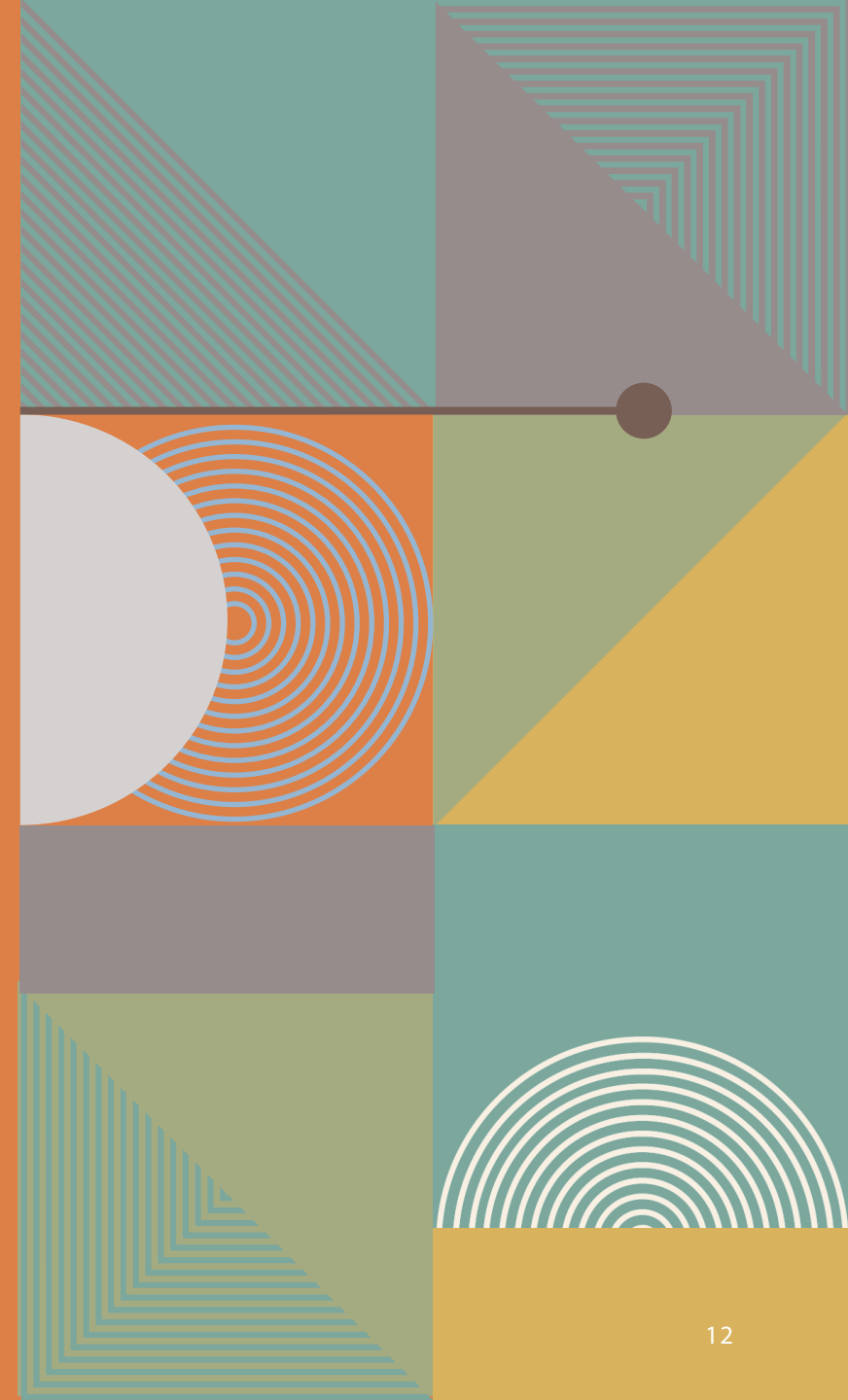
- Not to be made lightly.
- Judges should not accede too readily to applications for disqualification.
- Judges are required to discard the irrelevant, the immaterial and the prejudicial.
- Duty of a judge to disqualify themselves for proper reasons vs duty to hear any case where no proper reason for disqualification.



