

President's Say

It is a privilege to have the opportunity to serve the Institute as President.

What pleases me particularly about the present Council and Committee structures are that perhaps in the most emphatic way since the establishment of the Institute they demonstrate a truly national organisation at all levels. The Council elections produced a number and distribution of councillors Australia wide roughly proportionate to Chapter membership across the country.

David Waldby, our Senior Vice President is from Queensland, our Vice President, Clive Raymond, is from Western Australia, our Treasurer, Bruce Pascoe, is from Victoria, and our Immediate Past President, Robert Hunt, comes from New South Wales.

While I echo the tribute of the CEO to our past Council members and the input of the Executive Members, I want to say a little about our committee structure.

Under IAMA's articles the Council is charged with the management and direction of the affairs of the Institute. Nevertheless, most efficiently run national bodies have national committees with representations so far as is possible in each jurisdiction. It is particularly pleasing to me that this year IAMA has managed to develop a series of nationally represented, well led committees to support the initiatives of the Council and the administration of the CEO.

Our Membership and Profile Committee is led by Tim Sullivan of New South Wales, with strong support in each jurisdiction. They have hit the ground running with a series of suggestions for developing the profile of the Institute and improving member services. If you as members have suggestions as to how that Committee can work better for the benefit of the Institute please contact Tim at tim.sullivan@contraxgroup.com.

It is necessary that IAMA has practice notes, rules and by-laws. To some extent over the years these have grown like Topsy, and Stephen Hibbert is co-ordinating a concerted effort by the Practice Notes, Rules, and By-Laws Committee to review, co-ordinate, and provide a consistent format for those instruments. This is a big task because it builds on the Institute's know-how contributed over many years by able people who have made a great contribution to our collective intellectual property. Revision of those documents and principles is a difficult and lengthy task, and there will not always be complete agreement on value judgments in every area. Nevertheless, the task is an important and ongoing one, and I hope that members will feel encouraged to make constructive contributions to the work of that Committee. Please contact Stephen at stephen_hibbert@corrs.com.au.

David Waldby chairs the Professional Affairs Committee, which once more has national representation. The Committee is presently reviewing a draft Code of Conduct for Arbitrators, and a revised Complaints Procedure. Last year this Committee completed a revision of the Policy for the Registration of

Practising Arbitrators. The work of the Committee also involves considering complaints made by parties to arbitrations. Fortunately, the Institute has had little in the way of substantiated complaints over the years. It is a tribute to the quality of our arbitrators and mediators Australia wide that there is such a relatively small percentage of complaints in any event, and that, of those few, most reflect the disappointment of an unsuccessful party. Please do not hesitate to offer your contribution to the Institute's professional standards by contacting David Waldby whose address is waldby@serv.net.au.





Robert Hunt continues to provide yeoman service to the Institute in his role chairing both the Education and Professional Development and Journal Committees. The former monitors our educational initiatives in the Chapters and attempts to ensure that our extensive and collective intellectual property is available throughout the country. This is a major area where we can provide services to our members, and Robert's Committee is endeavouring to co-ordinate national CPD activities through each Chapter, and to support the joint venture National Course with the Adelaide University.

The Journal Committee, I am pleased to report, does not consist of sleepy academics dreaming of esoteric legal points attaching to arbitration, but is a national group committed to the maintenance of a high quality journal while grappling with the nuts and bolts of such practical issues as ensuring that the publisher adheres to an agreed production timetable. Robert will welcome your input at robhunch@bigpond.com.

Almost last, but certainly not least, Bruce Pascoe chairs the Finance Committee. He and the CEO, with that Committee, have the pressing task of ensuring the provision of adequate

Quid Novi

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President's Say (cont.)

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and clear information about our finances, and proper budgeting to ensure an effective outcome in what everybody knows are difficult times for bodies such as the Institute. The Finance Committee also aims to carefully monitor our two major dispute resolution centres in Sydney and Melbourne respectively. Because of the significant fixed costs involved in operating both centres it is necessary to carefully monitor their income and operations. If you have the opportunity to help the Institute by scheduling meetings or hearings at either dispute centre, I ask that you give them the first priority. In addition, each Chapter should give consideration to the running of the Institute's National Mediation and Conciliation courses. The recent Western Australian course was over subscribed, loudly applauded, and very successful. The forthcoming South Australian course is already oversubscribed. There is a continuing market for well presented courses of this kind, and the need for the provision of such training is likely to continue while disputes exist. Those who have suggestions for the Finance Committee should communicate with Bruce at bruce.pascoe@aat.gov.au.

In the present structure there has not been a large call for

Executive meetings. My preference would be for the Executive Committee to have a limited role, because the Council is keen and active, and the committee system should provide a very adequate basis for the Council to function as a Council rather than operate as a large Committee. For those who would like to make suggestions about the effective running of the Executive or Council, or who would simply like to communicate their thoughts about the Institute, please do not hesitate to email me at iannos@nospart.com.au.

Finally, I would like to compliment our hardworking National Office team. Running a National Office for an Institute of this kind is a difficult task. Most of us are busy practitioners, and some are used to, or have in their primary career significant levels of infrastructure at their beck and call. Most of you appreciate that in the Institute this is not always possible. It is for this reason that it is important that as Council Meetings approach Councillors, Committee Chairmen, and Chapter Administrators ensure that material is submitted in a timely fashion to permit the orderly distribution of Council papers.

I wish you all well, and look forward to your continuing support of the Institute.

Ian Nosworthy

COUNCIL 2002 - 2004

Congratulations to our newly elected Councillors. They are:

Ian Nosworthy	<i>President</i>	SA	(08) 8227 1900
David Waldby	<i>Senior Vice President</i>	Qld	(07) 5499 9933
Clive Raymond	<i>Vice President</i>	WA	(08) 9263 7132
Robert Hunt	<i>Immediate Past President</i>	NSW	(02) 9231 4366
Bruce Pascoe	<i>Treasurer</i>	Vic	(03) 9282 8463
Bryan Ahern	<i>Councillor</i>	ACT	(02) 6247 0871
Janet Grey	<i>Councillor</i>	NSW	(02) 9810 4111
Stephen Gunn	<i>Councillor</i>	Vic	(03) 9885 6503
Stephen Hibbert	<i>Councillor</i>	NSW	(02) 9210 6357
Laurie James	<i>Councillor</i>	WA	(08) 9321 3755
Angela O'Brien	<i>Councillor</i>	Vic	(03) 8344 8362
George Strohfeldt	<i>Councillor</i>	Qld	(07) 3236 1936
Tim Sullivan	<i>Councillor</i>	NSW	(02) 9360 5466

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Rates are very competitive: 1/4 page: \$75 • 1/2 page: \$150 • Full page: \$275

The CEO Report

There has been much happening since the last newsletter arrived on your doorstep. Most significantly we have a new National Council and a new Executive, who are listed elsewhere in this newsletter. May I give my warm thanks and congratulations to two outstanding Executive Members of the old Council.

Firstly, Robert Hunt, Immediate Past President, who made an outstanding contribution across all sectors of the Institute not only at Council level but in a number of Committees as well. Fortunately, Robert will be continuing an important role on the present Council as an Executive.

Secondly, to Tony Commisso, the former Honorary Treasurer. Tony was always able and willing to give of his time and expertise as our accountant and financial adviser to assist the Institute in developing its financial reporting systems particularly, and also in a range of other areas as well.

Thanks also go to Barry O'Mara, Patrick Pinder and Geoff Markham for their contribution to the Council over the past year. I look forward to working with the new Council which is geographically well spread and has also a good professional spread as well.

The Advanced Practitioner's Symposium 2002 which occurred on the Gold Coast on May 25 and 26 (coinciding with the AGM), was a great success with 110 registered participants. Not only did it make a small surplus, it provided a great opportunity for meeting and exchanging of views between members on a range of practice related issues in both the arbitration and mediation fields.

The keynote addresses provided by His Honour, Chief Justice Phillips (Victorian Supreme Court) and the Honourable Rod Welford MP, Attorney-General and Minister for Justice, Queensland were brilliant as was the after dinner speech provided by George Golvan QC. The Chairman of the Queensland Chapter, Eric Pratt QC ably finished up the Symposium with a report on the many activities occurring in that State.

The model provided by the Symposium and its predecessor, the Colloquium 2001, seems to work well for the Institute's needs as it provides members with ample opportunities to meet and exchange views as well as provide them with some useful information.

Other points of interest that may be worth noting are:

- A business plan has been agreed to by Council (27 June 2002). If you want to know more about this, please give me or your local Councillor a call.
- A new Policy and Procedures Manual has finally been adopted and copies of this have been distributed to all Chapters. It contains a comprehensive outline of the important constitutional and policy document which frame the governance and administration of the Institute.
- The contact lists on the website are soon to be updated, so make sure you let National Office know of any change in contact details that may have happened recently.
- A new Post Accreditation and Mediation Workshop piloted by Queensland has been developed and we are hoping that all Chapters will offer this later this year or in 2003. It is specifically designed for accredited mediators who want to update and enhance their field.

