

## President's Say

### Generally

Since the last issue of the National Newsletter in August 2001, our communal perception of the world in which we live has undergone a dramatic adjustment.

Elsewhere in this Newsletter, you will see the Joint Statement issued by the Institute and LEADR following the terrorist attacks on 11 September 2001.

With recent events including war and terrorism, airline collapses and consequent corporate downsizing, many people in the community are asking themselves 'What's next?' with a sense of foreboding rather than optimism.

It is timely to recall the words of President Franklin D. Roosevelt, in his first Inaugural Address on 4 March 1933. In facing the challenges of rebuilding a nation whose economy and confidence had been shattered by the ravages of the Great Depression, he said:

*'Let me assert my firm belief  
that the only thing we have to fear is fear itself.'*

The Institute and its members need to be pro-active in managing the future. We cannot afford to sit back and hope that opportunity drops into our laps. We all need to be actively encouraging the growth of efficient and cost-effective dispute resolution services in which the Institute and its members have a substantial role to play.

As is evident from the matters referred to in the CEO's Report in this Newsletter, over the past year or so we have achieved significant progress towards our goal of achieving recognition of the Institute as the best source of skilled efficient dispute resolvers. As well as improving the quality and scope of our initial training by introduction of the National Practitioner's Certificate in Mediation & Conciliation in 2001, we have introduced a high-quality CPD program nationwide with a compulsory requirement for completion of eligible training by Grade 1 and Grade 2 Arbitrators and Accredited Mediators to maintain their accreditation.

We have also enhanced our Rules for expeditious and cost-effective resolution of disputes by introducing our new *Industry and Consumer Dispute Resolution Rules and Guidelines* earlier this year, and the new *Expert Determination Rules* and new *Mediation & Conciliation Rules* approved by Council in November 2001 (see right). We have also issued a new Practice Note 3C, designed for use with the *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)* which were introduced in August 1999.

Having taken these various steps to improve the quality of our 'product', we need to spread the word and encourage the use of our services by the community. This should be done using all of the tools at our disposal: on the Web, by publication of papers and word of mouth.

The Institute's office-holders (who give freely of their time, energies and talents) cannot be expected to shoulder all the burden of promoting the interests of the Institute and its members. All members have a stake in the future of the Institute, and should be actively

seeking to promote the use of the Institute and its members, to ensure that we play a significant role in the provision of dispute resolution services in the twenty-first century.

### Resignations etc.

On the subject of people who have given freely of their time, energies and talents for the benefit of the Institute and its members, I note with regret the recent resignation of Clyde Croft S.C. from the Council and the Executive, and the retirement of Patricia Luxford as WA Chapter Administrator (effective from the end of 2001).

Clyde has been a Councillor of the Institute for many years, and was President from 1997 to 2000. He has contributed an enormous amount of time to the Institute over those years. In resigning, Clyde indicated that he can no longer afford to devote the time to the affairs of the Institute which he felt was required as a Councillor, Member of the Executive and Member of the Victorian Chapter Committee. On behalf of the members, I would like to thank Clyde for his contribution to the Institute, and wish him well for the future.

Patricia Luxford has been WA Chapter Administrator since July 1998. From what I have seen, she has been heavily committed to the welfare of the WA Chapter and its members. Patricia did not treat the position of Chapter Administrator as merely a job, and has been prepared to spend whatever time was necessary on the work involved. Again, on behalf of the members, I would like to thank Patricia for her contribution to the Institute, and wish her well for the future.

### New Expert Determination Rules and Mediation & Conciliation Rules

At its meeting on 22 November 2001, Council approved new Expert Determination Rules and Mediation and Conciliation Rules to replace the existing Expert Determination Rules, Mediation Rules and Conciliation Rules.

The new Rules will be available at the Institute's website. They are the result of an extensive process of consultation and review since June 2001.

Following consultation with Janet Grey, Graham Easton and Peter Condliffe, and discussion at the NSW Chapter Members' Forum in July 2001 (at which the proposed new Expert Determination Rules were discussed in general terms) and meetings of the Practice Notes Rules & By-laws Committee, exposure drafts of the proposed new Rules were circulated for comment to Councillors, Chapter Committees and various other people including experienced lawyers, senior ADR practitioners and former Judges. The WA Chapter held a Members' Meeting on the proposed new Expert Determination Rules and Mediation & Conciliation Rules on 17 October 2001, and forwarded a written Summary of the comments made.

I would like to thank the members of the NSW Chapter and the WA Chapter who provided their comments at those Chapter meetings. I would also like to thank the following people who provided individual comments on the proposed new Rules:

Anthony Brand, the Honourable John Brownie QC, Peter Condliffe, Jennifer David, Graham Easton, Brian Gallagher, Gavan Griffith QC, Doug Jones & Craig Pudig, Geoff Masel, Fred McCardell, Chris Morrow, Graeme Peck, Clive Raymond, the Honourable Moreton Rolfe QC, Ian Steele, Max Tonkin (NSW DPWS), Brian Wales, Bruce Walsh and Patrick Weaver.

With a view to standardising the Institute's Rules in relation to preliminary and general matters, the proposed Expert Determination Rules and Mediation & Conciliation Rules each contain Rules expressed in similar terms to the present Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules), dealing with such matters as Nomination, Definitions, Application of Rules, Counting of Days and Liability for Acts and Omissions.

The proposed Expert Determination Rules were the subject of more comment than the proposed Mediation & Conciliation Rules. It is worthy of note that the Institute's Expert Determination Rules were originally introduced in response to a strong market demand for expert determination in the mid 1990s. The demand for expert determination has probably grown rather than diminished since that time. If the market requires a process of expert determination as an alternative to arbitration, then the Institute should obviously position itself to meet that demand.

#### **Compulsory CPD Requirement for Grade 1 & Grade 2 Arbitrators and Accredited Mediators**

The CPD Policy approved by Council requires Grade 1 & Grade 2 Arbitrators and Accredited Mediators to complete 75 hours eligible training per triennium, with a target of 25 hours each year. CPD Record Sheets for 2001 from all Grade 1 & Grade 2 Arbitrators and Accredited Mediators are required to be submitted by 31 March 2002.

A proforma CPD Record Sheet can be obtained from the National Office. Eligible training activities are rated as follows:

1. Institute Masterclasses/Workshops - 2 hours per contact hour.
2. Other Institute training activities (eg. conferences, seminars etc) - 1 hour per contact hour.
3. Training activities conducted by other professional bodies approved by the Institute - as determined by the Education Committee (including rating), up to a limit of 8 hours per annum.
4. Approved undergraduate course - 1 hour per contract hour up to a limit of 5 hours per annum.
5. Approved postgraduate courses - 1 hour per contact hour up to a limit of 8 hours per annum.
6. Lecturing or Tutoring in an approved tertiary course - 3 hours per contact hour up to a limit of 8 hours per annum.

7. Published Papers and Articles, or Presentation of Original Material - rated and determined by Education Committee.
8. Professional Practice (including writing awards and pupil training) as an arbitrator, mediator or other ADR practice - 1 hour per hour actually spent up to a limit of 8 hours per annum.
9. Approved Pupillage - 1 hour to each hour actually spent up to a limit of 8 hours per annum.
10. Member of Council/Committee/Chapter - 1 hour to each hour actually spent up to 5 hours per annum.
11. Other Activities - as approved by the Education Committee.

The Professional Affairs Committee will conduct an Audit each year on a range of Records Sheets, requiring verification of the activities claimed. In the event of failure to submit a CPD Record Sheet or to complete CPD requirements, a member will be asked to show cause why she or he should not be removed from the Institute's Panels or regraded.

#### **NADRAC Report**

In June 2001, the National Alternative Dispute Resolution Advisory Council (NADRAC) published its report to the Commonwealth Attorney-General dated April 2001 entitled '*A Framework for ADR Standards*'.

Among the recommendations contained in the NADRAC Report were recommendations that:

- All ADR service providers adopt and comply with an appropriate code of practice, developed by ADR service providers or associations, which takes into account such matters as the process, informed participation, access and fairness, service quality, and complaints and compliance.
- ADR service providers have in place an appropriate an effective system for managing complaints.
- ADR organisations examine the feasibility and appropriateness of a body to provide a second tier complaints system.
- Those responsible for accrediting ADR practitioners clearly define levels of competence and assessment criteria, provide fairness and transparency in accreditation procedures, and develop processes for mutual recognition of qualifications, training and assessment.

The CEO and I have been meeting with representatives of other ADR organisations since early September 2001, to explore the development of a uniform approach on these matters.

In addition, the ACT Chapter has been preparing a draft Code of Practice for consideration and approval by Council.

*Robert Hunt*

## **WOULD YOU BELIEVE...**

*"A little pepper, sir?" - Conflict Resolution in Confined Spaces...*

Lift rage erupted in Canada between two men over whether the elevator they were in should go up or should go down. One attacked the other with pepper spray forcing a partial evacuation of the building. It is not known which direction the lift went...

Odd spot - *The Sunday Age* 28 October 2001

# The CEO Report

## ENERGY AND INNOVATION

The end of the year is almost upon us. A time for reflection upon what has happened in the last year and that which we have yet to do. Things that have happened in the past year include:

- Creation of a new database;
- Creation of a new website;
- Holding of the Colloquium;
- Establishment of new financial management system based on MYOB;
- Initiation of Continuing Professional Development (CPD) program;
- New membership cards;
- Chapter business plans;
- National and Chapter budgets;
- Membership survey (see Report in this newsletter);
- National Mediation and Conciliation Course;
- Outsourcing of journal (for a trial period);
- Separation of functions between ACICA and IAMA;
- Liaison with LEADR and other ADR groups;
- New Trust Account Guidelines;
- New Preliminary Conference Rules and Practice Notes;
- New Industry and Consumer Rules and Guidelines;
- Introduction of Nominee Fee and new Nomination Procedures;
- New Victorian and National Office rooms and headquarters;
- New Mediation Accreditation Register of Practising Arbitrators Policy;
- New brochures;
- 2 year terms for National Councillors (starting 2002);
- New Auditor.

IAMA is an amazing organisation. It has not only the energy to undertake these changes and innovations but the courage to do so. There is still much to do including:

- Further database and website development;
- Consolidation of National Mediation and Conciliation Courses and the development of others;
- A new Policies and Procedures Manual;
- Renewal and further development of the national Business Plan.

Necessarily, because of our size and resources some of our progress will be incremental. I do not mind being known as an "incrementalist". The reality is that one cannot plan everything ahead of time – sometimes things emerge piecemeal and there is room for flexibility in this.

## LOOKING FORWARD

We are on track to:

- Double our membership within the next five years;
- Diversify our services to include more training and establish inroads into new markets including financial services, insurance, family, industrial relations and small business;
- Establishing a more coherent and visible national presence.

## MEMBERSHIP SURVEY

Remember this? It was undertaken at this time last year. Some of the results, which are summarised elsewhere in this newsletter, are interesting. Hannes Günter, the young and bright German exchange student and Organisational Psychologist, who undertook the task came up with some useful results.