TIMING & PROCEDURE

- As soon as reasonably practicable.
- Be focussed and made respectfully.
- Careful consideration and seek time to do so.
- What is the evidence?
- The judge against whom bias is alleged decides whether actual or apprehended bias is made out.
- A judge's view about their ability to decide the case carries little weight in the fair mind of the hypothetical lay observer.

THE INVOLVEMENT OF JUDICIAL OFFICERS: WHAT IS GENERALLY PERMISSIBLE AND WHEN THE LINE HAS BEEN CROSSED





GENERAL PRINCIPLES

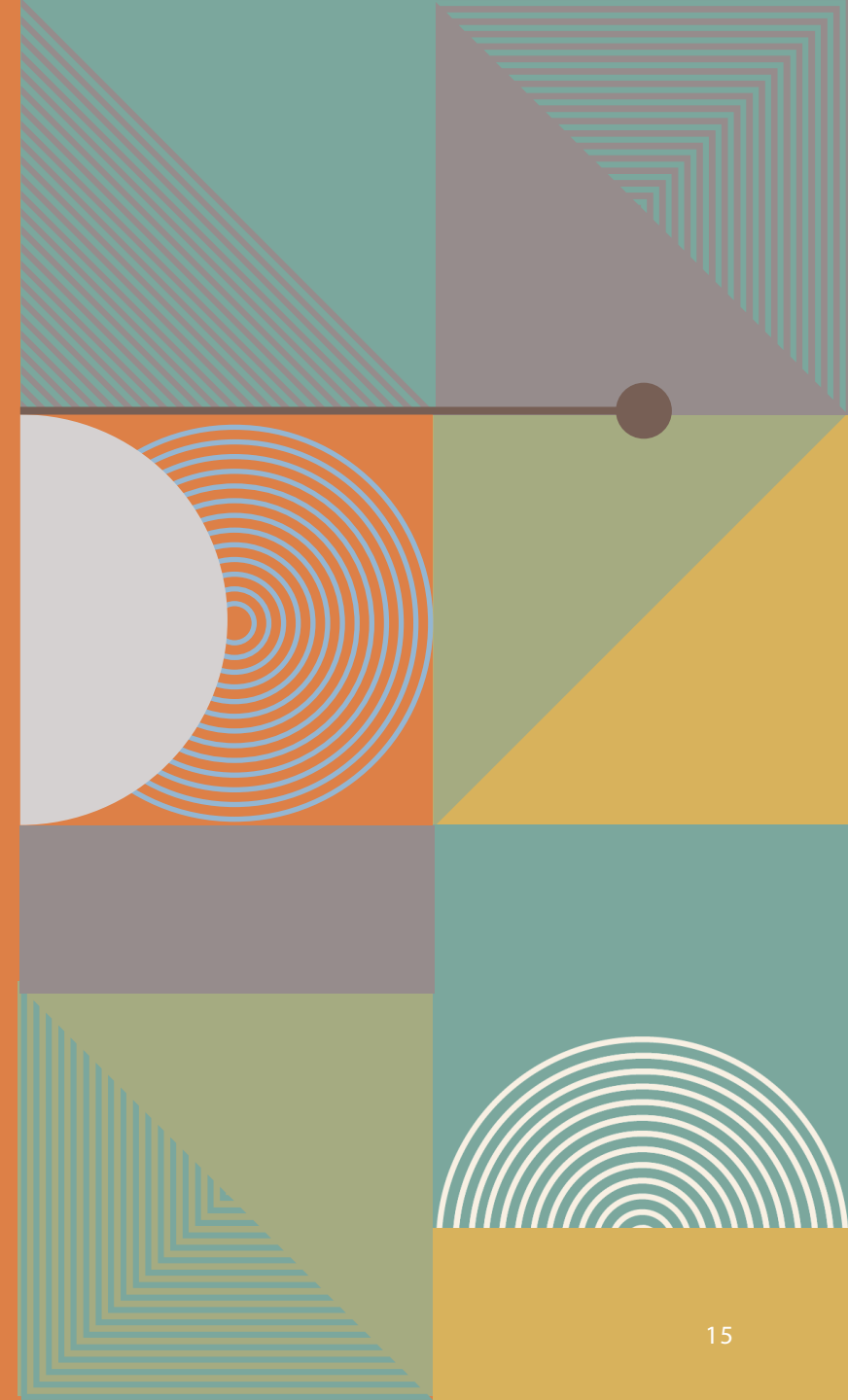
- As a general rule, anything that a judge says in the course of argument would “be merely tentative and exploratory”.
- A short and emotional exchange taken out of context and weighed in isolation won’t be enough.
- What is the cumulative effect of comments?
- Interventionalist comments or conduct alone will not automatically be enough.

