

COMMERCIAL ARBITRATION: DOES IT REALLY HAVE A FUTURE?

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The Commercial Arbitration Act 2011 has expanded the potential for arbitration to grow as a more popular method of dispute resolution and as a realistically feasible alternative to litigation. National reform has created greater procedural certainty and predictability and has solidified the overarching benefits of arbitration. This has been achieved through various avenues, such as incorporating efficiency, both in cost and time, into the legislation. Further, the purpose in the Act has been given a meaningful status in the interpretation of the subsequent provisions. The case law demonstrates the broad way in which arbitration agreements and the subject matter to which they are applied are interpreted where appropriate, without undermining party autonomy where a narrower approach is to be preferred and is indeed required. The authors explore the Act, its effects and operation as well as highlighting trends and unique examples in case law as to how arbitration has progressed in Victoria, as well as in other states within Australia.

I: INTRODUCTION

With the passing of the *Commercial Arbitration Act 2011* (Vic)¹ ('CAA'), and similar Acts in all other States of Australia, the opportunity for domestic commercial arbitration to really take hold appears to be high. This is reflected in the stated purpose of the CAA set out in section 1AA(a), being:

To improve commercial arbitration processes to facilitate the fair and final resolution of commercial disputes by arbitration without unnecessary delay or expense.

The CAA is largely modelled and reflective of the *UNCITRAL Model Law on International Commercial Arbitration* ('*Model Law*').² The CAA is intended to be as uniform as possible with the *Model Law*. The benefit of this is to increase familiarity with, and standardise as much as possible, domestic and international commercial arbitration; especially so in light of the *International Arbitration Act 1974* (Cth) as amended in 2010.

In furtherance of the regeneration of opportunities represented by the CAA, in March 2014 the Melbourne Commercial Arbitration and Mediation Centre situated in the William Cooper Justice Centre was launched. There is now also a Melbourne Commercial Arbitration and Mediation Hub, a booking service for rooms for the purpose of conducting arbitration and mediation and conciliation in Melbourne launched simultaneously. It is expected that this hub will soon attract many stakeholders with an interest in commercial arbitration.

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¹ The CAA came into effect on 17 November 2011.

² *UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 40th session, Supp No 17, UN Doc A/40/17 (21 June 1985) annex 1, as amended by UN GAOR, 61st session, Supp No 17, UN Doc A/61/17 (7 July 2006) annex 1.

The momentum for arbitration is growing in line with arbitration being the most favoured form of dispute resolution for international trade disputes. It is noted also that the Commonwealth Government now includes arbitration clauses in all of its negotiated free trade agreements.

Before considering recent case law developments this article will examine what may be seen to be seven benefits arising under the new *CAAs*, namely:

- (a) privacy and confidentiality;
- (b) efficiency;
- (c) specialist expertise;
- (d) informality;
- (e) the ability of the arbitral tribunal to exercise a significant degree of control;
- (f) interim measures;
- (g) limited appeals.

II: PRIVACY AND CONFIDENTIALITY

Until the passing of the *CAAs* in the various States, the limited privacy and confidentiality of arbitrations was established by the High Court in *Esso Australia Resources Ltd v Plowman*.³ In that case it was held that when one party produces documents or discloses information to an opposing party in an arbitration that is to be heard in private, the documents or information are not clothed with confidentiality merely because of the privacy of the hearing. Further, the use of a document in such proceedings does not make the document confidential. The Court held absolute confidentiality of documents produced and information disclosed in an arbitration is not a characteristic of arbitration in Australia. Accordingly, a party who enters into an arbitration agreement is not taken merely on that account to have contracted to keep absolutely confidential all documents produced and information disclosed to that party by another party in the arbitration.

Nevertheless, the Court determined that documents produced by a party compulsorily pursuant to a direction by an arbitrator attract the same confidentiality that would attach to them if they were litigating their dispute, subject only to the legitimate interest of the public in obtaining information about the affairs of public authorities.

The Court stated the private character of arbitration inheres in the subject matter of the agreement to submit disputes to arbitration, and does not arise as a result of an implied term to that effect.

The *CAA* has reversed *Esso v Plowman* by introducing sweeping and beneficial changes. Section 2 of the *CAA* contains definitions of ‘confidential information’ and ‘disclose’:

³ (1995) 183 CLR 10.

Confidential information, in relation to arbitral proceedings, means information that relates to the arbitral proceedings or to an award made in those proceedings and includes the following:

- (a) the statement of claim, statement of defence and all other pleadings, submissions, statements or other information supplied to the arbitral tribunal by a party;
- (b) any information supplied by a party to another party in compliance with a direction of the arbitral tribunal;
- (c) any evidence (whether documentary or otherwise) supplied to the arbitral tribunal;
- (d) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal;
- (e) any transcript of oral evidence or submissions given before the arbitral tribunal;
- (f) any rulings of the arbitral tribunal;
- (g) any award of the arbitral tribunal;

... 'disclose', in relation to confidential information, includes publishing or communicating or otherwise supplying the confidential information.⁴

Now, in accordance with s 2 of the *CAA*, the pleadings, information supplied by a party to another party or the arbitral tribunal, the evidence, notes of the arbitral tribunal, transcripts of evidence, rulings and awards of the arbitral tribunal are truly confidential. This emphasises both the privacy and the confidentiality of the arbitration process under the *CAA*.

Section 27E provides that the parties and the arbitral tribunal must not disclose confidential information in relation to the arbitral proceedings unless the parties otherwise agree or unless disclosure is allowed under ss 27F, 27G, 27H or 27I. Thus parties are permitted to 'opt out' of the confidentiality regime.

Section 27G permits the arbitral tribunal to make an order allowing a party to disclose confidential information in circumstances other than those mentioned in s 27F but only after giving each of the parties the opportunity to be heard.

Section 27H permits the Court to prohibit a party from disclosing confidential information if the public interest in preserving the confidentiality of arbitral proceedings is not outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed.

