



GREENWAY CHAMBERS

# Arbitration CPD – Practice and procedure in commercial arbitration after *Tesseract* and *CBI Contractors*

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## **Tesseract v Pascale Construction**

1. Arbitration and proportionate liability regimes.
2. Observations of Edelman J (under Postscript).
3. Observations of Steward J (para 282 and 283).



## CBI Constructors v Chevron Australia

1. The arbitral tribunal had bifurcated the arbitration between liability and quantum, and issued an award on liability issues.
2. The claimants sought to agitate additional liability issues and the respondent objected on the basis that the claimants were precluded by preclusive estoppel from agitating those issues.
3. The majority (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ) upheld the principle that an arbitrator was *functus officio* in relation to the issues to which an interim award relates.

## Drafting an arbitration agreement

1. Agreement to appeal – requirement to expressly agree to ‘opt in’ for appeal, rather than ‘opt out’ as per *Arbitration Act 1996* (UK).
2. Proportionate liability (whether to exclude where possible under the relevant legislation).
3. Choice of rules of law (s 28 of the Commercial Arbitration Act 2010 (NSW)).
4. Consider clause allowing for the consolidation of related arbitrations, and mirror provisions in related contracts.
5. Multi-party arbitration agreements and joinder.
6. Expedited arbitration (ACICA Rules).

## Notice of Dispute

1. Drafting issues.
2. What is the dispute.
3. Is it better to confine or be expansive?
4. Problems that may arise.



## First procedural conference

1. Consider whether to seek/oppose orders to split or separate issues – jurisdiction, liability, quantum.
2. The effect of the terms of procedural orders which may limit the way in which a party may present its case.
3. Non-privities cannot be compelled to participate in the arbitration.
4. Consider whether an interested party can be joined via the definition of “party” under the CAA - any ‘person claiming through or under a party’ to the arbitration agreement.



## Statement of Claim and Defence

1. Memorials or pleadings.
2. Section 19 of the Commercial Arbitration Act.
3. ACICA Arbitration Rules (R29).



## **Emergency Arbitration / Interim Relief**

1. When appropriate.
2. ACICA Rules (R37).
3. Potential pitfalls and solutions.



## Document production

1. When appropriate and form (Stern or Redfern Schedule).
2. Potential problems and solutions.



## Evidence

1. Preparation of evidence where third party alleged to be concurrent wrongdoer but not present. Evidence of an alleged concurrent wrongdoer.
2. Effect on related or future court proceedings against the concurrent wrongdoer.
3. Expert evidence, practice of 'conclaves' and joint report(s).



## Hearing

1. Concurrent evidence of experts.
2. Cross examination.
3. Private and confidential, ACICA Rules (R26).



## **Award**

1. Jurisdiction.
2. Functus officio and CBI Contractors.



## Enforcement

1. Section 34 of the CAA. Standing of a third party affected by an arbitral award to set it aside?
2. Section 36 of the CAA.
3. Asset tracing.



## Appeal

1. Section 34A of the CAA.
2. Discretion.



## Other matters

1. Arbitration or litigation.
2. Section 8 of the CAA.





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Questions?

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