

Message from the Chair



Chairman's Report to Members presented at the Annual General Meeting on 13th June 2006

1. Thirtieth Anniversary Celebrations

The last twelve months have proved to be both fruitful and challenging for the Victorian Chapter. It has been a time for change and reflection. The key work of the Chapter Committee this year has been our efforts to improve both our profile in the community and our services to members.

2005 was the Thirtieth Anniversary of IAMA and the Chapter held two events to recognize this milestone. On 5th July, the Tasmanian sub-branch of the Chapter held its 30th Anniversary dinner in Hobart, attended by National Councilors, the CEO, Gordon Tippett, the Executive Assistant, Gianna Totaro, the former Vic Chapter administrator, Elisabeth Siecker and myself.

On Friday 2nd September The Victorian Chapter celebrated its 30th Anniversary with a dinner held at the Royal Melbourne Yacht Squadron. This was a memorable event with good representation from members and partners. The National IAMA President, Tim Sullivan, attended and addressed us on some of the past achievements and future challenges for the organisation.

Dr Clyde Croft SC provided an oral history of the Victorian Chapter supported by some wonderful memorabilia. Clyde reminded us of the considerable contribution of the Victorian Chapter in establishing alternate dispute resolution in Australia. The Hon Neil Brown QC delivered the after dinner address, Key members of the Chapter organisation were presented with Certificates of Appreciation

2. Membership

This evening I am able to provide details of current membership figures for IAMA. Most worrying is the drop in membership numbers over the past two years. Last year the

National Council made a decision to write off debts, primarily unpaid subscriptions. Effectively this meant we removed the names of non-financial members thus providing a clearer idea of real numbers. The maintenance membership, a key source of revenue, continues to challenge us. As of April this year, there were over 70 members who had not paid for 2006. We are currently attracting new members, primarily in association with National Mediation Course enrolments.

David Thyer, Membership Convener reports each month to the Committee on Associate Membership applications, accreditation and grading applications, re-grading applications and pupilage. Would any member having anything to raise relating to any of these matters please contact David in the first instance?

The Corporate membership model, which was introduced in 2005, has not resulted in the hoped for increase in membership and CPD revenue for the Chapter. Could all members please make themselves familiar with this new category of membership? The Chapter looks to its members to spread the word concerning the privileges of both individual and corporate membership.

3. Premises

Last year the Chairman, Andrew Kincaid, reported on a project to establish a Victorian Chapter Office at the County Court, as an interim arrangement prior to establishing a stand-alone Dispute Resolution Centre. Some members had already, generously, pledged money to fund expected establishment costs of the Centre. A number of Committee members, including Andrew, Danielle Huntersmith and David Thyer, committed significant time and energy to this proposal.

Despite Committee support for this initiative, and its submission of a detailed business plan in December 2005, it did not eventuate.

National Council believed that the appreciable establishment costs incurred in fitting out the Chapter Office (which would need to be borne by the Victorian Chapter), the desirability of the National Office (wherever based) and the relevant State Chapter office being seen as a single entity and the need to reduce the duplication of office resources all pointed towards maintaining the current arrangements.

I am sure that the question of whether the Chapter Office should have its own DRC, its "beating heart" as one member has expressed it, will continue to be discussed and considered in coming months. We are in the process of returning member's contributions towards the project.

On this issue I am very happy to report that St Michael's Centre, the new 'home' identified for CPD events and Mediation has proved to be a great success. I am sure those of you who have attended events there recognize it is a superior facility. Our thanks go to John Rundell for his initiatives in successfully negotiating a beneficial working relationship with St Michael's.

4. Continuing Professional Development

Last year John Rundell accepted the Committee's invitation to assume the most important role of CPD coordinator. John took over management of the 2005 program halfway through the year and has developed an excellent program for 2006, as listed on IAMA's website. www.iama.org.au

Dr Clyde Croft SC and David Levin QC facilitated one of our earliest events, The Arbitrators' Master Class, which was held on Saturday 6th August, with panel support from Russell Cocks, Lecturer in Law at Deakin University and Christopher Kee.

It was a great success. We had excellent attendance from Grade 1 and 2 Arbitrators and quite a lot of interest from Grade 3 Arbitrators who were invited to attend as observers. All attendees agreed it was a stimulating and informative day that provided an opportunity for senior members to meet colleagues and share ideas.

IAMA President Tim Sullivan and Senior Arbitrator Robert Thyer acted as assessors. Other CPD events were less well attended in the second half of 2005.

Events this year have been much better attended and John Rundell's initiative to co-operate with other ADR organizations has resulted in joint functions with Latrobe University, VADR and The Chartered Institute of Arbitrators. John has scheduled excellent speakers, including visiting

Professors Don Arnava and Mark Cato, and the Telecommunications Industry Ombudsman. I encourage you to attend CPD events for the remainder of the year, including the forthcoming event on Domain Names by Chairperson elect, Neil Brown QC.

