Arbitrators are Easily Challenged but Hard to Dismiss

*Jonathan Harrison**

Introduction

Despite the best efforts of arbitrators to provide comprehensive disclosure and to identify possible conflicts of interest, there is an ever-present risk that arbitrations and awards may be challenged on the basis that the arbitrator has an association with one or other of the parties or an indirect interest in the outcome of the arbitration.

In the recent decision of *AT&T Corporation & Anor v. Saudi Cable Company*[1], for example, one party to the dispute sought the removal of the arbitrator on the basis that he was a non-executive director of one of the parties' main competitors.

In its decision, the English Court of Appeal looked beyond the 'mere possibility' of bias on the arbitrator's part and decided that there was 'no real danger' of bias. This decision is the most recent of a growing number of cases which indicate that, regardless of the tests applied, courts will have regard to policy considerations, and in particular the commercial realities associated with the selection of arbitrators and the conduct of arbitrations, when deciding whether or not an arbitrator should be removed on grounds of bias.

This article will consider:

1. the development of the tests applied by Australian and English courts when considering allegations of bias; and
2. the mechanisms used by those Australian and English courts to accommodate policy considerations.

Finally, the article will conclude with some suggestions as to the steps arbitrators can take to minimise their prospects of being removed on grounds of bias.

*Jonathan Harrison is a Senior Associate in the Construction Law Group of Minter Ellison's Brisbane office.
1 [2000] BLR 743 - 758

1. Development of the tests applied by Australian and English courts when considering allegations of bias

The tests applied by the courts when considering whether or not to remove an arbitrator are broadly similar to those used when deciding whether or not a judge should preside over a matter. Accordingly, this article refers to several decisions which concerned applications seeking the removal of judges as opposed to arbitrators. Given that the reported decisions relating to these applications predate those decisions concerning arbitrators, by referring to the decisions concerning the removal of judges it is possible to trace the development of the various tests for bias.

In one of its first attempts to articulate an Australian approach to bias, the High Court demonstrated a reluctance to remove an adjudicator in the absence of compelling evidence of bias. The court made the following comments:

> *Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons.*[2]

This test incorporates a standard of proof well above the normal 'balance of possibilities' test applicable to civil matters and was certainly weighted in favour of the adjudicator as opposed to the disgruntled applicant.

Over the next 20 years, Australian courts developed an approach which favoured a 'realistic possibility' test rather than the 'high probability' approach. In 1969, the High Court held that proceedings would only be tainted with bias:

> *when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal...may not bring to the resolution of the questions before the tribunal fair and unprejudiced minds.*[3]

In this way, the Australian Courts imported the flexible concept of 'reasonableness'. As discussed below, this paper argues that it is through manipulation of this concept that policy and commercial considerations are accommodated in judicial determinations.

In the same year, the English Court of Appeal decided the case of *Metropolitan Properties Co (FGC) Ltd v Lannon*[4]. In this case, each of the three judges applied different tests for imputed bias. Lord Denning MR held that there must be a 'real likelihood of bias'[5]. Danckwerts LJ found that imputed bias would exist where one

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[2] *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116.

[3] *R v Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group* (1969) 122 CLR 546 at 553-554.

[4] [1969] 1 QB 577.

[5] *Ibid* at 599.

'might reasonably feel doubts' about the partiality of the judicial officer[6] while Edmund Davies LJ rejected the 'real likelihood' approach, preferring the less stringent test of 'reasonable suspicion of bias'.[7] This divergence of opinion was characteristic of the inconsistent approaches to the question of bias which had plagued English courts until the decision of the House of Lords in *R v Gough* in 1993.

In 1976, the Australian High Court reviewed the manner in which the Australian and English courts had formulated the tests and affirmed that Australian courts should continue to use the 'reasonable suspicion' test.[8] To avoid the unintended nuances of meaning associated with the word 'suspicion' the High Court refined the test, when handing down its decision in Livesey, by substituting 'reasonable apprehension' for 'reasonable suspicion'. Accordingly, the test was articulated as follows:

> *... a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.*[9]

This statement represents the current approach of Australian courts to cases involving allegations of bias. It was recently reaffirmed by the High Court in *Johnson v Johnson*[10] and has been applied in cases alleging bias by an arbitrator throughout the last decade[11]. The most recent case involving allegations of bias against an arbitrator is *Cadoroll Pty Ltd v Mauntill Pty Ltd.*[12] in which the Supreme Court of the Australian Capital Territory said that the test from *Livesey* applied to cases involving arbitrators.

