

**One Rule to Rule Them All:
A Unitary Standard of Bias in Judicial Review.**

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“Three Rings for the Elven-kings under the sky,
Seven for the Dwarf-lords in halls of stone,
Nine for Mortal Men, doomed to die,
One for the Dark Lord on his dark throne
In the Land of Mordor where the Shadows lie.
One Ring to rule them all, One Ring to find them,
One Ring to bring them all and in the darkness bind them.
In the Land of Mordor where the Shadows lie.”

-J.R.R. Tolkien, epigraph to *The Lord of the Rings*.

Introduction

The principle against bias is often expressed in the maxim *nemo iudex in causa sua* (no one may be a judge in his own cause).¹ Graham Taylor succinctly describes bias as “a predisposition to decide a cause or an issue in a certain way which does not leave one’s mind properly open to persuasion.”² In this way bias undermines the proper conduct expected of a decision-maker. Along with the maxim *audi alteram partem* (listen to the other side), the principle against bias is one of the two fundamental requirements of natural justice.³

In this paper, I consider the principle against bias under three heads: actual, presumptive, and apparent.⁴ Actual bias is the rule that deviation from the required standard of impartiality disqualifies the decision-maker; presumptive bias disqualifies a decision-maker who has a pecuniary interest in the decision before them; and apparent bias requires disqualification if it *appears* that there has been an actual bias. However, I argue in this paper that these putatively distinct rules are in reality all reflections of one vital principle: that the public’s reasonable perception of impartiality in decision-making must be protected.

In the first chapter of this paper, I consider the principle against bias in its historical context, and the various tests adopted by courts to ensure impartiality in decision-making. My survey of the history of presumptive and apparent bias law shows that the law in the mid-2000s was messy, convoluted, and in need of reform. The chapter concludes by articulating the reform effected by the Court of Appeal in *Muir v Commissioner of Inland Revenue*,⁵ and then the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*.⁶

In chapter II, I argue that the presumptive bias rule for pecuniary subject matter ought to be abandoned. I argue that by adopting the *Saxmere* approach to apparent bias as a rule of general-purpose application the law of pecuniary interest bias can achieve clarity. Finally, in chapter III, I challenge a trend in the jurisprudence to exclude Ministers and local government from apparent bias critique. I argue that this trend was based on a misapprehension of the appellate authority, and should be abandoned in favour of the versatile approach in *Saxmere*. Therefore, in this paper I argue that one rule, of general application, should be applied to all types of decision-maker, for all subject matters that may give rise to bias concerns. This approach is flexible enough to cover the strictness applicable to judges, as well as the greater latitude needed in local and central government.

¹ Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at 461; compare *R v Gough* [1993] AC 646 (HL), where Lord Goff ties the maxim to only one subset of bias, which I call presumptive bias.

² Taylor, above n 1, at 521–522.

³ Taylor, above n 1, at 461.

⁴ At ch I(A); see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 1076; Taylor, above n 1, at 522, 524, and 531.

⁵ *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, 3 NZLR 495.

⁶ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 [*Saxmere*].

Chapter I: The Tests of Actual, Presumptive, and Apparent bias

A *The Insufficiency of Actual Bias*

Actual bias is that a decision-maker is disqualified if the Court concludes that he or she, *in fact*, fell short of the standard of impartiality that was required in the situation.⁷ However, it is not satisfactory to limit the principle against bias to instances of actual bias. The social purpose served by this part of the law of natural justice is the appearance of justice. In the words of Lord Hewart CJ: “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁸ Pursuing the appearance of justice ensures that two things follow:⁹ impartiality in fact, and impartiality in appearance.

Investigating actual bias alone will not always ensure decisions have been impartial in fact. It is intrinsically difficult to investigate a person’s state of mind,¹⁰ and even then, bias can be so insidious that someone believing herself to be fair “may unconsciously be affected by bias”.¹¹ Further, “juristic policy” militates against investigating the state of mind of jurors,¹² as well as judges. It is a “feature of Commonwealth jurisprudence” that judges are reluctant to investigate actual bias in other judges, arising from reluctance to criticise the impartiality of lower courts.¹³ Furthermore, actual bias relies “on the assumption that an investigation will reveal all the facts of an incident”, which will not always occur.¹⁴ What is required is a “margin of error” to ensure that fewer instances of bias are missed by courts on review because of the difficulty in establishing bias in fact.¹⁵ Therefore, an actual bias inquiry, stifled by juristic policy and practical difficulty, is insufficient to prevent all instances of bias in fact.

As mentioned, the second goal of the principle against bias is ensuring the appearance of impartiality.¹⁶ In *Dimes v Grand Junction Canal Proprietors* — often considered the *locus classicus* of the principle against bias — Lord Campbell emphasised that members of tribunals must both ensure they are not improperly influenced, and “avoid the appearance of labouring under such an influence.”¹⁷ Ensuring that there is no actual bias does not alone meet the goal that justice is seen to be done. However, demanding the appearance of impartiality, or manifest fairness, ensures there is justice in fact, as well as public confidence in the system “of justice

⁷ *Gough*, above n 1, at 661.

⁸ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 (KB) at 259; see also at 260 per Lush J.

⁹ See *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [136].

¹⁰ *Gough*, above n 1, at 659.

¹¹ *Gough*, above n 1, at 659; *R v Barnsley Licensing Justices, ex parte Barnsley* [1960] 2 QB 167 (CA) at 187.

¹² *Gough*, above n 1, at 659.

¹³ *Anderton v Auckland City Council* [1978] 1 NZLR 657 (SC) at 680.

¹⁴ *Webb v R* (1994) 181 CLR 41 at 52.

¹⁵ *Webb*, above n 14, at 52.

¹⁶ *R v Sussex Justices*, above n 8.

¹⁷ *Dimes v Grand Junction Canal Proprietors* (1852) 3 HLC 759, 10 ER 301 (HL) at 794; Joseph, above n 4, at 1079; Taylor, above n 1, at 524.

without which peaceful resolutions of disputes would be impossible.”¹⁸ Lord Devlin, writing extrajudicially, put it this way:¹⁹

[I]mpartiality and the appearance of it are the supreme judicial virtues. It is the verdict that matters, and if it is incorrupt, it is acceptable. To be incorrupt it must bear the stamp of a fair trial. The judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails.

To ensure both the avoidance of bias in fact, and the appearance of bias, courts turn to supplementary investigations: presumptive bias and apparent bias. This also allows courts to avoid criticising lower judges for actual bias, because applying a presumption, or stating that there is an appearance of bias, does not involve criticism of the decision-maker to the same degree as finding actual bias would. In fact, most bias cases involve either the test of presumptive bias, or apparent bias.²⁰ The three species of bias, although all potentially disqualifying, are established by different inquiries: actual bias considers the real state of mind of the decision-maker; presumptive bias looks at the pecuniary interest the decision-maker has in the case under consideration; while apparent bias considers how impartial the decision-making appears to be. I will return to discuss allegations of actual bias in chapter III; this chapter and the next focus on presumptive and apparent bias.

B Presumptive Bias

1 The Rule

The presumptive bias rule arose in the mid-19th century to disqualify judges with a pecuniary interest in their decisions. It was discussed in New Zealand in *Auckland Casino Ltd v Casino Control Authority* where counsel assumed in argument “[t]he existence of an irrebuttable presumption [of bias] in cases of pecuniary interest”.²¹ In the foundational case of *Dimes* the rule disqualified the Lord Chancellor for having shares of several thousand pounds in a company that was a party to the decision.²² Although the House of Lords said that nobody could suppose the interest would influence the judge’s decision, disqualification had to follow.²³ This shows that the presumptive bias rule was, at its inception, not a test of actual bias or apparent bias.²⁴ In other words, the presumptive bias rule could disqualify a decision-maker in circumstances where the apparent or actual bias approaches would not.

The 1866 English case of *R v Rand* highlights that the presumptive bias rule is only attracted for *pecuniary* interests.²⁵ In that case the justices’ trusteeship of organisations which had lent money to a party would not have made them “liable to costs, or to other pecuniary loss or

¹⁸ Abimbola A. Olowofoyeku “Sub-Regional Courts and the Recusal Issue: Emergent Practice of the East African Court of Justice (2012) 20 Afr J Int’l & Comp L 365 at 368.

¹⁹ Lord Devlin “Judges and lawmakers” (1976) 39 MLR 1 at 4.

²⁰ Taylor, above n 1, at 524; *Gough*, above n 1, at 659 per Lord Goff.

²¹ *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA) at 148.

²² *Dimes*, above n 17, at 793.

²³ *Dimes*, above n 17, at 793.

²⁴ See *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at [121].

²⁵ *R v Rand* (1865-66) LR 1 QB 230; relied on in *Auckland Casino*, above n 21, at 148.

gain...”, so Blackburn J for the Court considered the rule to be inapplicable.²⁶ Justice Blackburn emphasised a distinction between the presumptive bias rule for pecuniary interests, and circumstances that may raise a “suspicion of favour”.²⁷ In other words, where partiality is said to arise from a pecuniary interest the presumptive disqualification test is applied. However, if partiality is said to arise from non-pecuniary matters (for example, friendship with a party) the apparent bias test must be met. In *R v Rand* this is described as a distinction between ‘interests’ (attracting the presumptive disqualification) and ‘favour’.²⁸

While the presumptive bias rule attaches only to pecuniary interests,²⁹ it is not the case that every pecuniary interest will attract the rule — the interest must also be direct.³⁰ Moreover, in contrast to the 19th century origins of the rule,³¹ an exception for minimal interests has been recognised. I discuss these issues below.

2 *The Boundaries of the Rule*

Early cases involved curial insistence that even the smallest interest, if direct, would disqualify a decision-maker. Justice Blackburn in *R v Rand* held that “any direct pecuniary interest, however small” disqualifies a judge,³² and in *Serjeant v Dale*, Lush J said “[t]he law does not measure the amount of interest which a judge possesses... he is disqualified, no matter how small the interest may be.”³³ Justice Slade stated that “[i]t is, of course, clear that any direct pecuniary ... interests ... however small, operates as in automatic disqualification”.³⁴ However, by the time he delivered judgment in *Auckland Casino*, Cooke P was ready to recognise a *de minimis* exception, treating previous strictness “at the present day in New Zealand as an exaggeration”.³⁵

Regarding the question of how direct an interest must be, *Grey District Council v Banks* lies at one end of the scale.³⁶ Justice Pankhurst observed that “[i]t is difficult to imagine a more obvious case of personal interest” than that of the arbitrator in a rent dispute with the Council who was also a lessee of the Council.³⁷ Further, it has been held that the pecuniary interest of one spouse can disqualify the other.³⁸ On the other end of the scale, the Court of Appeal in *Cook v Patterson* dismissed the appellant hotelkeeper’s allegation of presumptive bias against a member of a liquor-Licensing Committee, Mr Morris.³⁹ Morris was the secretary-treasurer of a Working Men’s club and his firm took a fee for accountancy services provided to the club

²⁶ At 232. Compare *R v The Justices of Hertfordshire* (1845) 6 QB 753, 115 ER 284.

²⁷ At 233; see *R v The Dean and Chapter of Rochester* (1851) 17 QB 1, 117 ER 1181 at 31.

²⁸ Joseph, above n 4, describes the distinction as between ‘pecuniary’ and ‘non-pecuniary’ interests at 1076.

²⁹ But see the discussion below of *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL) [*Pinochet*].

³⁰ *Gough*, above n 1, at 661.

³¹ *R v Rand*, above n 25, at 232.

³² *R v Rand*, above n 25, at 232.

³³ *Serjeant v Dale* (1877) 2 QBD 558 (DC) at 567.

³⁴ *R v Camborne Justices, ex parte Pearce* [1955] 1 QB 41 (DC) at 47.

³⁵ *Auckland Casino*, above n 21, at 148.

³⁶ *Grey District Council v Banks* [2003] NZAR 487 (HC).

³⁷ At [45]. Although the case dealt with a rule of disqualification under the Arbitration Act 1996, it is a useful illustration of a direct interest.

³⁸ *Collinge v Kyd* [2005] 1 NZLR 847 (HC); applying obiter from *Auckland Casino Ltd*, above n 21.

³⁹ *Cook v Patterson* [1972] NZLR 861 (CA).

“which in a sense [was] in opposition to the [appellant’s] hotel”.⁴⁰ The Court considered that there would be no effect at all on the club, “or so little that any effect may be disregarded”, and, in any case, Morris had no financial interest in the club’s liquor sales.⁴¹ In the criminal law context the English Court of Appeal in *R v Mulvibill* declined to apply presumptive bias where the judge had shares in the bank which was robbed in one of the charges before him, considering that interest insufficiently direct.⁴²

The directness question raises specific problems in instances of partial shareholding. In *Auckland Casino*, the relevant shareholding was in a parent company to a subsidiary affected by the decision.⁴³ *Auckland Casino Ltd*, the appellant, was unsuccessful in its application to the Casino Control Authority for the licence to build a casino that was instead granted to *Sky Tower Casino Ltd*. Two of the six members of the Authority, Messrs Lawrence and Cox, had shares in *Brierley Investments Ltd*, which owned 80 per cent of *Sky Tower*. The Court considered that the *de minimis* rule “could well apply” to Mr Cox’s 880 shares (worth more than a dollar each).⁴⁴ However, Mr Lawrence and his wife held 18,766 shares as well as 2,345 convertible notes. The Court observed some inconsistency in cases where the decision-maker had an interest in a company which wholly owned the company that was party to the dispute: a High Court case had held such an interest to be sufficiently direct,⁴⁵ while a Supreme Court of Western Australia case held otherwise.⁴⁶ Nevertheless the Court considered that the Lawrences’ shareholdings were sufficiently direct, and would have been fatal to the Authority’s decision, despite *Brierley* owning only 80 per cent of *Sky Tower*.⁴⁷ It is possible that the quantum of the Lawrences’ shareholdings, the magnitude of *Brierley*’s ownership of *Sky Tower*, and the public perception that in effect, *Brierley* — not *Sky Tower* — had won the application all contributed to the conclusion that the interest was sufficiently direct.⁴⁸ This case indicates that the directness question in presumptive bias can create some uncertainty. For example, if *Brierley*’s shareholding of *Sky Tower* were less or even a minority, it is unclear whether that would be sufficiently direct. The application of presumptive bias in New Zealand is discussed in more detail in chapter II(B)(1) of this paper.

C Apparent Bias

Chief Justice Lord Hewart’s expression of the principle against bias in *R v Sussex Justices* emphasised that “[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice”.⁴⁹ Apparent bias, compared to actual and presumptive bias, most closely reflects this rationale. In Australia, it is known as “the

⁴⁰ At 862.

⁴¹ At 865.

⁴² *R v Mulvibill* [1990] 1 WLR 438 (CA), apparent bias was applied instead.

⁴³ *Auckland Casino*, above n 21.

⁴⁴ *Auckland Casino*, above n 21, at 148.

⁴⁵ *Auckland Casino*, above n 21, at 148; citing *Simmonds v Fortune* HC Christchurch M700/79, 5 February 1982.

⁴⁶ *Re Ritchie* (1993) 8 WAR 469 (SC).

⁴⁷ *Auckland Casino*, above n 21, at 149.

⁴⁸ At 148. As the Court concluded that any bias was waived by the appellant at 153, the direct interest did not result in disqualification.

