

Message from the Chair



Welcome to our final Newsletter for 2005. There have been a number of developments since the September edition:

Restructuring

At the present time, without the demands of a Dispute Resolution Centre, we do not have sufficient work to justify employing a full-time Chapter administrator, the Victorian Chapter is therefore restructuring its administration and activities: a new appointee, to replace Elisabeth Seicker, will be chosen early in 2006. Until then National Office staff will administer the Chapter activities.

On behalf of the Committee and members, I would like to thank Elisabeth for her hard work with the Chapter over the past five years.

I know that many members will miss her warm personality and her many contributions to the Chapter.

Elisabeth has undertaken many roles and responsibilities as Chapter Administrator and acquitted herself well. I would like to take this opportunity to mention a few highlights during her time with The Victorian Chapter. When the Chapter hosted the IAMA National Conference In 2003, Elisabeth, along with members of the National Office, was largely responsible for the success of that event. Elisabeth organised two other high profile events this year – the 30th Anniversary dinners in Hobart and Melbourne. Both were successful and memorable. One of Elisabeth's key qualities is her ability to manage great events. No doubt all of you will see some as standing out more than others; for me some of the best were held in the Victorian barracks, including last year's Christmas dinner.

Elisabeth has provided a wonderful service to our members over the past four years, and managed to balance friendliness with efficiency. On behalf of the Victorian Chapter Committee and all members, I wish her the very best in the future, including the opportunity to realise some of her long held dreams.

Since moving from the Supreme Court building we have ceased to run a DRC. In 2005 we have held our events in the rooms of Jon

Kenfield, Director of the Solutionist Group and IAMA member. It is unlikely that this will be possible in 2006.

I would like to thank Jon Kenfield and his staff for their ongoing support in 2005. 459 Little Collins Street became a home away from home for Victorian members. Jon and Kate were always there to assist when needed. It has certainly enabled us to be able to offer our CPD events and the National Mediation Course in a friendly, central location.

We are currently in discussions with the County Court management who have a magnificent new building and we hope to negotiate an arrangement with them for 2006.

CPD Events for 2006

John Rundell is currently finalizing the CPD program for 2006.

Next year we plan to offer fewer events that are targeted to meet the real needs of our members. If you have a topic you would like covered, feel free to contact John by email at:

john.rundell@stratica.com.au.

CPD Geelong

This year we have tried, with little success, to organise an event in Geelong. We are keen to offer something in 2006. Could members who are interested in being involved in developing a program of CPD events in Geelong please contact either John Rundell or myself and we would be pleased to set up a discussion meeting.

Mediation News

Our third and final Professional Practitioners' Mediation Course for the year was conducted in August, by Jim Cyngler and Danielle Huntersmith. It was our most successful Course this year with excellent numbers and a very

high level of satisfaction from participants. On the strength of this program we hope to offer three courses again in 2006, although we may modify the timing. Next year we will be using the new Mediation Handbook prepared by National Councilor Aysoun Boyle.

Members wishing to update their knowledge of the mediation course will be able to purchase a copy. I encourage all members to publicise the Mediation Course amongst your colleagues and friends? It is an excellent course and one of our key sources of revenue.

Recently Carol Grace, Chair of VADR organised a meeting with the Chairs of other Dispute Resolution organisations, including LEADR, LIV, AFMA and the Vic. Bar. We discussed ways in which we might collaborate to offer an improved service to our members. We have decided to try to synchronise and cross-advertise our key CPD events for the year. We also hope to run a joint event. This is most likely to be in February when Professor Laurence Boulle will be conducting a public meeting to discuss his draft proposal for National Accreditation Standards for Mediators. Professor Boulle's proposal is discussed in the CEO's Message in this Newsletter.

Mediator members are urged to read the Draft Proposal and either respond directly or send comments to IAMA. The Chapter Committee will be making a response on your behalf.

We are still lacking a convener for our Mediation Discussion Group. I urge Mediator members to consider whether they would be

prepared to take on this role, which is to facilitate an informal monthly meeting.

Adjudication News

At last we are seeing some signs of governmental activity on the proposed changes to the Security of Payment Act, as reported elsewhere in this newsletter. However, it still seems that nothing is likely to actually happen before the middle of 2006 – we plan to be ready, and remain recognised as the leading Authorised Nominating Authority.

