CHALLENGING ARBITRATORS: RECENT DEVELOPMENTS FROM AN AUSTRALIAN PERSPECTIVE

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This paper examines recent legal developments in Australia regarding challenges to arbitrators for conflicts of interest on the ground of apparent bias. It considers the effect of changes from the 'reasonable apprehension' test to the 'real danger' test in newly enacted Commonwealth and State and Territory legislation and its implications for the future development of arbitration in Australia.

Introduction

Arbitration is rapidly becoming a hot topic issue in Australia following the Global Financial Crisis ('GFC'). Recent economic uncertainty has fuelled demand for an efficient, final and cost effective forum to resolve disputes leading to a significant rise in commercial arbitration. However, Australia's traditionally complex, dual legislation and increasingly adversarial procedural rules have threatened to jeopardise the appeal of arbitration to resolve both domestic and cross-border disputes. A criticism that has become particularly prevalent has been the ease with which parties may challenge arbitrators for conflicts of interest on the ground of apparent bias. A tactic commonly employed to delay proceedings or circumvent the enforcement of an unfavourable award.

As a result, a major overhaul of the International Arbitration Act 1974 (Cth) ('IAA') and the uniform State and Territory Commercial Arbitration Acts ('CAA') has recently been undertaken to streamline arbitral procedure and promote Australia as a modern, attractive seat for arbitration. One of the most significant legislative changes is the replacement of the common law 'reasonable apprehension' test for apparent bias with a 'real danger' test based on the English House of Lords decision in R v Gough.¹ This paper will analyse the significant implications of this change including whether the new test will result in a reduction of excessive challenges to arbitrators as well as its wider impact on the legal interpretation of the public versus private nature of arbitrators and judges. It will conclude by comparing current tests applied in similar common law jurisdictions and demonstrate that Australia would be adopting the strictest of the three established tests which would differentiate it from the established arbitration hubs in the region.

Arbitration during the GFC

The GFC has had a significant effect on the number and nature of commercial disputes. The unsustainable levels of debt and severe lack of funding

¹ [1993] AC 646.
available to companies during this period had and continues to impact significantly on their ability to pursue business opportunities as well as fulfil their existing contractual obligations.\(^2\) Rising conflicts and disputes naturally spring out of such circumstances. As the economy stalled and transactions dried up, companies looked more closely at litigious methods to recoup losses. Given such uncertain times, the legal services industry has had to deal with the tightening of external legal budgets of corporate counsels, and with it an evaluation of traditional methods for resolving disputes.

There has been a push toward more efficient, lower cost and final resolution of disputes. Given its inherent characteristics, arbitration is ideally suited to times of economic strife as an appropriate form of ADR. It provides the benefits of lower cost, less formality, confidentiality and finality that are sought after by risk adverse commercial parties. This is particularly so in cross-border disputes given the reputation of significant uncertainty in enforcing judgments of a foreign jurisdiction. Arbitration thus has provided a truly flexible, private enterprise alternative to traditional litigation to resolve disputes. This trend has been demonstrated by a clear escalation in international arbitral disputes being administered by the top arbitral institutions between 2007 and 2009. Growth has been particularly strong between 2008 and 2009 as the full effects of the GFC hit.

<table>
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<th>Arbitral Institutions</th>
<th>No. cases administered 2007</th>
<th>No. cases administered 2008</th>
<th>No. cases administered 2009</th>
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<td>29.1</td>
<td>60.6</td>
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Trend in international arbitration cases administered from 2007-2009.\(^3\)

A growing number of commercial disputes within the rapidly developing Asia-Pacific region will continue to drive the development of arbitration in

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Australia. Although not yet an established hub internationally, the opening of Australia's first dedicated international dispute resolution centre in Sydney demonstrates that Australia is preparing itself to take a significant piece of the pie.  

**Practical problems: conflicts of interest**

Along with the recent growth of arbitration in Australia, problems with the current arbitral system have also become more prevalent.