- The Professional Certificate in Arbitration has been considerably overhauled this year to make it run more smoothly and it now offers an online course facility as well.
 - Membership has continued to expand with 1380 members now being noted on our database as of the 27 June 2002 meeting of Council.
 - EBC Business Guides, a widely used publisher of business publications, has asked the Institute to be its ADR service provider and has included the Institute's contact details on its website and publications.
 - On 14 June 2002, the Institute provided the New South Wales Attorney-General's office with a commission relating to the review of the Commercial Arbitration Legislation. The New South Wales department is co-ordinating the matter on behalf of the Standing Committee of Attorneys-General (SCAG). If any member wants a copy of this submission, please contact me.
 - The Council will be meeting regularly during the year and for members' benefit, the dates are as follows:
29 August 2002
31 October 2002
23 January 2003
27 March 2003
15 May 2003
 - Quite a number of accredited mediators and arbitrators have still not returned their CPD record sheets. Please note that there has been some misapprehension that these record sheets need to fulfill the 25 hours target for this year – they don't. At this stage you simply have to return the record sheet with whatever number of hours that you can claim. The Professional Affairs Committee is actively reviewing the operation and audit of the returns.
- Finally, congratulations to our new President, Ian Nosworthy, upon his election to this crucial position and to all members of the new Council.

Peter Condliffe

STOP PRESS

Domain Name Disputes: IAMA Accepted As A Provider

The Institute has been accepted as a provider of dispute resolution services by auDa.

For further details, visit...

www.auda.org.au

The Advanced Practitioner's Symposium 2002

Brief Report From Symposium

The Honourable Chief Justice John Harber Phillips AC, Chief Justice of Victoria gave the keynote address. A highly learned man, we were both entertained and informed by his address. He summarised the history of ADR which he explained had a long lineage dating back to the Ancient Greeks. He noted, for instance, that there is an ancient monument in Iraq built to honour an Arbitrator of a major frontier dispute. He said that in 2002 there were 14 ADR organisations and then predicted what ADR might look like in 25 years from now. He predicted a greater use of on-line dispute resolution. The full-text of this address will be published in the *Arbitrator and Mediator*, and it is a definite "must" for the reading list.

Another notable address was given by The Honourable Rod Welford MP, Attorney-General and Minister for Justice, Queensland. Probably one of the most qualified politicians in Australia, the Attorney-General gave details of how the judicial system in that state is being transformed through the use of ADR. For instance, that it is using abbreviated mediations in the small claims court very successfully and the use of conferencing in the Supreme Court has considerably reduced delays in that jurisdiction. Many of the Tribunals are also utilising mediators. A panel of 350 accredited mediators has been established to implement the new policies and procedures.

George Golvan QC, always a controversial figure, raised hackles during the after-dinner speech on the Saturday evening when he suggested arbitration had become irrelevant because it was too complicated, too expensive and too drawn out. He challenged the arbitrators present to review their *modus operandi* or perish. For the old-style Arbitrators this was like a red rag to a bull and set the scene for lively discussions during the second day of the Symposium.

The closing address was given by the Queensland Chair, Eric Pratt QC. Clearly Queensland shines as the model for ADR practices and endeavours in Australia and Eric took the opportunity to outline the many achievements of that State. The Chapters' success has come from a strong commitment from members and from the very close ties that have been developed with the State Government.

Participants were asked to participate in either the arbitration or the mediation streams. The first mediation session looked at narrative approaches to mediation and was facilitated by Debbie Dunn and Sue Davidson. Narrative mediation involves engagement and exploration, deconstructing the conflict and reconstructing an alternative story where the parties have co-authorship. For those of us coming from counselling backgrounds this approach already forms part of our repertoire but for other practitioners, particularly those involved solely in commercial mediation, it was a mind-blowing experience. One of the more significant things to come out of these sessions was the diversity of styles used by practitioners. For those people interested in learning more about narrative mediation please refer to the two following books: *What is Narrative Therapy?* by Alice Morgan (Dulwich Centre, T: (08) 8223 3966) and *Narrative Mediation*. – *A New Approach to Conflict Resolution* by John Winslade and Gerald Monk (ISBN 0787941921). See www.dulwichcentre.com.au

The second mediation session offered strategies for getting unstuck in mediation and was facilitated by Steve Lancken, George Golvan QC and Geoff Charlton. Three mediators with three different styles made for an interesting facilitation exercise! The major issues that get mediators stuck were identified as; making the first offer, parties not comfortable with

mediators, evaporating authority, long way apart when actually bargaining, the final/last gap, can't/won't communicate, time limits, lack of good faith, and cultural issues. This session had a very strong commercial slant.

The third mediation session was facilitated by Michael Whelan and The Honourable John Hannaford. The facilitators asked participants to offer suggestions about how they would inform the parties about the mediation process and what techniques they would use. It seemed clear that there are many different ways to get to the same point. To demystify the mediation process, some practitioners are using a range of innovative approaches including visual aids and are referring parties to the website www.mediate.com. Again the most significant thing to come out of this session was the wide range of approaches used in mediating disputes.

The first arbitration sessions facilitated by Eric Pratt QC and David Waldby who used the Geoffrey Robinson hypothetical approach in attempting to address the issue of making the right impression and managing the preliminary conference and interlocutory processes. This was challenging as whatever response was given, Eric had the opportunity to ask "what if?". Problems of jurisdiction and accepting the appointment had the group engrossed for most of the session. Other topics explored were legal representation, conclaves or experts conferences and whether the arbitrator should be present, and if so in what circumstances. The issue of what should arbitrators charge and an indicative scale of fees was debated with a range of views being put forward. The misconduct of an arbitrator in relation to cancellation fees determined in *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWSC 77 was briefly mentioned. The session ended with Eric Pratt's firm advice about dealing with recalcitrant parties: "Get the stick out".

The arbitration group then dealt with the issue of making effective use of expedited arbitrations and asked the question, "Is this a better alternative to expert determination?" This session was facilitated by Geoff Markham and Phil Kennon QC. The consensus was that Expert Determination and Arbitration were rarely alternatives. It is a matter of "horses for courses". Whether the Commercial Arbitration Act should be amended to cater for Expert Determination was postulated. The Institute's rules for Expert Determination were dissected. The session used a group workshop approach to compare Expert Determination with Arbitration on a list of 11 issues. The increased use of expert determination as an alternative or substituted for Arbitration was discussed in the context of "what does the market want?"

Finally, the arbitrators tackled the challenging issue of delays, obfuscation and other misdemeanours like dealing with difficult parties and learning from others' mistakes. The session was facilitated by Robert Hunt and Clive Raymond. Numerous issues were proffered and many participants volunteered their own sorry tales of woe to be answered with helpful suggestions on solutions from others. The "blame the lawyers" issue received some rough treatment in this session. Some particular tales illustrated how the party was often the reason but the arbitrator would often not be informed of that or the real reasons.

Apart from adding 10 points to the professional development, the annual symposiums provide a very good opportunity to meet a wide range of practitioners (read personalities!) and to imbue oneself with new and challenging ideas. We hope to see you there next year.

Bryan Ahern and Rosemary Dupont

ACT

The Advanced Practitioner's Symposium 2002

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After-Dinner Speech

25 MAY, 2002

A little controversy is a good thing, and George Golvan QC, who delivered the Symposium's After-Dinner Speech, certainly provided some. "Radical new approaches are required to Arbitration if it is to remain a major player in dispute resolution," he said. Dissenter? Free Thinker? Typical Mediator? Nothing could be so black and white, surely, (unless it's GG's favourite football team, Collingwood). Judge for yourself. An excerpt follows:

"... It is indeed an honour to have been asked by the Institute to be the after-dinner Speaker at this unique Symposium of eminent Advanced ADR Practitioners. I am reminded of an after-dinner speech, which the late President Kennedy once delivered to a gathering of distinguished academics and intellectuals invited to dine at the White House. He pointed out to them that they represented the most significant gathering of "brain power" to assemble at the White House, since Thomas Jefferson dined alone. On this occasion, however, I believe that I can confidently announce that this is the most important gathering of ADR Practitioners to have dined at the Surfers Paradise Marriot Resort, unless Sir Laurence Street has dropped in for lunch.

