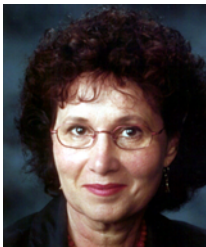


## Message from the Chair



**Welcome** to our first Victorian Chapter Newsletter for 2006, which promises to be a wonderful year for the Chapter. Your Chapter Committee is working hard to ensure that we can provide a better service to you and we are already making headway in terms of balancing the budget after a difficult 2005.

### Administration

I would like to thank the staff in the National Office for their assuming administrative responsibilities for the Victorian Chapter since the departure of our full-time Administrator. Jessica Martina has been looking after nominations and Airlie Slessor has been handling all member related concerns. From the committee point of view things have gone very smoothly and I hope that members have had a similar experience. Sadly, Airlie will be leaving IAMA in mid-March for an extended working holiday. We wish her well in the future. Jessica is also experiencing changed circumstances as she is soon to be married, but she will be returning to the Institute after her honeymoon. The CEO, Gordon Tippett, is currently looking for replacement personnel for the National Office. The Victorian Chapter Committee intends to fill a part time position within the next two months, and we will do so mindful of our co-location with the National Office. I would also like to thank our Honorary Secretary, Joyce Marshall, who has undertaken to act as minute secretary until we have made an appointment.

### CPD Calendar 2006

CPD Coordinator, John Rundell, has finalised the CPD program for 2006 and members are now able to access it on the IAMA website. We have already had three very successful events: the first event, a presentation on *Party Designated Arbitrators and Conflicts of Interest* by visiting American Law Professor from Penn State University, Prof Donald Arnavass, was held in conjunction with Latrobe University; the second was a presentation on *The*

*Mediation Agreement* by former Councillor Steve Gunn. On Tuesday March 7<sup>th</sup>, we were treated to an informative and entertaining address by Professor Mark Cato, a distinguished academic and international arbitrator, and the author of many books on arbitration. Professor Cato's address was provocatively entitled *Medication – the Ultimate Form of Dispute Resolution*. I am delighted to report that all events have been very well attended. We hope to maintain these numbers for future events; I encourage all members to consult the calendar and put the events into your diaries.

A key feature of the excellent program that John has drawn up is collaboration with other organisations and ADR groups. This approach will certainly broaden the pool of people invited to our events and will offer IAMA members the opportunity to extend their contacts.

Members will be aware that we were investigating a new venue for CPD events and training courses for 2006. I am pleased to advise you that we have now negotiated an arrangement with St Michael's Centre in 120 Collins Street. We have already held one successful event there and I am sure that members who attended will agree that it is a superior facility. John has negotiated excellent rates and scheduling for the full year.

We have scheduled a CPD event for Geelong this year, with the support of Geelong member Graham Morrow. I encourage all country and city members to put this date in your diary and ensure it is a success. The presentation will be by, IAMA member, Charles O'Neill, Operations Director of Bilfinger Berger.

I am grateful to John for his tireless work in preparing the CPD calendar. Members can contact John on:

[john.rundell@stratica.com.au](mailto:john.rundell@stratica.com.au)

## Message from the Chair continued

### News

Committee members Michael Sweeney and Andrew Kincaid are working with John Rundell on organising Arbitration events this year. In addition to the detailed events we are also planning to reschedule the Expert Witness workshop. As indicated in earlier newsletters, senior Arbitrator Toni de Fina is offering a Pupilage program this year. I have written to all aspiring and Grade 3 arbitrators, outlining the details of the program. Please contact Michael Sweeney if you have any questions.

### Mediation News

There is a lot happening on the Mediation front this year. The CEO has noted the consultation processes being conducted by Professor Laurence Boule, and the involvement of an expanded IAMA National Mediation Committee. The Victorian Chapter are in the process of reviving the Mediation Discussion Group, which will consult with Penny Webster and Danielle Huntersmith who will be the Victorian Chapter's representatives on the expanded National Mediation Group. I would like to thank Miriam Landau who has offered to undertake the organisation for this group, and Todd Trevaks who has agreed to resume his role as Chairperson of the group. All mediators will be advised when we have scheduled meeting dates.

The first of three Mediation Courses for 2006 is scheduled for 29-31 March and 4-5 April, and will be conducted by Danielle Huntersmith and Jim Cyngler. Members interested in offering their services as coaches are encouraged to contact the National Office, including a resume of Mediation experience. Coaches must be available for the two final days of the course.

## Security of Payment Act update



At last the Victorian government has begun the formal process of amending the Security of Payment Act!

The Minister introduced an amending bill into parliament in early February, and debate was due to be resumed (i.e. started) on 23 February.

The bill introduces many new features, including some that run counter to earlier IAMA submissions. In response, IAMA national president Tim Sullivan, came to Melbourne especially to congratulate the Building Commission on the 'good' parts of the bill, and point out some implications of certain other parts.

Only time will tell how the government responds to the insights that Tim Sullivan (who is extremely experienced in adjudication) has provided to the Building

2006 training courses will be based on the recently published 'Mediation Training Handbook' updated by Alysoun Boyle and launched in Sydney by Tony Fitzgerald. The Sydney launch was such a success that we are planning a similar public event in Victoria, managed by Gianna Totaro. We hope this event will strengthen our relationship with Government and improve our public profile.

The biennial National Mediation Conference will be held in Hobart on 2-5 May and I encourage all Mediator members to attend.

### Adjudication News

Gordon Tippett and Lawrence Reddaway have reported on the latest round of discussions with the Building Commission and developments with the Security of Payments Act elsewhere in this newsletter. I am pleased to add that the Victorian Chapter had its ANA status renewed early this year and would like to acknowledge the work of Steve Gunn in preparing the necessary documentation.