John Rundell has agreed to continue in the role of CPD Coordinator for which we are grateful. If any members wish to suggest a particular topic, or anything else that might add to the CPD experience, please contact John. john@johnrundell.com

5. Other Events

The Victorian Chapter has been actively engaged in other events conducted by the National Council. The first of these was the IAMA IR ADR training course conducted on 24th and 25th April, involving Victorian Committee members Neil Brown QC and Penny Webster, among others. This was a popular well-attended event which brought considerable income into the Chapter.

The second event was the Victorian Chapter's involvement in the Shenzhen Arbitration Commission training course on 8th May. Professor Chen of Latrobe University, and senior IAMA members, Jon Kenfield, Ron Salter, Hugh Foxcroft QC and Toni de Fina, made presentations. John Rundell was of great assistance in identifying a local translator, Joanna Deng, who made a significant contribution to the day. The Lord Mayor Mr. John So met with the delegates at lunchtime. This event gave an excellent boost to profile of the Victorian Chapter internationally and I am grateful to all members who were involved and of course National Office staff particularly Gianna Totaro who undertook administrative organisation.

Next month the National Council will be hosting a mediation launch by the Victorian Attorney the Hon Rob Hulls.

This will be another opportunity to profile the work being done in the Victorian Chapter.

6. Adjudication

Lawrence Reddaway has chaired the Security of Payment Group sub-committee this year, and has agreed to continue in the role for the coming year. The sub-committee is likely to have a busy year because they will need to re-write the IAMA National Adjudicators' Guide to bring it up to date with the new Victorian Act, still to be finalised. The Building and Construction Industry Security of Payment Amendment Act has had its second reading but seems have stalled in its process through the

Parliament. When it is finally approved we run the long-awaited Victorian adjudicator accreditation course in its new form. Currently accredited adjudicators will need to undertake the new course.

I am pleased to report that the Victorian Chapter has been re-appointed as an ANA. Through the CEO Gordon Tippett and David Thyer, we have representation on both the ANA (Approved Nominating Authority) Consultative Committee which is developing a code of practice for ANA's and adjudicators and the Security of Payment Industry Reference Group, both of which are chaired by the Building Commission.

My thanks to Lawrence Reddaway, Steve Gunn, David Thyer and Saul Rozenbes for their contributions to Adjudication throughout the year.

7. Arbitration Business Development

Andrew Kincaid and Michael Sweeney have co-convoked the Arbitration sub-committee. A key task has been the formulation of a new set of arbitration rules to reduce the length of hearings and associated costs. You will be aware that Andrew Kincaid has been elected to National Council where he will undertake leadership in arbitration matters at a national level.

A number of newly graded arbitrators have indicated a desire to gain pupillage experience. To address this concern John Rundell and Michael Sweeney organised for senior arbitrator Toni de Fina to conduct a Pupilage Seminar Program throughout the year. There were insufficient numbers to run the program in 2006 and we may need to return to individual pupillage.

8. Mediation Business Development

We have held three successful National Professional Practitioners' Mediation Courses since last AGM, coordinated by Danielle Huntersmith and conducted by Jim Cyngler, Danielle Huntersmith and Penny Webster. Two more courses are to be offered in August and November this year. This year we are using the new National Mediation Handbook prepared by National Councilor Alysoun Boyle. Members wishing to update their knowledge of the mediation course can purchase a copy. I encourage all members to publicise the National Mediation Course amongst your colleagues and friends. It is an excellent course with a very high level of satisfaction from participants and one of our key sources of revenue.

An encouraging development last year was the convening of a mediation discussion

group. While this group has met infrequently this year, it did provide input to the National Mediation Accreditation project through a paper prepared by Penny Webster. I am pleased to report that Miriam Landau has agreed to reconvene this group, and I encourage mediator members to become involved.

Last month I attended the National Mediation Conference on behalf of IAMA and am pleased to report that the Conference supported a National Mediation Accreditation Scheme. It will be a minimalist and cooperative scheme. We hope that IAMA will be one of the Recognised Mediator Accrediting Bodies. I will be representing IAMA on the Implementation Body.

A comprehensive report is soon to be published in the IAMA Newsletter and I have copies available for interested members.

Joyce Marshall, our Honorary Secretary has been working on Mediation Business Development. Joyce and I presented a one-day program to HR professionals at the Alfred hospital last and this course is being refined for wider distribution.

Joyce is working with David Thyer to submit a tender to the Victorian Police to conduct Mediation training programs.