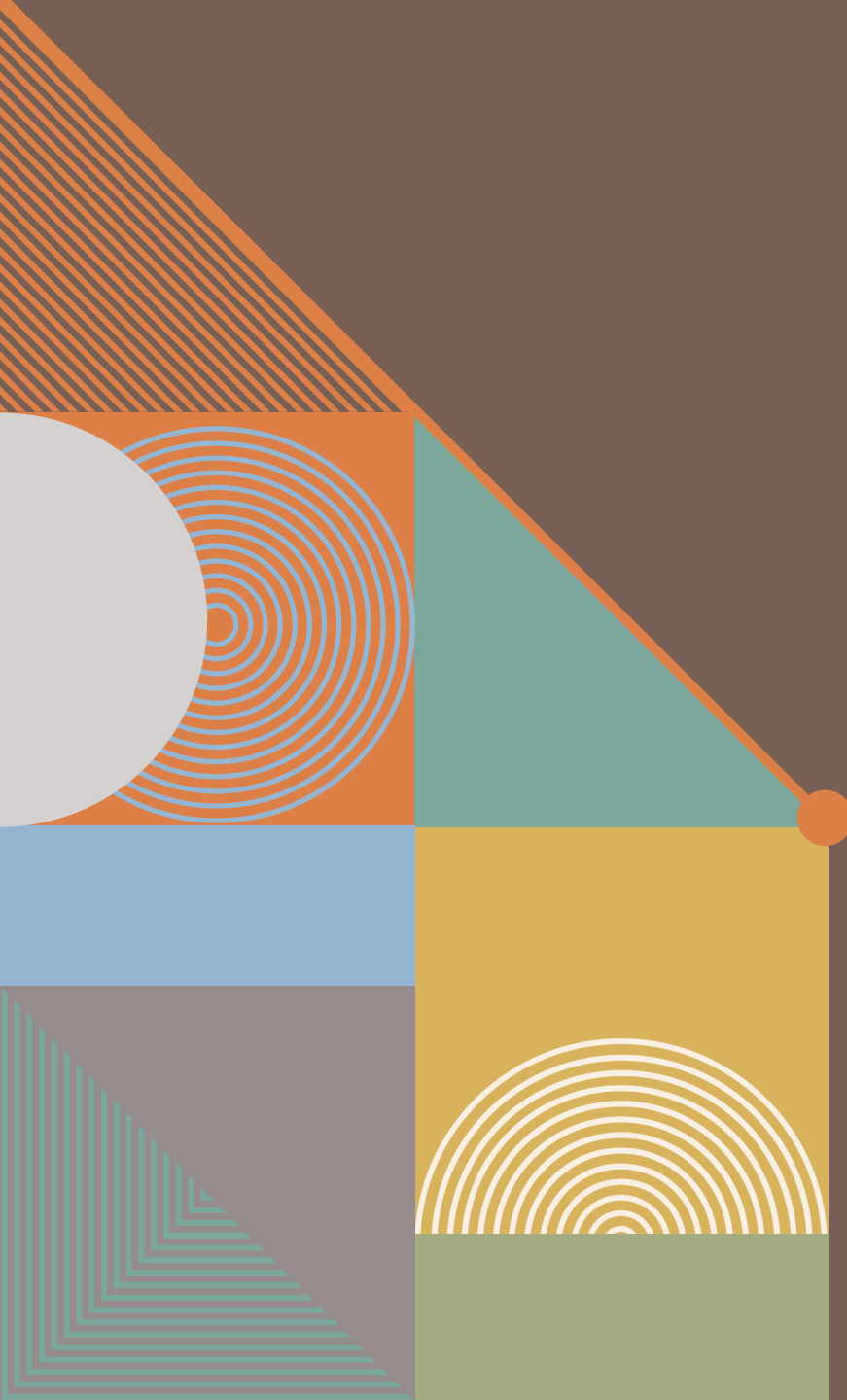
Charistead & Charistead (2021) 273 CLR 289