## INDUSTRY AND CONSUMER SCHEMES

The Institute has recently entered into agreements with Western Power in WA and the Study Group nationally to provide dispute resolution services. These schemes will provide staged conciliation and arbitration options as part of these organisations' conflict management processes. The former was negotiated by the WA Chapter and the latter through National Office. To see a copy of the Proforma for the schemes, visit our website [www.iama.org.au](http://www.iama.org.au)

## SUBSCRIPTIONS

Subscriptions are unchanged for 2002. Please let us know if you have any queries about your notice and please update your details when returning.

## ADR GROUP

We have begun to have some discussions with other ADR groups about some more formal liaison, co-operation and networking. This is a slow and sensitive process and one that has been tried before unsuccessfully. We will keep you informed as it progresses.

## NEW STAFF APPOINTMENT

I have appointed Gianna Totaro as my personal assistant. She has a background in media and amongst her other achievements, is co-editor of *The Demidenko File* (Penguin).

An enthusiast of international and national affairs, she would like world peace, and er, Collingwood to win another AFL Premiership, preferably in her lifetime.

**Finally, may the end of the year bring you and yours peace and joy.**

*Peter Condliffe*

## THE FAMILY LAW REFERENCE GROUP

To assist and further the Institute's evaluation of the Attorney-General's Family Dispute Management Practitioners Program (see the report in the August 2001 National Newsletter), four very experienced practitioners have put their name forward to go onto this group. They are Linda Dewey, Mikal Ponder, Geoff Charlton and Colleen Papadopoulos. They have already had some input in a questionnaire and will be meeting over the next 12 months to support and develop our work in this area. Dr Kate Roberts, our contracted evaluator, is putting together a detailed evaluation program for the two programs funded to provide services in this area.

# New Preliminary Conference Practice Note 3C

Since its formation, this Institute has published Practice Notes dealing with the Preliminary Conference, reflecting the arbitration legislation then in force in the various States and Territories of Australia and the Institute's Rules for the Conduct of Commercial Arbitrations.

At its last meeting on 13 September 2001 Council adopted a new practice note 3C. Since the last publication (Practice Note 3B in November 1991), commercial arbitration in Australia has undergone a substantial change, in response to criticism that the practice of arbitration in the common law world had become bogged down with processes derived from litigation which made arbitration much less efficient than it should otherwise have been.

This change in thinking was commented on by the Honourable Justice Michael Kirby AC CMG, who said in July 1999:<sup>1</sup>

*"Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology."*

The approach referred to by Justice Kirby is reflected in the *Rules for Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)*, which were adopted by the Institute of Arbitrators & Mediators Australia (IAMA) on 13 August 1999, to replace *The Rules for Conduct of Commercial Arbitrations* (December 1978) and *The Expedited Commercial Arbitration Rules* (June 1989). The objective of the new IAMA Rules<sup>2</sup> is to provide an arbitral framework for just resolution of disputes in a manner which is both expeditious and cost effective, and which is consistent with the statutory requirements for the conduct of arbitrations. The new Rules preserve the fundamental right of parties to a dispute to agree on the manner in which their arbitration is conducted, by providing default provisions which are expressed to be subject to the contrary agreement of the parties.

The Preliminary Conference provides an important opportunity for the Arbitrator and the parties to determine an arbitral procedure which is both expeditious and cost effective.

The new proforma Preliminary Conference Agenda for the first Preliminary Conference is designed to achieve that result by using a format which is compatible with the new IAMA Rules and the requirements of the *Uniform Commercial Arbitration Acts* presently in force in the various States and Territories of Australia (the Uniform Acts), while retaining the flexibility which is essential in ensuring that the procedure adopted is that which is best suited to the circumstances of the particular dispute. The proforma Agenda is designed for use whether or not the nomination of the arbitrator

is made pursuant to the new IAMA Rules or the parties agree the arbitral procedure to be used is that set out in the new IAMA Rules.

In this revision of the Practice Note, we have included the following:

- examples of a notice convening the first Preliminary Conference, and follow up letter if one party does not attend at the time and place appointed (Appendices A + B);
- a proforma Preliminary Conference Agenda for the first Preliminary Conference (Appendix C), and draft annexures (agreement on costs and form of authority and examples of procedural directions which could be made) .

The proforma Agenda comprises various parts. The body of the document includes a standard form for those items which are generally common to arbitral references, to which various other documents are to be annexed, such as the procedural directions which generally require a more flexible approach depending on the circumstances of the particular dispute. This is consistent with the approach used in the new IAMA Rules and the Schedules to those Rules.

The Practice Note is intended to assist Arbitrators and parties in proceeding with the Preliminary Conference using the proforma Agenda, bearing in mind that almost every case is different, and the directions which should be made should be those which are most appropriate for the particular circumstances. In each case, consideration will need to be given to whether the proforma documents will need to be amended (even to a substantial degree) before being used in a particular dispute.<sup>3</sup>

The new Practice Note 3C is now available on the Institute's website and from each Chapter Office. To be printed in full in a future edition of the Arbitrator.

Janet Grey

<sup>1</sup> These remarks were made by his Honour in opening the Institute of Arbitrators and Mediators Australia (IAMA) Dispute Resolution Centre in Melbourne. The full text of his Honour's address is contained in Volume 18 number 2 of *The Arbitrator* (September 1999), at page 107.

<sup>2</sup> The new IAMA Rules and Explanatory Notes are available at the Institute's website at [www.iama.org.au](http://www.iama.org.au)

<sup>3</sup> The proforma Agenda has been prepared on the basis that all of the matters to which it refers will be dealt with at one Preliminary Conference. In more complex matters, some experienced Arbitrators prefer to convene more than one Preliminary Conference, on the basis that the process can be conducted more efficiently by not making procedural directions for evidence and hearings until after there has been an exchange of pleadings, discovery of documents and narrowing of issues (eg. by experts meetings or conclaves). If this approach is adopted, the procedural directions made at the first preliminary Conference are usually limited to pleadings, discovery etc.

## WHO NEEDS DISCUSSION?

Look out for the following useful discussion papers.

*Dispute Resolution in Electronic Commerce* by the Consumer Affairs Division, Treasury, available at [www.treasury.gov.au](http://www.treasury.gov.au)

*Raising the Standard: A Quality Framework for Primary Dispute Resolution Under the Family Law Act 1975 - A Consultation Paper* by the Attorney-Generals Department. Ph 1800 250 056

## VIEWPOINT

### POWER

JOSEPH GRYNBAUM

## Risk-Shifting Contracts Hurt

**H**ow can the power sector deliver one new powerplant per week for the next 20 years, when its major contractors are falling like flies? Consider the recent fates of former, once-reputable firms such as Stone & Webster, Morrison Knudsen and Raytheon Engineers & Constructors.

For industry survivors to meet the Bush administration's ambitious energy goals, powerplant contractors need a robust industry. They need collaborative agreements with project owners instead of today's adversarial, risk-shifting, lump-sum, engineer-procure-construct, EPC contracts. Fortunately, an excellent model of collaboration exists—outside the powerplant sector.

**ALLIANCES.** In the oil-and-gas sector, pre-merger British Petroleum Co. PLC turned around a bad situation. About 10 years ago, its dealings with contractors and suppliers suffered from name-calling, out-of-control schedules and bitter litigation to settle claims. Determined to build projects cooperatively, BP overhauled its contracting culture from top to bottom and introduced an innovative contracting method called project alliance contracting.

This alliance method combines an integrated management approach with open-book accounting in a "no-blame" environment. The method also offers financial incentives to share risks, and rewards for exceeding clearly defined target goals. For BP, the method works so well that construction of its North Sea "Andrew" oil field, completed in 1996, came in 22% under the target price and six

months under schedule.

My opinion is that the EPC contract has outlived its usefulness. First used in the early 1980s as a lump-sum arrangement to help what was a fledgling private power sector at the time, the EPC method has become a liability, fomenting a "who's to blame" contracting culture. With an EPC contract, a contractor must carry all the financial and schedule risk for a project's completion. This burden has driven up costs to uncompetitive levels, and pushed too many contractors towards insolvency.

By comparison, the project alliance method shines. Alliance team participants share risks without hurtful confrontations. They define common business goals, set target costs and schedules, and create a total team rather than a "them and us" culture. They achieve savings from reductions in oversight management staff, completion risk contingencies and legal costs. They reward innovation, and encourage proactive constructibility and maintainability reviews and life-cycle considerations.

Why, then, is the alliance method such a tough sell in the powerplant sector? Several project owners, lenders and EPC contractors with whom I have spoken have expressed reluctance to try the alliance method because it requires a wholesale change in how the industry currently defines a project relationship. For the alliance method to see the light of day will require a

thorough analysis by lenders and owners before it can be offered to contractors for acceptance. But the extra effort of such an analysis may be well worth it.

Perhaps some examples will help the power sector see a better way to build powerplants less acrimoniously. Alliance contracting has been used successfully in the water, wastewater and transportation sectors as well as in the energy field. Examples include the current expansion of an oil-sands plant at Suncor Energy Inc.'s Project Millennium in Alberta, Canada. Scheduled for completion next year, the \$1.9-billion project includes alliance members Suncor, Banral Inc., Fluor Daniel Canada Inc., SNC-Lavalin Engineers & Constructors Inc. and a joint venture of Bechtel

months to complete rather than the typical three years by traditional contracting methods. The alliance's no-blame culture was tested when a seawall was breached.

**NO BLAMING.** At Wandoo B, water flooded the rig construction area to a depth of 21 ft. After two weeks of work to seal the breach and another four weeks to pump out the water, the actual delay to the project was one week for pouring the platform base concrete. Project participants recall with some surprise that there was absolutely no blame assigned—and no litigation over the accident. The team members included Ampolex Ltd. (now part of Mobil Exploration & Producing Australia Pty Ltd.), Ove Arup & Partners, Leighton Contractors Pty Ltd., pre-merger Brown and Root Inc., and Keppel fels Energy & Infrastructure Ltd.

When the power sector gets serious about the need to reform the EPC contract, it must not lose sight of the fact that contracts are essentially relationships on paper. If the relationship is not based on trust but based on conflicting goals and paranoia-induced legalities with penalties to boot, then inevitably we will paint ourselves back into the same adversarial corner. I believe that project alliance technique offers an industry-wide solution to correct the recurring problems spawned by the EPC practice of project delivery.

*Joseph Grynbaum, a registered civil engineer, is the founder of Mediation Resolution International, a consulting firm in West Hartford, Conn. He may be e-mailed at [wendol7@worldnet.att.net](mailto:wendol7@worldnet.att.net).*



**SUCCESS** Alliance benefited Andrew field

Canada Co. and Fluor Constructors Canada Ltd.

Such alliances really pay off when things go wrong. Despite an accident off the coast of Western Australia, the \$255-million "Wandoo B" oil platform began operating in 1997 after taking just 26

If you have an idea for a column, please contact Viewpoint editor David B. Rosenbaum at [david\\_rosenbaum@mcgraw-hill.com](mailto:david_rosenbaum@mcgraw-hill.com).

