

DISQUALIFICATION OF JUDGES: PRACTICE AND PRO-
CEDURE

DISCUSSION PAPER

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SYNOPSIS

This paper reviews matters of practice and procedure relating to the disqualification of judges in Australian courts for apparent bias. As such, the principal focus of the paper is upon:

- (a) the way in which questions of disqualification are raised and dealt with;
- (b) the extent to which a decision by a judge to withdraw or to continue to sit may be susceptible to review; and
- (c) the extent to which evidence relevant to the question of disqualification may be put before the court which initially considers the question and on review.

Such matters are largely unregulated at present and different, even conflicting, approaches have been adopted by different courts.

While the focus of the paper is not upon the substantive principles by which it is determined whether a judge ought to disqualify him or herself, the content of those principles and the reasons why they exist are relevant to any assessment of matters of practice and procedure. Specifically, the practice and procedure of disqualification must be consistent with, and promote, those broader principles, as well as serving the fair and efficient administration of justice generally. However, there is an apparent tension between the impartiality rule – that a judge should not be a judge in his or her own cause – and the present practice which leaves it to the judge against whom objection is, or might be taken, to decide whether he or she should withdraw. The existence of this tension tends to suggest that, at least in certain cases, that question should be determined by a different judge or be susceptible to a timely and independent review. In the case of collegiate courts, the impartiality rule suggests that responsibility ought to lie upon the court itself to ensure that it is lawfully constituted and therefore that the court (absent the member to whom objection is taken) ought to determine its composition. This is not to deny, however, that in many cases there is value in the issue of disqualification being raised, even if only informally, before the judge to whom objection might be taken. Among other matters, in some cases this can provide an opportunity for the judge to dispel an appearance of bias. For example, if disqualification is sought on the basis of statements by the judge in the course of trial, the judge might be able to explain what he or she meant and in that way, eliminate any appearance of bias.

A consideration of these issues must also be sensitive to the contexts in which the question of disqualification can arise. For example, where an objection is made on the basis of the judge's conduct during the course of a trial which is already well advanced, the interests of justice would probably be best served by allowing the matter to proceed to conclusion before any review of the decision is available. On the other hand, where disclosure is made prior to trial of an interest or association which potentially disqualifies the judge, the scales may weigh more heavily in favour of the question being determined or reviewed by a different court before the trial commences. In such cases, disclosure by the judge of a potentially disqualifying interest or association at the earliest opportunity and, if possible, before the commencement of the trial, is to be encouraged. Equally, where a real issue arises as to whether the judge ought to withdraw, which is not raised by the judge, the parties ought to raise that matter in a timely fashion.

Bearing these matters in mind, the paper commences with a discussion of the context in which matters of practice and procedure arise, including the substantive principles governing disqualification and their role and importance in the administration of justice. In Part 2 the manner in which the disqualification may arise and be dealt with is examined primarily in the context of a judge sitting alone. This includes a discussion of the appropriateness of the present rule that the challenged judge should decide the issue. The manner in which the decision of a single judge at first instance might be reviewed forms the subject of Part 3. The special position of intermediate and collegiate courts is considered in Part 4, aside from the position of the High Court which is discussed in Part 5. This is followed by a comparison with practice and procedure in the United States, which has taken a very different path to that taken in Australia. The paper concludes with an appraisal of the present practice and suggestions as to the manner in which areas of difficulty might be addressed.