### Other News

In addition to the National Council election this year, there will also be a Victorian Chapter Committee election. I encourage all members to consider nominating for positions on our governing bodies. I also urge Victorian Chapter members to support Victorian nominations for National Council. The Victorian AGM is scheduled for Tuesday 13<sup>th</sup> June.

Angela O'Brien Chapter Chairperson

[aob@unimelb.edu.au](mailto:aob@unimelb.edu.au)

Commission. It seems that the final bill is not likely to be passed until later this year, and may not come into effect until early in 2007.

The Chapter's Security of Payment Group committee is already working on holding an upgraded course, in accordance with IAMA National guidelines, to re-accredit current adjudicators and accredit new ones. This will be held as soon as possible, but cannot be held until we are clear as to whether, for example, the government is intending to set criteria for such courses. We currently believe that it cannot be held before September 2006

Lawrence Reddaway Convenor Security of Payment Group committee

[L\\_V\\_Reddaway@bigpond.com](mailto:L_V_Reddaway@bigpond.com)

## Message from the IAMA CEO



**January** is a paradox month for National Office, the country is in holiday mode, we return from Christmas and the Boxing Day test, looking forward to the Australian Open, and the break in the schedule of National Committee meetings, and are launched into the most intensive period of administrative activity of the year. The fact that the Institute operates on a financial calendar year basis, means that 31<sup>st</sup> December each year has an additional significance, which normally occurs at the end of June in other corporate entities. As we finalise our accounts for the previous year, there is also a flood of last minute payments to meet the end of the discounted payment period for membership subscriptions. Despite this Monty Pythonesque arrangement, each year we manage to get all the money banked and complete the balance day adjustments to the previous period accounts with increasing efficiency, to the degree that this year we are about to go to audit a month earlier than in 2005.

**At the end of last year** there was another dimension, in that my National group has taken up the administration of the Victorian Chapter, whilst a new structure is being developed for the future. Although there has not been a lot of Chapter activity, the level of involvement has been good for the National staff, as they are taking active roles in member activities they are not normally exposed to. The combined Chapter-National Christmas drinks party at the 190 Queens Street offices prior to Christmas was an excellent opportunity for members, who hadn't visited previously, to make up for lost time. We also found that a number of those at the function met each other for the first time, a reflection on the need for Chapter members to improve their CPD participation rate.

**From a National perspective** we see our membership size, countrywide spread and member interaction as the important benefits that IAMA membership can offer ADR professionals in comparison with the other ADR organisations. On this theme the 2006 Victorian CPD events conducted to date; the address by Prof Donald Arnavaass, Law Professor from Penn State University on **Party Designated Arbitrators and Conflicts of Interest**, and by Stephen Gunn on **The Mediation Agreement**, both attracted significantly better member numbers than the sessions held in late 2005. This last event was held in the St Michael's Church rooms in the 120 Collins Street Building on the corner of Russell and Collins Street. The move by one of the big four Chartered Accountants into new accommodation had left the Church

authorities without regular users for the facilities; and John Rundell has brokered an arrangement to use them for the 2005 CPD and Mediation Training Courses.

A similar response also attended the Consultation seminar conducted by Prof Laurence Boule of Bond University Law School, who is developing a report for the Federal Attorney-General on the accreditation standards for mediators. Professor Boule will be travelling to all States before preparing his final draft report, which will be debated at the **National Mediation Conference**, the biannual event that is to be held in Hobart from 2-5 May this year. Our **National Mediation Committee** has been expanded to allow each of the State Chapters to nominate two additional members to provide a wider range of opinions on a range of important issues being considered on mediation including development of the IAMA submission to the Boule study, the new Mediation Training Handbook and its application to the 2006 round of training courses, and a number of issues related to the rules for mediation.

**The 30<sup>th</sup> Anniversary** editions of **The IAMA News**, our newsletter and **The Arbitrator and Mediator** our journal, were released on the website during the last week of work in December. By now you will have received the printed copies and you will agree that the changes seen in 2005 where the newsletter evolved from its all blue print format, initially to black print, and then to the latest 'new look edition' with full colour photographs.

A major production problem for editor Gianna Totaro in the past has been the quality of the photos received from Chapter events around the country, not being of acceptable quality when printed as a single colour. While this anniversary edition is a special, the multiple sources of the photos published together with the fact that digital cameras now make high quality commonplace, I'm sure you will agree the colour is a big improvement. Already we are receiving flattering responses from both inside and outside our membership.

**The amending bill for the Security of Payments Act 2001** took us all by surprise on the 9<sup>th</sup> February when we were pleased to be advised by the Building Commission that, it had been given its second reading that day. While this has been long awaited, a meeting of Adjudication Nominating Authorities (ANA's) held in November and attended by David Thyer and myself on behalf of IAMA, were given the impression that this stage would be much later in the legislative program. The prospect of an election later in the year does wonders to

## Message from the IAMA CEO continued

the priority setting. The amendments are largely based on the NSW legislation with some additional finetuning to suit local conditions. As reported above, IAMA has met with the responsible officers in the Building Commission to discuss the amendments, and their application. One obvious area which will need attention is the re-training of our adjudicator members, and luckily the Institute is well placed as we now enjoy the reputation as the best equipped adjudicator training organisation in the country, due in no small measure to the way in which the Queensland Chapter approached the introduction of their legislation in October 2004. The standard training course and the electronic Adjudication Handbook is now being used universally in each of those States with SoP legislation.

Speaking of Queensland the program for the **2006 Annual Conference** to be held at the Novotel Palm Cove Resort from 26-28 May 2006, is near finalisation, and will be circulated shortly. We are expecting confirmation of a High Court Judge as keynote speaker together with International and local speakers on arbitration, mediation and adjudication, but with added topical themes including Maritime, Free Trade Agreements and Native Title. Registrations are now open with details on the website.