9. Regional Members

It was very apparent at the recent National Conference that many of our regional members feel, with some justification, that their opportunities to undertake CPD activities are considerably lessened by being located out of Melbourne. We have a scheduled CPD event coming up in Geelong and we encourage active involvement from members in other country areas, particularly Ballarat and Bendigo. Graham Morrow, who has undertaken a liaison role in Geelong, is moving to Western Australia. I would like to record my appreciation for his contribution.

10. Tasmanian Chapter

At the 30th Anniversary dinner held in Tasmania, the National Council agreed to support the establishment of a separate Chapter in Tasmania. I spoke to members of the Committee in Hobart and they are working on this proposal. Craig Doherty, who has undertaken a leadership role in Tasmania, is leaving the Chapter. I would like to take this opportunity to thank him for his work.

11. Nominations

In keeping with revised national policy concerning the provision of details of nominations to the members, attached to

this report are details of nominations made during year from 1 July 2005 to 13th June 2005. *(This is now available at Chapter Office)* Some of you will have observed that I have continued what appears to be a policy of multiple appointments in the nominations. That is because I support the previous Chair's view that, if for any reason an appointment or reference does not proceed beyond nomination, then the person nominated ought to be provided with another opportunity to conduct a hearing or adjudication.

12. Chapter Publications

Robert Knott has done an excellent job in his role as Editor of the Chapter Newsletter. I trust that you enjoyed the 3 or 4 issues to date as much as I have. The next edition will be comprised of this Report, for members who are unable to attend the AGM. *(This is the 9th issue since I was appointed to replace Toni McCormack in 2004)*

Robert has asked me to appeal to legally qualified members to provide case notes on arbitration and mediation for the Chapter Newsletter. Please speak to me if you are interested in doing so.

13. National Conference

A contingent of Victorian members attended the annual conference held in Palm Cove at the end of May. It was an excellent event with three full streams in Arbitration, Mediation and Adjudication. Once again, the National Conference demonstrates the considerable benefits of being a part of Australia's pre-eminent ADR body, and all the strong marketing benefits that go with that. The quality of the papers delivered at the conference, and the subsequent discussion, were of a very high standard. For these reasons I commend next year's conference to each of you, which will be held a little closer to home in Adelaide.

14. Chapter Office

The Victorian Chapter restructured its administration and activities in 2006. Without the demands of a DRC, we do not have sufficient work for a full-time person. Since the departure of our full-time administrator, our administrative needs have been handled by National Office staff and Laura, who works one day a week for the Victorian Chapter.

I would like to thank the National Office staff for their support for the Victorian Chapter: Andrew Hassed has kept our accounts up to date, Jessica Martina has done an excellent job with nominations, Airlie, Kate and Lorrae have liaised to ensure smooth member

communications. The CEO Gordon Tippet and his Executive Assistant Gianna Totaro have been very supportive and assisted in many different ways.

We have had some additional administrative support particularly from Laura, one day a week specifically for the National Mediation Course. It is our intention to appoint a part time Chapter Administrator as soon as is practicable.

15. Chapter Committee

I want to take this opportunity to thank last year's committee for their commitment and work in a difficult year. Our committee meetings have been characterised by high engagement and spirited debate. As I look back over the meeting minutes, I am delighted to note the very high attendance of all Committee members. I have already mentioned the contribution of a number of members above and want to make mention here of the efforts of the Chapter Executive. Joyce Marshall has generously undertaken the demanding and thankless task of preparing minutes and agendas. Her paperwork is exemplary and has been suggested as a model for other Chapters. Penny Webster liaised with Andrew Hassed to bring our accounts in order. Neil Brown QC the Vice Chairperson and former Chairperson Andrew Kincaid have worked closely with me and provided a wealth of wise advice.

I am also delighted that three members of the Committee have been elected to the National Council for the coming term. It gives Victoria strong representation, commensurate with our status and membership in IAMA. Congratulations to Andrew Kincaid, whose tireless work for the Victorian Chapter has been recognized by his election to National Council in a highly competitive environment.

I remind members that the last Members' election resulted in the following 10 members being appointed to the 2006-2008 Victorian Chapter Committee:

Hon Neil Brown QC	Danielle Huntersmith
Joyce Marshall	Albert Monichino
Angela O'Brien <i>(also a National Councillor)</i>	
Lawrence Reddaway	John Rundell
Michael Sweeney	David Thyer
Penny Webster	

Andrew Kincaid and Ken Stout who did not stand for election, are also, as National Councillors, ex officio members of the Committee. I would like to welcome Albert as our only new member.

15. **Declaration of Chapter Committee Office Bearers 2006-2007**

Executive Positions of Chapter Committees are elected every year.