When I was invited by the Institute to give this after-dinner speech, I imagined that it had some relationship to my reputation as an ADR Practitioner. It only dawned on me that the Institute was "scraping the barrel", so to speak, when Gianna Totaro began to send me helpful aids to public speaking; very useful material for giving an after-dinner speech to Australian ADR Practitioners such as "*Great Speeches of the Twentieth Century on CD*", a book of "*A Hundred Famous Speeches*" ranging from the Funeral Oration of Pericles to Richard Nixon's Inaugural Address, translated into both English and Chinese and finally, "*The Important Speeches of Paul Keating*", - who is not exactly a dispute resolution icon.

"... And that brings me to the subject of dispute resolution. I would in this regard, like to pay particular tribute to Chief Justice John Harber Phillips, the Chief Justice of Victoria. Not only is he one of those rare individuals, a true Renaissance man, who writes poetry, sings Italian airs, and is a lover of all things Greek, but he also had the vision and the leadership to recognise and promote mediation in Victoria at a very early stage, not as an inferior form of justice but a different and equally important type of justice. He has remained a strong advocate of mediation, as is apparent from his involvement with this Symposium and his magnificent and scholarly keynote address this morning. I feel sure that that may bear some relationship to the Ancient Greek origins of Mediation, which the Chief Justice spoke about. Homer, as early as the eighth century BC, noted that even the Gods are portrayed as allowing their disputes to be referred to Mediation. One can readily imagine the Mediator assisted by a Greek text entitled something like: "Getting to Yes - Dealing with Difficult Gods!"

In any event, back to mere mortals, when mediation was a process that was basically confined in Victoria to County Court building disputes conducted after hours in barristers' chambers, His Honour was instrumental in introducing the Supreme Court

"Spring" and "Autumn" offensives in the early 1990's in which a large number of Supreme Court Civil Cases, languishing in lists, were referred to mediation before senior legal practitioners. As a result of these initiatives, something like 400 cases were sent to mediation. Although a number of the selected mediators were relatively inexperienced at first, the widespread use of mediation and its remarkable success rate in settling a diverse range of commercial and construction disputes was the most important single factor in "turbo-charging" the rise of Court Annexed Mediation in Victoria, and placing Victoria at the cutting edge of Australian jurisdictions using Court Annexed Mediation. His Honour lit the spark, which started the prairie fire, and he deserves the appreciation of all ADR practitioners.

The single feature which, I believe, has stood out in Victoria to explain the success of Court annexed mediation is the model of mediation which the Supreme Court has adopted as part of its Rules. It is a model, which has been shown to constantly work well in complex commercial and construction disputes.

In the first place, mediation is compulsory at the discretion of the Court, although the timing of the referral is entirely a matter of judgment by the Court, and each case is treated individually. For example, in a case which I dealt with this week as the mediator, the trial Judge, after hearing an urgent interlocutory injunction application in the Supreme Court in a sale of business dispute, formed the view that the dispute should be resolved as soon as possible, and directed the matter to mediation within 14 days before a mediator of choice, before even pleadings had been exchanged. The mediation conference was able to be conducted within 5 days, including an urgent preliminary conference and the exchange of comprehensive position statements. The dispute was settled in a one day mediation conference involving a restructuring of the entire business transaction in a way that was commercially acceptable to all the parties, but could never have been achieved by a Court imposed solution. In the end, what had commenced as a highly acrimonious dispute with the potential to become a lengthy and expensive Supreme Court Trial was able to be resolved quickly, cheaply and in a business like manner, with both directors shaking hands and wishing each other luck. In other cases, the Judge waits until setting the trial date before sending the dispute to mediation. The important thing is that Judges in Victoria view mediation as a partner in disputes, not as a competitor. If the truth be known, mediation needs to operate in the "shadow" of the Courts and Arbitration, and the Courts need to use the potential of mediation, to create a truly effective unified dispute resolution system.

Secondly, in Victoria, although the Judge has the right to nominate the mediator, in most cases, the parties are able and encouraged to select their own mediator and reach an agreement on the Mediator's fees. The fact that the parties can exercise choice means that they can select the best mediator for the dispute. That mediator can be a retired Judge, a barrister with mediation skills, a solicitor with particular expertise in the field of the dispute, or even a non-lawyer mediator. The parties decide! The responsibility to pay the mediation costs and room hire is usually shared by the parties, so that there are no added Court or Government expenses.

The Advanced Practitioner's Symposium 2002

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Thirdly, the mediation is invariably conducted before an external mediator, outside the Court jurisdiction, usually in specialist facilities, such as the purpose created Victorian Bar Mediation Centre, (which the Chief Justice opened in 1997), with no special reporting obligations. I know that there is a debate in some jurisdictions as to whether Judges, Tribunal Members and Arbitrators should be involved in mediations. I think that true mediation is inconsistent with judicial or quasi-judicial functions, and I strongly support the views of Sir Laurence Street that there are real difficulties in sitting Judges and Tribunal Members acting as mediators. They should generally leave it until they retire.

Finally, there are no set rules or protocols as to how the mediation should be conducted, other than the requirement that the mediator should report to the court, when the mediation is finished. This gives mediators a great deal of flexibility as to how the mediation is to be conducted. Indeed, the custom is for the mediator to control all of the procedural and process issues and to create a mediation process which best serves the particular dispute. Again, if I can illustrate from my own experience, I was the appointed mediator in the dispute between the State Government and the Builder involving a large infrastructure project. The dispute involved a lot of money and many construction, design and legal issues. The mediation was structured in consultation with the parties to take place over four days. One day for a comprehensive site view. Each party was then given one day to present its case in whatever manner was most effective, such as computer presentations and short presentations by expert witnesses, with time for discussion about the issues. The final day was devoted to negotiations, involving the CEOs of the relevant organisation, who had attended the presentations of issues. A comprehensive resolution was able to be achieved of all outstanding disputes, following a mediation process which had been carefully shaped to suit the dispute.

The hallmarks of Court referred mediation in the Supreme Court of Victoria are its relative cheapness, flexibility, freedom of choice and simplicity. You do not need formal hearing rooms, transcripts, formal rules and an expensive infrastructure. Just access to a meeting room, a couple of breakout rooms, white boards and plenty of strong coffee.

I have often been asked what are roles of a good mediator. It is an issue to which I have given thought, and I would like to share some of my ideas this evening:

(a) It seems to me that it is appropriate that we have listened to a musical program by students from the Queensland Conservatorium because a mediator is firstly a conductor, guiding the disputants through the "Mediation Symphony," in which the mediator controls the speed and tempo of the music. The Symphony invariably has four movements. It commences with a slow introduction in which the competing themes are introduced and explained, called simply "Opening Statements". The second movement is a lively *scherzo*, containing a free exchange of ideas, which I have called the "BATNA Serenade". The third movement contains loud and

discordant music and is often called "Crossing the Last Gap". Finally, a triumphant march in which the discordant music emerges as a harmonious and joyful melody, called, naturally "Settlement".

Of course, the Mediation Symphony always finishes with an *aria* sung by a large soprano, because as mediators all know, it's not over until the fat lady sings.

Sadly, there is always the risk that like in Haydn's *Farewell Symphony*, each of the players will take their instruments and depart the stage before the end, leaving the mediator alone to contemplate what went wrong.

- (b) a mediator is also a therapist who helps the parties to understand and prioritise their real interests and concerns, and to make decisions based on realistic choices and goals, rather than emotional desires;
- (c) a mediator is a motivator, maintaining and building momentum in the negotiations even when things seem hopeless, and persuading the parties when all they can see are the "lemons" that somehow they can squeeze "lemonade"; and finally,
- (d) a mediator is a source of creative ideas, putting forward lateral suggestions to help the parties through the maze of options and risks, which they have to confront, to eventually find a solution.

So if you have the conducting talent of an Arturo Toscanini, the psychotherapist techniques of a Sigmund Freud, the motivational skills of a Lawrie Lawrence, and the lateral thinking ability of an Edward de Bono, congratulations, you have all the qualities of a good mediator. ..."

"...I think that it's time for some radical new approaches to Arbitration if it is to remain a major player in dispute resolution. Maybe, it's time for Arbitration to move away from the old adversarial model, and adopt a new more pro-active and inquisitorial model, which works so well in Mediation; deconstructing the traditional notion of an arbitral hearing.

After all, the only procedural rules which constrain the arbitrator are an obligation to act, and appear to act, fairly. Maybe domestic arbitrators should adopt some of the techniques of International Arbitrators and impose tight time constraints upon the conduct of the hearing, using a chess clock approach. Maybe Arbitrators need to consider offering a lump sum fee for their involvement for the entire arbitration, so that they lock in their fees. New and better ways are available. And, unless new ways are found, there is a real risk that arbitration will finish up like the old soldier, not dying, but gently fading away. We may be left with the final spectacle of the President of the Institute of Arbitrators and Mediators Australia sadly proclaiming from the steps of the National Offices:

"Men and women of the Institute of Arbitrators and Mediators, Australia, long may we say God save the Institute, because nothing can save arbitration".

