



The View

<p>Thanking the 2004 Corporate Sponsors:</p>  <p>Jackson McDonald Lawyers</p>	<p>The official newsletter of the WA Chapter of the Institute of Arbitrators and Mediators Australia</p> <p>Vol: 14 No. 6 December 2004</p>
<p>In this issue:</p> <ul style="list-style-type: none"> • Editorial • Chairman's Message • Reports of recent events • Administrator's Report • Contact numbers 	<p>NEXT MEETINGS ARE:</p> <ul style="list-style-type: none"> • General Meeting and Sundowner 15 December 5:15 at MBA • C.P.D.: } see 2005 Calendar enclosed • Breakfast } <p><i>Comments expressed in this newsletter are those of the author of the particular piece and do not necessarily reflect that of the IAMA unless so indicated.</i></p> <p>Letters to the Editor can be sent to: faigen@allpointsbuilding.com.au</p> <p>The Administrator is Sue Doherty Ph. 9368 4755 Fax 9368 4744 suedoherty@bigpond.com</p>

The Editor's View What are we doing here?

One of our members received a call from another who had been nominated to act as arbitrator. The nominee called the parties to arrange a preliminary meeting and wrote to them on two occasions without any reply from either. After the long period of silence the nominee came to the realisation that the parties were not proceeding thereupon asking the question of himself (and his colleague) *"am I entitled to be paid for the time expended?"*

Some stalwarts suggest "No" because the nominee does not have an agreement upon which the fees can be based. Equally, others might believe that because the parties have caused the nominee to expend time on their behalf that some entitlement is due.

I referred to the "parties" because essentially disputes are something brought on themselves (in theory at least), and perhaps you might suggest they are both liable for the nominee's charges. However, it is the usual case that one party – the Claimant – calls for the nomination process. Thus, you might query, should the Claimant only be responsible for the "costs" incurred to then?

From this scenario I raise the question: Is it unreasonable for a nominee to adopt some sort of pride that the notion (did I say threat?) of an arbitration put the parties into settlement mode (maybe the nominee's reputation preceded him?). In that case is quiet satisfaction not enough reward in itself?

And further, is it not unreasonable for a nominee to suggest the parties attend a preliminary meeting and if the reference does not proceed to absorb that time as "good will"?

Question 2: Are we here to provide a service to the business community or to 'feather our own nest'? Answers or debate welcome.

Oh, and Seasons Greetings extend to all members.

Ed.

Chairman's Message for the December View

Our last official event of the year takes place on 15 December 2004 with the holding of the Chapter committee meeting, followed by a General Meeting at 5.15 p.m. and thereafter our traditional Christmas Sundowner.

This brings to an end one of the Chapter's most successful years in a number of ways. Our W.A. **membership stands at approximately 170 members** which represent, on my recollection of numbers, a growth rate of approximately 45% above the membership level of about five years ago.

But, more important than this, is the increase in the level of activity within the Chapter. It was only a few years ago that our CPD activities were planned on an ad hoc basis. By contrast, we now have a full calendar planned almost a year in advance. What underlies the calendar is the effort which is put in by so many of our members in conducting those activities.

There are, I think, two areas which have stood out this year. The first, is the advances made by our **Mediation** members. The mediation group under the guidance of Peter Byrne and Barbara Kwiecien has developed a momentum of its own. Interest in mediation and the activities within the Chapter has never been at a higher level. This is reflected in the Chapter holding two National Mediation Courses for the first time in a single year and the success of the colloquia which have been conducted.

The other stand out area is **Adjudication**. The W.A. Chapter has without any doubt taken the lead as a training body in this field. I acknowledge the enormous effort put in by Graham Anstee-Brook, Laurie James, Mark Sheehan and Phil Faigen in setting up and conducting the first Adjudication training course held earlier this year, and the ongoing efforts of the Adjudication sub-committee in achieving formal recognition of the course and preparing the application for registration of the Chapter as a Prescribed Appointer.

While I have made specific mention of some, all committee members and many members, have given unstintingly of their time. My thanks go to each and every one of you.

The success of this year, and previous years, could not have occurred without the very able and efficient support which I and the committee have received from **Sue Doherty**, the Chapter Administrator. The amount of time which Sue has had to dedicate to meeting the needs of the Chapter has doubled from that required when she first started. Sue's networking and marketing skills have been a very large factor in the improved profitability of most of our activities. My special thanks to Sue, on my own behalf, and on behalf of the Committee, for her outstanding contribution, particularly, during the last year. Unfortunately, Sue has decided not to seek the renewal of her contract which expires at the end of December but I speak for all members in wishing Sue all the best in the future.

