

*National • Independent • Multidisciplinary*

## President's Say



**IAN NOSWORTHY**  
President

When I considered what I should write for this Newsletter, I thought that I should welcome all Members to 2003. I then realised that the year is well under way, and a lot has happened already. Welcome, nonetheless. I hope the year has started well, and wish you all every success.

I am delighted to say that the Institute appears to me to be progressing well, and doing the sorts of things it ought to do. I was made very welcome by the New South Wales Chapter at the start of February, when giving a paper on the future of arbitration and mediation. The South Australian Chapter has asked me to re-present that paper in Adelaide, and I am delighted that the Honourable Chief Justice Doyle of our Supreme Court, the

*As I have said before, and probably will say again, one matter which has been most gratifying to me in my time as President has been the unifying nature of our diversity, and the input from all Chapters which has led to the success of our Institute as a national body in difficult times.*

Honourable Justice von Doussa of the Federal Court, and Dr Andrew Cannon of the Adelaide Magistrates Court have all kindly agreed to comment on the paper and contribute to a public forum IAMA will hold in Adelaide on 29 April 2003. I hope that Members and those interested in ADR will come to what hopefully will be a stimulating session.

I am very pleased to note that membership renewals are at good levels. While we cannot be complacent, I suggest that the good state of the Institute indicates that we are doing some things right. I hope that you share this view. As usual, I urge anyone who has a concern about particular issues they want to raise to contact me. I am pleased that, although from time to time Members will raise specific issues with me, in general there is mostly a speaking silence following my requests for Members to raise concerns direct with me.

I continue to be very gratified on your behalf by the work of our Council Committees. While it is often invidious to single out individuals in what is plainly a team effort, probably most Members do not know a great deal of the workings of two important and very effective Committees. The Practice Notes, Rules and By-Laws Committee is led by Stephen Hibbert and has undertaken a thorough review of the Institute's documents. It is probably the first time for many years that there has been a concerted attack on all our rules, and an attempt to assemble in logical fashion all those documents and to bring them up to date. The work has included not only Councillors, but also enthusiastic younger Institute Members such as Arturo Dal Cin of South Australia. There has been a good deal of work done to eliminate duplication,

simplify rules and practice notes and provide a coherent basis for access to that material for Members and the public. I thank all contributors for their good work.

I am also delighted at the continued good work of the Journal Committee which continues to attract good material by way of articles, submissions, case notes and the like. That is not to say that Members should be reticent about contributing. On the contrary. While the Journal is intended to be high quality, it also offers scope for the practical and down to earth. Hopefully the difference between quality and elitism is well understood, both by contributors and readers.

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The last two symposiums have enjoyed the support of the ACT and Queensland Chapters. They were both immensely successful and enjoyable occasions, providing a forum for the exchange of ideas, a platform for Member contributions and an occasion for good fellowship, renewing old acquaintances and making new friends. It is now Victoria's turn. I am pleased with the progress and planning for the Symposium 2003 which has been undertaken by the Victorian Chapter's hardworking committee. I hope Members will support what should be a very stimulating program on the weekend of 23 - 25 May.

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Address:  
Level 1  
450 Little Bourke Street  
Melbourne 3000

Telephone:  
(03) 9607 6908

Facsimile:  
(03) 9602 2833

Email:  
national@iama.org.au

As I am sure you are aware, the NSW and Queensland Chapters have absolutely first class, vigorous continuing education programs which provide a repository for excellent contributions to training, and development and ideas for not only the less populous states which have to work hard to put programs together, but also the intellectual property of the Institute as a whole. South Australia justifiably claims credit for the Adelaide University Joint Venture Course which is run Australia-wide. It is interesting to see that course evolving into a vigorous online learning environment, which must surely be one of the important ways of future learning. We are also delighted with the successful operation and running of our national mediation courses in Western Australia and that Chapter's continuing contact and development of ideas with Murdoch University.

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We are also considering the establishment of a Tasmanian Chapter. We are pleased to have the benefit of the involvement of former Premier Ray Groom, who has put his not inconsiderable personal influence behind the project. We are hopeful that this initiative can be developed, and that it will add to our strength nationally.

Elsewhere in this newsletter you will read of the ACT Chapter's involvement in attempts to assist on a *pro bono* basis in connection with recovery from the tragic bushfires in January. I will not repeat the matters appearing in the ACT Chapter report, but our nation and this Institute owe a considerable debt to a keen group of generous practitioners in the ACT. On your behalf, I offer my sincere congratulations to Alysoun Boyle and ACT Chapter Members for their generosity.

It occurs to me that in an organisation like ours, there are often some unsung heroes who are perhaps not as well known amongst our membership as they deserve to be. I would like to say a little about two such Members.

The first is Tony Commisso, who was our Treasurer

until the elections in 2002. Unfortunately, he was unable by reason of injury to join us on the Gold Coast and his warm sense of humour was then, and still is missed. Tony is a Fellow of the Institute of Chartered Accountants and the Australian Institute of Company Directors as well as a Member of our Institute. He has been in practice as an accountant for 20 years, the last ten as a principal in his own practice. He has had extensive experience in the finance sector and has also been involved in a variety of business and strategic planning issues. All these skills were brought to bear in his time as Treasurer of the Institute. Needless to say, he has had a significant involvement in mediation, with a variety of small and medium sized businesses, and he had extensive business experience and wide ranging community involvement. Apart from all this, he has an irrepressible sense of humour and offered an untiring application to the Institute's affairs in what were difficult times. I hope that Tony will maintain his contact with us.

Another quiet worker has been George Strohfeltd. He, too, enjoys a wicked wit and generous heart, which has seen him work incredibly hard for our Institute over a long period in Queensland. George's background is that of a Chartered Professional Engineer with over 25 years of industry experience, both in civil engineering design and construction supervision. George is an experienced contract administrator and project manager, with experience at all levels of the construction process. George deals with the day-to-day of contractual documentation and management, claims advice and a variety of dispute resolution, risk assessment and loss control issues. He is also a graded Arbitrator and accredited Mediator, as well as an approved Mediator for the Supreme Court of Queensland. He is also a nominated Adjudicator and Expert under the Queensland Main Roads Department contracts. George has been a Chairman of the Queensland Chapter and is actively involved in the Institution of Engineers Australia. He is a fine man who has worked hard for the Institute over many years, and I look forward to his continued involvement.

I hope to see you all at the Symposium in May.

Ian Nosworthy  
iannos@nospart.com.au

## An Australian First: .au Domain Dispute Resolved

In an Australian first, the Institute, as the authorised provider of dispute resolution services and one of our auDA Panel Members, has resolved by arbitration a domain name dispute between a Western Australian-based group and an NSW-based company.

The IAMA is approved by .au Domain Administration Ltd (auDA), the national government-endorsed body that oversees domain name policies, for the resolution of Australian domain name disputes.

The dispute, the first case under auDA's new dispute resolution policy, concerned the rights of the Australian Drivers Rights Association (WA) and the Australian Dust Removalists Association (NSW) to the domain name [www.adra.com.au](http://www.adra.com.au). The drivers' organisation had been using this name for several years, but its right to use it lapsed in July 2002 after its renewal was not processed by the registrar, Internet Registrations Australia. Subsequently, the Australian Dust Removalists Association registered the name.

Under the new dispute resolution policy the Australian Drivers Rights Association selected IAMA to resolve its problem, requesting the return of its right to use the domain name.

The IAMA-appointed arbitrator, Dr John Brydon, compared the claims of the two parties in the light of the dispute resolution rules set up by auDA and his findings can be viewed at [www.iama.org.au/auDA.htm](http://www.iama.org.au/auDA.htm).

If this case is any indication, this dispute resolution procedure will prove to be a low-cost, expedient way to prevent hijacking of domain names, including registration purely for resale at a profit, and for resolving other disputes between individuals or organisations with competing rights to a domain name. For an interesting piece examining the background and issues to this new dispute resolution system, see an article by Adam Reynolds in Volume 14 Number 1 Australian Dispute Resolution Journal February 2003. (See also "Off the Press" for an outline of some of the media coverage this case attracted.)



**PETER CONDLIFFE**  
CEO

## The CEO Report

The Institute continues to move forward on a number of fronts which reflects the increasing diversity and vitality of our organisation. The Chapters Committees, without exception, are working very hard on professional development activities and nominations. I am also very pleased to be able to report that our membership keeps growing and that our CPD and national course offerings are better than ever. Below I have summarised some of the more interesting recent developments. Please feel free to call me if you have any queries about any of these developments.

### Internet Domain Disputes: An Australian First

In November 2002, the first internet domain name dispute under new rules from auDA was referred to the Institute and in early January was decided (on the documents) by a NSW Member, Dr John Brydon. It involved two claimants (one from Perth, the other from Sydney) to the name www.adra.com.au. This was an Australian first, and also an example of the trend towards fast and relatively inexpensive decision-making.

### The Principles of Conduct for Mediators

If you are an active Mediator it would be useful for you to check these principles adopted by Council at its meeting on 6 February 2003.

The principles are intended to perform three major functions:

- to serve as a guide for the conduct of Mediators;
- to inform the mediating parties; and
- to promote public confidence in mediation as a process for resolving disputes.

They can be found on our website under "Guidelines, Rules and Agreements to Help You With Your Case".

### CPD Audit

Forty-two Members were randomly selected for audit and contacted by myself and Councillors. The new system of recording CPD hours via subscription forms seems to be working well. If you need further information please visit the amended CPD Policy on our website.

### Master Class Policy

The Education and Professional Development Committee of Council has made some amendments to this policy and you can also find this on the website and in the April 2003 edition of *The Arbitrator & Mediator*.

### Information Update

Thankyou to those Members who have submitted the Information Update forms and Resumes. These will be published on the web and be used to provide our President, Chairs and Committees with information. If you have not completed it yet you are probably missing out on a very good opportunity to provide potential clients with your details. If you go to our home page on the web you can download the "Information Update Form" and send it in.

### New Recognised Courses

Welcome to The Accord Group and Massey University (New Zealand) into our group of recognised mediation course providers. Members who complete the Graduate Diploma in Business Studies (Dispute Resolution) will now be recognised as meeting the academic requirements for accreditation with the Institute. The five-day mediation course offered by the Sydney-based Accord Group is also now recognised as meeting the training requirements for accreditation as a mediator with the Institute. For further details about these courses, please contact me.

The Practitioner's Certificate in Mediation and Conciliation Certificate is now the most popular in the country with over ten courses on offer this year. For information regarding dates in various States, please check the CPD program on the website.

### Annual General Meeting

You will note that I have included in this Newsletter a Notice about our upcoming AGM on 24 May 2003, to take place during the Symposium. There are no elections this year as Councillors now serve two-year terms. However, there will be an election of office bearers (President, Senior Vice President, Vice President and Treasurer). I look forward to seeing you all at the Symposium.

Peter Condliffe



## The Baseball Clause

### Three Strikes and You're Out

The "Baseball" clause is sometimes also called the "Final Offer" clause and used in many different contexts, particularly in the USA. Apparently it originated in negotiations related to baseball players' salary disputes, although a version of it has been used

***"Each party shall submit to the Arbitrator and exchange with each other in advance of the hearing their last, best offers. The Arbitrator shall be limited to awarding only one or the other of the two figures submitted."***

in the Queensland sugar industry. It is particularly effective when parties have a long-term relationship and there is a dispute over the cost or price of something. The procedure involves each party submitting a number to the Arbitrator and simultaneously providing the other side with the it on the understanding that, following a hearing and in the absence of a settlement, the Arbitrator will pick one of the submitted numbers, nothing else. The appeal of this

approach is that there is an incentive for each party to submit a reasonable number, since this increases the likelihood that the arbitrator will select that number. In some instances, the process of submitting the numbers moves the parties so close together that the dispute is settled. An example of such a clause is provided below.