Under s 27I the Court may make an order allowing a party to disclose confidential information in relation to the arbitral proceedings. The circumstances in which it may do so, other than those mentioned in s 27F, are where the Court is satisfied that the public interest in preserving the confidentiality is outweighed by other considerations. Such considerations may render it desirable in the public interest for the confidential information to be disclosed.

⁴ *Commercial Arbitration Act 2011* (Vic) ss 2(1)(a)-(g).

However, the particulars of the disclosure must be no more than what is reasonable for that purpose. An order under ss 27H and 27I can only be made after giving each person who is or was a party to the arbitral proceedings the opportunity to be heard. Under s 27I a party may only apply for an order under sub-s (1) if the mandate of the arbitral tribunal has been terminated under section 32 or a request by the party to the arbitral tribunal to make an order under s 27G has been refused.

The privacy and confidentiality of arbitral proceedings and the new provisions on confidentiality in the *CAA* are of major benefit to parties who desire their disputes not to be open to the public, media scrutiny and commentary.

Examples of where privacy and confidentiality are more likely to be of benefit to parties include partnership disputes (whether they be corporate partners or individual partners in professional practices), joint venture disputes, employment disputes, shareholder disputes, unit holder disputes, intellectual property and licencing disputes, and matters which parties regard as 'commercial in confidence'. In essence, disputes which the parties would not want to have in the public domain and the press using as media headlines. A recent example includes the Gina Rinehart family dispute under the trust deed (which had an arbitration clause which was narrowly construed, so that the removal of the trustee was not a dispute 'under' the trust deed) and the recent matter in the Federal Court with Victoria Shea and Energy Australia involving Mr McIndoe and Mr Holmes. Other disputes which could require privacy and confidentiality are professional practice disputes where one would not want to destroy the goodwill of the practice by clients becoming aware of internal bickering and disputes. This, of course, can extend into corporate partnership and joint ventures as well as in philanthropic organisations. It can also extend to disputes in associations and other organisations between members where it is appropriate to resolve disputes by private and confidential determinative processes, such as arbitration.

III: EFFICIENCY

A combination of the purpose in s 1AA(a) and the paramount object of the *CAA* in s1AC, coupled with the right mind-set of parties, representatives and arbitral tribunals can combine to deliver more efficient and less costly outcomes when compared to litigation. Section 1AC(1) states:

The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.

Section 1AC(2) refers to informality and speed and brings into play proportionality in the sense that parties are free to determine, with the arbitral tribunal, how to resolve the dispute, in a manner which can be cost effective in relation to the amount in dispute and its complexity and importance. Further, s 1AC(3) states:

This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.

This section mandates that the arbitral tribunal ‘must’ exercise its functions so that the paramount object of this is achieved. In the Second Reading Speech sub-s (3) was said to be intended to promote commercial efficiency in conduct of private dispute resolution.⁵ The legislative enunciation of the paramount object in s 1AC of the *CAA* is unique. Under the *LAMA Arbitration Rules*, r 1 provides for an overriding objective:

... that the arbitration is conducted: fairly, expeditiously and cost effectively; and in a manner which is proportionate to: the amount of money involved; complexity of the issues and any other relevant matter.⁶

Arbitration can be seen as being uniquely positioned to achieve the paramount object. The paramount object will be interpreted by giving effect to its purpose and simultaneously maintaining the unity of the overall statutory scheme of the *CAA*.⁷ Thus the paramount object in s 1AC will be interpreted in partnership with the key provisions of domestic commercial arbitration; ss 18 and 19.

Section 18 provides that the parties must be treated with equality and each party must be given a reasonable opportunity to present their case. The note to s 18 states that it differs from the *Model Law* to the extent that the *Model Law* requires a party to be given a *full* opportunity of presenting the party’s case whereas s 18 refers to a *reasonable* opportunity. The extent to which a party may be regarded as having been accorded a reasonable opportunity of putting its case will likely be determined according to the dictates of efficiency and expense in a way that differs from international practice under the *Model Law*. However, it is unlikely that there will be any useful purpose served by trying to draw a distinction between these two terms.

Section 19(1) reiterates the time honoured and legally recognised right of party autonomy in agreeing to the procedures to be adopted. However, it is now couched in terms that it is ‘subject to the provisions of this Act’. Further s 19(2), which enables the arbitral tribunal to conduct the arbitration in such manner as it considers appropriate failing agreement of the parties, is also conditioned by the words ‘subject to the provisions of this Act’.

The effect of this condition ‘subject to the provisions of this Act’ draws upon the purpose and in particular the paramount object of the *CAA*. The legislative entrenchment and enunciation of the paramount object is unique. It demonstrates that public policy has evolved, shifting arbitral norms of behaviour with the demand for efficiency and avoidance of expense in the private domain of arbitration.⁸ It is also entrenched by s 1AC(3) which compels the arbitral tribunal, consistent with the principles of equality and fairness, to exercise its functions without unnecessary delay or expense bringing into account proportionality. In addition s 24B(1), which relates to general duties of the parties, the *CAA* requires that ‘parties must do all things necessary for the proper and expeditious conduct of

⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 August 2011, 2642-4 (Robert Clark, Attorney General).

⁶ Institute of Arbitrators and Mediators Australia, *LAMA Arbitration Rules* (at 1 June 2007) r 1. These rules were based on the Lord Woolf Reforms of the United Kingdom which was later in 2010 incorporated into *Civil Procedure Rules* in New South Wales and the *Civil Procedure Act 2010* (Vic). The new *LAMA Arbitration Rules* reflecting the *CAA* and the *UNCITRAL Model Rules* came into effect on 2 May 2014.

⁷ Michael Heaton, ‘Understanding the Paramount Object in the Context of Party Autonomy’ (2012) 31(1) *The Arbitrator and Mediator* 15, 19.

⁸ *Ibid* 17.

the arbitral proceedings'. Further, the mandates of s 24B(2) require parties to comply without undue delay with any order or direction of the arbitral tribunal with respect to any procedural, evidentiary or other matter. Finally under s 24B(3) a party must not wilfully do, or cause to be done, any act to delay or prevent an award being made. Thereby, any tactics to stall the arbitral proceedings are prohibited. There is no equivalent provision in the *Model Law*. Therefore, there now is a real and meaningful imperative for efficiency, speed, cost effective procedures and proportionality. Any reasonable party would desire this and there are now powers to facilitate how to compel efficiency against any recalcitrant party.