We are in the course of reviewing, and interviewing, applications for the Chapter Administrator's position and hope to have someone on board as soon as possible.

I am pleased to advise that the Committee has resolved that a name be added to **the Chapter Honour Roll**. The recipient of this recognition will be named at the General Meeting on 15 December and I hope that many of you will be there to witness the presentation. I encourage our older members, who probably can work out the identity of the recipient, to come along and add their valued recognition to the occasion.

Inclusion in the Honour Roll is limited to retired members who have made an outstanding contribution to the promotion of the objects of the Institute and in particular the activities of the W.A. Chapter and have demonstrated a selfless and loyal commitment to the Chapter over a considerable period of time. To date there are only two names on the Roll being Fred McCardell and Ken Brine whose contributions to the Chapter have set the bar very high in considering future candidates. This is a good thing because inclusion in the Roll must be meaningful. It is likely that there will be times when many years go by without a new name being added to the Roll. This year's recipient will certainly maintain the standard and is a very worthy inclusion.

I end wishing all members a happy and relaxing break over the Christmas season and a healthy and rewarding New Year.

Clive Raymond Chapter Chairman

Adjudication

NOTICE FOR THOSE WHO ATTENDED THE COURSE IN AUGUST 2004

Those who attended the adjudication course in August 2004 will be required to attend an update session on the regulations code and guidelines. I have been advised by the Department of Housing & Works that they are hopeful of having the regulations gazetted on 14 December 2004 and that the code and guidelines will be available on the same day.

Provided that the regulations code and guidelines are available an update session will be presented at
5.30pm on 21 December 2004
at the offices of Minter Ellison, Level 49 Central Park,
152-158 St Georges Terrace Perth.

For those unable to attend this session they will be given the opportunity of attending this session during the course presented at the beginning of February 2005.

You will be notified if this session is not going to take place.

ADJUDICATION COURSE 2005

The next courses are scheduled for

5 and 12 February 2005 and 19 March 2005

and later in the year on

24 September 2005, 1 October 2005 and 12 November 2005.

These courses will cover

DAY 1

- a detailed explanation of the *Construction Contracts Act*,
- the regulations, the code and the guidelines

DAY 2 (half day) the course will cover

- adjudication decision writing and an adjudication exercise will be distributed.

The adjudication exercise must be completed within 14 days

DAY 3 (half day)

- the adjudication exercises will be discussed and analysed.

The venue for the first 2005 course is yet to be decided.

WANTED - EDITOR for "the VIEW"

I have had the privilege of setting up "the View" *ab initio* (issue no. 1, vol 1 dated August 1990) and seeing it issued 6 times a year thereafter – the flow on effect is that we have a National Newsletter to support the ever-flow of information so essential in these times.

I find that it is time for another person to take the mantle for a whole number of reasons, least of all being my doctrine of "change is not always bad".

The time involved is not a lot, the rewards are immense.

If any person has a tinkering to play editor and wish to impost him/herself in this capacity, please call or e-mail me and I will go through the details.

Phil Faigen 9316 3025

From the Administrator's Desk

Welcome to new members:

<i>David Hodson</i>	<i>Computer software</i>
<i>Leslie Linton</i>	<i>Draftsman</i>
<i>Natasha Owen-Conway</i>	<i>Barrister</i>
<i>Ralph Unger</i>	<i>Engineer</i>
<i>Stephen Penrose</i>	<i>Lawyer</i>
<i>Richard Wilenski</i>	<i>Lawyer</i>
<i>Peter Loughton</i>	<i>Student</i>
<i>Anthony Kay</i>	<i>Lawyer</i>

The Practitioner's Certificate in Mediation & Conciliation

Congratulations to all 18 students who were assessed as competent following the October presentation of the Practitioner's Certificate in Mediation & Conciliation. Course presenters Archie Zariski and Su Lloyd did a fantastic job, along with the coaches and Chapter members who volunteered to undertake role plays on the final 2 days of the course.

Those who attended the course came from a wide range of professional areas – local government, medicine, law, engineering, public sector, human resources, environmental consultancy, community activist and aged care.

The Chapter plans to present the course in March 2005. See Registration form enclosed.

Professional Development Paper.

Copies of Natasha Breach's paper: "The current tendency to 'Appeal' an award on grounds of misconduct" is available from the Chapter Administrator. Natasha spoke to this paper at the Chapter's CPD session held in November.

