
Review Of Decisions On A Judge's Qualification To Sit

Enid Campbell*

When a party to litigation objects to a judge sitting in a case, or continuing to sit, on the ground of bias or apprehended bias, the practice of Australian courts is for the question of whether the judge is disqualified to be decided by the judge who is the target of the objection. This practice is adopted even in cases where more than one judge has been listed to sit.¹

Parties may not always be satisfied with a judge's ruling on an objection to his or her eligibility to sit. Should the judge have recused himself or herself during or after a lengthy hearing, but before delivery of judgment, parties may be dismayed at the prospect of a rehearing of the case, with its attendant costs and delay. The question is: Are there means by which judges' rulings on their own qualification to sit may be judicially reviewed? This is the question with which this article is concerned. It is a question easily answered in cases where the ruling has been made by a judge of an inferior court, but less easily answered where the ruling has been made by a judge of a superior court.

Should a judge of an inferior court have rejected a submission that he or she is disqualified, the objector may seek a writ of prohibition or like order from the relevant court of supervisory jurisdiction.² Should the judge of the inferior court have stood down in light of the objection of a party, another party might contest the correctness of that ruling on an application for a writ of mandamus or like order.³

In the exercise of the original jurisdiction given to it by s 75(v) of the federal Constitution, the High Court of Australia may issue a writ of prohibition against a judge of the Federal Court or the Family Court of Australia, on the ground that the judge is disqualified to sit.⁴ In point of principle there seems to be no reason why the High

* Emeritus Professor of Law, Monash University.

¹ See eg *Kartinyeri v Commonwealth* (No 2) (1998) 72 ALJR 1334.

² *Ex parte Qantas Airway Ltd*; *Ex parte Horsington* (1969) 14 FLR 414; *R v Cavitt*; *Ex parte Rosenfield* (1985) 33 NTR 29; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593.

³ *Sankey v Whitlam* [1977] 1 NSWLR 333; *Falconer v Howe* [1978] WAR 81; *R v Moss*; *Ex parte Mancini* (1982) 29 SASR 385; cf *Fitzgerald v Director of Public Prosecutions* (1992) 28 NSWLR 593.

⁴ *R v Watson*; *Ex parte Armstrong* (1976) 136 CLR 248.

Court could not, again in exercise of its jurisdiction under s 75(v) of the Constitution, review a ruling by a judge of either of these federal courts that he or she is disqualified to sit. Review of such a ruling could be sought on an application for mandamus. Were the High Court to conclude that the judge's ruling was incorrect, it might, in exercise of its discretion, decline to grant the remedy sought, but it would nevertheless have indicated to the judge that it was entirely proper for him or her to sit in the case.⁵

Problems will, however, arise when a court is asked to review a ruling by one of its own members on the question of his or her qualification to sit in a particular case. Should the ruling have been made by a judge of a Supreme Court it is unlikely that the application for review would be by way of application for a prerogative writ or like order. This is because the Supreme Courts are classified as superior courts of unlimited jurisdiction, the members of which are not amenable to prerogative writs emanating from their court. Review of rulings by Supreme Court judges on their qualification to sit will therefore be likely to be sought by way of appeal. The question of whether such rulings are appealable is examined later in this article.

Whether the Federal Court has jurisdiction to grant prerogative writs against its own members is uncertain. Under s 39B of the *Judiciary Act* 1903 (Cth) the Federal Court has been invested with a supervisory jurisdiction which is virtually co-extensive with that invested in the High Court under s 75(v) of the Constitution. Unless s 75(v) is interpreted as incorporating a general rule that prerogative writs cannot be issued by a court to any of its members, s 39B of the *Judiciary Act* 1903 (Cth) would have to be construed as giving the Federal Court a supervisory jurisdiction over judges of the Court. In practice, however, litigants who are aggrieved by rulings of judges of the Federal Court on their qualification to sit will be able to obtain review of these rulings either by the High Court, in exercise of its jurisdiction under s 75(v) of the Constitution, or by appeal to a Full Court of the Federal Court under provisions of the *Federal Court of Australia Act* 1976 (Cth).