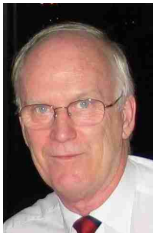
A new Chapter Committee Executive has been elected, comprising:

Chair
Vice Chair
Honorary Secretary
Honorary Treasurer

Neil Brown QC
Danielle Huntersmith
Joyce Marshall
Penny Webster

Angela O'Brien
aob@unimelb.edu.au

Message from the IAMA CEO



The Annual Conference on the last weekend in May at Palm Cove near Cairns in Queensland is now over. Each year this event marks the end of a significant administrative workload for the Institute staff. This is the period when new membership subscriptions are being received, the new year training programs are being organised, the previous year financials are being completed, the Annual Audit commences, Annual General Meeting preparations take place, including the writing and printing of the Annual Report, and this year biennial National Council and Chapter Committee elections were held. Thankfully, each of these events come and go, and at this time of the year we look forward to managing the activities for the remainder of this year and planning those for the next.

Those Victorians who were fortunate enough to escape winter for the warmth of Palm Cove were rewarded with another excellent IAMA Conference. Around 200 participants enjoyed the tropical surrounds while taking in the exemplary program developed by the Conference organising Committee from the Queensland Chapter, headed by National Councillor Kayrn Reardon. The speaking program was split into arbitration, mediation and adjudication streams, with the main plenary and keynote speech being delivered by High Court member the Hon Justice Ian Callinan AC. His Honour commenced by speaking of the similarities between the Rules for Duelling and modern ADR, then went on to discuss the fact that the universal right to democratic justice in the Courts was becoming too expensive, and that government subsidised mediation and dispute resolution may be a solution. The August Conference editions of the *IAMA News* and *the Journal* will carry papers and items from the Conference. The 2007 Conference is to be held in Adelaide, with 2008 in Perth.

Preceding the Conference was the biennial election of National Councillors and I am pleased to announce the following result in order of votes received: -

Ian Bailey, NSW
Tim Sullivan, NSW
Laurie James, WA

Brian Ahern, ACT
Robert Hunt, NSW
Angela O'Brien, Vic
Kayrn Reardon, Qld
Kenneth Stout, Vic
Warren Fischer, Qld
Andrew Kincaid, Vic
Andrew Robertson, SA
Graham Anstee-Brooke, WA

Unsuccessful candidates were:

Alysoun Boyle, Brigit Barker-Hudson and Mark Griffith.

The National Council meeting held prior to the Conference at Palm Cove appointed the following office bearers to the Executive: -

President	Mr Laurie James
Snr Vice President	Prof Angela O'Brien
Vice President	Prof Ian Bailey SC
Hon Treasurer	Kenneth Stout
Past President	Tim Sullivan

On 8th March the Institute was approached by the Federal Government in connection with the new Workplace Relations Legislation and agreed to join 13 other ADR organisations to be part of the scheme aimed at facilitating employers and employees resolving differences at the workplace level. The legislation introduces private ADR as an alternative to proceedings in the Australian Industrial Relations Commission. As a scheme to subsidise this process, the Alternative Dispute Resolution Assistance Scheme (ADRAS), will provide parties in dispute with \$1,500 to approach registered ADR providers from the 14 ADR organisations.

In order to meet the requirements set out by the Department of Employment and Workplace Relations for ADR providers, a training course was held in Melbourne for 54 IAMA practitioners from all states on 24 and 25 April. Training covered the new IR legislation, the ADRAS scheme processes, and the new IAMA rules, requirement and procedures. Although not known at the time, the new legislation became effective on 27 April 2006, with IAMA well prepared with its panel in place. This short preparation time frame is an excellent example of the ability of this organisation to react quickly to

changing demand. The 11 member National Workplace Relations ADR Committee formed by Tim Sullivan from all Chapters, quickly developed a training regime to deal with difficult new and expansive legislation. Having established a panel of 50 practitioners the Council has decided not to schedule further training until the ADRAS scheme activity builds and we can gauge future needs.

Also on the training theme, and in the same time period, the Institute delivered training in Australian adversarial arbitration methods and techniques to a group of 21 senior arbitrators from the Shenzhen Arbitration Commission (SZAC) in China. Shenzhen is the special economic zone adjacent to Hong Kong, directly administered by the Central Government of the PRC, and has a population of 12 million. When in Shenzhen in October 2005, then President, Tim Sullivan signed a Memorandum of Co-operation (MoC) between IAMA and SZAC. Brisbane City has a sister city relationship with Shenzhen and the IAMA Brisbane Chapter has been involved in the visits to Australia by SZAC officials and has enjoyed regular contact since 2003.