Moving on:

After 3 years as Chapter Administrator, I have decided it is time for me to move on.....

Looking back over the last 3 years, the highlights for me have been the introduction of the Practitioner's Certificate in Mediation & Conciliation course. The course has generated new interest in the IAMA and particularly in mediation, the interest coming from many sectors and individuals. This has led to an increase in membership, the Chapter's decision to undertake a Mediation Strategic Planning session, the establishment of a Mediation group and more recently the introduction of Mediation Colloquiums. Since 2002 the Chapter's presentations of Introductory sessions on Arbitration, Mediation and Adjudication have been successful in reaching some 250 people. During the latter part of this year, the Construction Contracts Act 2004 was proclaimed. The Adjudication training was offered to Chapter members and further presentations of the training are planned for 2005.

Crystal ball-gazing sees 2005 as a time of challenges and more opportunities for the WA Chapter, enabling it to firmly establish itself as a key ADR organisation in this state. It seems the time is right to hand over the administrative responsibilities to someone who will look at things differently and support the Chapter to develop, meet new challenges and respond to the opportunities presented.

My thanks to the Chapter Committee and members for their support, advice, encouragement and patience over the 3 years. I have learnt a lot about ADR while in this position, and will take this knowledge and share it with others.

Sue

MD/IAMA/Mediation Group Colloquium #2_report

Mediation and The Family Court A Colloquium led by Colin Kaeser

Mediation of cases coming to the Family Court is not compulsory, although recommended and actively encouraged. Family Court mediators must comply with certain legislative requirements, but there are no penalties, as it is self regulated. Colin Kaeser is a qualified Family and Child Mediator. He shared some of his thoughts and observations with a group of twelve participants on 12 October 2004.

The issue of power and control differences between the parties was of particular interest. Most of Colin's experiences have been in Legal Aid Family Conferences (i.e. mediations). In those conferences, there is an initial screening done by a Legal Aid worker, and he does a 'corridor intake' on the day. Sometimes this leads to the decision to set up a shuttle mediation.

When offers are made, he arranges for the parties representatives to do the deliveries, so keeping himself out of the triangle. His experience of the overbearing and interjecting party is that firm insistence on the previously agreed rules, and insistence on staying strictly with the process, can be effective. Similarly, he has learned the power of (his) silence, particularly when the parties are stuck about how to resolve an issue.

The importance of the pre-mediation screening processes was again emphasized. Attendees agreed that further CPD work was needed on this topic.

In Family Law mediation, the interests of others than the parties – their children – must be considered. In his mediations, Colin "brings" the children into the session by encouraging the parties to talk about them and by putting their names prominently on the white board.

One notable exception to the general rules of mediation is that relating to rights of the parties to safety. The mediator is obliged to reveal the potential for danger to any of the parties or their families to the court, or the relevant authorities.

Mediation sessions in the legal aid model are typically limited to two or three hours. The parties are usually highly stressed and in crisis. So, in this circumstance, should the Mediator push the boundaries of the pure mediation model and put up possibilities of resolution that they might not have considered? Colin's answer to this is "yes, carefully", using questions such as "have you considered?" or "in my experience". This is a theme that rises again and again, regardless of the subject of the mediation.

There was considerable discussion about the matter of accreditation of mediators, specifically for family law matters, but also generally. Numerous benefits and problems were discussed. Who should provide "accreditation"?

Should there be ongoing training requirements to keep accredited status? Should there be penalties for failing to comply? Should there be accreditation in the first place? Is there a need for change to the current self regulated situation?

The question "how can I become a Family Law mediator?" was also asked. There are a number of bodies providing training in mediation that would satisfy the legislative requirements. Examples include AIFLAM, LEADR, RA and CentreCare. IAMA offers such general mediation training, but does not appear to be engaged in discussions regarding the accreditation question. Members felt that IAMA should be more proactive in this regard.

Colin’s presentation and the ensuing contributions and discussions by the attendees were well appreciated. There was an excellent discussion about difficult mediations, successful and not-so successful. The concept of success was touched on, reminding us that any outcome other than total abandonment might be considered ‘successful’. Those not working in the Family Law area doubtless broadened their knowledge.

The mediation colloquia continue to provide useful insights and connections of themes and ideas for those whom attend. The three mediation discussion sessions held in recent months have thrown up common themes. One of these, one which should give encouragement to those less experienced, is that of experienced mediators agonising over how better they might have handled a particular situation that arose in an earlier mediation.