Whether or not a judge's ruling on his or her qualification to sit is appealable will depend on the terms of the particular statute which defines the relevant appellate jurisdiction and the kinds of decisions which can attract that jurisdiction. Rights to appeal against judicial decisions, and jurisdictions to entertain appeals against judicial decisions, are not accorded by common law. They exist only by statute. Commonly the statutes which confer an appellate jurisdiction on a court employ terms which indicate that the appellate jurisdiction is not attracted unless there is some formal judicial order, recorded in official records. Section 73 of the federal Constitution, for example, confers an appellate jurisdiction on the High Court in respect of "judgments, decrees, orders and sentences" of specified judges and courts, subject to limitations prescribed by Parliament.

⁵ On the issue of mandamus to judges of superior courts see Sir A Mason 'Judicial disqualification for bias and apprehended bias and the problem of appellate review' (1998) 1 *Constitutional Law and Policy Review* 21 at 23 (text accompanying nn 15 & 16).

A judge's ruling on an objection to his or her qualification to sit may be reflected in a formal order of a kind which will attract an appellate jurisdiction. For example in *Gas and Fuel Corporation Superannuation Fund v Saunders*⁶ a Full Court of the Federal Court held that its appellate jurisdiction had been attracted by a decision by a primary judge of the court to accede to a request that he disqualify himself. The appellate jurisdiction had been attracted because the primary judge had made orders that the proceeding before him should no longer stand for judgment by him, that the proceeding be placed in the list of cases to be fixed for hearing, and that the costs of the trial (and other costs) be reserved to the judge who would be assigned to try the case. The Federal Court's interpretation of what could be recognised as an appealable order was subsequently endorsed by a differently constituted Federal Court in *Brooks v The Upjohn Company*.⁷ This was a case in which the primary judge of the Federal Court had rejected a submission by a party that she was disqualified to sit. Her ruling was reflected in formal orders entered in the Court's records, they being that the motion that she disqualify herself be denied, and that party who had moved her to disqualify herself should pay the costs of the motion.

The decisions of the Federal Court in these two cases throw doubts on the accuracy of the statement by Sir Anthony Mason, in an article published in 1998 after his retirement from the office of Chief Justice of the High Court, that

It is well established that a decision by a judge on ... an objection to his or her qualification to sit, whether it be a decision to sit or not to sit, does not constitute a curial order from which an appeal would lie to a superior court in the hierarchy.⁸

Sir Anthony referred to cases, which he thought supported that assertion, among them the decision of the New South Wales Court of Appeal in 1979 in the case of *Barton v Walker*.⁹ He did not, however, refer to the Federal Court's decision in *Gas and Fuel Corporation Superannuation Fund v Saunders*.¹⁰ He could not have been expected to have referred to the decision in *Brooks v The Upjohn Company*¹¹ because that decision was made a few days after publication of his article.

In the case of *Brooks* the Full Federal Court gave attention to the case of *Barton v Walker*,¹² but concluded that it was distinguishable from that it had to decide. The reason was that the ruling of the primary judge in the New South Wales case — which was that he was not disqualified — had not been reflected in any formal order entered in the records of the Supreme Court. The case of *Barton* could, the Federal Court said, be “distinguished on the basis that in those proceedings there was no notice of motion [that the judge rule on an objection to his qualification to sit] filed, no formal order extracted

⁶ (1994) 52 FCR 48; 123 ALR 323.

⁷ (1998) 156 ALR 622

⁸ Mason *supra* n 5 at 22.

⁹ [1979] 2 NSWLR 740.

¹⁰ *Supra* n 6.

¹¹ *Supra* n 8.

¹² *Supra* n 9

and no reasons for judgment published.”¹³ Whereas “[a]ll of these steps [had] occurred in the” case of *Brooks*.¹⁴ The Court went on to say that if they were wrong in concluding that *Barton* could be distinguished, they “would . . . not follow that decision.”¹⁵ It seemed to them that the decision in *Barton* did “not sit all that comfortably with” a later decision of the New South Wales Court of Appeal in *Australian National Industries v Spedley Securities Ltd (in liq)*.¹⁶ They were also of the view that problems Samuels JA had identified in *Barton* were “not insurmountable”.¹⁷