The manner in which English courts approached allegations of bias remained uncertain until the decision of the House of Lords in *R v Gough*[13]. In that case, Lord Goff favoured a formulation of the test in terms of 'real danger'. He stated:

> *... for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the*

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[6] *Ibid* at 602.
[7] *Ibid* at 606.
[8] *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262-263.
[9] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294.
[10] (2000) 174 ALR 655.
[11] *Giustiniano Nominees Pty Ltd v Minister for Works* (1996) 16 WAR 87; *Gascor v Ellicott* [1997] 1 VR 332; *Haskins and Cassar v Brae-Villa Homes Pty Ltd* (unreported) Supreme Court of Victoria, 15 December 1995, Nathan J; *The Manly Fishing & Sporting Association Ltd v Total Quality Constructions Pty Ltd* (unreported) Supreme Court of NSW, 13 September 1996, Bainton J.
[12] [2000] ACTSC 79 (19 September 2000).
[13] [1993] 2 WLR 883.

> *relevant 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 ...*[14]

As noted above, the recent decision of the English Court of Appeal's recent decision in *AT&T* affirms the English judiciary's acceptance of Lord Goff's 'real danger' test by the English judiciary. However, in *AT&T*, their Honours noted the divergence of tests within the Commonwealth, perhaps suggesting that there is little practical difference between the tests. One reason for this could be that, regardless of any differences in formulation of the tests, each of the tests provides a mechanism which enables the courts to have regard to policy considerations.

2. The mechanisms used by Australian and English courts to accommodate policy considerations

While some commentators query whether or not application applying 'reasonable apprehension' and 'real danger' tests leads to different results in any set of given circumstances, both tests provide an opportunity for the courts to have regard to policy considerations. These considerations include the manner in which arbitrations assist with the administration of justice and the commercial detriment suffered by the parties when arbitrators are disqualified in the absence of demonstrated bias. In this regard, the courts may be regarded as having returned to the original position that adjudicators should not be disqualified unless there is a high probability of actual bias.

As will be seen below, by imputing the 'reasonable man' with sophisticated levels of knowledge in relation to the circumstances of particular cases and the nuances of the legal profession, courts have accepted that an arbitrator or judge can bring an impartial mind to bear on a matter, despite having previously represented, or appeared against, one or other of the parties. Further, courts have had regard to the commerciality of removing an arbitrator or judge late in proceedings and the benefits associated with adjudicators expressing the expression of tentative opinions, during in the course of a hearing, by some adjudicators.

The Australian position

As noted above, Australian courts have adopted the 'reasonable apprehension' test. This means that, when determining whether or not there is a 'reasonable apprehension' of bias, they courts consider whether or not a 'reasonable man', in the circumstances, would apprehend that an arbitrator's decision may be affected by bias.

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[14] *Ibid* at 670.

Australian courts have adopted differing and sometimes generous views as to the experience and level of commercial sophistication of the 'reasonable man'. At a minimum, the courts have assumed that the reasonable man would be in a position to understand and appreciate the nuances of the legal profession and the ability of a professional adjudicator 's ability to bring an impartial mind to bear on an issue that involves a party with whom the adjudicator has had a previous association.

When determining what level of knowledge and understanding is held by the reasonable man, courts generally consider that the standard to be observed is that of a 'hypothetical fair minded and informed lay observer'[15]. The flexibility of the concept of 'reasonableness' has enabled the courts to attribute varying degrees of knowledge to the fair minded observer who has been moderately informed in some cases[16] and possessing an understanding of not only the material facts, but the finer points of professional practice of barristers and arbitrators[17].

For example, in *Gascor v. Ellicott, ESSO Australia Resource Limited & BHP Petroleum (NW Shelf) Pty Ltd*[18], an arbitrator was not disqualified despite having the fact that he had presided as an arbitrator, and appeared as leading counsel, in two previous and similar arbitrations which were similar to the matter at hand. Further, when acting as counsel, the arbitrator had been critical of expert witnesses who also appeared in the present proceedings.