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# CPD Programs: Meeting your professional training needs in 2002

*\*The following programs are drafts only. It is advisable you ring your respective Chapters to confirm dates.*

## VICTORIAN CHAPTER

### DRAFT CPD PROGRAM FOR 2002

There will be a monthly PD seminar usually on the second Monday of the month. The events will be held at either the Institute's rooms or at the Celtic Club. Normally the seminar will be an evening speaker followed by discussion, lasting 1 to 1 1/2 hours, or an occasional breakfast or lunch, with the speaker/discussion aimed at 45 minutes.

There will also be 2 presentations of the national 5-day Practitioner's Certificate in Mediation. The national General and Advanced Certificate in Arbitration will also be offered.

A half-day Advanced Mediation Workshop will also be offered in August.

2002	EVENT	CPD POINTS
11 February	Ongoing Education in Constitutional Law Presenter: Snr lecturer Melbourne Uni	1
11 March	<b>[Lunch]</b> International Arbitration: what is different and what are the opportunities Presenter: Michael Pryles	1
8 April	<b>[Breakfast]</b> Mediations in the Federal Magistrates Court Presenter: Maurice Phipps	1
13 May	International Mediation Presenter: Eleanor Wertheim	1
11 June (Tuesday)	<b>[P Plate]</b> Waiver & Estoppel Presenter: Elizabeth Solomon	1
8 July	Workplace Mediation Presenter: Joyce Marshall	1
12 August	<b>[L plate &amp; P plate]</b> Interpretation of Contract Law Part 1 Presenters: Andrew Kincaid & Matthew Harvey	1
24 August (Sat)	Advanced Mediation Workshop 10am – 3pm Presenters: Colleen Papadopoulos and other senior mediator members	8
9 September	Award Writing Workshop Presenter: Grade 1 arbitrator	3
14 October	<b>[Lunch]</b> Presenter: High profile speaker e.g. A-G, judge	1
11 November	Computers in Case Preparation: 2 views Presenter: Grade 1 arbitrators	1
9 December	<b>[Breakfast]</b> Christmas Breakfast on the bank of the Yarra Presenter: Chairman to summarise 2002 achievements, next year's goals	1
(backup)	Managing the Costs of the Reference Presenter: Grade 1 arbitrator	1
(backup)	Recent Judicial Reviews of Arbitration Decisions Presenter: Senior lawyer	1

## NSW CHAPTER

2002	EVENT	CPD POINTS
6 February	<b>FORUM - “Adjudications Under the Building Industries Security for Payment Legislation”</b> Presenter: Michael Whelan	1
18 February	Chapter Committee Meeting	
6 March	<b>FORUM - “MEDIATION-ADR :RECENT DEVELOPMENTS”</b> Presenter: John Hannaford	1
15 March	Newcastle Evening Session on ADR - 6pm – 8 pm Presenter: Peter Callaghan SC/Tim Sullivan	4
16 March	Newcastle Workshop and Accreditation Program for Adjudication - 9am. – 4 pm Presenters: Peter Callaghan SC/Tim Sullivan /Ian Bailey	12
18March	Chapter Committee Meeting	
3 April	<b>FORUM - “UNCONSCIONABILITY IN ARBITRATIONS”</b> Presenter: Ian Bailey	1
12 April	Dubbo ADR Evening Session - 6pm - 8 pm	4
15 April	Chapter Committee Meeting	
1 May	<b>FORUM - Dinner for Max McDougall</b> Speakers to be advised	1
8 May	Evening workshop session – ARBITRATION SKILLS 5pm-8pm Award Writing Exercise Issued	6
20 May	Chapter Committee Meeting	
5 June	<b>FORUM - “REFERENCES OUT OF COURT”</b> Presenter: Rudge SC	1
5 June	Submission of awards for Review and Assessment	6
12 June	Award Writing Assessment and Review 5pm-8pm	6
17 June	Chapter Committee Meeting	
3 July	<b>FORUM - “DESIGNING AN EFFICIENT ADR SYSTEM”</b> Presenter: Shirli Kirscher	1
15 July	Chapter Committee Meeting	
7 August	<b>FORUM -</b> Presenter: Peter Condliffe TBC	1
16 August	Wollongong Evening Session on ADR 6 – 8 pm	4
17 August	Wollongong Workshop and Accreditation Program for Adjudication 9 am - 4 pm	12
19 August	Chapter Committee Meeting	
4 September	<b>FORUM - “TBA”</b> Presenter: Rashda Rana	1
14 September	Mediation refresher workshop (including mediation 9am-4pm)	12
16 September	Chapter Committee Meeting	
2 October	<b>FORUM - “GLOBAL CLAIMS-CONTINUED”</b> Presenter: G Zakos	1
21 October	Chapter Committee Meeting	
25 October	<b>NEGOTIATION SKILLS - 2 – 6 pm Workshop</b>	7
1 November	<b>NEGOTIATION SKILLS – 2 – 6 pm Workshop</b>	7
6 November	<b>FORUM - “TBA”</b> Presenter: John Twyford	1
18 November	Chapter Committee Meeting	
4 December	<b>FORUM – CHRISTMAS FUNCTION</b> Guest Speaker	1
23 December	Chapter Committee Meeting	

## QLD CHAPTER

2002	EVENT	CPD POINTS
7 February Seminar Evening	Comparative ADR Solutions (Negotiation, Mediation, Adjudication & Arbitration) Presenters: Eric Pratt & Jennifer Wyatt Relevant Recent Case Update Presenter: Local Solicitor	1
7 March Seminar Evening	Current Topic to be selected Presenter: Justice White Relevant Recent Case Update Presenter: Local Solicitor	1
March - May Course	QUT Professional Certificate in Arbitrating General Course. Presenter: Ms Wendy Cusack	2
14 April Workshop	Expert Determination Presenters: Mr Graham Easton & Mr Brad McCosker	
4 April Seminar Evening	Current Topic to be selected Presenter: Serving or retiring Judge to be selected Relevant Recent Case Update Presenter: Local Solicitor	1
April Course	The Practitioner's Certificate in Mediation and Conciliation (1 CPD Point per contact hour) Presenters: Mr Peter Condliffe - CEO, IAMA, Ms Jennifer David & Ms Alysoun Boyle - Jennifer David & Associates	1
2 May Course	Hybrid Processes Expert Determination / Legal Issues Presenters: George Strohfeldt & Eric Pratt Relevant Recent Case Update Presenter: Local Solicitor	1
May Workshop	Application / Practice Mediation Skills Presenter: Eric Pratt & Others	
6 June Seminar Evening	Full paper on outstanding issue Presenter: Local Solicitor AGM Report Presenter: Eric Pratt	1
10 June Workshop – Module 1	Arbitration - Training/Update for all Grades - Evidence and Award Writing (Prize for best award) Presenter: Eric Pratt & Others	2
24 June	Arbitration - Training/Update for all Grades - Contract, Waiver and Estoppel Presenters: Eric Pratt & Others Professional Development (CPD) Program 2002	2
4 July Seminar Evening	Mediation Developments Presenter: Senior Mediator Relevant Recent Case Update Presenter: Local Solicitor	1
July Workshop – Module 3	Arbitration - Training/Update for all grades - Trade Practices Act and Tort Eric Pratt & Others	2
July - October Course	QUT Professional Certificate in Arbitrating – Advanced Course Presenter: Ms Wendy Cusack	1
1 August Seminar Evening	Inner Northern Buway Presenter: John Purcell Relevant Recent Case Update Presenter: Local Solicitor	1
5 September Seminar Evening	Mock Arbitration Presenters: IAMA Members Relevant Recent Case Update Presenter: Local Solicitor	1
3 October Seminar Evening	IT Dispute Resolution Update Senior Executive Qld Government Relevant Recent Case Update Presenter: Local Solicitor	1

## QLD CHAPTER - CONTINUED

2002	EVENT	CPD POINTS
3 October Course	The Practitioner's Certificate in Mediation and Conciliation Presenters: Mr Peter Condlifee, Ms Jennifer David & Ms Alysoun Boyle	1
October Workshop	Application / Practice Mediation Skills Presenter: Eric Pratt & Others	
7 November Seminar Evening	STOB & ICB Update Presenter: Dave Stewart Relevant Recent Case Update Presenter: Local Solicitor	1
November Breakfast Meeting	Non-curial Dispute Resolution in Australia Overview of the law and practice of arbitration and its commercial application	
5 December Seminar Evening	Christmas Function and presentation of QUT Arbitration Course Certificates	1

## WA CHAPTER

2002	EVENT	CPD POINTS
February 20	Question & Answer session following General Meeting. Duration: 1.0 Hour	
March 20 23 26	Professional Development Meeting. Duration: 1.5 Hours <b>INTRODUCTORY SEMINAR – REGIONAL</b> (for non-members) Duration: 1 Day Breakfast Seminar. Duration: 1.0 Hours	
April 13 17	<b>L Plate Arbitration Workshop.</b> Duration: 1 Day Question & Answer session following General Meeting. Duration: 1.0 Hour	
May 1 15 18	<b>INTRODUCTORY SEMINAR - LOCAL</b> (for non-members) Duration: 3.0 Hours Professional Development Meeting. Duration: 1.5 Hours <b>CHAPTER CONFERENCE/FORUM</b> Duration: 1 Day	
June 7-9 19 29-30	<b>National Mediation Course.</b> Duration: 3 Days Question & Answer session following Chapter AGM. Duration: 1.0 Hour <b>National Mediation Course Assessment.</b> Duration: 2 Days	
July 17 20 23	Professional Development Meeting. Duration: 1.5 Hours <b>Mediation Workshop.</b> Duration: 1 Day Breakfast Seminar. Duration: 1.0 Hour	
August 10 21	<b>P Plate Arbitration Workshop.</b> Duration: 1 Day Question & Answer session following General Meeting. Duration: 1.0 Hour	
September 18 24 28-29	Professional Development Meeting. Duration: 1.5 Hours Breakfast Seminar <i>L Plate Mediation Course*</i> . Duration: 2 Days	
October 5 16 19-20	<b>Award Writing Workshop.</b> Duration: 1 Day Question & Answer session following General Meeting. Duration: 1.0 Hour <i>P Plate Mediation Course*</i> . Duration: 2 Days	
November 16-17 20 26	Mediator Assessment*. Duration: 2 Days Professional Development Meeting. Duration: 1.5 Hours Breakfast Seminar. Duration: 1.0 Hour	
December 11	Question & Answer session following General Meeting. Duration: 1.0 Hour	

Notes:

- a) Dates of University General and Advanced Course Workshops not yet available – some adjustments may have to be made  
 b) Details of Chapter Conference/Forum to be finalised  
 c) \* Provision for local Mediation Courses if National Mediation Course does not eventuate

## SA CHAPTER

2002	EVENT	CPD POINTS
February	<b>Taxation / GST Issues</b> • Awards, • Settlements Presenter: Brenton Ellery. Duration: One Hour	1
March	<b>Expert Witness</b> • Role and purpose • Obligations Presenter: T.B.A. Duration: Two Hours	2
April	<b>Agriculture and ADR</b> Project Contracts etc Presenter: Charles Drew. Duration: One Hour	1
May	<b>Preliminary Conference</b> “L” Plate and “P” Plate Half day role play of moot Arbitration Presenter: T.B.A Duration: Half Day	4-8
June	<b>Mediation Form</b> Panel of experienced Mediators Questions and answers of frequently asked questions Presenter: T.B.A Duration: Two Hours	2
July	<b>Industrial Advocacy / Strengths and special problems</b> Presenter: Chase Cini. Duration: One Hour	1
August	<b>Mediation Training</b> Presenter: Peter Condliffe Duration: Five Days	40
September	<b>Appeals</b> – Presentation and preparation of an appeal against an Arbitration award Presenter: T.B.A. Duration: One Hour	1
October	<b>Roles, Rules and Pitfalls of Discovery</b> Presenter: T.B.A. Duration: One and a Half Hour	1
November	<b>Awarding costs in an Arbitration Rules / Discretion / Offer</b> Presenter: T.B.A. Duration: Two Hours	2

## ACT CHAPTER

On the first Thursday of each month there will be an evening event at the Canberra Club. These events will be one of the following:

- A speaker for 45 minutes with questions for 15 minutes
- A practice and/or coaching session for 2 hours.

