Disqualification for Bias by Professor John Tarrant, Federation Press, 2012, 416 pages, ISBN 9781862878808, RRP $165.00 (hardback).

An application to disqualify a decision-maker from presiding over proceedings not only requires courageous advocacy at times but also a principled understanding of the jurisprudence and scope of the disqualification doctrine. Such applications should only be made after careful reflection by a legal practitioner.

Professor John Tarrant, in his book entitled *Disqualification for Bias*, lays out the substantive and procedural issues that may arise when practitioners make an application for a judicial officer to be disqualified on the grounds of apprehension of bias.

The recent High Court decisions in *Michael Wilson & Partners Ltd v Nicholls*[1] and *British American Tobacco Australia Services Ltd v Laurie*[2] and the recent NSW Court of Appeal decisions in *CUR24 v DPP*,[3] *Barakat v Goritsas (No 2)*[4] and *Rouvinetis v Knoll*,[5] give cause to reflect upon the history and application of the disqualification principle in the various contexts in which the issue has arisen.

Professor Tarrant's text clearly and concisely navigates through the application of the principle in a judicial context but importantly also canvases the application of the doctrine to administrative decision-makers, international courts and tribunals, arbitrators, local government, disciplinary hearings, enquiries, sporting clubs and military tribunals.

The book is divided into nine chapters, headed as follows: 'The Disqualification Principle', 'Early History and Modern Developments', 'Test for Bias', 'Disqualifying Factors', 'Exceptions to the Disqualification Principle', 'Application of the Disqualification Principle', 'Practical Issues', 'Remedies' and 'Future Developments and Conclusion'.

The Honourable Justice John Basten, who has written several leading judgments on this topic in the NSW Court of Appeal, appropriately authors the foreword. His Honour, on the book's utility, comments:

> Judges who swear to decide cases without fear or favour, affection or ill-will, may be called on to identify the content of that obligation and the circumstances in which they are precluded from sitting sooner than they expect. A similar level of understanding is required of practitioners minded to seek recusal. In an area where contestable evaluative judgments are the norm: difficult lines must be drawn in the sand. Persistent practical questions also arise.
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> Professor Tarrant's lucid articulation of the case law and principles will help the legal system to cope more readily with these issues in the future. It will also provide readily accessible guidance to tribunals, public enquiries and the large body of persons exercising powers subject to the obligation to accord procedural fairness.

1 (2011) 244 CLR 427; 282 ALR 685; [2011] HCA 48; BC201109206.
2 (2011) 242 CLR 283; 273 ALR 429; [2011] HCA 2; BC201100308.
3 [2012] NSWCA 65; BC201202033.
4 [2012] NSWCA 36; BC201201169.
5 [2013] NSWCA 24; BC201300788.

> This monograph should provide an excellent resource to fill what has, up to this time, been a gap in the legal resources available in Australia.

As to the various contexts in which the doctrine has applied, it has been said that 'it would be dangerous and futile to attempt to define or list factors which may or may not give rise to a real danger of bias'.[6]

In *CUR24 v DPP*,[7] the NSW Court of Appeal had occasion to consider whether indiscreet comments by a judge at a social function, not directed to any particular case or litigant, but to a class of criminal behaviour gave rise to a reasonable apprehension of bias in the sense of prejudgment. The circumstances said to give rise to a reasonable apprehension of bias in that case concerned comments allegedly made by a District Court Judge to the effect that all pedophiles charged are guilty and should be put on an island and starved to death.

Ultimately a principled approach is required. In their joint judgment in *Ebner v Official Trustee in Bankruptcy*,[8] Gleeson CJ, McHugh, Gummow and Hayne JJ said that the applicable principle requires two steps and continued:

> First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.[9]

The timing and maintenance of a disqualification application is also an important consideration for legal practitioners. Professor Tarrant's text considers the recent decision of the High Court in *Michael Wilson & Partners Ltd v Nicholls*[10] which revisits the issue of a party waiving the right to object to a judge on the basis of an apprehension of bias. In that decision, the High Court observed:

> It is well established that a party to civil proceedings may waive an objection to a judge who would otherwise be disqualified on the ground of actual bias or reasonable apprehension of bias. ... If a party to civil proceedings, or the legal representative of that party, knows of the circumstances that give rise to the disqualification but acquiesces in the proceedings by not taking objection, it will likely be held that the party has waived the objection.[11]

> Whether failure to seek leave to appeal against refusal of an application that a judge not try the case on account of a reasonable apprehension of bias precluded maintenance of the complaint in an appeal against the final judgment would require consideration of whether the failure to seek that leave was reasonable.[12]

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6 *Locabail (UK) Ltd v Bayfield Properties Ltd (CA)* (2000) 2 WLR 871 at 887JH per curiam.
7 [2012] NSWCA 65; BC201202033.
8 (2000) 205 CLR 337; 63 ALD 577; [2000] HCA 63; BC200007446.
9 Ibid, at [8].
10 (2011) 244 CLR 427.
11 Ibid at [76].
12 Ibid at [84].

Given the breadth and enormity of the subject, practitioners and decision-makers alike will be grateful that for the first time in Australia a text has been published that deals with this difficult area in a comprehensive manner. Professor Tarrant provides the perfect balance by explaining the various rationales and historical underpinnings of the doctrine while also providing useful guidance as to the practical considerations that arise.

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