The May training which is the first tangible fruit of the MoC, involved sessions in Brisbane, Sydney, Melbourne and Adelaide. The group also visited Cairns and Canberra. The Melbourne Training was conducted at the Melbourne Town Hall, where Lord Mayor Cr John So met the group. China has 185 domestic arbitration Commissions, all of which can hear local province matters, other provinces or international issues. With the growing levels of international trade and the pressure introduced by China's membership of the World Trade Organisation, the Central Government is requiring these Commissions to improve their standards. As Chinese law is based on Civil Code and there is no tradition of adversarial proceedings, IAMA was asked by SZAC to provide this training.

Mediators will be aware that the National Mediation Conference was held in Hobart in the first week of May. Angela O'Brien, supported by the other Victorians who attended, officially represented IAMA. The important key item presented to this Conference was the report prepared for it by Bond University Law Professor Laurence Boulle, on a proposal to introduce a National Accreditation Standard for Mediators.

This Federally funded study was commissioned at the previous Conference two years ago in Darwin, and is a reflection of the view of Government that if it is to introduce legislative requirements for ADR

there needs to be a practitioner quality measure. Any scheme will be non-compulsory and will set a minimum standard which can be added to for specialised situations. The Conference accepted the Boulle report and has now established an Implementation committee, which will work over the next two years to develop the final scheme. I represented IAMA on the steering committee for the Boulle Report and Angela O'Brien will now take over during its implementation phase.

Mediator training and standards in the Family Law Sector are of more immediate concern for those in the Federal Attorney-General's Department (AG's) involved in the recent changes to that legislation. The Family Pathways Branch has commissioned the Community Services and Health Industry Skills Council to develop accreditation standards for family counsellors, family dispute resolution practitioners, and workers in government-funded children's contact services. While this sounds like reinventing the wheel, the encouraging sign is that the AG's people were at Hobart, and have been impressed with the Boulle Report discussions.

The Council has met and particular interest has been shown in our training, rules, competencies, accreditation processes, and grievance processes. The fact that the first pilot centres of the planned 65 Family Relationship centres are now recruiting staff to provide the services required for Family Law Mediations, means that we will not have to wait long to see the outcome of this.

While this has been a busy first half to 2006, we are now planning for the remainder. Chapter budgets for next year are due in August, the next round of mediation training courses are about to commence. The Palm Cove Council meeting has adopted a number of measures to ensure the consistency of standards in our training throughout all chapters, and these will be worked on during this period.

On a local level the activities of the Victorian Chapter, during this period when my staff have helped with its administration have been excellent, and have broadened their appreciation of the role of ADR in the community. For my part I will be an armchair expert and bore at home during the Tour de France, having now been exposed to the secrets and team tactics of road cycle racing as revealed by Anna Wilson in her excellent session. If any members would like printed copies of the 2005 Annual Report; a number were produced for the AGM and copies are available by contacting the Queens Street

office. Also, going to press as I write this, are the June editions of *the National News*

and *the Journal*, which will be posted to you shortly.

Gordon Tippet IAMA CEO
ceo@iama.org.au

Text of the paper presented by Cameron Ross, Senior Associate, Minter Ellison at the recent Security of Payment Forum



Proposed amendments to Victorian security of payment legislation

On 7 February 2006 the *Building and Construction Industry Security of Payment (Amendment) Bill 2006* (Vic) ('amendment bill') was introduced into Victorian parliament to amend the *Building and Construction Industry Security of Payment Act 2002* (Vic) (Act). The Legislative Assembly passed the amendment bill on 13th June 2006 with further upper house amendments regarding variations that may be included in payments claims under the Act.

If passed, the amendments will significantly influence the use and operation of security of payment legislation in Victoria both by parties making claims under the Act and parties responding to claims under the Act. Importantly, the amendment bill includes a number of changes to the procedures for adjudications under the Act.

The Victorian security of payment legislation currently largely mirrors the security of payment legislation first introduced in NSW in 2002. The current Victorian Act represents the first generation security of payment legislation. The amendment bill is intended to allow claimants to properly recover progress payments more effectively and aims to do this by:

- including the latest amendments made to the NSW legislation (and largely reflected in the Queensland Building and Construction Industry Payments Act 2004), being the second generation security of payment legislation; as well as

- introducing new approaches to issues related to security of payment legislation.

The result is a proposed third generation of security of payment legislation.

The key features of the amendment bill are:

- expansion of the application of the Act to allow for a wider range of payment claims to be made under construction contracts including claims for final payment, single payments and milestone events;

- provision of greater clarity as to matters that can and can not be included in payment claims by:

- excluding claims under the Act to prevent claims for damages, time related costs (including delay and prolongation costs), latent conditions and claims arising other than under the construction contract (such as trade practices claims); and

- requiring variation claims that are included in a payment claim to be 'claimable variations'. Under the amendment bill 'claimable variations', are defined as:

claims for work or services where there is an agreed direction or request by the respondent to perform additional works or services but disagreement as to the method of valuing the variation, valuation methodology or time for payment and the consideration under the construction contract is less than \$5 million, or where the consideration under the construction contract is greater than \$5 million but the construction contract does not provide a method for resolving the dispute.