⁴⁹ *R v Sussex Justices*, above n 8, 259.

apprehension of bias principle”,⁵⁰ although in England the preferred articulation is “real possibility” of bias.⁵¹ This section and the next outline the history behind the standardisation of apparent bias by the Supreme Court in *Saxmere*.⁵² It is useful to explore this history in detail, and attempt to draw out principles that may be applied to engage in the further standardisation that my research questions propose. This section will elucidate a trend in common law jurisprudence to move to an objective assessment of the appearance of bias from the perspective of a reasonable lay observer, rather than the subjective perspective of the court on review.⁵³

1 A Variety of Approaches

There were two factors which varied in the tests applied for apparent bias: the *perspective* from which an assessment of bias is made; and the *threshold* for disqualification.⁵⁴ For example, in the 1951 decision of *Black v Black*, the Supreme Court asked whether the facts would “create in the mind of a *reasonable man* a *suspicion* that the principles of natural justice will be departed from.”⁵⁵ This test has a threshold of ‘reasonable suspicion’ while the relevant perspective is objective — that of ‘a reasonable man’.⁵⁶ By contrast, in *Healey v Ruahina Hutchinson* J rejected the *Black v Black* approach and adopted a test with a threshold of ‘real likelihood’, taking the court’s perspective for that assessment.⁵⁷ Although Hutchinson J considered the ‘reasonable suspicion’ test less exacting, his Honour adopted the ‘real likelihood’ because it carried “the weight of authority”, not because he considered it a superior test.⁵⁸

While tests with the ‘real likelihood’ threshold often took the court’s perspective,⁵⁹ and those with ‘reasonable suspicion’ took the objective perspective, there were exceptions.⁶⁰ Adding to the complexity of the picture, in *Re Royal Commission on Thomas Case* the Court of Appeal considered that the threshold may change depending on the decision-maker,⁶¹ while in *Anderton v Auckland City Council* it was thought to be the *source* of the alleged bias — whether it arose inside or outside the proceedings — that affected the test to be applied.⁶² As reflected

⁵⁰ *Ebner*, above n 24, at [6].

⁵¹ *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103].

⁵² *Saxmere*, above n 6.

⁵³ In this context, the ‘objective’ compared to ‘subjective’ taxonomy is distinct from the taxonomy in the European Court of Human rights discussed in *Porter v Magill*, above n 51, at [88].

⁵⁴ In *Webb*, above n 14, Deane J at 70 names these two factors respectively the ‘reference point’ and the ‘substance’.

⁵⁵ *Black v Black* [1951] NZLR 723 (SC) at 728 (emphasis added).

⁵⁶ See for example *Police v Pereira* [1977] 1 NZLR 547 (SC); *Turner v Allison* [1971] NZLR 833 (CA).

⁵⁷ *Healey v Ruahina* [1958] NZLR 945 (SC). Relying on *Frome United Breweries Co Ltd v Bath Justices* [1926] AC 586 (HL); *R v Rand*, above n 25, at 233.

⁵⁸ *Healey v Ruahina*, above n 57, at 951.

⁵⁹ *Healey v Ruahina*, above n 57.

⁶⁰ In *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA) at 549–550, the threshold was ‘real likelihood’ but the perspective was that of the fair-minded and responsible person.

⁶¹ *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA).

⁶² *Anderton v Auckland City Council*, above n 13, at 688. If the alleged allegations were based on comments inside the proceedings then it was ‘reasonable suspicion’, but if they were outside the proceedings then the test was a ‘real likelihood’.

in *Black v Black* and *Healey v Ruahina*,⁶³ the test for apparent bias “is a convoluted story, with uncritical deference to overseas case law causing complication.”⁶⁴ Because New Zealand has taken its lead in apparent bias from England and Australia, the next section addresses the recent history of apparent bias in those jurisdictions.

2 Approaches in England and Australia

In the 1960s and 1970s the English Court of Appeal did not provide a consistent picture of apparent bias. In *R v Barnsley Licensing Justices, ex parte Barnsley* Devlin LJ held that ‘real likelihood’ of bias did not entail an inquiry of “what impression might be left on the minds... of the public generally”.⁶⁵ Therefore, Devlin LJ took the relevant perspective to be that of the reviewing court, knowing the circumstances of the justices under review. However, in *Metropolitan Properties Co (FGC) Ltd v Lannon*, Lord Denning MR and Edmund Davies LJ explicitly rejected the articulation in *Barnsley* in favour of the objective perspective.⁶⁶ Their Lordships considered *Barnsley* to diminish the principle that justice must be seen to be done.⁶⁷ Predictably, inconsistency followed these conflicting decisions,⁶⁸ leading to a unanimous House of Lords attempting to provide some clarity. In 1993, *Gough* set out a ‘real danger’ standard assessed through the eyes of the presiding judge.⁶⁹ It is helpful to set out the articulation in *Gough*:⁷⁰

Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him...

In contrast to England, Australia has had a consistent objective test based on ‘reasonable suspicion’ since 1969.⁷¹ Soon after *Gough*, the High Court in *Webb v R* was asked to reconsider its approach and adopt the ‘real likelihood’ test expounded by the House of Lords.⁷² The High Court rejected that invitation, unanimously considering that public confidence in the administration of justice is better maintained by a test involving “the reaction of the ordinary reasonable member of the public” rather than the conclusions of a judge.⁷³

⁶³ *Black v Black*, above n 55, relied on *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 (Ch). *Healey v Ruahina*, above n 57, relied on *Frome United Breweries Co Ltd*, above n 57leod; and *R v Rand*, above n 25, at 233.

⁶⁴ Joseph, above n 4, at 1082.

⁶⁵ *Barnsley*, above n 11, at 187.

⁶⁶ *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 (CA) at 599 and 606; Danckwerts LJ had some doubts, but proceeded along the same lines as Denning MR and Edmund Davies LJ at 601.

⁶⁷ See *R v Sussex Justices*, above n 8.

⁶⁸ *R v Altrincham Justices, ex parte Pennington* [1975] QB 549 (QB); *R v Liverpool City Justices, ex parte Topping* [1983] 1 WLR 119 (QB); cited in *Gough*, above n 1, at 667 as examples of confusion.

⁶⁹ *Gough*, above n 1, at 670 per Lord Goff; Lords Ackner, Mustill, Slynn and Woolf agree at 670–671.

⁷⁰ At 670.

⁷¹ *R v Commonwealth Conciliation and Arbitration Commission, ex parte the Angliss Group* (1969) 122 CLR 546; *R v Watson, ex parte Armstrong* [1976] 136 CLR 248 at 261.

⁷² *Webb*, above n 14.

⁷³ At 51 per Mason CJ and McHugh J.

Despite Lord Goff's careful articulation in *Gough*, the inconsistency the case caused with European,⁷⁴ Scottish,⁷⁵ and Commonwealth⁷⁶ jurisprudence led to an about-face by a unanimous House of Lords just seven years later.⁷⁷ In *Porter v Magill*, the English approach was modified in favour of the 'reasonable suspicion' test, with an articulation Lord Hope considered "clear and simple language", that is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility" of bias.⁷⁸ This returned England to its position in *Lannon*, and squared it with the approach taken in Australia since 1969.

3 *The Response in New Zealand*

In 1995, New Zealand's Court of Appeal considered the recent comprehensive investigations into the rule against apparent bias by England in *Gough* and Australia in *Webb*.⁷⁹ In *Auckland Casino*, Cooke P preferred the 'real danger' test in *Gough*.⁸⁰ Although the English approach was consciously adjusted in *Porter v Magill* in 2001, New Zealand continued to apply *Gough*. In *Man O'War Station Ltd v Auckland City Council (Judgment No 1)* the Privy Council was urged to adopt the adjustment in *Porter v Magill* for New Zealand, but declined to do so.⁸¹

Subsequently, the Court of Appeal suffered from inconsistent application of the apparent bias rule. *Erris Promotions Ltd v Commission of Inland Revenue* and *Ngati Tahingi v Attorney-General* were cases that moved toward a 'reasonable suspicion' approach.⁸² In *Erris Promotions*, the Court favourably commented on the approach in *Webb*, and then suggested "not in any declaratory way, but as a reference for possible future discussion" a revision to the New Zealand approach closely aligned with that in *Webb*.⁸³ In *Ngati Tahingi*, where a tenuous allegation of bias arose from Randerson J's personal connections to the Anglican Church, the test suggested in *Erris Promotions* was applied for expediency because it was considered more favourable to the applicants.⁸⁴ However, in neither case did the Court specifically restate the law of apparent bias and recognise the shift in England and Australia to a specifically objective approach. Anderson P said extrajudicially that although people may "take what inference they will" from the fact he wrote both the judgments of the Court in *Erris Promotions* and *Ngati Tahingi*, "that cannot be taken as any indication of what might happen in a future case."⁸⁵

These indications toward a 'reasonable suspicion' test were followed with opposite indications in two later decisions of the Court of Appeal: in *R v Jessop* and *Lamb v Massey University* the

⁷⁴ *Hauschild v Denmark* (1989) 12 EHRR 266 at [48].

⁷⁵ *Bradford v McLeod* 1986 SLT 244 (HCJAC).

⁷⁶ *Webb*, above n 14.

⁷⁷ *Porter v Magill*, above n 51, at [102] and [103].

⁷⁸ At [103].

⁷⁹ *Auckland Casino*, above n 21.

⁸⁰ At 149; confirmed in *BOC New Zealand Ltd v Trans Tasman Properties Ltd* [1997] NZAR 49 (CA) at 54.

⁸¹ *Man O'War Station Ltd v Auckland City Council (Judgment No 1)* [2002] UKPC 28, [2002] 3 NZLR 577 at [10].

⁸² *Erris Promotions Ltd v Commissioner of Inland Revenue* (2003) 21 NZTC 18,214 (CA); *Ngati Tahingi v Attorney-General* (2003) 16 PRNZ 878 (CA).

⁸³ *Erris Promotions Ltd*, above n 82, at [32].

⁸⁴ *Ngati Tahingi*, above n 82, at [17].

⁸⁵ Noel Anderson "The Harkness Henry Lecture: The Appearance of Justice" (2004) 12 Wai L Rev 1 at 13.

Court appeared to prefer the ‘real likelihood’ approach.⁸⁶ *R v Jessop* did not cite *Ngati Tahingi*, while *Lamb v Massey University* misinterpreted it as an application of the *Auckland Casino* test.⁸⁷ *R v Jessop* held that the correct test was that applied by Lord Goff in *Gough*, taking support from its application in *Auckland Casino*, *Man O’War Station Ltd*, and especially the Court’s decision to not overrule *Auckland Casino* in *Erris Promotions*.⁸⁸ The difference between the tests was more closely considered in *Lamb v Massey University* as the appellant argued that the test in *Erris Promotions* should have been applied in the lower court, not the test in *Auckland Casino*.⁸⁹ The Court rejected that argument, saying that *R v Jessop* correctly represents the law.⁹⁰ This “shilly-shallying with two different tests [was] highly undesirable”, as counsel were forced to re-examine the law in every case, unsure whether it was about to change.⁹¹

While *Erris Promotions* suggested a ‘reasonable suspicion’ test, and *Ngati Tahingi* indicated movement in that direction, *R v Jessop* and *Lamb v Massey University* indicated satisfaction with the ‘real likelihood’ test in *Auckland Casino* and *Gough*. The indications were, however, slight: in three of the cases the difference between the tests would not have affected the outcome,⁹² and in *Lamb v Massey University* the Court considered that ‘reasonable suspicion’ test argued for by the appellant was in fact applied by the Judge, although that was considered an error.⁹³ Thus, the cases before the Court were not ideal candidates for reforming apparent bias. Further inconsistency arose because although the Court in *BOC New Zealand* considered the *Gough* test to involve an objective assessment, in the subsequent applications of those cases the Court considered the test as being undertaken from the Court’s viewpoint, not that of an observer.⁹⁴

4 Interpretation of *Gough*

I have described the two factors that vary in apparent bias tests as factors of threshold and perspective. The Court of Appeal has downplayed any apparent differences in thresholds that appear in the various decisions,⁹⁵ and has rather focussed on the importance of the perspective taken. In contrast, Philip Joseph, commenting on the *Auckland Casino* decision, said that the endorsement of “the one expression...may not simplify the law but simply restrict our choice of legal diction.”⁹⁶ Nevertheless, for the purposes of my examination of the standardisation effected in New Zealand with *Saxmere*, the perspective taken is the most important factor.

⁸⁶ *R v Jessop* CA13/00, 19 December 2005 (CA); *Lamb v Massey University* CA241/04, 13 July 2006 (CA).

⁸⁷ *Lamb v Massey University*, above n 86, at [25].

⁸⁸ At [65], [66] and [68]; *Ngati Tahingi*, above n 82, was not referred to.

⁸⁹ *Lamb v Massey University*, above n 86, at [21].

⁹⁰ At [23].

⁹¹ Andrew Beck “Standards for Bias” [2006] NZLJ 419 at 420.

⁹² *Erris Promotions*, above n 82, at [33]; *Ngati Tahingi*, above n 82, at [17]; *R v Jessop*, above n 86, at [68], [73] and [74].

⁹³ At [25].

⁹⁴ *Lamb v Massey University*, above n 86, at [25]; *R v Jessop*, above n 86, at [65] and [74].

⁹⁵ *Auckland Casino*, above n 21, at 149; *BOC New Zealand*, above n 80, at 55; *Erris Promotions*, above n 82, at [29]; *Lamb v Massey University*, above n 86, at [25].

⁹⁶ Philip A Joseph “The bias rules in administrative law reconsidered” (1995) NZLJ 110 at 114.

While *Gough* “relies on the court’s own view”, *Webb* relies on “the court’s view of the public’s view”.⁹⁷ Although in *BOC New Zealand* the Court of Appeal contemplated *Gough* to involve an objective consideration of the perspective of the observer,⁹⁸ Lord Goff in that case said it was “unnecessary... to require... the court [to] look at the matter through the eyes of a reasonable man”, although his Lordship continued to explain this is because the Court personifies the reasonable man.⁹⁹ In my assessment, Lord Goff considered the differences between *Barnsley* and *Lannon* to relate only to threshold, and not perspective. Lord Goff read Devlin LJ in *Barnsley* to be emphasising that mere suspicion is insufficient to disqualify a judge,¹⁰⁰ taking support from the interpretation of *R v Sussex Justices* in a later House of Lords decision.¹⁰¹ This explains how Lord Goff concluded that Lord Denning MR’s judgment in *Lannon*, which included the phrase “there must appear to be a real likelihood of bias”,¹⁰² was only a slight adaptation of the test in *Barnsley* despite Lord Denning MR purporting to differ from Devlin LJ.¹⁰³ Lord Goff considered Lord Denning MR’s focus on the impression of the reasonable man to be the same in result as the impression on the Court.¹⁰⁴

Therefore, the correct understanding of *Gough* is that it posits a test from the perspective of the Court, rather than contemplating the impression on an observer. The High Court of Australia in *Webb* rejected *Gough* primarily because of its emphasis on the court’s perspective,¹⁰⁵ and the examination of *Gough* in *Porter v Magill* makes clear that the former case was too focussed on the court’s view.¹⁰⁶ As New Zealand’s Court of Appeal recognised in its decisions after *Auckland Casino*, this country’s consistent application of *Gough* left this jurisdiction with a test that takes the viewpoint of the Court.¹⁰⁷

5 The Objective Perspective

The objective perspective adopted in England and Australia assessed disqualification from the impression taken by an observer. However, that impression must be reasonable: “[w]hat is decisive is whether this fear can be held objectively justified”.¹⁰⁸ The consequence of this is that there was no extant problem of disqualification occurring too readily, and a ‘mere suspicion’ — that is, surmise or conjecture — disqualifying a judge who could not reasonably be considered impartial.¹⁰⁹

The focus of an apparent bias inquiry is meaningfully affected by whether the perspective is objective or that of the Court. Where the perspective is taken as the reviewing Court’s, the inquiry becomes tantamount to appraising actual bias. Although the actual state of mind of the

⁹⁷ Michael Taggart “Administrative Law” [2003] NZ L Rev 99 at 100–101; *Webb*, above n 14, at 52.

