The Rule against Bias
Ongoing Evolution and Practical Conundrums for Tribunals

Prof Simon Young
USQ School of Law & Justice
UWA Faculty of Law
Introduction

- The importance of the ‘rule against bias’
- A long, long lineage…. the *Magna Carta*
- My (more contemporary) focus today:
  - The ‘speciation’ of bias
  - The ‘spectrum’ of bias, and
  - Contemporary conundrums for tribunals
The Species of Bias

- The redundant distinction between ‘pecuniary’ and ‘non-pecuniary’: *Ebner (2000)*
- The increasingly strong distinction between ‘actual’ and ‘apprehended’
- …and a finer taxonomy? Eg *BAT (2011)*
  - Interest
  - Conduct
  - Association
  - Extraneous knowledge
- Is there legal significance in these latter subdivisions?
The Species of Bias (cont)

- A separate test for ‘prejudgment’?
  
  *Jia Legeng (2001); Applicant S20 (2003); McGovern (2008)*

- A distinction between ‘incompatibility’ and ‘prejudgment’?
  
  *Isbester (2015)*

- Exclusion of ‘incompatibility’ from the Ebner 2-step test? ‘Association’ also?
  
  *Isbester (2015); Cf Murlan (2009); Spencer (2012); Hurd (2015)*
The Spectrum of Bias

- Context is critical
  - Jia Legeng (2001); Epeabaka (2001); AZAEY (2015);
  - Hot Holdings (2002); McGovern (2008);
  - Watson (2010); Duncan (2013); Isbester (2015)

- Judges are held to a high standard
  - but with a sense of reality:
    - Glaxosmithkline (2013)

- Tribunal members?
  - AZAEY (2015); Tarrant (2015)
  - cf however (eg):
    - Ex parte ‘H’ (2001); SZRUI (2013); MZZLO (2015)

- Applicable to all species? Isbester (2015)
Conundrums for tribunals

- Multiple involvements
  *BAT (2011); Wilson (2011)*

- The shape of the reasonable lay observer
  *Johnson (2000); Isbester (2015); AB (2016); Zhai (2015); Eastman (2015); ALA15 (2016); Lawrie (2016)*

- Are the judge or member’s own reasons relevant?
  *BAT (2011); Wilson (2011); Zhang (2015); MZZXM (2016); Re Henry (2015)*

- Post hearing conduct / comment?
  *Epeabaka (2001); Zhai (2015)*

- Multiple decision-makers
  *McGovern (2008); Isbester (2015)*

- Prejudgment of component issues *Bahonko (2011)*

- Allegations to be proved or ‘plausibly alleged’?
  *CUR 24 (2012); Horne (2015); Waterhouse (2016)*
Conclusions

- Ongoing speciation…
- Ever-broadening spectrum (but more selectively applied)…
- Accumulating conundrums!