**The Annual General Meeting** of the Institute will be occurring conjointly with the Conference, and as this year is a National Council election year, the AGM will include the declaration of the Poll. I will be calling for nominations on 28 March, Nominations close on 21 April, Ballot papers issued on 5 May, and Voting closes at 4.00pm on 19 May 2006.

the new **Mediation Handbook** was launched by The Hon Tony Fitzgerald QC launched to an audience of legal identities, mediator members and press at the NSW Dispute Resolution Centre on St Valentines Day. The basic text for IAMA mediation training, the new Handbook is based on the manual used since 2001, it has been re-written by ACT National Councillor, Mediator and Trainer, Alysoun Boyle. Tony Fitzgerald in his address, which was reported in the Financial Review, The Australian, Australian Legal Business and Lawyers Weekly, Australia, pointed to the adoption of ADR by

the Courts as the biggest change to the Law that he had seen in his 40 year involvement. He also commented that the surge of interest and acceptance by Governments in introducing ADR concepts into legislation is producing huge savings for the courts but is placing greater responsibility for training and facilities onto organisations such as IAMA and LEADR, without any significant public funding contributions. This is an obvious issue for us to follow-up. Copies of the Handbook are available through National Office – ordering details are on the website.

**A Guide to Arbitration Practice in Australia**, is also newly of the presses. The new edition of the text produced with contributions in part by senior IAMA practitioners and edited by **Vicki Waye** of the University of Adelaide is the text for our **Professional Certificate in Arbitration Course** run jointly by the University and IAMA. Members wanting to update their library can order the new volume through the University at <http://www.adelaide.edu.au/arbitration/resources/>.

**The Triennial Review of Gradings** is the other issue of relevance to Grade 1 and 2 Arbitrators, which has been underway since late last year, has a completion deadline of 31 March 2006 for the Grade 1's and 30 June for Grade 2. There will be some follow-up in the next few weeks to chase up some stragglers, but we will be hampered by the fact that our membership officer Airlie Slessor leaves us on 14 March to embark on a two year working holiday in Ireland, and we thank her for her time at IAMA and wish her well in her travels.

**During March**, with activities of the Commonwealth Games followed by the Grand Prix, Chapter activity is also starting in earnest with the first Mediation Course at the end of the month. A number of organisations have enquired about in-house mediation training, possibly spurred by discussion about the impending Industrial Relations changes, and we will be doing our best to accommodate this new market.

Gordon Tippett IAMA CEO

[ceo@iama.org.au](mailto:ceo@iama.org.au)

## National Mediator Accreditation System - Melbourne Consultation



**Prof. Laurence Boule** led a session, on Saturday 18<sup>th</sup> February 2006, which focussed on advancing the establishment of a National Mediator Accreditation system. The participating group of more than 40 people represented many different sectors currently involved in providing mediation services to the public.

The group was asked if the system should be voluntary or mandatory? And if mandatory how would it be monitored? What qualifications would instructors need? How would CPD be recognised? and from which organisations? We learnt that German mediators undertake 200 hours of theoretical training and participate in four cases; is this the model we need? Should the mediator standards match the ANTA competencies? or is there something more that is needed? Is accreditation driven by the need to protect the consumer? Does mediation have to be a recognised profession before it has accreditation? Or is accreditation an essential step to becoming a profession?

There has been ongoing debate in Australia around issues of accreditation, training and standards for Mediators. Two years ago, at the National Mediation Conference in Darwin, these issues were again discussed. In 2004 NADRAC published a report 'who says you're a mediator? Towards a National System for Accrediting Mediators' the Attorney-General Department has since made funds available to the National Mediation Conference Pty Ltd to undertake a consultation process and develop a proposal. A sub-committee was formed, of which Gordon Tippett is a member, and Prof. Boule has agreed to facilitate the consultation process.

Prof. Boule has compiled a draft Proposal, based on a comprehensive literature review, liaison with the advisory committee and his own extensive knowledge of the practise, the practitioners and the industry in Australia and overseas. This draft is available at [www.mediateconference.com.au](http://www.mediateconference.com.au)

and includes options for semi-structured feedback. I would highly recommend that members take the time to read the draft and the opportunity to make some input.

There are a number of overarching considerations that will particularly impact IAMA as a national organisation, in both the medium and long-term. These are questions about the type of national body that will carry out the functions of approving the Recognised Mediator Accreditation Bodies, managing professional standards complaints and disciplinary actions, maintaining a Register of Accredited Mediators and a review, evaluation and adaptation function.

Prof. Boule puts forward eight models as options for consideration. One option that has gained some favour already is the federal or conferral body of participating institutions, of which IAMA would be one. This is a devolved model, which supports representation from presently established organisations and will require ongoing collaborative efforts. There are a number of issues yet to be addressed including fees and membership rates, and the expected issues about standards, qualifications, training, CPD, and RPL.

The draft is quite comprehensive and the consultation process has so far been deep and thorough. It is anticipated that the National Mediation Conference, (Hobart, 3<sup>rd</sup> – 5<sup>th</sup> May 2006) will provide a further opportunity for practitioners to make progress towards the establishment of a national accreditation system.

Penny Webster PhD Candidate  
Department of Management  
Faculty of Economics & Commerce  
The University of Melbourne

[pwe@pgrad.unimelb.edu.au](mailto:pwe@pgrad.unimelb.edu.au)

[www.management.unimelb.edu.au](http://www.management.unimelb.edu.au)

## Message from the Editor



Regular readers will note an innovation in this issue in the form of a brief biographical note on one of the contributors. Charles O'Neil has an unusual and, in my opinion, interesting background, which I thought may interest others. Although, after seeing their photos in the newsletter, we know our office bearers, committee members and other contributors by sight; that may be as far as it goes for most members. If there is a good response to this innovation, I propose to invite all past and present contributors to provide a similarly brief biographical note for

publication in future issues. Thereafter I propose to publish such notes with a member's first contribution, and updates as circumstances may change over time.