The Advanced Practitioner's Symposium 2002

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Letters to the Editor

Having attended the mediation streams of the Advanced Practitioner's Symposium held at Surfers Paradise on 25 & 26 May, I was prompted to reflect on certain issues that I believe go to the core of IAMA's attempts to embrace all resolution practices.

The issues appear to arise out of some members not recognising and/or accepting the difference between a **conflict** and a **dispute** and significant differences in dealing with each.

Use of the term "warm and fuzzy" by some quite senior members of IAMA to describe mediators was not well received by all members attending. Particularly a number that I spoke to who daily deal with scenes of human misery and conflict that those of us who deal with commercial disputes cannot even begin to contemplate. To categorise mediators as "warm and fuzzy" appears to suggest that arbitrator members are the hard men and women of the Institute. The ones that do the real work, make the tough decisions and put their reputation on the line.

There is nothing "warm and fuzzy" about a social worker mediator dealing with a battered wife or the sexual abuse of children or marriages that have gone horribly awry. I believe that at the end of the day having handed down his/her judgement in a case an arbitrator is more likely to feel "warm and fuzzy" that the social worker, mediator who has been exposed to gut wrenching emotions and often unresolvable conflict.

If the Institute is to truly represent all practitioners involved in the resolution of conflict and disputes it is essential that we recognise and accept the fundamental differences between a conflict and a dispute and through that recognition respect the work of those resolution practitioners who are predominantly involved with one or the other.

To assist the Institute adopting a workable definition for the terms conflict and dispute that will serve the whole of its constituency it may be helpful to review the work of some highly respected and experienced authors.

In defining a **dispute** Professor John Burton (1990) states "we mean situations in which the issues are negotiable, in which there can be compromise, and which, therefore, do not involve consideration of altered institutions and structures". Burton goes on to state that "the issues that lead to conflicts are not the ordinary ideas, choices, preferences and interests which are argued and negotiated as part of normal social living. They are those who sources are deeply routed in human behaviours".

Possibly a more appropriate definition for consideration by the Institute is provided by Dr. Gregory Tillett in his book "Resolving Conflict - A Practical Approach" (1991) where he describes dispute and conflict in the following terms;

"A dispute arises when two (or more) people (or groups) perceive that their interests, needs or goals are incompatible and seek to maximise fulfilment of their own interests, or needs, or achievement of their own goals (often at the expense of the others). This may be done through bargaining or negotiating, and is often reached through compromise: to obtain that which is most important, one party may yield to the other on that which is less important. Disputes are usually settled. That is, either a mutually agreed settlement (often involving compromise) is reached by the parties to the dispute (either with or without the assistance of a third party or mediator), or is imposed on them by an external authority (for example, an arbitrator or a court).

A conflict arises when two (or more) people (or groups) perceive their values as being incompatible, whether or not they propose, at present or in the future, to take any action on the basis of those values. Conflicts relate to deep human needs and values."

Most contemporary definitions of the terms conflict and dispute embrace similar parameters to those used by Burton and Tillett.

The benefit to be gained from the Institute adopting a workable definition of conflict and dispute include facilitating those members primarily involved with the mediation of commercial disputes to become more aware of the part that underlying conflict might be playing in a particular case and conversely those that are predominantly involved with the resolution of personal conflict recognising that at times dispute resolution practices might be useful in the resolution of part of the manifestation of a conflict.

A clear example (although not identified as such at the time) of the difference between **conflict** and **dispute** was offered by one of the attendees to the mediator's stream of the Symposium. The matter concerned a **dispute** over a property settlement arising out of the husband and wife parties separating as a result of the husband having an affair. The mediator described how following an initial mediation conference held shortly before Easter the parties themselves came to an agreement about the property settlement or in other words they solved their **dispute** (the property settlement) however the **conflict** which led to the **dispute** e.g. the parties incompatible views of the husbands affair and the accompanying human needs and values which led to the separation remained.

I sincerely hope that the above observations will provide food for thought to IAMA members and lead to the formulation and adoption of definitions that will properly recognise and respect the work and interests of all constituent members of IAMA.

Yours sincerely
Hank C. Laan

Narrative Approaches to Mediation

In two short hours we invited participants to consider proposals different to interest-based and problem-based approaches to mediation, proposals informed by Narrative Therapy. For many of the participants these were new ideas. We explored ideas such as "expert knowledge", "externalization", differences between relating to problems as "outside-in" rather than "inside-out", why Narrative Therapy is not a 'model', the differences between "even-handedness" and "neutrality".

However, many also connected with the stories we told as they heard resonances with their own beliefs and practices. In the sessions following us the presenters continued to reflect on the conversations from this first session to broaden questions and understandings about Narrative approaches. Many participants also spoke of their interest in training that would further their awareness and practices of Narrative Mediation.

These are some of the questions that we have found helpful. What would they add to your practice?

- What differences to my practice would I notice if I held the belief that conflict is socially constructed compared with holding the belief that conflict is an expression of inner needs or interests?
- Then,
- How would I see the problem?
 - How would I see my role as mediator?
 - How would I see some of the taken-for-granted truths of interest-based approaches such as "neutrality", "impartiality" and power relations?

We are interested in continuing conversations with others keen to explore these ideas.

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Sue Davidson
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Off the Press – Without Fear or Favor

- Compiled by *Factotum Iamus*, National Office

There are two sides to every story and then some. A couple of viewpoints that set tongues wagging in the last couple of months are presented for readers' information. "Off the Press" offers no opinion. We gratefully acknowledge Richard Ackland's permission to publish the following piece which appeared in The Sydney Morning Herald on 14 June 2002.

Judge not thou who ought thyself be judged

KEN Carruthers, QC, like so many of his brethren, on retirement as a judge of the NSW Supreme Court struck out for a fresh career as an arbitrator. It meant he didn't have to hang about at home all day, while at the same time his mind was kept in gear as he supplemented his judicial superannuation with a few extra bob.

Indeed, those few extra bob were to generate quite a bit of strife for Carruthers. Twice in the past few months he has been the subject of firm words from his brethren on the Supreme Court about his fees. His conduct in relation to a mediation involving the Tasmanian catamaran builder ICT Pty Ltd and the shipowners Sea Containers Ltd was found to have given rise to "misconduct" and the "appearance of bias".

The agreed mediation fee for Carruthers and his two co-arbitrators, Michael Thompson and Anthony de Fina, was \$3000 each a day. The arbitration was to have a hearing of nearly four weeks.

Early on in the negotiations Carruthers wrote to the parties and asked that \$250,000 be placed in an escrow account as security for fees, costs and expenses.

A dispute then arose between the parties over the arbitrators' request for cancellation fees which would have to be paid in the event that the hearing settled prematurely or did not proceed for the full period set aside.

After much argy-bargy and correspondence the ICT group decided that the arbitrators had misconducted themselves by pressing repeatedly for the agreement of the parties to pay cancellation fees. The company thought in view of that it could not get a fair hearing.

On February 8 this year, Carruthers, QC, stated to the parties that the arbitrators would not withdraw.

And so it went to the Supreme Court, where an equity judge, Justice Gzell, ordered the arbitrators to be removed, saying: "Their concern to have agreement upon a cancellation or commitment fee ultimately assumed such importance in their minds that they allowed themselves to be swayed by this concern to the detriment of their duty to maintain the appearance of acting in the interests of bringing down a just award."

De Fina sent an invoice claiming a cancellation fee of \$60,000 in respect of 20 vacated hearing days, and Carruthers sent a memorandum of fees including \$60,000 for the vacated hearing days reduced by a "contra" of \$22,000, presumably meaning he found other remunerative work on the down time.

It should be said that Thompson did not render an account to the parties.

Instead of the arbitrators seeking an order of the court in relation to the costs of the arbitration in the event that the matter was settled early, Gzell found that they "increased their pressure upon the parties and, in particular, [ICT Pty Ltd] to agree".

It didn't get much better when Gzell's findings were appealed. Roddy Meagher went into full flight: "Just how there could be a moral obligation to pay for work which might never be done, I quite fail to see. It is, in my opinion, that at this point the conduct of the arbitrators passed beyond the realms of unseemliness into misconduct and misconduct of a very high order.

"They, apparently, brushed to one side any consideration that a litigant might feel more than a little uncomfortable if he went to court knowing that the judge was plaintiff in an action against him arising out of the very matter the judge was supposed to adjudicate.

"At this point the arbitrators' behaviour became disgraceful."

The funny thing is that Carruthers also sits as an acting judge of the Supreme Court, along with a whole heap of other retirees.

The Supreme Court says its policy for acting judges is that only former judges or those holding current commissions from other jurisdictions can be appointed. In this way the workload and the delays can be addressed more expeditiously.