- Primary Judge refused disqualification.
- The Full Court (by majority) dismissed the appeal.
- The High Court granted special leave and allowed the appeal.

- Undisclosed communications...

The barrister stated that the “communications” with the trial judge did not concern “the substance of the ...case”.





Summarising the decision of the Full Court (majority):

[20] ...what the fair-minded lay observer, properly informed as to the judiciary and the Bar, would think.

...barristers are professional members of an independent Bar who do not identify with the client; ...judges are usually appointed from the senior ranks of the Bar;

...may be expected they will have personal or professional associations with many counsel appearing before them.

...hypothetical observer would be “able to tolerate” some degree of private communication even if undisclosed

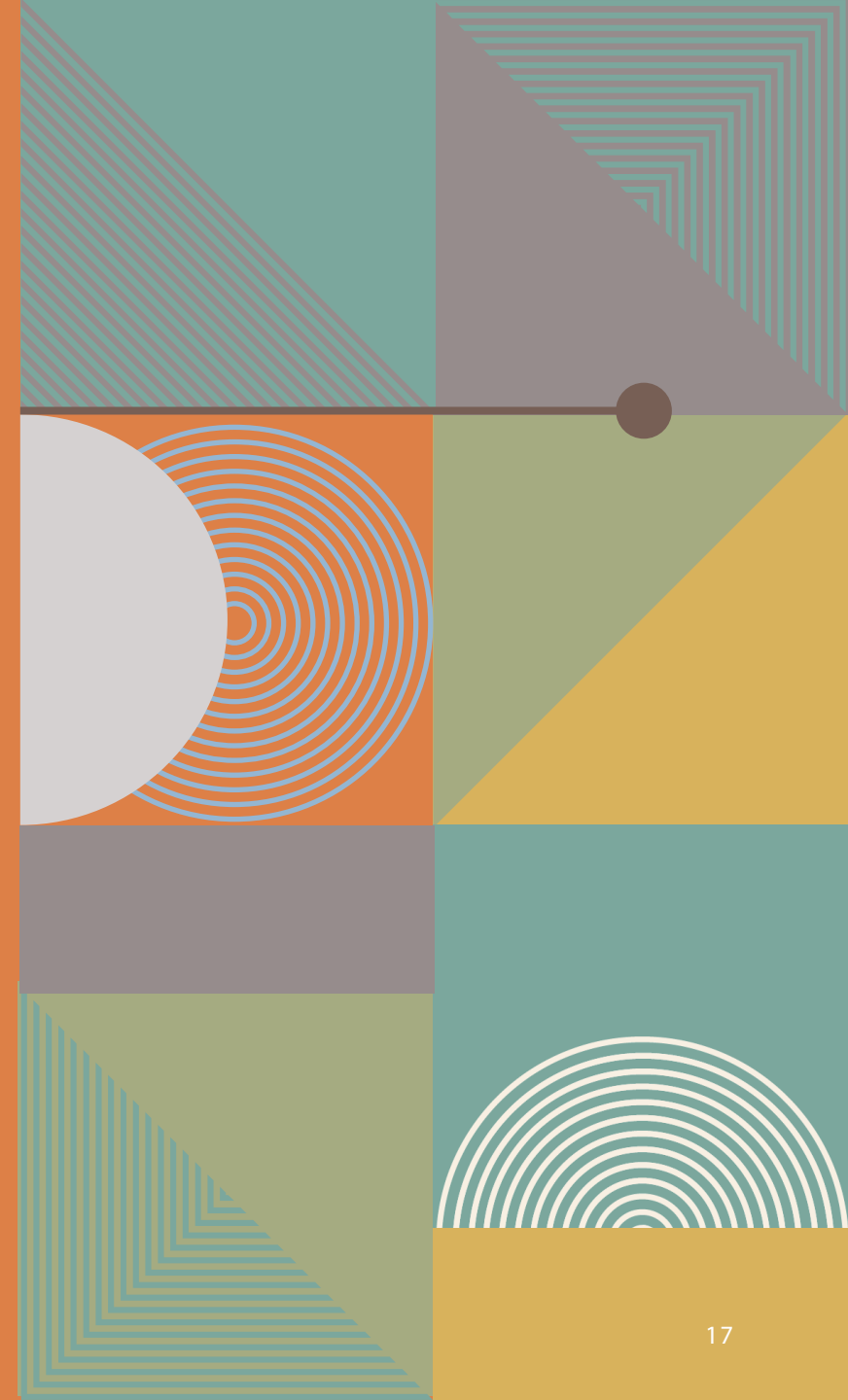
...would adhere to professional restraint in what was discussed