Suggestions, contributions, comments and criticisms are invited. Please make use of your Chapter newsletter as a means of communication between members.

Members' articles reporting on PD and other events are particularly welcome as a means of sharing the experience and information with those who were unable to attend.

[robertknott@smartchat.net.au](mailto:robertknott@smartchat.net.au)

## Party Designated Arbitrators & Conflicts of Interest ----- New Ethical Codes & Guidelines



Charles O'Neil  
FCI Arb, Dip Arb.

Chartered Arbitrator and Accredited Mediator (UK) After starting his working career as a Stockman, became a Welder, Then a Bush Pilot, obtained a NSW Builder's Licence and became a flying Project Manager in inland NSW and Queensland: after that spent 30 years working in construction, property development finance and property management.

For the last 5 years has been Operations Director of Biflinger Berger PPP projects, firstly based in UK and for the last 12 Months National Director in Australia.

Biflinger operate in 30 Countries with 55,000 employees, and is the parent company of Baulderstone Hornibrook and Abigroup.

Being involved in the delivery and operations of PPP projects has provided him with a wealth of International and local experience, both from the contractor's perspective and that of an investor, in negotiating dispute resolutions to prevent them having to be formally resolved.

PPP investments in Australia include: hospitals, prisons, schools, motorways, tunnels, bridges, embassies etc.

## A Lecture by Professor Donald Arnavas at La Trobe University City Campus 31 January 2006

Professor Arnavas was welcomed by Professor Gordon Walker, Head of La Trobe University Law School, who referred to his distinguished career as a U.S. Judge, arbitrator, law professor and author, and said that his visit to Australia presented a great opportunity to learn about arbitration practice in the U.S. He opened his address with a quote from Judge Richard Posner in *Merit Ins. v. Leatherby Ins.*—'No one would dream of having a judicial panel composed of one part-time judge and two representatives of the parties – but that is the standard arbitration panel'.

**Tripartite arbitrations** conducted in the United States have traditionally used partisan, non-neutral party-appointed arbitrators, a system described as, *'somewhat of an embarrassment'*, and as one that has little credibility in a world of globalised transactions. In a recent example, a US Appellant Court upheld an award, even though a Party Designated Arbitrator had previously performed substantial services for his appointing party (in an unrelated matter), because the parties had retained the right to select partial arbitrators and, said the court, 'they are free to choose for themselves to what lengths they will go in their quest for impartiality' In another, a Party Designated Arbitrator was present at his nominating parties' witness preparation and strategy sessions, participated in a mock arbitration and communicated with his nominating party during deliberations. The Appellant Court found 'nothing insidious' with respect to the arbitrator's behaviour, absent some showing that he misled the Neutral Arbitrator or otherwise improperly prejudiced the outcome of the proceedings. This rather liberal approach has been criticised by some observers and is at least partially responsible for the advent of the AAA Code and IBA guidelines discussed later.

Tri-partite panels are used in 20% of U.S. arbitrations, principally in high value or complex matters and they can be quite beneficial to the proper disposition of the controversy As an example Prof Arnavas described a domestic dispute involving architectural services on a D & C project. He acted as the neutral arbitrator and there were two non-lawyer party designated arbitrators, each with architectural experience. They provided an equitable and timely award due in large measure to the expertise of the Party Designated

Arbitrators. It is a good example of a tri-partite arbitration working as it should. The rights of appeal in arbitrations are very narrow, so that party designated arbitrations can exercise some measure of control over "loose cannons".

**Looking at the positive side** of this, the primary responsibility of a party designated arbitrator is to make certain that the position of each party is well presented and understood, this permits them to bring to the arbitral tribunal a perspective that may not be available to a single arbitrator or a Court.

**On the negative side**, tri-partite arbitrations can sometimes be cumbersome and difficult to schedule due to the number of parties, comprising the 3 arbitrators, 2 sets of lawyers and the witnesses, also tri-partite arbitrations are more costly with added fees and expenses for the extra participants.

**Professor Arnavas** served for 8 years as a Judge on the Armed Services Board of Contract Appeals (ASBCA), which is the Federal forum for adjudicating contract disputes involving the US Government. Its protocol for rendering awards is collegial, that is the draft judgment is prepared by the presiding Judge and then reviewed by two other Judges who offer constructive comments on the judgment and make certain that the contentions and concerns of each party were properly considered and addressed. There are real advantages to this type of collegial approach and it is a good method for reviewing reasoned Arbitration awards.

**In respect of neutrality and disclosure of conflicts of interest**, Professor Arnavas referred to two important documents providing guidelines to commercial arbitrations in the U.S and internationally.

**The 2004 Code** – In 2004, the American Arbitration Association and American Bar Association finalised a revised Ethical Code for arbitrators in commercial disputes. In this pivotal policy change, the 2004 Code reversed the long-standing presumption of non-neutrality that has previously applied to party-designated arbitrators. Hereafter, states the Code, *'all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.'*

**IBA Guidelines** – The International Bar Association *'Guidelines on Conflicts of Interest in International Arbitration 2004'* has been introduced in an effort to attain a consistent approach to the issues of arbitrator neutrality and disclosure of conflicts of interest. These guidelines provide colour coded standards for disclosure of conflict of interest, and these describe more than 50 situations to which they can be applied.

