

His Honour held that pursuant to Section 21 the parties had opted out of the Model Law which otherwise would have applied to their dispute. Instead, they had agreed to have their dispute resolved in accordance with the New South Wales Commercial Arbitration Act.

Some of the matters in dispute between the parties to the two arbitration agreements did not fall within the scope of these agreements. Further, the claims against other defendants were not subject to any arbitration agreement.

His Honour was prepared to appoint the arbitrator a special referee pursuant to Part 72 of the Supreme Court Rules to determine these additional matters in dispute which did not come within the ambit of the arbitration clause. He indicated that he had power to fix the hearing of the reference at the same time as the arbitration and conversely under Section 47 of the Commercial Arbitration Act to direct when the arbitration was to be heard.

His Honour indicated that matters to be considered in determining whether or not an arbitrator should be appointed as special referee were the private nature of arbitration proceedings and the intrusion of other parties, the desire to avoid duplication of proceedings and the overlapping of issues.

His Honour was not unduly concerned by the fact that different criteria applied in relation to an appeal from an arbitrator's award and whether or not a referee's report would be adopted.

CONFIDENTIALITY OF ARBITRATION PROCEEDINGS

Supreme Court of Victoria, Unreported,

Marks J

8 December 1992

The Minister for Energy and Minerals v Esso Australia Resources Ltd & ORS

Natural gas from Bass Strait is supplied to the Gas & Fuel Corporation of Victoria and State Electricity Commission of Victoria pursuant to two separate supply agreements. The suppliers of natural gas pursuant to the supply agreements had a tax imposed upon them by the Commonwealth Petroleum Resource Rent Tax Assessment Act 1987. They sought to pass on this tax to Gas & Fuel and the SEC by increasing the price of natural gas. Gas & Fuel and the SEC disputed the suppliers' entitlement to a price increase and each referred the matter to arbitration pursuant to an arbitration agreement contained in the supply agreements. A panel of arbitrators had been appointed for each arbitration but the arbitration had not commenced.

The suppliers asserted that information coming to light in the arbitrations was confidential and could not be disclosed to non parties, including the Minister despite the fact that he represented the Executive Government.

The suppliers argued that the supply agreements contained implied terms as to confidentiality and sought the following declaration:

“That subject to lawful exception each of GFC and SECV are not entitled to use for a purpose other than the arbitrations information and documents of the producers disclosed to each of them by the producers for the purposes of the arbitration.

That there is an implied term of each arbitration agreement that the arbitration is to be conducted in private in the sense that strangers are to be excluded from the hearing and the conduct of the arbitration”.

His Honour declined to make the declarations sought. In his judgment, he examined in some depth the concept of privacy and confidentiality as they apply to arbitration proceedings.

The issue before him was not so much one of privacy but rather “whether those who go out of the hearing room may take information with them and tell others what it is”. However, His Honour commented that while arbitrations normally do take place in private, this is by virtue of an express or an implied term in the arbitration agreement and not by virtue of a general principle of law that arbitrations are private.

On the issue of confidentiality of information disclosed in arbitration proceedings, His Honour determined that there was no overriding obligation of confidentiality with respect to arbitration proceedings. Any obligation of confidentiality depended on the terms of the arbitration agreement and just as with Court proceedings, where appropriate, the rules of equity in relation to unconscionable conduct.

His Honour therefore was not prepared to make a declaration with respect to the confidentiality of information disclosed in the arbitration in the wide terms sought. He did indicate however that the Court had power in its equitable jurisdiction to impose confidentiality upon commercially sensitive information disclosed during the arbitration if application was made to the Court for this.

Although not strictly necessary for his decision, His Honour expressed the view “that arbitrators have no means of enforcing a ‘confidentiality’ direction nor power to make an ‘award’ enforceable by a Court which restricts or prevents disclosure by a party of information which, although commercially sensitive, is not privileged or otherwise legally protected against such disclosure.” This power rather was to be exercised by a Court pursuant to Section 47 of the Commercial Arbitration Act.