Tadgell JA (with whom Brooking JA concurred) highlighted the flexibility of the 'reasonable man' concept in the context of cases involving allegations of bias when he stated that:

> *...it is for the court to determine what knowledge the fair-minded or reasonable lay observer is to apply to an appraisal of the situation. No exhaustive criteria for such a determination appear to have been authoritatively laid down.*[19]

By way of general principle, Tadgell JA states that:

> *However one describes the knowledge, the observer whose view the court is to seek is in my opinion to be fastened with sufficient knowledge to enable a reasonable and rational view - not just a perfunctory or superficial view - to be formed.*[20]

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[15] *Webb v R* (1994) 181 CLR 41 at 67; *Westcoast Clothing Co Pty Ltd v Frechill Hollingdale and Page (a firm) and Others* [1999] VSC 24.

[16] *Pflieger v Sparks* (unreported) Supreme Court of NSW, 9 March 1989, Giles J.

[17] *Webb v R* (1994) 181 CLR 41 at 67-68; *Gascor v Ellicott* [1997] 1 VR 332 at 340.

[18] [1997] 1 VR 332.

[19] *Ibid* at 342.

[20] *Ibid* at 343.

When determining the level of knowledge and understanding held by the 'reasonable man', Tadgell JA had regard to the complex nature of the issues involved and considered that the complexity justifies the court in imputing a more sophisticated level of knowledge to the reasonable observer:

> *In a case of such complexity as this it is in my view insufficient to attribute to the hypothetical lay observer knowledge merely that the range of matters arising for consideration in the three arbitrations had similarities.*

In this way, Tadgell JA considered that the 'reasonable man' would possess a detailed understanding of the intricacies of the issues which were before the Court and went on to find that there were no identifiable significant issues of fact or law which would lead to a reasonable apprehension of bias.

Similarly, in *Kilpatrick Green Pty Ltd v. Leading Synthetics Pty Ltd*[21] a barrister was not disqualified as a special referee despite having been retained by the plaintiff's solicitors as counsel in unrelated matters. In his reasons, McDonald J considered that the fair-minded reasonable observer would possess a considerable degree of understanding of the professional role, duties and functions of counsel. In particular, His Honour decided that the fair minded observer would be aware that barristers were often retained by solicitors to act for their clients and that the conflicting relationships which may exist by virtue of these retainers would not affect the manner in which counsel performed his professional duties.

In *West Coast Clothing Company Pty Ltd v. Freehill Hollingdale & Page (a firm)*[22] the court refused to disqualify a judge on the basis that, as a barrister, the second defendant's law firm had previously briefed him. When applying the standard of the hypothetical, fair minded and informed lay observer, Warren J quoted Priestley JA in *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd*[23] and commented that:

> *... built into the legal system is public knowledge and long acceptance of the fact that judges will often know to a greater or less degree the counsel and solicitors who appear before them.*[24]

Warren J also cited with approval the statements of Merkel J in *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd*:[25]

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[21] (Unreported) Supreme Court of Victoria, McDonald J, 22 July 1997.
[22] [1999] VSC 24.
[23] (1986) 6 NSWLR 272 at 276.
[24] *Westcoast v Freehill Hollingdale and Page* at para 31.
[25] (1996) 65 FCR 215 at 761.

> *[Courts] appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive professional associations with clients but that something more than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of the association*[26]

On these bases, Warren J considered that a fair minded lay observer imbued with such knowledge could not reasonably apprehend that the association between the judge and the defendant would give rise to prejudice and partiality on behalf of the judge.

In *Johnson v Johnson*[27], the High Court refused to disqualify a judge who had made comments about the credibility of certain witnesses which allegedly gave rise to an apprehension of bias. In dismissing the appeal, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated that:

> *Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice...develop to take account of the exigencies of modern litigation.*[28]

In this case, the fair minded observer was taken to understand that during dialogue between the judge and counsel, judges may express tentative views which should not be taken to indicate biased prejudgment. The Court considered the context of the case and noted that the comments were made with regard to an application concerning discovery of certain documents and were intended to explain the importance that the judge attached to discovery. The Court cited the comments of McHugh JA in *Vakauta v Kelly*[29] with approval, stating that:

> *...two things need to be remembered: the observer is taken to be reasonable; and the person being observed is 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'*[30].