- introducing time limitations for making a payment claim to work carried out in the previous three months (unless the contract provides for a longer period) and establishing the reference date for the new type of payment claims under the Act such as final, single and milestone events payment claims;

- in certain circumstances, allowing a respondent to have a second opportunity to serve a payment schedule where the respondent failed to provide a payment schedule period of 10 business days (or lesser period if required by the construction contract);

- requiring a respondent to identify in a payment schedule any excluded amount as described in 2(b) above;

- creating a new process for the appointment of adjudicators that involves a more significant role for the authorized nominating authority;

- creating an expedited process for a claimant to enforce the payment of an adjudicated amount including:

- introducing the right of a claimant to exercise a statutory lien or a right over unfixed goods to the value of the unpaid amount; and

- removing the ability of a respondent who is required to pay an adjudicated amount to provide security (such as a bank guarantee or payment into trust account) in lieu of payment of the adjudicated amount; and

- allowing a claimant to obtain an adjudication certificate for use in Court proceedings seeking to enforce an adjudicated amount;

- establishing a new process for aggrieved parties to seek review of an

adjudicator's determination where the disputed amount is greater than \$100,000 and the dispute relates to specific grounds; and tightening the contracting out provisions to prevent any provision that excludes, modifies, restricts or has the effect of excluding, modifying or restricting the operation of the Act.

If the bill is passed by the Victorian parliament it will commence either upon proclamation or no later than 30 March 2007.

Cameron Ross

Cameron.ross@minterellison.com

A member's comments

on the

Forum discussion



Adjudicators: How can we do it better? What does the future hold?

The recent IAMA security of payment discussion group forum held on 10th May 2006, chaired by Laurence Reddaway and lead by Cameron Ross discussed these and other questions.

Given the current plight of the proposed amendments to the Victorian legislation, it was reassuring to have a lively group of attendees discussing adjudication matters. Considering the Legislative treatment proposed for variations 'Adjudication RIP' may have been a more appropriate title for the discussion forum.

Before discussing the current proposed amendments, context was introduced by noting that there had been approximately 60 adjudication applications in Victoria over the last three years, 45 of which have resulted in adjudication determinations. It is fair to say that the adjudication process has not been used a great deal in regard to payment disputes in the construction industry. Notwithstanding this, the group's experience was that most claimants were now issuing payment claims under the current Act, despite this Act not giving a lot of help or comfort to claimants in dispute.

Most present agreed that the current Act is hamstrung by the ability of the respondents to pay into trust rather than the respondent paying the claimant direct. Some cited experiences, which suggested that the Court option was better than adjudication, as at least the Court provides more certainty than adjudication; the cost of adjudication was seen also as a significant factor.

Comparisons were made with the UK and NSW legislation, but virtually all present were agreed that if the proposed amendments to the current Act are passed, the process of adjudication in Victoria will be largely useless. Adjudicators look with envy to the activity in NSW, where there are approximately 200 adjudications applications per month.

Having dismissed the proposed legislation amendments; rather than retire for drinks, the assembled group were ably lead by Cameron Ross through consideration of other adjudication issues. The Forum was a success, with most attendees participating in discussions of various adjudication matters.

Slight differences of opinion emerged, for example; when considering the appeal ability of an adjudicator's determination. Adjudicators were pointed in the direction of the *Musico v Davenport* [2003] NSWSC 977 decision, with jurisdictional error being reconsidered in the subsequent *Brodyn Pty Ltd t/as Time Cost & Quality v Davenport* [2004] NSWCA 394 decision.

The latter is a less technical approach and suggests that decisions are appealable subject to narrow grounds, such as a denial of natural justice, or not in accordance with the essential provisions of the Act. It was common ground that adjudicators do not have to get everything right as long as the essentials are there, for example a construction contract payment claim, adjudicators' appointment and subsequent decision being in accordance with the Act.

It was felt that the *Brodyn* decision reduces the number of appealable issues for a party. It was also suggested that some of the NSW cases and challenges were made prior to there being a more settled position, with the legislation now having been tested, and with less cases likely to be brought to the Courts for appeal in the future.

One case the subject of appeal was commented on, as it looked very much as though the adjudicator had not allowed sufficient time in considering the decision. It was also common ground that if the adjudication claim is contained in multiple folders, then perhaps it is not a clear or concise claim and therefore bad advocacy or poor management on behalf of the claimant. Nonetheless the adjudicator would have to deal with whatever quantity of information provided. Although the stop clock system of time management

applicable to Courts in America was seen as a positive suggestion for reducing & monitoring time in Court hearings, no clear ideas as to avoid large payment claims in the adjudication process were discussed.

