



THE
INSTITUTE OF
ARBITRATORS
& MEDIATORS
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The

View

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Next Meeting ...

Annual General Meeting:
Wednesday, 20 June 2007 at 5.15pm
4th Floor, MBA Building, 35 Havelock St, West Perth


Jackson McDonald
lawyers

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- Letters to the Editor to Cal Pruiti: cpruiti@bigpond.net.au
 - Comments expressed in this newsletter are those of the author of the particular text and do not necessarily reflect that of IAMA or the WA Chapter unless so indicated.

LOCAL FOCUS: WA Chapter Chairman's Report

I mentioned in my last report that Wendy Brown was on leave from 6 April 2007 to 4 June 2007 and that she had arranged for correspondence and communications to be dealt with in her absence. My thanks go to Kim Doherty, Glynn Logue, Scott Ellis and Ian Johnstone who have all made extremely valuable contributions whilst Wendy was away. I am sure that they are pleased to see her return to take over the duties they have carried out.

I attended the 2007 National IAMA conference in Adelaide from 1 to 3 June 2007. The title of the conference *New Horizons in ADR* was supported by numerous excellent papers which in fact did propose *New Horizons*.

Laurie James offered useful insights into the new arbitration rules which incorporate the fast track arbitration rules. It will be interesting to follow to what extent these rules are adopted in the community. In my view, it will be up to practitioners in the various industries to promote these rules. I encourage you all to carefully review these rules and where possible encourage their use as I believe that this will be in the best interests of arbitration.

I was involved in the session which evaluated the various adjudication regimes. I noted with interest the difficulties encountered by the other states in relation to their legislation. In contradistinction, our *Construction Contracts Act* has had minimal exposure in the State Administrative Tribunal and the courts which is hopefully a sign of how well it works.

Another paper worth mentioning was that delivered by Albert Monichino entitled *Management of Expert Witnesses*. A number of thoughtful suggestions were made but one in particular was a proposal that at an early stage and as early as the preliminary conference the arbitrator gets to understand the issues in some detail and in conjunction with the parties a brief is worked up and only one expert is appointed. It leaves it open for the parties to engage their own experts but provided the brief to the single expert is properly prepared it may be unnecessary to incur the further costs of experts.

Now that the 2007 National Conference is over all eyes will be focused on Western Australia for our conference which is scheduled for April 2008. John Fisher is the convener of the sub-committee responsible for the 2008 National Conference and I am sure that he would more than welcome any suggestions or contributions which you may have. I am sure you are all aware of the enormous effort that it takes to arrange a conference and every bit of help will be greatly appreciated.

Graham Anstee-Brook
Chapter Chair – WA

NATIONAL HAPPENINGS: The Chief Executive's Report

The June CEO Report for *The View* is tending to smack of *Foreign Correspondent*. Last year I was writing from Palm Cove in Tropical North Queensland at the *Drawing a line in the Sand* Annual Conference hosted by the Queensland Chapter. This year it is the eve of *New Horizons in ADR* at Glenelg Beach, hosted by the South Australian Chapter. *Horizons* is shaping up to be the continuation of the past successes that the IAMA Annual Conference has developed into. Another excellent mix of speakers, the Conference will be opened by South Australian Chief Justice the Hon John Doyle, the keynote dinner speech by the Hon Andrew Rogers QC, visiting speakers from Malaysia and China. Registrations have reached similar numbers as in 2006, which was a record, so the South Australian organising committee headed by National Councillor Andrew Robertson are anxiously watching the final numbers. An added highlight is that Sandra Pursar of the Federal Attorney General's Department is bringing three Chinese lawyer participants in a program to widen Chinese knowledge of Australian legal practices. All of this is a promising prelude to the 2008 Conference in Fremantle in April 2008.

The preparation for the Annual Conference each year is part of a very busy period for the staff of National office. In the past few weeks, members will have been receiving the results of this activity. Editions of our journal *The Arbitrator & Mediator* and the newsletter *The IAMA News* have been distributed, publicity sent for the Conference, and the electronic distribution of the *2006 Annual Report*. This last item has been a primary focus for me as it requires finalisation of all outstanding accounts at the end of our financial year on 31 December, generation of the end of year adjustments, and the audit process. The 2006 result was a modest profit, but a welcome change from the negative results of the prior two years. The Annual reports are distributed electronically, with a small print run to provide copies for members at the Annual General Meeting at the Annual Conference. If any members do not have electronic access and would like a printed copy, please contact National Office.

One of the announcements to be made at the Conference will be the launch of *The Arbitration Rules (incorporating the Fast Track Arbitration Rules)*. This event follows a review of the existing rules by the National Arbitration Committee, and the recognition of the need for parties to have access to processes for fast track resolution.

In other areas of interest, the changes to the *Security of Payments* legislation in Victoria has meant that the 60,000 Registered Building Contractors in that State will be required to attend PD sessions on the new changes. The Victorian Chapter has joined with the largest metropolitan TAFE college and will be providing general overview seminar sessions as well as individual sessions for both Claimants and Respondents. The period for Family Law mediators to convert their registration to practice under the new legislative changes finishes

on 30 June 2007. A series of seminars have been conducted throughout Australia to explain the transition processes, and if any members are not sure, they could contact Barbara Kwiecien, who attended the Perth session. The encouraging feature of the new requirements is that the implementation team attended the National Mediation Conference 2006 in Hobart and consequently, a 40 hour mediation course will be a prerequisite for future registration.