## Party Designated Arbitrators & Conflicts of Interest ---- New Ethical Codes & Guidelines Continued

### Typical examples are:

The Red Code which includes 4 non-waivable situations in respect of financial interest in one of the parties or the outcome of the case, and 14 situations that may be waivable within 30 days of such disclosure; e.g. when the arbitrator has had previous involvement in the matter as a lawyer for one of the parties.

The Orange Code, which contains a number of situations that may be deemed, waived in the absence of timely objection by one of the parties.

The Green Code which covers situations when no disclosure need be made if, when viewed by a 3<sup>rd</sup> party, no perceived conflict exists, e.g. when a law-firm has previously acted for a party in a non-related matter.

The IBA drafters caution that the examples cited are not intended to be comprehensive and that robust commonsense should be applied to their interpretation. Other international ADR providers (e.g. The ICC) have raised concerns about the new IBA Guidelines but, in professor Arnvas' opinion, they are still a good step forward in the right direction.

**An important neutrality case in the U.S.** is *Commonwealth Coatings vs. Continental Casualty Co.* – 393 U.S. Supreme Court 145 (1968) in which the Neutral Arbitrator in a tri-partite panel failed to disclose that he had performed consultative services for one of the parties over a 12 year period, albeit not to a great extent. The U.S. Supreme Court ruled that the Award had to be vacated due to his non-disclosure, and that the arbitrator had had an obligation to advise any conflict that might affect the decision.

The session concluded with some questions from the audience and some comments in respect of how the cases quoted would breach the local Commercial Arbitration Act. The address was well attended and enthusiastically received by acclamation on conclusion by a large audience, representing a broad cross-section of the legal and dispute resolution professions.

**Donald Arnvas** has been adjunct Professor of Law at Penn State/Dickson School of Law since 1983 and he also served on the adjunct faculties of the George Washington University and the University of Virginia. As well, he lectures at the US Army JAG School and has visited several law faculties in England and Australia.

He has served as a Judge on the Armed Serviced Board of Contract Appeals in Washington DC. In his private law practice he serves as a mediator and arbitrator primarily in disputes relating to government and commercial contracts and is also a panel member of ACI, a London-based ADR provider.

He has written two widely used texts, 'Government Contract Guidebook' and 'Resolving Government Contract Disputes Through ADR' (2004) and authored over 30 articles on litigation, ADR and procedural topics. He has also served for 20 years as the Senior Editor of the American Bar Association's Public Contract Law Journal. He can be contacted at:

[dpa612@bellatlantic.net](mailto:dpa612@bellatlantic.net)

Charles O'Neil, Operations Director  
Bilfinger Berger - PPP projects (Australia)

[Charles.O'Neil@bilfingerbot.com.au](mailto:Charles.O'Neil@bilfingerbot.com.au)

## MEDICATION - the Ultimate form of Dispute Resolution

### A Presentation by Professor Mark Cato, 7th March 2006



In a joint presentation hosted by IAMA and the Chartered Institute of Arbitrators (UK), Professor Cato trawled his considerable experience of all types of dispute resolution (domestic, national and international) to present a highly informative and thought provoking message, relevant to all concerned with Dispute Resolution. His fundamental message was, make and tailor Dispute Resolution to succeed in resolving any particular dispute, rather than make the dispute fit a rigid Dispute Resolution procedure.

This was the first offering of this presentation, entitled **Medication - the Ultimate Form of Dispute Resolution**, which will be presented to various audiences internationally. The title is derived by combining mediation, adjudication and arbitration, in order to distil a unique and suitable tonic administered to achieve successful Dispute Resolution. Senior members commented later that their only disappointment with the presentation was the fact that there was a lack of lawyers from the larger national law firms present; they would be the key players in advising their clients to adopt the approach proposed. Not all of us mourned their absence.

## MEDICATION - the Ultimate form of Dispute Resolution continued

Professor Cato recalled a previous presentation to Australian Arbitrators, where he concluded that there should be more emphasis on practical resolution of disputes without lawyers and that arbitrators under the *Commercial Arbitration Act* are well placed with sufficient tools to be flexible in their approach to Dispute Resolution. The recurring underlying theme was that in Dispute Resolution, can we be flexible, or should we stick to the processes adopted and follow stoically?

He further suggested that each form of Dispute Resolution should blend into each other; the Dispute Resolution should be tailored to the dispute, and never the other way around, even if the outcome is not binding. This was not necessarily considered to be a problem if it provided a cost effective resolution.

The smorgasbord of possibilities in resolving a dispute were identified, including conciliation, private Judging, Dispute Review Board, Dispute Adjudication Board, adjudication, arbitration (various forms) and litigation. Options that the presenter considered exciting included the neutral fact finder, who acted as a mediator and was invited to assist the parties to reach agreement, the early neutral evaluation, and the Dispute Resolution Advisor. The latter is named in the contract and can investigate or attempt to resolve the dispute or decide on the most appropriate procedure. These methods have in common the early identification and consideration of the dispute and the dispute process. They avoid being locked into an ineffective mediation, a long arbitration or litigation. Mediation was considered to be no more than a sophisticated form of negotiation, the presenter's view is that it relies on people being sufficiently dissatisfied in order to get a compromised result.

Other possible Dispute Resolution procedures included mediation then arbitration, shadow mediation and co-mediation arbitration, which all have their places. The duplication of resources, with separate mediator and separate arbitrator, although more expensive, can be appropriate and result in good outcomes in terms of dispute resolution. It was considered that these processes have not yet been field tested in Australian disputes. Likewise mediation with recommendations, using a proactive mediator, who will propose settlement terms and practice real head banging, is an example of a process which to be effective needs to adapt and change with the hearing of the dispute.