The problems were later described by Sir Anthony Mason as being that: “It is not possible to regard . . . a decision” by a judge on his or her qualification to sit “as an order by the judge to himself authorising or forbidding himself to sit or not to sit, as the case may be. Nor is there any means by which the decision can be enforced.”¹⁸ Samuels JA had identified two further problems. The first was the possibility that the judge who had ruled on the question of his or her disqualification might change his or her mind.¹⁹ The second was:

How does the judge deal with assertions of fact which he knows to be incorrect? They might not be challenged by the party not moving [that the judge disqualify himself]. How can the judge himself introduce evidence upon which he might have to rule, if its admissibility is challenged, and which he might ultimately have to evaluate?²⁰

The relevance of that particular problem to the question of whether a ruling by a judge on his or her qualification to sit is subject to appeal is not apparent.

In *Brooks* the Federal Court addressed some of the problems which Samuels JA had identified in *Barton*. It said that “a disqualification order or an order refusing to disqualify might be regarded as in its nature declaratory and self-operative in the majority of cases. Enforcement problems are unlikely to arise.”²¹ (The Court did not indicate whether the order would need to be formally entered on the record before the relevant appellate jurisdiction was attracted.) As to the “problem of a judge changing his or her mind”, the Federal Court’s answer was that “[d]isqualification orders are

¹³ *Supra* n 7 at 628.

¹⁴ *Ibid.*

¹⁵ *Ibid* at 629.

¹⁶ (1992) 26 NSWLR 411.

¹⁷ *Supra* n 7 at 630. This was a case in which a Court of Appeal, consisting of five judges, heard an appeal against the dismissal by a primary judge (Cole J) of a motion that he list the proceedings before him before another judge. They were complex commercial proceedings. A majority of the Court of Appeal allowed the appeal. Kirby P, one of the majority, noted that all of the parties (and also Cole J) “had invited” the court “to rule on the matter...”. He thought it was “manifestly convenient and desirable that the issue of the suggested disqualification of Cole J should be decided as quickly as possible so that the pending litigation may proceed according to its timetable and before a different judge and without delay ...”. (at 423).

¹⁸ Mason *supra* n 5 at 22.

¹⁹ *Supra* n 9 at 749.

²⁰ *Ibid.*

²¹ *Supra* n 7 at 630.

clearly interlocutory and the usual principles with regard to variation or recall of interlocutory orders would apply ...".²²

The Federal Court recognised the artificiality of the device of fastening on the formal orders which the primary judge had made as "the appropriate way of enabling review on appeal (before a trial) of a decision on a disqualification application ...".²³ The primary judge in the case (O'Connor J) had ruled herself not disqualified, and on appeal that ruling, reflected in formal orders, was sustained. The judges who sat in the appeal expressed the view that:

Any inconvenience which arises from the problems identified by Samuels JA in *Barton* would . . . be far less than the obvious inconvenience of submitting parties to a trial conducted by a judge disqualified to hear it and only allowing the point to be taken on appeal after judgment.²⁴

The judges constituting the Full Federal Court went on to say:

We acknowledge that the view we have expressed may be seen in some quarters as encouragement to engage in what was described in this matter as 'judge shopping'. However, such a perception would, in our opinion, underestimate the capacity of judges at first instance to recognise such a tactic and the controls which exist at appellate level to discourage what might otherwise be a flood of appeals against disqualification decisions. They include, of course, stringent scrutiny at the stage of application for leave and, where appropriate, a variety of costs orders.²⁵

The High Court of Australia has yet to resolve the question of whether it has jurisdiction to review rulings by its own members on objections to their qualification to sit. Section 73 of the federal Constitution gives to that Court jurisdiction "to hear and determine appeals from all judgments, decrees, orders and sentences" of inter alia "any Justice or Justices exercising the original jurisdiction of the High Court."²⁶ The High Court might accept that s 73 enables it to review, on appeal, a ruling by one of its members on his or her qualification to sit in a case in which the original jurisdiction of the High Court has been invoked and in which the judge's ruling fulfils the description of a judgment, decree or order.

In 1998 in the case of *Kartinyeri v Commonwealth*²⁷ the plaintiffs moved the High Court to review the decision by Callinan J, one of the Justices, that he was not disqualified from sitting in the case. It was a case in which all seven Justices had been listed to sit. The application for disqualification was made before the hearing on the substantive issues and Callinan J made his ruling, supported by written reasons, before the hearing began. The application to have the ruling reviewed was not however made

²² *Ibid.*

²³ *Ibid* at 629.