Australia has a system of dual layered legislation governing international and domestic arbitration. Cross-border disputes fall within the ambit of the IAA which is based on the widely adopted United Nations Commission on International Trade Law (UNICITRAL) Model Law (‘Model Law’). Domestic arbitrations are regulated according to the CAA, adopted by the various States and Territories. However, the domestic acts differ significantly from the IAA as they do not adopt the general rules and procedures of the Model Law. This has resulted in a complex and inconsistent approach to arbitration in Australia in which domestic arbitration has significantly lagged behind the international standards set by the Model Law in the IAA. In practice, arbitration in Australia has progressively become more adversarial in nature and with it more lengthy and costly. Increasingly complex arbitral procedures relating to pleadings and discovery, evidence and the provision of expert witnesses often rival that of court proceedings. This blurring has led to criticisms about the effectiveness of arbitration and highlighted the threat that overly adversarial rules pose to the potential growth of arbitration as an alternative form of dispute resolution in which the power to specify procedure is intended to lie with the parties. One of the most prevalent problems, and the focus of this paper, is the impact of challenges to arbitrators for conflict of interest or bias.

Conflict of interest issues typically arise out of personal, professional, pecuniary or political interests. Common examples include:

- when a barrister from one chambers acts for a party and the arbitrator appointed is employed in the same chambers; or

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6 Note that recent reform of the CAA will adopt the Model Law. See ‘Domestic Reforms’ section for further details.

7 Craig Pudig, 'Domestic Lessons from International Arbitration' (December 2004) 23 (3) *The Arbitrator & Mediator*. 

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where an arbitrator owns shares in a company that is a party to the proceedings.

Legal complexity and uncertainty in the treatment of conflicts of interest of arbitrators has provided opportunistic parties the ability to abuse the arbitral process by claiming that an arbitrator is biased as a tactic to delay proceedings or escape enforcement of an award. This issue has been widely acknowledged in the international arbitration community most notably in the International Bar Association's ('IBA') 'IBA Guidelines on Conflicts of Interest in International Arbitration' ('IBA Guidelines') and exacerbated in recent years as a result of the GFC. To understand why this is the case it is necessary to examine the law as it relates to bias.

**Bias**

A claim for bias may take one of two forms. Actual bias occurs when prejudice of an arbitrator is actually shown. In the context of private arbitration, actual bias is rarely observable and therefore challenges on that basis are rare, but if made, the facts will not likely be the subject of contention. On the other hand, challenges are more likely to occur on the basis of apparent bias which occurs when prejudice of an arbitrator is apparent based on the surrounding facts and circumstances. Article 12 of the Model Law sets out the circumstances where an arbitrator may be challenged for apparent bias. In particular, Article 12(2) states that:

> An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.

The broad interpretation of Article 12 taken by the courts in each jurisdiction has resulted in the formulation of several tests that are uncertain in their application and predisposed to excessive challenges.

**Development of the test for apparent bias**

*Reasonable apprehension* test

In Australia, the test for apparent bias historically developed from English common law in the context of judicial conflicts of interest. It was borne out of the fundamental principle of natural justice espoused by Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* that "justice should not only be done, but should manifestly and undoubtedly be seen to be done". In that case, a claim arose following a dangerous driving conviction that the magistrates’ legal adviser had represented the driver of another car involved in the collision in a previous civil action. The court found that although the adviser did not actually give any advice, the appearance of bias warranted that the conviction be set aside. In this sense, judges, as officers of the court, were not only

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9 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.
required to act impartially but must also be seen to be acting impartially to maintain public confidence in the administration of justice. The appearance of justice was held to be just as important as reality.

*R v Sussex Justices* was confirmed by the High Court of Australia in *Livesey v New South Wales Bar Association*\(^\text{10}\) where it set out the modern test for apparent bias as whether "a fair-minded observer might entertain a reasonable apprehension of bias" by reason of not bringing an impartial mind to the resolution of the dispute. The 'reasonable apprehension' test has two limbs:

- An assessment of the conduct from the perspective of an objective fair-minded lay observer; and
- Circumstances leading to a *reasonable apprehension* that the judge is not impartial or independent.