It appears that some regard adjudication legislation as first, second, or third generation legislation, with other states unlikely to follow Victoria's proposed amendments.

The most contentious item in the proposed amendments to the Victorian legislation is; what can be included in a payment claim (and the subject of an adjudication) in regards to claimable variations? The current proposal requires a variation to be 'an agreed variation' for it to be the valid subject matter of adjudication. All claims for 'un-claimable' variations under the proposed legislation are excluded, for example latent conditions, TPA issues, regularity changes etc.

The result of such a proposal is that adjudication claims in Victoria will be reduced to those for core contract price works only. This will reduce adjudication to a straightforward question: was the work carried out and in the appropriate payment claim? It is really only a question of timing? This seems to miss the purpose of adjudication.

A major question of interest to all present was; why Victoria had chosen not to follow the NSW amendments? It appears the answer is a different policy direction. This opened up further debate on the Australian construction industry culture, which traditionally is to have a big argument at the end of a project 'if you can survive that long'. It was noted that under the proposed amendments to the act the final claim could be included in a payment claim, which is currently not the case.

Those present indicated that they see a likely decrease in the use of adjudication due to the amendments proposed. Specifically it is not unusual to have a 40% change in the contract value, with this all being variations. As noted above this will not be the subject of adjudication if the proposed Act eventuates.

It was suggested that the published policy paper has not been followed when viewing variations, and the legislators have taken some licence in coming up with the current proposals. It would appear that property owners and developer have successfully advocated the government on this issue.

Although the Building Commission have not commented specifically on this issue, they appear to have been aware of the consequences of their acts regarding excluding variations from the proposed amendments.

The group were reminded that if adjudication does occur, the limited time frame, in which an adjudicator has to act, is critical. A further proposed amendment is that the new review process applies if the amount due under an adjudicator's decision is more than \$100,000.00.

A very wise old owl made one of the most telling comments, how should adjudicators ensure that they get paid? It appears that it would be more difficult to get paid under the proposed amended legislation. Obviously the safest and best way is to require payment in advance, but individual participants, particularly those at the lower end of the food chain, may not accept this.

A further interesting question was asked, how do adjudicators deal with jurisdictional challenges? Adjudicators indicated that these were frequently raised; with some of the legal representatives present surprised to hear this. It was agreed that if the adjudication is not accepted, the adjudicator has no status and the adjudicator should indicate that he or she does not believe that they have jurisdiction, or do not believe that the claim is a valid one, when not accepting it.

Once the adjudicator has been appointed, and he or she sees no reason to avoid the appointment, the adjudicator should consider the matters at hand. They need to satisfy themselves under the Act, that the process has been followed, and then make their decision. This may include giving reason why jurisdiction applies. Again discussion occurred regarding *Brodyn*, and other decisions, and the question that *Brodyn* was no longer good law was raised.

The group's debate was brought to an end by an adjudicator, who believed he had jurisdiction, chairperson Laurence Reddaway, adjudicated on the matter within the strict time frame and closed the meeting. No one sought to appeal this decision, *but several lawyers were seen frantically trying to contact their clients and encouraging them to consider doing so*

Graham Morrow

GMorrow@coulterroache.com.au

Member's profile



Victorian Chapter Chairman

Hon Neil Brown QC

Neil was born in Melbourne, attended Moonee Ponds Central School, and proceeded via Melbourne High School to the University of Melbourne. Graduating as Bachelor of Laws in 1963, he commenced articulated Clerkship with Maurice Cohen Jowitt and Co. From 1963 to 1968 he was a resident at International House and Tutor in law at Ormond College, University of Melbourne.

Admitted to practice as Barrister and Solicitor of the Supreme Court of Victoria in 1964 he was appointed as Queen's Counsel in 1980 and practiced as a Barrister and a Queen's Counsel from 1964 to 2005 covering a wide field including: Criminal Law, Commercial and Company Law, Town Planning and Local Government Law, Building and Construction Law, Administrative Law and Industrial Relations and Employment Law. His practice provided extensive experience in Alternative Dispute Resolution, including mediation and arbitration from his involvement in various planning, arbitration and Industrial Relations professional organizations.