Each event will be followed by drinks and nibbles for about half an hour.

In addition there will be two breakfast meetings with a guest speaker for 30 minutes and questions for 10 minutes.

Also there is a a five day national Practitioners Certificate Mediation and Conciliation course and a one-day Advanced Mediation event in conjunction with ANU Faculty of Law.

2002	EVENT	CPD POINTS
February 7	<b>Fishbowl practice mediation with coaching</b> , mediating a workplace dispute A number of members, who mediate in workplace disputes, will coach at this event	
March 7	<b>Family Court</b> Judge and Registrar to talk about the new <b>Primary DR procedures</b> (both arbitration and mediation) in the Family Court Kevin Perceival, Registrar has already offered to do this and will organise the judge	
March 23 - all day	<b>Advanced Skills Workshop</b> A joint event with the ANU	
April 4	<b>Presentation of IAMA video of arbitration</b> Bryan Ahern – Discussion of aspects of arbitration focussed on the video	
April 11 - breakfast	<b>Public Seminar</b> - ADR as an alternative to litigation An event with the Canberra Business Council	
May 2	<b>Exploration Stage - theory, skills and practice</b> Qld Chapter has a program for this practice and teaching session	
June 6	<b>AGM - Dinner Speakers IAMA</b> - where the Chapter has come from and where IAMA is going nationally. Suggest a “panel” of Robert Hunt National President (on future) and Keith Rodda from ACT Chapter about its history	

**ACT CHAPTER – CONTINUED.**

<b>2002</b>	<b>EVENT</b>	<b>CPD POINTS</b>
July 4	<b>Workshop for Grades 2 and 3 - in family law arbitration</b> AIFLAM and Bond Uni provide these - perhaps IAMA will have own or get AIFLAM to provide	
July 24 - breakfast	<b>Speaker on Youth Conferencing</b> ACT member	
August 1	<b>Advanced Communication</b> ACT member to lead	
September 5	<b>Fishbowl practice mediation with coaching</b> concentrating on commercial disputes A number of members undertake these mediations and will coach	
October 3	<b>Award Writing</b> Talk by ACT member	
October 22 - lunch	<b>Multi-party dispute mediation - additional techniques and skills</b> Talk by ACT member	
November 7	<b>Demonstration of a Mediation</b> - with assessment y attendees Open to potential students for the PCMC course	
November 14-16 and 23-24 - all day	<b>Practitioners Certificate in Mediation and Conciliation course (PCMC)</b> National trainers	
December 5 - breakfast	<b>Christmas Event - Champagne Breakfast</b> Brief summary of 2002 achievements by Chapter Chairman	
December 12	<b>Practice evening - follow-up for attendees at the PCMC</b> ACT members to coach and input	

## Variations Costs and Mediation

The following is an extract from a booklet titled "Variations, Costs and Mediation" by Joseph Sierra (Australian Institute of Quantity Surveyors, July 2001).

There is a general rule regarding building contracts that it is not possible to complete a contract without some departure from the contract documents. There are basically two reasons for supporting this:-

- Architects/Designers/Engineers want to reserve their options to improve or modify their earlier thinking and the
- Owner/Client/Proprietor/Principal who want the opportunity to also change their minds.

There is also the technical/contract variation, the one that is often 'unexpected', the result of an unexpected soft spot in a trench where the Engineer/Building Surveyor has to instruct the Contractor to either dig deeper or cut out the soft spot and backfill with either mass concrete or crushed rock.

A contract could be written so as to allocate all the 'risk' for variations for the duration of the contract works onto the Contractor. The problem with this, is that there is every chance that tenders received would be highly inflated and worst of all, the Owner would end up paying a premium for what had not occurred on the works, perhaps exposing the contract arrangements to criticism of lack of probity, efficacy or even fraud. The dictum, to my mind should be when writing contracts, is to allocate the 'risk' properly to where it belongs. The Contractor should be only paid

for what he has done, no more or less pursuant to the tendered contracts documents.

Generally speaking, variations are a nuisance to the Contractor. Whilst it is appreciated that in the recognised standard forms of contract, recompense is allowed for the actual measurement and pricing of the variation, the 'arguing' and time delays in settlement can be costly and hence no joy to all the parties concerned. Of course, there are sharp Contractors who are able to prepare a tender in such a manner as to engineer a costly variation extra during construction to their maximum benefit. Whilst variations do not generally vitiate a contract, the right to vary is restricted in a sense that the variations/s must be within the general scope of the works (the contract). For example a variation order to add an extra floor to a building or an extension to a residence would not be interpreted as within the scope of the contract. The Contractor is in no way obliged to carry out this kind of variation. This would have to be negotiated with the Contractor on the basis of different terms and prices. Having spent many years as a Superintendent on contracts pursuant to AS2124, I am continually surprised at the lack of understanding some consultants have in this regard. I hope that this work will go a long way to rectify the situation as well as demonstrating how variations should be calculated and prepared.

The work is a useful guide although the section on mediation is scanty.

*Editor*

## THE NEED TO RESPOND PEACEFULLY TO CONFLICT

LEADR and IAMA come together, as organisations committed to the peaceful resolution of conflict, to express our deepest sympathy to the people of the United States of America and all other nations who lost loved ones in the violence and terror which struck New York, Washington and Pennsylvania on 11 September 2001.

The world community is diminished by these criminal acts, and united in grief. The horror and disbelief we felt as we witnessed the attack on the World Trade Centre will never leave us. Nor will we lose our tremendous admiration for the courage, tenacity and spirit of sacrifice of the rescuers, who reminded us of the best of humanity in the face of the worst.

As news of the events unfolded, who was not struck by the fact that all those who were able to make contact with their families and friends spoke of love? Their last words are now our precious legacy. They challenge us to identify what matters most in our lives and dare us to hold to a higher purpose.

Even as the world looks to the response to the attacks, we must be conscious of the extent of human suffering already inflicted and avoid needlessly increasing that suffering. Any response must distinguish the call for justice from the cry for revenge.

Many have spoken of a new sense of fragility, of vulnerability. Perhaps a kind of strength will emerge from this recognition which bring us closer to neighbours and strangers in a sense of shared humanity. If we can build upon a momentary sense of interdependence, perhaps we can capture it and make it a continuing reality.

We hope that, through dialogue and exchange, the great principles of resolution, we may yet achieve peace. If we do, it will be a fitting tribute to those who died so needlessly on 11 September 2001, and to the many others the world over whose suffering we have not witnessed, mourned, nor marked.

*Robert Hunt*

President, IAMA (Institute of Arbitrators and Mediators Australia)

*Joanna Kalowski*

Chair, LEADR (Leading Edge Alternative Dispute Resolvers)

**LEADR and IAMA are Australia's two largest independent national alternative dispute resolution organisations. For further information, contact IAMA at [national@iama.org.au](mailto:national@iama.org.au) or telephone (61) 03 9607 6908 or LEADR at [leadr@fl.asn.au](mailto:leadr@fl.asn.au) or telephone (61) 02 9233 2255.**

## PUBLISHING & DATA

Have you seen the new IAMA website? It was designed and developed by Publishing & Data, a Brisbane-based consultancy that specialises in website and brochure design.

If you're looking for someone to create or maintain your website, Publishing & Data would like to hear from you.

Before you contact us, be warned:we'll ask you questions!

1. Why do you need a website?
2. What you want your website to do?
3. How do you want it to look?

Too many people think of these three issues in the reverse order,which explains why there are so many dysfunctional websites around.

Most web designers usually offer you an off-the-shelf design that may suit your needs. Or it might not...

Publishing & Data prefers to look at your specific needs so that you get a site that does exactly what you want it to, not one that is convenient for whoever builds it.

We 'd prefer not to fill your site with dozens of images and

animations. It will load faster, encouraging clients to use it in preference to ones that elevate appearance over content.

A website is a public face that defines your business or profession, and its development is likely to follow an evolutionary path. Continuing support is an integral part of Publishing & Data's service. As your needs change, we'll be ready to adjust your website to meet them. If you're a long way from our office, don't worry: the Internet makes long-distance collaboration easy.

As well as websites, we also produce flyers and manuals. Publishing & Data staff also have many years of experience in editing. With years of experience in traditional publishing, we offer our editorial expertise on an hourly or entire job basis.

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# Members Only

*Processes demand arbitrators and mediators possess integrity, gravitas and impartiality. A position of detachment invites curiosity, naturally. In this issue of the National Newsletter, we introduce a new column where we are given an insight into the people they are, rather than the positions they hold. We launch PROFILE with the eminently qualified, John Muirhead.*

## PROFILE JOHN MUIRHEAD

Civil and Structural Engineer. Grade 1 Arbitrator; Mediator, NSW Chapter Committee since 1984, Chairman 1990–92, Councillor since 1992, President 1996–97. Member Engineering Contracts and Dispute Resolution Committee of Inst. of Engineers since 1989. Active as Arbitrator, Referee to Supreme and District Courts, Mediator and Expert in Determinations and expert witness to the Courts in arbitrations. Tutor for National Arbitration Course.

**Profession:** Civil Engineer

### What/Who inspired you into arbitration/mediation?

The arbitration – Stuart Bros & Partners v Commissioner for Main Roads of NSW over the construction of the Gladesville Bridge.

I was employed by Reed & Stuart at the time.

### What trait makes a good mediator/arbitrator?

Patience

### Refer to an historical conflict you wished you could have participated in and why?

The Battle of Britain. The result had a critical influence on the development of World War II, and the survival of western civilisation.

### What is your idea of perfect happiness?

A world at peace.

### What is your greatest fear?

Continued increase in the population of homo sapiens.