PMB

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The Mediator of Commercial Disputes – An Agent of Reality
IAMA/colloquia/ colloquium #3_report

Colloquium 2 December 2004

Laurie James is well experienced in the mediation of commercial disputes. He was a good choice for leading this colloquium, the last in 2004.

Laurie knows how to tell a story – the timing, understatement, metaphor, external references and relevant diversions. His exposition of his approach to commercial disputes provided the stimulation for full participation by the twenty or so attendees.

Being a meeting of the mediation-minded, the questions were searching. The question “what is it that you bring?” eventually provided the revealing answer: “I am an agent of reality”.

Laurie James undertakes most of his mediation work in response to referrals from law firms. In his experience the mediations tend to be in short sessions after which parties go away to reconsider and rework their positions.

There was discussion on the need for dual, split or expanded mediations as other parties’ interests become apparent, such as when negligence may be raised as an issue and an insurance company’s interests are revealed. A valuable point was raised: that it is part of the mediator’s role to identify the parties.

The issue of a party’s lack of authority to settle was considered. This can be common, particularly with insurance companies and statutory authorities. So long as the situation is known, it can be managed.

The issue of mediation clauses in construction contracts; and the use of a mediation as a ‘fishing expedition’ was discussed (and surely will be again!).

One point of view was that this is not in the best interests of dispute resolution and that the one ‘fishing’ may gain an unfair advantage and that it is likely too early for any resolution. Another point of view was that, even if the mediation proves unsuccessful, it has the potential cause the parties to better focus; and the full facts would come out in arbitration anyway.

Members and visitors enjoyed the opportunity to mingle. The catering reflected the season. The informal abstinence policy was relaxed for the occasion.

PMB

WA Chapter CPD Program 2005

Date	Events & Topics	Contact Hrs	CPD Points
February			
5 th February	Adjudication Course – training under the Act	6	12
8 th February	Mediation Colloquium #1	2	4
12 th February	Adjudication Decision Making	3	6
16 th February	Chapter Committee Meeting & Chapter General Meeting	1 & 1	1 & 1
22 nd February	Breakfast Meeting	1	1
March			
16 th March	Chapter Committee Meeting	1	1
16 th March	Professional Development Session	1	1
17 th , 18 th , 19 th March & 1 st , 2 nd April	The Practitioner's Certificate in Mediation & Conciliation	40	30
19 th March	Adjudication Course – de-brief from training held on 5 th Feb.	3	6
April			
2 nd April	Mock Arbitration Workshop	6	12
5 th April	Mediation Colloquium #2	2	4
13 th April	Chapter Committee Meeting & Chapter General Meeting	1 & 1	1 & 1
26 th April	Breakfast Meeting	1	1
30 th April	Mock Arbitration – de-brief	3	6
May			
12 th May	Mediation Workshop 1 - Before the Mediation	2	4
18 th May	Chapter Committee Meeting & Prof Development Session	1 & 1	1 & 1
19 th May	Mediation Workshop 2 – In the Mediation	2	4
26 th May	Mediation Workshop 3 – After the Mediation	2	4
27 th - 29 th May	National Conference – 30 years & beyond – CANBERRA		15
June			
7 th June	Mediation Colloquium #3	2	4
15 th June	Chapter Committee Meeting & Annual General Meeting	1 & 1	1 & 1
18 th June	Arbitration Module 1 – Evidence; Practice; Contract; Procedure; Award Writing	6	12
July			
13 th July	Chapter Committee Meeting & Prof Development Session	1 & 1	1 & 1
23 rd July	Arbitration Module 2 – History of the Hearsay Rule with Role Plays; Contract; Pleading; Torts	6	12
August			
6 th August	Master Class – Grade 1 & 2 Arbitrators	6	12
9 th August	Mediation Colloquium #4	2	4
17 th August	Chapter Committee Meeting & Chapter General Meeting	1 & 1	1 & 1
27 th August	Arbitration Module 3 – Evidence; Evaluation; Estoppel; Procedure; Trade Practices; Award Writing	6	12
30 th August	Breakfast Meeting	1	1
September			
14 th September	Chapter Committee Meeting & Prof Development Session	1 & 1	1 & 1
24 th September	Adjudication Course – training under the Act	6	12
October			
1 st October	Adjudication Decision Writing	3	6
5 th October	Mediation Colloquium #5	2	4
6 th , 7 th , 8 th , 14 th & 15 th October	Practitioner's Certificate in Mediation & Conciliation	40	30
19 th October	Chapter Committee Meeting & Chapter General Meeting	1 & 1	1 & 1
25 th October	Breakfast Meeting	1	1
November			
12 th November	Adjudication Course – de-brief from training held on 24 th Sept.	3	6
16 th November	Chapter Committee Meeting & Prof Development Session	1 & 1	1 & 1
December			
6 th December	Mediation Colloquium #6	2	4
14 th December	Chapter Committee Meeting; Chapter General Meeting & Sundowner	1 & 1	1 & 1

Call for Papers

IAMA 30th Anniversary Conference 2005

Celebrating ADR Informing Inspiring Innovating

The Institute of Arbitrators and Mediators Australia is proud to announce its 30th Anniversary Conference to be held in May 2005, and is inviting expressions of interest for presentations at that Conference.