UPDATE – RECENT DECISIONS

1. Since completing this discussion paper, two relevant decisions have been delivered, namely, the decision of the High Court in *Ebner v The Official Trustee in Bankruptcy and Clenae Pty Ltd v ANZ Banking Group Ltd*¹ and a decision of the Full Court of the Supreme Court of South Australia in *Southern Equities Corp Ltd v Bond*.²
2. Following the decision in *Ebner*, it is now settled that there is no separate and free-standing rule of automatic disqualification which applies where a judge has a direct pecuniary interest in the outcome of the case.³ The rule is the same as that which applies to disqualification for association, namely, whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.⁴
3. Neither the decisions in *Ebner* or in *Southern Equities Corp Ltd* depart from the principles previously established by the weight of authority as to matters of practice and procedure relating to the disqualification of judges.
4. First, consistently with the position outlined in the discussion paper,⁵ the High Court rejected the proposition that a judge was under a duty to disclose a potentially disqualifying interest or association which, if breached, would itself constitute a ground of disqualification or give the litigant a right to have the judgment set aside for want of procedural fairness.⁶ Rather, it held that the matter of disclosure was a matter “of prudence and professional practice”.⁷ As such, the failure to disclose “...is relevant (if at all) **only** because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias.”⁸
5. Secondly, the majority in *Ebner* confirmed the principle that it is for the judge against whom objection is taken to decide whether to sit⁹ and that that decision could be reviewed only on appeal from the substantive decision in the matter or in proceedings for prohibition, certiorari or similar relief.¹⁰ With respect to the former, the majority disagreed with the suggestion by Callinan J that it would be preferable for challenges on the ground of apprehended bias to be determined, where possible, by a judge other than the judge against whom objection is taken,¹¹ doubting that another judge would have power to determine such an application.¹² The position taken by the majority confirms the view expressed in the discussion paper that any change to this principle, or to the position as to an appeal, is likely to require legislative intervention.¹³
6. The decision in *Southern Equities* illustrates how the principle that no appeal will lie from a decision of a judge not to disqualify him or herself can lead to the paramountcy of form over substance as judges endeavour to avoid the harsh and impractical results which can result from the application of that principle.¹⁴ Thus, the majority considered that the appeal was competent in so far as it was an appeal against the decision of the judge at first instance dismissing the application that the trial of the action be heard by a judge other than him. However, consistently with earlier decisions, the majority did not consider that the appeal was competent in so far as it related to the judge’s decision not to disqualify himself.¹⁵
7. The decision in *Southern Equities* also indicates that the administration of the docket system may need to be sensitive to the risk that, in ruling upon particular interlocutory applications where findings of fact and credibility may be required, the judge allocated to the case may come to be disqualified from further hearing the matter. Thus the majority held that the judge allocated to deal with the case was disqualified by reason of findings made by him on an application for a Mareva injunction, prompting the observation by Olsson J that “[w]ith the benefit of hindsight, it would have been preferable for applications of this type to have been dealt with by a judge other than the trial judge, so as to avoid the situation which has actually arisen.”¹⁶

¹ [2000] HCA 63.

² [2000] SASC 450.

³ See further [1.1] of the paper.

⁴ It was noted by the majority, however, that there must be a prohibition upon a judge sitting in a case to which he or she was a party, subject to qualifications of waiver and necessity: [2000] HCA 62, [59-63]. Kirby J dissented, holding that a judge who had a direct pecuniary interest in the outcome of the matter was automatically disqualified: *ibid*, [62]. Gaudron J agreed with the majority as to the result in the appeals, but departed from the majority in that she considered that “waiver and necessity aside, a substantial shareholding or financial interest automatically results in a judge’s disqualification if the company concerned is a party to litigation or has an interest in its outcome”: *ibid*, [98]. Note also that there is clear support in the reasons of Gaudron (*ibid*, [79-82]) and Kirby JJ (*ibid*, [116]) for the view that a constitutional foundation exists for the requirements of impartiality and independence of federal courts and courts vested with the judicial power of the Commonwealth: see further [1.5, 1.8], [5.8-5.9] of the paper.

⁵ See Part 2(B) of the paper, esp [2.24-2.27], [7.1].

⁶ [2000] HCA 63, [67-70] Gleeson CJ, McHugh, Gummow and Hayne JJ.

⁷ *Ibid*, [69] Gleeson CJ, McHugh, Gummow and Hayne JJ. See also Part 2 (B) and [7.1-7.4] of the paper in relation to the issue of disclosure.

⁸ [2000] HCA 63, [70] Gleeson CJ, McHugh, Gummow and Hayne JJ (emphasis added). See also [2.27] of the paper. Cf the result of the adoption of the automatic disqualification rule by Kirby J: *ibid*, [161], point 2.

⁹ [2000] HCA 63, [74] Gleeson CJ, McHugh, Gummow and Hayne JJ. See further Part 2(F) of the paper for a discussion of the advantages and disadvantages of this approach.

¹⁰ [2000] HCA 63, [71]. See further Part 3 of the paper.

¹¹ [2000] HCA 63, [185] Callinan J.

¹² *Ibid*, [74].

¹³ See further Part 3(C) and Part 7(C), esp [7.16, 7.19], of the discussion paper.

¹⁴ See the criticism of the principle by Bleby J, [2000] SASC 450, [116-119].

¹⁵ [2000] SASC 450, [3-6], [67] Olsson J (who also agreed at [65] with the reasons of Bleby J), and [114-115] and [157] Bleby J. Cf *ibid*, [97-102] Williams J (diss).

¹⁶ *Ibid*, [64] Olsson J.

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