This test was extended to arbitrators in *Giustiniano Nominees Pty Ltd v The Minister for Works & Ors.*\(^\text{11}\) The Full Supreme Court of Western Australia was asked to consider whether an arbitrator should be removed on the grounds of reasonable apprehension of bias because he failed to disclose that he was actively participating in exclusive seminars presented by a company of which he was half owner to what was effectively one of the parties to the arbitration, the Building Management Authority ('BMA'). Ipp J found, with the other members of the Court agreeing, that while the seminars were of a general nature, they had a bearing on the issues in the arbitration and were held exclusively for the BMA. Ipp J held that, in his opinion:

> all these matters expose the arbitrator to a suspicion of having had relevant communications with the BMA in the seclusion of the private seminars and detracts from what should have been his apparent impartiality. In my view this seriously undermined the confidence that the appellant reasonably could have had in the impartiality of the arbitrator.\(^\text{12}\)

The requirement that justice must seen to be done and that an arbitrator must have "complete objectivity and neutrality" led Ipp J to conclude that there was no difference between a judge and arbitrator with regard to bias.\(^\text{13}\) This test has been confirmed in more recent decisions including *ICT Pty Ltd v Sea Containers Ltd*\(^\text{14}\) and *Pindan Pty Ltd v Uniseal Pty Ltd*\(^\text{15}\) and applies to arbitrators in both domestic and international disputes.\(^\text{16}\)

**Practical application of the 'reasonable apprehension' test**

Vexatious tactics to delay arbitral proceedings or challenge awards have become prevalent as the test to prove 'reasonable apprehension' is not as

\(^{10}\) (1983) 151 CLR 288 at 294; See also *Webb v Queen* (1994) 181 CLR 41.

\(^{11}\) (1995) 16 WAR 87.

\(^{12}\) Ibid at 95.

\(^{13}\) *Giustiniano Nominees Pty Ltd v The Minister for Works & Ors* (1995) 16 WAR 87 at 12 per Ipp J.

\(^{14}\) [2002] NSWSC 77.

\(^{15}\) [2003] WASC 168.

\(^{16}\) *Gascor (Trading as Gas and Fuel) v Ellicott and Ors* [1997] 1 VR 332.
onerous as it could be. By its very nature, the test as applied to arbitrators is prone to significant challenge.

Firstly, the test has developed with a low standard of proof in accordance with the fundamental principle laid down in *Sussex Justices*. The courts have erred on the side of caution in assessing whether there is a reasonable apprehension that justice may be tainted by a conflict of interest. This is because focus is placed on the appearance rather than any fact of bias. As such, a vexatious claim may fall well short of any real proof of prejudice, yet result in a prolonged inquiry into an arbitrator's conduct and interests to unequivocally ensure the proper administration of justice.

Secondly, the application of the test to the multitude of conflicts that may arise in practice has been the subject of significant uncertainty both in Australia and overseas resulting in repeated litigation. In response, the IBA in 2004 appointed a working group of 19 international arbitration experts to produce and approve a set of IBA Guidelines to address the lack of sufficient clarity and uniformity in the application of apparent bias throughout varying jurisdictions. It also includes non-exhaustive lists of specific practical examples seeking to clarify which conflicts do and do not give rise to justifiable doubts as to an arbitrator's impartiality and independence. However, in practice, case law has sparingly applied the IBA Guidelines in the years since its release. As the authors themselves acknowledge, the IBA Guidelines "are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties". This was confirmed in the English decision *ASM Shipping Ltd of India v TTMI Ltd of England*. The High Court was asked to consider a challenge by ASM against one of the arbitrators who had previously been instructed by the solicitors now representing TTMI in another arbitration where serious allegations were made against ASM's principal witness. Counsel for TTMI argued that because the situation in this case did not appear in any of the lists specified in the IBA Guidelines, this was not a circumstance in which the award should be set aside for apparent bias. In his reasoning, Morison J stated:

> The IBA Guidelines do not purport to be comprehensive and as the Working Party added 'nor could they be.' The Guidelines are to be 'applied with robust common sense and without pedantic and unduly formulaic interpretation.' I am not impressed by the points Mr Croall made on these lists.

In this sense, the IBA Guidelines do little to curb excessive challenges of arbitrators as it provides no definitive clarification on the practical application of the apparent bias test.

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20 [2005] EWHC 2238 (Comm).
Thirdly, arbitration has historically developed among a tight knit community of practitioners where the appearance of a conflict of interest from the perspective of an objective fair minded lay observer is not uncommon. The pool of arbitrators has traditionally consisted of distinguished barristers, solicitors, law professors, engineers and architects. Arbitrators are not public servants but private citizens that are often appointed by the parties to a dispute on a regular referral basis. It is therefore not unusual that an arbitrator may have had some form of prior professional or personal relationship with either party or counsel. This has provided somewhat of a convenient excuse for parties to frequently challenge appointed arbitrators for strategic purposes.