At least practising barristers or academics or solicitors are not appointed to act judicially, as was the policy at the District Court some years ago.

Nonetheless, the appearance of judicial independence remains in issue if people without permanent tenure are appointed by the Government on short-term renewable commissions.

At the heart of judicial independence is permanency until a fixed retiring age. It's surprising that the Bar Association hasn't made more of a fuss about it, specially since there are 15 people with commissions to act as judges of the Supreme Court and on any given day half could be sitting. We should be thankful for small mercies at least they are not charging cancellation fees.

justinian@lawpress.com.au

Cash solved building disputes: MBA chief

4 June 2002 *Illawarra Mercury*

The Royal Commission into the Building Industry yesterday heard of "chequebook" industrial relations and employer fears about seeking independent dispute resolution, during the first day of hearings in Sydney. Counsel assisting the commission, Nicholas Green, QC, said the inquiry would hear evidence of inappropriate payments within the building industry and allegations of corruption.

"The commission will hear accounts from many witnesses disclosing behaviour of a kind that would provoke a cry of moral outrage from ordinary men and women of Australia," Mr Green said. Master Builders Association (MBA) NSW executive director Brian Seidler, the only witness to give evidence yesterday, outlined the practice of chequebook industrial relations to resolve industrial disputes.

Mr Seidler said it worked to ensure an employer paid a little more to get a problem resolved.

"I do recall a number of scenarios where perhaps rather than having an employee in an unfair dismissal retained, an amount of money is paid as an ex-gratia payment, simply in the process of resolving an unfair dismissal; the chequebook industrial relations policy is used," Mr Seidler told the commission.

He said the matter would be resolved if the price was right.

"My experience is that those who accede to chequebook industrial relations ... it usually follows them around from job to job, nearly all of the time," he said.

Mr Seidler said one of the key concerns for employers in the building game was that unions often did not adhere to dispute resolution procedures.

He said some building employers, in particular contractors and sub-contractors, were hesitant to take disputes to the industrial relations commission for resolution because they feared antagonising unions.

"We have had some instances where perhaps the genesis of a dispute, which is usually something small, gets out of hand, and if it's unpalatable for the union or the union official to have any history of the dispute put onto transcript or formally recorded, comments may be, 'if you take this to the commission you'll never resolve it'," he said.

Mr Seidler said in an extension of the "no ticket, no start" rule, many unions were now encouraging a "no union enterprise agreement, no start" mentality.

He said that meant contractors were being forced to sign onto union-brokered workplace agreements in return for industrial harmony.

At the start of yesterday's hearings, about 50 building workers carrying a giant inflatable rat marched through the city to mark the opening of the commission.

The commission, headed by Terence Cole, has summonsed more than 100 witnesses to give evidence.

Quotable Quotes

"I would rather engage in passionate dispute than settle for lazy consensus"

- Christopher Hitchens – *"Letters to a Young Contrarian"*

"The first time I needed an arbitration was in the seventh grade at the Dalton School in New York City. I lost a contest to appear at the New York Times Youth Forum; we had been assigned an essay on Democracy. I had my father write mine because he knew words like "cognizant" and "sanguine"."

- Bo Goldman – *"The First Time I Got Paid For It – Writers' Tales from the Hollywood Trenches"*

Members Only

PROFILE – ROBERT HUNT

LLM, DipLaws, BSc(Eng), MIEAust, FIAMA, FCIArb, FAMINZ(Arb), CPEng, Chartered Arbitrator

Immediate Past President. National President 2000-2002. Member of Board of Management, subject author and tutor for the National Professional Certificate in Arbitration. Has practised as a barrister, specialising in construction industry disputes, since 1984. Formerly practised as a civil engineer & builder 1967 to 1980. Experienced Grade 1 Arbitrator, Court-appointed Referee, Mediator and Expert Appraiser. Since the late 1980's, speaker at numerous courses and seminars conducted by the Institute and other professional bodies, and author of a large number of published articles on dispute resolution.

Profession:

Barrister, Arbitrator, Mediator, Civil Engineer

What/Who inspired you into arbitration/mediation?

I initially became involved in arbitration as a contractor in the 1970's. Then, in the John Keays Address at the Institute's 1996 Conference, Justice Drummond said:

"It is trite to observe that we live in an age of consumerism. If the arbitration industry is unable to satisfy the demands of consumers of its services for an efficient, economical and expeditious dispute resolution service, then it will continue to wither. I say 'continue' because the process is already under way."

That inspired me to do something positive about arbitration and ADR being used efficiently and effectively.

What trait makes a good mediator/arbitrator?

Desirable traits in both mediators and arbitrators are analytical ability, intelligence, clear-thinking, good process skills. They should also be articulate, enthusiastic, patient and pro-active. In addition, a good mediator will be able to engender trust and confidence, and be able to think outside the square, whereas a good arbitrator will be decisive.

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

Adam and Eve (as Adam), as I could not resist the temptation to point out to Eve the inherent dangers in trusting a serpent.

What is your idea of perfect happiness?

Globally, to live in a world without fear. Personally, to be able to indulge myself with good health, family and friends, good food, good wine and regular travel to exotic places.

What is your greatest fear?

- 1 George W. Bush, with his finger on or near the trigger / button.
- 2 Too many more years with John Howard as PM.
- 3 Losing my marbles (or becoming reconciled to 1 or 2 above).

What is your greatest extravagance?

Optimism

What do you consider the most over-rated virtue?

Humility

Which living person you do most admire?

Sir William Deane - a man of towering intellect and social conscience

Which living person do you most despise?

- 1 George W. Bush - for ignorance and complete absence of any aspiration to intellectual endeavour.
- 2 John Howard - for promoting racial intolerance and fear for short term political gain (runner up: the ALP for not having the courage to challenge it).

Which historical figure do you most identify with?

Earl Mountbatten of Burma

What is your favourite journey?

Through the Immigration counter at Sydney Airport (outbound)

What is your favourite piece of music?

Cavalleria Rusticana – Pietro Mascagni

What is your favourite book of literature?

A Perfect Spy - John le Carre (much more than just a spy novel)

What is your favourite film?

The Deer Hunter

What credo/maxim/motto inspires you?

Do unto others as you would have them do unto you.

- The Gospel according to St Matthew Chapter 7 verse 12.

WELCOME!

NEW ASSOCIATE MEMBERS

David Aitken	WA	Leo Kuter	Vic
Aisha Amjad	NSW	Steven Lieblich	WA
Nigel Amphlett	Qld	Pitt Lim	O/S
Geoffrey Barker	WA	Gregory Litster	Qld
Brydget Barker-Hudson	NT	Nicholas Longley	Vic
Paul Bekker	NSW	Gary Lucas	Qld
Colin Brooks	Vic	Kevin McGill	WA
Leslie Butterfield	NSW	Valmai Macaulay	Qld
Meghan Cahill	Vic	Louise Macrae	Qld
Jonathan Cave	NSW	Mary Maher	Qld
Alan Chanesman	Vic	Gail Maskiell	Qld
Carmen Champion	NSW	Kathryn Mazlin	Qld
Leonard Chapman	SA	Brian Middleton	WA
Ruth Charlton	NSW	Timothy Moore	WA
David Cohen	NSW	John Morhall	WA
Jillian Comber	NSW	Mark Nevill	WA
Andrew Cox	NSW	Mary Pocoock	Qld
Trevor Davern	Qld	Karen Powell	WA
Mark Dawbney	NSW	Prudence Power	ACT
Sarah Dewdney	NSW	John Rayner	NSW
Nelson Evans	NSW	Peter Richards	Qld
Peter Farrell	Qld	Vanessa Richardson	Vic
Francis Feher	WA	Victoria Rubensohn	NSW
Graeme Ferrier	Vic	Emma Sayers	NSW
Christopher Fitzhardinge	WA	Teri Shea	Qld
Richard Fordham	WA	Penelope Shehadeh	Qld
Wayne Fulford	NSW	Ronald Sicree	Vic
Robert Gehringer	WA	Graeme Simon	NSW
Walter George	Qld	Babette Smith	NSW
John Gibcus	Vic	Patricia Smith	WA
Simon Grant	Qld	Robin Stanier	ACT
Ron Green	SA	Robert Sternberg	Qld
Raymond Groom	Tas	David Talintyre	NSW
Steven Haites	Qld	Christopher Taylor	Qld
Ian Hammond	WA	Michael Taylor	WA
Tanya Harper	NSW	Errol Thomas	Qld
Graham Hawkins	WA	Michael Thompson	Vic
Marilyn Hopkins	WA	Bruce Turner	Vic
Michael Howard	Qld	Desmond Waldoock	WA
Sally Jetson	WA	William Walsh	NSW
Colin Kaeser	WA	William Wight	Qld
Anthony Kelly	Qld		