*"Each party shall submit to the Arbitrator and exchange with each other in advance of the hearing their last, best offers. The Arbitrator shall be limited to awarding only one or the other of the two figures submitted."*

Negotiators and arbitrators can also use this approach informally. For example, when a negotiation becomes "stuck" around a cost or pricing this sort of process can be implemented, with the agreement of the parties, so as to move the negotiation on.

The Practice Notes, Rules and By-Laws Committee is presently considering a draft of a possible clause that could be inserted into contracts.

Peter Condliffe



BRIAN COLLIS QC

1968  
Member of the Victorian Bar

1978-93  
Chairman Victorian Football  
Association Tribunal

1992  
Appointed one of Her  
Majesty's Counsel

1996/97  
Member AFL Tribunal  
1998-Present  
Chairman AFL Tribunal

2001  
Awarded Australian Sports  
Medal  
"Life Membership Victorian  
Football League (Incorporating  
Victorian Football  
Association)"

2003  
Appointed Appeal Consultant  
to Australian Olympic  
Committee

# Insider: The AFL Tribunal

## The AFL Tribunal: The Chairman, The Player and The Sportswriter.

*If you thought it was tough out on the football field, think again. When football gets down to business, some of the most brutal action takes place behind closed doors – at Club Committee meetings, the AFL Commission, and, for some, the AFL Tribunal. As the season of the great national game is upon us, we went behind the scenes to find out how the Tribunal conducts its resolution process - the guidelines, its history and composition. We sought the views of the Chairman who enforces the Rules, a player who often broke them, and a sportswriter who noted them. We thank them for their generosity.*

## Brian Collis QC: The Chairman

### Preamble

Australian Football has often been described as *"the game of the people for the people"*.

The Australian Football League ("AFL") competition incites passion and loyalty akin to tribalism in the supporters of the various clubs involved in such competition.

The AFL Tribunal is the disciplinary tribunal which hears and determines reports of alleged contraventions of the laws of Australian Football, made by umpires or other designated officials of the AFL. In the event that the Tribunal determines that the offense has been committed, it must then impose an appropriate penalty (suspension, fine etc.) against the player who has committed such offense.

The stated purpose of the laws of Australian Football are:

- "(a) to ensure that the game of Australian Football is played in a fair manner and a spirit of true sportsmanship, and*
- (b) to prevent injuries to players participating in a match so far as his objective can be reasonably achieved in the circumstances that Australian Football is a body contact sport."*

Notwithstanding these laudable objectives, the laws themselves are not *"black and white"*, and one must turn to one's experience and knowledge of the game and on occasions make value judgement as to whether in fact a breach of the laws has occurred. In such situations even the greatest experts of the game can have completely different opinions as to whether a breach of the laws has occurred. This, combined with the passion and loyalty of the AFL competition gives rise to, results in the AFL Tribunal being placed in a *"no win"* position, as its decision will invariably not be accepted by some Members of the football community.

As the current Chairman of such Tribunal, I liken the position of the Members of the same to that the immortal Winston Churchill once found himself in, when he was confronted by Lady Astor who said to him:

*"Winston, if you were my husband I would poison your wine"*

Without demur, Winston replied:  
*"And Lady Astor, if you were my wife I would drink it."*

### Appointment

The AFL Commission makes appointments to the AFL Tribunal on a yearly basis. Such Commissions may remove a Member of the Tribunal at any time *"at its absolute discretion"*. Members of the Tribunal receive an honourarium.

### Laying of Reports

The laws of Australian Football lay down procedures to be followed in the laying of reports of offenses contrary to such laws. Although the AFL Tribunal may hear and determine any report notwithstanding procedural irregularities in the making of the same, the current AFL Tribunal is of the opinion that such reporting procedures shouldn't be strictly complied with unless there are compelling circumstances to proceed to hear the matter. Furthermore, the Tribunal is acutely aware of the rules of Natural Justice and the need to enforce the same.

### Representation

The process and procedure to be followed by the AFL Tribunal is set out in the Players' Rules (*"The Rules"*). Rule 23.11.2 provides:

- "(a) Subject to Rule 23.11.2(b), a person shall not be represented by a Legal Practitioner at any hearing before the Tribunal;*
- (b) A person may be represented by a Legal Practitioner where:*
  - (i) a matter is referred to the Tribunal under the Racial and Religious Vilification Rule; or*
  - (ii) the person has been reported for an alleged contravention of the AFL Anti-Doping Code."*

In an Appeal from the decision of the AFL Tribunal to the AFL Appeals Board, a legal practitioner is permitted to represent the appellant where *"in the opinion of the Appeals Board, there are exceptional and compelling circumstances which would make it harsh and unconscionable for the person to appear without legal representation."*

The AFL Commission for each club appoints players' advocates to represent the players at Tribunal Hearings, and the AFL Commission appoints *"Reporting Officers"* to assist the Tribunal at its hearings. Players' advocates and *"Reporting Officers"* are almost all current or ex-police officers with courtroom background.

### AFL Tribunal Hearing

Rule 23.3.2 of the rules provides that:  
*"The hearing before the Tribunal shall be –*

- (a) inquisitorial in nature; and*
- (b) conducted with as little formality and technicality and with as much expedition as a proper consideration of the matter before it permits."*

Rule 23.3.3 provides:

"Why do crowds of nearly 100,000 attend the finals of the Australian Rules Football at the Melbourne Cricket Ground, and stand in that cold and blowy outer?"

– Manning Clark, eminent historian, *The Nation*, 6 October 1962

*The anaesthetist looked at me with a smile as he was about to insert his needle to knock me out and said: "And this is for Glenn Archer."*

The late Patrick White spoke scathingly of Australia's obsession with gladiatorial combat on the football field. I am part of that obsession. Where is the writer or dramatist who can draw 100,000 patrons to a single performance?

... Sorry Patrick. Tribal passions live. We had a great, great day! [Grand Final Day 1990]

David Williamson, playwright, *The Sunday Age*, 7 October 1990

"The tribunal is not bound by the rules of the evidence or by practices and procedures applicable to Counts of Record, but may inform itself in any such manner as it thinks fit."

Evidence given before the Tribunal is not given under oath and the Rules further provide that the Tribunal "may regulate any proceedings brought before it in such manner as it thinks fit."

The Tribunal hearing is conducted in much the same manner as summary hearings in a Magistrates' Court subject to the above differences. The evidence on behalf of the umpire is presented first, followed by the evidence on the part of the reported player. Both the parties are afforded the opportunities to sum up. The hearing with regard to penalty is not

conducted unless the player is found guilty of the reported offense, and, in this sense, it is a separate hearing. The Tribunal makes its decisions on the evidence placed before it "on the balance of probabilities". However, no party to the Tribunal Hearing bears any onus on proof as regards proof of the reportable offense. Although the rules do not require the Tribunal to give reasons for its decision, its current practice is to give short succinct reasons. Every Tribunal decision can be appealed to the AFL Appeal Board upon the lodging of a financial bond. The Appeal Hearing is essentially a hearing "de novo".

### Sanctions

Rule 23.7.3 of the Rules directs the Tribunal ["without limitation to other reasons"] to take into

consideration the following matters in determining what is the appropriate penalty for a Reportable Offense it finds has been committed:

- "(a) the seriousness of the Reportable Offense sustained against the person;
- (b) the injury sustained and effect upon the person whom the Reported Offense has been committed (clearly the potential for injury is also relevant);
- (c) the prior record of Reportable Offense committed by the person, and
- (d) insofar as they are relevant, the objective of the AFL Player Rules and Regulations

The objectives of the Rules and Regulations state that the players engaged in the AFL Competition play the game at the elite level and therefore should set an example of how the game should be played both competitively and fairly. Their conduct should be both fair and reasonable so as to encourage participation in Australian Football at a junior level.

The circumstances giving rise to the Commission of a Reportable Offense are never the same and are committed by players with different, sometimes vastly different, playing records. The Tribunal in handing down decisions on penalties, must use its best endeavours to reflect all of these matters.

### Summary

To be a Member of the AFL Tribunal is an interesting and challenging role. Furthermore, you are never free of the football public as I discovered recently when I underwent some minor surgery requiring a general anaesthetic. The anaesthetist looked at me with a smile as he was about to insert his needle to knock me out and said:

"And this is for Glenn Archer."

BW Collis QC



DAVID RHYJONES

During a 182-game career with the Sydney Swans and Carlton, David Rhys-Jones made 25 Tribunal appearances (the most recorded by a player). The champion footballer took out the Norm Smith Medal in Carlton's 1987 premiership win.

Published with the co-operation of the authors of *Rhys*, David Rhys-Jones and Howard Kotton, as well as the publisher, Lothian Books. RRP \$24.95

## David Rhys-Jones: The Player

"... During the season I never made plans for Monday nights and my wife knew not to either. Monday night was Tribunal night – and I happened to be a regular visitor there, either as the accused or as a victim. If friends invited us out on Monday night, I would tell them 'Pick up the paper on Sunday or Monday and that will tell you if I'm coming or not.'

The Tribunal became a contest. As a witness I sometimes would head to the wrong side of the table. In most cases I had convinced myself by Monday night I had not done anything wrong. A player would meet their advocate and conduct their story. In the early days, you would also meet the opposition player and work out what both of you were going to say. Each time, I was so sure I was innocent – I would be devastated if I was found guilty.

It was the unwritten law that you never give a guy up in the Tribunal. I think it is disgraceful the way clubs are dobbing in opposition players these days. It is unnecessary and the game is clean enough, anyway. The crowds enjoy the aggressive side of the game, but it seems there are a few do-gooders around who don't accept it.

If I was playing today, I would play differently. I went to the tribunal 25 times as the accused, But I was found not guilty on 14 occasions. I stretched the rules and that would not change today. The only

difference is the rules have changed and I would have to adapt. I could not get away with as much, but I would still stretch every rule to the best of my ability. My opposition would have had to change as well – they would not be allowed to do anything illegal against me. A lot of these blokes didn't realise that any hit to my head didn't hurt. They kept trying and it didn't worry me.

In my opinion I didn't do anything that bad. It wasn't as if blokes were coming in with broken jaws and noses. A few of them may have had a few stitches, I would make sure they said it was from another incident. At the Tribunal, I was always nervous going in. There were certain times I knew I would be cleared after I watched the video. The only time I would worry a bit was when the opposition player was giving evidence. You can talk about it beforehand, but you don't know what he is going to say until he opens his mouth.

There was plenty of tension in the Tribunal room. I hated the way Tribunal Member John Schultz used to look at me. I could tell by his questions that he didn't like seeing me up there and he got sick of me towards the end. Former Chairman Jack Gaffney also got sick of me in the finish. I thought he was hard but fair. Gaffney would give the opportunity to get off, but I found with Neil Busse you had to work to escape a penalty. With Busse you were guilty before you got in there ..."



**GARRY LINNELL**

Garry Linnell is Editor-in-Chief of **The Bulletin**. A former sportswriter and sports editor of **The Age**, he is the author of **Football Ltd: The Inside story of the AFL** and **Raelene: Sometimes Beaten, Never Conquered** - the autobiography of Olympic champion Raelene Boyle. His next book **Playing God - the cult of Gary Ablett** will be released later this year.