²⁴ *Ibid* at 630.

²⁵ *Ibid.*

²⁶ But this is subject to limitations imposed by the Parliament.

²⁷ (1998) 72 ALJR 1334.

until after the hearing had concluded and the Court had reserved its judgment. The Court was prepared to consider the application for review, though in the event it was not necessary for it to do so since Callinan J decided to withdraw from the case.²⁸

In support of their motion for review of Callinan J's initial ruling, the plaintiffs proposed to argue that the High Court has an inherent jurisdiction to ensure that proceedings before it are conducted in conformity with the principles of natural justice, and that Chapter III of the Constitution implies that the High Court is under a duty to act in accordance with these principles.²⁹ The plaintiff placed no reliance on s 75(v) of the Constitution.

Had not Callinan J withdrawn from the case prior to delivery of judgment, the plaintiffs might have moved the High Court to set aside its judgment on the ground that there was reasonable apprehension of bias on the part of Callinan J. There would, of course, have been no right of appeal against the judgment, but the High Court has accepted that it has an inherent jurisdiction to set aside any of its judgments when the proceedings before it have involved a denial of natural justice.³⁰ The House of Lords recently invoked its inherent jurisdiction when it set aside a judgment of an appellate committee on the ground that one of the members of the committee, Lord Hoffmann, was disqualified.³¹ In this case, however, the cause for disqualification had not been discovered until after judgment had been delivered.

If the High Court has an inherent jurisdiction to set aside a judgment to which a disqualified Justice has been privy, there must surely be no reason why that inherent jurisdiction does not extend to review of a decision by a Justice not to disqualify himself. Members of the Court would hardly welcome the prospect of having to set aside a judgment to which they have been privy (supported by reasons for decision which have taken considerable time to prepare) and then having to rehear and redecide the matter. In some cases, the outcome after rehearing may be the same.³² There could, however, be other occasions on which the rehearing produces a different outcome because the bench has been differently constituted. It could be a bench of six who are equally divided in opinion, in which case the opinion of the Chief Justice will, if the Court is exercising its original jurisdiction, prevail.³³ The same Chief Justice may have been one of the minority of three in the case when first heard and decided. Between the setting aside of a judgment of the High Court, constituted by all seven of its members, and the rehearing of the matter, there may also have been changes in the personnel of the Court.

²⁸ The case is described in Mason *supra* n 5 at 21-2.

²⁹ The submissions are the basis of an article by two of the counsel for the plaintiffs: S Tilmouth and G Williams 'The High Court and Disqualification of One of its Own' (1999) 73 ALJ 72.

³⁰ *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302, 308.

³¹ *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272. For a commentary on the case see Sir D Williams 'Bias; the Judges and the Separation of Power' [2000] PL 45 at 55-9.

³² As in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827.

³³ *Judiciary Act 1903*, s 23 (Cth).

The events in *Kartinyeri* may prompt the Justices of the High Court to review the practice of having objections to the qualification of one of their members to sit in a case decided by the target Justice. Sir Anthony Mason has made a strong case for change of this practice, at least in those cases in which a matter is to be decided by more than one Justice. He has suggested that the colleagues of the target Justice are as well able to adjudge whether there is reasonable apprehension of bias on the part of that Justice as the Justice himself or herself.³⁴ He has also drawn attention to the Court's responsibilities under the Constitution. The Court, he suggested:

has a responsibility to ensure that it is constituted in accordance with the provisions of the law governing the judicial process, the exercise of judicial power and natural justice. The court should not retreat from that responsibility by either delegating that responsibility to one of its number or declining to review his decision on the objection.³⁵

There seems to be no legal principle which commands that a judge who has been listed to sit in a case which is to be decided by a bench of judges is the only one who may rule on an objection by a party to his or her qualification to sit.

The position in cases in which a single judge has been listed to sit is different because, absent statutory provisions to the contrary, no one but that single judge has authority to rule on the objection, even though the ruling may be subject to review on appeal or on application for a prerogative writ or like order.