The Conference will be hosted by the ACT Chapter in Canberra – the location of IAMA's inaugural meeting in 1975.

There will be three streams in the Conference:

- General ADR innovation (eg, system design, standards, ethics, court and other referral programs)
- Consensual processes (eg, mediation, conciliation, facilitation)
- Decisional processes (eg, arbitration, adjudication, expert determination, court references)

IAMA will be using this Conference to showcase and emphasise its capacity to take the initiative and lead in ADR – preference will be given to practical papers with a focus on innovation and inspiration.

Times for presentations are 20 - 30 minutes plus questions/discussion.

All presentations will be followed by interactive discussions facilitated by IAMA's experts – emphasis will be on group participation and from-the-floor contributions.

Please submit your Expression of Interest (including a 50 word summary, the presentation time required and the Conference Stream you would prefer):

	Electronic submissions	Manual submissions
ACT Chapter Office	Act.chapter@iama.org.au FAX: 02 6260 7118	PO Box 5013 Kingston ACT 2604

Expressions of Interest must be received by COB Friday 31 December 2004.

The IAMA 30th Anniversary Conference 2005 Committee reserves the right to design the Conference Streams and does not guarantee acceptance as per your stated preference.



ABN 80 008 520 045

The Practitioner's Certificate in Mediation and Conciliation REGISTRATION DETAILS

NOTE: Cancellations received two weeks prior to the course will be charged a fee of 10%, within two weeks a fee of 25% will apply. A substitute registrant may attend at the applicable fee for that registrant. Registration occurs on receipt of payment.

Members are financial members at date of registration. New Membership applications attract the members rate provided the prescribed annual subscription to the Institute at the time of registration. Applicants who join at the time of registration for this course will also be eligible for a 30% discount on associate membership fees. IAMA reserves the right to change or alter the contents of the enclosed program and/or course presenters due to circumstances beyond its control.

Dates of: 17th, 18th, 19th March & 1st, 2nd April 2005
Location: St Catherine's College, NEDLANDS

\$1,840.00 (incl. GST) IAMA Members

\$2,050.00 (incl GST) non-members

Group Bookings * 3 to 5 = 10%

TOTAL: \$.....

THIS FORM BECOMES A TAX INVOICE/TAX RECEIPT ON FULL PAYMENT

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FORWARD REGISTRATION FORM & PAYMENT TO: IAMA WA Chapter PO Box 518 COMO WA 6952

Please send me membership information

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NADRAC's second national ADR research forum (round table) will be held on:

Friday 25 February (all day) and Saturday 26 February (morning) 2005 at Brookman Hall, City East Campus, University of South Australia, cnr Nth Terrace and Frome Rd, Adelaide.
(Our thanks to the University of South Australia, for organising the venue.)

The forum aims to optimise research in ADR by promoting information sharing and collaborative effort among those involved in conducting or commissioning ADR research and evaluation.

There is no charge for attending the forum but participants are expected to cover their own travel costs. If you are interested in attending, please e-mail an expression of interest (by 17 December 2004) to nadrac@ag.gov.au. The expression of interest should contain:

1. a key research question or area that you would like to discuss with others

Note: this should be limited to one to two paragraphs maximum: a full paper or research proposal is NOT required! The questions and research areas that you provide us will enable us to organise the workshop sessions.

2. relevant background material

Note: this is optional. However it would be useful if participants were able to read relevant information prior to the forum.

3. your contact details.

ie your e-mail, postal address and phone number.

Please circulate this information to others who may be interested.

If you have any questions about the research forum, please contact the convenor of the NADRAC research committee, Professor Tania Sourdin, on 03 9285 5201. Please note that NADRAC now has an e-mail notification service. To subscribe to this service, send an e-mail to lyris-admin@lstsvr1.ag.gov.au and, in the body of the message simply type 'subscribe NADRAC' ... then your name (eg 'John Smith').