# Garry Linnell: The Sportswriter

Despite the incredible advances in science in the last century, the cosmos remains a mysterious place filled with unanswered questions. How did the universe begin? How will it end? And, even more perplexing, why is it that senior Australian footballers - men trained like intelligence agents to remember complex game plans and strategies - suddenly experience extraordinary lapses in memory?

This was the big question I pondered for many years. Every Monday evening I would join a group of fellow sportswriters - dressed in our uniform of cheap crumpled suits, and bad ties - and take a seat at the AFL Tribunal.

Over the next few hours we would be regaled with tales of physical violence laden with excruciating detail. From twisted testicles to eye gouges, we heard it all. Yet, amid this banquet of debauchery, one constant remained.

The umpire told the Tribunal what he had seen; the players couldn't remember a thing.

There has always been an adage in football that players have followed with religious zeal: "What happens on the end of season trip, stays there." In

years, also applied to the game: "What happens on the field, stays on the field." In other words, you didn't dob on a fellow player, even though his fist may have broken your jaw, putting you out of the game for months and causing you financial as well as physical pain. I lost count of the number of times I heard a player recount the following: "I can't remember ... it's all a blur ... my mind's a blank."

During the 1980s rigid adherence was paid to this rule with fundamentalist zeal; footballers were simply a band of brothers who did not tell tales on one another. But gradually, as the game became more professional - and players came to rely on it for their sole income - several began to question this state of affairs. Lo and behold, they began to remember events on the field. That right arm with the clenched fist that came swinging toward them actually belonged to an identifiable player.

This sea change (of course, some recalcitrants still cling to the old days) also came about because the Tribunal began getting tougher on serial amnesiacs, and the modern player began receiving a higher standard of advice from their advisers. Too much is now on the line for the old ways to survive in the modern game. Some people lament the new era of professionalism and the way money has supposedly corrupted the game. But when it comes to the Tribunal, at least the truth is out there. Well, a lot more than it was in my day when we dubbed a night at the Tribunal "Blankety Blanks."

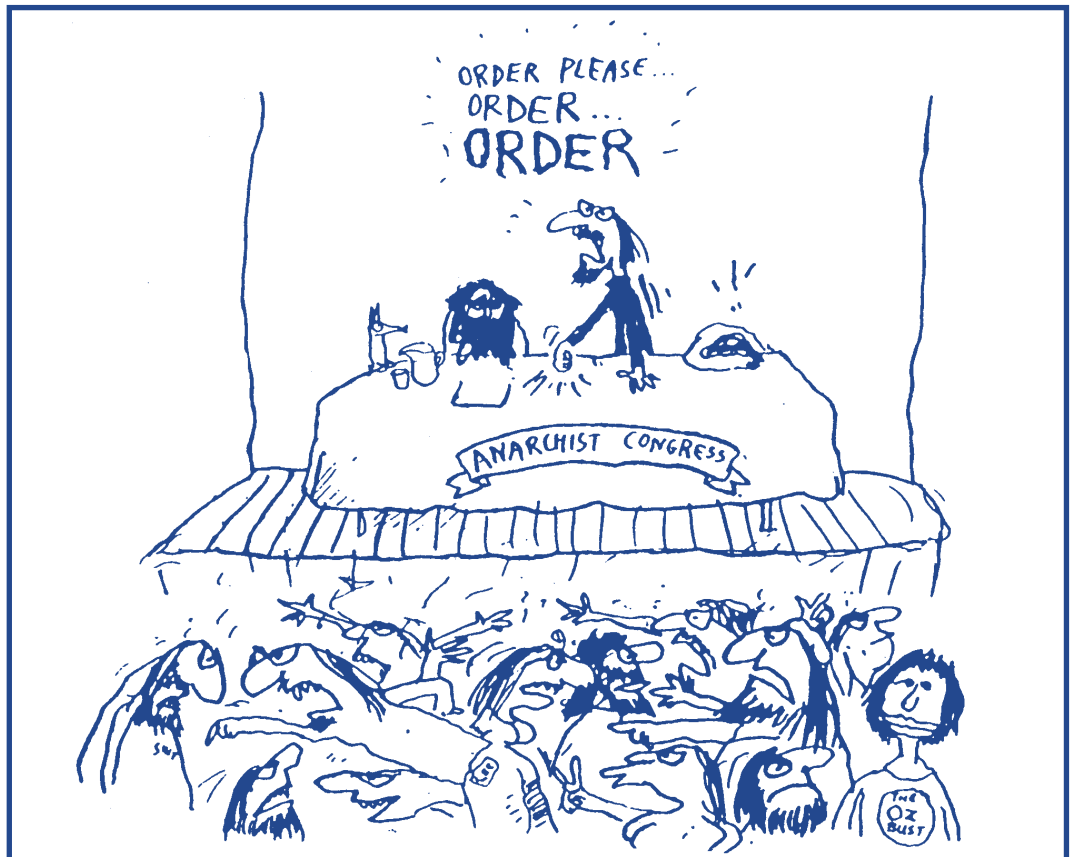
Garry Linnell

*The umpire told the Tribunal what he had seen; the players couldn't remember a thing.*

other words, wives and girlfriends should never discover what really goes on. That rule, for many

## Anarchists Embrace Tribunal Decision ...

We gratefully acknowledge permission from Richard Walsh, Richard Neville and the incomparable Michael Leunig to reprint this illustration, extracted from **Ferretabilia - Life and Times of Nation Review (UQP) 1993**.





GAVAN GRIFFITH QC

# Members' Profile: Gavan Griffith QC

**Name:**  
Gavan Griffith QC

**Profession:**  
Queen's Counsel and International Arbitrator.

**Short CV:**  
Solicitor-General of Australia 1984-1997  
Barrister Melbourne and Essex Court  
Chambers, London.

**What inspired you into arbitration?**  
Leading Australia's delegation to UNCITRAL for 14 years, including settling the Model Law on International Commercial Arbitration in 1995, and the UNCITRAL Notes on Arbitration. The association became addictive.

**What trait makes a good arbitrator?**  
Common sense directed to ensure a fair and efficient result by taking firm, but patient control of the procedural and hearing process.

**Refer to an historical conflict you wish you could have participated in and why?**  
Currently (as at end February) the issue of Australia's involvement in President Bush's coalition of the willing, for the purpose of ensuring that, as a friend of the USA, Australia counsels, warns and advises against unilateral invasion.

**What is your idea of perfect happiness?**  
To be as happy in life as I am happy in work.

**What is your greatest fear?**  
Physical and mental infirmity.

**What is your greatest extravagance?**  
After five years in practice, leaving the bar for four years to study and teach at Magdalen College Oxford.

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

Modesty; as Churchill unfairly said of Atlee, "He had much to be modest about".

**Which living person do you most admire?**  
Two great Australians: Sir Ronald Wilson, who grew after the High Court, and Sir Anthony Mason, who peaked as Chief Justice of that Court.

**Which historical figure do you most identify with?**  
F D Roosevelt, who saw around the corners.

**What is your favourite journey?**  
Route du Vin in Alsace, between Strasburg and Colmar, best on a bicycle.

**What is your favourite piece of music?**  
Shostakovich Cello Concerto No.1 in E Flat Major, Op 107, as played by my daughter.

**What is your favourite book of literature?**  
Harold MacMillan advised "A gentleman should go to bed every night with a nice Trollope". Favourites should be re-read.

**What is your favourite film?**  
As my paternal grandfather was a founder of Hoyts, to me the cinema represents the unending search for the favourite film.

**What maxim inspires you?**  
*Sapere aude* (Dare to be Wise), a motto of a school that dared to be unwise, but now sanctioned for me by the Royal College of Arms.

## Welcome & Congratulations

### New Associates

Leigh Bernhardt QLD  
Emma Boylan VIC  
Jane Button NSW  
John Camilleri VIC  
James Campbell VIC  
Karl Carbery VIC  
Darren Carrolan VIC  
Victor Del Rio VIC  
Matthew Donnahie NSW  
Francis Douglas QC NSW  
Stephen Ellis VIC  
Albert Fee QLD  
Beverley Foster NSW  
Ian Gillings NSW  
Allen Gowland VIC  
Wahiad Gray O/Seas  
Bela Grenacs QLD  
Robyn Halliburton VIC  
Ellie Hanna VIC  
Roy Harding VIC  
Wendy Hare ACT  
Antony Hewson ACT  
John Hickey NSW  
Gary Hodges QLD  
Craig Jensen QLD  
Noel Jensen QLD  
Debra Johnson QLD  
Gilbert King VIC  
Stephan Kosa VIC  
Nicholas Kukulka VIC  
Jan Lobban QLD  
Michael Lowry NSW  
Wendy Lundgaard VIC  
Mary Morrison QLD  
John Murray ACT  
Graham Neale VIC  
David Newton NSW  
Peter Pereyra VIC  
Phyllis Pirihi VIC  
Jeffrey Poultney QLD  
Andrew Roach-Bowler VIC  
Edward Samo VIC  
Peter Sharpe VIC  
Julie Soars NSW  
Thomas Stodulka QLD  
Michael Tharme ACT  
Raymond Tolcher NSW  
Peter Towell VIC  
Spencer Zifcak VIC

### Accredited as Mediator

Andrew Beckmann SA  
Leigh Bernhardt QLD  
Alistar Brown SA  
Gail Brown QLD  
Reg Chapman SA  
Ruth Charlton NSW  
Vladimir (Wally) Chudoschnik VIC  
Bonnie Cooney SA  
Ron Green SA  
Paul Grey QLD  
Kenneth Griffin SA  
Noel Jensen QLD  
Debra Johnson QLD  
Margaret Kummerfeld QLD  
Tony Latimer QLD  
Jan Lobban QLD  
Rodney Martin SA  
Sandra McNeil SA  
Robert Mills QLD  
Mary Morrison QLD  
Don Moss WA  
Angela O'Brien VIC  
Ross Oden QLD  
Mary O'Donoghue QLD  
Peter Panek WA  
Helen Poropat QLD  
Penelope Shehadeh QLD  
Justin Toohey ACT

### Graded as Arbitrator

Name	State	Grade
David Anderson	QLD	3
Stephen Callaghan	QLD	3
Neal Corbett	QLD	3
Arturo Dal Cin	SA	3
Roger Davis	WA	1
Phil Faigen	WA	1
Paul Grey	QLD	3
Noel Jensen	QLD	3
Chri Lenz	QLD	3
Alan Longstaff	Vic	1
Paul Marshall	QLD	3
Sean McGarry	WA	3
Peter Panek	WA	3
Lloyd Polglaze	QLD	3
Helen Poropat	QLD	3
Bruce Poyser	QLD	3
John Savage	QLD	3
John Shillabeer	QLD	3
Judith Simpson	QLD	3
Christopher Taylor	QLD	3
John Tyerman	SA	3
Grahame Wrobel	QLD	3

## QUOTE

"...The admission of all those presently in detention would not fill the current and rather low quota for refugee and humanitarian entries of only 12,000 persons.

It is hoped that the politically driven coarsening of our collective social consciousness is merely a temporary distortion.

There are signs that our inherent sense of decency and understanding of what is fair is emerging ahead of the inertia of compassion fatigue."

Gavan Griffith QC argued the legal case against the government's action on the Tampa.

