

## Chairman's Message



### NEW IAMA VICTORIAN CHAPTER HEADQUARTERS & DISPUTE RESOLUTION CENTRE

Further to my letter of 12 November 2004 to Victorian Chapter Members I am very pleased to advise that financial contributions and pledges so far received towards funding for the Chapter's new premises amount to almost \$20,000.

Unfortunately, the commercial terms that would have been imposed in return for taking up the lease to occupy an entire floor of the premises at 459 Little Collins Street were unacceptable to the Institute and the proposal did not proceed.

The Victorian Chapter Committee is presently working on an alternative arrangement, which is anticipated to

provide all the benefits of the previous proposal. Full details will be provided to members at the earliest appropriate time.

In the meantime; funds contributed towards anticipated costs of the 459 Little Collins Street proposal are being held in trust pending the outcome of the Committee's current initiative, and their being directed towards a satisfactory alternative proposal.

The Committee and I are very grateful to those members who have contributed funds, for their support of the Chapter's work and appeal to those members who have not yet contributed to consider participating in this important initiative.

Andrew Kincaid

email [akincaid@vicbar.com.au](mailto:akincaid@vicbar.com.au)

## Working Group convenors report

### The Mediation practice discussion Group convenor Breda Annesley reports

#### Lively Debates On Ethical Issues For Mediators

##### The Key Stages' Series.

This year, the Mediation Practice Discussion Group is inviting everyone to participate in the 'Key Stages' Series. The Series has been designed to:

Refresh member's knowledge of the critical stages and skills for achieving 'successful' mediations; and

Learn new tools and techniques; and  
Provide a forum for discussing the effectiveness of various approaches in different situations.

The 'Key Stages' Series will continue at 5:30pm on Wednesday nights throughout the year, and we encourage mediator, non-mediator members and other non-members to attend.

The series commenced in February with a session beginning with a lively discussion prompted by the question:

#### To intervene or not? – The boundaries of duty of care and advice giving.

If a retail tenant agrees with the landlord's suggestion to pay land tax should the mediator reveal that the landlord is legally liable for the land tax? Victor Tzu put this question to twenty-two mediators during the first session of the 'Key Stages Series' run for the Mediation Practice Discussion Group. The room polarized between those mediators who advocate a 'hands off' approach and those who drew links with the mediator's duty of care responsibilities to the parties and to the organisation who engaged them.

Discussion on the Key Stage of; '**Agreements to Mediate**' led by Jim Cyngler progressed from quiet beginnings, including examples of various documents used by practitioners, to a lively debate on issues around

## Working Group convenors Report continued

intervention tactics where values, ethical issues, duty of care and advice giving bump up against each other. Along the way we explored reasons for inserting some clauses and not others into the various Agreements to Mediate.

The second in the Key Stages Series commenced with a session in March when Dr. Hilde Lovegrove followed the pattern by beginning with a stimulating subject for discussion on:

### **Saving Face – Gender differences**

The statement “Women don’t want to look stupid (although don’t mind looking weak), and men don’t want to look weak (although don’t mind looking stupid)” generated a lively response from twenty mediators.

discussed, as well as a mediator’s inability to modify parties’ behaviours (as opposed to being able to help them to move from entrenched positions to interests). Examples of the practical aspects of this stage were highlighted, including getting people ready and into the right ‘zone’ for moving forward, the presence and role of third parties, appropriate confirmation of what was said by a party without irritating them, the question of ‘To vent or not to vent?’ chunking for agenda setting and the advantages and disadvantages of different agenda formats, such as single words, phrases, questions.

If you have any queries about the Mediation Practice Discussion Group, please contact Breda Annesley phone: 03 9600 4921 or by email at [breda@solutionist.com.au](mailto:breda@solutionist.com.au)

## Case Note

### **Built-Rite Constructions Australia Pty Ltd v Nazih Seoud, Fred Seoud & Amyoun Nominees Pty Ltd (22 April 2005)**

This case, heard before Shelton J in the County Court on 15<sup>th</sup> March, considered the *Building and Construction Industry Security of Payment Act 2002* (Victoria) [“the Act”], and whether summary judgment could be entered in the circumstances given. The legal test for summary for summary judgment to be successful is: that it must be clear that “there is no real question to be tried”.