On these grounds, the Court held that a reasonable observer would not have apprehended that the judge would not bring an open mind to the resolution of the dispute.

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[26] *Westcoast v Frechill Hollingdale and Page* at para 34.
[27] (2000) 174 ALR 655
[28] Ibid at paragraph 13, page 657 / 658
[29] (1988) 13 NSWLR 502 at 527.
[30] *Johnson v Johnson* at paragraph 12, p657 /658

Courts have also taken into account the costs and inconvenience which may be borne by parties when judges and arbitrators are removed for apprehended bias.

For example, in Dovade, the court held that by failing to allege bias when at the time of the judge's disclosure of the circumstances that later gave rise to the allegation, the appellants had waived any right to object on this ground. It was stated that:

> *The trial commenced and continued for twenty-four days. The matter was never again raised. It would be scandalous if a party were able to hold in reserve an objection based upon apprehended bias as a ground for impugning a judgment when the matter was addressed so squarely at the very commencement of the trial.*[31]

In refusing to find bias in arbitration cases, courts have more recently focused on the duty of judicial officers not to disqualify themselves where no proper reason exists to justify disqualification. This duty is a counterbalance to the duty to avoid the appearance of bias, and exists to prevent judges from acceding too readily to suggestions of bias. The primary rationale for this duty is to discourage parties from believing that, by seeking the disqualification, of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour[32].

However, factors of cost and convenience also underlie the court's imposition of this duty. For example, in *Re Ebner; Ebner v Official Trustee in Bankruptcy*[33] where the Federal Court asked:

> *Why is it to be assumed that the confidence of fair minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value but not by the waste of resources and delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?*[34]

It is understood that the differences between arbitral and judicial proceedings do not justify a departure from the basic principles relating to bias. However, the courts have acknowledged that in applying those principles, the courts must have regard also to the circumstances of the case and the context of the arbitration. For instance, in *Haskins and Cassar v Brae-Villa Homes Pty Ltd,*[35] it was alleged that the arbitrator's professional association with the respondent, and his standing as a building consultant, gave rise to an apprehension of bias. In deciding that this was not so, Nathan J acknowledged that:

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[31] *Ibid* at 181.
[32] *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 per Mason J.
[33] (1999) 161 ALR 557.
[34] *Ibid* at 568.
[35] (Unreported) Supreme Court of Victoria, 15 December 1995, Nathan J.

> *An arbitration process in not a judicial one, and arbitration must proceed perforce in a relatively specialised area where the number of experts and participants is limited. Just as there is camaraderie at the Victorian Bar...so there must be the same amongst the relatively small pool of arbitrators and practitioners in arbitration...The community and the profession have come to expect and understand, and in fact, receive, fair representation despite social intercourse and discourse between the participants. A fortiori, the same applied to the arbitral process.*[36]

Giustiniano Nominees Pty Ltd v Minister for Works[37] is one of few recent cases in which the court was prepared to find a reasonable apprehension of bias. In that case, the arbitrator had conducted private seminars for one of the parties to the arbitration while the arbitration was on foot. The seminars touched generally on the issues relevant to the arbitration and were conducted at a discounted rate. Furthermore, the arbitrator failed to disclose that he was conducting the private seminars. The Court highlighted the fact that the seminars had been conducted while the arbitration was underway and took into account the private nature of the seminars, the subject matter discussed and the payment arrangements when deciding that there was a reasonable apprehension of bias. It is noted, however, that the judge at first instance refused to disqualify the arbitrator and, in reaching this conclusion, had regard to the limited number of arbitrators, and the limited nature of the building industry, in Western Australia[38].

The English position

Like the Australian courts, those in England also have regard to policy and commercial considerations when determining applications to remove for the removal of arbitrators and judges. For example, in the *AT&T* decision, the court held that there was no real danger of bias despite the fact that the arbitrator was being a non-executive director of a competitor of one of the parties and there was an inference that the arbitrator could benefit from the outcome.

This decision illustrates an acknowledgement by the English Court of Appeal that it is conscious of the financial burdens that may be inflicted upon innocent parties by the removal of arbitrators at a late stage, and the requirement that an applicant seeking removal must demonstrate not only an appearance of bias, but a *real danger* of bias.