Emphasis was placed on Sections 33 and 34 of the *Arbitration Act* (UK), allowing UK arbitrators to: -

*"adopt procedures suitable to the circumstances of the particular case" and "decide all procedural and evidential matters provided the parties have not agreed otherwise ... and give each party a reasonable opportunity of putting his case and dealing with that of his opponent".*

The trick emphasised was that the parties should be convinced to let the arbitrator decide the procedural and evidential matters. This allows the power to be left with the arbitrator. Unfortunately in these situations frequently the parties cannot agree on anything substantial, so they may not agree to this arbitrator's proposal.

*Commercial Arbitration Act* Section 27 was considered favourably by the presenter. Indeed the presenter considered that this section should result in further workload for Australian Arbitrators, rather than a diminishing one.

Parties to a dispute should be limited to having a reasonable opportunity rather than a full opportunity to present and defend their cases. This would allow the arbitrator to control costs, and ensure that they stayed proportionate to the value the amount in dispute.

A rule of thumb which advisors to clients and dispute resolvers should bear in mind, and would do well to adopt, is that in any dispute no more than 25% of the value of the dispute should be used in the dispute resolution process. The presenter's view was that any more money above this ceiling is immoral and crazy. An example was given involving the failure of squash court glass and consequential loss of profit incurred by the squash court centre temporarily closing. The tenacious control of the arbitrator allowed this 25% rule of thumb to be invoked. We all need to be aware of devising systems which limit and control the costs of presenting evidence. The approach taken was that at the preliminary meeting the parties were encouraged by the arbitrator to consider themselves as members of a team, rather than a traditional arbitration. The questions were then asked; what is the best way of resolving this dispute, how can this be achieved, and how can this be achieved for 25% of its cost? In this case the result was achieved by constricting the experts to one day of evidence each, despite their voluminous reports technical analysis and international standing. The presenter was aware that the criticism of this compression might be that it allowed an element of "rough justice" as the full case may not have been heard, but the principals were satisfied with the outcome, so in effect the end justified the means.

## MEDICATION - the Ultimate form of Dispute Resolution continued

Experts are to be encouraged to narrow down issues in dispute, with the presenter suggesting:

An Expert may address questions to another expert, who shall reply if such questions are asked.

The arbitrator can take an adverse view of the responding expert, if they do not answer the question.

The arbitrator may ask questions of either expert before the hearing, and likewise the expert of whom the question has been asked.

The arbitrator again can take an adverse view of that expert, if they do not answer the question.

According to the presenter, the greatest costs in hearings are the experts, so any encouragement given to reducing the issues in dispute between experts is most useful. Experts should be encouraged to question each other with a view to finding the answer, and it should be remembered that the expert in this role is not an advocate of a party. Dialogue amongst experts was considered to be a very powerful and effective tool in controlling hearing costs.

Professor Cato's view of arbitration in the UK is that although an arbitration may be fair and just it is not justice administered by an arbitrator, it is merely an arbitrator deciding the obligations of the parties to the dispute. The practice of adjudication in the UK was not well received by the presenter. His view is that it was too quick, even allowing for the 28 day period in the UK under their Act. Adjudication in the UK is now a compressed arbitration, and the presenter, when presented with voluminous files has had the strength to send these back to adjudication parties and ask for a 5 page submission only.

Another dispute that the presenter was involved with whereby building work was carried out under a contract that had only been put in place to satisfy the third party bank to gain finance approval re-confirmed the presenter's approach. The builder had signed the contract in the knowledge that the drawings had changed from what had been included in the contract price, but, because of the relationship with the principal, proceeded with the works. A strict legal interpretation of the contract would have (in these circumstances) given the builder no legal right to recovery. The fair and reasonable test was used, which produced a different result to the dispute.

A further building dispute experienced by the presenter included 750 items in dispute. By proactively pursuing what the parties actually required, which was in the nature of a final account for the project, the parties agreed to resolve approximately 90% of

these items. This left only 10% to be considered by the dispute resolver. Resolution of these values was achieved quickly, and it was agreed that liability on other issues was not part of the arbitrator's appointment. The mixture of the dispute resolution processes, and the role played by the dispute resolver, appears to be critical to the speedy and economic resolution of the disputes described.

Senior Executive Appraisal Mediation ("SEAM") was considered in detail where the mediator and the CEO's of the disputants hear submissions from senior employees of each party. This reduces the role of the lawyer to an organisational one, in effect the captain of his or her team. The CEO's are encouraged by the mediator to draft the agreement between themselves, and this assists in making the process work. This process depends on the CEO lawyers understanding their position, and a mutual respect of the key parties. The agreement between the CEO's of how the dispute will be handled will allow flexibility, and tasks to be designated, for example selected issues to be arbitrated.

SEAM ties up extensive resources for a short time and is not cheap, but can be successful as it is not overtly technical. In addition nothing is binding or final until packaged and signed. This process started in Hong Kong and had been picked up by Sir Laurence Street in Sydney, but has not been widely used in the UK or Australia. It appears to be appropriate where there are many issues involving a large amount of money - the presenter considered that it has a great deal of merit.

The venue for the Professor Cato's 'dose of medicine' was St Michael's Centre at 120 Collins Street; it seemed to work well. It allowed for more than the 30 attendees, which a presentation of this quality merited; then again not many people like going to their doctor.

Graham Morrow –  
Lawyer, Quantity Surveyor & Arbitrator

[GMorrow@coulterroache.com.au](mailto:GMorrow@coulterroache.com.au)

**Note:** The paper will be published in full in the national newsletter (IAMA News), to provide a national audience for this important message; dispute resolvers must consider disputes flexibly and ensure that the dispute resolution process is adjusted and tailored to fit the dispute, and that the converse is not allowed to happen.