A payment claim was made pursuant to the Act, following work carried out by the plaintiff builder on a South Yarra restaurant run by the third defendant Amyoun Nominees Pty Ltd [“Amyoun”]. The first & second defendants were directors of Amyoun.

Two questions arose; was the payment claim a ‘final claim’ under the Act, and does the Act apply to final claims as well as to progress claims?

The evidence was accepted that this was a final claim, as the plaintiff builder had abandoned the work. Regarding the later question, His Honour referred to NSW cases (similar to the Vic Act prior to the changes in its legislation). One of the changes brought in by the NSW amendments was to allow a payment claim to include a final claim.

Some of the potential traps of ‘Opening Statements & Agenda Setting’ were

In addition, the facts that the claim was stated as being “final” and it was made eight months after work had ceased on the restaurant were more than sufficient to defeat the plaintiff builder’s application for summary judgment, and submission that the claim for payment was merely the last progress claim.

His Honour provided further reasons why the matter was not one for which summary judgment should not be sought: -

a) the affidavit in support of the application of the plaintiff builder (made by a legal practitioner) claimed that the payment claim was faxed to the correct fax number of the restaurant on 4 August 2004, after a White Pages internet search. The attached exhibit of the internet search was dated 17 December 2004.

b) the affidavit also referred to an employee at the restaurant called ‘Maurice’, who the affidavit deposer had spoken to allegedly at the restaurant. The defendants led evidence indicating that there was no ‘Maurice’, nor had there ever been, employed at the restaurant.

c) there was a further anomaly in the affidavit of the plaintiff builder, between the time of the alleged call to ‘Maurice’ and the time of sending the payment claim

## Case Note continued

d) the payment claim was addressed to the first defendant and the third director of Amyoun, c/ the restaurant.

This raised the arguable point regarding service, as under s16 (2)(a) of the Act for the proceedings to be considered, the payment claim must be served ' on the person who under the contract is liable to make the payment.' On the given facts, service of the second and third defendants appeared questionable.

Having found these anomalies and inconsistencies, and having applied the correct legal test, Shelton J had no option but to refuse the application for summary judgment.

In my opinion, this case reinforces the following: -

The Act needs to be amended to incorporate the removal of teething issues, in a similar vein to the NSW 2002 amendments.

This would allow the Act (in Victoria) to cover final claims, which are currently excluded.

Without any amendment to the Act, it is currently not worth attempting to bring a claim for payment eight months after the work is completed;

Supporting affidavits should not be riddled with factual inconsistencies and errors; this legal practitioner' s affidavit was not up to the required standard;

Compliance with s 14(3)(c) is not strictly applied

Service is a pre-requisite to any application under the Act - as any perceived shortcomings will be exposed; service requirements must be strictly adhered to.

Graham Morrow

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## Book Review

### **Adventures in Law and Justice Exploring big legal questions in everyday life**

by:

**Bryan Horrigan**

Published by:

**University of New South Wales Press  
Ltd 2003**

**Cost: \$Aus 32.00  
available free from public libraries**

#### **The Author:**

**BRYAN HORRIGAN** completed a doctorate in law at Oxford University as a Rhodes Scholar, and has consulted extensively to governments and business on a range of legal and policy issues. He is a law professor at the University of Canberra, where he is also Director of the National Centre for Corporate Law and Policy Research and Deputy Director of the National Institute for Governance. He is a regular media commentator on landmark legal developments, and has published widely in a range of legal journals and books as well as national newspapers.

**What the book is about:** In this wide-ranging exploration of both newsworthy and timeless dilemmas in law and justice, Professor Bryan Horrigan traces the connections between law, society, and our everyday lives. Vividly illustrated with Australian and international examples, this travel book for the mind unlocks the mysteries of law and justice and makes them accessible to everyone. It dispels many misconceptions surrounding our legal and constitutional systems, and delves into major law and justice questions that affect us all. Written for readers interested in public affairs and current events, as well as those grappling with ' big picture" issues in law and government as students, professionals or concerned citizens: this book serves as an introduction, a critique, and as a thought-provoking ride, all in one.

It tells law' s stories, exposes law' s myths, and enlivens law' s contemporary issues and challenges, using topical and newsworthy examples from Australian, English, North American, European, and international law, which high- light comparative approaches to common problems. It contains what, for many, will be a different way of looking at law and justice.