IV: INFORMALITY

Tied in with efficiency is the paramount object that commercial disputes be resolved not only in a cost effective manner, but informally and quickly. This links in substantially, again, with ss 18, 19, 23 and 24.

As observed, s 19 enables the parties to agree on the procedure to be followed and failing agreement, for the arbitral tribunal to conduct the arbitration in such a manner as it considers appropriate. The arbitral tribunal can consider and determine admissibility, relevance, materiality and weight of evidence. It can make orders or give directions for examination of a party or witness on oath or by affirmation.

Under s 23, subject to any contrary agreement of the parties or a direction of the arbitral tribunal, within the time agreed by the parties or determined by the arbitral tribunal, the claimant must state facts supporting his or her claim, the points at issue and the relief or remedies sought. The respondent must state their defence with respect to these particulars. Under s 23(2) the parties may submit with their statements, documents they consider relevant and may add a reference to documents or other evidence they will submit. Under s 23(3) parties may amend or supplement their claims or defences unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it. Finally, s 23(4) expressly provides that sub-s (1) does not require a statement by the claimant or respondent to be in a particular form.

Section 23, together with the paramount object and purpose, gives the parties and the arbitral tribunal maximum flexibility to develop the procedures to apply to the arbitral proceeding by taking into account the nature of the dispute, the amount in dispute, the complexity of the dispute, the number of disputes within the dispute and their variety so that it may adapt the most cost effective, efficient procedure to move the arbitration to a conclusion.

This highlights the differences between arbitration and litigation and the flexibility that arbitration can provide in tailoring procedures to achieve an expeditious, cost effective, informal and quick resolution of the disputes and differences.

Section 24, which covers hearings and written proceedings, similarly provides in sub-s (1) that subject to any contrary agreement by the parties, the arbitral tribunal is to decide the following; whether to hold oral hearings for presentation of evidence or oral argument, or whether the proceedings are to be conducted on the basis of the documents

and other materials. Subsection (2) provides that unless the parties have agreed that no hearings be held, the arbitral tribunal must hold hearings at an appropriate stage of the proceedings 'if so requested by a party'.

Further, sufficient advanced notice of any hearing and any meeting of the arbitral tribunal for the purpose of inspection of goods or other property or documents is required under sub-s (3). Subsections (4) and (5) require statements, documents and information supplied to the arbitral tribunal by one party to be communicated to the other and also any expert report or evidentiary document on which the arbitral tribunal may rely, be communicated to the parties. Therefore, s 24 permits maximum flexibility and informality to achieve the cost effective, informal and expeditious resolution of the disputes.

The provisions of the *CAA* are designed to have parties and arbitrators review the disputes individually to analyse what is the best procedure for the informal, speedy, efficient and proper resolution of the dispute and then adopt the procedure most suited to that end.

In conclusion, the informality of the arbitration procedure can be a real benefit and advantage to parties over the formal litigation procedure.

V: ARBITRAL TRIBUNAL: SPECIALIST EXPERTISE

Quite apart from benefits promoted by the *CAA*, a real benefit of arbitration (as opposed to litigation) is the ability to have an arbitral tribunal with expertise in the subject matter of the dispute. Comprehension of the evidence of various technical, specialist and other issues that may be the subject of dispute calls for arbitrators who are experienced in the subject matter the parties are disputing. This is particularly beneficial to the parties, as each party usually has the chance to nominate an arbitrator. As a result, arbitrators will generally have a good understanding of the issues they are expected to address. This can save a lot of time for the parties in dispute in areas such as building and construction, intellectual property, information technology, infrastructure, energy pricing, maritime disputes and other trade related disputes which require specialist knowledge.

Moreover, it is possible to have an arbitral tribunal consisting of more than one arbitrator so that if necessary, multiple skills and areas of expertise are available to understand the evidence which is given. It is important to emphasise that this expertise is to understand the evidence, not to replace or substitute the evidence for the arbitrator's expertise. By the same token, the expertise is also helpful in testing the evidence because of the deeper understanding of the evidence being presented.

VI: CONTROL OF THE ARBITRATION AND CERTAINTY

Since the arbitration is within the control of the parties (in accordance with party autonomy) and the arbitral tribunal and secondly, the paramount object requires the *CAA* to be interpreted and the functions of the arbitral tribunal to be exercised, so that as far as practicable, the paramount object of the *CAA* is achieved. The arbitral tribunal has considerable power to lay the down the appropriate timetable and set dates to create

certainty and speed which is often missing in litigation. As observed the powers in s 19 and regarding the preliminary stages in s 23, as well as the hearing in s 24, combined with the paramount object, require the arbitrator to act, if necessary, with a firm hand to produce certainty of timetabling and of any hearing. These benefits of arbitration combined with the appropriate culture and mindset of parties, practitioners and arbitral tribunals applying the *CAA* present a real alternative to litigation and the authors consider the opportunities abound.

VII: INTERIM MEASURES

Unless otherwise agreed by the parties, arbitral tribunals now have legislative fiat to grant interim measures. The provisions are contained in pt IVA Interim Measures of the *CAA*. Section 17(1) provides the power and s 17(2) defines an interim measure as:

Any temporary measure whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally resolved, the arbitral tribunal orders a party to:

- (a) maintain or restore the status quo pending determination of the dispute; or
- (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; or
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) preserve evidence that may be relevant and material to the resolution of the dispute.

Sub-section (3) provides that, without limiting sub-s (2), the arbitral tribunal may make orders with respect to security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, inspection of property which is or forms part of the subject matter of the dispute, taking a photograph of any property which is or forms part of the subject matter of the dispute, samples to be taken from, or any observation to be made of or experiment conducted on, any property which is or forms part of the subject matter of the dispute or dividing, recording and strictly enforcing the time allocated for a hearing between the parties (that is, a stop clock arbitration).