⁹⁸ *BOC New Zealand*, above n 80, at 54.

⁹⁹ *Gough*, above n 1, at 669.

¹⁰⁰ *Gough*, above n 1, at 665.

¹⁰¹ *R v Camborne Justices*, above n 34.

¹⁰² *Lannon*, above n 66, at 599.

¹⁰³ *Gough*, above n 1, at 667.

¹⁰⁴ At 668.

¹⁰⁵ *Webb*, above n 14, at 50 and 70.

¹⁰⁶ *Porter v Magill*, above n 51, at [103].

¹⁰⁷ *Lamb v Massey University*, above n 86, at [25].

¹⁰⁸ *Hauschild v Denmark*, above n 74 at [48], cited in *Porter v Magill*, above n 51, at [100].

¹⁰⁹ *Lannon*, above n 66, at 599.

decision-maker is not the target of inquiry, “[n]onetheless, the ultimate question... is whether there was a real danger... of actual bias.”¹¹⁰ The Court of Appeal in *Auckland Casino* failed to address this “important criticism” of the *Gough* test, as *Saxmere* later recognised.¹¹¹ In effect, under the *Gough* test, the reviewing Court investigates actual bias by a modified standard of proof, ‘real danger’ or ‘real likelihood’. This is undesirable for the reasons at section A of this chapter. Furthermore, where the perspective taken is that of the Court, the implicit assumption is that “public confidence in the administration of justice will be maintained because the public will accept the conclusions of the judge”.¹¹² I argue that a test of apparent bias that does not consider the impression taken by a reasonable member of the public is inadequate at ensuring that justice is seen to be done.

While it may seem a fine distinction to say that a judge’s view of the public’s view is of more public reassurance than a judge’s own view of bias (under the *Gough* approach), in my view it is an important distinction. Where a judge is able to state that a fair-minded observer would not apprehend bias, that is a much more confident statement about the state of affairs than a statement to the effect that one particular judge does not apprehend bias. There are three further reasons that the objective perspective, expressed in *Webb*, is the better expression of the law of apparent bias than the test in *Gough*.¹¹³ A finding of apparent bias from the objective perspective is less critical of the decision-maker: it does not involve a Court making a finding of likelihood that the decision-maker is in fact affected by bias. This allows the appearance of justice to be achieved by disqualification, without unfair criticism of a decision-maker who was in fact not biased. Secondly, a finding of a danger, likelihood, or possibility of bias would itself damage public confidence in the administration of justice, with a Court in effect agreeing with a concerned party that there was a possibility of bias occurring. This undermines the goal of maintaining public confidence that the apparent bias test ought to preserve. Taking these two reasons together, a third benefit of the objective test precipitates: while the *Gough* approach makes reviewing judges wary of concluding that there is an appearance of bias — because of the harm that might do either to the decision-maker’s reputation, or the appearance of the administration of justice — the objective perspective avoids those frustrating factors. Therefore, under the *Webb* approach closer attention can be paid to justice “manifestly and undoubtedly [being] seen to be done”¹¹⁴ in the case at hand. In other words, the appearance of justice can be achieved in every case that comes before the Court, without casting a shadow over the administration of justice in general.

D Belated Reform

1 The State of Bias

The approach taken by Cooke P in *Auckland Casino* was to assess apparent bias from the Court’s perspective, following *Gough*.¹¹⁵ Despite *BOC New Zealand* suggesting that *Auckland*

¹¹⁰ *Webb*, above n 14, at 71.

¹¹¹ At [71].

¹¹² *Webb*, above n 14, at 51.

¹¹³ *Webb*, above n 14, at 72.

¹¹⁴ *R v Sussex Justices*, above n 8, at 259.

¹¹⁵ *Auckland Casino*, above n 21, at 149.

Casino responded to criticisms¹¹⁶ of the *Gough* approach by taking an objective perspective,¹¹⁷ Cooke P's comments only went as far as saying that the 'real danger' test was almost indistinguishable from a test with a threshold of 'suspicion' when the latter test had a perspective of a reasonable and informed observer.¹¹⁸ The 'real danger' test remained assessed from the Court's perspective. Furthermore, the articulations of *Auckland Casino* in the mid-2000s cases of *Lamb v Massey University* and *R v Jessop* plainly took the Court's perspective.¹¹⁹ Despite some indications made toward the approach in *Webb* and *Porter v Magill*,¹²⁰ there were equal indications that the *Auckland Casino* test should stay.¹²¹ As Anderson P wrote extrajudicially:¹²²

Following the House of Lords 'adjustment' in *Porter v Magill* one could choose if one wished between tests of 'real danger', 'real possibility', or 'reasonable apprehension'. One could also choose between 'the Court's own view' and 'the Court's view of the public view'.

This disharmonious landscape faced change on two fronts. First, England — formerly in New Zealand's position with inconsistent appellate authority — had adopted the objective approach to apparent bias.¹²³ In the early and mid-2000s, Both England¹²⁴ and Australia¹²⁵ were consistent in applying the objective approach, while New Zealand was erratic.¹²⁶ Presciently, in December 2006 Andrew Beck wrote "[t]he time has been reached for a proper decision as to whether *Auckland Casino* is to be jettisoned, rather than simply saying that the same conclusion would have been reached whichever test had been applied."¹²⁷ Second, in the realm of presumptive bias, there was movement in Australia to subsume that rule within the objective approach to apparent bias. Just five years after *Auckland Casino*, the High Court of Australia held in 2000 that the irrebuttable presumption of bias for pecuniary interests was not a free-standing rule.¹²⁸ These two issues were addressed by the Court of Appeal in 2007, and then the Supreme Court in 2009, bringing long-awaited clarity.¹²⁹

2 Muir v Commissioner of Inland Revenue

Dr Muir, a tax lawyer, conceived of 'the Trinity scheme', where 300 investors bought 50-year licences to grow trees in Southland and then depreciated those licenses, "effectively granting them a 50-year tax holiday."¹³⁰ Justice Venning in the High Court found the scheme to be

¹¹⁶ In *Webb*, above n 14, at 51.

¹¹⁷ *BOC New Zealand*, above n 80, at 54.

¹¹⁸ *Auckland Casino*, above n 21, at 149.

¹¹⁹ *Lamb v Massey University*, above n 86, at [25]; *R v Jessop*, above n 86, at [65] and [74].

¹²⁰ Beck, above n 91, at 420.

¹²¹ *Erris Promotions*, above n 82; *Ngati Tahingi*, above n 82; compare: *Lamb v Massey University*, above n 86; *R v Jessop*, above n 86.

¹²² Anderson, above n 85, at 12.

¹²³ *Porter v Magill*, above n 51.

¹²⁴ *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528 at [61]; *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 at [22].

¹²⁵ *Ebner*, above n 24, at [6]–[8]; *Smits v Roach* [2006] HCA 36, (2006) 227 CLR 423 at [54] and [58].

¹²⁶ See above at ch I(C)(3).

¹²⁷ Beck, above n 91, at 420.

¹²⁸ *Ebner*, above n 24, at [54].

¹²⁹ *Muir*, above n 5; *Saxmere*, above n 6.

¹³⁰ *Muir*, above n 5, at [6].

artificial and tax-driven.¹³¹ The Commissioner then pursued Muir for costs, and Muir responded by objecting to Venning J hearing that case. Justice Venning declined to recuse himself.¹³² In the Court of Appeal, Muir argued both that Venning J had a financial interest in the case that ought to automatically disqualify him,¹³³ and that there was a disqualifying appearance of bias. Muir relied on the judge’s professional associations,¹³⁴ as well as adverse comments by his Honour about Muir, to found the allegations of apparent bias.¹³⁵ The Court took the opportunity to address the law of bias.

Under its heading “One principle or two?” the Court briefly considered whether the separation of presumptive and apparent bias ought to be abandoned.¹³⁶ The Court considered the bifurcation in *Auckland Casino*, and the High Court of Australia’s unification in *Ebner v Official Trustee in Bankruptcy*, but declined to determine the issue “in the absence of an invitation and the necessity to do so”.¹³⁷ In any case, the Court concluded that the Judge had no pecuniary interest in the outcome of the case.¹³⁸

The Court recognised that the law for apparent bias was “in a[n] awkward state in New Zealand.”¹³⁹ The Court concluded its thorough examination by deciding that it was “time to extinguish the tenuous hold on existence the *Gough* test has had in New Zealand.”¹⁴⁰ The approach in *Porter v Magill* and *Webb* was considered superior; not only because New Zealand was “out of line with the jurisprudence of all the other common law countries”,¹⁴¹ but also because it emphasises “how something might reasonably be regarded by the public”.¹⁴² In the end, the allegations of apparent bias from association and from adverse comments were dismissed as untenable.¹⁴³

3 Saxmere Co Ltd v Wool Board Disestablishment Co Ltd

The bias allegations in the *Saxmere* litigation are well known. After the Court of Appeal delivered a decision adverse to the interests of Saxmere and the other appellants in a funding dispute,¹⁴⁴ they raised an allegation of apparent bias. The bias was said to arise from the business and personal relationship between Wilson J, who had sat on the Bench in the Court of Appeal, and counsel for the respondent Wool Board in that hearing, Mr Galbraith.¹⁴⁵ Justice Wilson and Galbraith jointly owned Rich Hill Ltd. The Supreme Court applied the objective

¹³¹ *Accent Management Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027 (HC). Aff’d in *Accent Management Ltd v Commissioner of Inland Revenue* [2007] NZCA 230, [2007] BCL 728.

¹³² *Accent Management Ltd v Commissioner of Inland Revenue* (2006) 22 NZTC 19,758 (HC).

¹³³ *Muir*, above n 5, at [71].

¹³⁴ At [88].

¹³⁵ At [98].

¹³⁶ At [37]–[43].

¹³⁷ At [43].

¹³⁸ At [82].

¹³⁹ At [44].

¹⁴⁰ At [60].

¹⁴¹ At [61].

¹⁴² At [60].

¹⁴³ At [97] and [108].

¹⁴⁴ *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2007] NZCA 349, [2007] BCL 885.

¹⁴⁵ *Saxmere*, above n 6, at [1].

approach in *Muir*,¹⁴⁶ and found that there was no apparent bias.¹⁴⁷ The Court recalled its judgment just four months later.¹⁴⁸

The recall application was made on bases that were determined to be insufficient.¹⁴⁹ However Wilson J responded to the recall application by providing the Supreme Court with a memorandum containing further information about his relationship with Mr Galbraith.¹⁵⁰ It emerged that shortly before the Court of Appeal hearing Wilson J and Mr Galbraith had made unequal advances to the company, leading to an imbalance of \$242,804 in the shareholding accounts.¹⁵¹ As a result the Supreme Court, applying the same test but to different facts, came to “the clear opinion that the objective lay observer could reasonably conclude that” the imbalance could affect the Judge’s impartiality in determining the case.¹⁵²

The *Saxmere* decisions put to rest any dispute between the apparent bias test in *Gough*, and that adopted in *Porter v Magill* and consistently applied in Australia. *Saxmere* relates ‘two steps’ that are required,¹⁵³ and *Muir* refers to ‘two stages’;¹⁵⁴ these are distinct but complementary points. The ‘two steps’ relate to articulating the allegation of apparent bias: first, the matters that are said to give rise to the appearance must be identified; and second, the connection between those matters and the feared deviation from impartiality must be logically expressed. Together, these ‘two steps’ make up the first of the ‘two stages’ in *Muir*, the Court’s factual inquiry. The second stage is the Court’s assessment of whether those circumstances “might lead a fair-minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case.”¹⁵⁵ As emphasised by a recent Supreme Court decision, the *Saxmere* formulation has persisted as the settled test for apparent bias.¹⁵⁶ In the following two chapters I address the test’s scope of application. I address subject-matter in chapter II, considering the test’s application to pecuniary interests. In chapter III, I argue that the apparent bias test should be applied to non-adjudicative, including ministerial, decision-makers.

¹⁴⁶ At [3], [37], [89], [121] and [126].

¹⁴⁷ At [35], [37], [117], [121], and [126].

¹⁴⁸ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122, [2010] 1 NZLR 76 [*Saxmere 2*].

¹⁴⁹ Those bases were that the Court had overlooked a section of the Judicature Act 1908 said to be relevant, as well as the *Guidelines for Judicial Conduct*. These bases were rejected in *Saxmere 2*, above n 148, at [12].

¹⁵⁰ At [6]–[7].

¹⁵¹ At [16].

¹⁵² At [17].

¹⁵³ *Saxmere*, above n 6, at [4]; *Ebner*, above n 24, at [8].

¹⁵⁴ *Muir*, above n 5, at [62].

¹⁵⁵ *Muir*, above n 5, at [62].

¹⁵⁶ *Creser v Creser* [2016] NZSC 37 at [5].

Chapter II: A Single Approach to Bias in Adjudicative Settings

The two leading commentaries on New Zealand’s administrative law differ on the effect that *Saxmere* has had on presumptive bias for pecuniary interests. Taylor argues that pecuniary interests “do not automatically give rise to bias”, but they raise a strong case for bias that can then be displaced.¹⁵⁷ Taylor is of the opinion that instances of pecuniary interest have been dealt with under the appearance of bias rubric,¹⁵⁸ and although *Auckland Casino* recognised an automatic disqualification, the effect of *Saxmere* was to settle “the matter in favour of a unitary principle”.¹⁵⁹ In contrast, Joseph points out that only two¹⁶⁰ judges in *Saxmere* allude “to the issue of a unitary test”, saying that their *dicta* “explain what the law ought to be, not what it is.”¹⁶¹ In this chapter, I will explore the unitary approach in Australia, and articulate how apparent bias can cover instances of pecuniary interests. Then, in section B, I will analyse the approach to presumptive bias in New Zealand before and after the reform brought in *Muir* and *Saxmere*. Finally, in section C, I will consider whether the unification perceived by Taylor, and favoured by Joseph, ought to be adopted in New Zealand.

A The Unification Approach

1 In Australia

The High Court of Australia dealt with two appeals in *Ebner*; in each case it was alleged that the judge was disqualified because of a shareholding in a bank.¹⁶² In the first case the Judge was a beneficiary of a trust which held shares in the bank; the bank was not a party but had a financial interest in the outcome.¹⁶³ In the second case, the Judge personally held shares in the bank — a party to the proceedings — having inherited those shares during the trial.¹⁶⁴ In neither case would the outcome have affected the value of the shares.¹⁶⁵ The appellants argued that the judges were automatically disqualified by their bare ownership of shares in the bank, regardless of any other circumstances.¹⁶⁶ The Court was unanimous that the Judge in the first case was not disqualified.¹⁶⁷ While six of the Court held the same for the second case, Kirby J would have disqualified that judge by reason of the automatic rule for pecuniary interests.¹⁶⁸ Only one other member of the Court considered the automatic rule to remain,¹⁶⁹ while the majority

¹⁵⁷ Taylor, above n 1, at 531.

¹⁵⁸ See *Cook v Patterson*, above n 39.

¹⁵⁹ Taylor, above n 1, at 531.

¹⁶⁰ Although note ch II(B)(2) below.