**Recent legislative reform**

In response to a number of Australia's problems, legislative reform has recently been passed on both the domestic and international front seeking to resolve inconsistencies, streamline proceedings and enhance Australia's reputation in the field of arbitration.

**International reforms**

The *International Arbitration Amendment Bill 2010 (Cth) (‘IAA Bill’)* was recently enacted to amend the IAA.\(^{22}\) The IAA Bill has been heralded as the most significant reform of its kind in Australia since the Model Law was originally implemented into the IAA in 1989. It is part of the federal government's broader push to promote alternative dispute resolution and, in particular, Australia's international arbitration capability. The IAA Bill is intended to bring greater certainty to foreign awards and also to encourage and attract parties to nominate Australia as their seat for international arbitration.\(^{23}\)

The principal change is the adoption of the amended 2006 Model Law which will now apply to all international arbitration proceedings throughout Australia. Section 21 of the IAA has been replaced to ensure that the parties can no longer opt out of the Model Law by electing to resolve their dispute according to the legislation of a State or Territory of Australia. A number of additional provisions that supplement the Model Law have also been included into the IAA to help bring improved efficiency and enhance confidence in the Australian arbitral system.

Among the key reforms is an amendment to the apparent bias test for challenging arbitrators in international disputes. The IAA Bill inserts a new section 18A into the IAA which states:

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(1) \quad \text{For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration.}
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\(^{22}\) The IAA Bill was passed through Parliament on 17 June 2010 and commenced 6 July 2010.

\(^{23}\) See Hon Robert McClelland MP, speech entitled 'International Commercial Arbitration in Australia: More Effective and Certain' (4 December 2009).
(2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.

According to the Explanatory Memorandum, it overrides the common law 'reasonable apprehension' test for determining justifiable doubts as to the impartiality or independence of an arbitrator in favour of a 'real danger' test based on the House of Lords decision *R v Gough*.24 In *Gough*, the appellant was indicted for conspiracy to commit robbery with his brother (who had been discharged). Following his conviction, the appellant's brother started shouting in court, at which point, one of the jurors first recognised the brother as his next door neighbour and swore an affidavit to that effect. In reaffirming the Court of Appeal's dismissal of the appellant's claim that he may not have had a fair trial, Lord Goff, with the other members of the Court agreeing, held that:

> The same test should be applicable in all cases of apparent bias, whether concerned with judges or members of other inferior tribunals, or with jurors, or with arbitrators … 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.25 [emphasis added]

Lord Goff also considered the perspective from which the apparent conflict should be assessed and concluded that it was:

> unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.26

Thus, in summary, the 'real danger' test's limbs are:

- An assessment of the conduct from the perspective of the court; and
- Circumstances leading to a *real danger* of bias occurring.

**Domestic reforms**

In April 2010, the Standing Committee of Attorneys-General (SCAG) released a model *Commercial Arbitration Bill 2010* ('CAA Bill') to be adopted across all State and Territory jurisdictions. New South Wales has been the first state to adopt the changes.27 It proposes an all new domestic framework based on the amended 2006 Model Law "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay

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24 [1993] AC 646.
26 Ibid.
27 The *Commercial Arbitration Act 2010* (NSW) was assented to on 28 June 2010 but has yet to come in force (as at 1 July 2010).
or expense" which is consistent with the upcoming changes to the IAA. This signals a major reform of the excessively procedural and outdated domestic law and finally closes the gap between the application of the international and domestic arbitral systems in Australia. As a result of the adoption of the Model Law, subsections 12(5) and (6) of the CAA Bill reproduce the language of section 18A of the IAA to adopt the same 'real danger' test for apparent bias in domestic arbitration.

Implications

Comparison of the 'reasonable apprehension' and 'real danger' tests

Moving from the 'reasonable apprehension' test developed under common law to a statutorily imposed 'real danger' test has significant implications as it results in a change to both 'limbs' of the test for apparent bias.