### What is your greatest extravagance?

Optimism

### What do you consider the most over-rated virtue?

Hope

### Which living person do you most admire?

Nelson Mandela

### Which living person do you most despise?

Osama bin Laden

### Which historical figure do you most identify with?

Thomas Telford

### What is your favourite journey?

Moffat to Selkirk, Scotland

### What is your favourite piece of music?

*Laudate Dominium ex Vesperae Solennes de Confessore KV 339.*  
Wolfgang Amadeus Mozart

### What is your favourite book of literature?

*Call The Next Witness* – Philip Mason

### What is your favourite film?

Notting Hill

### What credo/maxim/motto inspires you?

“The professional man’s only asset is himself. If he does not contain the quality of integrity, he is worthless. If he does, he is priceless”

*Judge Gilbert Tuttle*

**At recent meetings, National Council approved the following Associate Memberships, Accredited Mediators and Graded Arbitrators.**

## WELCOME NEW ASSOCIATE MEMBERS!

Kathryn Adams (QLD)  
David Anderson (QLD)  
Jeffrey Austin (NSW)  
Graham Barter (NSW)  
Susan Beitz (ACT)  
Nigel Biginell (ACT)  
James Bremen (QLD)  
Peter Byrne (WA)  
Roger Colless (WA)  
Phillip Connors (TAS)  
Anthony Deal (NSW)  
John Donnelly (VIC)  
Leon Doret (WA)  
Geoffrey Ewing (QLD)  
Marcia Fogarty (SA)  
Paul Garde (NSW)  
Geoffrey Gleeson (NSW)  
Marlene Graham (QLD)  
Hannes Günter (VIC)  
Raymond Hargraves (QLD)  
Allan Herring (QLD)  
David Holt (SA)  
George Kalimnios (QLD)  
Michael Loewenstein (NSW)  
Elisabeth Lucke (WA)  
Colin MacLeman (QLD)  
Donald MacLeod (NSW)  
David Marsh (WA)  
Robert Nash (WA)  
Chris Papadopoulos (VIC)  
Jaap Poll (WA)  
Karen Rash (QLD)  
Jeff Rose (NT)  
Colin Rose (VIC)  
Harry Russell-BraBy (VIC)  
Tenille Saffin (VIC)  
Peter Sarlos (NSW)  
Jean Shannon (ACT)  
Judith Simpson (QLD)  
Laurie Smythe (VIC)  
Madeleine Stewart (QLD)  
Jane Tanner (NSW)  
Graham Thomsen (QLD)  
Max Tonkin (NSW)  
Maurice Wallin (VIC)  
Michael Wilde (WA)  
Carolann Wolfgang (ACT)

## CONGRATULATIONS!

### Accredited as Mediators

Katherine Adams (QLD)  
Malcolm Barnham (QLD)  
John Bell (ACT)  
Douglas Blackmur (QLD)  
James Bremen (QLD)  
Kym Doherty (WA)  
Ross Easton (WA)  
Ian Forrest (NSW)  
Marlene Graham (QLD)  
Laura Gray (WA)  
Carl Jansma (QLD)  
James Jordan (WA)  
Robert Knott (VIC)  
Robert Lees (VIC)  
Richard Machell (WA)  
Brad McCosker (QLD)  
Norman Mermelstein (VIC)  
Ian Miller (QLD)  
Susan Muir (QLD)  
Brian Naylor (NSW)  
Yvonne Packbier (QLD)  
Karen Rash (QLD)  
Karyn Reardon (QLD)  
Peter Sarlos (NSW)  
Carolann Wolfgang (ACT)  
Robert Zikmann (NSW)

### Graded as Arbitrators

Ian Anderson (NSW) – Grade 3  
John Behm (NSW) – Grade 3  
Mukul Dey (NSW) – Grade 3  
Trevor Donnelly (NSW) – Grade 3  
Rosemary Dupont (NSW) – Grade 3  
Anthony Elder (VIC) – Grade 3  
Ian Forrest (NSW) – Grade 2  
John Foster (WA) – Grade 2  
Graham Keen (VIC) – Grade 3  
John Lewer (NSW) – Grade 3  
Richard Machell (WA) – Grade 3  
Phillip Martin (NSW) – Grade 3  
Brian Naylor (NSW) – Grade 3  
Clive Raymond (WA) – Grade 1  
Graeme Robinson (NSW) – Grade 3  
Ian Steele (WA) – Grade 1  
Bruce Walsh (NSW) – Grade 3  
Steve White (VIC) – Grade 3

# Letters to the Editor

## RESOLUTION & TERRORISM

*I and over 1400 other ADR professionals participated at the First International Conference of the (recently merged) Association for Conflict Resolution in Toronto Canada. I lead with this fact because last Friday evening, while attending a hospitality reception, the alarm system sounded requiring evacuation of the Sheraton Hotel in downtown Toronto. The hotel is in the vicinity of the visually impressive CN Tower. Nobody at the reception exhibited alarm and we casually walked down the stairs out into the night street. We chatted and generally enjoyed the breath of fresh air. Despite the horrors of September 11 we are moving ahead and denying the terrorists the satisfaction of squelching our ability to function freely in an urban setting, wherever it may be. She's right again mate! as we Aussie's say.*

*Joseph Grynbaum, PE  
Mediation Resolution International, LLC*

"When righteousness is practiced to win peace, he who walks shall gain the victory and all fetters utterly destroyed."

– Buddhism

"The noble minded dedicate themselves to the promotion of peace and the happiness of others - even those who injure them." – Hinduism

"Shall I tell you what acts are better than fasting, charity, and prayers? Making peace between enemies are such acts; for enmity and malice tear up the heavenly rewards by the roots." – Islam

"How beautiful upon the mountains are the feet of him who brings good tidings, who publishes peace." – Judaism

"Blessed are the peacemakers; for they shall be called the children of God." - Christianity

– compiled by Factotum Iamus

## THE ARBITRATOR & MEDIATOR...CONSOLIDATING

The next issue of our Journal will focus on technology and the internet. It will also contain a consolidated index, thanks to the effort of Clyde Croft SC, and his hardworking research assistant.

The Arbitrator & Mediator is also consolidating its importance to a far-ranging audience as indicated by the following correspondence:

*"Dear Sir*

*I am a Fellow of The Chartered Institute of Arbitrators (Malaysia Branch) and am presently pursuing my Chartered Arbitration Training with The Chartered Institute of Arbitrators in London.*

*I read with interest some of the articles written by your member arbitrators, and am impressed with the contents*

*on the case managements of arbitration, especially those which are based on the Rules for Conduct of Commercial Arbitration, one such article is by Mr Robert Hunt. I would appreciate if you could kindly put me in contact with him."*

*Regards*

*Leon Weng Seng.*

**The Arbitrator & Mediator: The Journal of the Institute of Arbitrators & Mediators Australia**

**Editor: Grant Holley Ph: (03) 9870 9855**

## GOODBYE PATRICIA

Patricia Luxford, our long serving and enterprising Chapter Administrator in Western Australia, is leaving her position at the end of the year. She will be a huge loss for the Institute and particularly to Western Australia. From your many admirers around the Institute - all the best and good luck.

# The Future for Australia?

## PERFORMANCE MANAGEMENT FOR UNITED STATES ARBITRATORS & MEDIATORS

The Chairperson US Federal Labor Relations Authorities, (FLRA) Disputes Panel and FLRA Board Member (Bonnie Castrey) is a regular visitor to WA. She opened doors when the President of the Australian Industrial Relations Commission asked me to investigate case management in the US and Canada when I attended a Harvard based mediation program in Toronto.

As a result I spoke to the Chairs or CEO's of

- the US Federal Departments FLRA;
- National Labor Relations Board (NLRB);
- Federal Mediation & Conciliation Service (FMCS)
- National Mediation Board (NMB)
- Canadian Industrial Relations Board (CIRB)

Each utilises Private sector 'neutrals' in both arbitration and mediation. What happens in the Departments reflects beyond their immediate sphere.

I learned mainly about developments in Federal US Public Sector. Trends in case management in the public sector and new developments in the US Courts (Including the Supreme Court) however have profound implications for private sector arbitrators and mediators.

I concluded that we have two major trends converging. The first is the rapid emergence (& acceptance of the US judicial system) of mediation and arbitration in resolving many disputes. The second is a huge re-emphasis on performance management

If we take the latter first; executives of the agencies were all anxious to talk performance management, which was of course, linked to case management. The common theme for them all was the Government Performance and Results Act (GPRA).

It appears that in 1993 the US GPRA legislation was introduced. After subsequent testing it became fully operational in all US Federal agencies in 2000.

In a similar time frame the US also introduced the Paperwork Reduction Act. Significant here only because in the electronic reporting process provides additional capacities to look at more and more data and of course tends to remove excuses about costs of time and money. Electronic reporting can provide more and better reports.

The senior officers made it clear that there were no exemptions from the performance assessment process, including judges and neutrals notwithstanding alleged independence (most have quasi-judicial Boards or Panels and administrative judges.) Coming from Australia that was of great interest and of no little concern to me. I learned however that there was little direct interference in judicial decision making except in relation to timeliness. Pressure is apparent though in relation to mediators and arbitrators.

It quickly became apparent that the GPRA is having a major effect. It requires each agency to establish 5-year strategic plans submitted to Congress from 1st Sept 97 and 3 yearly thereafter. Also an annual performance plan from 1st Feb 98. Finally an annual report on program performance 6 months after end fiscal year with 1st one due in March 2000.

GPRA differs from past management reform in two ways. First, it

uses the Federal budget to provide visibility and accountability. Second, in contrast to previous administrative efforts the GPRA is LAW. The Congress therefore has a heightened authority and control over the bureaucracy and the bureaucracy has responded.

Some details of the legislation indicates its significance. Eg. Section 2 includes the following:

### A. Findings:

1. Waste and inefficiency in Federal programs undermine the confidence of the American people in the Govt and reduces the Federal Government's ability to address adequately vital public needs.
2. Federal managers are seriously disadvantaged in their efforts to improve program efficiency and effectiveness because of insufficient articulation of program goals and inadequate information on program performance.
3. Congressional policymaking spending decisions and program oversight are seriously handicapped by insufficient attention to program performance.

### B. The purpose of the Act.

1. Improve confidence of American people by systematically holding Federal agencies accountable for achieving program results.
2. Initiate program performance reform-improve effectiveness and accountability.
3. Improve service delivery by requiring to plan & by providing program results and service quality.
4. Improve Congressional decision making-.more objective information and achievement of stated objectives and on relative effectiveness and efficiency.
5. Improve internal management of Federal government.

### Performance plans

S.115 requires that each agency to prepare an annual performance plan. Such plan shall:

1. Establish performance goals to defined level of performance.
2. Express such goals in objective, quantifiable and measurable form
3. Briefly describe the operational processes, skills and technology etc to meet goals.
4. Establish perform indicators to be used in measuring or assessing relative outputs, service levels etc.
5. Provide a basis for comparing actual program results with established performance goals.
6. Describe means to be used to validate measured values.

### Performance reporting Section 116:

- a. No later than 31 March 2000 and thereafter each agency for President and Congress is..to prepare a report on program performance.
- b. Each report shall set forth performance indicators established in the perform plan along with actual performance compared to performance goals.
- c. The report for 2000 shall include .results of actual(s) for the preceding year (in future years these are for the preceding 3 years).

d. each report shall:

1. Review success in achieving performance goals.
2. Evaluate current years perform plan relative to performance achieved.
3. Explain and describe where performance plan was not met.
  - a) why the goal was not met.
  - b) Those plans and goals for achieving .the performance goals.
  - c) Impact of the GPRA.