Other News

By the time this newsletter is published, our Christmas function at Black Ruby on December 9th will be history.

I would like to encourage all members to attend Christmas drinks jointly hosted by the National Office and the Victorian Chapter.

This event will be from 5pm to 7pm at the IAMA offices, 190 Queen Street, on December 16th. We look forward to seeing you there.

On behalf of the Victorian Chapter Committee, I wish you a safe and happy holiday period.

Angela O'Brien

IAMA Vic Chapter committee chair

aob@unimelb.edu.au

Message from the IAMA Vic Chapter Security of Payment Group



Security of Payment update

We have all been waiting for months for news about the new Security of Payment Act, and now (early December) we are in the midst of a flurry of activity:

(a) The Building Commission has held a meeting of all ANAs to keep them informed, and to seek responses to some draft ideas for the new regulatory regime – now expected in the Autumn session of Parliament

(b) Your SoP Group committee, with assistance from the National Adjudication Committee, is preparing a response (due on 12 December) to a discussion paper prepared by the Building Commission on certain issues.

(c) IAMA has been selected, after making submissions, to be a member of the Building Commission's SoP Reference Group. (The other ANA selected is Australian Solutions Centre).

No doubt this is the outcome of all our efforts, particularly those of Tim Sullivan, IAMA National President, who visited Melbourne to confer with key Building Commission staff.

(d) Warren Fischer (Queensland, and chair of the IAMA National Adjudication Committee) has also sent information to the Building Commission concerning IAMA training - proving again the virtue of being a national organisation

(e) Your SoP Group Committee is preparing the annual report that the Building Commission requires.

See what we mean about being busy?!

Lawrence Reddaway

L_V_Reddaway@bigpond.com

Message from the IAMA CEO



I recently attended the October breakfast meeting of the Queensland Chapter, where Australian Attorney General the Hon Phillip Ruddock MP spoke on the ADR components of the new Industrial Relations system changes. The full house session at the Brisbane Hilton was the major annual public event for the Chapter, and a CPD event for the Queensland Law Society. Chapter Chair Eric Pratt QC, and his committee are commended for projecting the Institute so well.

As the Industrial Relations Commission will have a less proscriptive role in the new structure, employees and employers will be able to use accessible and less formal options for dispute resolution.

The structural format for these changes is not yet determined as the Government is to develop it from the lessons learnt from a pilot mediation program at present being conducted by the Australian Industrial Registry for small businesses involved in workplace relations disputes.

This pilot, started in May, and involving some members of the Victorian Chapter in the panel of sixty external private mediators, will end next month. The report on this program will be the major influence on the future shape of this new aspect of the new dispute resolution system.

Continuing the Queensland flavour, National Councillor and 2006 Conference Co-ordinator Karyn Reardon has been finalising the program for the Palm Cove Conference to be held on the last weekend in May 2006. The response to the call for papers has been significant as expected, and Kayrn and her organising group are promising to eclipse the excellent program at Canberra 2005. More information will be circulated as soon as the program is finalised, but North Queensland will be far warmer than May in Melbourne (and Canberra 2005), and you should consider pencilling in 26 - 27 May 2006 as an option now.

The past few weeks have seen a flurry of Mediation training throughout the whole Country. Victoria, South Australia and Queensland have followed the West Australian course. The Adelaide course delivered by Jennifer David and Alysoun Boyle was the first session of the revised training to be delivered nationally from the start of 2006, accompanied by the first major re-write of the training handbook since the 1999. The Queensland course was conducted in Townsville for staff of the Queensland Health Commission. Queensland Health have commissioned previous courses for staff involved in face to face involvement with the public, and see our training as providing valuable interpersonal situation techniques which are adaptable to the

challenges their staff meet in their day to day activities.

Mediation is also on the national agenda as Prof Laurence Boule of Bond University has just released a draft discussion paper on developing a base accreditation standard for the training of mediators throughout Australia. Prof Boule is conducting his study for the National Alternate Dispute Resolution Advisory Committee (NADRAC) reporting to Australian Attorney General Phillip Ruddock. Details for accessing the draft paper and commenting can be found on:

www.mediationconference.com.au/html/Accreditation.html

The Arbitration and Mediation training courses provided by the Institute are a valuable membership promotion activity, they attract non-member students to membership through the concessional joining arrangement offered in conjunction with the course fees. One of the challenges for chapter members as a whole is to provide these new-members with the incentive become active in Chapter events, and to maintain their membership beyond their initial year, One of the tasks that the National Council will be addressing in the final part of 2005, is to develop a better balance of CPD events across whole Institute in its 2006 program.