**No Turning Back – Reflections on the Tampa** by Michael Gordon, National Editor,  
*The Age*, 24 August 2002



**ROBERT HUNT**  
Immediate Past President

## Members' Question Time

### Introduction

This is a new feature in the Newsletter, which is intended to provide a forum for ventilating queries, problems and interesting scenarios which arise in the course of conducting arbitrations, mediations and other forms of ADR.

We are indebted to Adrian Bellemore for providing the first Question to get the ball rolling. Adrian was a Foundation Fellow on formation of the Institute in 1975, and last year was made a Life Fellow by Council in recognition of his services to the Institute and its Members.

Future issues of the Newsletter will each contain a new Question and responses received to the last Question (which in turn may generate further responses).

As the name suggests, the success of Members' Question Time depends on you, the Members, contributing both questions and responses. Please send your thoughts, responses (200 words or less) and further questions to Gianna Totaro at National Office (email: national@iama.org.au). We look forward to hearing from you.

*Robert Hunt*

*Future issues of the Newsletter will each contain a new Question and responses received to the last Question (which in turn may generate further responses).*

### Question

You have been appointed as an arbitrator consequent upon disputes that have arisen between the parties to a construction contract which provides for arbitration after service of written notice detailing the dispute. The specification required the Contractor to perform the works in a good and workmanlike manner using materials suitable for their intended purpose. It also expressly required the Contractor to

provide an effective system to service both the commercial and residential portions of the building. The Notice of Disputes that has been served by the Claimant upon the Respondent alleges a dispute and particularises a fault in the air conditioning system in the building. The building is a mixture of commercial and residential. No Final Certificate has been issued by the Superintendent.

The Claimant's Points of Claim allege that, in breach of the terms of the specification, the building has a fault in the air conditioning system which is so bad that no effective air conditioning can be provided notwithstanding numerous attempts by the Respondent to fix it.

The Respondent's Points of Defence states that, at a previous arbitration hearing of disputes between the same parties and arising out of the same contract, the Claimant had alleged in its Points of Claim that the Respondent had failed to perform the works in a good and workmanlike manner. In the previous arbitration the Claimant had particularised only defects in the ceiling fittings and the facade of the building, which were the only defects dealt with in the Arbitrator's Award.

The Respondent says that in those circumstances the Claimant is unable to raise the issue of the allegedly defective air conditioning as it is estopped by the previous arbitration award. The Respondent therefore asks for an award in its favour on that basis and says that you are not able to hear any evidence as to the faults in the building now alleged.

The Claimant in its Reply to the Points of Defence agrees with the facts alleged in the Points of Defence but says that no estoppel has arisen because the air conditioning defects were not apparent at the time of the first arbitration and were not the subject of the previous award.

At the hearing, should the Arbitrator allow the Claimant to present its evidence on the air conditioning defects, or is the Respondent entitled to an award in its favour on the basis that the Claimant is estopped by the previous arbitration award from maintaining its claim?

## The Daring Mediator President Theodore Roosevelt

"There had never been such a scene in the White House: labor and capital brought face-to-face with the President as mediator. Roosevelt did it to try to end the long coal strike of 1902. The conservative press denounced him. The mine owners were furious. Their leader, George F Baer, had refused to deal with John Mitchell's new United Mine Workers' union. "The rights and interest of the labouring man," Baer wrote, "will be protected and cared for – not by the labor agitators, but by the Christian men to whom God in his infinite wisdom has given the control of the property interests of the country." After his meeting ended in deadlock, Roosevelt sent Elihu Root to tell J P Morgan he was ready to send troops to seize and run the mines. Morgan persuaded Baer to go to arbitration. Even then, peace required more of T R's audacity. The owners would not have a labor man on the panel. They insisted on a judge, a military officer, a mining engineer, a prominent sociologist and a coal dealer.

Roosevelt solemnly announced that he was appointing one E E Clark as the sociologist. Heretofore Mr Clark had not been thought of as a sociologist. He was Grand Chief of the Order of Railway Conductors, a union man. He met the definition, said Roosevelt, because he had thought deeply on social questions. Roosevelt said it gave him a glimpse into one corner of the mighty brains of these "captains of industry" that "they would heroically submit to anarchy rather than have Tweedledum, yet if I would call it Tweedledee they would accept it with rapture."

**\*Theodore Roosevelt, 26th President of the United States of America. First President to win the Nobel Peace Prize and first to intervene in dispute between capital and labor.**

*"The Daring Mediator: Teddy Takes On Everyone". The American Century by Harold Evans, Pimlico 1998.*

# Fast Food Resolution

## QUOTE

"ADR is like a set of golf clubs. You take out your heaviest club for the longest drive"

**Laurie James**  
National Councillor

The Subway group of fast food outlets now has over 400 outlets in Australia with a new outlet opening on average every week. It is the fastest growing fast food franchise in North America.

Recently, on behalf of the IAMA, I have negotiated a Dispute Resolution Scheme with them to manage their franchise disputes.

Based upon our Industry and Consumer Scheme (these can be found on our website at [www.iama.org.au/rulesind.htm](http://www.iama.org.au/rulesind.htm)), the Subway Scheme will provide a low cost and efficient alternative to this company.

You may ask why would a huge operation like Subway enter into such an agreement? The

As the Australian Law Reform Commission reports a survey of Australian company directors found that they perceived that ownership and control of the conflict management process was lost during litigation and there was wide agreement that conflict could be better resolved using a mechanism other than litigation.<sup>1</sup> They felt that the important issues in disputes are often lost to procedural complexities, delay and cost. Also, the chance to keep intact pre-existing relationships and customers is considerably lessened in the traditional processes. The non-confrontational nature of alternative dispute processes (ADR) also leads to an important benefit for both private and commercial users: maintenance of on-going relationships between the parties.

As the National Alternative Dispute Resolution Advisory Committee (NADRAC), an advisory panel to the Commonwealth Attorney-General, points out, ADR is only cheaper and quicker if it is successful.<sup>2</sup> However, even if ADR is not successful in resolving the dispute completely, it may narrow the issues, help to maintain relationships, reduce the need for pre-trial processes, or contribute to shorter hearings, thus indirectly reducing costs.

Organisations like Standards Australia and the Australian Competition and Consumer Authority have published guidelines to guide organizations in establishing standards and benchmarks to further facilitate these initiatives. The Institute, as Australia's leading and only national arbitration and mediation service is of course keen to continue to be at the forefront of these developments.

These schemes can also:

- Provide cost control because the fees are more controllable. In the schemes administered by IAMA costs are fixed and administered by the Institute
- Save organizations thousands of dollars in unnecessary costs associated with damaging and preventable conflicts
- Helps maintain and build upon valuable relationships

These schemes have been introduced by IAMA to provide fair, quick and cost-effective resolution of claims. They may also be adapted for the better management of conflict within an organisation or between organizations.

The schemes provide for two stages in the dispute resolution process, namely conciliation and arbitration.

Conciliation is a relatively informal process where an independent person (the Conciliator) assists the parties to negotiate a settlement of their dispute.

Arbitration is a process that provides a final and binding determination of the dispute by an independent person (the Arbitrator), in the form of the Arbitrator's written Award.

If you would like some more information about these schemes please feel free to give me a call.

Peter Condliffe



## GRAHAM EASTON

Lawyer  
Civil Engineer  
Grade I Arbitrator  
NSW Member

## The Departure Lounge

Many of our Members engaged in dispute resolution activities spend a lot of their time travelling. In this first of a series of profiles on some of our more peripatetic Arbitrators and Mediators, we managed to catch up with Graham Easton. So often National Office fields his calls to ask with increasing curiosity, "Where are you?!". We managed to grill him at The Departure Lounge as he was about to board a flight to Canada.

### Name:

Graham Easton.

### Position:

Arbitrator and Mediator.

### The most important thing(s) you pack:

Credit cards, running shoes and passport.

### Favourite airline:

Qantas. I'm a shareholder!

### The person you would like to sit next to on a plane:

The pilot. (I would like to fly the plane!)

### Favourite boat trip:

Sailing in the Galapagos Islands, and the Hurtigruten run up the coast of Norway to the Arctic Circle.

### Favourite rail journey:

Sydney to Perth, across the Nullarbor Plain.

### Most frequented destination (business):

At the moment, Singapore.

### The most exotic destination (business):

An arbitration hearing in a Fijian beach resort.

### Favourite destination (leisure):

Too difficult to pick one. The Canadian Rockies (for skiing) or the French countryside (for hiking) are both near the top.

### Favourite drinks:

Beer (Tiger or Kokanee), red wine and margaritas.

### Favourite eatery:

Home.

### Favourite hotel:

The Peninsula in Hong Kong. It has the best combination of comfort, style and service.

### Preferred Weather:

Extreme, either dumping snow or very hot.

### The most intriguing person you have met on your travel (business or leisure):

Mr Fish (seriously). An African scientist who works as a guide in the Okavango delta in Botswana.

### The thing you miss most:

Sleep.

### Finally, best travel tip(s):

Only take what you can wear or carry – no check-in bags.

# Symposium 2003 Truth, Dare & Promise

Our national Symposium from 23-25 May will be hosted this year by the Victorian Chapter at the prestigious Le Meridien Hotel in Melbourne. It will be the most significant meeting of ADR Practitioners in 2003.

Victorian Chapter Chair, Jim Elliott-Smith, extends a warm invitation to all Members to register for the Symposium and its allied social events. "Visit us in Victoria and enjoy great networking opportunities while you see beautiful, historic Melbourne in the Autumn," he said.

The Symposium venue has been chosen because it not only represents the elegance of quality Melbourne hospitality, but also because the hotel site is steeped in Victorian history. Heritage values were preserved when building the hotel on the site of historic wool warehouses, and vestiges of the original buildings and cobblestone lanes have been incorporated. There is a special Symposium rate for accommodation at Le Meridien.

The hotel is located close to nightclubs, Southbank, the Crown Casino, great restaurants and the Telstra Dome. The new Federation Square with its innovative building design incorporating galleries, tourist information and restaurants is just a short walk or tram-ride from the Symposium venue. Water taxis and cruise boats on the Yarra provide a novel way for guests to move between leisure activities.

*Symposium 2003 will have an emphasis on group participation in streamed groups and a Seminar format. Registrants will be able to participate in two expertly facilitated streams, Arbitration and Mediation, both of which, will explore matters of interest and significance to practitioners.*

The Institute prides itself as being Australia's leading educator of Alternative Dispute Resolution professionals, and each annual Symposium is a showcase for the latest developments, practice skills and education opportunities made available by IAMA to Members and prospective Members

Proceedings will be opened by Judge Frank Shelton, a long-time and valued friend of the Chapter. Judge Shelton is a Past Chapter Chair, and has also served on the National Council. He will be ably assisted by National President, Ian Nosworthy. In addition, registrants will be given a Welcome by our traditional owners as part of the opening ceremony.

Symposium 2003 will have an emphasis on group participation in streamed groups and a Seminar format. Registrants will be able to participate in two

expertly facilitated streams, Arbitration and Mediation, both of which, will explore matters of interest and significance to practitioners. In addition there will be a Seminar where the two streams will merge, including a workshop session devoted to exploring the role of women in all aspects of ADR. The Symposium Panel of Session Chairs and Facilitators includes:

Bryan Ahern	National Councillor
Frank Costigan	Queen's Counsel
Susan Crennan	Queen's Counsel
Paula Gerber	Past President, NAWIC
George Golvan	Queen's Counsel
Janet Grey	National Councillor
Laurie James	National Councillor
Jon Kenfield	LEADR
Joyce Marshall	Vic Chapter Committee
Ian Nosworthy	National President
Colleen Papadopoulos	Vic Chapter Committee
Clive Raymond	National Vice President
George Strohfeldt	National Councillor
David Waldby	National Senior Vice President

The after-dinner speaker is journalist, broadcaster and businessman, John Jost.

