

## **B.A. (Toby) Shnookal QC**

Toby is an Australian QC who is also qualified and experienced as an engineer. He is mainly engaged as determiner of disputes, as arbitrator, expert determiner or adjudicator. He has a strong practice as a Mediator and Facilitator of Expert Conclaves.

### **History**

Before graduating as an engineer, Toby worked for the Department of Main Roads (WA) on the construction of remote area roads. Inspired by that work, he studied and qualified as a civil engineer from Monash University in 1978. He then worked in the oil industry, first in Melbourne then in a national role in Sydney. In Melbourne he had overall engineering and project management responsibility for all new and existing assets and facilities in SA, Victoria and Tasmania. It was a diverse portfolio of assets extending beyond oil distribution and retail facilities to include offices, transport depots, wharfs and aircraft facilities. Three works clerks, a drawing office and secretarial support reported to him.

Promoted to Sydney he assumed the national role of National Projects Manager and coordinated the assessment and implementation of all major new capital works projects across Australia (save for refinery work). In addition, he managed the major national maintenance contracts and, with the price of oil skyrocketing through the 80s causing dispensing pump heads that calculated sale price mechanically disintegrating at an exponential rate to price rises, he implemented the urgent upgrade to electronic pump heads of every petrol pump in Australia.

In these roles he often designed facilities and occasionally performed structural or mechanical engineering calculations. More commonly, he engaged external professional engineers, other building professionals, builders and subcontractors to implement projects for which he was responsible. He managed major projects through design, estimation, project assessment, and construction phases. This experience started his interest in contracts and law.

While studying law Toby worked part time as a site engineer on civil construction projects for Simpson Constructions Pty Ltd. He was that company's first employee; now it is a significant and highly successful civil construction company.

This experience led him, with a partner, to set up and manage a small construction firm of his own. It only took a few years, and the birth of his first child, to realise his focus had to be on just one career.



Toby obtained an Honours degree in law from Monash University in 1988. His Honours thesis was on building control by performance based regulation. At the time, a combined law/engineering degree was not offered by any university and so he received no academic credit for the earlier engineering degree.

Toby did articles and commenced his legal career working with John Sharkey AM at what is now Norton Rose Fulbright. After working as a solicitor, in 1990 Toby joined the Victorian Bar and read with John Digby, now Justice Digby of the Victorian Supreme Court.

In the early 90s arbitration was extremely popular as a means of dispute resolution of construction disputes and Toby's practice as a barrister was primarily based in that work. For the first 7 years at the bar he appeared in back to back arbitrations.

In 1994 Toby qualified with IAMA (Institute of Arbitrators and Mediators Australia) as an Arbitrator and he commenced his own practice as an arbitrator. He is a Grade 1 Arbitrator (the highest grade) with IAMA (now Resolution Institute) and he is a qualified arbitrator with CI Arb. He has been engaged as arbitrator in numerous disputes, many proceeding to award. He has conducted international arbitrations and arbitrations under numerous sets of rules including the ICC Rules.

In 1995 Toby qualified with the Victorian Bar as a mediator. He is nationally accredited (NMAS). In 2006 he was accredited as an Advanced Mediator by the Victorian Bar.

In 1996 the Domestic Building Tribunal was set up. Toby accepted appointment as one of the inaugural Sessional Member of that Tribunal. When the DBT was merged into VCAT in 1998 he became a Sessional VCAT Member for the next ten years, in addition to his primary practice as a barrister. Deciding the flexibility and efficiencies of arbitration and the speed of expert determination and adjudication provided better determinative structures, he gave up his commission in about 2008.

### **Practice Today**

Toby was appointed Senior Counsel in 2012. He is not aware of any other Senior Counsel in Australia with engineering qualifications.

Toby's practice is predominately as arbitrator, expert determiner and adjudicator, but he maintains extensive practices as a mediator and facilitator of expert conclaves. He

has undergone advanced training as a dispute board member and is a strong advocate for their establishment on major construction projects.

Efficient dispute resolution is Toby's central concern when engaged in any determiner role. The principal ways he seeks to achieve that is to create an environment where lawyers for parties work as co-operatively as possible and make clear and efficient directions to provide an effective path to determination. He takes the view the strength and clarity of the reasons he provides are the key to equipping the parties with the necessary platform for achieving final resolution.

Toby is commonly engaged in disputes that involve complex engineering issues, software disputes, disputes that involve building or engineering technology, and disputes that involve complex construction programming and sequencing. He has a passion for engineering and its interaction with the law. He has undertaken additional study in critical path programming, 'building by subcontract' and a variety of engineering software packages. His practice has involved studying and understanding provisions in numerous Australian Standards and reading and understanding thousands of expert reports. He regards the key to success in any technology based area of law as lying in the ability to understand the experts' reports.