When deciding whether or not an award should be overturned on the basis of bias, English courts must be satisfied that there is more than a mere 'appearance of bias'[39]. Rather, the courts will look beyond any 'apparent bias' and consider whether or not there was a *real danger* of bias or that the alleged bias in fact caused injustice[40].

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[36] *Ibid.*

[37] (1996) 16 WAR 87.

[38] See 'Application for Removal of Arbitrator Sec.42', *The Arbitrator*, May 1995 pages 22 and 23

[39] 'Apparent bias' was coined by Lord Hewart CJ - find reference.

[40] See the comments of Sir Thomas Bingham MR in *ex parte Dallaglio* [1994] for all ER 139 at 162

It is submitted that the English 'real danger' test, like the Australian 'reasonable apprehension' test, is sufficiently flexible enough to be applied in a diverse range of circumstances, and certainly allows courts to have regard to commercial considerations.

For example, the English superior courts have acknowledged that the co-location of counsel and arbitrator will not, of itself, be grounds for disqualifying an arbitrator. In *Laker Airways Inc v. FLS Aerospace Limited*[11], Ricks J of the Queen's Bench Division held that the arbitrator's membership of the same chambers as the first respondent's counsel did not give rise to justifiable doubts as to the arbitrator's impartiality. This decision was based on an application of the real danger test as set out in *R v Gough*. In finding that there was no real danger of bias, Ricks J referred to the following practical considerations:

> *A conflict of interest ... only arises as an impediment when the same person, or what is in law regarded as the same person, undertakes conflicting duties to different clients or puts himself in a position where he has a conflict between his duty to his client and his own self-interest... practising barristers are prohibited by the rules of their profession from entering partnerships or accepting employment precisely in order to maintain the position where they can appear against or in front of one another. If it were otherwise, public access to the Bar would be severely limited.*

There is also judicial comment to the effect that, the later a challenge to an arbitrator is made, the heavier the onus on the challenging party to demonstrate bias[12].

Commentary

It seems that, despite any divergence in the tests used by the English and Australian courts, the courts will construe the applicable test to accommodate policy considerations, and particularly commercial considerations. These include the limited number of arbitrators available and the costs associated with removing an arbitrator once hearings have commenced or been completed, by imputing the 'reasonable man' with sophisticated levels of knowledge.

While this may signal, in practice, a return to the position that an arbitrator will not be removed unless it can be demonstrated that there is a high probability of bias, the 'reasonable apprehension' and 'real danger' tests will continue to be applied when determining the presence of 'apparent bias', because of their flexibility and applicability.

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[11] [2000] 1 WLR 113

[12] See the comments of Simon Brown LJ in *Dallaglio* at page 152: '... by the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was unconscious bias'.

3. The steps arbitrators can take to minimise their prospects of being removed on grounds of imputed bias

As demonstrated above, when determining whether or not an arbitrator should be removed, through the application of the 'reasonable apprehension' and 'real danger' tests the courts are able to preserve arbitrations and awards in circumstances where, strictly speaking, there may be the appearance of bias. However, it is clearly in the interests of arbitrators, and the parties, to take steps to reduce the possibility of an application being brought seeking the removal of the arbitrator.

Arbitrations are founded upon agreements between the parties, and many agreements give the parties an opportunity to jointly select an arbitrator[13]. In this context, when determining the identity of an arbitrator, parties have an opportunity to investigate the associations of candidates and to provide candidates with an opportunity to disclose any potential conflicts of interest.

In circumstances where parties have jointly selected an arbitrator, and the arbitrator has made full and frank disclosure of any relevant interests, having regard to the manner in which the 'reasonable apprehension' and 'real danger' tests have been applied, it is highly unlikely that a party could later successfully seek in an application to have the arbitrator removed based upon information which was available or known to the parties at the outset. Certainly, it could also be argued that, by agreeing to an arbitrator whose relevant associations and interests have been disclosed, the parties waive any right to later object on the basis of apprehended bias.