STUDENT MEMBERS

Andrea Thorwath Overseas

ACCREDITED AS MEDIATORS

Jeffrey Austin	NSW	Gary Lucas	Qld
Nigel Biginell	ACT	Louise Macrae	Qld
Bonnie Walter	SA	Garry Maynard	Qld
Jim Box	Qld	Paul McCowan	Qld
Brett Codd	Qld	Patrick Mead	Qld
Frank Costigan QC	Vic	Lloyd Polglaze	Qld
Trevor Donnelly	NSW	Gary Price	NSW
Anthony Ednie-Brown	WA	Peter Richards	Qld
Paul Garde	NSW	Robert Sternberg	Qld
Mark Hamilton	SA	William Walsh	NSW
Patrick Hargraves	Qld	Jennifer Wyatt	Qld
Tony Kelly	Qld		

GRADED AS ARBITRATORS

Peter Callaghan	SC	1	NSW	Carl Jansma	3	Qld
Robert Crawford	3	NSW	Varan Karunakaran	3	Vic	
Peer Dalland	3	NSW	Greg Steinepreis	1	WA	
James Douglas	1	Qld	William Taylor	2	NSW	
Ian Hillman	3	NSW	Colin Wilkinson	3		
Jon Kenfield	2	Vic	NSW			

TRANSFER TO FELLOW

Jon Kenfield	Vic
Peter Callaghan	NSW

LIFE FELLOW

Adrian Bellemore NSW

IAMA Insurance

Insurance Options

One of the perennial problems we have as self-employed arbitrator and mediator professionals is accessing reasonable information and advice about our insurance needs, and also obtaining fair and competitive prices. Since joining IAMA, and as CEO, I have investigated a number of possibilities on behalf of members and fielded numerous requests for information. As you may know, IAMA has maintained our Directors and Association Liability Insurance through AON and it was through this source that we finally have secured what is, I think, a reasonable source of professional advice and information for members. IAMA benefits through receipt of a "marketing allowance" which is a small commission for policies written through this arrangement. This may be an opportunity for you to assist IAMA whilst obtaining advice upon insurance issues. While we must offer the usual caveats to ensure that the products are suitable to your needs, AON has similar arrangements with other professional associations including the Law Council of Australia, the Real Estate Institute of Victoria, Australian Association of Occupational Therapists and The Australian Psychological Society Ltd. If you want to enquire, you can use the Freefax form enclosed with this edition of the Newsletter. I have published the following article from Craig Ball, the consultant I have negotiated the package with, for your information.

Peter Condliffe

A Tax Deduction for your Insurance may not always have a favourable outcome.

Many self-employed people will attach their Life Insurance to their superannuation. The premiums are tax deductible and the benefits in most circumstances may be received by the estate tax free. Employees will often adopt a similar strategy through salary sacrifice to reduce costs, but what happens when you attach your Total and Permanent Disablement Insurance to your superannuation for the same reasons?

When a claim is made for a Total & Permanent Disablement (TPD) benefit and the insurance policy is owned by a superannuation fund, the insurance claim will be paid to the fund and the lump sum benefit paid out will form part of an Eligible Termination Payment (ETP).

It is an all too common mistake that many people make in believing that a claim for TPD held in a superannuation fund will automatically be paid out of the fund, and 100% be classified as a post June 1994 invalidity component and therefore be tax free. This is not true!

Firstly. To satisfy the definition of invalidity for tax purposes, two medical practitioners must certify that the invalidity is likely to render the taxpayer unable to be employed in a capacity for which the taxpayer is reasonably qualified by education, training or experience.

Secondly. The Australian Tax Office currently considers employment in an employee/employer relationship only. On this basis there would be little scope for the self employed to access a 'post-June 1994 invalidity component', even though they may have satisfied the 'two practitioner' test and be considered sufficiently incapacitated to access their preserved

superannuation benefits, as there is no 'termination of employment'.

And Finally

The post June 1994 invalidity component applies where a person's employment is terminated before the last retirement date (defaults to age 65) due to invalidity. Importantly, it is unlikely to render the entire TPD lump sum benefit tax-free. The post June 1994 invalidity component only represents a proportion of the ETP.

Case Study

Paul, aged 43, has discussed with *Adviser No 1* his insurance needs for Life Insurance and TPD Insurance. They have agreed he needs Life & TPD cover of \$1,000,000.

Paul's eligible service period start date with his employer is 10/05/1990 and he has an accumulated superannuation balance of \$200,000 (all post '83).

Adviser No 1 recommended that Paul attaches his Life & TPD insurance to his superannuation. This way the premiums would be paid with 'before tax dollars', and would be tax-deductible for Paul's employer. Paul could see the benefits of doing it this way because the cost of his insurance could effectively be halved.

Paul also sought a second opinion from *Adviser No 2* that agreed with the levels of cover but recommended that Paul own the TPD insurance, outside of his superannuation. He explained that although a reduced or tax-deductible premium is attractive, the taxation consequences at claim time may not be favourable.

If Paul was incapacitated and received a Total and Permanent Disablement benefit in say June 2002, and had implemented the recommendations made by *Adviser No 1*, then the **total tax payable** (including Medicare Levy) by Paul would be **\$110,445**.

If Paul had implemented the recommendations made by *Adviser No 2* then he would have to pay \$15,552 tax from his \$200,000 Post '83 superannuation component, but the **total tax payable** (including Medicare levy) by Paul from his TPD benefit would be **Nil**.

The important lesson here is to do your homework. Don't be pressured into making a decision without obtaining a second opinion. What may look attractive on the surface may very well fail you when you need it most – at claim time.

Craig Ball

Senior Consultant

AON Financial Planning & Protection

Phone: 0411 720 062 (mobile)

Toll free: 1800 244 379

Diary of a Mediation Student

Day 1 Thursday, 6 June 2002

Given that the weather was very unusual for Perth - we had lots of rain - the facilities for the five day mediation course of the WA chapter of IAMA were a fantastic choice: St Catherine's College greeted us participants with neatly set up tables, well light rooms and fresh coffee. Su and Peter, our ambitious trainers, made sure everybody was welcomed personally; more than 20 people from various professional backgrounds had come to attend.

At the start, Peter introduced some entertaining questions ("What is the most fun you've had with your clothes on?") and we got to know each other by answering and discussing them. But from there on, it was all tough work! The trainers gave a sound introduction to mediation and then walked us through the phases two to five of the mediation process. Everybody was invited to contribute with own experiences and professional expertise, and those contributions helped the atmosphere to stay comfortably casual and productive. From the beginning on, the learning process was spiced up by role plays. We experienced how demanding even active listening can be when you have to repeat everything you have understood back, which is actually an important tool for successful mediators.

Participants responded very differently to the role plays. We certainly all felt torn between the itch to give it a go and the anxiety about actually doing it. As Su outlined at the end of the day, the role plays and our experience as "baby"-mediators put us all through a shift in our perceptions. The simplest issue would grow into a seemingly explosive balloon. And then, with a nervous glance on our course material, we would try out a hint how to get unstuck, and... sometimes it really worked!

Day 2 Friday, 7 June 2002

Over the day, we discussed steps one and six to nine of the mediation process. It felt a bit draining at first, but more role plays got us back on track and reminded us of the importance of knowing the theory behind it all. Around midday, the "Jelly Beans Exercise" was a welcomed and engagingly discussed game. However, we had too much fun with it to experience the

suggested tension between the need to co-operate and the need to compete; the role-plays were far more effective for that. Through different scenarios, we swapped roles to be either mediator or one of the parties. As parties, we experienced how emotionally challenging a mediation can be. Not only did the role descriptions that we received help to reveal a number of acting talents in the group. We also sometimes really felt the tension, anger and frustration we were supposed to express in the role. Still, when it was time to be a mediator, we hoped that the "clients" would act gently, because at this stage we were all still struggling to get the process right.

Summary of the rest of the course:

Saturday started with the discussion of "difficult behaviours". We reflected on our own behaviours in conflicts, such as to which extent we are co-operative, honest and long-term oriented. The afternoon was spent on the introduction of conciliation.

On Monday we returned after a short weekend to be assessed in more role plays. The video cameras were merciless with the documentation of (pretended) emotional breakdowns by parties and eager attempts to fix the process and return to constructive work by to-be-mediators. After three days of role plays, we became more and more confident in this facilitating job. And so the additional trainers who had come for constructive feedback for this day only were full of praise. However on the next day, the final assessment day, we still were all nervous. "What if I don't reach agreement? What if I loose track of the process? What if...?"