... professional judge who has taken an oath of office would not discuss the case at hand.

And why it was held to be wrong (emphasis added below):

[21] ...The alignment of the fair-minded lay observer with the judiciary and the legal profession is inconsistent with the apprehension of bias principle and its operation and purpose.

...The hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts.



Flynn & Vincent [2026]

FedCFamC1A 21

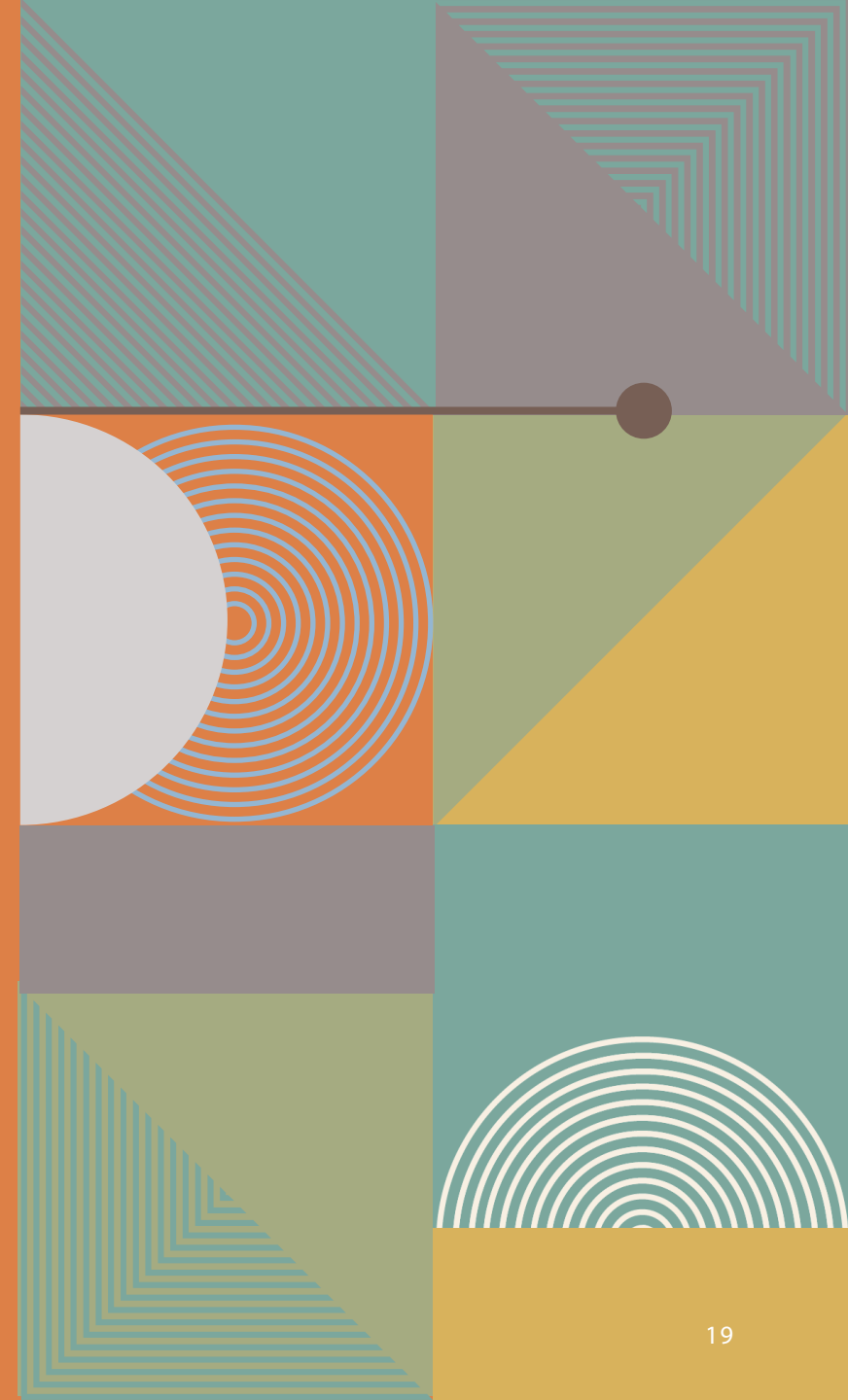
- Mother appealed from orders for the return of the child to the father, and for a Recovery Order to issue.
- The father had filed around nine months after the child had not been returned by the mother.
- Apparent Bias and Prejudgment (made out).