¹⁶¹ Joseph, above n 4, at 1082.

¹⁶² *Ebner*, above n 24.

¹⁶³ At [1].

¹⁶⁴ At [1] and [17].

¹⁶⁵ At [14] and [17].

¹⁶⁶ At [38].

¹⁶⁷ Per Gleeson CJ, McHugh, Gummow and Hayne JJ at [58], Gaudron J at [104], Callinan J at [186], and Kirby J at [174] and [175].

¹⁶⁸ At [176]–[178].

¹⁶⁹ Per Gaudron J at [98].

considered the automatic disqualification rule to be subsumed under the apparent bias principle.¹⁷⁰

The tenor of the majority’s reasoning was that the automatic disqualification rule relied on unsustainable distinctions between pecuniary and non-pecuniary,¹⁷¹ direct and indirect,¹⁷² and interests and associations.¹⁷³ The apparent bias principle, however, could apply in all situations. In neither appeal was a disqualifying appearance made out. In contrast, Kirby J preferred to refine the pecuniary rule “to make it more sensible and less apparently arbitrary.”¹⁷⁴ Therefore, his Honour supported the inclusion of a *de minimis* rule,¹⁷⁵ and emphasised that any interest that is indirect, remote or speculative would not lead to disqualification.¹⁷⁶ This led Kirby J to conclude that the interest in the first case — in a non-party to the proceedings — was too remote, and would also fall within the *de minimis* rule. However, in the second case, the Judge was disqualified as the bank was a party, so the Judge’s interest in the bank was direct.¹⁷⁷ Although Gaudron J recognised an automatic disqualification rule existed for pecuniary interests, his Honour did not consider it engaged in either case as the value of the shares was not affected by the litigation.¹⁷⁸ This indicates that Kirby J’s conception of the automatic disqualification rule is stricter than Gaudron J’s.

2 A Widening of Presumptive Bias

In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) (Pinochet)* the House of Lords held that presumptive bias could apply to a non-pecuniary interest.¹⁷⁹ Their Lordships held Lord Hoffman to be disqualified for his close links to Amnesty International, an intervener in the case. Those close links were considered so direct that Lord Hoffman was thought to have a non-pecuniary interest in the outcome of the case. The House of Lords considered their decision to be applying the presumptive bias rule consistently with *Dimes*, “reclaiming a lost application”.¹⁸⁰ Lord Browne-Wilkinson saw no reason to distinguish between pecuniary and non-pecuniary interests in the outcome of a case.¹⁸¹

The *Pinochet* decision has been criticised. Joseph criticised the decision for providing no justification for a difference in kind between associations with a party and other forms of apparent bias — such as “personal enmity or undue favouritism”.¹⁸² Olowofoyeku described the decision as “unfortunate” in extending the principle, and commented that despite *Pinochet* the “trend is to narrow down the scope of automatic disqualification”.¹⁸³ Taggart considered

¹⁷⁰ Per Gleeson CJ, McHugh, Gummow and Hayne JJ at [54], and Callinan J at [182]; recently applied in *Hinton v Alpha Westmead Private Hospital* [2016] FCAFC 107.

¹⁷¹ At [26].

¹⁷² At [26] and [41].

¹⁷³ At [28]–[31].

¹⁷⁴ At [164].

¹⁷⁵ At [166].

¹⁷⁶ At [168].

¹⁷⁷ At [177].

¹⁷⁸ At [99].

¹⁷⁹ *Pinochet*, above n 29.

¹⁸⁰ Joseph, above n 4, at 1081; *Dimes*, above n 17.

¹⁸¹ *Pinochet*, above n 29, at 135; I argue in section (C) below that this suggests the rule should be abandoned.

¹⁸² Joseph, above n 4, at 1081.

¹⁸³ Olowofoyeku, above n 18, at 368–369 and 373.

the extension of presumptive bias in *Pinochet* to be a product of the House of Lords' avoiding "the embarrassment of speculating whether Lord Hoffman's actions would in the court's view give rise to a reasonable suspicion or real danger of bias."¹⁸⁴ In contrast, the test in New Zealand does not require the court to believe there is a danger of bias.¹⁸⁵ The second *Saxmere* decision, in finding Wilson J to be apparently biased, indicates that our highest court is not as reluctant to make such a finding about a senior judge.¹⁸⁶ Therefore, although *Pinochet* indicates a widening in the role of presumptive bias, it should be considered an aberrant decision.

3 *An Articulation of Unification*

If New Zealand were to rid itself of the automatic disqualification rule, then bias said to arise from pecuniary subject matter would be assessed by the test in *Saxmere*. A party would identify the interest, articulate how it might be seen to affect the decision, and then argue that in those circumstances "a fair-minded and informed lay observer would have a reasonable apprehension that the judge might not bring an impartial mind...".¹⁸⁷ The requirement in presumptive bias that the interest be in the subject matter under consideration would be part of the *Saxmere* requirement to articulate a logical connection between the subject matter and the apparent deviation from impartiality.¹⁸⁸ The *de minimis* rule required in the presumptive bias rubric would be dealt with in the assessment of the lay observer; no reasonable observer would apprehend that a minimal interest would affect the judge's decision-making. While presumptive bias requires an assessment of the directness of the pecuniary interest, under a unified test the only assessment would be whether the fair-minded observer would apprehend bias. I argue that the apparent bias approach is fit to be the metric by which all claims of non-actual bias are tested. However, to explain why this approach is preferable — and not merely a sorting that will inexorably lead to the same sort of analysis undertaken under the presumptive bias test — I turn now to consider the effect *Muir* and *Saxmere* have had on pecuniary interest bias in New Zealand.

B The Effect of Muir and Saxmere on Presumptive Bias

1 The Approach before Muir

The New Zealand cases where a pecuniary interest was the subject of a bias allegation do not demonstrate a strict adherence to a rigid automatic disqualification rule. In *Auckland Casino* the Court of Appeal related the pecuniary interest rule by reference only to *R v Rand, Gough*, a Western Australia case,¹⁸⁹ and one New Zealand case: *Simmonds v Fortune*.¹⁹⁰ *Simmonds* applied the automatic disqualification with a hard line, Hardie Boys J saying the "size or extent of the interest is not relevant."¹⁹¹ *Simmonds* itself relied on *Anderton v Auckland City Council*, which comprehensively canvassed the law of bias and recognised, in *obiter dicta*, an automatic

¹⁸⁴ Taggart, above n 97, at 100.

¹⁸⁵ *Saxmere*, above n 6.

¹⁸⁶ *Saxmere 2*, above n 148.

¹⁸⁷ *Saxmere*, above n 6, at [89].

¹⁸⁸ *Saxmere*, above n 6, at [42].

¹⁸⁹ *Re Ritchie*, above n 46.

¹⁹⁰ *Simmonds*, above n 45.

¹⁹¹ At 10.

rule for pecuniary interests.¹⁹² As an example of the rule, *Anderton* referred to *Layton Wines Ltd v Wellington South Licensing Trust (No 2)*, which recognised the rule, then concluded that the interest would raise an appearance of bias.¹⁹³ Despite *Simmonds* involving a rule without a *de minimis* exception, the case is not an example of a pecuniary interest disqualification in the absence of an appearance of bias: Hardie Boys J recognised that the interest was substantial to the decision-maker.¹⁹⁴ Although the Court in *NZI Financial Corp Ltd v New Zealand Kiwifruit Authority* found the automatic disqualification was engaged for a minimal pecuniary interest, since the disqualification was excluded by statute, the Court did not have to contend with the severity of a rule without a *de minimis* exception.¹⁹⁵ Other cases involving pecuniary interests have been disposed of with apparent bias, without the automatic disqualification being raised.¹⁹⁶ Therefore the cases on pecuniary interests before *Auckland Casino* do not demonstrate strict adherence to an automatic disqualification rule, but are rather instances where the appearance of bias would also have justified disqualification.

Although the Court of Appeal in *Auckland Casino* dealt with presumptive bias and apparent bias separately, the Court’s approach suggests apparent bias principles underlie its presumptive bias analysis. As well as accepting the existence of a *de minimis* exception to the presumption,¹⁹⁷ the Court considered disqualification to require the decision-maker to be aware of the pecuniary interest that forms the basis of the complaint. President Cooke observed that “there would be no real danger of bias as no one could suppose that the judge could be unconsciously affected by that of which he knew nothing”.¹⁹⁸ It is revealing that when working out the bounds of the presumptive bias test — defining directness, determining sufficiency of quantum, and requiring awareness of the interest — Cooke P turned to public perception.¹⁹⁹ The Court’s comments on presumptive bias, although “obiter and not the subject of binding rulings”, were rightly recognised as stating propositions that were established in law.²⁰⁰

2 *The Rationes of Muir and Saxmere on Unification in New Zealand*

In *Muir*, the appellant alleged that the case under consideration raised “similar tax issues” that would be “relevant to the value of [Venning J’s] investment”,²⁰¹ in *Tahakopa Forest Trust Ltd*. That argument relied on the inference that, similarly to *Muir*’s scheme, *Tahakopa* was structured artificially to avoid tax. The Court was unwilling to make such a serious inference

¹⁹² *Anderton*, above n 13, at 687.

¹⁹³ *Layton Wines Ltd v Wellington South Licensing Trust (No 2)* [1977] 1 NZLR 570 (SC) at 578, relying on the ‘real likelihood’ test for apparent bias.

¹⁹⁴ At 11.

¹⁹⁵ *NZI Financial Corp Ltd v New Zealand Kiwifruit Authority* [1986] 1 NZLR 159 (HC); see also *Jeffs v New Zealand Dairy Production and Marketing Board* [1966] NZLR 73 (CA) at 85, 94 and 103; aff’d [1967] NZLR 1057 (PC) at 1066.

¹⁹⁶ *Meadowvale Stud Farm Ltd v Stratford County Council* [1979] 1 NZLR 342 (SC) at 348; *Calvert & Co v Dunedin City Council* [1993] 2 NZLR 460 (HC) at 471.

¹⁹⁷ *Auckland Casino*, above n 21, at 148.

¹⁹⁸ *Auckland Casino*, above n 21, at 148; compare *Dimes*, above n 17, at 315, where the Lord Chancellor was disqualified despite the court commenting that nobody could suppose his Honour could be influenced by his interest.

¹⁹⁹ See above at ch I(B)(2).

²⁰⁰ Joseph, above n 96, at 112; Taggart, above n 97, at 104.

²⁰¹ At [72].

in the absence of “very distinct proof”.²⁰² The Judge’s shareholding in Tahakopa was therefore not considered an interest in the proceedings at all, and the issues of *de minimis* and directness did not arise.

Despite the inapplicability of an automatic disqualification on the facts, the Court considered the approach taken in Australia to rely “exclusively on a unitary test of a ‘reasonable apprehension’ of bias”.²⁰³ The Court recognised that the position reached in *Auckland Casino* was “functionally akin to” Kirby J’s dissent in *Ebner* in retaining an automatic disqualification where the interest is direct and more than minimal.²⁰⁴ It is notable that despite *Auckland Casino* the Court considered the issues in *Ebner* to require some resolution in New Zealand,²⁰⁵ unification requiring “a distinct change in the law”.²⁰⁶ The Court recognised there were “powerful arguments for simplicity and straightforwardness” in this area of the law traditionally beset with conflicting approaches, and considered it quite plain that any more than minimal direct pecuniary interest would be considered bias by the reasonable observer.²⁰⁷ Yet, in considering the “policy arguments the other way”, the Court went into no further detail than saying “they are quite complicated in a small jurisdiction such as New Zealand.”²⁰⁸ The Court concluded that “no harm, and a great deal of good in terms of the understandability of the law, would be done by a unitary principle” but declined to attempt the task of unification itself.²⁰⁹ It is unclear what policy arguments against unification the Court thought would be exacerbated by the size of this jurisdiction.

The clearest comment on the issue of abandoning the automatic disqualification rule in *Saxmere* is Tipping J’s statement that “there should no longer be any distinction between cases in which the allegation of apparent bias rests on financial interest as against those involving other matters.”²¹⁰ The comments by the other members of the Court were much more ambiguous. Although Joseph takes McGrath J to allude to the issue,²¹¹ in fact the portion of the judgment which Joseph cites concerns the standardisation now reached within apparent bias in Australia and England.²¹² Although McGrath J does cite *Ebner*, his Honour refers to the portion of the plurality judgment dealing with the test for apparent bias, rather than the portion that rejects automatic disqualification as a standalone rule.²¹³

Later in his judgment, in discussing the contextual knowledge that may be imputed to an observer under the apparent bias test, McGrath J notes that “in those cases which are said to involve a material pecuniary interest, contextual knowledge is unlikely to be of significance.”²¹⁴ This comment suggests that McGrath J would apply an apparent bias analysis

²⁰² At [80].

²⁰³ At [40].

²⁰⁴ At [40]; see Taggart, above n 97, at 104; Taylor, above n 1, at 532.

²⁰⁵ At [41].

²⁰⁶ At [41].

²⁰⁷ At [42].

²⁰⁸ At [42].

²⁰⁹ At [42].

²¹⁰ At [42].

²¹¹ Joseph, above n 4, at 1082, n 593.

²¹² *Saxmere*, above n 6, at [89]–[92].

²¹³ *Saxmere*, above n 6, at [89], n 88; *Ebner*, above n 24, rejects the standalone rule at [54].

²¹⁴ At [97].

to pecuniary interests,²¹⁵ but does not necessarily mean McGrath J would abandon the automatic disqualification rule. The remaining members of the Court — Blanchard, Gault, and Anderson JJ — did not address or allude to the issue of abandoning the presumptive bias rule, although, like McGrath J, Blanchard and Gault JJ would seemingly apply apparent bias to pecuniary interests.²¹⁶

Therefore, *Muir* and *Saxmere* did not rid New Zealand of the automatic disqualification rule. *Saxmere* does indicate, however, that there is judicial readiness to apply the apparent bias approach to pecuniary interests. Justice Tipping’s judgment in *Saxmere* and the Court of Appeal in *Muir* support unification in the vein of *Ebner*, however the extant automatic disqualification rule in *Auckland Casino* is unaltered by these decisions. Despite the calls for resolution of the issue by Tipping J and the Court in *Muir*, that step was not taken by the Supreme Court, seemingly motivated by recognition of the strength of the arguments in *Ebner*.

3 The Subsequent Approach in New Zealand Courts

A number of cases since *Muir* and the *Saxmere* decisions have recognised, although not applied, an automatic disqualification rule. Before the decision in *Saxmere*, MacKenzie J in *Wikio v Attorney-General (No 2)* recognised a distinction between the *Muir* test and cases where a judge has an interest in the outcome of the case where “the existence of bias is effectively presumed.”²¹⁷ The importance of the distinction was not tackled, as his Honour applied neither *Muir* nor the automatic rule.²¹⁸ However, MacKenzie J noted that the distinction “cannot be sharply defined” as deciding whether the fact situation attracts the automatic rule is aided by considering “the reaction of the fair-minded lay observer.”²¹⁹

In the first two years following *Saxmere*, two High Court decisions recognised the tripartite separation of bias into actual, apparent, and presumptive without any sense that the presumptive test might be subsumed within apparent bias.²²⁰ However, in neither case was bias from a direct pecuniary interest at issue, and in one the presumptive bias rule was considered not subject to the *de minimis* exception.²²¹ Although this suggests the distinction was considered to persist, the court did not closely consider the issue.