The importance of full and frank disclosure is illustrated by a number of the cases discussed above. For example, in *AT&T*, due to an administrative error, the copy of the arbitrator's curriculum vitae which was provided to the parties omitted a reference to him being a non-executive director of a competitor of one of the parties. By extension, there was a slight possibility that the outcome of the arbitration could confer a material benefit upon the competitor. While the significance of this association had not occurred to the arbitrator (in fact, the arbitrator had not even realised that the company of which he was a director had bid on the project which was the the subject of the dispute), had the arbitrator's curriculum vitae been complete, it would have been apparent to the parties at the outset.

Similarly, in *Giustiniano Nominces*, while the arbitrator disclosed to the parties that his company carried out seminars and did training courses which were attended by many personnel of one of the parties, he did not go on to explain that, in fact, his company had been retained to run a number of courses exclusively for one of the parties. Had he done so, it is likely that the Court of Appeal would have found that the complaining party had waived any right to complain of this association.

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[13] See, for example, the AS and JCC standard forms of contract

While full and frank disclosure on the part of arbitrators may avoid allegations of bias being raised, it would be onerous to suggest that professional arbitrators should to be obliged to disclose details of the matters they had decided or clients they had represented.

In this regard, arbitrators can take some comfort from decisions including *West Coast Clothing Company and Kilpatrick Green* which clearly indicate that the courts will not disqualify an arbitrator merely on the basis that the arbitrator has previously been engaged by, or acted on behalf of, one of the parties in a professional capacity. Of course, if the arbitrator's association with one of the parties has been a long one, albeit in a professional capacity, it is clearly in his/her the arbitrator's interests to disclose this association to the parties at the outset.

Having regard to the decisions, it is clearly in an arbitrator's interests to ensure that their curriculum vitae sets out details of their commercial affiliations and appointments, especially directorships and consultancies. Arbitrators may also be prepared to circulate a document to the parties which lists entities in which they have shares, investments or other types of a commercial interest, for example shareholdings or investments.

While it is generally the practice of arbitrators to provide comprehensive curriculum vitae, they are often generally not appraised of the details of the dispute until they have been provided with the points of claim. Even at that stage, the commercial relationships and affiliations of the parties may not be readily apparent.

Accordingly, for this reason, it is suggested that, when attempting to jointly appoint an arbitrator, the parties prepare a document which sets out not only the details of the dispute, including the principal witnesses, but also provide an outlines of the parties' more significant commercial relationships. For example, the parties should state if they are part of a wider corporate structure and, if so, provide details of significant related entities. In addition to providing details of the dispute, it is in the parties' interest to prepare a project briefing paper which sets out the project background.

In their module entitled 'Opening Processes for Formal Arbitration'[1], Dr Croft and Mr Fargher refer to a draft form of agenda for a preliminary conference based upon that established by J A Morrisey LFIAMA. The draft agenda includes an item which suggests that, immediately after the parties are identified and appearances recorded, the arbitrator should declare:

> '. . . *any knowledge that s/he has which may be perceived by one or other party as prejudicial*'

Some pages later, the formal entrance of the arbitrator upon the reference is

[1] Prepared for the Professional Certificate in Arbitration and Mediation course conducted by the Institute of Arbitrators and Mediators Australia

acknowledged by the parties, at which stage the draft agenda suggests that the arbitrator asks the following question of the parties:

> *'. . . do the parties affirm that they agree to the conduct of the arbitration by the nominated arbitrator?'*

While there is a reasonable argument that, by answering 'yes' to this question, the parties waive any rights to later object to the arbitrator on the basis of information earlier declared by the arbitrator, it is suggested that, at the preliminary conference, the arbitrator should not only declare any knowledge which may be perceived as prejudicial (perhaps having had regard to the information provided by the parties) but also confirm that the parties have reviewed the material provided by the arbitrator. Once this is done, the arbitrator should immediately obtain the parties' confirmation that they are not aware of any conflicts of interest, either actual or perceived, or any other reason why the arbitrator should not enter upon the reference. This confirmation should be reduced to writing, perhaps by the parties subsequent endorsement of the minutes of the preliminary conference.

It is suggested that arbitrators take positive steps to avoid any potential conflicts of interest by:

- the provision of details of their associations;
- their review of background material provided by the parties; and
- specifically addressing the issue at the preliminary conference.

This will significantly reduce not only the risk of disqualification, but the risk of applications seeking their disqualification being brought in the first place.

[*] The author wishes to acknowledge the generous assistance provided by Stephanie Brumpton in the preparation of this article