Section 17A sets out the conditions for granting interim measures under ss 17(2)(a), (b) and (c). First, that harm not adequately repairable by an award of damages is likely to result if the measure is not ordered. Second, that harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted. Third, there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination of the last mentioned possibility does not affect the discretion in making a subsequent determination.

Division 3 of pt IVA contains other provisions applicable and div 4 relates to the recognition and enforcement of interim measures.

As such, there is now a full armoury for the arbitral tribunal to control the arbitration so that any attempt by a party to thwart the arbitration may be quelled by interim measures. Obviously they have similarities to the grant of interlocutory injunctions in litigation, providing for preservation of assets and control of proceedings. The benefit of the interim measures provisions is that they can be acted upon very quickly by the arbitral tribunal. Under div 5 of pt IVA the Court has the same power to issue interim measures as it has in relation to proceedings in courts. Under s 17J(2) the Court is to exercise the power in accordance with its own procedures taking into account the specific features of domestic commercial arbitration. This again emphasises and supports the full armoury given by the *CAA* to control the destiny of the arbitration.

VIII: APPEALS

Part 7 of the *CAA*, recourse against award, comprises of ss 34 and 34A. Section 34(1) provides that recourse to the Court against an arbitral award may be made only by an application for setting aside in accordance with sub-ss (2) and (3) or by appeal under s 34A. Section 34(2) provides that an award may only be set aside if:

- (a) the party making the application furnishes proof that:
 - i) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it under the law of this State; or
 - ii) the party making the application was not given proper notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to present the party's case; or
 - iii) the award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration provided that if decisions or matters submitted to arbitration can be separated from those not so submitted only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

- iv) the composition of the arbitral tribunal or the arbitral procedures was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement was not in accordance with this Act; or
- (b) the Court finds that:
- i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the State; or
 - ii) the award is in conflict with the public policy of the State.

Section 34(3) requires any application to set aside an award must be made within 3 months from the date on which the party making the application had received the award, or if a request had been made under s 33, from the date on which the request had been disposed of by the arbitral tribunal. Section 34 provides a limited but reasonable time for parties to exercise this action if required. Under s 34A an appeal lies to the Court on a question of law arising out of an award if:

- (a) the parties agree before the end of the appeal period (3 months) that an appeal may be made under section 34A; and
- (b) the Court grants leave.

Under sub-s (3) the Court must not grant leave unless a number of requirements are met. These comprise:

- (a) that the determination of the question will substantially affect the rights of one or more parties; and
- (b) that the question is one which the arbitral tribunal is asked to determine; and
- (c) that on the basis of the findings of fact in the award;
 - i) the decision of the tribunal on the question is obviously wrong; or
 - ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and
- (d) that despite agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

Hence, the ability to set aside or appeal an award is now very limited compared to the former Act.⁹ Further, in relation to appeals and the grant of leave under s 34A(5) the Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required. The benefit of these provisions is to bring finality to the

⁹ *Commercial Arbitration Act 1984* (Vic).

dispute, avoid regurgitation of factual issues and severely limit the ability of a party to set aside or appeal on grounds of natural justice and a decision that is ‘obviously’ wrong in law. So once a party has made its arbitration bed it is destined to lie in it.

IX: CASE LAW

A: Constitutional Validity of Sections 5, 34, 35 and 36 of the CAA

In *Ashjal Pty Ltd v Alfred Toepfer International (Aust) Pty Ltd*¹⁰ the validity of ss 5, 34, 35 and 36 of the *CAA* was in issue beyond the legislative power of New South Wales. The basis of the challenge was remarkably similar to that in the High Court case of *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.¹¹ The plaintiff relied upon two reasons. First, that the aforesaid sections were an impermissible attempt to remove from the Court its constitutionally entrenched jurisdiction to review arbitral awards for ‘jurisdiction error’ and, secondly, that ss 35 and 36 requiring the Court to enforce arbitral awards except in limited circumstances together with ss 5 and 34 impermissibly impair the ‘institutional integrity’ of the Court by requiring the Court to enforce an arbitral tribunal (sic) infected by jurisdictional error.

Stevenson J refused to make the declarations sought by the plaintiff. His Honour noted the nature of private arbitrations under the *CAA*. There was no analogy with cases such as *Kirk v Industrial Court of New South Wales*.¹² This was because an arbitrator when making an award, in the case of voluntary submission to arbitration, was not exercising public authority. Kirk’s case was concerned with the exercise of State executive and judicial power. His Honour also noted that prerogative writs do not issue in respect of the decisions of private arbitrators. Further on His Honour’s analysis of the jurisdiction of courts to review arbitral awards for error, he found that the history of such review was not suggestive of an entrenched inherent jurisdiction. There was no interference with the institutional integrity of the Court. The Court was not being used as a mere agency of the executive.¹³ The Court’s function was not being usurped or directed by the executive. The Court retained an adjudicative role in determining whether to enforce an arbitral award or not. This is similar to the role a court plays when enforcing a foreign judgment. It has no adjudicative role in relation to the foreign judgment. Its role is limited to whether to enforce the foreign judgment.

¹⁰ [2012] NSWSC 1306 (26 October 2012).

¹¹ [2013] HCA 5 (13 March 2013).

¹² (2010) 239 CLR 531.

¹³ Cf *Kable v DPP (NSW)* (1996) 189 CLR 51.