Two recent High Court decisions considered presumptive bias in more detail.²²² *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* concerned allegations of apparent bias against Venning J in outstanding costs proceedings which followed the trust’s unsuccessful judicial review of NIWA.²²³ The trust unsuccessfully

²¹⁵ See also *Saxmere*, above n 6, at [90].

²¹⁶ Per Blanchard J at [25]; Gault J at [123].

²¹⁷ *Wikio v Attorney-General* HC Wellington CIV-2004-485-2198, 11 July 2008 at [10].

²¹⁸ At [13]; see Taylor, above n 1, at 530, criticising MacKenzie J’s failure to apply *Muir*.

²¹⁹ At [12].

²²⁰ *New Era Electricity Inc v Electricity Commission* [2010] NZRMA 63 (HC) at [82]; *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV-2009-404-7381, 11 May 2011 at [72].

²²¹ *Dorbu*, above n 220; compare *Auckland Casino*, above n 21, at 148.

²²² *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 3560; *Bates v Valuers Registration Board* [2015] NZHC 1312.

²²³ *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297.

claimed that Venning J’s investment in a forest, which was registered to receive benefits under the Emissions Trading Scheme (ETS), was a direct pecuniary interest raising a presumptive bias.²²⁴ Justice Venning held that the suggestion that the proceedings would affect the ETS was “entirely speculative,”²²⁵ and required the incredible inference that even if NIWA were held to have applied incorrect methodology, the Government would “ignore other evidence of global warming and... abandon its obligations under the [Kyoto Protocol]”.²²⁶ Therefore there was “no sufficiently direct link” between the issue in the proceedings and the value of the ETS benefits that could attract a presumptive bias rule.²²⁷ Nevertheless, Venning J recognised a distinction between presumptive and apparent bias, relying on *Auckland Casino*, and the existence of a *de minimis* exception.²²⁸

In *Bates v Valuers Registration Board*, the Board resolved that Mr Gamby, one of the two members against whom objections were made, should recuse himself but Mr Taylor should not.²²⁹ Gamby was an employee and shareholder in a type of firm affected by the complaint made to the Board, so the Board concluded there was a potential for presumptive as well as apparent bias. However, Taylor was not disqualified because he was not a shareholder in his similar firm. Justice Kós held that despite not having a direct pecuniary interest, Taylor ought to have been disqualified because of the appearance of bias.²³⁰ This conclusion shows that the *Muir* approach to apparent bias is a more sensitive test than the apparent bias disqualification.

Two cases since *Muir* and *Saxmere* have dealt with situations where pecuniary interests were allegedly involved with the apparent bias approach.²³¹ Although neither case would have led to disqualification under the modern presumptive bias test applied in *Auckland Casino*, they are indicative of a judicial inclination to deal with such cases under the apparent bias rubric. In *Knight v Veterinary Council of New Zealand*, the Chairman’s veterinary practice competed with Dr Knight’s and it was argued that he stood to benefit from Knight’s disciplinary proceedings.²³² Justice Clifford applied *Muir* and held that the fair-minded lay-observer would not reasonably apprehend bias,²³³ considering the minor links between the practices of Knight and the Chairman as of no concern.²³⁴ In *Siemer v Solicitor-General*, the Chief Justice’s recusal was sought for an appeal in the Supreme Court.²³⁵ The proceedings in the lower courts were related to defamation action against Mr Siemer by Mr Stiassny,²³⁶ who was a director of Vector Ltd along with the Chief Justice’s husband.²³⁷ Justices Blanchard and McGrath dismissed the recusal application, finding that there was no appearance of bias, and rejecting the

²²⁴ At [9].

²²⁵ At [24] and [31].

²²⁶ At [30].

²²⁷ At [24] at [33].

²²⁸ At [12] and [35].

²²⁹ *Bates*, above n 222, at [25].

²³⁰ At [71].

²³¹ *Knight v Veterinary Council of New Zealand* HC Wellington CIV-2007-485-1300, 19 May 2009; *Siemer v Solicitor-General* [2010] NZSC 12, (2010) PRNZ 663.

²³² *Knight*, above n 231.

²³³ At [78].

²³⁴ At [38], [77], and [78].

²³⁵ *Siemer*, above n 231.

²³⁶ *Siemer v Solicitor-General* [2009] NZCA 62, [2009] NZLR 556.

²³⁷ *Siemer*, above n 231, at [4].

unsubstantiated suggestion that Stiassny might be in a position to cause pecuniary loss to the Chief Justice's husband.²³⁸

4 *Conclusions on the Approach in New Zealand*

The cases considered in this section show that there is no strong sense of an automatic disqualification rule for pecuniary interests. Although two earlier cases report a strict rule, in neither was it necessary to be so strict in application.²³⁹ Granting that some recent decisions have recognised the existence of a separate rule for pecuniary interests,²⁴⁰ it was not necessary there to apply the rule and thus not necessary to consider arguments for its abandonment. Further, the fact that the Courts in *Knight* and *Siemer* did not feel obliged to give thought to the presumptive bias rule indicates ease in relying solely on the apparent bias rule formulated in *Muir*. Therefore, New Zealand lacks the reluctance expressed by Kirby J in *Ebner* to abandon the presumptive rule.²⁴¹

The most important point is the central role that New Zealand courts afford apparent bias in the context of pecuniary interests. By concluding that there would be an appearance of bias after disqualification for pecuniary interest,²⁴² requiring an awareness of the interest,²⁴³ and using apparent bias to determine directness,²⁴⁴ the courts bely the truth that the appearance of bias is the justifying factor no matter what subject matter gives rise to the alleged bias.

C *Should New Zealand Adopt a Single Test?*

1 *The Impetus*

The widening of the test for apparent bias, which is discussed in chapter I of this paper, has led to recognition that it may be engaged in the same situations that the presumptive bias test is engaged.²⁴⁵ Since the apparent bias test “is as applicable and sensitive to pecuniary interests” as any other,²⁴⁶ it is broader in application than the presumptive bias test. This “pose[s] the question of the utility of retaining the separate rule.”²⁴⁷ However, simply recognising that the apparent bias test has the capacity to apply in situations involving pecuniary interests does not itself justify replacing the automatic rule.

Nevertheless, the impetus for the abolition of the presumptive bias rule has arisen from a desire to simplify the law.²⁴⁸ When the Court of Appeal in *Muir* decided not to take the step of adopting for New Zealand the *Ebner* unification because of unaddressed “policy arguments the other way”, it anticipated “simplicity and straightforwardness” as the argument for

²³⁸ At [5] and [8].

²³⁹ *Simmonds*, above n 45; *NZI Financial*, above n 195.

²⁴⁰ *New Zealand Climate Science Education Trust*, above n 222; *Bates*, above n 222.

²⁴¹ Reflected in the cursory attention paid to the pecuniary rule in Law Commission *Towards a new Courts Act: a register of judges' pecuniary interests?* (NZLC IP21, 2011) at 6–8.

²⁴² *Layton Wines*, above n 193.

²⁴³ *Auckland Casino*, above n 21.

²⁴⁴ *Auckland Casino*, above n 21; *Wikio*, above n 217.

²⁴⁵ *Muir*, above n 5, at [42]; *Saxmere*, above n 6, at [42]; *Ebner*, above n 24, at [54].

²⁴⁶ *Joseph*, above n 4, at 1082.

²⁴⁷ *Ebner*, above n 24, at [135] per Kirby J.

²⁴⁸ *Ebner*, above n 24, at [54].

unification.²⁴⁹ As such, the Court contemplated a future case would weigh up that simplicity with the opposing arguments, and either conclude to follow Australia and unify, or maintain the specific rule for pecuniary interests. The legal and policy arguments for unification that I address in this section go beyond the aspiration toward simplicity that motivated the majority of the Court in *Ebner*. However powerful the arguments were in *Ebner*, I argue that the situation in New Zealand is such that unification is of greater importance in this jurisdiction than it was in Australia in 2000.

The majority in *Ebner* reasoned from the rationale it perceived to be behind the automatic disqualification rule in concluding that there was no justification for its separate existence from apparent bias. The majority considered the rule anomalous in applying only to *pecuniary* interests, and applying only to *direct* pecuniary interests.²⁵⁰ While the focus on pecuniary might have been justified when, historically, financial interests were “the focus of most civil litigation”; as much litigation now concerns non-economic rights, the separation is unjustified.²⁵¹ Similarly, the majority considered indirect interests to be in some cases “at least as destructive of the appearance of impartiality”.²⁵² These comments indicate that the majority considered the justification for the focus on *pecuniary* and the focus on *direct* interests to be the maintenance of the appearance of justice. Since this goal would be no better served by the automatic rule than by the rule of general application, the majority saw no need for the specific rule. In other words, “[t]he principle of general application... would have been sufficient ... to cover the case of *Dimes*.”²⁵³

Justice Kirby criticised the suggestion that the rule in *Dimes* was about apprehended bias at all, considering it “a separate and specific rule of law.”²⁵⁴ This was evidenced by the fact that the rule had no *de minimis* exception,²⁵⁵ and “survived the advent of the supplementary doctrine of apprehended bias.”²⁵⁶ Although his Honour recognised that the Court may abolish the separate rule, he preferred it to be done by “identification of the legal principles and legal policy that would justify” the change, rather than an “ahistorical reinterpretation of *Dimes*”.²⁵⁷ In New Zealand, *Dimes* has already been affected by development of the law. The *de minimis* exception is established, and the case law shows appeal is made to the appearance of bias whenever the bounds of the automatic rule are tested.²⁵⁸ It is clear then that in New Zealand it is the appearance of impartiality that justifies the pecuniary interest disqualification.²⁵⁹ Nevertheless, I intend to respond to the cogent points made in Kirby J’s dissent in *Ebner*, and provide the legal principles and policies which justify the reform his Honour resisted in that case.

²⁴⁹ *Muir*, above n 5, at [42].

²⁵⁰ At [54].

²⁵¹ At [26].

²⁵² At [26].

²⁵³ At [54]; *Dimes*, above n 17.

²⁵⁴ At [121].

²⁵⁵ At [122].

²⁵⁶ At [123].

²⁵⁷ At [132].

²⁵⁸ See above at ch I(B).

²⁵⁹ *Jeffs* (CA), above n 195, at 103; *Meadowvale*, above n 196, at 348; *Collinge v Kyd*, above n 38, at [55]; see *Gough*, above n 1, at 661; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 251 (CA) at [7].

2 *Legal and Policy Reasons for a Separate Rule*

In his dissent in *Ebner*, Kirby J marshalled a number of reasons to adhere to automatic disqualification for pecuniary interest; however, in the context of New Zealand's jurisprudence on pecuniary interests they are less convincing. First, Kirby J argued that the established authority of *Dimes* provides a bright-line that obviates debate.²⁶⁰ However, the rule is not as clear as Kirby J suggests, as shown by *Auckland Casino* the determination of an interest's directness requires apparent bias investigation.²⁶¹ If a case involves an obviously direct interest, it will also be a clear apparent bias,²⁶² leaving the specific rule with no particular advantage. Relatedly, Kirby J argued that the specific rule was well-understood by the public.²⁶³ However, because the presumptive bias rule depends on the appearance of bias in consideration of directness and quantum, fully grasping it requires an understanding of how apparent bias assessments are made. In contrast, the general apparent bias approach has a single concept for all applications, better suiting public understanding. Justice Kirby also suggested that the pecuniary interest rule spares judges the process of considering what the observer would think of the case.²⁶⁴ Although it may be that a minority of cases can be disposed of more quickly under the pecuniary interest rule, the vast majority of those instances will not lead to a dispute. When a dispute arises, it is likely to be on the issues of directness or the *de minimis* exception, which requires apparent bias analysis nonetheless. The result is that few cases, if any, will be more efficiently dispatched by an automatic rule than by the apparent bias approach.

As well as arguments on the substantive differences between separation and unification, Kirby J argues that consistency with other jurisdictions supports separation. While the recognition in other Commonwealth countries of the separate rule bolstered his Honour's dissent,²⁶⁵ New Zealand's reliance on Australian law in *Muir* and *Saxmere* suggests that now, our Courts would follow the majority in *Ebner*. Justice Kirby also relied on the International Covenant on Civil and Political Rights which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law".²⁶⁶ His Honour saw "independence" to relate to pecuniary interests (as well as independence from executive government); and "impartiality" to relate to the appearance of bias.²⁶⁷ I consider this inference to be unconvincing. Non-pecuniary influence may vitiate independence, such as threats of bodily harm to a decision-maker or her family. The distinction is not one that is drawn in *Muir* or *Saxmere*.²⁶⁸

There are two further issues that require some attention. First, it must be considered whether pecuniary interests are qualitatively distinct from all other matters that found bias allegations, such that they require a distinct rule. In *Ebner*, the majority recognised that financial interests

²⁶⁰ At [141].

²⁶¹ *Auckland Casino*, above n 21.

²⁶² *Muir*, above n 5, at [42]; *Jeffs* (CA), above n 195, at 103.

²⁶³ *Ebner*, above n 24, at [161(1)].

²⁶⁴ *Ebner*, above n 24, at [161(2)].

²⁶⁵ At [150]–[154].

²⁶⁶ At [144].

²⁶⁷ At [146].

²⁶⁸ *Muir*, above n 5, at [32]; *Saxmere*, above n 6, at [91].

“are more concrete in nature than other kinds of interests... [and] easier to identify”.²⁶⁹ That is not always the case: “[t]he possible effect of the outcome of a case upon the value of assets owned by a judge may be a matter of serious difficulty.”²⁷⁰ More important, however, is the reason concreteness of interest is considered relevant. Justice Kirby argues that this concreteness raises an expectation in litigants and the community “that this element, at least, will be removed from the equation.”²⁷¹ Therefore this concern is squarely met when it is acknowledged that “[i]f a Judge has a direct pecuniary interest of anything more than the most minimal character, ... the reasonable observer would ... consider that to be ‘bias’.”²⁷² Definitionally, the public do not reasonably expect any more than the disqualification for interests that would otherwise raise a reasonable apprehension of bias.

Secondly, it is sometimes suggested that the presumptive bias rule is less impugning of judges than the appearance of bias rule.²⁷³ Although the House of Lords’ application of the automatic disqualification in *Pinochet* may be explained by their Lordships avoiding speculating whether a reasonable suspicion of bias arose from Lord Hoffmann’s actions,²⁷⁴ the test for apparent bias there relied on the Court’s perspective. Now, the test is simply an expression of reasonable public expectations of impartiality. As pointed out by McGrath J in *Saxmere*, if an appeal court disagrees with a judge’s decision to sit despite an allegation of bias, that “reflect[s]... disagreement with what the circumstances objectively require [, it] involves no criticism of the judge’s actual impartiality.”²⁷⁵

3 Legal and Policy Reasons for Unification

I have sought to explain why the arguments rallied to resist unification should not be considered substantial impediments to the approach adopted by the majority in *Ebner*. I now turn to present the arguments to unify pecuniary bias within the general-purpose apparent bias test. The Court of Appeal in *Muir* favoured unification because it would bring “simplicity and straightforwardness” to an area of law historically “bedevilled by contradictory approaches.”²⁷⁶ The struggle for simplicity is more than aesthetic. The obligation to simplify arises because it reduces “uncertainty amongst judges, litigants, and legal representatives, whilst at the same time contributing to community confidence in the administration of justice.”²⁷⁷ The importance of the community understanding the law is acute in the area of bias, as the jurisprudence is driven by notions of public perception.²⁷⁸

In *Ebner*, Kirby J provides a number of reasons to abolish the automatic disqualification rule.²⁷⁹ His Honour, convinced that sufficient reasons exist to retain the rule, modified the law of presumptive bias so that minimal interests, and speculative interests, are excluded, in an

²⁶⁹ At [34].

