AAL/ALRC Seminar:
Public confidence, apprehended bias, and the modern federal judiciary

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Thank you, Justice Derrington.

I also express my thanks to the Australian Law Reform Commission and The Australian Academy of Law for hosting this event. I also acknowledge the Gadigal people on who lands the event is being held live. I acknowledge their neighbours the Dharawal, the Gundungara, the Dharug, the Cammeraygal, the Gaymarygal. I also acknowledge the Barada and Kabalbara people whose country in central Queensland I join you from today.

I have been asked to speak briefly about our fictional friend, the fair minded observer. It goes without saying that, amongst other matters, the level of public confidence in any justice system will determined by the perceived impartiality of that system. In our federal judiciary we are not considering the role of juries, only our judicial officers. Nor am I talking about actual bias this afternoon.

In Australia, the determination of whether a judicial officer should remove him or herself from any given proceedings, or be removed, on the basis of an apprehension of bias is guided by the case law. The test is whether, in all the circumstances, a fair-minded lay observer with knowledge of the objective facts might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question. This is determined in two parts. First, it is necessary to identify the fact or circumstance that might lead the decision maker to be less than impartial. Some of the circumstances that might give rise to such an apprehension are where the decision maker has an interest in the proceedings, or by their conduct, by access to or possession of extraneous information, or association with the parties or subject matter. This is not a closed list. Once satisfied that the interest in or connection with the proceedings exists, the logical connection between that interest in or connection with the proceedings and the complained impact on the decision maker's impartiality must be shown.

In *Johnson v Johnson*, a decision of the High Court in 2000, Justice Kirby described the fair minded observer as follows:

> Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.

If we accept that that description of the 'fair minded observer' is accurate, it is clear that an actual fair minded observer might have difficulty determining what it is they are supposed to know in order to make the decision. The reality is the in most cases the lines will be blurry, because of the very flexibility that is needed to be built into the system to achieve as fair a result as possible. However, if the process of decision making, as opposed to the result, is opaque does that not impact the confidence the public can have in the system? Of course, it must.

The question could then be asked, what can be done to make the process more accessible to the public. Some have argued for codification, or partial codification. While it is possible that there might be some very limited codification of the area in terms of particular relationships between the judicial officer and the parties or matter, it seems to me that it is difficult to proceed very far down that path without losing the flexibility necessary to accommodate the variety of circumstances that will and do arise.

I note that our colleague Professor Gabrielle Appleby is speaking on the self-disqualification process and some models for reform, and think that that discussion has some merit. I look forward to questions later in the seminar.