We are fortunate to have secured Smith Bernal Wordwave Pty Ltd, as our Gold Sponsor. They have undertaken to provide us with interesting and interactive demonstrations of cutting edge technology in real time Transcripts, including the latest digital techniques. They will provide facilities at the Symposium venue, to enable Registrants to fully explore ways and means by which the latest Transcript technology can save money and time in medium to lengthy matters.

Melbourne firm, Allens Arthur Robinson have generously agreed to sponsor a Welcoming Cocktail Party, on their premises, adjacent to Le Meridien, on the evening of Friday, 23 May.

Qantas has again agreed to act as the official Symposium Airline, and we have negotiated a special rate for Registrants. There will be a discount of 40% on the full economy rate (excluding taxes at the time of booking). This offer is subject to seat availability, so be sure to book early. Details are available in the registration kit.

There will be an opportunity for non Symposium activities, including golf at the prestigious Royal Melbourne Golf Club. These activities require minimum numbers to make them available and again, early registration will assist in making these activities successful.

For more details please call the Victorian Chapter Administrator on 03 9602 1711, or e-mail at vic.chapter@iama.org.au.

## Insurance: Special Notice to Members

As you are aware, one of our priorities, as your association, is to provide a range of services that can assist you in your business.

During 2002, we established a relationship with AON, Australia's largest insurance broker, and we asked them to provide a range of Personal Insurance (Income Protection, Life & Trauma Insurance) services that would be applicable to professionals in arbitration and mediation.

The services include: Personal Insurance Reviews; Business Succession Planning; Retirement Planning; and Financial Planning.

As insurance contracts are constantly being updated to meet the demands of the everchanging markets, it is important that our insurance advisers can keep us all up to date. It is proposed that AON will send you a letter outlining their services and products. If you do not want to receive this, please let me know by telephoning 1300 66 3388 or e-mail at admin@iama.org.au.

Peter Condliffe



**JC BEHM**  
Solicitor  
Barrister  
Certified Practising Accountant  
NSW Member

## The Observer

*So often we publicise events, but it is rare to get some perspective or insight on what they were like – the speeches, the guests, the panel discussions, what was the purpose, what was achieved, for instance. We are fortunate this time, however, to have John Behm, NSW Member, provide us with an account of what happened at the recent International Bar Association's Sixth International Arbitration Day.*

### International Bar Association Sixth International Arbitration Day

On 13 February 2003 the International Bar Association held its Sixth International Arbitration Day. The theme of the symposium was international commercial arbitration and globalisation. Mr Michael Moore, recently retired Director-General of the World Trade Organisation, said this concerning globalisation:

*"Globalisation, the information age, democratic space and freedoms of all types are growing. The nation state has gradually and often painfully evolved democratic values and safeguards...but there is as yet no accepted body of law, values and formal democratic controls to manage globalisation. We are now in the process of wrestling with these issues and opportunities, and evolving answers."*

Several papers which were delivered at the symposium were "out there" in relation to issues of globalisation.

One such paper delivered by Professor Michael Pryles was entitled "Application of the *Lex Mercatoria* in International Commercial Arbitration". Professor Pryles postulated various applications in relation to the role of the *lex mercatoria* in international commercial arbitration and also explained the differing positions of Lord Mustill and Professor Berger.

In his book entitled *The Creeping Codification of the Lex Mercatoria* Professor Berger acknowledged a constant criticism of the *lex mercatoria* as being inherently "unknowable".

*"Globalisation, the information age, democratic space and freedoms of all types are growing. The nation state has gradually and often painfully evolved democratic values and safeguards ... but there is as yet no accepted body of law, values and formal democratic controls to manage globalisation. We are now in the process of wrestling with these issues and opportunities, and evolving answers."*

Writing in the *London Court of International Arbitration Journal* (Volume 18, No 1, 2002), Professor Berger has responded to that criticism by pointing to the development of the Transnational Law Database ("TLDB") developed by the Centre for Transnational Law (Central) as providing the "missing link" between the theory of transnational commercial law and international legal practice. As at the time of writing, the TLDB consisted of some 640 documents (arbitral awards, statutes, model laws, standard forms and doctrines) with over 1,470 references to the 74 principles of the *lex mercatoria* which he expounded in his text mentioned earlier. The database can be accessed at [www.tldb.de](http://www.tldb.de).

Professor Pryles notes that the *lex mercatoria* has been subject to criticism, mainly in common law

countries, and notes that the *lex mercatoria* has its proponents, including Professors Goldman and Schmitthoff. He also notes that there have been some awards where the application of the *lex mercatoria* has been applied and states that the UNIDROIT principles are now considered to be part of the *lex mercatoria* in relation to their use in international arbitration. This view is supported by Professor Hans van Houtte in "The Law of International Trade", 2nd ed at page 27.

The importance of the UNIDROIT principles in international trade was a theme also taken up by Antonias Dimolitsa who drew attention to an ICC Case No 9797/2000 which says:

*"The UNIDROIT principles of international contracts are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those 'principles directeurs' that have enjoyed universal acceptance and, moreover, the heart of those most fundamental notions which have consistently been applied in arbitral practice."*

Ms Dimolitsa has also drawn attention to the phenomenon "negative choice", being a situation where parties cannot agree on any given national law and the parties have been unable to succeed in providing any alternative specific formula. Ms Dimolitsa referred to ICC Award No 7001 which stated the following in relation to the term "negative choice" where there is no consent as to choice of law:

*"Such 'negative' choice by the parties commands as much respect as any expressed choice of law would have commanded had the parties inserted choice of law stipulations in the contracts."*

The decision in that case was that the Tribunal found that the contracts were to be governed by substantive rules not belonging to any discrete national legal system and that there was valid recourse to the *lex mercatoria* of which the UNIDROIT principles constitute a particularly valid and authoritative expression.

Representing the Australian contingent were Messrs James Creer, Jonathan Hoyle and Jos Mulcahy. Their paper gave an interesting commentary as to the situation where the parties decide to opt out of the *International Arbitration Act 1974 (Cth)* and the application of the uniform commercial arbitration acts in such circumstances.

For the sports lovers, Mr RJ Ellicott QC provided an informative insight into the world of sports arbitration and the role and function of the Court of Arbitration for Sport. Clearly this is a growth industry. The power of sports arbitral bodies was recently demonstrated in the case of a well known Australian cricketer with a penchant for diuretics.

Of equal fascination were papers delivered in relation to the growth and development of international commercial arbitration in the Asia-Pacific region by Professor Doug Jones and also dispute settlement procedures which occur in the World Trade Organisation by Mr Torsten Lorcher.

JC Behm

#### DIARY NOTE:

- IAMA Symposium 2003  
23-25 May  
[vic.chapter@iama.org.au](mailto:vic.chapter@iama.org.au)
- The 2003 Construction Law Masterclass  
3-4 June  
[www.lexisnexis.com.au](http://www.lexisnexis.com.au)
- ADR – A Better Way To Do Business  
3-5 September  
[www.nadrac.gov.au](http://www.nadrac.gov.au)



**RUSSELL THIRGOOD**  
Editor

## The Arbitrator & Mediator: Editor's Commentary

*The Institute publishes a refereed journal three times a year, which is distributed to all Members. It contains articles of interest, recent developments in arbitration, mediation and related topics by national and international contributors. The Editor, Russell Thirgood, provides the following preview of the April 2003 edition.*

Life is full of challenges. More than 2,300 years ago, Su Qin began the very challenging task of attempting to persuade the Lords of six weaker Chinese States to form a coalition against the strongest and most aggressive State. During this quest, Qin realised the need to focus on how to deal with the human factors and psychological makeup of the Lords. He developed techniques on how to accurately appraise the true intentions of the Lords and established a number of 'persuasion techniques' to ensure that his mission was a success. In this edition of *The Arbitrator & Mediator*, Selina Wong Baray examines those techniques and demonstrates that the processes used by Su Qin are very important for any mediation or negotiation. They include:

- (a) categorising types of people and events;
- (b) matching style of speech to please different personalities;
- (c) speaking to people with different levels of intelligence;
- (d) spending time on introspection;
- (e) putting yourself in another's shoes; and
- (f) mastering the art of building up and pinning down.

*I hope that you enjoy reading Selina Wong Baray's article 'Persuasion Techniques (The Ancient Chinese Style)'. However, a word of warning for all mediators – Qin was assassinated in 317BC!*

Su Qin succeeded in convincing all six Lords to form a coalition. They agreed to defend against the stronger aggressive State and appointed Qin as their prime minister to enforce the coalition agreement. He was the only person in Chinese history to have the honour of serving six States concurrently.

I hope that you enjoy reading Selina Wong Baray's article 'Persuasion Techniques (The Ancient Chinese Style)'. However, a word of warning for all mediators – Qin was assassinated in 317BC!

This edition of *The Arbitrator & Mediator* contains a number of very interesting articles, practice notes and case notes.

Laurie James examines a decision of the Western Australian Supreme Court which demonstrates the fundamental importance of pleadings in arbitration hearings. Pleadings are designed to crystallise the issues in dispute between the parties. A respondent cannot be expected to meet a case against it that has been unpleaded.

Brad McCosker and Naomi Youngberg compare the practices that exist across Australian jurisdictions for referring out matters that require particular expertise. It is noted that the broadest scope for referral out to special referees exists in New South Wales, while the situation in Queensland appears to suffer from unnecessarily restrictive rules.

Practitioners will read with interest Professor John Zeleznikow's article about using negotiation support systems to reduce legal risk. Professor Zeleznikow examines a very sophisticated negotiation support system which interprets data to produce risk assessments. Any system that may reduce the complexities that are involved in dispute resolution will no doubt be welcomed with open arms.

Throughout a typical arbitration, an arbitrator is

required to deliver a number of interlocutory findings. Kylie Downes and Dale Brackin have provided a useful analysis concerning whether or not costs orders made in the course of an arbitration are enforceable. The findings of Miss Downes and Mr Brackin may be surprising.

We are again privileged to hear from our National President in this edition. Ian Nosworthy discusses what he perceives to be the future of arbitration and mediation in Australia.

To assist you with the challenges that you face in your professional lives, this edition of *The Arbitrator & Mediator* contains a number of other informative papers. Joshua Wilson outlines the daunting task that arbitrators frequently face when part of their determination involves issues concerning the composition and construction of a contract comprised of a chain of documents. In this context, he examines a recent decision of His Honour Mr Justice Gillard in the Supreme Court of Victoria which may be of assistance to arbitrators. Michael Rochester follows the never-ending debate concerning 'global claims'; and Rachael Field explores the theory and practice of neutrality in mediation.

Amendments to the Building and Construction Industry Security of Payment Act 1999 (NSW) were passed by the New South Wales parliament on 11 December 2002 and commenced operation in New South Wales on 3 March 2003. To assist readers with coming to terms with this, Graeme Robinson (who is a Member of our Journal Committee) and Stephen Chong provide an analysis.

