

Experts And Arbitrators - Letter To The Editor

Sir,

I read with interest the article by Philip Davenport on Experts and Arbitrators in Issue 21 of the Newsletter. A quick reading of Mr Davenport's article would leave a reader with the impression that it is not possible to have expert appraisal procedures to which the Arbitration Acts do not apply. On a careful reading I do not understand Mr Davenport to be reaching this conclusion. In view of the importance of dispute resolution to the industry, may I offer the following views (in summary) on the subject:

1. It is possible for two parties to agree upon an expert appraisal procedure to determine disputes between them and for the Arbitration Act of the relevant State or Territory to have no application to the dispute resolution process.
2. Whether any particular dispute resolution process agreed between parties is an arbitration for the purpose of the Arbitration Acts depends upon the process agreed not the function to be performed (see *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8 and a number of the other authorities quoted by Mr Davenport in his article).
3. The mere fact that an expert appraisal is finally determinative of the parties rights does not mean that the process is an agreement to arbitrate for the purposes of the Arbitration Acts. It is the process which the parties have agreed upon (e.g. application of the rules of natural justice, entitlement to a hearing and other processes akin to a judicial process) which will be determinative of this question.
4. An expert appraisal is not a quasi arbitral function and expert appraisers do not have the protection from suit provided by the provisions of the Arbitration Act or that of an Arbitrator under the common law (see *Sutcliffe v Thackrah* [1974] AC 727).
5. Parties to an expert appraisal cannot "appeal" the expert appraiser's decision except where that decision purports to deal with matters beyond those referred to the appraiser by the parties. In particular, an expert appraiser is not bound by the rules of procedural fairness. A failure by an expert appraiser to decide matters according to law or according to the facts is likely to give rise to a cause of action by the party aggrieved against the appraiser but it is unlikely that that party will have any capacity to challenge the decision itself.

Although it is true that care needs to be taken in defining the process, and despite there being confusion in the minds of a number of legal advisers as to the distinction between an expert appraisal and an arbitration, expert appraisals have a very important part to play in dispute resolution in the industry and I would beg to strongly disagree with Mr Davenport's recommendation that agreements for [binding] expert appraisal in the industry should cease.

- D S Jones