A major reason for this new focus is that the National Council Meeting on the 17 November approved the membership applications of 21 new members to the NSW Chapter as part of the re-vamped Corporate Membership category. The new members have been sponsored by one of the existing Corporate Members, who already had 5 of their staff as members, but have now been attracted by the new concessional individual member rate. Firms taking Corporate Membership can now nominate staff as members in all membership categories at a flat annual subscription rate of \$330 per member. This means that Corporate Members nominating more than 3 staff as personal members will be making significant savings. Andrew Hassad our Finance Officer is monitoring the 2006 subscription payments now being received in this pre-Christmas discount period, to identify where payments are being made through employer organizations and we will be contacting those firms as part of our sale campaign to make them aware of the benefits of

this scheme. However, we would like all members in this situation to assess the advantages of your firm being involved. Chapters should also be aware that one of the major reasons for this scheme is to increase numbers at Chapter CPD events, and this effect is already being felt. The other aspect is that for those in firms represented Australia wide there is only one home chapter for the Firm itself; this is an incentive for you being pro-active to make that focus your own chapter.

Victorian members will, by now, be aware that Elisabeth Siecker, their Chapter Administrator since 2000, has left IAMA and is to be thanked for her service to the Chapter. As referred to in the Chapter Chair's message, until she is replaced National Office staff will administer the Victorian activities.

On the international front planning is now well advanced for activities in 2006, and part will be the results of the new relationships we have entered into with Singapore and Shenzhen in Southern China, and the finalisation of our Memorandum of Co-operation with the Kuala Lumpur Regional Arbitration Centre at Palm Cove 2006.

The introduction of adjudication into Singapore will see joint Singapore Institute of Arbitration/IAMA training early in the year.

The recent (October) Brisbane City Council mission to the 2005 Asia Pacific Cities Conference in Chongqing, Western China on which the Institute was represented, has resulted in signing of a Memorandum of Co-operation with the Shenzhen Arbitration Commission (SZAC), and discussions with the Chongqing Arbitration Commission and the Sub-Commission of CIETAC, the Chinese international arbitration body, in Shanghai. SZAC has had a close relationship with the Queensland Chapter since 2003, and the MOC is based on this. Chinese arbitration is preferred by the Central Government for the increasing number of trade related disputes.

The pressures to "Internationalise" traditional Chinese Confucian and Civil Law approaches to dispute resolution through training in adversarial systems have led to a request to IAMA to

conduct training for senior Chinese Arbitrators in China and Australia. While planning is at an early stage we are expecting a pilot course to be conducted in the first quarter of the year.

Resulting from each of these contacts with our regional neighbours, we are expecting a number of International representatives at the 2006 Conference (assisted by the promise of the tropical delights of North Queensland).

The Federal Government is also well aware of our involvement in China and Tim Sullivan has been involved in discussing the dispute resolution aspects of the forthcoming China Australia Free Trade Agreement with the negotiating team in the Department of Foreign Affairs and Trade.

Closer to home David Thyer and myself attended an ANA meeting at the Building Commission, to discuss the proposed legislative changes to security of payments to bring Victorian adjudication into line with legislative developments in other States. As a result of this meeting the Commission has appointed a Reference Group to advise it during the passage of the changes. IAMA as one of the two ADR provider's has a group representative, and David and I will oversee this involvement.

The next editions of the Journal and the National Newsletter are currently in production at National Office and will be published shortly.

December has crept up on us quickly again, best wishes to Chapter Chair Angela, her Committee and all Victorian members for the Christmas season. My staff and I are looking forward with enthusiasm to the new initiatives for IAMA in 2006 and wish you all a happy new year.

Gordon Tippett IAMA CEO

ceo@iama.org.au

2005 Master Class



In accordance with IAMA Policies on Master Classes the Master Class for Victorian arbitrators was held on 6 August 2005.

For grade one and two arbitrators it was the required assessment to maintain or improve their grading.