## Book Review continued

The book also reveals judges, politicians, and philosophers struggling with legal conundrums, making the theory and practice of law more accessible to the community. This enhances community legal literacy in an Internet age where court decisions and laws are freely available publicly. It also gives readers a glimpse of the dilemmas and arguments at stake in law and justice battles, in the words of those grappling with them. It focuses on decisions of the highest courts, because that is where the battle of legal ideas is most acute. It makes connections between ideas and illustrations across different chapters, and examines some common topics and examples from different angles.

**Who should read this book?** This book is written for followers and students of the intersection between public life and

fundamental questions of law and justice. public affairs and current events as well as law, especially anyone interested in It is also written for students, scholars, and professionals in any discipline of the humanities or sciences who grapple with fundamental issues of law and justice in their study or work. Its wide-ranging coverage offers lawyers and other professionals information about topical law and justice developments beyond their own specialist areas of expertise.

Business professionals and students will find business-related areas of law discussed in Chapters 1,3,5,6,7, and 9, in topics as diverse as corporate citizenship, commercial implications of native title, and the consequences of sexually transmitted debt in financial transactions.

## Letter to the Editor

The recent seminar, "**What's wrong with Arbitration?**" (16 March 2005) presented a rare occasion for those interested in the perception, outcome, and future of arbitration to sit down with an Applicant and discuss the background to his arbitration experience, and what went wrong. The discussion was significantly improved by also having the actual arbitrator present and contributing. The motivation of the Applicant to be present was fuelled by his desire to find a better way of resolving a dispute; he wished to bare his soul in order that others should not be forced through similar unpleasant experiences.

Briefly, the Applicant had an Arbitration Hearing scheduled for 2 days, which became 11 days after the commencement of the Hearing, and several Appeals to the Supreme Court. These circumstances were due entirely to the Respondent's actions. The matter was mediated successfully after the Hearing and before the outcome of the last Appeal.

As a grade 3 arbitrator, I believe that, we did not make the most of the opportunities afforded by such a unique event. The positives, which came from the discussion and comments, were:

The Arbitrator behaved impeccably throughout and handled the matter properly and without scope for setting aside the Award;

Members present were satisfied that the arbitration process was adequate and reasonable, but that it was hijacked by Respondents who were willing to 'burn money' in a series of attempts to thwart the process, and in doing so were acting totally unreasonably.

Despite these hijackings, the result time was considerably better than that offered by the court system in Victoria.

In my opinion issues which were raised and would have benefited from further consideration included:

- a. What do the **IAMA Expedited Rules** actually say and achieve?
- b. Should contracts include an amended arbitration clause limiting rights or either party to appeal by allowing appeals for technical misconduct of the arbitrator only? This was noted as a way to defeat the ability of one party to keep appealing to the Supreme Court during a arbitration process.
- c. In practical terms what can an arbitrator do to limit the misbehaviour of a party whilst remaining within the requirement to be seen to provide and maintain natural justice in the hearing of the dispute?

I believe that this last point is a key issue, and in response to the Applicant's plea for a change and improvement in arbitration, suggest the following could be considered.

## Letter to the Editor continued

Each CPD calendar year all IAMA Chapters to run a workshop or seminar on the subject of "what the Arbitrator can do when one or both parties are difficult, without compromising of natural justice" followed by amalgamating and sharing experiences gained.

Any applicant for grading or regrading can expect this subject to be raised at length, and any applicant is required at any level in any chapter to more than adequately respond to such a subject;

The national office could consider inserting an option in the standard clause to exclude rights of appeal in order to take the issue out of the preliminary conference entirely by including it in the arbitration clause from the outset.

Each Chapter should encourage Applicants and Respondents to forward their comments and experiences of the arbitration process to Chapter Offices. The Victorian Chapter should, in addition to thanking the applicant for participating on 16 March 2005, indicate that his efforts have been worthwhile as the items listed above are being addressed by IAMA.

Implementing the above will not prevent a repeat performance of a defendant in similar circumstances, but practicing arbitrators may be better equipped to deal with such a situation if it arises again.

## Response from Graeme Pyle

### Response:

Graeme Pyle, the Claimant in the action, which was the subject of the seminar 'What's wrong with Arbitration' wrote a letter to IAMA Vic Chapter outlining his concerns regarding the arbitration, which prompted the seminar referred to in Graham Morrow's letter. Mr Pyle was invited to respond to Mr Morrow's letter and his response is published below.