Toby has decided a considerable number of significant disputes as expert determiner in the technology area. He is particularly proud of his role in determining the dispute between the Victorian Government and the head contractor for the design, supply and installation of the myki ticketing system across Victoria's public transport system that included software design. Not only did his determination in this ad hoc joint appointment by the parties lead to the settlement of whole multimillion dollar dispute then referred, the parties subsequently executed an agreement to engage Toby as expert determiner for all subsequent disputes.

Some disputes in which Toby has appeared:

- Cost growth of the design and construction of a Woodside FPSO designed and constructed by John Holland partly associated with roll amplification factors and their effect on engineering ship mounted oil processing structures (Singapore/WA)
- Delays, defects and cost growth of the construction and installation of a Bass Strait gas platform and associated on shore gas processing plant constructed for Origin Energy (Vic)
- Dealing with lead paint as a latent condition in several major building projects (Vic)
- Catastrophic collapse associated with engineering design and weld failure of a large cement silo (Tas)
- Design inadequacy of retractable light towers constructed at the Adelaide Oval involving dynamic balanced thin structures, complex wind modelling and mechanical gear and mechanism design (SA)
- Design inadequacies of the design of the Anaconda Nickel Laterite processing plant, including capacity design, choice of material (titanium, ceramic and rubber issues) and maintenance planning; a \$1b arbitration dispute (WA)
- HDPE lining failures through oxidation in extreme environment in Uranium processing plant, Olympic Dam (SA)

- Delays in the complex construction sequencing involved in the construction of a four story hotel over a 4 story car park at Melbourne Airport (Vic)
- Functional growth of the software design that supported the introduction of Melbourne's Metcard public transport ticketing system (Vic)
- Water supply earth wall failure as a result of inadequate geotechnical design (Vic)
- Design failure of 5 large gas turbine based co-generation plants installed in Melbourne's largest public hospitals (Vic)
- Design failures and construction delays in five separate wind farm construction projects, involving blade design, wind resource harvesting, modelling of turbulent wind flow, construction sequencing, electrical grid capacity, national regulation of power plants, and the local engineering verification process for highly complex engineering projects (Tas, Vic, SA)
- Design failure of Melbourne's City Link Tunnel including the effect of lowering the Richmond water table on the ground support of existing surface buildings, analysis of delays in the development of the tolling software, and the structural failure of the tunnel floor decks (acting for Transurban) (Vic)
- Design based cost overruns on the upgrade of the Lucas Heights Nuclear Facility (NSW)
- Ship loader design based cost increases, Port of Adelaide (SA)
- Design cost overrun and the defective design of a freeway and rail opening bridges (Bascule bridges) in Adelaide (SA)

Some major disputes to which Toby has been appointed as determiner and which have continued to award include (respecting confidentiality):

- Australian wide contract for TV technology role out
- Precast concrete fabrication and installation
- Biosolids Treatment Process
- Marina Construction
- Water Treatment Plant
- Winery plant
- International dairy trade agreement
- Construction of ground up regional Shopping Centre
- Construction of air navigational system, at a major Australian Airport
- Major road project cost claim
- Design and construction of Victorian regional sewage processing plant
- Geotechnical cause of a commercial building failure
- The upgrade of steel fabrication plant
- High-rise façade construction
- Failure of concrete soil retaining structure
- Major upgrade of historic municipal offices
- Contract for operation and maintenance of steel mill
- Contract for maintenance of all of a municipality's assets

Toby has published over 60 determinations.

### **Texts, Papers and Committees**

Toby was co-author of the 4<sup>th</sup> edition of Brooking on Building Contracts, a law text for legal practitioners involved in engineering and construction disputes. He has published and presented papers at national conferences on FIDIC contracts, expert determination, adjudication, the ethics of forensic engineers, the giving of expert evidence and the reviewing a discretionary determination of Superintendents. Toby has been active on the Victorian Bar's ADR committee, chair of its Arbitration, Adjudication and VCAT Liaison subcommittees, and is a member of the County Court Building Cases Advisory Committee. He has served on the Board of the Dispute Practitioners Society, the Institute of Arbitrator and Mediators Australia and was Chapter Chair of IAMA's Victorian Chapter for a number of years. He was a founding member of the Melbourne Tech Chambers and has served as its Public Officer, Treasurer and Secretary. He was a founding member of the Victorian Bar Computer Users Group and is familiar with a number of programming languages and a considerable number of specialist engineering computer applications.

Toby is currently Co-chair of the Victorian Chapter of the Resolution Institute (RI) and a member of the Determinative Subcommittee of the Board of RI.

Toby has been in the engineering and construction industry for 40 years and the practice of law in relation to that industry for 30 years. He was born in 1956.