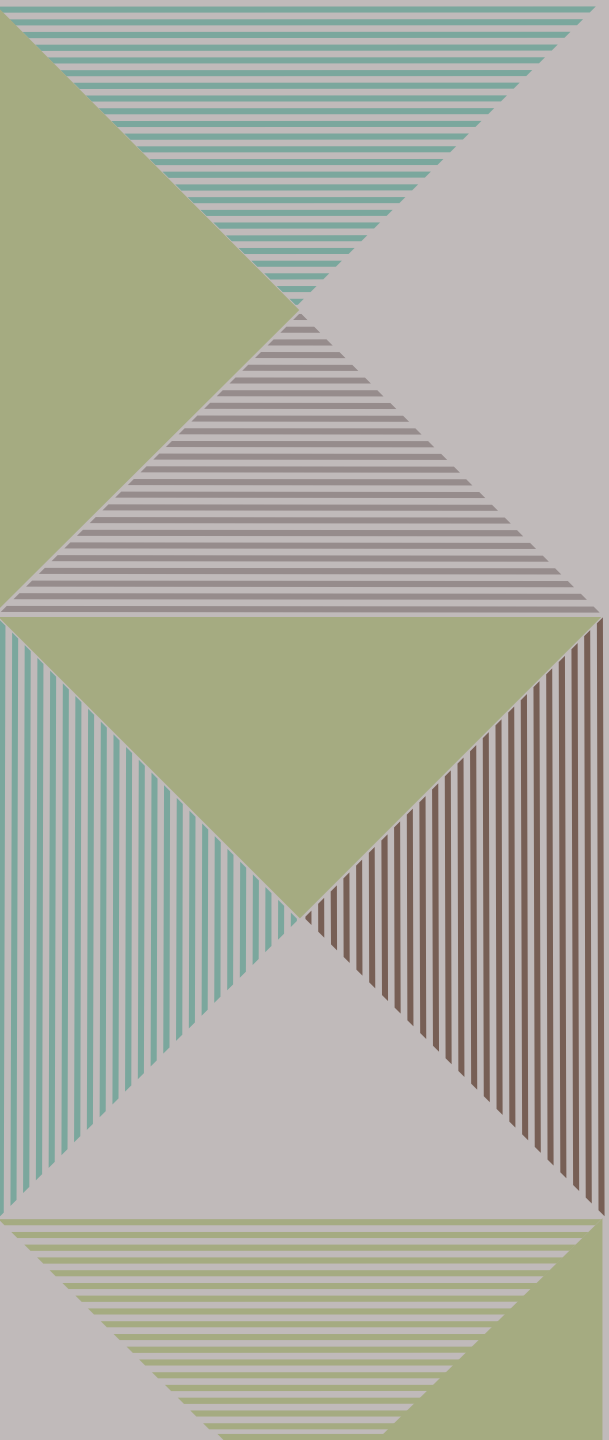
1. The mother said that she “was told I cannot physically force [the child] to go”, the primary judge responded:

“You were not told by a court, madam. So, I’m giving you an opportunity to try and engage in some discussion to try and rectify it. Otherwise, as I said, the order is really clear.” (at[33(a)])

2. The primary judge said a decision would be made that day, if the parties couldn’t reach agreement.

3. The primary judge said, “I’ve indicated quite strongly, I think, what that decision is likely to be”.



- 
- The primary judge said:

“I read what you said in terms of his plan towards, and in terms of [the child’s] experiences in the father’s household. Dad might have changed his ways. But at the moment we’ve got a 14 year old boy who’s not having the benefit of a relationship with both of his parents. This court will change that. It will happen. He needs to have a relationship with you and with his father.” (Flynn & Vincent at [31])

- What do you think?

Eccheli & Eccheli (No 6)

[2025] FedCFamC1F 325

- Oral application made on behalf of husband.
- Asserted actual bias (“challenging as it does, the judicial oath” at [40]) to and, or, apprehended bias.
- “The husband’s solicitor felt bullied on 4 April 2025.” Adjourned to 14 May.
- Marked up version of transcript tendered, with “comments as to tone” and audio.
- No oral submissions made on behalf of the husband.
- Audio recording...and use of “tone”
- 65 instances
- Not satisfied that any of the asserted subjective assessments of the solicitor individually or collectively demonstrate that His Honour had “entered the fray”, became an advocate for the wife, or that the hearing was unfair.

Bestari & Henley (No 5) [2023] FedCFamC1F 783 & Henley & Bestari [2024] FedCFamC1A 12

- Parties submitted final property orders when the matter was listed for final hearing.
- Primary judge declined to make the orders.
- Whether the primary judge ought to have disqualified himself from further hearing the matter because of his knowledge of the proposed property settlement orders?
- Apprehended bias - His Honour's knowledge of extraneous information.
- Concessions made by the appellant (a substantial deviation from his formal position).
- The Full Court -
- The proposed terms were not akin to ordinary evidence, which could be disregarded by the primary judge.
- A logical connection between exposure to the terms of settlement and the objective apprehension of bias made out.

Acheson & Begbie [2023]

FedCFamC1F 704

The father's view - primary judge had developed a position adverse to his interests.

- Whether Her Honour should have intervened in the cross-examination;
- Whether Her Honour's questions were an impermissible foray onto the playing field;
- Whether body language conveyed a view of the husband or his counsel;
- Whether a ruling about questions in re-examination was improper; and
- Was one barrister treated differently from the other?

- Husband asserted that the manner in which he was cross examined "... caused me to become upset".

- Interventions in cross examination.

" ... They could not on any scale be regarded as excessive. The question then is: were they inappropriate? ... still satisfied that there was nothing in the interventions by which a fair-minded lay observer would have concluded that I would not bring an impartial mind to the task..."

- Body language:

"...judges will from time to time experience frustration. It is equally true that such frustrations are almost always better masked than revealed but judges are human and will not always function as they would ideally choose. The question of where the limit is must be one of fact and degree..."

- What about evidentiary rulings?
- Even if rulings wrong, not automatically jump from flawed evidentiary ruling to apprehended bias.