B: Proportionate Liability and Arbitration in Australia

In *Aquagenics Pty Ltd v Break O'Day Council*¹⁴ the Full Court of the Supreme Court of Tasmania found it unnecessary to come to a final conclusion as to whether the *Civil Liability Act 2012* (Tas) (being the legislation applying proportionate liability in Tasmania) was applicable in an arbitration under the *Commercial Arbitration Act 1986* (Tas). Two of the three judges however (Tennent and Wood JJ) expressed clear views, albeit *obiter*, that proportionate liability could not apply in arbitrations. Tennent J considered:

There is no definition of 'tribunal' in the Act. Part 9A applies to "apportionable claims". The definitions of what are defined to be such claims both expressly refer to claims "in an action for damages". An arbitrator does not deal with an action. An arbitrator deals with a dispute. The Act, Pt9A, contemplates court proceedings involving a number of parties, and the court is empowered to join non-party concurrent wrongdoers. An arbitrator has no power to join parties not directly involved in the dispute being dealt with, although he or she can consolidate arbitrations with the consent of the parties. Further, an arbitrator's powers are derived from the agreement between the parties to send a matter to arbitration.¹⁵

Tennent J concluded that there was nothing in the Act that expressly extended the Act to apply to arbitrations.¹⁶

C: Scope of Arbitration Clause

This case considered an application for preliminary discovery, and whether urgent interlocutory relief should be granted; or whether a stay should be granted under s 8 *CAA*. *Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd*,¹⁷ Amcor and Baulderstone entered into a project delivery proposal agreement ('PDPA') in relation to construction of a new building to house a large paper machine for Amcor in November 2008. Prior to the execution of the PDPA Baulderstone representatives suggested that the most appropriate form of contract for the works would be a Guaranteed Maximum Price contract ('GMP'). In March and April 2010 drafts of a GMP were exchanged by the parties. In May 2010 the PDPA was amended to take account of the intention of the parties to enter into a GMP for Stage 2 of the works.

Negotiations in respect of the form of the GMP continued during 2010. Ultimately Baulderstone's holding company, Bilfinger, withdrew approval for Baulderstone to be involved in the works if governed by a GMP contract. The matter remained unresolved and Amcor entered into an alternative construction contract with another party.

¹⁴ [2010] TASFC 3 (10 May 2010).

¹⁵ *Ibid* [96].

¹⁶ *Ibid* [98], [108].

¹⁷ [2013] FCA 253 (27 March 2013).

Amcor commenced an application for preliminary discovery against Baulderstone and its individual representatives who were said to have represented that Baulderstone had the relevant approval to enter into a GMP contract. Amcor sought preliminary discovery to confirm its belief that it may have a right to issue a proceeding against Baulderstone, its representatives and Bilfinger.

Baulderstone opposed the application on the basis that the Court was required to stay the application for preliminary discovery under s 8 of the *CAA*. It pointed to cl 31 of the PDPA which provided that a party must not start court proceedings (excepting interlocutory relief) unless it had complied with cl 31. Clause 31 provided for a dispute resolution procedure including ultimately arbitration. Dispute was defined as a dispute arising out of or in connection with the agreement.

Marshall J considered that the words ‘in connection with’ had been given a wide and generous interpretation in the cases. Amcor contended that the relief it might obtain against Baulderstone could include the following:

- Relief pursuant to section 52 of the *Trade Practices Act 1974* (Cth) which applied at the relevant times;
- Against the proposed individual respondents;
- Against Baulderstone for breach of contract terms dealing with good faith;
- Against Baulderstone for equitable compensation by reason of Amcor’s reliance upon matters, assumptions and representations held out by Baulderstone.

Amcor maintained that such matters did not arise ‘out of or in connection with’ the PDPA rather the dispute concerned a proposed GMP contract that never eventuated.

Marshall J accepted Baulderstone’s submission that the PDPA extended its reach to each of the proposed causes of action foreshadowed by Amcor. The application for preliminary discovery concerned those claims, and, it followed that the application for preliminary discovery fell within the scope of a dispute arising out of or in connection with the PDPA.

Amcor contended that the application for preliminary discovery fell under the exception in cl 31 dealing with applications for urgent interlocutory relief. Marshall J accepted that there could be situations where the exception would apply such as where the preservation of the subject matter of the dispute was necessary. But such was not the case here. An application for preliminary discovery did not, from a policy perspective, require urgent intervention from a court, and, might be more appropriately addressed during the course of the arbitration.

Amcor also submitted that the fact that there were proposed personal parties who were not parties to the PDPA required that the application ought not be stayed. Baulderstone submitted that the Court could in the exercise of its discretion and having regard to s 23 of the *Federal Court of Australia Act 1976* (Cth) order a stay of the application as regards the individual respondents.

Marshall J acceded to Boulderstone's submissions and ordered a stay in respect of the proposed proceeding against Boulderstone pursuant to s 8 of the *CAA*; and, in respect of the proposed proceeding against the individual respondents pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth).

D: Construction of Dispute Resolution Clauses

In *WTE Co-Generation v RCR Energy Pty Ltd*¹⁸ the dispute resolution cl 42 in a building contract provided in part as follows:

42.2 Conference

Within 7 days after receiving a notice of dispute, the parties shall confer at least in the presence of the superintendent. In the event the parties have not resolved the dispute then within a further 7 days a senior executive representing each of the parties must meet to attempt to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to deal with such resolution of methods. All aspects of every such conference except the fact of occurrence shall be privileged.

If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute may be referred to litigation.¹⁹

Application was made by the defendants that the proceeding be stayed until the parties had complied with the contractual dispute resolution clause. The application was made pursuant to the *Civil Procedure Act 2010* (Vic) or alternatively s 30 of the *Supreme Court Act 1986* (Vic). The plaintiffs said the clause was uncertain and unenforceable.

Vickery J then dealt with legal principles in relation to contractual dispute resolution clauses and set out the following principles as to whether a stay should be granted where a contractual dispute resolution process is expressed to be a precondition to litigation and where the enforceability of such provisions is put in issue:

4. Dispute resolution clauses in contracts should be construed robustly to give them commercial effect. The modern approach to the construction of commercial agreements is generally to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement.
6. A dispute resolution clause in a contract, consistently with public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, enforceable content be given to contractual dispute resolution clauses.

¹⁸ [2013] VSC 314 (21 June 2013).

¹⁹ *Ibid* [12].