Under the first limb, the determination of the conduct shifts from the perspective of an objective reasonable man with knowledge of the material facts to a judge or court. The perspective of a court means the assessment of the conduct would likely take into account more specialised knowledge in the field of arbitration than a lay observer, including the practical commercial realities of how it is conducted. As mentioned earlier, arbitration has developed in a way in which it is not uncommon for there to be some form of personal or professional relationship between arbitrators, parties or counsel that although may give the reasonable apprehension of bias from the perspective of an objective lay observer, may not necessarily result in the arbitrator bringing an impartial mind to the resolution of the dispute. In this sense, a reasonable court may apply the bias rule more pragmatically, resulting in reduced successful challenges on this basis.

A higher threshold is also found within the second limb. In Gough, Lord Goff was firmly of the opinion that it was the reality of bias that was crucial, rather than the appearance, as it is under the 'reasonable apprehension' test. The 'real danger' test is based on facts and reality rather than perceived appearances. There may be situations where there is a reasonable foundation in the mind of an observer, but that falls short of a real danger of it occurring. For example, this may be the case in the circumstances where an arbitrator is a colleague from the same chambers as one of the party's counsel. The second limb is therefore more difficult to prove.

Greater certainty and enforcement

Although in practice it may arguably be unlikely that an arbitrator will fail the 'reasonable apprehension' test but not the 'real danger' test, the prevalence of bias challenges should be reduced. A stronger test would logically make it harder to allege a lack of impartiality or independence, resulting in greater certainty in the enforcement of awards and helping to create a more efficient

28 Section 1AC, Part 1A Commercial Arbitration Bill 2010.
arbitral process. A reduction in excessive challenges would also occur because the implied term to act in good faith in arbitration proceedings and an increased risk of abuse of process or a breach of professional rules if vexatious challenges are brought, would help to keep the 'real danger' test from similar abuse.

**Public/private function of judges and arbitrators**

The new amendments to the IAA and the CAAs signal a marked shift in the role of arbitration by imposing a different bias test for arbitrators from judges. As the Federal Attorney General Robert McClelland stated in a press release on 6 November 2009, "there is a widespread view that arbitration has become too litigious with proceedings increasingly resembling those of a court. We want to make sure that arbitration fulfils its potential as a genuinely quick and effective way to resolve commercial disputes." This divergence of treatment may have long standing implications for the future direction of arbitration. Australia appears to be moving away from the formality and overly adversarial rules which have been inherited from traditional court processes and become an increasingly common problem, particularly in domestic arbitration. The change also provides fundamental recognition of the distinction between commercial arbitration and traditional litigation as discrete forms of ADR. Unlike the established public function of judges, arbitrators are engaged by the parties in a private and voluntary system of dispute resolution whereby the appearance of justice has little role to play in practice. This provides a significant endorsement that justice 'need not seen to be done' in the context of arbitration and puts to rest the long established convention that judges and arbitrators should be treated equally with regard to conflicts of interest.

**International comparison**

The significance of any reform to international arbitration must be considered and compared in the context of other similar common law jurisdictions.

**England**

Unlike Australia, the law in England has moved on from the principle in *Sussex Justices*. As mentioned earlier, the 'real danger' test applied in *Gough* drastically changed the perception of judges and arbitrators as they no longer

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needed to be 'seen to be doing justice'. However, the principle only lasted a relatively short nine year period. In 2001, the House of Lords in Porter v Magill\textsuperscript{32} overruled Gough and instigated a reformulated test for apparent bias, namely "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"\textsuperscript{33} [emphasis added]. The test took the first reasonable observer limb of the 'reasonable apprehension' test with a derivative of the second limb of Gough. The emphasis on the reality of the bias meant the second limb of the 'real possibility' test is applied in much the same way as in Gough.

Lord Bingham in Porter considered a number of justifications for a move back from the perspective of the courts to a reasonable lay observer. An objective first limb brought the test in line with that applied by the European Court of Human Rights as well as most other common law courts. In addition, the test had to take into account the obligations under the European Convention on Human Rights following the enactment of the Human Rights Act 1998 which sought to read an obligation into the Arbitration Act 1996 (UK) that an arbitrator be both independent and impartial to give effect to the fundamental right of a fair trial.\textsuperscript{34}

New Zealand

New Zealand, after a period of uncertainty, has adopted the current English approach to apparent bias. The Court of Appeal initially followed the Gough 'real danger' test in Auckland Casino Ltd v Casino Control Authority.\textsuperscript{35} Following the modification of the test in Porter, the court in Erris Promotions Ltd v Commissioner of Inland Revenue\textsuperscript{36} acknowledged but did not consider whether to apply or reject the new test. It was not until Muir v Commissioner of Inland Revenue\textsuperscript{37} that the 'real possibility' test was confirmed as the appropriate test for challenging arbitrators for bias in New Zealand.