All authorities have reviewed their strategic planning and reviewed all their existing criteria; everything from selection processes, accounting through to the performance requirements of everyone (including contractors). These have included reviews of current measurement tools and expectations.

There have been significant changes to way they work, for example, NLRB. (CIRB) have changed processes entirely in some cases. They avoid some mediation and arbitration-by use of Investigating Officers (usually legal officers employed by General Counsel's office). Because they report to Boards and in some instances decisions are made by the Boards on the basis of the Investigating Officers' reports (subject to application for further consideration or hearing, etc) they are influential in resolving the disputes.

Also now have case management administrators who allocate and drive the process. NLRB also utilises:

- Settlement judges. Settle issues to stop courtroom door settlements
- Boards and Chief Judge set and review timeframes.
- Comparisons (anonymous) among staff and mediators.
- Joint Training
- Performance analysis of decisions.

In some Authorities those arbitrators who are consistently slow have been named and admonished. For example the NMB both named slow arbitrators and changed both the selection and pay process. Departments are now setting time frames and other objectives that the mediator and arbitrators are obliged to meet. They have also experimented to get better results eg use dual mediation and training mediators by mentoring. Some Departments also train mediators and clients; sometimes together.

The FMCS has established a nationwide roster of credentialed mediators. FMCS has also established international Services in 3 areas; being Domestic Alternative Dispute Resolution services; labour education and training; and International dispute resolution.

FMCS has Arbitration Panels (1500 Arbitrators) which include engineers, lawyers, academics and industry specialists. FMCS advises it will assist with any arbitration proceedings. On selection the usual circumstances apply to the arbitration relationships but FMCS states publicly that it may take action to ensure cases are heard and decided in a timely manner.

FMCS removes arbitrators whom:

- No longer meet FMCS requirements
- Are repeatedly and/or flagrantly delinquent in submitting awards
- Refuse to make reasonable and timely reports to FMCS
- Are the subjects of parties' reasonable complaints.
- After Board review are unacceptable to parties and/or fail to be selected.

FMCS has also tightened up its list of neutrals and to be credentialed neutrals must meet FMCS criteria.

A new development is the FMCS's Technology assisted group solution (TAGS) where computers are used to assist in interest based mediation and negotiation (worth a talk on its own).

FLRA. NLRB also engage in promoting collaborative ADR (interest based bargaining).

### Legal Changes

Arbitration is now accepted as part of the legal and disputes framework and the US Supreme Court has in recent years even permitted labour disputes to be dealt with under the Federal Arbitration Act if it forms part of the collective bargain agreement. Labor disputes were excluded. But two (2) cases eg in "Gilmer v Interstate Johnson" some 10 years ago the Court permitted mandatory arbitration in preference to Court litigation where as part of certification with the NYSE an employee had agreed to arbitration instead of litigation. Recently that was confirmed and extended in regard to collective agreements in 'Circuit City Stores v Adams'.

In parallel membership of AAA 'neutrals' roster has tightened and the eligibility criteria now are much more stringent than 5 years ago. AAA now advise that roster is smaller and more select. Candidates are screened by a two (2) tier process including evaluation of management skills, substantive expertise, commitment, ethics training etc.

AAA now also has in place Commercial Arbitrator Development Master Plan, which includes continuous education and training. Success completion of training each year is also required; eg from January 2000, 18 hours training in their first year of membership, 12 to 15 hours in the second year and so on. Specialist courses are available as well. (See for example [www.adr.org](http://www.adr.org)).

We see therefore a convergence of a more structured professional approach plus perform management. Acceptance of arbitration is increasing but associated with it are increasing demands for accountable professional conduct when undertaken on behalf of Federal clients or authority's. (see US Bar Assoc web-site re Arbitration). As the process becomes more accepted minimum standards of accountability and qualifications have risen.

### This has implications for Australia

Take for example the CIRB; The whole predecessor organisation was dismantled some few years ago because it was not seen as responding to public accountability demands. Not surprisingly the replacement CIRB is very responsive and has made great attempts to enhance efficiency. In relation to the independent mediators and arbitrators this has resulted in more stringent time line requirements for completing matters and timeliness of decisions. The CIRB reviews the work of all involved and removes from their lists those not meeting the requirements.

The implications for Australia are clear. We will get our own form of GPRA in due course and we will need to satisfy users that we can deal with matters in a timely and professional manner. It is clear that timeliness itself will be the major requirement for all of us and we will need to develop our own perform measurement systems.

*Bob Laing*

*Bob Laing is a Former Commissioner with The Australian Industrial Commission.*

# Around The Chapters

## ACT CHAPTER

### MEMBERSHIP ANALYSIS<sup>1</sup>

#### OVERALL MEMBERSHIP (AS PER DATABASE LISTING):

Financial	Male: 37	Female: 22	Total: 59
Unfinancial <sup>5</sup>	Male: 24	Female: 7	Total: 31
Unknown			Total: 1
			Total Listed: 91

Gender ratios:

Financial members is: 1.6 males to 1 female

Unfinancial members is: 3.4 males to 1 female.

Of the financial members we are pretty close to a 50/50 balance on gender. And, at least the female members are more reliable with their membership dues!

#### ARBITRATION/MEDIATION

Arbitrators	Mediators	Combined skills
Financial: 11	Financial: 44	Financial: 8
Unfinancial: 6	Unfinancial: 18	Unfinancial: 5

#### Arbitration/Mediation Ratios

Arbitrators 17      Mediators 62      Ratio 1 : 3.6

However, the ratio changes when the combined skills are removed (ie pure arbitrators and pure meditors):

“Pure” arbitrators 4      “Pure” mediators 49      Ratio 1 : 12.2

#### MEMBERSHIP RECRUITMENT FROM TRAINING COURSES (MEDIATION AND ARBITRATION)

Male: 13      Female: 15      Total: 28

**Joined in the last 18 months** (3 mediation and 1 arbitration course):

Male: 4      Female: 6      Total: 10

**Total attendees at mediation courses in the last 18 months** (ie 3 courses):

Male: 24      Female: 33      Total: 57

**Memberships suspended as at 29 June 2001:**

Male: 5      Female: 2      Total: 7

**Of those suspensions, the following had less than two years membership:**

Male: 4      Female: 2      Total: 6

(The males and females were all mediators)

**Additional memberships of less than 3 years and no longer financial:**

Male: 7      Female: 1      Total: 8

<sup>1</sup>This analysis is based on the membership listing of June 2001

<sup>2</sup>“Unfinancial/financial” is as at 29 June 2001

## QLD CHAPTER

### INAUGURAL BREAKFAST MEETING

#### SIR LAURENCE STREET SPEAKS AT THE QUEENSLAND CHAPTER'S INAUGURAL BREAKFAST MEETING - THURSDAY 15 NOVEMBER 2001

The Queensland Chapter held their Inaugural breakfast meeting on Thursday 15 November 2001 at which Sir Laurence Street spoke on “*Successful Dispute Resolution Through Mediation*”. The Chapter was overwhelmed by the response and booked to capacity (120 seats) within a week and a half of first advertising. People on the waiting list (who checked in constantly) were disappointed that only 2 seats became available through cancellation.

Chapter Chairman, Eric C Pratt QC said Sir Laurence Street's talk struck a cord because Queensland Chapter was moving more into mediation. Inspired by the response of members and non-members the Chapter is looking at including more Mediation training in the 2002 CPD Calendar.

Some responses to Sir Laurence Street's talk included:

- “Informative and at the same time entertaining”;
- “Was entertaining, incisive but relaxed and is a model for us all”;
- “Amazing”;
- The countless “How can I become a mediator?": and
- “When is Sir Laurence Street coming up to Queensland Chapter again?” from the people on the waiting list as well as all who attended.

The buzz of excitement will last for quite a while.

*Thank you, Sir Laurence Street!*

## SA CHAPTER

### WELCOME

Welcome to Andrew Robertson, newly appointed Administrator for the South Australian Chapter.

#### STOP PRESS!

#### ADVANCED MEDIATION & ARBITRATION PRACTICE SYMPOSIUM - GOLD COAST 2002

The Institute will be holding a one and half-day symposium for experienced mediators and arbitrators in May 2002. The location will be somewhere on the Gold Coast, Queensland.

The theme will be cross-group discussion of the latest issues and themes in professional practice. The symposium will coincide with the Institute's AGM.

Further information will be provided soon.

## WA CHAPTER

### CHAIRMAN'S MESSAGE

#### STATISTICS

With Richard Machell's assistance the year 2000 survey has under gone its first review. The first of the figures to be released makes VERY interesting reading, even for the most ardent of statistician.

The data is being processed for more detailed information and that will be circulated shortly. In the meantime, find Richard's overview in this issue – I don't want to steal his rightful credit by foreshadowing the initial results in my message.

#### GENERAL MEETINGS

Alan Swann has raised the issue of declining numbers at General Meetings. Perhaps this is due to the fact that we no longer have guest speakers, or the Q&A is becoming too difficult (surely not) or the demands on time are becoming even more pressing.

Can you think of anything that might encourage you, and others, to attend? Alan and I have a few thoughts, but this is YOUR Institute and it would assist us immensely if you could feed-back to us your thoughts.

#### REGIONAL INITIATIVES

Due to the Airline debacle the planned Broome initiative has been postponed until November. The upside of that is that members have more time to promote it to their North West colleagues.

If you have any contacts in that part of the world, let us know and we will send them the package.

#### RAILWAY ACCESS REGIME

The Act, Code and Regulations are now law. I have been asked to put forward a panel of suitable dispute resolvers for the Regulator's use, and this will be completed very shortly.

#### NATIONAL CONVENTION, PERTH, 2002

Due to the uncertainty of financial arrangements – in particular with sponsorship - is has been decided not to proceed with our National Conference in WA.

However, the Chapter intends conducting its own Chapter conference towards the middle of next year.

If there any issues or initiatives you believe are suitable for inclusion, or any keynote speaker that is worthy of our interest, let any of the Committee Members know.

#### WESTERN POWER

We have recently completed the preparation of a proposal for Industrial Resolution for Western Power's more professional sector. The 'tidying up' is in place at the moment with the expectation that our industrial members will be on a permanent panel as dispute resolvers for this organisation.

*Phil Faigen*  
WA Chapter Chairman

## STATISTICS, MORE STATISTICS, AND NO DAMN LIES!

### Survey of Arbitrations 2000:

#### Interim Report

*The WA Chapter is in the process of collating the results of a Survey of Arbitrations for the 2000 calendar year.*

A detailed questionnaire was sent to all Graded members of the Chapter. Several participants said that it wasn't exactly like having teeth pulled but was the closest, non-dentist experience that they had encountered so far.

The information collected will result in an interesting snapshot of what is really happening in Arbitration in WA. Some raw data, without analysis is hereby described.