7. The trend of recent authority is in favour of construing dispute resolution clauses where possible, in a way that will enable those clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.²⁰

His Honour held that cl 42.2 providing for senior executive representing each of the parties to meet to attempt to resolve the dispute or agree on methods for doing so, was unenforceable. His Honour stated:

It is not for the court to substitute its own mechanism where the parties have failed to agree upon it in their contract. To do otherwise would involve the court in contractual drafting, which is a distinctly different exercise from contractual construction of imprecise terms...Sub- clause 42.2 fails this yardstick. The sub-clause amounts to an agreement to agree on the process of dispute resolution to be employed and is not therefore enforceable due to this inherent uncertainty.²¹

The application for a stay was refused.

E: Survival of Arbitration Clauses

*Aquagenics Pty Ltd v Tasmanian Water & Sewerage Corp (Southern Region) Pty Ltd*²² followed the decision of Slattery J in *Gilgrandra Marketing Cooperative Ltd v Australian Commodities and Marketing Pty Ltd*²³ that s 42 of the *Commercial Arbitration Act 2011* (Tas) establishes that s 8 has retrospective effect.²⁴

Holt AsJ also dealt with authorities to the effect that despite determination of the principal agreement by repudiation and acceptance, an arbitration clause in the principal agreement survives the termination of the agreement. Holt AsJ referred to a passage in *Heyman v Darwins Ltd*.²⁵ He then referred to the judgment of the High Court and that of Mason J as he then was with whom Aickin and Wilson JJ agreed in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*²⁶ that a distinction is to be drawn:

...between a contract void ab initio, in which event there is no valid submission to arbitration, and a valid contract which is subsequently repudiated, where acceptance of the repudiation leaves the contract, including the arbitration clause, on foot for the purpose of enforcement, though performance under the contract is at an end.

In this circumstance the arbitration clause remains on foot. Holt AsJ also referred to a Full Court of Western Australia decision of *Eastern Metropolitan Regional Council v Four Seasons Constructions Pty Ltd*²⁷ as being authority that an arbitration clause in terms of the one

²⁰ Ibid [39].

²¹ Ibid [46]-[47].

²² [2013] TASSC 13 (19 April 2013).

²³ [2010] NSWSC 1209 (22 October 2010).

²⁴ [2013] TASSC 13 (19 April 2013) [25]-[31].

²⁵ [1942] AC 356 in *Moschi v L& Air Services* [1973] AC 331, 350 (Lord Diplock).

²⁶ (1982) 149 CLR 337, 364.

²⁷ [1999] WASCA 144 (23 August 1999).

currently under consideration will survive even after the parties performance obligations have come to an end and even if the agreed preliminary involvement of the contract superintendent becomes impossible.

His Honour decided that s 8 applied to the counterclaim for liquidated damages and as a consequence referred the matters the subject of the defendant's defence, set off and counterclaim, with the exception of those matters being purely matters of defence, to arbitration.

F: Section 43 of the CAA as Transitional and Retrospective

Section 43 of the *CAA* provides:

Savings and transitional provisions

- (1) Subject to subsection (2)—
 - (a) this Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and to an arbitration under such an agreement; and
 - (b) a reference in an arbitration agreement to the *Commercial Arbitration Act 1984*, or a provision of that Act, is to be construed as a reference to this Act or to the corresponding provision (if any) of this Act.
- (2) If an arbitration was commenced before the commencement of this Act, the law governing the arbitration and the arbitration agreement is to be that which would have been applicable if this Act had not been enacted.
- (3) For the purposes of this section, an arbitration is taken to have been commenced if—
 - (a) a dispute to which the relevant arbitration agreement applies has arisen; and
 - (b) the arbitral tribunal has been properly constituted.

In *Hancock v Rinehart*²⁸ Gina Rinehart and others claimed that on the issues as joined in recently amended pleadings there was a dispute 'under' the Deed within the meaning of cl 20 of the Deed. The Deed was a confidential settlement deed of August 2006 and a confidential settlement deed of 13 April 2007. It was also contended that the dispute was a 'matter which is the subject of an arbitration agreement' within the meaning of s 8(1) of the *Commercial Arbitration Act 2012* (WA) ('*CAA* (WA)') and must be referred to arbitration. The plaintiffs to the existing litigation and respondents to the application resisted the

²⁸ [2013] NSWSC 1352 (18 September 2013), affirmed on appeal in *Rinehart v Hancock* [2013] NSWCA 326 (3 October 2013).

application on various bases including that the applicants were seeking to re-litigate matters the subject of a Court of Appeal judgment.

Bergin CJ considered in the circumstances it was necessary to review the amended pleadings to identify the new claims made by the plaintiffs and the defences thereto for the purpose of determining whether there was a dispute ‘under’ the Deed. Her Honour also considered it would be necessary to review the relevant provisions of the Deed. Her Honour further noted that the *CAA* (WA) came into force on 7 August 2013 and that the major difference is that there was now a mandatory statutory requirement that where ‘an action is brought in a matter which is the subject of an arbitration agreement’ the court must refer the parties to arbitration, unless the arbitration agreement is null and void, inoperative or incapable of being performed (s 8(1)).

Her Honour referred to s 7(1) of the *CAA* (WA) which defines an ‘arbitration agreement’ as an ‘agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not’. Her Honour then said cl 20 of the Deed fell within the definition of arbitration agreement in s 7(1) of the *CAA* (WA).

As to what constitutes ‘a matter which is the subject of an arbitration agreement’ her Honour referred to a number of authorities including a passage of Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd*²⁹ to the effect that there must be a direct relationship between the matter before the court and the matter which is the subject of the arbitration agreement and ordinarily this is likely to arise where the relationship between the two is sufficiently close as to give rise to a material risk of conflicting decisions of fact or law. His Honour also referred to the prospect of a stay of arbitral proceedings which were ‘clearly coextensive’.³⁰

Her Honour also referred to a passage in *Tanning Research Laboratories Inc v O’Brien*³¹ in relation to a matter as appearing in s 7(2) of the *International Arbitration Act 1974* (Cth):

Even so, the expression ‘matter ... capable of settlement by arbitration’ indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. See Flakt. It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy. The words ‘capable of settlement by arbitration’ indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power.