At this stage I don't know how many did not pass the course, but I think I can say that, in contrast to our worries, we all did pretty well. The training had achieved to make us feel familiar with the mediating process, and the supportive atmosphere of the course enabled amazing results for many of the participants, who are now to be called mediators. Thanks to our terrific trainers Sue and Peter and everybody else who contributed to make this course happen!

Andrea Thorwarth

German Postgraduate Student and Intern with IAMA



Around The Chapters

NSW Chapter

The Supreme Court of New South Wales, Law Society of New South Wales and the New South Wales Bar Association are revising their roles for the appointment of mediators under section 110K of the *Supreme Court Act*. Rather than use a list of over 150 names the new protocol proposes that the court may appoint a specific person or Registrar, as mediator or if the parties cannot agree, a nominated body (the Institute is one of these) may nominate the mediator.

April and May have been particularly busy for the NSW Chapter as we continued with our monthly Forums which are held on the first Wednesday of every month, expanded our regional programme and focussed on Award Writing Skills for Arbitrators.

At our *April Forum*, I addressed our membership and guests on “Commercial Arbitration – Claims of Unconscionability and Unfair Dealing”. Ever since the 1990 decision in *IBM Australia Ltd v National Distribution Services* held that claims under the Part V of the Trade Practices Act 1974 for misleading and deceptive conduct could be the subject of commercial arbitration proceedings, such causes of action have often been included in arbitration pleadings. While the definition of what may amount to a contravention is very wide, Ian explored recent decisions which suggest the potential for claims alleging unconscionable conduct has application to the construction industry.

At our *May 1 Forum Evening*, the NSW Chapter was most pleased to host a dinner to mark the retirement of one of the most highly respected arbitrators and court referees in Australia, Max McDougall. Over 80 people attended the dinner held at the Tattersalls Club in Elizabeth Street. Guest speakers, Doug Jones AM and the Hon Justice Robert Hunter provided very entertaining and amusing anecdotes of their experiences working with Max over many years in Australia and overseas. The dinner provided the Institute and industry with an opportunity to recognise Max’s contribution to dispute resolution in Australia and to thank him for his services to the Institute.

Arbitration Skills Parts 1 & 2 Workshop is designed specifically to provide training, skills update and practical experience in the process of writing Awards for Arbitration and will also assist those writing decisions or determinations in Adjudications and Expert Determinations. The workshop was held over two evenings in May and June and provided an important opportunity for those who currently act as experts, referees and or arbitrators or anyone who might do so in the future, to develop and improve their writing skills. The presenters, Janet Grey, Peter Callaghan SC and Tim Sullivan, brought their vast practical experience on procedural aspects of commercial arbitration. Each participant has been assigned the task of writing an award which will be critiqued in the June session.

Regionalisation. The NSW Chapter is committed to extending its activities to major centres around the State. Our first effort was a forum held in Newcastle on Friday 26 April followed on Saturday 27 April by an Accreditation course for Adjudicators under the Building and Construction Industry Security of Payment Act 1999. Peter Callaghan SC, Michael Whelan, Brian Varnam, Alan Wylie, Tim Sullivan, Robert Foggo and I

presented the sessions which were held at the Institution of Engineers in Parry St, Newcastle.

The Friday evening session presented an overview on arbitration, court references, expert determination and mediation, as well as a brief introduction to the *Building and Construction Industry Security for Payment Act* legislation. The Saturday Adjudicator’s training course was for professionals, developers, builders, legal and others to understand the processes under the legislation and how to deal with the adjudication of disputed progress payments.

Participants were taken through each section of the Act and were given an overview as to how the Act has been working in practice in its first two years and how the courts are dealing with claims.

There will be a follow up session to the Newcastle session, mainly on Procedural Fairness and Decision Writing. In the meantime the great response received in Newcastle has been most encouraging and plans are already underway for our next regional destination, namely Dubbo on 20 and 21 September 2002.

There was a healthy New South Wales participation at the very successful Symposium at Surfers Paradise. One aspect which received some attention was the need for arbitrators to develop greater procedural flexibility and to make use of other ADR skills. We will focus in future Forums on the development of blended processes, beginning with our *July Forum* to be conducted by Shirli Kirschner on the subject “DESIGNING AN EFFICIENT ADR SYSTEM”.

Ian Bailey
Chair

SA Chapter

Congratulations on the appointment of Ian Nosworthy, the first South Australian to be elected President of the Institute.

The Law Society of SA has revised its Guidelines for Legal Practitioners acting as Mediators to recognise the Practitioner’s Certificate in Mediation and Conciliation. Lawyers who do this course can now be admitted to the Society’s Mediator List.

The South Australian Chapter has its turn for the National Mediation course in August with interest running high. You may have seen the advertisements which ran in both the Advertiser and Messenger recently.

We held a breakfast CPD session on “Advocacy, Alternative Dispute Resolution and Industrial Relations” on Wednesday 31 July which was a session jointly run with the Industrial Relations Society.

The concept of co-badged events seemed to work well so the Chapter will investigate holding further events with other organisations in the future.

The Chapter has also just completed a submission to the Industrial Relations Review promoting the importance of using accredited Alternative Dispute Resolution practitioners.

All of these steps help to lift the profile of the Institute in SA.

The next CPD session will be a “CPD Recap” to be held on Tuesday 20 August. The CPD obligations form an important

Around The Chapters (cont.)

part of promoting the Institute and members need to be familiar with their obligations. Contact the Chapter on 8227 2111 for further details.

Andrew Robertson
SA Chapter Administrator

WA Chapter

Do you feel it? – the air of expectancy and vibrancy is with us. There are so many wonderful aspects to the WA Chapter such as regional initiatives, members' participation at CPD sessions and meetings, volunteers to be on committees, working parties, opportunities for courses and workshops and so on. It's relentless.

What's more, the enquiries to the administrator from the general public is not decreasing – indeed it is healthy.

Although our membership 'adjusts' regularly, it is still on the increase. My comments when I first took the chair were that my goal was to achieve a membership of 200 members before I leave office.

Mediation Course

Let me congratulate the efforts of Sue Doherty (our energetic and tireless administrator) on achieving a "full house" of attendees for the National Mediation Course – she even had a wait list of at least 4 persons. If my memory serves me correctly, other Chapters have not achieved such success.

Pat Pinder's efforts cannot go unnoticed as are those of Clive Raymond. Thanks to all of them.

Peter Condliffe in Perth

Our CEO was in Perth for the Mediation course and the committee meeting on 5 June 2002.

Voting – Chapter

All of the previous committee will be re-elected, together with 2 new members in John Knuckey (an engineer) and Graham Anstey-Brook (a solicitor) I intend to introduce all of them with particularity at the AGM.

Voting – National Elections

Congratulations to both Clive Raymond and Laurie James for election to National Council.

Although the voting across the continent was down considerably – being less than 20% of the national membership, WA had 30% members voting. Last year WA had 50% of members voting.

Mentor Scheme

We have introduced a mentor scheme for new members.

That is, when a new member is introduced to the Chapter a member of committee will be nominated that person's mentor so as to provide ease of contact for the services we offer, or to answer any questions of the services, opportunities or contacts within the general membership.

In simple terms, a "buddy system" to welcome and wean the new person into the fold.

I have already mooted a networking program – refer my earlier message in the View. Although nothing structured is in place it is nonetheless in existence.

I am aware that many members refer clients on or engage the services of other members on a regular basis. But if anyone wishes to suggest (and organise) something of a more controlled nature, I would welcome their contact.

Phil Faigen
Chapter Chair

ACT Chapter

On 6 June 2002 our Chapter broke new ground for IAMA: we elected a mediator Chair. It's the first time an IAMA Chair in any Chapter has not been an arbitrator. We see this advance as a major step forward for the mediator members across all Chapters. Being the second woman Chair in 26 years is another step forward for the women members as well.

We had a great start to the Chapter year with the ACT's Chief Minister addressing our Annual Dinner. John Stanhope, MLA, expressed strong support for IAMA and its diverse range of dispute management skills. He also offered a wide range of opportunities for the Chapter's advancement in the ACT (many of which we are already following up). It was a terrific night and one of our most successful (numbers, \$ and profile) for some time.

Not only did we have a good member turn-out, the Dinner was also attended by representatives from other ADR agencies in the ACT – part of the Chapter's initiative in taking a co-operative approach to raising ADR's profile in this region – among government, business and the wider community

The ACT's new Chapter Committee is particularly enthusiastic and is looking at ways of implementing many new ideas including: following up on members' requests made in the membership Survey last year, providing mentoring for mediator members, being active in marketing and promoting the Chapter (including a feature article in *The Canberra Times*), designing a CPD program that includes a diverse and exciting range of events for the next year, as well as special activities to increase the participation of those "nominal" members we don't often get to meet.