²⁷⁰ *Ebner*, above n 24, at [37].

²⁷¹ At [161(1)].

²⁷² *Muir*, above n 5, at [42]; *Saxmere*, above n 6, at [97].

²⁷³ *Ebner*, above n 24, at [131] and [153].

²⁷⁴ Taggart, above n 97, at 100; Joseph, above n 4, at 1081; see above at ch II(A)(2).

²⁷⁵ At [90].

²⁷⁶ At [42].

²⁷⁷ *Ebner*, above n 24, at [106].

²⁷⁸ See *R v Sussex Justices*, above n 8.

²⁷⁹ *Ebner*, above n 24, at [133]–[140].

attempt to “make it more sensible and less apparently arbitrary.”²⁸⁰ The modified version of the law suggested by Kirby J’s dissent is the position taken in *Auckland Casino*. Does any reason exist, unexpressed by Kirby J’s survey of the legal principles, for unifying the law notwithstanding the rationalised state it is presently in? In other words, is the difference between the unification in the majority’s reasons in *Ebner* and the approach in *Auckland Casino* a difference in name only?

The problem with retaining the presumptive bias rule is that in its articulation the true principles are concealed. The presumptive bias rule is presented as if it stands aside from rules that operate to protect the appearance of the administration of justice. However, New Zealand’s experience with presumptive bias shows its bounds are tested by reference to the apparent bias test.²⁸¹ When it was argued that the interest in *Auckland Casino* was indirect, the Court of Appeal resolved the dispute by reference to the public perception that it was the parent company that won the casino licence, despite the licence technically going to the subsidiary in which the decision-maker had an interest.²⁸² The result would have been no different if the *Muir* test for apparent bias were applied. Despite the adequacy of apparent bias, if the automatic rule persists in the law, litigants will inevitably use it to seek disqualification of a judge perceived to be unfavourable. One example is *New Zealand Climate Science Education Trust*, where Venning J’s interest was said to arise by reason of an interest in a forest possibly affected by climate change policy.²⁸³ Other novel cases will arise, and the bounds of the automatic rule will be tested. Future cases may include:

- a judge’s diversified savings policy invested in a business affected by a decision;
- a judge inheriting shares in a party by the unexpected death of a relative on the last day of a long trial;²⁸⁴
- a company that the judge has an interest in is bought by another company without the judge’s awareness, perhaps during the course of a lengthy trial; or
- an immaterial pecuniary interest becomes substantial based on massive and unexpected success of a company, or changing situations.

The courts will be confronted by novel situations, and will seek to resolve them by appealing to the impression on a fair-minded lay-observer. However, that resolution may only come after the expense of delay and appeals. Even if each stage of the appeal process comes to the same outcome, if the courts fail to declare that arguments based on automatic disqualification are obsolete, there will be uncertainty in the legal process. Under the unified approach, judges will not have to go to pains to explain why a particular interest is not disqualifying — why it is not sufficiently direct — if the reasoning is explicitly and openly based on the appearance of impartiality. A litigant is more likely to argue that a decision-maker applied the wrong test by not applying the automatic disqualification rule, than they are to argue that the application of

²⁸⁰ At [164].

²⁸¹ See above at ch II(B)(4).

²⁸² *Auckland Casino*, above n 21.

²⁸³ *New Zealand Climate Science Education Trust*, above n 222.

²⁸⁴ See *Ebner*, above n 24.

that test was wrong. This is partly because the application of the apparent bias test relies on a factual examination of what circumstances would give rise to an appearance of bias.

Novel arguments will arise based on novel factual situations. Under the presumptive bias rubric that leads to changes in the nature of the legal test, *Auckland Casino*'s alterations with the *de minimis* exception, and the directness, and awareness requirements are such examples.²⁸⁵ However, under the appearance of bias approach, novel situations do not affect the nature of the legal test itself. Therefore, the public understanding of how justice is administered can be consistent, simple, and thereby comprehensible with a unified test.

²⁸⁵ *Auckland Casino*, above n 21.

Chapter III: A Unitary Standard for All Decision-makers

A *Nomenclature*

I propose that the distinction that courts have drawn between apparent bias and predetermination is based on misapprehension of the true nature of apparent bias jurisprudence. *Saxmere* standardised the law of apparent bias in New Zealand, resolving inconsistency in the threshold to be applied and the perspective to take when allegations of apparent bias are made.²⁸⁶ However, in cases involving decisions of Ministers and local government courts have been reluctant to apply an apparent bias test at all, restricting review to investigation of ‘predetermination’ in fact.²⁸⁷ This discrepancy is a wrong-turn in the law. In short, I argue that in rejecting an apparent bias test that arose in the context of adjudicative decision-makers in favour of a predetermination test, the courts have thrown the baby out with the bathwater. The law is better served by approaching all cases with the standardised and flexible approach in *Saxmere*. This approach does not require that all decision-makers are held to one standard of impartiality,²⁸⁸ but may be tailored to the circumstances that are applicable. I suggest that this discrepancy likely arose from imprecise use of nomenclature in the jurisprudence.

Descriptions of bias are beset with imprecision. Taylor writes that bias is “a predisposition...which does not leave one’s mind *properly* open to persuasion”,²⁸⁹ suggesting that for Taylor ‘bias’ means disqualifying-bias. However, on the same page Taylor writes that “[i]t is the whole factual matrix that determines the ...effect of bias”,²⁹⁰ suggesting that whether or not the bias disqualifies is determined by the circumstances. Joseph considers ‘bias’ to disqualify, but the “dividing line between permissible and impermissible standards of partiality shifts with the context.”²⁹¹ Therefore, Joseph distinguishes between ‘bias’ and ‘partiality’. I consider that distinction to be counterintuitive, so to provide clarity, my nomenclature recognises that bias is synonymous with predisposition and partiality.²⁹²

In my nomenclature, unlike Joseph’s, bias is not a binary concept. For example, one administrative decision-maker may personally hate wind-turbines, while another merely has an aversion to them. To put it another way, if a judge is shown to be close personal friends with one party, but has been happily married to the other party for many years, it is clear that the judge must not sit. The bias for one side is not negated by the bias for the other side.²⁹³ In other words, not all biases are created equal. Bias in this sense will not always lead to disqualification. Different circumstances will tolerate different gradations of bias. Whatever level of impartiality is required by the circumstances, where the bias is sufficient in magnitude to require disqualification it is a ‘disqualifying bias’.

²⁸⁶ *Saxmere*, above n 6; see the discussion above at ch I(D).

²⁸⁷ *Back Country Helicopters Ltd v The Minister of Conservation* [2013] NZHC 982, [2013] NZAR 1474.

²⁸⁸ Compare *Back Country Helicopters*, above n 287, at [130].

²⁸⁹ Taylor, above n 1, at 521–522 (emphasis added).

²⁹⁰ At 522.

²⁹¹ Joseph, above n 4, at 1076.

²⁹² See below at ch III(C)(3).

²⁹³ See *R v Watson*, above n 71, at 265.

In this chapter, I propose that the apparent bias test should be applied to all decision-makers. The tailoring that circumstances require is effected in the gradation of bias that will disqualify the decision-maker. This proposal is at odds with the statements of the law in the leading textbooks in two respects.²⁹⁴ First, Taylor and Joseph state that only closed-mind-predetermination can disqualify “decision-makers in bureaucratic or administration-like environments.”²⁹⁵ In contrast, I suggest that there will be instances where a bias less than closed-mind-predetermination, but greater than the bias that would disqualify a judge, will disqualify an administrative decision-maker. Second, Taylor and Joseph require “actual predetermination as distinct from an appearance of predetermination”.²⁹⁶ I argue that the appearance test should be applied to all types of decision-maker, for its benefits covered at chapter I(A).

B The Nature of Apparent Bias

1 Expected Standards of Impartiality are Context Specific

There is no one standard of impartiality to which all decisions makers are held.²⁹⁷ Although Courts sometimes prefer to say that the necessary tailoring comes from “what is to be taken as showing or indicating bias”, the result is the same.²⁹⁸ The English Court of Appeal’s decision in *Locabail (UK) Ltd v Bayfield Properties Ltd* related to five cases where apparent bias was alleged in relation to a number of different kinds of adjudicative decision-makers.²⁹⁹ The Court noted that whether or not disqualifying levels of apparent bias arose could depend on “the nature of the issue to be decided”.³⁰⁰ For example a judge’s relationship with a member of the public involved in the proceedings could raise an appearance of bias particularly if their credibility were at issue.³⁰¹ The High Court of Australia, in considering the necessary standard of impartiality for a Minister, emphasised that the standard is flexible, adapting “to the nature and significance of the decision concerned, the character of the office of the decision-maker and the requirements, express or implied, of any legislation applicable to the case.”³⁰²

When the apparent bias test is applied, its flexibility comes from the ‘fair-minded observer’ approach. *Saxmere* itself shows the test being tailored to circumstances where the alleged bias arose from the Judge’s relationship with counsel for the Wool Board, Mr Galbraith.³⁰³ The Supreme Court determined that “a fair-minded observer would not have had a reasonable apprehension of [disqualifying] bias.”³⁰⁴ The Court considered that the observer could be taken to be “reasonably informed about the workings of our judicial system”.³⁰⁵ For example, that

²⁹⁴ Taylor, above n 1, at 540; Joseph, above n 4, at 1088–1090.

²⁹⁵ Taylor, above n 1, at 540.

²⁹⁶ Taylor, above n 1, at 540–541; Joseph, above n 4, at 1089.

²⁹⁷ *McGrath v Minister of Justice* [2014] NZHC 3279, [2015] NZAR 122 at [17].

²⁹⁸ *Riverside Casino v Moxon* [2001] 2 NZLR 78 (CA) at [32].

²⁹⁹ *Locabail*, above n 259; adopted in *Man O’War Station Ltd v Auckland City Council* [2001] 1 NZLR 552 (CA).

³⁰⁰ At [25].

³⁰¹ At [25].

³⁰² *Jia Legeng*, above n 9, at [136] per Kirby J; at [181] per Hayne J, Gleeson CJ and Gummow J concurring at [100]; at [284] per Callinan J.

³⁰³ *Saxmere*, above n 6.

³⁰⁴ At [35]. The inserted word reflects my preferred nomenclature.

³⁰⁵ *Saxmere*, above n 6, at [5].

observer would know that barristers do not become identified with clients, but act as members of an independent bar; that judges are often appointed from the senior ranks of the bar so will be likely to have associations there;³⁰⁶ that judges have taken an oath of impartiality and are not entitled to pick and choose their cases;³⁰⁷ and that counsel are not themselves judged, only the merits of their cases.³⁰⁸ Those considerations aided the conclusion that there could be no reasonable apprehension that the friendship between the judge and counsel would be at all affected by a ruling against Galbraith's side.³⁰⁹ The observer was also taken to "quickly reject the view" that the outcome of the case might affect Galbraith's fee, or his professional standing.³¹⁰ *Saxmere* is an example where a variety of specific facts about a profession are imbued into the knowledge of the reasonable observer. This does not make the observer no longer representative of the public, rather it ensures the perception taken is "rational and reasonable".³¹¹ The reasonable observer test is not a blunt approach: it is well-suited to tailoring for specific and varied contexts, decision-makers, and factual scenarios.

2 How the Apparent Bias Test is Applied

The capacity of the apparent bias test to apply in a variety of situations is reflected in the case law. In *Gough*, the House of Lords decided that the same test for apparent bias should be applied for judges, inferior tribunals, jurors and arbitrators.³¹² In New Zealand, since *Muir* and *Saxmere*, application of the apparent bias test to judges,³¹³ juries,³¹⁴ and arbitrators³¹⁵ has been uncontroversial. *Saxmere* has also been applied to a variety of inferior tribunals.³¹⁶ Beyond tribunals, the *Saxmere* test has been applied without ado to professional disciplinary bodies³¹⁷ and recognised as applicable to university discipline.³¹⁸

Despite some variety in the preceding examples, they are all broadly adjudicative. However, the tailoring of the test for Commissions of Inquiry indicates that there is nothing conceptually problematic about applying the test outside standard adjudicative contexts. Because "the process [of a Commission of Inquiry] is by definition inquisitorial" a greater extent of

³⁰⁶ At [7], [66] and [101].

³⁰⁷ At [8] and [105].

³⁰⁸ At [8] and [104].

³⁰⁹ At [23] and [45].

³¹⁰ At [24].

³¹¹ *Saxmere*, above n 6, at [97].

³¹² *Gough*, above n 1, at 670.

³¹³ See *R v Gan* [2016] NZHC 2031; *Creser v Creser*, above n 156; *Davies v Family Court at Auckland* [2016] NZHC 66.

³¹⁴ See *R v C* [2009] NZCA 272, [2010] 2 NZLR 289; applying *Muir*, above n 5.

³¹⁵ See *White v Maiden* [2014] NZHC 3037; *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2014] NZHC 249, [2014] NZAR 311.

³¹⁶ For example: the Employment Relations Authority in *Spacey v Vice Chancellor University of Waikato* [2015] NZERA Auckland 348 at [20]; the Sports Tribunal in *Miller v Olympic Weightlifting New Zealand* ST09/16, 6 July 2016 at [25] and [29]; the Weathertight Homes Tribunal in *Hiltex Building Systems Ltd v Wilkinson Building and Construction Ltd* [2014] NZHC 475 at [176].

³¹⁷ *McGuire v Manawatu Standards Committee* [2015] NZHC 2100; *Sisson v Canterbury District Law Society* HC Christchurch CIV-2008-409-2950, 7 July 2009 at [34]; *Knight*, above n 231, at [76]; recently accepted as the correct approach in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2016] NZCA 224 at [24].

³¹⁸ *OUSA v University of Otago* [2010] 2 NZLR 281 (HC).

questioning is tolerated than would be for a judge.³¹⁹ This is not a question of a higher or lower test, but a matter of the versatility of the apparent bias approach to accommodate various types of decision-making processes.³²⁰ The tailoring of apparent bias here is specific to the inquisition that is necessary, it does not relate to appearances that may arise from other subject matter such as personal favouritism.

Before *Muir* and *Saxmere* the Court of Appeal intimated that “administrative authorities whose work requires them to act in part judicially”, may have a different test applied than that used for Courts.³²¹ However, in *New Era Electricity Inc v Electricity Commission*, the High Court had no reservations about applying the *Muir* approach to the Commission’s decision approving a proposal to upgrade electricity lines.³²² The Commission was not disqualified because the Court took note of the “highly politicised and pressured environment” in which it worked, and did not expect perfect impartiality from that body.³²³ This case shows that *Muir* can be successfully applied in administrative circumstances without holding decision-makers to the same standard as a court. *Saxmere* was recently applied by the High Court —without discussion of its appropriateness — to a Commissioner appointed by Auckland Council to make notification and consent decisions for resource management.³²⁴ This further shows the breadth of the approach.

Problem Gambling Foundation of New Zealand v Attorney-General involved decisions of an evaluation panel established by the Ministry of Health.³²⁵ Justice Woodhouse accepted that the *Saxmere* test could apply to administrative decision-makers, such as the panel, depending on the context.³²⁶ However, because the context indicated such a high standard of impartiality,³²⁷ the panel was held to the same standard as a court.³²⁸ Although *Problem Gambling* is not an example of the *Saxmere* approach modified to a lesser standard than a court, it indicates the potential to apply it to administrative bodies.³²⁹

Problem Gambling is particularly helpful because it points to factors that indicate the appropriate standard of bias. Justice Woodhouse held that the starting point is “any legislative provisions directed to management of conflicts of interest and bias”, and then any mandatory rules.³³⁰ In *Problem Gambling* the rules required that the panel would make assessments only by the content of proposals, rather than prior knowledge; this led to the high standard being

³¹⁹ *EH Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (CA) at 153; *Re Royal Commission on Thomas*, above n 61.