As a grade three arbitrator this reviewer "observed", and was therefore not being assessed. This introduction to the Master Class system as an observer is recommended to all

who are not familiar with its format because the marking procedure of the participant arbitrators might be difficult for first time attendees to follow.

All grade one and two arbitrators were required to actively participate as they were being assessed on their contributions to discussions on the day.

The high standard of Master class was maintained by Dr Clyde Croft QC, David

Levin QC, Russell Cox, Christopher Key and Dr Michael Pryles AM as facilitators of the discussion. It was also of great assistance to have president Tim Sullivan present as an assessor along with Robert Thyer. Most participants had received their papers in advance, and had prepared for the discussion; those who had not were somewhat disadvantaged.

The assessment of participants was based on their general participation, clarity of expression, understanding of issues, understanding of role and contribution to argument.

With the exception of the few participants that had not received their materials, and a revised seating plan to allow us "observers" to take our rightful position in the back stalls, the day went well and the time table was maintained.

As a result, not all scheduled sub-areas of discussion topic could be considered thoroughly by the group. This may have been due to the keenness of the participants to make points or raise issues on the topics discussed. This keenness was no doubt principally attributable to the fact that they were being marked on their contributions. Given the number attending, it may be that the group could be usefully split into two smaller groups for the next class. This would allow more contributions from participants, and more even level of opportunities to make contributions from within the group.

The morning program kicked off with the fundamental topic, ***What is Arbitration?*** This sparked lively debate, which remained throughout virtually every session and subject. The first debate focused on the requirements of an arbitration and the difference between an arbitration and an expert determination and consideration of the role of an arbitrator. President Tim Sullivan made the very practical point that if an arbitrator wants to raise an issue then they should not interrupt the flow from counsel, the matter should be raised at a later stage. The discussion also covered misconduct, and the ambit of an arbitration agreement.

The second session considered pleadings and amendment, areas of law and global claims. The power of the arbitrator to amend proceedings and take expedient measures was considered. A very effective form of arbitration can occur when the parties agree to the dispute being reduced to a series of questions to which the arbitrator has to give the answers.

The future and its impact upon arbitrators as viewed by president Tim Sullivan were also considered. This was necessary, as the Institute's senior arbitrators need to be aware of new developments such as the proposed

short form arbitration rules, proposed changes to VCAT's jurisdiction and the important fundamental differences between arbitration and adjudication.

Expert evidence was the first post lunch topic. The consensus, following this discussion, was against the arbitrator convening an expert's conclave without the parties' legal representatives being present. A practical alternative is for the arbitrator to appoint someone else to be the convener of the experts in this situation. Such a procedure can substantially reduce hearing time if the appointed convener is able to successfully encourage the experts to question each other and try to reach agreement on various issues, or agreement on where their opinions diverge. Of course, the arbitrator needs to be convinced of the real prospect of advancing a case in order for the arbitrator to consider that the costs and time of an expert conclave are justified.

International commercial arbitration and the criticisms of Australia as an international seat for arbitration were a starting point for the fifth session. *Anaconda v Fluor Daniel* (IAMA Journal 24 Number 1 April 2005 refers) was procedurally dissected. Perhaps all arbitrators can use this as a successful advertisement of the flexible approach to arbitrations, which should make it more widely attractive as an alternative method of dispute resolution. In this particular case, the dispute was broken down into agreed modules and issues, and dealt with on an issue-by-issue basis.

Provided it is approached correctly, arbitrators can (indeed should) consider such measures as expedited rules, exploration of time saving techniques including time limitation/management, and a running order for the issues to be heard. It is also important to establish whether the arbitration is domestic or international.

Following the current, IAMA policy on Master Classes, there were no set talks or presentations given, but a facilitated discussion of the above noted and other issues.

The policy appeared to be satisfactory, but the flipside of such a policy is that discussions are inconclusive with a lack of finality on many issues. This may be explained by the plurality of views of arbitrators present and the need for arbitrators to contribute in order to be

heard and assessed. Some participants were adept at steering the discussion in a chosen direction, whilst others stoically pursued their rationale or position. As previously mentioned, the group was rather large for this type of format, but most participants appeared at ease within the format and what was expected of them.

An observer's conclusions:

- Nothing was expected of the grade three arbitrators, and we did not disappoint. Attendance on the day was worthwhile and it is recommended as valuable CPD for grade three arbitrators.