Thus, in some cases a stay will be ordered. In other cases the litigation may be stayed and it may be that an arbitration in relation to matters not stayed proceeds and the litigation in relation to other matters proceeds at the same time.

²⁹ [2006] 3 NZLR 794, [58].

³⁰ Ibid [61].

³¹ (1990) 169 CLR 332, 351 (Deane and Gaudron JJ).

Her Honour then noted that s 8(1) of the *CAA* (WA) provides that it is the ‘matter’ in respect of which the action is brought. Her Honour considered the matter the subject of the action is the claim that Gina Rinehart had misconducted herself in breach of trust, the appropriate remedy for which is claimed to be her removal as trustee of the trust. Further Gina Rinehart’s conduct in causing the 2006 amendments was but one aspect of her conduct relied upon in the matter the subject of the action before the court. Her Honour then said ‘[h]owever, for the purposes of these applications, if there is a dispute ‘under’ the Deed, I will assume that the 2012 Act requires that the parties, as opposed to the proceedings, be referred to arbitration’.

Her Honour then analysed the three identified disputes in Gina Rinehart’s notice. Her Honour said that for there to be a dispute there would have to be a ‘sustainable’ assertion in the context of these applications and one in respect of which there would be reasonable prospects of success that is reasonable prospects of finding that any of the new claims pleaded in the third statement of claim have been released by deed.

Her Honour then analysed each of the three disputes and found that in relation to each of them the alleged dispute was not sustainable. Therefore there were no disputes under the Deed to be referred to arbitration thus a stay under s 8(1) of the *CAA* (WA) should be refused.

What is important from this judgment is that s 43 is retrospective, in relation to what constituted a ‘matter’ and what constituted a ‘dispute’.

G: Setting Aside an Award – section 34(2)(a)(iv)

In *Ringwood Agricultural Company Pty Ltd v Grain Link (NSW) Pty Ltd*³² an application was made for an order setting aside an arbitral award on the grounds the arbitral procedure was not in accordance with the agreement and was not in accordance with the *Commercial Arbitration Act 2010* (NSW) (*CAA* (NSW)) because the tribunal declined to give it an oral hearing which it claimed it was entitled to require and that it was not given a reasonable opportunity of presenting its case.

The arbitral award was made on 8 October 2012 awarding the defendant damages of AUD 359 413. The final award was preceded by an interim award described by the tribunal as a ‘partial award’ published on 20 June 2012 in which the tribunal ruled it had jurisdiction and the plaintiff was liable to the defendant for damages for breach of contract. The tribunal did not in the partial award determine the quantum but directed the parties to make submissions in relation to quantum. On 17 August 2012 the tribunal published procedural orders to facilitate that process. Sections 24(1)-24(2) of the *CAA* (NSW) provide:

24 Hearings and written proceedings

- (1) Subject to any contrary agreement by the parties, the arbitral tribunal is to decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings are to be conducted on the basis of documents and other materials.

³² [2013] NSWSC 191 (21 February 2013).

(2) However, unless the parties have agreed that no hearings are to be held, the arbitral tribunal must hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

Section 18 of the *CAA* (NSW) provides: ‘The parties must be treated with equality and each party must be given a reasonable opportunity of presenting the party’s case’.

The plaintiff’s complaint was that in breach of ss 18 and 24(2) the tribunal failed to hold an oral hearing with respect to determination of quantum, despite the plaintiff’s request to do so. The arbitration was conducted under the Grain Trade Australia (‘GTA’) *Dispute Resolution Rules*.³³ Throughout the arbitration until the partial award, the plaintiff had not taken the opportunity to be involved.

Hammerschlag J noted that the GTA art 27.1 and s 24 contemplate hearings to facilitate the tribunal determining issues truly before it. He found the plaintiff had eschewed an oral hearing on all issues (liability and damages) by declining to participate in the proceedings up to and including the partial award. All that was left for determination after the partial award was resolution of the two issues described in the partial award and in respect of which the plaintiff now accepted that it had no challenge. His Honour considered a reading of the final award made it clear that is how, correctly, the tribunal saw the position. The issues that the plaintiff accepted that there was no challenge to were the determination of the tribunal that the washout value of the grain was AUD 104 per tonne and that as appears from the final award the tribunal determined in favour of the plaintiff, correctly, that only the delivery shortfall was to be taken into account.

His Honour noted the plaintiff was undoubtedly entitled to an oral hearing on those issues but it did not then, and does not now, seek that. Not only was it given the opportunity, from the outset it was given the opportunity to present its case in full, a course which did not commend itself to the plaintiff.

His Honour considered the arbitral procedure was not otherwise than in accordance with the agreement of the parties, nor was it otherwise than in accordance with the Act. His Honour found it could not be said the plaintiff was not given a reasonable opportunity to present its case.

His Honour referred to the case of *Grand Pacific Holdings Pty Ltd v Pacific China Holdings Ltd (in liq) (No 1)*³⁴ where the Hong Kong Court of Appeal considered the Hong Kong equivalent of s 34(2)(a)(ii) which provides that an arbitral award may be set aside by the court if the party making the application was not given proper notice of the appointment of an arbitral tribunal, or of the arbitral proceedings, or was otherwise unable to present the party’s case. In the context of that section the court held³⁵ that the conduct complained of must be serious, even egregious, before the court could find that a party was otherwise unable to present his case. The court held³⁶ that burden is on an applicant to show that he had or might have been prejudiced. The court observed that in some cases the prejudice is obvious and it matters little who has the burden.

³³ Grain Australia, *Dispute Resolution Rules* (at June 2014).

³⁴ [2012] 4 HKLRD 1.

³⁵ Ibid [95].

³⁶ Ibid [106].

