

B.A. (Toby) Shnookal QC



Toby is an Australian KC who is also qualified and experienced as an engineer. Since 2016 he has only accepted work as an arbitrator, expert determiner, mediator, adjudicator, facilitator or on a dispute board. That is, as a neutral.

He is experienced in all determinative processes being conducted entirely on-line.

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 (Ampol Petroleum), first in Melbourne then in a national role in Sydney. In Melbourne, first as Works Supervisor then as Branch Engineer, 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 40 oil distribution depots and 170 petrol stations to include offices, a transport depot, and several wharf and aircraft refueling facilities. Three works clerks, a drawing office and secretarial support reported to him. Safety and environment protection were very important parts of the role.

Promoted to Sydney he assumed the 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 all major national maintenance contracts and implemented the urgent upgrade to electronic pump heads of every petrol pump in Australia owned by the company.

In these roles he often did basic layout design and costing and occasionally performed structural or hydraulic 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, budget allocation, project management and offsite construction management 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 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. This introduced him to the world of tendering from a contractor's

perspective. 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 his earlier engineering degree. In a twist of history, in recent years he has worked as Counsel Assisting in relation to Inquires concerning combustible cladding purported used in compliance with performance regulations in the National Construction Code.

Toby did articles and commenced his legal career working with John Sharkey AM at what is now Norton Rose Fulbright. 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 an extremely popular 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 at that time. He has been engaged as arbitrator and expert determiner in a vast number of disputes since then. He is a Grade 1 Arbitrator (the highest grade) with IAMA (now Resolution Institute), a Fellow of the Chartered Institute of Arbitrators and has a Diploma in International Arbitration. He is one of Australia's busiest arbitrators and expert determiners.

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 on the recommendation of his peers. He has an extensive mediation practice across Australia strictly in the engineering, building and construction field.

In 1996 the Domestic Building Tribunal was set up and Toby accepted appointment as one of the inaugural Sessional Member. 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 barrister and arbitrator. In that role he conducted numerous hearings and Compulsory Conferences; essentially mediation by a sitting Member. Deciding he preferred the flexibility and efficiencies of arbitration, more complex engineering projects, and a process where the parties selected him as their determiner rather than being assigned, he gave up his VCAT commission in 2008.

Practice Today

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

Since 2016 Toby's practice has been solely as neutral: arbitrator, expert determiner, adjudicator, facilitator of expert conclaves and mediator. 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 role. As a determiner the principal ways he seeks to achieve that is to create an environment where lawyers for parties work as co-operatively as possible. He strives to make clear and efficient directions to provide an effective path to determination. He takes the view the strength and clarity of the reasoning of the determination are vital.

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 the provisions of numerous Australian and International Standards and reading and understanding many 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 expert reports.

Toby has made more than 175 determinations. As Expert Determiner, he is particularly proud of his role as expert determiner in 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. The issues included highly complex software design and delay events that impacted on design and testing. Not only did his determination in this appointment lead to the settlement of the whole multimillion dollar dispute then referred, the parties subsequently executed an agreement to engage Toby as the expert determiner for all subsequent disputes during the operation phase of their contract. There were no more disputes.

As a mediator he sees his role as making clear to parties what the alternative paths of pursuing resolution by determination and by negotiation look like to clients. The merits, costs, risks and relative advantages of settlement compared to determination are explored in the context of a discussion about the actual issues that are in dispute. He is not a mediator to engage if a party is reluctant to explore the technical arguments between the parties. He can be expected to read all technical reports before a mediation commences and engage with the parties about what they say.

Some representative disputes Toby appeared in as Counsel before giving up that practice:

- Cost growth of design and construction of a Woodside FPSO designed and constructed by John Holland 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 extraction platform and associated on shore gas processing plant constructed for Origin Energy (Vic)
- Lead paint as a latent condition in several major building projects (Vic)
- Catastrophic collapse associated with engineering design and weld failure of a large 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 (the precursor to Myki) (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)
- Counsel Assisting in Inquiries relating to building or construction failure.

Some representative disputes Toby has determined (respecting confidentiality):

- Australian wide contract for TV technology role out (Aust)
- Precast concrete fabrication and installation (Victoria)
- Biosolids Treatment Process (NSW)
- Marina Construction (Victoria)
- Regional Water Treatment Plant (Victoria)
- Winery plant (Victoria)
- Wind farm (NSW)
- International dairy trade agreement (NZ-Aust)
- Design of Myki ticketing system (Victoria)
- Construction of ground up regional Shopping Centre (Vic)
- Construction of air navigational system, at a major Australian Airport (Vic)
- Major road project cost claim (Victoria)
- Design and construction of Victorian regional sewage processing plant (Vic)
- Geotechnical cause of a commercial building failure (Victoria)

- The upgrade of steel fabrication plant (Victoria)
- High-rise façade construction (Victoria)
- Failure of concrete soil retaining structure (Victoria)
- Major upgrade of historic municipal offices (Vic)
- Contract for operation and maintenance of steel mill (Vic)
- Contract for maintenance of all of a Metropolitan Council's assets (Vic)
- Role out of NBN - subcontractor (Tas)
- Container Port (NSW)
- Major Irrigation system in NW Victoria (Vic)
- Electrical Contractor for major builder over numerous sites (Vic)
- Role out of NBN (NSW)
- Economic Stimulus Package (Vic and SA)
- Housing development (Vic)
- Aged care development (Vic)
- Major dam wall design and construction (Vic)
- Regional Road upgrade design and construction (Vic)
- Melbourne Tramway electrical upgrade construction (Vic)
- Water Treatment Plant Melbourne design and construction (Vic)
- Port Upgrade subcontract (Brisbane, Qld)
- Wind Farm construction (Victoria)
- School construction (Victoria)
- Sewer transfer hub construction (Victoria)

Texts, Papers and Committees

Toby was co-author of the 4th 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, reviewing a discretionary determination of Superintendents and expert determination. Toby has been active on the Victorian Bar's ADR committee, chair of its Arbitration, Adjudication and VCAT Liaison subcommittees, and was a member of both the Supreme and County Court Building Cases Advisory Committees. He has served on the Board of the Dispute Practitioners Society and was Chapter Chair of IAMA's Victorian Chapter for many years. He was a founding member of 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. He was a national director of IAMA and is a director of Resolution Institute (RI). Together with Dr Manly he co-ordinated the revision and publication of the RI Arbitration Rules 2020. He is chair of the national RI Determinative Committee and active on its 5 subcommittees. He is on the Board of Management of the Professional Certificate in Arbitration course at Adelaide University. He is also a passionate member of the Shoreham Foreshore Reserve Committee of Management which manages 187 hectares of bush frontage onto Westernport Bay.

Toby has been in the engineering and construction industry for 43 years and the practice of law in relation to that industry for 33 years.