The Arbitration system's compelling advantages over the court system are saving in time and cost. If reluctant participants and their lawyers can negate these inducements, then amendments to the rules of arbitration are required.

Graham Morrow's letter was an insightful account of the meeting I attended in Melbourne on the 16th March 2005. Graham has given excellent direction on

The following further considerations may also be relevant:

What sanctions would the court apply in a court hearing when the defendant totally misleads the court in regard to the length of the hearing?

Could and should court sanctions be applied by an arbitrator in such a situation?

Can arbitration, as supposedly "commercial dispute resolution", take a harder or different tack to that of the courts on the issue of an overlitigious / overzealous (or bad faith) participant?

Any further discussions require the benefit of senior and experienced arbitrators.

The topic title question: "What's wrong with Arbitration?" provided as many more questions as answers, with only the mediation process emerging relatively unscathed.

The ultimate answer to the question appears to be that the arbitration process is unavoidably and closely linked to the court system, and therefore open to the same abuses by reluctant participants with more money than commercial common sense.

Graham Morrow  
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the paths that may be taken to correct inadequacies in the current

Arbitration system. It is now up to you, the members of the IAMA, to make these vital changes or risk becoming irrelevant. There is a very old yarn that goes "Better today than tomorrow, better at sunrise than noon, let doing not wait on delaying, nor now be the servant of soon." Get on with it!

The failings of the arbitration system cost me a great deal of money and were a huge disruption to my life. If you do nothing else on this planet but fix these problems, I, and thousands of future participants in arbitrations in Australia, will be eternally grateful.

Graeme Pyle Farmer Berrigan NSW.  
[gmpyle@mcmedia.com.au](mailto:gmpyle@mcmedia.com.au)

Members wishing to have a copy of Mr Pyle's original letter can obtain it from Elisabeth Siecker IAMA Vic Chapter Administrator: [vic.chapter@iama.org.au](mailto:vic.chapter@iama.org.au)

## Editor's Message

This Newsletter is the first in 2005. When I was appointed by the Chapter Committee last Year It was intended that there would be Monthly issues. Late last Year there were problems in circulation of the newsletter by email and the November and December issues were only accessible to many members on the website.

These problems have now been solved and I invite all members to contribute to make the newsletter not only a useful means of communication but making information available to those who are able to attend functions and events available, to all.

Committee members, Sub-Committee Chairs and Working Group Convenors are particularly invited to contribute to each issue.

Case Notes would be welcome, as would Book Reviews and Reports on events of personal or general interest, Obituaries, Congratulations etc.

Please respond direct to the Editor:

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## Personal Notes

### Congratulations to the following members:

Accreditation as a Mediator: Mr. Michael Sweeney

Admissions to Associate Membership: Mr. Trevor Dickson, Mr. Michael Earwaker, Ms. Julia Grainger, Mr. Christopher Loorham, Mr. Nicholas Rudge and Ms. Ozlem Susler

## Some more useful websites

### Topical Legal News and Commentary JURIST' s Legal News and Hot Topics

<http://jurist.law.pitt.edu/issuesindex.htm>

LIAC -Hot Topics

[http://www.austlii.edu.au/au/other/liac/hot\\_topic/](http://www.austlii.edu.au/au/other/liac/hot_topic/)

Online Opinion's 'Law and Justice' Section

<http://www.onlineopinion.com.au/Sections/law.htm>

Speeches by High Court judges on topical legal issues

<http://via www.hcourt.gov.au>

The Australian Financial Review -Legal Affairs

<http://www.afr.com.au/legalaffairs>

The Public Record (ABC Online)

[http://abc.net.au/publici\\_indexes/default.htm](http://abc.net.au/publici_indexes/default.htm)

The Times Online ~ Law

<http://www.timesonline.co.uk/sectionIO.,200,00.html>

Writ: FindLaw's Topical News and Legal Commentary Section

<http://lwrit.news.findlaw.com>

**For other ADR website in general please see:**

[http://www.arbitrationicca.org/directory\\_of\\_arbitration\\_website.htm](http://www.arbitrationicca.org/directory_of_arbitration_website.htm)

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