Hammerschlag J considered he should follow the approach taken by the Hong Kong Court of Appeal that the plaintiff had the burden of showing that any departure from any requirement under the Act, or the parties' agreement, did or might have prejudiced it. The principle that: where there is a departure from the rules of natural justice at a trial, an aggrieved party will not get a new trial, if it would inevitably result in the same result, was affirmed by the High Court in *Stead v State Government Insurance*.³⁷

His Honour further noted the tribunal determined that the place for delivery was that specified in the written contract which the plaintiff had breached by failing to deliver there. He considered, on any view, the plaintiff was bound by those findings. His Honour also found that the matters the plaintiff proposed to contest were self-evidently untenable. His Honour thus considered there was no prospect that an oral hearing to pursue the propositions the plaintiff wished to had any prospect of success. The proceeding was dismissed.

This case highlights that a party bound by an arbitration agreement and who fails to participate runs the real risk of an award against it which it is unable to set aside. It also highlights the difficulty of setting aside an award under the new *CAAs*.

H: Enforcement of Awards

In *Yesodei Hatorah College Inc v The Trustees of the Elwood Talmud Torah Congregation*³⁸ the Congregation was an award creditor in an arbitration conducted under the *Commercial Arbitration Act 1984* (Vic) and sought to enforce its award as a judgment of the Court. The College sought orders for leave to appeal and if granted to vary or set aside the award.

The reference to arbitration included the following provision:

2. Basic principles relating to arbitration

The parties agree that the arbitrator may determine any question that arises for determination in the course of the arbitration by reference to considerations of general justice and fairness.

Croft J considered whether the requirements of s 38(5) of the Act had been met.³⁹ His Honour had no difficulty deciding that the question of law raised by the appeal 'could substantially affect the rights of one or more parties'. His Honour considered on the basis of the authorities that the requirement of strong evidence of error is satisfied where a 'strong prima facie case' of error is established. The same circumstances may attract both of the sub-paragraphs of s 38(5)(b) of the Act.

As to the requirement that an appeal on the basis of an error of law also required a finding that the relevant question may add or be likely to add substantially to the certainty of commercial law. The College submitted that the arbitrator had made errors of law in

³⁷ (1986) 161 CLR 141.

³⁸ [2011] VSC 622 (22 December 2011).

³⁹ Ibid [18].

failing to apply s 22(2) of the Act to the matters in dispute including whether the parties had entered into a binding agreement for lease.

The arbitrator in his award expressly stated that in determining whether there was a concluded agreement for lease he applied the law and the common law principles relating to the formation of enforceable contracts. In this he said s 22(2) had no operation in determining this question.

The argument by the College was that the arbitrator erred in not applying s 22(2). Properly construed it was submitted that s 22(2) did not require the arbitrator to determine the issue strictly in accordance with common law principles of contract law but required him to have regard to wider considerations. Those considerations enabled him to temper the effect of evidentiary, procedural and technical rules.

Croft J undertook a detailed examination of authorities dealing with s 22(2) and similar concepts in other jurisdictions. On the basis of that analysis he concluded that:

... it is clear, in my opinion, that the provisions of section 22(2) of the Act do not require an arbitrator to determine matters the subject of the arbitration in accordance with strict legal principles. The arbitrator may have regard to such principles, but is permitted and required to depart from them and to have regard to wider considerations in determining issues in dispute “by reference to considerations of general justice and fairness” according to the statutory mandate provided by section 22(2), a mandate which provides him with a very broad canvass encompassing the possibility of deciding matters *ex aequo et bono* or *amiable compositeur*.⁴⁰

However, the court may not ‘second guess’ the application of considerations of general justice and fairness. His Honour considered that for the reasons put by the College the arbitrator had erred in ruling that s 22(2) had no application in determining whether an agreement for lease had been reached by the parties. In these circumstances there was an error of law on the face of the award that went to the whole and fundamental basis of the arbitrator’s mandate.

The award in its entirety could not stand. Compare now, however, with s 36 of the *CAA*. The real importance of this decision in the context of the *CAAs* is the discussion on ‘considerations of general justice and fairness’ as it appeared in s 22(2) of the 1984 Act, *amiable compositeur* and *ex aequo et bono* as appearing in art 28(3) of the *Model Law*.⁴¹ Compare now with s 28(4) of the *CAA* and art 28(3) of the *Model Law*.

⁴⁰ Ibid [70].

⁴¹ Ibid [40]-[78].

X: CONCLUSION

The following may be discerned from the cases referred to above.

- First, the *CAAs* are within the legislative power of the States.
- Second, proportionate liability does not apply to arbitrations under the *CAA*. The authors do however understand there is a push from the insurance industry to change this.
- Third, courts strive to uphold commercial bargains including dispute resolution clauses.
- Fourth, dispute resolution clauses should be drafted carefully so as to avoid: (a) anything being left to be agreed; (b) anything being incomplete; and (c) uncertain content.
- Fifth, a dispute resolution clause referring disputes or matters ‘under’ an agreement is construed more narrowly than one referring disputes ‘arising out of or in connection with’ the agreement.
- Sixth, arbitration agreements are generally construed to be separate to and survive determination of the principal agreement.
- Seventh, the *CAA*, by s 43 or its equivalent, are retrospective.
- Eighth, in s 8 of the *CAA* ‘matter the subject of the arbitration agreement’ is a wide expression and covers the differences between the parties or the controversies that are covered by the terms of the arbitration agreement but that does not necessarily mean the whole matter in controversy in the court proceeding. One yardstick is whether there is a possibility of inconsistent findings of fact or law and another is whether the dispute or part thereof is within the arbitration agreement.
- Ninth, under s 8 of the *CAA* it is mandatory referral to arbitration, subject to satisfying the requirements of section 8.
- Tenth, the ability to set aside or appeal an award is extremely limited.
- Eleventh, for there to be a dispute there must be a sustainable assertion in respect of which there would be reasonable prospects of success. Finally, the Victorian Bar has established a Commercial Arbitration Appointment Service and an Expert Determination Appointment Service to operate where parties cannot agree on who should be appointed. Details of the services and barristers with arbitration qualifications are on the website.⁴²

Although commercial arbitration has been available as a dispute resolution procedure over many decades it is now and in the future, with a degree of optimism, that it is likely to be more useful as it is a valuable private process which is now be assured by the *CAA*.

⁴² Victorian Bar, *Website* <<http://www.vicbar.com.au/home>>.