³²⁰ If anything, a higher standard of impartiality would be expected of Commissions of Inquiry than of arbitrators, for example. See below at ch III(D)(2).

³²¹ *EH Cochrane Ltd*, above n 319, at 153.

³²² *New Era Electricity Inc*, above n 220, at [84].

³²³ At [95].

³²⁴ *Urban Auckland, Society for the Protection of Auckland City and Waterfront Inc v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [163].

³²⁵ *Problem Gambling Foundation of New Zealand v Attorney-General* [2015] NZHC 1701.

³²⁶ At [280].

³²⁷ At [315].

³²⁸ At [325]–[338].

³²⁹ A similar inference can be taken from the pre-*Muir* decision of *Zaoui v Grieg* HC Auckland CIV-2004-404-317, 31 March 2004. The Inspector-General of Intelligence and Security was held to the same standard as a judge, and was disqualified for apparent bias.

³³⁰ At [281].

applied.³³¹ Further, Woodhouse J interpreted a rule against “potential conflict[s] of interest” — ostensibly a rule about actual partiality — to import notions of apparent bias.³³² This suggests that courts are not reluctant to recognise the importance of apparent bias as distinct from actual bias.³³³ In contrast, the regulations in *Splice Fruit Ltd v New Zealand Kiwifruit Board* meant that apparent bias based of a member of the Board based on their interest in the proceeding could not lead to disqualification, because the regulations contemplated that one person on the relevant panel could have an industry interest.³³⁴

3 Conclusions

It is clear that the *Saxmere* approach is applied in adjudicative contexts outside the courts. These various contexts, from veterinary professional discipline³³⁵ to regulatory commissions,³³⁶ require tailoring so that the standard of bias tested for with the *Saxmere* approach is appropriate. There is also High Court authority that the approach can be applied to administrative decision-makers.³³⁷ Further, because the legislative context informs the standard expected of the decision-maker, there is no concern that applying *Saxmere* to administrative decision-makers will create a standard that is inconsistent with legislative intent. However, despite the wide capacity of the apparent bias approach that I have demonstrated, there is an opposing trend to exclude Ministers and local government from that approach. That is the topic of the following section.

C The Trend Excluding Decision-makers from Apparent Bias Critique

1 Back Country Helicopters

Back Country Helicopters Ltd v The Minister of Conservation involved applications to the Associate Minister of Conservation seeking concessions to undertake aerially assisted trophy hunting (AATH).³³⁸ The plaintiffs had sought ten-year concessions, however the Associate Minister granted the concessions for only two years and with a number of conditions.³³⁹ The plaintiffs sought judicial review, alleging, *inter alia*, that the Associate Minister was actually and apparently biased because of his public statements condemning practices associated with AATH.³⁴⁰ In regards to the apparent bias allegation the plaintiffs relied on *Muir* and *Saxmere*.³⁴¹ Justice Kós considered those authorities unhelpful, saying that the “principles expounded there are not appropriate standards to apply” to Ministers.³⁴² For Kós J, the only

³³¹ At [289] at [316].

³³² At [288].

³³³ See *Marbello International Ltd v Douglas* DC Christchurch CIV-2008-009-2926, 20 July 2009 at [41]–[42].

³³⁴ *Splice Fruit Ltd v New Zealand Kiwifruit Board* [2016] NZHC 864, [2016] NZAR 680 at [41]; see *Jeffs* (CA), above n 195; and *NZI Financial*, above n 195.

³³⁵ *Knight*, above n 231.

³³⁶ *New Era Electricity Inc*, above n 220.

³³⁷ *McGrath*, above n 297, includes *obiter dicta* indicating that the *Saxmere* approach may apply to a Minister at [18]. However, it does not contain much analysis of use on this issue.

³³⁸ *Back Country Helicopters*, above n 287.

³³⁹ At [4].

³⁴⁰ At [123] and [124].

³⁴¹ At [130].

³⁴² At [130].

relevant question was whether the Associate Minister *actually* predetermined the application, in the sense of a failure to approach “the matter with an open mind”.³⁴³

Back Country Helicopters relied on two decisions relating to Ministers — the Court of Appeal’s decision in *CREEDNZ Inc v Governor-General*,³⁴⁴ and the High Court of Australia’s decision in *Minister for Immigration and Multicultural Affairs v Jia Legeng*³⁴⁵ — as well as High Court decisions applying predetermination, but not apparent bias, to local government.³⁴⁶ Other High Court decisions have similarly excluded apparent bias critique of local government decisions.³⁴⁷ I make three arguments in this section in opposition to this approach. First, the High Court decisions that have concluded that only *actual* predetermination — and not *apparent* bias — is legitimate are each based on an erroneous understanding of the Court of Appeal authority. Second, there is no sustainable distinction between ‘predetermination’ in *Back Country Helicopters* and other sorts of bias. Third, cases that have declined to apply the *Saxmere* approach to apparent bias suffer from a gap of reasoning: they move from recognising that the standard applied to judges is inappropriate for Ministers and local government, to the conclusion that the principles and the approach applied in *Saxmere* is altogether irrelevant.

2 Actual Predetermination compared to Apparent Predetermination

In *Back Country Helicopters*, Kós J relied particularly on the High Court decision of *Travis Holdings Ltd v Christchurch City Council*³⁴⁸ in concluding that “proof of actual predetermination” is necessary to disqualify a Minister.³⁴⁹ Other High Court decisions that have required *actual* predetermination also relied on *Travis Holdings* or a High Court case applying it.³⁵⁰ *Travis Holdings* involved a resolution of the council to dispose of some of its land under s 230 of the Local Government Act 1974. *Travis Holdings Ltd*, which unsuccessfully sought to purchase the land, alleged that the council appeared to predetermine its decision by entering into a contract with the purchaser before passing the necessary resolution.³⁵¹ It is clear that in *Travis Holdings* Tipping J intended to exclude intervention for only the “*appearance* of predetermination.”³⁵² To do so, Tipping J had to distance the case from the Court of Appeal’s decision in *Lower Hutt City Council v Bank*, where McCarthy P related a rule based on the appearance of predetermination, intervening if “it appears to right-thinking people” that the fairness duties are not met.³⁵³ In *Bank*, the council had undertaken by contract to close portions of its streets for the benefit of a developer.³⁵⁴ If the council failed to do so, its lease of land to

³⁴³ At [139].

³⁴⁴ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

³⁴⁵ *Jia Legeng*, above n 9.

³⁴⁶ *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 (HC).

³⁴⁷ *Protect Pauanui Inc v Thames Coromandel District Council* [2013] NZHC 1944, [2014] NZAR 1269 at [80]–[82]; *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC) [*Friends of Turitea*]; *Howe v Keown* [2011] NZAR 764 (HC) at [41] and [42]; *Wakatu v Tasman District Council* [2008] NZRMA 187 (HC).

³⁴⁸ *Travis Holdings*, above n 346.

³⁴⁹ *Back Country Helicopters*, above n 287, at [138].

³⁵⁰ *Friends of Turitea*, above n 347, at [97]; *Wakatu*, above n 347, at [23]–[24].

³⁵¹ *Travis Holdings*, above n 346, at 45.

³⁵² *Travis Holdings*, above n 346, at 46 (emphasis added).

³⁵³ *Bank*, above n 60, at 551.

³⁵⁴ *Bank*, above n 60, at 546–547.

the developer for a term of 99 years would be “void and of no effect.”³⁵⁵ In *Travis Holdings*, Tipping J confined *Bank* by saying it was restricted to circumstances where “the council has purported to bind itself by... contractual obligation.”³⁵⁶ His Honour considered the contract in *Travis Holdings* to depend on the resolution, rather than obligate its passage.³⁵⁷ However, this distinction is inconsistent with McCarthy P’s observation that whether the “obligation is enforceable or not” is irrelevant if it “appears to be exercising... a restraint” on the council.³⁵⁸ I therefore consider Tipping J’s interpretation of *Bank* to be in error.

Justice Tipping’s aversion to *apparent* predetermination arose from his Honour’s concern that “delicate footwork... would be necessary” to avoid the appearance of bias.³⁵⁹ That is, Tipping J saw apparent predetermination as a blunt test, likely to engage in wholly inappropriate situations. This concern is not well founded: as discussed above,³⁶⁰ the modern approach to apparent bias is sensitive to the requirements of the context. Accordingly, the error in *Travis Holdings* is not justified by the circumstances of local government.

In *Travis Holdings* Tipping J relied on *CREEDNZ Inc* to support his exclusion of apparent bias for local government.³⁶¹ This unanimous decision of the Court of Appeal has been relied on in other High Court cases excluding application of apparent bias for local government and Ministers.³⁶² *CREEDNZ Inc* involved a decision of the Executive Council to allow a “fast track” procedure to approving the construction of a aluminium smelter.³⁶³ Contrary to its interpretation in *Travis Holdings*,³⁶⁴ the Court’s decision in *CREEDNZ Inc* does not support the abandonment of appearances from tests for bias. Justice Richardson, whose judgment was based on *Bank*,³⁶⁵ includes the following quote from McCarthy P’s judgment in that case: “[a]s to the necessary *appearance of impartiality*, we think it must follow that if a public authority... *appears* to obstruct the fair... disposal of public rights, prohibition should normally issue.”³⁶⁶ Although Richardson J later comments that it must be established that “*in fact* the minds of those concerned were not open to persuasion”³⁶⁷ — in the context of his Honour’s adoption of *Bank* and his quotation from the High Court of Australia referring to “reasonable ground for a lack of confidence in the integrity of future decisions”³⁶⁸ — I argue that the words “in fact” should be taken as emphasis of threshold, rather than exclusion of apparent bias. The clear tenor of Cooke J’s concurring judgment in *CREEDNZ Inc* is that the Ministers’ public favour toward the project could not disqualify them, as Parliament could not have intended them to “refrain from forming and expressing, even strongly” their views on a lengthy project of such

³⁵⁵ *Bank*, above n 60, at 547.

³⁵⁶ *Travis Holdings*, above n 346, at 45.

³⁵⁷ At 45.

³⁵⁸ *Bank*, above n 60, At 551.

³⁵⁹ At 47.

³⁶⁰ At ch III(B)(2).

³⁶¹ At 47; *CREEDNZ Inc*, above n 344.

³⁶² *Friends of Turitea*, above n 347, at [97] and [100]; *Back Country Helicopters*, above n 287, at [136]; *Howe v Keown*, above n 347, at [41].

³⁶³ *CREEDNZ Inc*, above n 344, at 177.

³⁶⁴ At 47.

³⁶⁵ *CREEDNZ Inc*, above n 344, at 194.

³⁶⁶ *Bank*, above n 60, at 550 (emphasis added).

³⁶⁷ At 194 (emphasis added).

³⁶⁸ *Commonwealth Conciliation and Arbitration Commission*, above n 71, at 555.

public interest.³⁶⁹ His Honour’s statement that “no test of impartiality or apparent absence of predetermination has to be satisfied”³⁷⁰ should therefore be considered a reference to “apparent absence of *any* predetermination.” This argument is supported by Cooke J’s recognition that if the “Ministers had approached the matter with minds already made up” they would be disqualified.³⁷¹ Justice Cooke does not exclude partiality critique as a whole, so he should not be considered to have excluded apparent bias.

Therefore, *CREEDNZ Inc* does not prevent the application of apparent bias to Ministers and should not have been taken in *Travis Holdings* to support the deviation from the apparent predetermination test in *Bank* in the context of local government. Neither does *Jia Legeng* aid in the exclusion of apparent bias,³⁷² although it is marshalled in *Back Country Helicopters*.³⁷³ In *Jia Legeng*, the High Court of Australia considered whether a Minister’s public statements about deporting non-citizens who had been imprisoned were grounds for complaints of actual bias or apparent bias.³⁷⁴ The plurality adopted the reasoning of Hayne J,³⁷⁵ who considered that “[o]nce it is recognised that there are elements of the decision-making process about which a decision-maker may legitimately form and hold views” that reduces the “area within which questions of actual *or apprehended* bias by prejudgment may arise”.³⁷⁶ Apparent bias was also applied by Kirby and Callinan JJ.³⁷⁷ If my argument in this section is accepted, then there is no appellate court authority for the exclusion of Ministers and Councils from apparent bias critique.

3 *There is no Sustainable Distinction between Bias and Predetermination*

In *Back Country Helicopters* Kós J held that predispositions could only disqualify a Minister if they amounted to actual predetermination. However, his Honour suggested that bias actions would remain for “personal bias or a private pecuniary or proprietary interest.”³⁷⁸ Justice Kós did not indicate whether the *Saxmere* approach, or *apparent* bias at all, would be applicable in those instances.³⁷⁹ Although this indicates that Kós J intended some instances of ministerial bias to have a test other than actual predetermination, distinguishing between those cases presents a problem. So even if Kós J intended an *apparent* bias test to remain for a cache of ministerial biases, without a clear distinction between that cache and cases determined under the predetermination rule, the requirement of *actual* bias may be carried over into all ministerial biases.

³⁶⁹ At 179.

³⁷⁰ At 179.

³⁷¹ At 179; see at 214 per McMullin J.

³⁷² *Jia Legeng*, above n 9.

³⁷³ At [137], quoting from the judgment of Gleeson CJ and Gummow J at [105].

³⁷⁴ *Jia Legeng*, above n 9; relied on for another point in *Saxmere*, above n 6, at [94].

³⁷⁵ *Jia Legeng*, above n 9, at [100] per Gleeson CJ and Gummow J.

³⁷⁶ At [192] (emphasis added).

³⁷⁷ At [157] per Kirby J, at [279] and [284] per Callinan J.

³⁷⁸ At [138]. The Local Authorities (Members’ Interests) Act 1968 provides guidance for pecuniary interests in local government, but does not obviate the need for an apparent bias rule for the reasons discussed in ch II.

³⁷⁹ At [130].

There is no sustainable distinction between predispositions, or predetermination, and other sorts of bias. In my nomenclature, ‘bias’ is a synonym for ‘predisposition’.³⁸⁰ Being close friends with a party is a predisposition to decide for their side as much as it is partiality for them. Owing money to a party is a predisposition to decide in their favour. In all instances, a thumb is placed on the scales of justice. There is no distinction where the predisposition arises because the decision-maker favours a substantive outcome,³⁸¹ or if they have decided in another case factual issues now under dispute.³⁸²

In recent cases, ‘predetermination’ has been taken to mean that the decision-maker “approached the decision with a closed mind, unwilling honestly to consider changing his mind.”³⁸³ In my nomenclature, this closed-mind-predetermination is a type of bias that cannot be outweighed by any argument, evidence, or counteracting predisposition. This is unlike lesser predispositions, which could in some cases be overwhelmed by evidence against the favoured party. Therefore, closed-mind-predetermination is different from other biases, but only as a matter of degree, not of kind. This is not a robust distinction, because characterisation of a decision-maker’s mind as closed, or merely highly predisposed, is a semantic nicety. Without a strong distinction between types of bias, doing away with assessment of appearances for predispositions and predetermination is likely to encourage its disappearance for all sorts of bias that a Minister might have. This supports my argument against the exclusion of *Saxmere* and apparent bias for Ministers.