**Case note**  
**Blueview**  
**V Vain Lodge**  
(no photo you have  
seen him before)

**Blueview Constructions Pty Ltd (t/as WRS Constructions) -v- Vain Lodge Holdings Pty Ltd [2005] VCC (15 November 2005)**

In this matter His Honour Judge Shelton considered an application to set aside an earlier Summary Judgement decision involving the same parties. The original application for Summary Judgement was made pursuant to Section 16(2)(a) of the *Building and Construction Industry Security of Payment Act (Vic) 2002* ("the Act"). No payment schedule had been served by the Defendant on the Plaintiff under Section 15 of the Act

The earlier decision was made under Supreme Court Rule 22.02, and the application to set aside was made under Rule 22.15.

Rule 22.05 states that the Plaintiff may apply to the Court for judgement against the Defendant where there are no grounds for defence. This makes an application for Summary Judgement the next port of call for parties to adjudication, where:-

- a) no payment schedule is issued, under Section 16(2) (a) & 16(4) of the Act;
- b) the amount scheduled for payment as a payment schedule is not paid under Section 17(2) (a) & 17(4) of the Act; or
- c) no payment of the adjudicated amount (or a lesser payment) is received, under Section 27(a) of the Act.

Rule 22.15 states that judgement may be set aside where a party who had not attended the original application for Summary Judgement makes such an application. It is an appeal to the Court's discretion, and considers the same factors that are relevant to an application to have default judgement set aside.

The first question considered by His Honour was whether there was a defence on the merits. As adjudicators and advisors should be aware, by virtue of Section 15 and 16 of the Act, if the Plaintiff had complied with Section 14 of the Act, the Defendant would have no defence on the merits of this action. Having reviewed the decision of Macready A.J. in *Bechaus Civil Pty Ltd v Council of the Shire of Brewarrina* [2002] NSWSC 960, and the operation of the special condition of the Contract in question, the Plaintiff was found to be entitled to a progress payment in accordance with Section 14 (1) of the Act. The reason for this finding is that "entitlement to a progress payment did not refer to a contractual entitlement"; compliance with the contract is not a pre-requisite for a valid progress payment under Section 14(1) of the Act.

Other submissions by the Defendant on Sections 14(2) & (3) of the Act were made but not accepted. Confirming his earlier

approach in *AMD Formwork Pty Ltd v Yarraman Construction Group Pty Ltd* (3 August 2004) [See report in December 2004 Newsletter], His Honour confirmed that this Section should not be interpreted too strictly, the Court should:-

*"...adopt a more practical approach, recognising that progress claims are made in the course of a busy construction project and without the opportunity to descend to drafting niceties. It is sufficient that if the payment claim tells the recipient enough to enable it to lodge a payment response, if thought appropriate."*

His Honour found that there was compliance with Section 14(3)(a) for the majority of the Summary Judgment application. The Defendant had proved an arguable case only in regard to one component of the amount earlier claimed by the Plaintiff. Interestingly, an evidential inference was drawn in favour of the Plaintiff due to the absence of any material from the Defendants indicating insufficient progress claim information.

No explanation was given as to why the Defendant Company was not represented at the earlier Summary Judgement Hearing of the matter, apart from the Company Director's Affidavit indicating that he would have attended but that the date had slipped his mind due to another Court matter at that time. This was given short shift by His Honour on the basis of Rule 1.17, which requires companies to be represented by solicitors in any legal proceedings before the Court. This made the explanation of the Defendant's Director somewhat irrelevant.

The earlier Summary Judgement decision was set aside in part, to reflect the one component, which demonstrated an arguable defence on the merits.

This case illustrates that: -

Advisors to adjudication parties, both legal and lay, need to understand the summary judgement procedure of the Court in order to provide complete advice to their clients.

Applications for Summary Judgement pursuant to the Act need to have material complying with Section 14. In considering if this Section has been complied with, the Courts will not interpret this Section strictly but will take a practical approach when considering the material.

If the Applicant is compliant with Section 14, then by virtue of Sections 15 & 16 of the Act, the Defendant will fail both in a Summary Judgement Application and the seeking of an order setting aside the matter.

If a Respondent is to object to a claim under Section 14 (3) (a) they should have supporting Affidavit material showing that the progress claim was unable to be assessed due to the insufficient or

## Case note Blueview V Vain Lodge Concluded

inaccurate information. Otherwise the Court may assume the reverse, i.e. that the material and the progress claim were adequate.

Where the Applicant is a company, a request from the Defendant in a Summary Judgement set aside application is more

likely to succeed if made by Solicitor's Affidavit. It must explain the non-attendance at the earlier Summary Judgement Application.

Graham Morrow  
Lawyer, Quantity Surveyor & Arbitrator  
[GMorrow@coulterroache.com.au](mailto:GMorrow@coulterroache.com.au)

## Case note Cooper Morrison v Casa d'Abruzzo (again no photo you have seen him before)

### Cooper Morrison Pty Ltd -v- Casa D'Apruzzo Club [2006] VCC 16th of February 2006

The Plaintiff builder, Cooper Morrison Pty Ltd ("Cooper Morrison"), had entered into a contract to carry out various building works on the Defendant's property, the Casa D'Apruzzo Club ("the Club").

The application before His Honour Judge Shelton was for a Summary Judgement (pursuant to Order 22 of the County Court Rules) which concerned two payments and was made under Section 16(2)(a) of the *Building & Construction Industry Security of Payment Act 2002* (Vic). This section of the *Act* allows recovery in a Court of competent jurisdiction of the debt due where the Defendant fails to provide a payment schedule, or fails to pay any amount before the due date.