Here in Canberra, we are starting to promote our Chapter members as professionals with flexible ADR skills applicable across many circumstances (rather than staying in the relatively narrow confines of only arbitration and only mediation). This approach is already receiving promising feedback and may even be producing new work opportunities for our members.

We look forward to further progress on initial steps already taken with the NSW Chapter in the last month: co-promoting each other's CPD Program (for those travelling members) and looking at cooperative regional activities that promote the two Chapters as well as IAMA generally. We also owe special thanks to Tony Comisso for his energy within the ACT Chapter and the National Council over the last few years.

A final note: how many members know that the first ever AGM of the Institute took place at the Canberra Club in the centre of Canberra in 1976 – it was a national AGM because none of the Chapters existed. More history snippets next time.

Alysoun Boyle
Chair

PS Don't forget the National Mediation Conference in September (see "Getting Together" for more details)

Around The Chapters (cont.)

MEMBERSHIP SURVEY – PART 2

Giving Us All A Future Focus*

Alysoun Boyle and Jen Manson

During the past year, the ACT Chapter has conducted two major activities to identify member needs and how the Chapter can re-align its focus to better meet those needs.

An analysis was conducted of the ACT Chapter's membership database and the results of that were published in the ACT Newsletter late last year and in the National Newsletter in November 2001. Essentially, the analysis showed that, although the Chapter had a healthy rate of membership "recruitment", there was a high rate of member attrition (ie, members were leaving after a short period of membership).

**NB This is a summary report, not a strictly statistical one.*

Immediately after the analysis was completed, the Chapter conducted a membership survey asking members to give their views on a range of issues including:

- Why they joined IAMA
- What incentives would help them remain as members
- Which of IAMA's information services they accessed (national Journal, Chapter Newsletter, Chapter emails)
- What members would like to see included in the Chapter Newsletter
- What incentives would attract members to attend more CPD events
- What skills members can offer IAMA colleagues
- Networking opportunities
- The profile of the ACT Chapter

The results of the survey* have given the Chapter many valuable ideas on which to build over the next year or two. The selected results summarised below are listed in order of frequency according to how often the issues were mentioned by respondents to the survey.

Responses to the questions relating to the Chapter Newsletter and to training issues (ie, CPD) are summarised elsewhere in this Newsletter.

Two other major results areas from the survey centred round "Skills Development and Networking" and "Accessing Work Through IAMA".

Skills Development and Networking

These issues were the most frequently raised by members. For example, the most frequently cited reasons for joining IAMA were:

- Professional credibility
- Professional development
- Networking with like-minded people

The most frequently cited incentives for remaining as members were:

**22% of members responded – a reasonable figure for organisational surveys.*

- Better value for money (more modest fees and/or better services)
- More learning and skills development
- More and better networking opportunities

Under the question about "networking", 94% of respondents

said they would like to participate in professional alliances with like-minded organisations, while 50% said they would participate in interagency activities.

Accessing Work through IAMA

This issue ranked well behind "Skills Development and Networking". For example, less than 20% of respondents said they had joined IAMA in the expectation of referrals of work. It also had a low frequency ranking as an incentive for remaining as members.

Chapter response:

The value of data analyses and membership surveys is that they create concrete information on which action can be taken – ie, the Chapter no longer needs to guess at what members would like and so be restricted to a fairly random approach to its purpose and activities.

In summary, members have asked, through the survey, that the Chapter become a dynamic, professional organisation that enjoys widespread community respect and provides a range of benefits to its members.

Although there are many possibilities for implementing members' suggestions, responding to the survey is a major project for the next ACT Committee. However, some ideas are already being talked through and put in place.

This Newsletter will be the forum for letting members know what is being done within the Chapter to address the issues raised in the survey – so, stay tuned!

Thanks to: all members who participated in the survey, those people who helped me design the survey form, and to Jen Manson who oversaw distribution of the survey and collated the results.

QLD Chapter

The House of Winzar

The secretariat has been run at Contract Control International. Administrative Assistant Lisa-Marie Ihle left the Queensland Chapter in early May to pursue an exciting career opportunity. Her departure left the office in a somewhat chaotic state for a short period of time but things are now back on track. Ann Winzar, who served as Queensland Chapter Administrator for 4 years, has now handed over the reins to Jennifer Winzar. Although Ann's act will be hard to follow she remains in the background at CCI for initial administrative support during the handover. I am sure I express everyone's sentiment when I record my heartfelt thanks to Ann for all she has done for us. Ann's remarkable organisational ability, together with her tact and personal charm, have been a Godsend for this Chapter. I am sure our members will long remember the help she has given them. Fortunately, Ann's daughter Jennifer is already showing us that she has inherited her mother's attributes.

Eric C. Pratt QC
Chair

The Noticeboard



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WORKCOVER CONCILIATION SERVICES

Notice of move to new premises and change in name.

As a provider to the WorkCover Conciliation Service, we wish to advise you that the Conciliation Service is moving to new premises and undergoing a change in name.

Could you please note the following important information and update your customer records accordingly.

From Tuesday 11 June 2002, the Conciliation Service will be located at new premises. The new street address will be: Level 9, 460 Lonsdale Street, Melbourne 3000

The postal address and telephone numbers will remain unchanged, with general contact details being:

Postal address: GPO Box 251B Melbourne 3001

General Enquiries: 9940 1111

Freecall: 1800 635 960

Email: info@conciliation.vic.gov.au

In addition, the Service is changing its name to the: Accident Compensation Conciliation Service

Useful Books and Resources

“Practitioner’s Handbook on International Arbitration and Mediation”

For the complete table of contents and further information on all the contributors, visit our website: www.arbitrationlaw.com.

ADDR Terminology: a discussion paper.

Responding to this paper.

The purpose of this paper is to stimulate discussion on terminology in ADR, to seek information about how terms are being used in ADR and to invite those with an interest in ADR to suggest future directions for ADR terminology.

NADRAC welcomes responses from a wide variety of groups. Responses may address specific questions raised in the paper, deal with questions or issues overlooked in the paper, or

address the issues of ADR terminology in a general way.

Responses to the paper may be sent to:
nadrac@ag.gov.au

OR

NADRAC Secretariat
Robert Garran Offices
BARTON ACT 2601

The deadline for responses is 31 December 2002.

Statistical Explanation with Microsoft Excel.

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ISBN: 0 534-51611-4

Getting Together

IABSE Symposium

“Towards a Better Built Environment – Innovation, Sustainability, Information Technology”.

Melbourne, Australia

11-13 September 2002

Melbourne Hilton on the Park

Website: www.iabse.ethz.ch/conferences/melbourne

Organised by the Australian Group of IABSE in conjunction with The Institution of Engineers, Australia.

Negotiation and Deal Tactics 2002

“Practical Strategies To Improve Performance In Negotiation and Deal-Making”.

Presentations by 19 Top Business Leaders including Nick Greiner (Chairman & Director, former Premier of NSW); John Roberts (Principal, McKinsey & Company); Don Marples (Head of Project & Infrastructure Finance, Commonwealth Bank); Robert Hunt (Barrister & Immediate Past President, IAMA)

Dockside, Cockle Bay, Sydney, Australia

24 – 25 September 2002

Further information, contact L21 on

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arbitration is having on international commercial arbitration. It will also examine emerging trends and developments in the area.

For further information please contact Robert Hunt at robhuntch@bigpond.com.

National Mediation Conference

“Pathways to Dispute Management”

Over the past decade the processes for managing and resolving disputes have become increasingly innovative and sophisticated as they strive to meet the disparate needs of clients and the wider community. Recent amendments to legislation in various jurisdictions have recognised the inherent value of mediation, conciliation and other alternative (sometimes hybrid) processes within courts and tribunals.

Give the growth and increasing use of the many ADR processes, this conference is a vital event on the calendar of every ADR practitioner and will provide a stimulating forum for participants to explore the diverse range of new ideas, new research and new challenges that face the practice of mediation and ADR today.

IAMA Session at the National Mediation Conference

Alysoun Boyle, ACT Chair, will be leading a one-hour session (immediately following the opening plenary sessions) with a panel of other experienced member arbitrators and mediators. The subject will be “Flexible Approaches and Processes for Resolving Disputes”.

When: 18 - 20 September 2002

Where: National Convention Centre, Canberra

Contact: Conference Co-ordinators

Phone: (02) 6292 9000

email: confco@austarmetro.com.au

6th IBA International Arbitration Day

“International Commercial Arbitration and Globalisation”

Sydney, Australia

13 February 2003

Over the years, international commercial arbitration has played an important role in supporting the internationalization and globalisation of business. With the enormous increase of international business and investment in recent years, there has also been a significant increase in the use of international commercial arbitration to resolve an ever expanding range of disputes in a variety of new contexts. The conference will consider the effect globalisation and the increased use of