WIPO Report



Our Chapter committee Deputy Chairman, Hon Neil Brown QC, has recently returned from three conferences held by the World Intellectual Property Organisation (WIPO) in Geneva. Here he reports on one of them:

The Second event, on 18th and 19th October, was a two-day workshop on Arbitration, particularly considering International Arbitration. But most of what was taught and discussed was just as appropriate to domestic arbitration.

The workshop was designed to bring participants up-to-date on the latest trends and developments and to discuss the major problems to be overcome. It took the form of lectures by four prominent international arbitrators, followed by extensive questions and exercises, where participants had to act as if they were one of the advocates or parties or, in some cases the arbitrator and talk about how they would handle the problems thrown up by the lecturers.

THE ISSUES

The workshop reached a series of conclusions over two days about what the arbitration community sees as the really big issues facing arbitration today. I have listed them as follows:

1. Should arbitration be *ad hoc* or institutional; i.e. should the parties just get together and appoint an arbitrator and agree on the rules to be applied or should the arbitration be run by an institution, using its own rules, and, if so which institution? Opinions will differ on this question, but most people believe that there are now such good institutions with tried and tested rules, that there is a lot to be said in favour of institutional arbitration.
2. How should the parties go about choosing and appointing their arbitrators? More specifically, a real controversy is brewing about the increasing practice, particularly with parties and lawyers from the USA, of interviewing

The standard aimed for was that of grade one arbitrator - it was reassuring to note that we all appear to be 'on the same tram'.

- Perhaps the only difference between the various grades of arbitrators is that the more experienced have the better seats; those who have more recently boarded are still standing.

Graham Morrow

GMorrow@coultorroache.com.au

potential arbitrators before they are appointed. The idea is supposed to be that this is a check on what the potential arbitrators know about a particular area of expertise that is needed in the arbitration. But the concern is that the parties and their lawyers really use this to get an indication of how an arbitrator, if appointed, would decide a particular type of case and whether they have a tentative feeling for or against a particular party to a dispute. It has even been said that the appointment of arbitrators in some case has turned into a 'beauty contest' where the parties try to get arbitrators more favourably disposed to their case. The feeling at the conference was that this practice is certainly happening, and that rules should be drawn up to ensure that arbitrators retain their independence and neutrality, which some say is under threat.

3. The importance of directions hearings and orders.

Good arbitrations are those where the parties and their representatives know what they must do by way of preparation in plenty of time before the hearing starts.

4. Discovery: here there was what was called 'a clash of cultures', with those in the American tradition wanting virtually unlimited discovery and those in the civil law tradition trying to limit discovery to the minimum number of relevant documents. It was agreed that there should be a 'more or less limited disclosure', so that cost, time and paper can be kept under some sort of control.

5. The ever-present problems of time and cost are now threatening the popularity of arbitration, which has always prided itself on being quicker and

cheaper than court proceedings. But is it still quicker and cheaper? Some doubt it.

6. Confidentiality and the Australian High Court case of *Esso Resources Ltd v. Plowman*, holding that there is no duty of confidentiality on the documents and information obtained during the course of the arbitration were discussed. This was thought to be a blow to arbitration, but it was pointed out that the parties could always agree that confidentiality will apply in *their* arbitration.

7. Enforcement in overseas countries of arbitral awards is still seen as one of the great attractions of arbitration. There is still no International treaty on the enforcement of foreign court judgments and unlikely to be one, so arbitration is still attractive.

8. Once the arbitrator is offered an appointment, what should be disclosed? For instance about the arbitrators' connections or commitments that might show a bias. Fortunately, the International Bar Association has published Rules on this issue, which at least give a guide to everyone on what conflicts must disqualify an arbitrator and those that might, but need not necessarily, do so.

THE CONSENSUS

After considering all the pros and cons, the consensus in the business and legal communities is that arbitrations can still be faster and more economical than court proceedings and that it is better than court proceedings in appropriate cases, but not in all cases.

PROPOSED REFORMS AND GOOD ARBITRATION PRACTICE

The future of arbitration will depend on implementing reform where necessary and enforcing good arbitration practice.