#### Issues regarding first payment claim

Cooper Morrison's payment claim under the *Act* itemised the amounts claimed and showed how the total claimed was calculated. The Architect had certified the full amount claimed, but the Club made part payment only, leaving \$67,861.22 unpaid. His Honour considered that there was sufficient material before the Club to issue a payment schedule in response to the payment claim, as envisaged by Section 15 of the *Act*. Quoting *Nepean Engineering Pty Ltd -v- Total Process Services Pty Ltd (in liquidation)* [2005] NSWCA 409 at paragraph 48, the Club was "..... in a position to determine in meaningful fashion whether to make payment, or else even dispute it for reasons so as in that case to permit adjudication of the dispute, utilising the summary of procedures under the *Act*."

The payment claim complied with the *Act*. The payment schedule clearly did not. Letters by the Club's Solicitors merely indicated that their client (the Club) disputed the payment claim made. His Honour found

that they did not comply with Section 15(4) of the *Act* and made no other comment about the other requirements of a payment schedule.

The dire consequences of missing the strict time limits of the *Act* were confirmed by His Honour referring again to *Nepean Engineering*, and also the decision of Palmer J in *Bookhollow Pty Ltd -v- R & R Consultants Pty Ltd* [2006] NSWCA 1 at paragraph 41; both held that if a payment claim is made and a payment schedule is not provided within the specified period, then a Defendant cannot oppose the Summary Judgement Application asserting that the payment claim was not a valid claim.

**It was emphasised that**, had the Club wanted to dispute the payment claim, it could have lodged a payment schedule in accordance with Section 15 of the *Act*. This reviewer considers that it should have done so and questions why, in these circumstances, was the matter brought before the Court?

#### Issues regarding second payment claim

The second payment claim considered had no detail contained therein, but was ascertainable from immediately prior correspondence. His Honour relied on Mason J in *Clarence Street Pty Ltd -v- ISIS Projects Pty Ltd* [2005] NSWCA 391 at paragraph 40

".....construction work for which a claim is made may be identified by reference to earlier documents such as variation claims and other documents capable of being identified by reference to the contract or the earlier dealings of the parties."

and found that the work was sufficiently identified for purposes of the *Act*.

The Club sought to rely on the same Solicitors letters referred to in respect of the first payment claim. These letters only referred to the first payment claim amount, and therefore could not be relied on as a

## Case note Cooper Morrison v Casa d'Abruzzo Concluded

payment schedule in respect of the second payment claim.

Applying the **Fancourt** test, His Honour found "no real question to be tried" and therefore the objection to Summary Judgement was refused. Cooper Morrison was awarded Summary Judgement in the sum of \$183,968.06, being the total amount unpaid under the above progress claims.

### This case confirms:

1. What, in terms of detail, should be put in a payment schedule in response to a payment claim.
2. If adequate details are not put forward in a payment schedule responding to a payment claim,

3. then Summary Judgement against the Plaintiff is inevitable.
4. Solicitors writing on behalf of clients, in response to a progress claim (and generally) should be aware and have knowledge of this *Act*.
5. The time frames for responses are strict under the *Act*.
6. What comprises a payment claim/payment schedule is a question of fact, to be decided by the Court if disputed.

Graham Morrow  
Lawyer, Quantity Surveyor & Arbitrator  
[GMorrow@coulterroache.com.au](mailto:GMorrow@coulterroache.com.au)

## UK Protocol for the Instruction of Experts to give Evidence in Civil Claims

This is and Editor's  
note for  
information of  
members.

The Protocol can be downloaded from the Civil Justice Council UK website:

[www.civiljusticecouncil.gov.uk](http://www.civiljusticecouncil.gov.uk)

The Legal system in UK is so similar to ours particularly in respect of the matters addressed in the protocol that I believe it would be a very useful for IAMA Members. The value that I see in it is, that it more fully describes the potential value of an Expert Consultant/Witness beyond the commonly held concept of providing an "opinion report" It would particularly assist members who are inexperienced in the field in avoiding the many pitfalls.

Expert witnesses perform a vital role in litigation. It is essential that both those who instruct experts and experts themselves are given clear guidance as to what they are expected to do. The purpose of this Protocol drafted by the Civil Justice Council (UK) is to provide such guidance. It reflects the rules and practice directions current [in June 2005], replacing the UK Code of Guidance on Expert Evidence. The authors of the Protocol acknowledge the valuable assistance they obtained by drawing on earlier documents produced by the Academy of Experts and the Expert Witness Institute, as well as suggestions made by the Clinical Dispute Forum. The UK Master of the Rolls has approved the Protocol.

**The Aims of Protocol** are to offer guidance to experts and to those instructing them, in the interpretation of and compliance with Court rules. It is intended to assist in the interpretation of those provisions in the interests of good practice, but it does not replace them. It sets out standards for the use of experts and the conduct of experts and those who instruct them.

**The Protocol applies** to any steps taken for the purpose of civil proceedings by experts or those who instruct them.

It applies to all experts who are, or who may be, governed by codes of practice and rules and to those who instruct them.

Experts, and those instructing them, should be aware that some cases may be "specialist proceedings" where there are modifications to the general Court Rules.

Further, some courts and Tribunals have published their own Guides, which contain provisions affecting expert evidence.

Expert witnesses and those instructing them should be familiar with them when they are relevant.

Courts may take into account any failure to comply these guides and protocols when making orders in relation to costs, interest, time limits, the stay of proceedings and whether to order a party to pay a sum of money into court.

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](http://www.iama.org.au)

Chairperson: Angela OBrien

Chapter Administrator

Newsletter Editor: Robert Knott

Email: [aob@unimelb.edu.au](mailto:aob@unimelb.edu.au)

Email: [vic.chapter@iama.org.au](mailto:vic.chapter@iama.org.au)

Email: [robertknott@smartchat.net.au](mailto: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.*