Hong Kong

The courts of Hong Kong have similarly followed English authorities in the application of the bias test. The approach in Gough was applied in Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co before the revised Porter test was adopted in Deacons v White & Case Ltd Liability Partnership & Ors.\textsuperscript{38}

\textsuperscript{32} [2001] UKHL 67.
\textsuperscript{33} The 'real possibility' test was subsequently applied to arbitrators in ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm).
\textsuperscript{35} [1995] 1 NZLR 142, CA; See also Man O' War Station Ltd v Auckland City Council [2001] 1 NZLR 552, CA.
\textsuperscript{36} (2003) 16 PRNZ 1014.
\textsuperscript{37} [2007] NZCA 334.
\textsuperscript{38} See Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co [1997] HKC 481.
\textsuperscript{39} (2003) 6 HKCFAR 322; See also Suen Wah Ling v China Harbour Engineering Co. [2007] BLR 435 HKCA.
Singapore

Singapore, applying the principle from *Sussex Justices*, has followed a similar approach to the common law position in Australia. In *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd*, Chao Hick Tin JC stated the test as whether "a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a *reasonable suspicion* that a fair trial for the applicant was not possible" [emphasis added]. The courts subsequently acknowledged the revised formulation following the *Gough* decision but has ultimately stuck firm to the 'reasonable suspicion' test for apparent bias which is applied in similar fashion to the 'reasonable apprehension' test.

Significance

Regardless of whether the 'reasonable apprehension' test or the 'real possibility' test applies, the general authority among common law jurisdictions continue to espouse an objective first limb in which arbitrators along with judges must appear both impartial and independent. Malaysia appears to be the only common law country of any significance still applying the *Gough* derived 'real danger' test. Resurrecting an out of favour test would see Australia significantly depart from the established common law position.

In this sense, Australia will be able to differentiate itself from the more prominent arbitration centres in the region such as Hong Kong and Singapore in what appears to be an attempt to create an international best practice legal framework for arbitration. An underlying assumption made in submissions for the stronger 'real danger' test was to help promote Australia as a more attractive seat for international arbitration. However, whether a different test will encourage or hinder Australia's growth in the international arbitration market is not necessarily so clear. Will a tougher stance on arbitrator bias attract parties or will it be seen as a rigid and unjust process? Clearly an argument can be made that such a marked change may in fact further entrench the status quo rather than persuade parties to use Australia as a seat for arbitration as it will be out of synch with its established competitors. Whether Australia is ultimately seen as a progressive leader or an anomaly by the international arbitration community will be an interesting development that will be played out in the coming years.

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41  *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd* [1988] SLR 532 at 503.
42  *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97.
43  *Re Shankar Alan s/o Anant Kulkarni* [2006] SGHC 194.
Conclusion

The push toward more efficient, lower cost and final resolution of disputes as a result of the GFC has helped to fuel the growth of arbitration in Australia and with it those that wish to employ tactics to exploit its flaws. The 'reasonable apprehension' test for apparent bias has provided an outlet for excessive challenges to arbitrators and threatened the effectiveness of the arbitral process as a genuine private enterprise alternative to litigation.

By creating a more modern, uniform framework for regulating commercial arbitration, the newly enacted reforms to the IAA and the State and Territory CAAs will be an important driver in establishing Australia as a centre for arbitration in the coming years. The adoption of the stricter 'real danger' test should help to reduce the number of excessive arbitrator challenges and enhance confidence in Australia's arbitral system. The change also implies a fundamental shift in the legal treatment of arbitrators who no longer appear to be held to the same high standards of public scrutiny as judges. Finally, the 'real danger' test will put Australia out of alignment with its regional competitors as it attempts to market itself as a unique and progressive seat of arbitration. Whether the change can make a real difference to attract parties and enhance Australia's reputation as an efficient, impartial and enforceable forum for commercial arbitration remains to be seen.