Finally, so that you are all kept abreast of important recent judicial decisions, we have included a number of informative case notes from Graham Morrow, Bill Morrissey, Greg Hinchy and our Immediate Past President, Robert Hunt.

I trust that you will enjoy and benefit from this April 2003 edition of *The Arbitrator & Mediator*.

Contributions are welcome, and should be sent to:  
Russell Thirgood  
Editor

*The Arbitrator & Mediator*  
National Office, Level 1, 450 Little Bourke Street,  
Melbourne, 3000 (hard copy) and  
national@iama.org.au (soft copy).

### Deadline for Submissions

All submissions for the August 2003 edition must be with the Editor by **30 June 2003**.

As a guide, please visit Publications at [www.iama.org.au](http://www.iama.org.au) and click onto Notes For Contributors.

**\*"Plato" is the password to access The Journal and Practice Notes.**





GIANNA TOTARO

## Off The Press – Without Fear or Favor

*When we introduced this section in March 2002, it was essentially to highlight articles relating to ADR. A year on, we can report the Institute made news of its own when it resolved the first .au domain dispute under auDA's new dispute resolution policy. In the process, the Institute attracted coverage in both tabloid and broadsheet newspapers, commercial radio, ABC radio, ABC online and even the international World Trademark Law Report. We chart the following for your interest.*

### QUOTE

"Let me get the politics over with early. I don't share this Nixonian - you won't have me to kick around any more - attitude. I like engagement. The Garboesque has no attraction for me. I don't want to be alone. I ask myself these days, does this make me peculiar? That I like to talk to the press? That, wrong-headed or inconvenient as they sometimes are, I like journalists? That I like politics? Am I wrong to believe that, for all the inevitable imperfections, this is one of the world's better democracies, and Australian journalists are a powerful reason why this is so? I don't think I am wrong ..."

**- former Prime Minister, Paul Keating at the Walkley Awards, Sydney, 27 November 1992**

A \$NZ200,000 (\$A184,179) dispute between two New Zealand telephone companies has been resolved in an unusual out-of-court settlement – a best-of-three arm-wrestling match between the chief executives.

### ODD SPOT

**The Age  
10 March 2003**

*We gratefully acknowledge the permission from Jenny Sinclair and The Age to reprint the following article*

### Web address dispute shows what's in a name

Jenny Sinclair – *The Age*, 11 January 2003

A Western Australian organisation that lost its Web address has complained that the Australian domain-name system fails to protect name holders.

The first dispute arbitrated under the new Australian naming rules found against the Australian Drivers' Rights Association in its claim for www.adra.com.au, despite it having operated a site with that address since 1998.

The name lapsed after the drivers' association in May paid registration resellers Internet Registrations Australia to renew it, but the resellers failed to do so in July last year. It was snapped up within a month by the New South Wales-based Australian Dust Removalists' Association.

Chief executive Glenn Secco said the association had made the payment to Internet Registrations Australia as an "agent" of large-names company Melbourne IT, and had been shocked to find the name taken from under it.

The association went to arbitration, but a decision released on Thursday awarded the name to the new owners.

Mr Secco said he had been certain the name would be returned. "I could understand it if we'd just failed to renew it," he said, but his group had believed the name had been renewed through an authorised reseller.

"I will have to take action against them (Internet Registrations Australia), but it doesn't give me the name back," Mr Secco said. "We have to rebuild our identity."

The drivers' rights group, which claims 10,000 Members, used its website for almost all its Member communications, campaigns and research materials. Mr Secco said he would now have to find a new address for the site and notify all Members, while continuing to pursue the return of www.adra.com.au.

Chris Disspain, chief executive of the national domain name authority, auDA, said companies needed to be vigilant about protecting their names. "It's a bit like your car registration," he said. "It's your responsibility."

The decision, the first under auDA's new rules on dispute resolution, was made by an arbitrator from the Institute of Arbitrators and Mediators Australia, an authorised arbitrator under auDA's rules.

Mr Secco said the dust removalists' association had asked for \$30,000 to return the name.

A spokesman for the dust removalists, Colin Rule,

said that while he had sympathy for the drivers' association, the name had been registered in good faith. When initial checks were made, the address was blank due to the registration lapsing.

Mr Rule said his association, which represents several companies in the business of cleaning up lead and other contaminated dust, had spent a significant amount of money printing promotional material and sending it to New South Wales councils with the www.adra.com.au address.

He said the dispute had adversely affected his Members, too, as the site was suspended until the dispute was resolved, and he criticised Internet Registrations Australia's handling of the matter.

Mr Secco said he was surprised that the name was resold within such a short period. "There's no safety net," he said. He is contemplating legal action against Internet Registrations Australia, which was itself the subject of Australian Consumer and Competition Commission court action last year.

Names registered or re-registered after July 1, 2002 are subject to the new rules. A decision by a one-person panel costs \$1500; a three-person panel can rule for \$3000. One other case over an unidentified name is pending.

*We gratefully acknowledge the permission from Ben Woodhead and The Australian Financial Review to reprint the following article.*

### Arbitrator rules on first domain dust-up

Ben Woodhead – *The Australian Financial Review* – 13 January 2003 : Section: News Page: 5

New rules capping internet domain name dispute arbitration proceedings have produced their first success, paving the way for faster and cheaper resolutions.

The case, involving the Australian Drivers Rights Association and Australian Dust Removalists Association was the first dispute resolved under the .au Domain Administration's (auDA) new arbitration rules introduced last August.

The dispute started when the Australian Dust Removalists Association registered the adra.com.au domain after the Australian Drivers Rights Association allowed its right to use the name to lapse in July.

The Australian Drivers Rights Association sought arbitration from auDA-approved dispute resolution provider, the Institute of Arbitrators and Mediators Australia, which found in favour of the Australian Dust Removalists Association.

IAMA acting chief executive officer Graham Keen said the result marked the beginning of cheaper and fairer dispute resolution under auDA's new regulations.

The new rules limit the time complainants and respondents have to submit responses to arbitrators

and limit submissions to **arbitrators** to documents only. Under the old rules, either party could make unlimited submissions and call witnesses.

Costs are now capped at \$1500 for complainants seeking settlement by a single **arbitrator**, or \$3000 for a panel of three.

Mr Keen said that while the result was good news it would still be several years before all disputes were being resolved under the new rules. Domain name holders are obliged to follow the new procedures only if they have registered or re-registered a domain name after August last year.

*The Australian Drivers Rights Association asked IAMA to resolve its problem, requesting the return of its right to use the domain name. It also claimed the dusties wanted \$30,000 to give the site back.*

Domain name disputes are usually caused by two parties wanting the the same domain name, or when a domain name has been bought purely to be resold for a profit.

Other auDA-approved dispute resolution providers include Leading Edge Alternative Dispute Resolvers, The Chartered Institute of Arbitrators - Australian Branch and the World Intellectual Property Organisation. Approved arbitrators can be approached directly or sought through auDA.

*We gratefully acknowledge the permission from John Rolfe and The Daily Telegraph to reprint the following article.*

### Driving into dust

John Rolfe – *The Daily Telegraph*, 13 January 2003  
Page 1 – Business Section: Harbour Views

In a first, the Institute of Arbitrators and Mediators Australia (IAMA) has resolved by arbitration a domain name dispute between a West Australian group and a NSW firm.

The dispute, one of the first cases under auDA's new dispute resolution policy, was over the rights of the Australian Drivers Rights Association (WA) and the Australian Dust Removalists Association (NSW) to the domain name [www.adra.com.au](http://www.adra.com.au).

The drivers' organisation used this name and website for a couple of years, but its right lapsed in July 2002 after its renewal was not processed by the registrar, Melbourne IT. Subsequently, the Australian Dust Removalists Association registered the name.

The Australian Drivers Rights Association asked IAMA to resolve its problem, requesting the return of its right to use the domain name. It also claimed the dusties wanted \$30,000 to give the site back.

However, the dusties won, because the drivers failed to prove all the elements required, including that the dusties had "no rights or legitimate interests" in the name.

*We gratefully acknowledge the permission from the Australian Broadcasting Commission to reprint the following article.*

ABC ONLINE Posted: Mon, 13 Jan 2003 12:35 AEDT

### Domain name dust-up settled in Australian first

A Western Australian-based organisation has failed to win back the rights to an Internet domain name registered by a company in New South Wales.

The dispute, believed to be the first of its kind in Australia, centred on the domain name [adra.com.au](http://adra.com.au), formerly used by the Australian Drivers Rights Association based in Western Australia.

The organisation's rights to the name lapsed in July last year and the domain name was subsequently taken up by the Australian Dust Removalists Association in New South Wales.

The drivers' association took the matter to arbitration claiming the renewal of its rights to the name was not processed by the registrar, Melbourne IT at the time.

However the arbitrator, appointed by the Institute of Arbitrators and Mediators, ruled this was not sufficient reason for the name to be returned and that it should remain the property of the New South Wales company.

*We gratefully acknowledge the permission from Fran Spencer and The West Australian to reprint the following article.*

### Drivers group fails mediator test

Fran Spencer – *The West Australian*, 14 January 2003

A WA association has come off second best in the first Australian domain name dispute to be tackled by a group offering 'alternative conflict resolution' through mediation.

The Institute of Arbitrators and Mediators Australia (IAMA), which describes itself as the country's leading alternative dispute resolution provider, has been approved by domain name body auDA as the first port of call for Australian domain names disputes.

Last week, IAMA announced its arbitrator, John Brydon, had ruled on one of the first cases to be handled under auDA's new dispute resolution policy - a clash between WA's Australian Drivers Rights Association and a NSW group, the Australian Dust Removalists Association.

Both claimed the right to the domain name [www.adra.com.au](http://www.adra.com.au), which had been used by the WA group for two years.

However, the WA group's right to use the domain name lapsed in July last year after its renewal was not processed by the registrar, Melbourne IT.

The NSW group then stepped in and registered the name, leaving the WA group to file a complaint with IAMA in an attempt to get the rights back.

In registering the complaint, the WA group claimed the NSW association had registered the name to prevent it from using its 'well-known website' and had asked for \$30,000 to transfer the site back.

But Dr Brydon's decision, posted on the IAMA website last week, was to allow the NSW group to retain the name as the registration 'was not in bad faith' and both groups had a legitimate interest.

The WA Association is now understood to be considering legal action to regain the name.

*We gratefully acknowledge the permission from Des Ryan – Davies Collison Cave Solicitors, Melbourne to reprint the following which appeared in the World Trademark Law Report.*

### World Trademark Law Report

Monday 10 February 2003

In *Australian Drivers Rights Association v Australian Dust Removalists Association*, a panellist of the Institute of Arbitrators & Mediators, one of the dispute resolution service providers approved by the Australian domain operator auDA, has refused to order the transfer of the domain name 'adra.com.au'. This is the first decision released under the '.au' Dispute Resolution Policy (auDRP).

The Australian Drivers' Rights Association, a motorist lobby group, had registered 'adra.com.au' in

1998 but registration lapsed in July 2002 because the registrar allegedly failed to act on instructions to renew the name. The Dust Removalists Association, an association for dust removal professionals, subsequently registered the domain name. This led the drivers association to bring proceedings to obtain the transfer of the domain name.

The drivers association argued (i) that the removers association had registered the domain name to prevent it from using its allegedly well-known website, and (ii) that the removers association had requested A\$30,000 for the transfer of the domain name, which was evidence of bad-faith registration.