- Was the other counsel treated differently (more favourably)?

Satisfied that all interactions with each of the barristers were “undertaken professionally and courteously” (at [60]).

- Modern case management
- Declined to give reasons for dismissal of application at that time

“ ... The overriding principle of achieving timely and efficient outcomes for litigants means that a judge will, as occurred here, control the court room including permitting or disallowing questions as part of evidence in chief, cross-examination or re-examination.”

The High Court of Australia has made plain it would be both an abdication of judicial function and an encouragement of procedural abuse for a judge to impulsively or too readily disqualify him or herself whenever requested by one party to do so... A judge should not disqualify him or herself for reasonable apprehension of bias unless substantial grounds exist .

Fowles & Fowles (No 2) [2024]

FedCFamC1A 115

- Excessive intervention by a judge?
- Apprehension of bias or a miscarriage of justice?
- ... “the judge’s questioning has unfairly undermined the proper presentation of a party’s case or...is such an egregious departure from the role of a judge ...that it unduly compromises the judge’s advantage in objectively evaluating the evidence from a detached distance”

- Principles from Finch & Finch (2020) FLC 93-949:
 - “ ... excessive judicial intervention leading to a lack of procedural fairness is a separate basis of appealable challenge”;
 - “...whether ...excessive involves an assessment and balancing of the appropriate role and limits of judicial engagement and management ...”;
 - “Inept representation may justify greater judicial intervention ...”;
 - “ ... the judge must not assume the role of advocate, or be unduly intimidatory, interventionist or directionist, nor unduly press so-called “preliminary views” ...”; and
 - “...number, frequency and duration of the judicial interventions will be relevant, ...nature and context (including the stage of the trial), content and manner of delivery (including tone of voice)”.
- Many interventions - but be understood in the context of an extremely long trial; difficult witness.
- Assessment and degree.

Adacot & Sowle [2020] FamCAFC 215

- An example of a matter where it was held that primary judge's intervention amounted to an unfair trial.
- Appeal was allowed, " ... lest the integrity of the judicial system be undermined."

Huda & Huda & Laham [2018]

FamCAFC 85

- Appeal confined to the issue of procedural unfairness and related challenge relating to interventions by the primary judge.
- Whether excessive judicial questioning/critical comments create a real danger that the trial was unfair?
- Number, length and circumstances of the interventions.
- Judicial cross examination?
- Pressure in answering the judge vs counsel.
- Moves beyond question of bias into realm of procedural unfairness and the conduct of the trial becoming unfair (see [51]).
- “entered the fray”
- Appeal allowed for procedural unfairness – not based on reasonable apprehension of bias (bound by conduct at trial).

Ostap & Sidak [2024] FedCFamC1A 74

- Application by a self-represented litigant for recusal of primary judge and for removal of ICL, both refused
- Primary judge was invited by all counsel to give an intimation
 - A preliminary intimation is something where I talk about the issues that I see coming off the documents in front of me, noting that I've yet to hear all of the evidence from each of you in the course of the trial.
 - My reflections on this are on what I've read to date and also my knowledge of the history of the matter.
 - ...this is based on my reading and the information to date. I've yet to hear all of the evidence, but these are the problems that I see, should the trial proceed, that will need – that I will need help from your counsel and you in terms of the evidence. Understood?

Ostap & Sidak [2024] FedCFamC1A 74

- Regarding intimation:
 - Always a danger of crossing the line particularly at the outset of the proceedings,
 - Primary judge identified two matters of significance which, if they remained unaffected by the evidence and submissions yet to come, were likely to drive the outcome.
 - In doing so, with the “hedges and caveats” noted, insufficient to lead to a reasonable fair-minded lay observer apprehending that the primary judge might not bring an impartial and unprejudiced mind to the resolution of the proceedings.
- Regarding the ICL:
 - Mother contended that the ICL proposed orders which she thinks inappropriate and unfair and cross-examined the mother in a manner which she did not like.
 - Not sufficient to justify her discharge



CONCLUDING REMARKS & QUESTIONS