Of the 40 graded Arbitrators that were canvassed (and harassed) 21 responses and no death threats were received. From those responses there were 60 Arbitrations that were current, commenced or finalised in the 2000 year.

Of the 60 Arbitrations, 40 were commenced in 2000. 38 were finalised during the 2000 year with 3 Consent awards being made, 15 Final Awards made, 10 settled by the Parties without award, 1 was abandoned and 6 were settled through S27 referrals with a further 3 unexplained conclusions.

A total of 11 S27 referrals were made from the 60 Arbitrations of which 6 were successful and a further 2 were described as being partly successful.

27 Disputes concerned either Domestic (14) or Commercial Building (13) with a further 12 being Engineering related, 2 industrial relations, 2 property based, 4 Professional matters and 12 categorised as 'Other'. It would appear, as suspected, that the Building Industry is in the majority.

Leave to appeal was sought in 5 instances, resulting in leave being granted in 4 cases but with only one appeal being successful. The basis for the appeal was on the grounds of Law in 3 cases and Technical Misconduct in the other 2 cases

The values of the disputes ranged from 11 under \$20,000, 18 between \$20,000 and \$100,000, 15 between \$100,000 and \$500,000 and 16 being over \$500,000.

Arbitrators costs, understandably, also varied with 11 Arbitrations costing less than \$1,000, 11 between \$1,000 and \$3,000, 8 between \$3,000 and \$5,000, 10 between \$5,000 and \$10,000, 8 between \$10,000 and \$20,000, 3 between \$20,000 and \$35,000 and 1 greater than \$50,000.

In 18 Arbitrations neither of the parties were represented, 5 Arbitrations had only one of the parties represented and in 35 cases both or all parties were represented.

It is proposed to provide further analysis of the survey results in coming editions of The View. A variety of data reports are able to be provided and will be worked on in the near future.

Anyone interested in receiving a copy of the original questionnaire should contact the WA Chapter Administrator: [wa.chapter@iama.org.au](mailto:wa.chapter@iama.org.au)

*Richard Machell*  
[rmachell@southwest.com.au](mailto:rmachell@southwest.com.au)

*Richard Machell is a member of the WA Chapter Committee*

## NSW CHAPTER

### Compulsory Reference to Mediation and Arbitration in the District Court of New South Wales

The District Court of New South Wales has published changes to its Practice Note 33, with those changes to take effect from 1 January 2002.

Practice Note 33 deals with case management of civil actions in the Court (such as personal injury claims, negligence, contractual claims, insurance claims etc) with the exception of cases entered in the Court's specialist Construction, Commercial, Defamation and Family Relationships Lists.

As well as providing harsh penalties where cases are not ready for trial because of breaches in compliance with the Practice Note, the revised Practice Note places a strong emphasis on ADR (particularly mediation and arbitration). It seems likely that the emphasis on ADR will be applied in the Court's specialist Lists as well.

Paragraph 10 of the Practice Note provides:

*'It is proposed to finalise as many matters as possible through alternative dispute resolution systems. Most matters will be referred to arbitration or Court managed mediation. There are guidelines in place as to which matters should be referred to*

*arbitration. Cases may be sent to arbitration or meditation at any time.'*

It is expected that the Court will not refer matters to mediation if that process has already been tried bona fide by the parties. That should lead to an increase in consensual mediation by mediators agreed between the parties.

Paragraph 5.8.1 of the Practice Note provides that a Status Conference will be appointed 7 months after filing of the Statement of Claim, when parties must be ready to take an arbitration hearing date or have their case referred to mediation, or take a hearing date before a Judge within 1 - 2 months of the Status Conference.

Paragraph 5.8.4 of the Practice Note provides that if a date for mediation is given at the Status Conference, the parties will either be given a date for hearing or a date for a mention when a hearing is to be fixed.

The changes to Practice Note 33 will make it important for all legal practitioners to understand and be able to apply differing ADR processes. Skills in using mediation and an ability to advise clients of the most appropriate ADR process will be vital in providing clients with the best possible advice.

*Robert Hunt*

## Getting Together

### CLIDE-CLTA CONFERENCE

10-12 February 2002

MONASH CONFERENCE CENTRE,  
30 COLLINS STREET, MELBOURNE

Jointly hosted By CLiDE and the Corporate Law Teachers' Association, the conference will feature overseas keynote speakers and panels addressing particular aspects of the conference theme:

#### **Corporations and Financial Regulation in the Digital Economy**

Information technology, especially the Internet, promises much yet is not without risk. The law's response to electronic financial markets and corporations online is still evolving. At this conference you will hear speakers whose views are influencing the future of corporate and financial regulation in the digital economy. They will address a number of topics including the legal significance of changing investor behaviour in the online securities markets and the changing forms of financial information and advice. The effect of communications and information technologies on the institutions of the securities markets such as exchanges, advisors and dealers, and new approaches to legal regulation and enforcement in the online markets will be considered. As the speakers have expertise in a variety of North American and European jurisdictions these topics

and others will also be considered in the light of approaches taken in overseas markets.

#### **Cost of Conference:**

Unless stated otherwise, the cost includes pre-conference drinks on 10 February, conference dinner on 11 February and conference papers. (Cost is inclusive of GST).

Academics:	\$385
Full time students (excludes dinner)	\$99
Other:	
Full Conference	\$770
Day 1 only (includes dinner)	\$440
Day 2 only	\$330

#### **For Further Information:**

Conference website: <http://www.law.monash.edu.au/clide/citaconf>

#### **Contact Person:**

Ms Vickie Liew  
Administrator for CLiDE  
Faculty of Law, PO Box 12, Monash University, Vic, 3800  
Tel: 03 9905 3303 Fax: 03 9905 5305  
e-mail: [clide@monash.edu.au](mailto:clide@monash.edu.au)

# Useful Books and Resources

## ARBITRATION FORMS AND PRECEDENTS LOOSELEAF

Julian Critchlow & Professor Robert Merkin

*Arbitration Forms and Precedents* brings together documentation required for the conduct of commercial arbitration in commercial disciplines, including a number of specialist areas such as international commodities, construction and maritime arbitration.

It contains worked examples of all documentation required for the conduct of commercial arbitration, including standard arbitration contracts, clauses, precedents, notices and model letters/forms in use. The price also includes 12 months free updates.

## CONSTRUCTION ADJUDICATION – A PRACTICAL GUIDE

John Riches and Christopher Dancaster

*Construction Adjudication – A Practical Guide* provides a “nuts and bolts” guide not only for parties to different construction contracts but also for the adjudicator on how they should approach the process. Split into clear user-friendly sections, the book answers all construction adjudication issues and is a useful addition to any construction library.

## CONSTRUCTION CLAIMS: CURRENT PRACTICE AND CASE MANAGEMENT

Jeremy Hackett

This book provides an overview of the impact of recent legislation has had on claims management in the UK. It provides advice on claims practice and tactics and what the courts or arbitrators expect both parties to have done to resolve the dispute.

## DELAY AND DISRUPTION IN CONSTRUCTION CONTRACTS 2ND EDITION

Keith Pickavance

The second edition has been updated to cover the 1998 versions of 35 of the most commonly used standard forms of contracts. In addition, there are approximately 35 new cases and previous sections have now been expanded to become entire chapters.

These include: computers and manipulating the program notices, claims and extensions of time; disruption to progress and loss of efficiency.

## THE EXPERT IN LITIGATION AND ARBITRATION

D Mark Cato

*The Expert in Litigation and Arbitration* outlines the role of the expert witness. The book contains articles and chapters from leading practitioners and looks at the role of the expert witness in the UK, Germany, France, Italy, USA, Australia, Hong Kong and China, examining topical issues such as the independent status of the expert and professional liability.

### These books are available from:

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69-77 Paul Street  
LONDON  
EC2A 4LQ UK  
Tel +44 (0)20 7553 1000  
Fax +44 (0)20 7553 1106  
Website: [www.informa.com](http://www.informa.com)

## THE ARBITRATOR'S COMPANION

By Geoffrey Gibson

This book is an introduction and guide to arbitration for lawyers who are not arbitrators and an introduction and guide to law for arbitrators who are not lawyers. Its main concern is commercial arbitration, reflecting the author's 30 years of experience as a barrister and a partner in a major law firm.

The Arbitrator's Companion sets out in short and simple terms the law of arbitration. It then describes in practical terms the course of an arbitration to assist arbitrators in conducting an arbitration and dealing with lawyers. The practical guide concludes with a sample arbitration from start to finish so that both lawyers and arbitrators can see the advice in action. There are then two sections specifically for arbitrators.

The first provides descriptions of the law that arbitrators may find useful. There are thirteen general entries, such as the Australian Legal System, Contract, Discovery, Evidence, Interpretation of Acts and Contracts, Pleadings and so on. There is then a glossary of legal terms for arbitrators. The final part contains the text of the uniform Commercial Arbitration Act 1984 and the Commonwealth International Arbitration Act 1974.

### Contact:

The Federation Press, PO Box 45, Annandale, NSW, 2038.  
Phone (02) 9552 2200 Fax: (02) 9552 1681  
e-mail address: [info@federationpress.com.au](mailto:info@federationpress.com.au)

## NARRATIVE MEDIATION – A NEW APPROACH TO CONFLICT RESOLUTION

Authors: John Winslade & Gerald Monk

In this John Winslade and Gerald Monk introduce an innovative conflict resolution paradigm that is a revolutionary departure from the traditional problem-solving, interest-based model of resolving disputes.

The narrative mediation approach encourages the conflicting parties to tell their personal 'story' of the conflict and reach resolution through a profound understanding of the context of their individual stories. The authors map out the theoretical foundations of this new approach to conflict resolution and show how to apply specific techniques for the practical application of narrative mediation to a wide variety of conflict situations.

### Order Information:

CAT:	SP8175
ISBN:	0 787 94192 1
PRICE:	\$79.95
EXPORT PRICE:	\$72.68
FORMAT:	Hardcover, 253 pp
PUBLISHER:	Jossey-Bass Inc, California, 2000

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**THE ICSID CONVENTION**

The Law of the International Centre for Settlement of Investment Disputes describes the origins, organisation and operations of the Centre, popularly known by its acronym ICSID. This book summarises the facts and the law derived from examining the cases that have come before ICSID Tribunals and provides a critical analysis of the issues that are likely to crop up in arbitration proceedings. It gives a critical analysis for busy lawyers of the law governing arbitrations administered by the Centre and raises all the issues that are likely to crop up in arbitration proceedings.