4 *The Gap in the Reasoning*

The major flaw in *Back Country Helicopters*, as in the other High Court decisions excluding Councils from apparent bias critique,³⁸⁴ is that after recognising that standards of impartiality cannot apply to the Associate Minister in the same way as they apply to judges, Kós J concludes that *Saxmere*’s apparent bias analysis is inapposite.³⁸⁵ This conclusion fails to recognise the capacity of the *Saxmere* approach to accommodate those things that are required by circumstances.³⁸⁶ Although *Back Country Helicopters* relied on *Jia Legeng*, I argue that Kós J did not appreciate its full importance. In *Jia Legeng*, after the High Court of Australia recognised that Ministers were not to be held to the same standard of impartiality as judges,³⁸⁷ it assessed what would be expected of the Ministers in that context. Justice Hayne noted that “there are some elements of the decision-making process about which” the Minister could legitimately hold preconceived views.³⁸⁸ This examination reduced “the area within which questions of actual or apprehended bias by prejudgment may arise”.³⁸⁹ Therefore, if there were

³⁸⁰ See ch III(A).

³⁸¹ As in *CREEDNZ Inc*, above n 344.

³⁸² As in *R v Bogue* [2014] NZHC 1989, where Brewer J had made rulings adverse to the position of the accused in the case of his co-accused.

³⁸³ *Back Country Helicopters*, above n 287, at [145]; *Friends of Turitea*, above n 347, at [102].

³⁸⁴ *Travis Holdings*, above n 346; *Friends of Turitea*, above n 347; *Wakatu*, above n 347.

³⁸⁵ *Back Country Helicopters*, above n 287, at [130]–[138].

³⁸⁶ See ch III(B)(2).

³⁸⁷ At [99], [136], [181] and [284].

³⁸⁸ At [192].

³⁸⁹ At [192]; ‘apprehended bias’ is equivalent to apparent bias in New Zealand, see *Saxmere*, above n 6, at [76].

predispositions in relation to other elements — for which predisposition would be inappropriate — that predisposition may have led to disqualification for bias or apparent bias.

A related flaw in the cases that have excluded apparent predetermination is illustrated by Tipping J’s reliance on *CREEDNZ Inc* in *Travis Holdings*.³⁹⁰ His Honour did not consider whether the standard of predetermination could be different for local government than for the Executive Council in *CREEDNZ Inc*, “the body at the apex of the government structure”.³⁹¹ This failure to consider the differences between decision-makers indicates that the predetermination approach is insufficiently sensitive for the variety of non-judicial decision-makers.

It is true that apparent bias is more rigorous than actual bias because it imposes a duty to *appear* impartial, not just to be impartial in fact. However, that does not mean that apparent bias always requires the appearance of perfect-impartiality. This point may have been missed in the cases that have excluded apparent bias analysis for Ministers and local government. Justice Kós’s decision in *Back Country Helicopters* was motivated by a desire to ensure Ministers could “exercise statutory decision-making powers, without delegation”,³⁹² that goal is attainable with an apparent bias approach.

D Discussion on a Unitary Test for Bias for all Decision-makers.

It is plain that the law must make distinctions between various decision-makers and contexts when there is disqualification for bias.³⁹³ I argue that all the required flexibility can be found within one test, that of the fair-minded and informed lay-observer,³⁹⁴ and that applying this unitary test means the approach is consistent and clear.

1 Problems with Actual Closed-mind-predetermination

As articulated in the High Court decisions, the approach for local government and Ministers is that of actual bias with a threshold of closed-mind-predetermination.³⁹⁵ I have already addressed the problems with testing for actual bias.³⁹⁶ In relation to the threshold, closed-mind-predetermination is a very high bar.³⁹⁷ As exemplified in *Back Country Helicopters*, if there is evidence of any movement from an earlier stance, it will be sufficient proof that the decision-maker’s mind was not totally closed.³⁹⁸

Furthermore, it is unclear how the closed-mind-predetermination threshold would apply to multi-faceted decisions. Whereas the *Saxmere* test considers an overall impression, if a

³⁹⁰ *Travis Holdings*, above n 346, at 47.

³⁹¹ *CREEDNZ Inc*, above n 344, at 177.

³⁹² At [145].

³⁹³ See the discussion above at ch III(B).

³⁹⁴ *Saxmere*, above n 6.

³⁹⁵ *Back Country Helicopters*, above n 287; *Wakatu*, above n 347; *Friends of Turitea*, above n 347; *Travis Holdings*, above n 346.

³⁹⁶ See above at ch I(A).

³⁹⁷ See Andrew Beck “Bias and Recall” [2010] NZLJ 97 at 100.

³⁹⁸ At [145].

decision requires multiple steps and a decision-maker has predetermined some of them, it is unclear whether or not that would result in disqualification.

Another problem is that there is not necessarily a bright line between decision-makers who are held to a test of actual predetermination and those who are subject to apparent bias. Ministers may act in other roles, such as the Attorney-General. In *Attorney-General v Siemer*, the Attorney-General successfully sought an order that prevented Mr Siemer from instituting any proceedings in Court because of his 13-year “campaign of [vexatious] litigation”.³⁹⁹ *Inter alia*, Siemer objected to the Attorney-General bringing the case because the Attorney-General was an opposition member of the Justice and Electoral Committee at a time that the Committee had received a petition to inquire into Siemer’s imprisonment for contempt of court.⁴⁰⁰ The Committee did not consider the petition as its substance was before the courts.⁴⁰¹ Justices Ronald Young and Brown held that the Attorney-General’s involvement in the Committee did “not establish any form of personal bias” regarding Siemer.⁴⁰² Their Honours also rejected a claim that the Attorney-General’s comments in an article, which suggested antipathy towards lay litigants, could “be considered to show any unfair or inappropriate bias towards Mr Siemer.”⁴⁰³ This case indicates that apparent bias allegations may apply to the Attorney-General. However, if apparent bias is applicable because the Minister, as Attorney-General, has non-political duties and responsibilities, there will be difficulties in establishing when the Minister is acting in which role. Members of local government may also hold multiple roles, as in *Woods v Kapiti District Council*.⁴⁰⁴ Unsuccessful allegations of apparent bias were made in relation to the council’s decision to continue adding fluoride to its water, because a councillor was also deputy chairperson on the district health board, which supported the fluoridation. In *Woods* the *Saxmere* test was applied.⁴⁰⁵

The greatest problem with the threshold is that it is without any breadth. It does not recognise the importance of context-specific analysis to impartiality. It is implausible that the only decisions the public will consider to be improper are those that are wholly predetermined. So, excluding Ministers from apparent bias scrutiny by mere fact of their position will not sufficiently protect the appearance of the administration of justice.

2 *Do the Differences between the Decision-makers Justify a Unique Approach?*

It might be queried whether there is an obligation to appear impartial for Ministers and local government. If there is not, then if damage were done to public confidence in the administration of justice because a Minister appeared to be improperly biased, that would be a harm that is tolerated by our legal system. There are two ways to answer this question. First, Ministers and local government do have an obligation to *appear* impartial. This arises because “holders of

³⁹⁹ *Attorney-General v Siemer* [2014] NZHC 859 at [3]; Mr Siemer’s appeal was dismissed in *Siemer v Attorney-General* [2016] NZCA 43, [2016] NZAR 411; leave to appeal refused in *Siemer v Attorney-General* [2016] NZSC 75, [2016] NZAR 765.

⁴⁰⁰ At [43].

⁴⁰¹ At [43].

⁴⁰² At [47].

⁴⁰³ At [48].

⁴⁰⁴ *Woods v Kapiti District Council* [2014] NZHC 1661.

⁴⁰⁵ At [20].

public office involved in the deployment of government power” have standards of impartiality generally in common with judges.⁴⁰⁶ This concept has been recognised to a limited extent in *Problem Gambling*.⁴⁰⁷ Similarly, in *Jia Legeng*, Kirby J made a similar point that “Ministers, as statutory decision-makers, like other persons entrusted to decide the fate of individuals, must simply learn the rule of reticence... avoid the appearance and actuality of prejudgment.”⁴⁰⁸ This concept is reflected in the Court of Appeal decision of *EH Cochrane*, where the application of apparent impartiality requirements to Commissions of Inquiry were explained because of their great influence on public and government opinion, and their effect on personal reputations.⁴⁰⁹ For these reasons there is an expectation of apparent, and not just actual, impartiality for Ministers and local government. Their decisions can have a profound impact and justify the greater burden of *appearing* impartial.

A second way to answer this question focusses on the Court. Plainly courts have a duty to maintain the appearance of justice’s good administration. The Court will fail that duty if it does not ensure that Ministers’ decisions appear to be exercised fairly. As it was said in *Webb*, “If public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored.”⁴¹⁰ Therefore, it should be considered that the rationale of protecting the appearance of justice applies to Ministers and councils. Of course, much lesser standards are expected in the appearance of impartiality, but the appearance is a part of the rationale.

Judges are obviously different from non-judicial decision-makers. However, it is important to not over emphasise that difference. Judges do not approach their decisions with minds that are totally blank; that would be an impossibility. This is recognised in cases dealing with judicial predetermination.⁴¹¹

Just as Ministers’ political natures may affect their decisions without disqualification, the institutional obligations of judges cannot be cause for disqualification. In *Muir*, it was recognised that adverse rulings, which are necessary for the administration of a case, would not lead to disqualification.⁴¹² Neither do tentative views formed during proceedings disqualify a judge.⁴¹³ Likewise, adherence to *stare decisis* is, patently, not disqualifying predetermination.⁴¹⁴ Apparent bias can accommodate the institutional requirements of Ministers as it can for those of judges.

In rejecting the *Saxmere* approach for Ministers in *Back Country Helicopters*, Kós J placed emphasis on the fact that when a decision is delegated to a Minister, it is contemplated by

⁴⁰⁶ *Ebner*, above n 24, at [160].

⁴⁰⁷ *Problem Gambling*, above n 325, at [279] and [280].

⁴⁰⁸ *Jia Legeng*, above n 9, at [157].

⁴⁰⁹ *EH Cochrane Ltd*, above n 319, at 153.

⁴¹⁰ *Webb*, above n 14, at 52.

⁴¹¹ *Hardy v Police* HC Christchurch CRI-2008-409-000221, 21 August 2009 at [46]–[47]; *Antoun v R* [2006] HCA 2, (2006) 159 A Crim R 513 at [22], [29] and [81]; *Muir*, above n 5, at [63].

⁴¹² *Muir*, above n 5, at [101]; see *Antoun v R*, above n 411.

⁴¹³ *Hardy v Police*, above n 411, at [43]; *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 23,991 (HC) at [32].

⁴¹⁴ *Redcliffe Forestry Venture Ltd*, above n 413, at [32].

Parliament that their policy perspective will be applied to the determination.⁴¹⁵ This is not a sufficient reason to exclude apparent bias. Although a fair-minded lay-observer would not “apprehend bias where there is simply a predisposition to decide... in accordance with previous policies”,⁴¹⁶ that does not cover all instances of apparent bias. Non-political preferences of a Minister — such as a taste for high fidelity stereo systems apparently influencing a decision to exclude stereo equipment from a new import tax regime, or a preference for blue plumage apparently influencing a decision to increase conservation efforts for the Takahē over the Kākāpō — would not be justified by Parliament’s delegation to a political figure.

Ministers, as members of Parliament, and local government councillors are, of course, elected. This difference may have motivated Kós J’s statement that “[t]he accountabilities, and standards applicable, are altogether different” for Ministers than with judges.⁴¹⁷ However the differences should not be overstated. The fact that Ministers have electoral accountability as members of Parliament does not preclude judicial review of their decisions in general; it is not a replacement for the importance of apparent impartiality.⁴¹⁸ It is simplistic to fail to consider that judges too have some degree of public accountability.

A legitimate concern is that apparent bias would lead to over judicialisation of decision-makers that need to operate more efficiently. This concern is addressed by the breadth of the *Saxmere* apparent bias approach. A Minister’s remarks “on an early morning interview by radio should not be dissected in the way sometimes appropriate to analyses of the considered reasons of a court or tribunal.”⁴¹⁹ Reposing such power in Ministers cannot be a method of avoiding the reach of apparent bias critique. Rather, criticism for the appearance of partiality “is the price to be paid” for choosing to divide power in this way.⁴²⁰ Although there are plainly some important differences between judicial decision-makers and Ministers, those differences do not justify immunity from adherence to the appearance of impartiality.

3 Conclusion

Decision-makers and decisions do not fit into discrete categories. Bright line tests will therefore always be limited. What is required then is a methodology that allows for fine-grained differences depending on the circumstances. This approach is available in the *Saxmere* test of apparent bias. I have shown that the core concern in the bias jurisprudence, for all decision-makers, is the appearance of justice. Applying a unified approach is “an endeavour to better articulate what it is that lies at the heart of the concern”.⁴²¹ This chapter has shown that applying the *Saxmere* test will not lead to over judicialisation, or disqualify the decision-makers delegated by parliament just by virtue of the political nature. This addresses the concerns that motivated the exclusion from apparent bias critique effected by the High Court in *Travis*

⁴¹⁵ At [133].

⁴¹⁶ Wade & Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 390-391; quoted in *Back Country Helicopters*, above n 287, at [133].

⁴¹⁷ At [130].

⁴¹⁸ See *Jia Legeng*, above n 9, at [122]–[125].

⁴¹⁹ *Jia Legeng*, above n 9, at [141].

⁴²⁰ *Jia Legeng*, above n 9, at [158].

⁴²¹ *Muir*, above n 5, at [50], referring to the standardisation of apparent bias in that case.

Holdings through to *Back Country Helicopters*.⁴²² Furthermore, my suggested approach will prevent decisions that appear to a reasonable observer to be improperly biased from going unchecked. It will also provide the margin of error that an apparent bias test provides to ensure that justice is in fact done.⁴²³ Most importantly, the existence of a single, clearly articulated, universally applicable test for bias will itself aid in the public confidence in the administration of justice; litigants, judges, and the public will always be confident about what standard will be applied.

⁴²² *Travis Holdings*, above n 346; *Back Country Helicopters*, above n 287.

⁴²³ See ch I(A).

Conclusion

In chapter I, I surveyed the history of varied articulations of principles, conflicting appellate authority in Commonwealth jurisdictions, and contradictory applications of bias jurisprudence. This history imposes a special obligation to express the law of bias “with as much precision as possible, in order to reduce uncertainty amongst judges, litigants and legal representatives, whilst at the same time contributing to community confidence in the administration of justice.”⁴²⁴ In this paper, I have endeavoured to provide clarity in three ways. In chapter II, I argued that a single approach to bias for pecuniary and non-pecuniary subject matter would better serve the law’s goal of ensuring public confidence in the administration of justice. This was both because a single test is more easily applied and better reflective of the underlying principles, and because that test is more comprehensible to the public. In chapter III, I argued that *Saxmere* provides a methodology for applying apparent bias analysis to all types of decision-maker, including Ministers and local government. I argued that the trend to exclude Ministers and local government was a wrong turn in the law that should be remedied. In both chapter II and chapter III, I expounded a way that existing tests may be pulled together and simplified into a single general-purpose test that achieves the touchstone goal of bias law: ensuring that public confidence in the administration of justice is maintained. The importance of this goal was captured by Anderson J in *Erris Promotions*, who said “[t]he integrity and moral authority of a legal system depends on those factors which satisfy the reasonable informed observer that it is fair in practice.”⁴²⁵

⁴²⁴ *Ebner*, above n 24, at [106].

⁴²⁵ *Erris Promotions*, above n 82, at [24].

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