In 1969 he was elected Member for Diamond Valley in the Federal Parliament serving from 1969 to 1972 & 1975 to 1983 and later as Member for Menzies from 1984 to 1991. During his Parliamentary career he served, first in Opposition, as Shadow Attorney-General from 1984 to 1985, as Deputy Leader of the Opposition, Shadow Minister for Employment and Industrial Relations and Shadow Minister for Foreign Affairs from 1985 to 1987 and later in Government as Minister for Employment and Youth Affairs and Minister for Business and Consumer Affairs from 1981 to 1982, as Acting Attorney-General from 14.9.1982 to 17.12.1982 and as Minister for Communications, and Minister Assisting the Attorney General from 1982 to 1983. Again in Opposition he served as Deputy Leader of the Opposition, Shadow Minister for Employment and Industrial Relations and Shadow Minister for Foreign Affairs from 1985 – 1987 also served as Shadow Attorney-General and Shadow Minister for Justice 1988 – 1990 and as Shadow Minister for Communications from 1990 – 1991

In 2003 he was appointed to the Panel of Conciliators at the International Centre for the Settlement of Investment Disputes (ICSID) in Washington, USA. Also in 2003 he was awarded the Centenary Medal by the Commonwealth of Australia

In 2004 he was appointed as a member of

the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Center's List of Neutrals and the Center's Domain Name Panel.

He represented Australia as a Minister at a meeting of Labour Ministers at the Organisation for Economic Co-operation and Development in Paris, and at the South Pacific Labour Ministers' Conference in Kiribati.

He represented Australia as Minister at an International Labour Organisation conference in Geneva and as Delegate to the General Assembly of the United Nations in New York.

He was appointed leader of the Australian National Observer Group observing independence elections and served as a member of the Australian delegation to independence celebrations in Zimbabwe.

He represented Australia at the Inter-Parliamentary Union Conference in Guatemala, at the International Conference on issues in the Asian Region - South Korea and at the Bilderberg Group Meeting - Belgium.

At various times he participated in parliamentary delegations and private study visits to Europe, Asia, Africa and the Americas concerning, factors such as Government decision-making and issues relating to public and commercial representation and advocacy, legal and political factors attendant on democratisation and free and fair elections, employment and labour relations issues, including Federal and State systems of individual contracting, bargaining, conciliation and arbitration, the principles of law and general conduct of public inquiries, including administrative and constitutional factors relating to appointments and composition, procedural fairness and judicial review and Legal, regulatory and commercial factors relating to the telecommunications industry.

Since leaving Parliament, he has maintained his active involvement in public affairs by serving on government committees and conducting two Inquiries at the request of the Federal Government.

Apart from his Government appointments he has at various times held the following positions:

Director of Meridian Communications Pty. Ltd., a private company actively involved in the tendering process for the introduction of satellite TV into Australia.

Member of the Advisory Board of the Commonwealth Rehabilitation Service (CRS) responsible for the running of the

CRS at the time of its restructuring and preparation for its conversion to a company.

Director of Life Insurance Complaints Service Limited, a company overseeing an alternative dispute resolution structure for the Life Insurance industry.

Chairman of various selection panels to recommend appointments to Federal agencies.

Appointed by the Federal Government as Leader of the Australian National Observer Group, an election-observing group. Awarded a Study and Travel Grant for a study of the Indian Ocean region by the Australian Institute of International Affairs.

nabrownqc@yahoo.com

CONGRATULATIONS to members:

Penny Webster has been granted a Human Rights Scholarship, the Fay Marles Scholarship, from The University of Melbourne to support her PhD studies in 'Sustainable approaches to grievance handling in organisations'.

Penny has also recently been appointed as a part-time member of the Mental Health Review Board Victoria, which she sees as presenting a great opportunity to be part of an appeal process.

Hon Neil Brown QC has recently been elevated to Fellowship of the Chartered Institute of Arbitrators.

New Associate members:

Captain Hendrik (Henk) Merbis
Mr Danny Glavan
Ms. Rennis Witham
Mr. Bruce Nadenbousch
Mr Timothy Graham
Mr James Ji
Mr. Gavan Cooper
Ms. Beatrice Nielsen
Mrs Robyn Kennedy

Mr. Andrew Whitelaw
Mr. Graham Timothy
Mr Bruce Nadenbousch
Ms Barbara Rozenes
Mr. Wayne Davies
Ms. Carole Smith
Mr. Martin Jones
Ms. Rosemarie Brown
Ms Cheryl Wile
Ms. Samantha Bruni
Mr. Simon De Garis

Accredited Mediators:

Mr Glen Pauline
Mr Alan Dircks
Mr Lee Furness

Personal note:

Graham Morrow has left Coulter Roache in Geelong, and returned to Perth, W.A.

He will be missed for his participation as an active member of the Victorian Chapter during his period in Victoria. I am particularly indebted to him for providing interesting Case Notes and other articles for the newsletter.

Message from the Editor

This newsletter was delayed so that the reports from the AGM could be incorporated.

The newsletters for the balance of 2006 will be published in August, October and November.

Member's profiles will be published, as the information becomes available.

Do not be shy, your fellow members are interested in more than your CV details on the IAMA website.

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

Chairman: Hon Neil Brown QC

Chapter Administrator

Newsletter Editor: Robert Knott

Email: nabrownqc@yahoo.com

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