US\$85 ISBN 1-929-446-05-5. 260 Pages. Table of Cases. Index

**Order Information:**

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**NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL PUBLICATIONS**

Title	Type	Date	Html	pdf	Printed copies available
A Framework for ADR Standards	Report	April 2001	✓	✓	(152 pp)
On Line ADR	Background paper	Jan 2001	✓		<a href="http://www.nadrac.gov.au">www.nadrac.gov.au</a>
Letter of Advice to the Attorney-General on Parenting Plans	Report	March 2000	✓		(16pp)
Submission on Franchising Code of Conduct	Submission	March 2000	✓		<a href="http://www.nadra.gov.au">www.nadra.gov.au</a>
Notes from forums on ADR standards	Working document	June 2000	✓		<a href="http://www.nadrac.gov.au">www.nadrac.gov.au</a>
The Development of Standards for ADR	Discussion Paper	March 2000		✓	(150pp)
A Fair Say: Managing Differences in Mediation and Conciliations	Guide	Sept 1999		✓	(32pp)
Use of ADR in the Federal Magistry	Report				
– Part 1		March 1999	✓		<a href="http://www.nadrac.gov.au">www.nadrac.gov.au</a>
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Primary Dispute Resolution in Family Law	Report	March 1997	✓		(78pp)
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		1998/99	✓		
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# Expert Evidence

## Five Day Program

A five day program to be presented in Adelaide, providing the groundwork for your role as an Expert Witness to the Courts, and ADR medians.

To be run over two sessions, one x three day (Friday – Sunday) and one x two day workshop (Saturday and Sunday), this is a pilot program, presented by the Institute of Arbitrators and Mediators Australia and Adelaide University.

## About the Presenter

Ian Freckelton is a barrister in full-time practice, and by night a Professor and Vice-President of the International Institute of Forensic Studies in the Law Faculty at Monash University, as well as a Professor in the Department of Psychological Medicine and an

Honorary Associate Professor in the Department of Forensic Medicine at Monash University, a lawyer member of the Medical Practitioners Board, the Psychologists Registration Board and the Mental Health Review Board in Victoria.

Ian is the co-editor of the five volume work, Expert Evidence, and is editor of the Journal of Law and Medicine. He is known internationally for his research and writings.

Cost: \$1950

Five days: 9.00 – 5.30pm

25 – 27 January, 2002 (Friday, Saturday & Sunday)

9 – 10 February 2002 (Saturday & Sunday)

Course assessment/assignment:

Lunch, refreshments, course text and folder provided.

# Evaluation of the Membership Poll

## “A SURVEY OF VIEWS ABOUT IMPROVING THE INSTITUTE’S PERFORMANCE”

In mid-2000 the Council of the Institute of Arbitrators and Mediators Australia (IAMA) decided to conduct a membership poll for enabling the organisation to better respond to current and emerging issues that are of importance to its members. The Council regards that it is important that the Institute has the benefit of the views of its membership.

Peter Condliffe, CEO of the Institute of Arbitrators and Mediators, developed the membership poll after consultation with the Council. 298 membership questionnaires were collected (1329 members were invited to participate) over a 3 months period between November 2000 and February 2001.

The questionnaire asked for members’ views on specific issues perceived to be very important to them. Respondents were asked to indicate how important these benefits were for them and to rate the performance of the IAMA in each of these services.

The following graphic shows that members are relatively satisfied with the Institute’s performance in the following areas:

- Provide opportunities to improve practice skills and methodologies in arbitration and ADR [Training].
- Provide opportunities to keep up to date with issues in conflict management [Updating].

The service, which most members say is most important or very important to them, is “being provided with opportunities to improve practices skills” (37% of the members indicate this).

Being provided with referrals is a very important service of the IAMA for 32% of the members. 30% see it as very important to get opportunities to keep up with issues in ADR. 11% think that networking is a very important service of the Institute.

The Institute of Mediators and Arbitrators performance in providing opportunities to improve and update practice skills in ADR [training] and updating members matches the importance the members attach to these services.

IAMA has inherent strengths and potentials to rely on in meeting the needs of members. One of the biggest assets the IAMA can build on in the future is its good performance in providing training opportunities to its members and keeping members up to date with issues in conflict management.

It can be concluded that the IAMA is fulfilling its core mission (“to provide our members with the best possible education and training so that they can deliver the highest quality dispute resolution service...”) but needs to improve in certain other areas to meet members’ expectations.

The National Council is further considering the Report.

The author, Hannes Günter, has extensive experience in analysing, evaluating and editing complex data (with quantitative software analysis programs). He is a German international postgraduate student, specialising in organisational psychology. For further information please contact him via email at: hannesguenter@hotmail.com

# Case Snips

Adapted with kind permission of: *Jacobs, Commercial Arbitration Law and Practice (Lawbook Co., looseleaf service), Summary, Update 52, October 2001.*

## When is a dispute, a “dispute”?

In *Marc Rich Agricultural Trading SA v Agrimex Ltd*, one party had sent the other an invoice but received no response for five weeks. The party receiving the invoice submitted that the dispute arose when it received the invoice or alternatively five weeks later in any event. The sender submitted that after merely sending an invoice and receiving no response for five weeks, there was still no dispute. Langley J reviewed the authorities, including *Tradax Internacional v Cerrahogullari TAS, The M Eregli*, in which it was held that the limitation period in regard to an arbitration order under charterparty ran from the discharge and not the existence of a dispute, and held that “...each case must turn on its own wording and circumstances”. The question of when a dispute arises is “primarily one of fact save that it is clear law that a demand or invoice followed by silence is capable of giving rise to a dispute”. [3.125], [3.370]

See Templeman LJ’s decision in *Ellerine Bros Pty Ltd v Klinger*: “It is not necessary, for a dispute to arise, that the defendant should write back and say ‘I don’t agree.’” [3.123]

## Is a letter to the Institute sufficient notice?

In *Aquaclear Technology Pty Ltd v Cameron & Barister & Co Pty Ltd*, Prior J discussed whether a letter sent to the Chairman of the South Australia Chapter, Institute of Arbitrators and Mediators giving the details of the dispute between the parties and attaching some documentation constituted a “notice of dispute in writing

adequately identifying and providing details of the dispute” as required by cl 47.1 of the construction contract. Finding that it did, Prior J held that Aquaclear did not take up the reasonable opportunity to insist upon strict adherence to the requirements of the Notice of Dispute and by failing to act, it waived such compliance. [3.515], [3.528]

## Waiver: do you need to protest?

In *LG Caltex* “it was held that the lack of protest during the course of the arbitration meant that the applicants had to lose their right to assert that the arbitrator lacked jurisdiction to decide the issue, unless they showed that at the time they took part in the arbitration proceedings, they did not know and could not with reasonable diligence have discovered the grounds for the objection”. [5.270], [40.820]

## The Calderbank letter

In *Townsend v Townsend*, Giles JA was shown a Calderbank letter and invited to make an award of indemnity costs. He declined to do so, holding that a Calderbank letter may be taken into consideration in exercising the discretion of the court in regard to costs but would not automatically result in a more favourable costs order being made. [32.150]

## An Award by any other name

In *Penrith District Rugby League Football Club v Fittler* (unreported, Sup Ct, NSW, 1

February 1996) Santow J held that an award includes the arbitrator’s reasons therefor...[27.615]

# Professional Certificate in Arbitration

The course is designed for completion in two parts: a General and an Advanced Course, over two University semesters.

Starting uniformly across Australia on Tuesday 5 March 2002, the Professional Certificate is offered by provider universities in Adelaide, Brisbane, Canberra, Hobart, Melbourne, Perth and Sydney.

In addition, regional students may undertake the course by on-line web access.

## General Course:

Fees: \$2100 for members of the IAMA  
\$2200 for non members  
Dates: 5 March –28 May 2002  
(weekly Tuesday evening tutorials 6 – 8pm)

## Advanced Course:

Fees: \$2200 for members of the IAMA  
\$2300 for non members  
Dates : 23 July – 8 October 2002  
(weekly Tuesday evening tutorials 6 – 8pm)

## Course assessment:

3 components (workshop, assignment and examination)

**For information on these courses contact Susan Boehm at Adelaide University by phone 08 8303 5236, fax 08 8303 4411 or email [susan.boehm@adelaide.edu.au](mailto:susan.boehm@adelaide.edu.au)**

# Looking For a Venue?

## VICTORIA – Dispute Resolution Centre

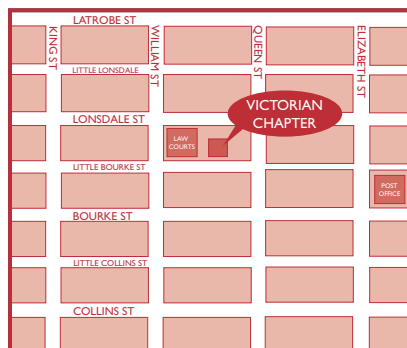
The Dispute Resolution Centre (DRC) is situated in the old High Court building. This beautiful building, full of Victorian ambience, houses rooms which are suitable for arbitrations, court referred matters, mediations, conferences or other meetings.

Level 1, 450 Little Bourke Street, Melbourne, Vic. 3000

Tel: (03) 9602 1711

Fax: (03) 9602 2833

Email: vic.chapter@iama.org.au



## NSW – Dispute Resolution Centre

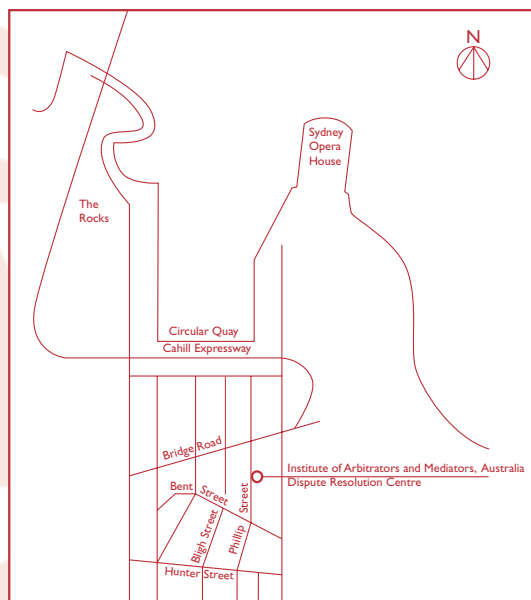
The Dispute Resolution Centre (DRC) provides purpose designed and equipped rooms for arbitrations, court references, mediations and other meetings. Hiring rates are scheduled on the enclosed sheet.

The rooms comprise:

- Three large hearing or conference rooms
- Two rooms may be combined to provide for larger hearings, seminars or conferences
- Six party rooms or small offices

Features include:

- Privacy and confidentiality achieved by sound rated walls and doors
- Witness waiting area
- Resident transcript service
- Facility for receipt and storage of subpoena material
- Office support facilities (telephone, facsimile, photocopying)
- Visual aids available upon request
- Facilities for data wiring to rooms
- Convenient CBD location
- Proximity to off-street parking stations
- Kitchen facilities
- Catering upon request
- Proximity to restaurants and coffee shops



Level 9, 52 Phillip Street Sydney NSW 2000

Telephone 02 9241 1188

Facsimile 02 9252 2911

Email nsw.chapter@iama.org.au

WA – If in Perth look for the following venues

### Institution of Engineers

712 Murray Street, West Perth

Phone: (08) 9321 3340

Master Builders Association

35 Havelock Street

West Perth

Phone: (08) 9322 5133

Two of our members also offer rooms for hire.

South of the River:

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39 Willcock Street

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Phone: (08) 9316 3025

- suitable for up to 3 persons from each party at the one time
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- suitable for up to 4 persons from each party at one time
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