The following are reforms that were generally thought to be desirable to achieve this objective:

1. Use a chess clock in arbitrations, so that each party is given the same time to use as they wish to present their case, and as the clock ticks down both sides either finish or run out of time. This keeps the overall time of the arbitration under control.

2. Have a conclave or meeting of expert witnesses from the opposing sides in the case, where they get together in advance to see what they can agree on and then give their evidence from the same witness stand at the same time and be examined by the tribunal and/or the parties in turn.

3. Steps are needed so that the result of the arbitration is final, to prevent parties having a second go and/or endless appeals. Arbitration therefore needs backing from the local judiciary which should support arbitration and where, apart from serious departures from the law, the judiciary will agree that the award is final.

4. Ethics and conflict of interest. These issues must remain under constant scrutiny. Arbitration will be supported if people know it is 'all above board' and conducted according to sound ethical principles and where the arbitrators have no conflict of interest in the matter.

5. There must be monitoring of whether the arbitration has been conducted in accordance with the rules of natural justice. Two experienced international arbitrators at the workshop suggested a novel reform. At the end of the last day of hearings, they ask the parties or their lawyers if they are satisfied that they have had a fair go and if the arbitration has been conducted in accordance with the rules of natural justice. They get some interesting replies, but at least this process forces the parties and their lawyers to face up to the question before the close of the hearings.

A PERSONAL NOTE

As an Australian, there was one thing that impressed itself on me during the consideration and discussion of these reforms. It was this: as Australians, we must do all we can, to promote the use of Australian facilities and Australian arbitrators. Although we have institutions like IAMA and ACICA who are well established and respected we appear to be reluctant to do this. Both organisations have good rules and access to good arbitrators. We should also promote the real attractions of Australia as a location and the savings to be made by conducting an arbitration here instead of in London or New York. There is also our weather and everything else that makes Australia an attractive destination. Until we promote Australia as an arbitration venue, arbitrations that could and should be conducted in Australia by Australian arbitrators will continue to be conducted overseas by overseas arbitrators.

Hon Neil Brown QC

nabrownqc@yahoo.co

Congratulations to:

New Associate Members:

Folker Schaumann
Sabine Phillips
Glen Pauline
Gillian Canapini
John Bolton
Matthew Harvey
David Kinnear
Mark Maier
Barry O'Meara
Ross McCarroll
Hendrik Merbis

New Corporate Members:

Bilfinger Berger Concessions pty Limited -
Charles O'Neil

New Mediators:

Stephen White
Jonathan Forbes
Mara Ray
Ross McCarroll
Henry Jolson QC
Colin Macleod

New Arbitrators

Grade

Robert Heath	3
Matthew Harvey	3
Henry Jolson QC	1

Regraded Arbitrators

Albert Monichino	2
Hugh Foxcroft SC	1

Message from the Editor



I wish to thank the members of the Chapter committee, Staff of both Chapter and National Office and all of those members who have contributed to the newsletter during the year.

To those who have not yet contributed I extend an invitation to do so next year.

All submissions will be considered on their merits. Personal notes and experiences are particularly welcome.

It is intended that in future the newsletter will be sent to all members direct by email in addition to being posted on the IAMA website.

Members are encouraged to visit the website where in addition to a wealth of other useful information the newsletters of other IAMA chapters make interesting reading

Some Members may not be aware that this is the fourth newsletter for this year the others may be downloaded from the IAMA website

The Chapter is facing many challenges in the coming year, many of which are referred to in the preceding articles.

The Chapter Committee invites members suggestions and offers opportunities for active participation in sub-committees as well as in Chapter activities.

Finally I wish you all a happy and fruitful holiday season and look forward to your contributions in 2006.

Robert Knott

The Institute of Arbitrators and Mediators Australia, Victorian Chapter, Suite 5, 1/190 Queen Street Melbourne

Postal Address: GPO Box 4134 Melbourne 3001. Phone: 9602 1711 Fax: 9607 6969 Website: www.iama.org.au

Chairperson: Angela OBrien

Chapter Administrator

Newsletter Editor: Robert Knott

Email: aob@unimelb.edu.au

Email: vic.chapter@iama.org.au

Email: robertknott@smartchat.net.au

Disclaimer: the Institute does not necessarily endorse Views expressed by contributors to this newsletter. The Institute, the editor, or the printers accept no responsibility for the accuracy of information contained within the newsletter.