Were the High Court to adopt a practice whereby objections to the qualification of a Judge to sit in a case committed to a bench of its members are to be dealt with by the Justice's colleagues, there could be problems about what role, if any, the target Justice may properly play in the proceedings to determine whether the objection should be sustained. The party who has lodged the objection may have asserted facts which the target Justice would wish to contradict.³⁶ The target Justice may also wish to adduce evidence to counter that adduced by the objector. The target Justice may well complain that he or she has been denied natural justice if denied opportunity to present evidence in opposition to that of the objecting party. Were it to contemplate change in its present practice, the High Court, it may be supposed, would be attentive to these matters.

One of the concerns which judges have expressed when they have had to consider the reviewability of rulings by individual judges on objections to their qualification to sit is that processes for review of such ruling may be exploited by parties to litigation for tactical purposes, for example, to prolong the time within which the litigation can be expected to be concluded, or to secure the services of a judge thought to be more sympathetic to their cause than the judge assigned to adjudicate the case. Australian judges seem to be well aware of the fact that some legal advisers may go 'judge shopping' by challenging a particular judge's qualification to sit. Some judges have also expressed concern about the fragmentation of judicial processes which would result

³⁴ Mason, *supra* n 5 at 26.

³⁵ *Ibid.*

³⁶ *Brooks v The Upjohn Company* (1998) 156 ALR 622 at 630.

from a regime under which a judge's ruling on his or her qualification to sit is readily reviewable.³⁷ That concern may be addressed by courts in a variety of ways, the most salutary of which is by way of orders as to costs payable, as between party and party, in respect of the application for judicial review. Other means of control include statutory provisions which preclude appeals against judicial decisions save by leave of a court, and exercise of judicial discretions on application for prerogative writs and like orders.

Sir Anthony Mason's arguments, in support of adoption of a practice whereby objections to the qualification of a particular judge to sit as an adjudicator in a case to be decided by a bench of judges are dealt with by a bench which does not include the target judge may be strengthened by the following further arguments. First, members of the public may wonder whether the target judge can be impartial in deciding an objection to his or her sitting in the case, or continuing to sit. Secondly, if the target judge is left to rule on the objection to his or her qualification to sit, it does not make much sense if the reviewability of the judge's ruling should depend on the status of the court of which the judge is a member or on whether the ruling has been reflected in an appealable court order.

A practice whereby objections to the qualification of a member of a collegiate court are dealt with by a bench which does not include the target judge will, of course, be effective only in cases in which parties become aware of a possible ground for disqualification and lodge a formal objection. When a possible cause for disqualification is not discovered until after judgment, as in the case of Lord Hoffmann, the question of whether the target judge was disqualified cannot be determined by the judge's colleagues except on appeal or by motion to set aside the judgment. The case of Lord Hoffmann prompted questions to be asked of the Lord Chancellor in the House of Lords. In answer he stated that he had asked the senior Law Lord, Lord Browne-Wilkinson, to request that members of any proposed appellate committee should consider among themselves whether any of them might appear to have a conflict of interest. If so, the circumstances which gave rise to the appearance of bias should be disclosed to the parties. The target Law Lord should not sit if a party objected and the appellate committee decided that the objection should be sustained.³⁸

In Australia there is no legislation which requires judges to register information about their proprietary interests, their shareholding in corporations or their membership of associations in any central register accessible to members of the public. It appears to be the practice in some courts for judges to disclose to parties before them their shareholding in a corporate party,³⁹ thereby enabling parties to decide whether they wish to contest the judge's qualification to sit. In light of the ruling of the House of Lords in the case of Lord Hoffmann, it may be desirable that this practice of disclosure on the part of judges be extended to disclosure of their links with associations which have a non-financial interest in the outcome of proceedings before them, and which are, or have become, party to those proceedings. The instruction given by the

³⁷ *Barton v Walker* (1979) 2 NSWLR 740 at 761.

³⁸ 596 HL Deb col 10 (11 January 1999). See also TH Jones 'Judicial bias and disqualification in the Pinochet case' [1999] PL 391 at 398.

³⁹ See *Clenae Ltd v Australia and New Zealand Banking Group Ltd* [1999] VSCA 35 at paras 6, 42 and 89.

Lord Chancellor to Lord Browne-Wilkinson certainly appears to envisage that Law Lords should make disclosures in such cases, initially to their colleagues.