The removers association responded that:

- prior to the dispute it had no knowledge of the drivers association and, having checked that the domain name was available, registered it as an obvious acronym (ADRA) for its name;

- it had prepared and widely distributed literature bearing the acronym to municipal councils and others; and
- in response to the demand of the drivers association, it had suggested an "off the cuff" figure of A\$30,000 as an appropriate amount for the transfer of the name.

Sole panellist John Brydon stated that the registrant's failure to act on the drivers association's renewal instructions was not a relevant consideration under the auDRP, and held that the removers association had a legitimate interest in the domain name and that the registration had not been made in bad faith. He therefore refused to order the transfer.

Des Ryan

Davies Collison Cave Solicitors, Melbourne

## Bench Press

*The following is an excerpt from "Foundations of the Freedom of the Press in Australia", The Inaugural Australian Press Council Address delivered by the Honourable J J Spigelman AC, Chief Justice of New South Wales (20 November 2002).*

*We note with some amusement, the 'primary form of alternative dispute resolution', and thank his Honour for granting us permission to reprint this piece. You can access the full speech via [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)*

*Honour being satisfied, the parties rode back to Sydney for breakfast. At that time, duelling was the primary form of alternative dispute resolution but, as the incident at Homebush established, it could not be relied upon as a means of controlling the press.*

"...Only three years before William Charles Wentworth and Robert Wardell, the first two barristers admitted as such by the Supreme Court of New South Wales, had commenced publication of the Australian, which joined the official Sydney Gazette. A year later the Monitor began publication under the direction of Edward Smith Hall.

Wardell was a highly competent barrister, who had been passed over for Saxe Bannister as Attorney-

General. If Darling had had him as principal law officer, the history I am about to recount would probably have never happened. Wentworth, locally born, and already emerging as the leader of the emancipists, had met Wardell in London in 1819 where Wardell was already an editor, of the Statesman evening newspaper. They travelled to Australia together in 1824, accompanied by a printing press. Their approach was clearly stated in their first editorial:

"A free press is the most legitimate, and, at the same time, the most powerful weapon that can be employed to annihilate influence, frustrate the designs of tyranny, and restrain the arm of oppression."

"... When Robert Wardell wrote an article in the Australian critical of Colonel Henry Dumaresq, the brother of Governor Darling's wife and his personal assistant, Dumaresq challenged Wardell to a duel. They met in a field at Homebush, each fired three shots at the other, all of which missed. Wardell's second, William Charles Wentworth, convinced him to apologise. Honour being satisfied, the parties rode back to Sydney for breakfast. At that time, duelling was the primary form of alternative dispute resolution but, as the incident at Homebush established, it could not be relied upon as a means of controlling the press ..."

### A GUIDE TO ARBITRATION PRACTICE IN AUSTRALIA (2001)

Members who have undertaken or tutored in the Professional Certificate in Arbitration would know about this terrific 742-page text book with Chapters in it from leading practitioners and academics.

Edited by Vicki Wayne, Academic Co-ordinator of the course, it is a great resource. (If you want

to order it, use an Order Form on our website in the publications/books section.)

The book is now being re-written. If you would like to make comments about how the new edition may be improved, please contact Vicki on (08) 8303 5024 or at [vickiwayne@adelaide.edu.au](mailto:vickiwayne@adelaide.edu.au).

### ARBITRATION CLAUSE FOR INTERNATIONAL DISPUTES

You can find this clause on our website at [www.iama.org.au/clauses](http://www.iama.org.au/clauses)

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with, and subject to, the UNCITRAL Arbitration Rules. The appointing and administering body shall be The Institute of Arbitrators and Mediators Australia (IAMA). There shall be one arbitrator, the language of the

arbitration shall be English, the place of the arbitration shall be (nominate city in Australia).' Please note:

- The parties may designate different rules to the UNCITRAL Arbitration Rules.
- The parties may provide for 3 arbitrators.
- The parties may designate a language other than English.

For an up-to-date copy of the UNCITRAL Rules visit our website: [www.iama.org.au](http://www.iama.org.au).



# Around the Chapters

## NEW SOUTH WALES

The role of the Institute as the pre-eminent national organisation in the training, accreditation and nomination of ADR practitioners has been exemplified recently by the applications for acceptance of the Institute as an Authorised Nominating Authority (ANA) under the Building Industry Security of Payment legislation in New South Wales and in Victoria and the submissions by the Western Australian Chapter in relation to the Construction Contracts Bill which provides similar procedures for adjudication of payment disputes.

Established procedures and experience permits the Institute to provide the training and accreditation of adjudicators and the procedural administration in all states where this significant reform of contractual practices in the construction industry is implemented.

The legislation, unfortunately, is not uniform particularly in that the Victoria Act does not include the recent, 2002, reforms introduced in New South Wales. The 2002 amendments were developed by the government after consultation and a review of the operation of the Act over two years.

It is probable, or at least hopeful, that the New South Wales reforms will be adopted nationally in due course. The 2002 Act in NSW significantly now requires payment to be made of an amount determined after adjudication. The role of ANAs has also increased with the Adjudication Certificate issued by the ANA permitting the prompt issue of a Court order or judgment.

To date there has been some transfer of knowledge about training programs and the use of the legislation between the State Chapters. This will continue. In the future the Institute through its capacity to provide coordinated assessment of ADR procedures will be in a unique position to guide the development of adjudication as a means of resolving disputes within the construction industry.

Apart from the activity involved in obtaining accreditation under the 2002 Act and the development of new training courses for accreditation of adjudicators, the NSW Chapter has maintained a busy CPD program.

The very successful Saturday seminar entitled "Mediation Breaking Through" involved some of the most experienced and able practitioners who shared their knowledge and experience with Members. We were most fortunate to have Sir Laurence Street KCMG AC chair and participate in the seminar along with Peter Condliffe (CEO), Robert Angyl, John Tyrril, Graham Easton and Mary Walker. Valuable insight into the mediation process was provided by

*Established procedures and experience permits the Institute to provide the training and accreditation of adjudicators and the procedural administration in all states where this significant reform of contractual practices in the construction industry is implemented.*

Katherine Johnson and John Hannaford in their session conducted with Michael Whelan. We are hopeful that we could conduct a similar program later in the year. An interesting lesson from the seminar was that events conducted on Saturday give many, particularly country Members, a chance to attend who otherwise are unable to attend during the week.

The Practitioner's Certificate in Mediation & Conciliation course is being conducted in early May by Jennifer David and Alysoun Boyle.

The Chapter looks forward to an intense period of activity in training and accreditation of adjudicators including the conduct of courses in regional cities in New South Wales.

Ian H Bailey  
Chair

## ACT

2003 in Canberra started with more *oomph* than anyone expected. As we shift into March, it is hard to believe that January is so far away on a calendar and yet no distance at all in our lives. Everyone in Canberra has been affected in some way by the firestorm and by the bushfires – and our Members are no exception. However, as a Chapter, we are doing what we can to assist in the community's recovery from that disaster and we are looking to make this a year of high promise for our Members.

### Chapter Services to Aid Bushfire Recovery

Demonstrating its commitment to assisting the Canberra community in its long-term growth and recovery from the bushfires of January 2003, the ACT Chapter has made an important offer to assist those people affected by the local firestorm and bushfires. The offer is for participating Members to provide dispute resolution services (including arbitration, conciliation, mediation, facilitated meetings, etc) to assist in the recovery process. Participating Members have generously offered to provide their services at significantly reduced rates or for free (depending on the circumstances). The offer has been formally presented (and accepted) through both the Canberra Business Council and the Bushfire Recovery Taskforce.

Already the Bushfire Recovery Centre has asked if we would be the nominated organisation for assisting people who have conflict around the bushfire recovery grants. We understand this to be simply "the beginning".

The NRMA has invited all 40 businesses who have made special offers to assist with the recovery to participate in a "Help Expo" on 7 and 8 March. The Help Expo has already had major media exposure here and we expect this to be another major publicity event for the Chapter and for IAMA. Overall this project gives everyone an opportunity to benefit.

An offshoot of this project is that it should enable a greater number of pupillage and mentoring opportunities for arbitrator and mediator Members.

This is a big project and getting the whole thing "off-the-ground" is demanding much of a keen Committee and enthusiastic Members: designing how the project will operate (including how referrals will be made, what professional supports we can provide each other for debriefing, how to increase practice opportunities for new Members), creating a plain-English contract, defining process options (including lateral ways of using our skills to assist the community's recovery), adapting IAMA's existing rules to define terms and conditions for the provision of services, incorporating continuous client feedback and designing promotional activities. Following discussions with the National Office, we have also arranged for the printing of an IAMA banner here in Canberra – we will use it in the NRMA Help Expo, then it will be returned to National Office for safe keeping and to be available to all Chapters.

Implementing this offer is an important and exciting project for the Chapter and, on behalf of the Committee, I would like to thank the Chapter Members who are being generous with their time and their skills to assist in this important project. I would also like to thank National Office and Robert Hunt for their assistance.

### Chapter Services for Schools Competition

ACT Chapter is also working with the Law Society of the ACT with this year's SCRAM competition (Schools Conflict Resolution and Mediation). For the first time, the 2003 competition has the ACT standing alone (rather than being part of NSW), and 10 schools are participating. Chapter Members will be coaches and adjudicators for the competition.

This is a good opportunity to help the long-term development of ADR by encouraging its use among the next generation, and we thank the Law Society for inviting us to assist.

Again, I would like to thank the Chapter Members who have come forward to work on this.

## Members' Dinner - Justice Connolly, ACT Supreme Court

Our first CPD event for the year was a great success: a delightful social and informative evening with Justice Connolly talking about ADR in the ACT Supreme Court. We were delighted to welcome a special guest at the dinner: Robert Hunt.

Justice Connolly undertook his mediation training at Harvard University in 2001 and at the dinner he talked about the pilot mediation program he initiated when he was Master of the Court. He pointed out that only 5% of disputes are litigated and of those only 5% end up being heard. He is interested in seeing non-litigious dispute resolution processes being used for the other 95% of disputes. The Chapter looks forward to working with staff in the ACT Supreme Court to further the use of ADR in all its forms.

### In Conclusion

These have been snippets only - overall, the ACT Chapter is attaining a high profile in this region and the number of new Members continues to climb, reinforcing Robert Hunt's comment at the dinner that we are a vibrant Chapter! This is thanks to a Chapter Committee that continues to apply its creativity to helping us grow and to an active membership that is very keen to contribute.

## *The ACT Chapter has made an important offer to assist those people affected by the local firestorm and bushfires.*

The number of enquiries about our services has increased enormously and we are hearing good feedback about our services. One unsolicited comment was "We have heard that [the Chapter] has a very high standard of professional services, and that's what we're after." That's the sort of feedback all Members want.

The landscape is growing the finest tinge of green. The whole of Canberra continues to recover and to progress from strength to strength - and the Chapter is travelling too.

Alysoun Boyle  
Chair

## TASMANIA

The Tasmanian Group has recently gained a new lease of life from the grading, in August 2002, of nearly a dozen of our Members as arbitrators. It seems that this is the first time (in current memory, at least) that the Institute has had graded arbitrators in Tasmania.

Aside from the benefit of having graded arbitrators now available, this has injected a new enthusiasm into the Institute. The first in our new series of CPD activities was held in late February. His Honour Mr Justice Blow of the Supreme Court of Tasmania kindly agreed to address our meeting on the subject "Arbitrators: How not to make a mug of yourself". Approximately one third of our total membership attended the meeting and had the benefit of both some very helpful practical advice and his Honour's lively wit and extensive repertoire of entertaining anecdotes.

The program will continue with a variety of topics, with a meeting scheduled for every second month.

While we have no reliable way of recording the level of arbitration activity in the State, it seems that the grading of numerous arbitrators has assisted in bringing about a growth of arbitration in Tasmania, a trend which we aim to continue encouraging.

Craig Doherty  
Secretary

## QUEENSLAND

### Post Accreditation Mediation Workshop

We recently conducted our first Post Accreditation Mediation Workshop for the year which was attended by 15 accredited mediators. Our next two-day workshop will be held on the 14th and 15th of November.

## The Practitioner's Certificate in Mediation and Conciliation

In May we will commence our intensive mediation training program for the year which will include two Brisbane courses, in May and September. We are also hoping to expand our training services to North Queensland in 2003 with the possibility of a public course in Townsville later in the year.

### The Professional Certificate in Arbitration

The introductory lecture for the General Course on 4th March was extremely well attended. Over 20 students were present and almost all of these are enrolled in, or intend to enroll in, the year-long course.

### The Committee

We have been negotiating with the Commissioner for Body Corporate and Community Management in anticipation of amending legislation to the Body Corporate and Community Management Act 1997 which will provide the Commissioner with power to appoint 'special adjudicators' and 'special mediators' in respect to disputes under the Act. In the event that the provisions of the Act are amended, as we expect, a wide range of disputes will be available for special adjudication or mediation.

We have also been negotiating with the Queensland Building Services Authority regarding the proposed Building and Construction Industry Payments Bill with a view to providing nominated adjudicators to be included on a gazetted list of adjudicators under the new legislation. Furthermore, we have offered to devise and deliver training courses under the new legislation for both adjudicators and likely participants within the industry.

We met with the Attorney-General and Minister for Justice, Mr Rod Welford MP, regarding two current issues in Queensland. The first is our possible role in dispute resolution between solicitors and their clients and secondly, the possibility of amending the Supreme Court Rules to provide judges with the power to refer matters to arbitration without the consent of the parties.

### Lunch with the Attorney-General

Following the success of our breakfast seminars over the past two years we are extremely fortunate to present our Members with the opportunity to attend a luncheon seminar featuring Rod Welford as our guest speaker. Invitations to this event will be extended to all Members once a date has been confirmed. Non-Members are also most welcome to attend.

### Continuing Professional Development

By popular demand from our Queensland Members, Mr Brett Codd commenced our 2003 seminar series with his presentation "Confidentiality in Mediation", which was published in the December edition of *The Arbitrator & Mediator*.

In March we featured a presentation by Dr Rachel Collis on "Prevention and Management of Workplace Bullying - Practical Implications of Proposed Amendments to Queensland Legislation". We had an overwhelming positive response from our Members on this presentation and several requests for a follow-up seminar in the future. Dr Collis's speaker notes and powerpoint presentation are available for purchase from the Secretariat.

A CPD calendar detailing the Queensland Chapter's 2003 activities will be available shortly from the website and issued to all Queensland Members with the release of our March newsletter.

Eric Pratt QC  
Chair

## VICTORIA

The Victorian Chapter is proud to host the IAMA National Symposium which, together with the National AGM, will be held from 23-25 May at Le Meridien Hotel in Melbourne. We are looking forward to welcoming participants from all parts of Australia, and can assure everybody that a strong symposium program combined with a good range of social activities will provide the ideal setting for establishing new networks and renewing old

friendships. Proceedings will commence with the National Council Meeting and a Cocktail Party on May 23, and for those interested perhaps a game of golf at Royal Melbourne. Registration material will be widely circulated very soon.

The Victorian 2002/03 CPD program has been well attended, and thanks must go to those of our Members who gave their time to act as Presenters. Their knowledge and skills, passed on through CPD sessions, is a most effective way in which the Institute can help Members to keep abreast of new and current developments in both Arbitration and Mediation.

We were fortunate to have presentations by Professor Michael Pryles, who spoke to us on the subject of International Arbitrations. Ms Eleanor Wertheim, who is an international practitioner in mediation, also gave us some valuable insights into the solution of disputes where international boundaries and ethnic considerations are sensitive issues - both certainly very relevant presentations for our current international climate!

National President, Ian Nosworthy, attended our end-of-year breakfast on the banks of the Yarra, giving many of our Members a good opportunity to meet with him. There was an excellent attendance and the food was first class, even though the environment was a bit chilly so to speak.

The forthcoming year is an exciting one, and will include, amongst other things, a Master Class for senior Arbitrators, a seminar for Mediators, and a number of other interesting topics. One of the feature events will be a repeat of last year's very successful luncheon and discussion at Victoria Barracks. For the first time this year we are offering discounts to those who attend CPD sessions regularly.

### The Victorian 2002/03 CPD program has been well attended, and thanks must go to those of our Members who gave their time to act as Presenters.

The Victorian Chapter, has recently been appointed as a Nominating Body under the new Security for Payment legislation. The Chapter has run a CPD evening for those interested and there is a planned one day course in the offing for aspiring adjudicators who wish to have their names included on the Chapter's nomination register.

In 2003 we are working toward a repeat of last year's very successful national arbitration courses, both basic and advanced, as well as continuation of the national mediation courses. In 2002 we were able to successfully run two national mediation courses and a mediation training course for a government department. These courses together with the arbitration courses, proved to be a rich source for new membership recruiting. We plan to equal and preferably better our performance in both of these areas this year.

I would like to welcome Christine Ekhardt, Assistant Chapter Administrator. An ANU graduate, Christine will be assisting Elisabeth Siecker.

I cannot close these remarks without referring to the help and assistance provided by our Chapter Committee. All are busy professionals. All give freely of their time. All contribute to building this Chapter into the best possible facility for the benefit of both the Institute and the Victorian Chapter Members. My thanks to them, and also to our dedicated and hard working Chapter Administrator.

Jim Elliott-Smith  
Chair

## WESTERN AUSTRALIA

### What happened to natural justice?

The draft Constructions Contracts Bill 2003 (W.A.) states quite clearly

#### 29 Adjudicator Procedure

- (1) For the purposes of making a determination, an appointed adjudicator -
- (c) is not bound by the rules of natural justice.

Thinking it was a misprint, further enquiries were made to the Minister's officer to be told that the clause is indeed correct, and the "not" was purposely inserted.

"Why?" - the obvious question put.

Answer: "Well", the officer stated, "there are two reasons why the drafters inserted this clause.

"Firstly: there are enough procedural steps with the mutual exchange of documents to set up natural justice, and,

"Secondly: So as to avoid the possibility of an appeal to the Local Court on the basis that the adjudicator breached the rules of natural justice."

It is not difficult to conjure up a myriad of typical situations in which an adjudicator is likely to make contact with persons who are not parties to establish the facts so as that he/she can prepare, produce and publish a proper and correct determination - oops, adjudication.

This clause allows the adjudicator to use whatever information he/she obtains necessarily without sharing it with either party, or worse still (if it could be worse) if it was passed onto one of the parties without the second knowing of it and being able to respond.

Without labouring the point too much, the cornerstone of arbitration and the judicial system is Natural Justice so it is difficult to see if the business community will willingly accept this insertion.

We wonder how a judge, when being presented with an appeal on some or other grounds, will look at a blatant breach of Natural Justice in spite of the fact that the Bill allows the adjudicator not to be bound by them.

If it remains as part of the Act when promulgated, it might be useful to provide more descriptive measures to Section 44.(1) which defines a "protected person"!

Phil Faigen  
Chair

(P.S. Thank you to the eastern states counterparts for their generous support and information whilst we were conducting our review of the Bill.)

## SOUTH AUSTRALIA

Diversity and growth are our watchwords. We continue to grow with new Members and they continue to come from pleasing and interesting sources, including a sitting Supreme Court Justice. As our membership grows, the diversity in backgrounds, experience and what the membership want from the Chapter grows.

This makes designing and delivering a relevant CPD program for Members a challenge. However the high interest in the Chapter demonstrated by the response from Members and invited guest to the Christmas function late last year is pleasing. We want to capitalize on this interest by continuing to promote the Institute to the public and the professions. To that end we will shortly be announcing a presentation the Chapter will be sponsoring from Ian Nosworthy, National President, aimed directly at spreading the word on arbitration and mediation. We hope that senior Members of the judiciary will be part of this presentation that will be a new direction for the South Australian Chapter in providing events where Members are not the primary focus (though they continue as always to be part of the focus). However we see promoting the use of alternative dispute resolution to the community as a core function of the Chapter, together with service to Members. Increasing acceptance of ADR can only be beneficial to the ADR practitioners who are our Members.

We will not be losing touch with our Members though and we will shortly be confirming our upcoming Continuing Professional Development program with details of technical presentations for both arbitrators and mediators to be announced for the next few months.

The next mediation course (hopefully there is room for two this year) will also form an important component in our strategy of promoting ADR and the profile of the Institute. If you have any ideas, suggestions or comments they will always be gratefully received at the Chapter.

Andrew Robertson  
Chapter Administrator

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INSTITUTE of  
ARBITRATORS & MEDIATORS  
——  
AUSTRALIA

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# NOTICE

## ANNUAL GENERAL MEETING

The Annual General Meeting of the Members of the Institute of Arbitrators & Mediators Australia will be held at Le Meridien at Rialto on Collins on Saturday 24 May 2003 at 5 pm.

### ORDER OF BUSINESS

1. Opening.
2. Apologies.
3. Minutes of Previous Meeting.
4. Installation of the President and the Executive.
5. Presentation of the audited financial statements of account and the report of the Council for the financial year ended 31 December 2002.
6. Proposed Amendments to Memorandum and Articles of Association subject to ASIC approval.
7. Consideration of any other business (for which proper notice has been given).

A Member entitled to attend to vote is entitled to appoint a proxy. The person appointed proxy must be a Member of the Institute.

Proxy forms must be received at the National Office by 4:00 pm on 21 May 2003.

PETER CONDLIFFE  
*Chief Executive Officer*  
17 March 2003

THE  
 INSTITUTE of  
 ARBITRATORS & MEDIATORS  
 ————  
  
 AUSTRALIA

*National • Independent • Multidisciplinary*

## FORM OF PROXY

I \_\_\_\_\_

of \_\_\_\_\_

am a Member of The Institute of Arbitrators & Mediators Australia. I appoint as my proxy to vote for me at the Annual General Meeting of the Institute to be held on Saturday, 24 May 2003 at 5 pm:

(name) \_\_\_\_\_

(address) \_\_\_\_\_

or failing him/her I appoint ; \_\_\_\_\_

(name) \_\_\_\_\_

(address) \_\_\_\_\_

or failing him/her I appoint the Chairman of the Annual General Meeting.

This form is to be used in accordance with the directions of the Appointor. If the proxy is not so directed by the Appointor, he/she may vote or abstain as he/she thinks fit.

### DECLARATION

I understand that if I have not directed my proxy how to vote, my proxy may vote or abstain from voting as he/she thinks fit.

I understand that if the person I appoint as my proxy is not present at the meeting, this form cannot be redirected by my proxy to another person in attendance at the meeting of my proxy's choice.

\_\_\_\_\_  
 SIGNATURE OF MEMBER

\_\_\_\_\_  
 DATE

This Form of Proxy must be received by the Chief Executive Officer at National Office by 4:00pm Wednesday, 1 May 2003.