The Professional Certificate in Arbitration, the Institute's pre-requisite training for grading as an Arbitrator which is delivered by the University of Adelaide, is now taking enrolments for the 2008 intake. There was no intake for 2007 and the Board of the joint venture between IAMA and the University is expecting that this will mean a greater interest for 2008.

The first half of the year has also been productive for our International relationships. The Singapore Institute of Arbitrators is sponsoring the first Regional Arbitral Institutes Conference from 12-13 July 2007, and Vice-President Professor Ian Bailey SC is speaking on our behalf. Following the discussions, that immediate Past President Tim Sullivan held in Hong Kong in February, Senior Vice-President Professor Angela O'Brien will be meeting the group of overseas members of IAMA who live there, during her visit in July. Overseas members are a small but expanding section of our membership.

My apologies for this truncated contribution,

Regards,

Gordon Tippet
Chief Executive Officer

INSIDE THE CHAPTER: The Chapter Administrator's Report

Having been overseas for the last seven weeks I have nothing to report on the Institute front, however here are some things that struck me as noteworthy on my travels

- At Hong Kong airport I was tested for explosives ... but at Dubai I didn't even have to go through customs.
- I just walked off the boat from Turkey into Italy ... but was frisked at Rome airport.
- How do they check the passport photos of women who wear the head-to-toe veil?
- Dubai Airport is a shopping mall masquerading as an airport.
- Traffic in Cairo is a moving car park. My guide said that to be a good driver you need "a good horn, good brakes and good luck" ...and "meters in Taxis and lines on the road are just there for decoration".
- Every B&B in England has a different shower mechanism.
- A Turkish bath is not to be taken lightly!!!
- You meet the nicest people when travelling.
- Things I wish I had taken with me ...
 - a collapsible beaker for water
 - a small kettle to boil water instead of having to buy it
 - a universal plug for basins that don't have any
 - bath gel
 - a plastic mac.
- My most extravagant purchase ... \$17 for a bowl of ice cream in Rome
- Best line ... "I don't know what you are looking for but I have it!" (Cairo markets)
- Best poster ... "Concrete – it's all about style" (Dubai)
- Best artefact ... "a rare 18th Century telescopic Lark spit" (for sale at just £295 in The Olde Gate pub, Brassington, Derbyshire)

Wendy Brown
WA Chapter Administrator

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Notice of Annual General Meeting

Notice is given that the Annual General Meeting of The Institute of Arbitrators & Mediators Australia (WA Chapter) will be held at the Master Builders Association, 4th Floor, 35 Havelock St, West Perth on:

Wednesday, 20 June 2007 at 5.15pm

Agenda:

1. Welcome visitors & guests
2. Apologies
3. Minutes of the Annual General Meeting held on 15 June 2005
4. Chairman's Report
5. Announcement of Committee Members for 2006-2008
6. Minutes of the previous General Meeting
7. Matters Arising
8. National Council
9. Chairman's report
10. Working Party reports
 - 10.1 WADRA
 - 10.2 University Arbitration Course
 - 10.3 National Mediation Course
 - 10.4 Mediation
 - 10.5 Certificate in Adjudication
 - 10.6 Current Training Programs
11. Any other business (of which due notice has been given by Wednesday 13 June 2007)

Members and guests are cordially invited to enjoy some light refreshments following the meeting.

To assist with catering please RSVP your intention by Wednesday 13 June 2007 to:

Wendy Brown
P: 9201 0564
F: 9201 0563
E: wa.chapter@iama.org.au

Minutes of the 2006 Annual General Meeting of THE INSTITUTE of ARBITRATORS & MEDIATORS AUSTRALIA – W.A. CHAPTER

Held at the Master Builders Association, 35-37 Havelock Street, West Perth on Wednesday 21 June 2006.

Present: G Anstee-Brook – Chairman, K Doherty, B Tonkin, L James, I Johnstone, G Logue, B Kwiecien, J Fisher, C Pruiti, A Dickson, J Luxford, J Mercer, A Swann, D Johnston, R Machell, D Court, C Herriman, T Brand, B Phillips (19 members)

In attendance: W Brown – Chapter Administrator, Alex Durning - member's guest

Meeting opened: 5.15pm

1 Apologies: S Ellis, D Moss, P Byrne, C Raymond, S Lloyd, M Kroon, G McPhail, P Evans, A Ednie-Brown (9 members)

2 Minutes: *That the Minutes of the Annual General Meeting of 15th June 2005 be received as correct*
 Moved: B Tonkin Seconded: I Johnstone Carried

3 Chairman's Report:

This last year has been a very enjoyable one for me. The Committee has done a fantastic job, having worked very hard and very enthusiastically on behalf of the members. They have assisted me as Chairman very much - many thanks.

From 3 January last year until now we have had 24 Arbitrations, 12 Adjudications and 2 Mediations.

The Arbitration course this year is on line, as it was last year. Last year's Arbitration Master Class was well attended. We have had some very good CPD sessions, with David Malcolm a highlight. Thanks to Glynn Logue.

Mediation Colloquia have been very successful and so well attended so that we are making a venue change from Mt Lawley to St Catherine's, which is more central, has more space and better parking.

Committee members Laurie James, Ian Johnstone and Scott Ellis, as well as some Chapter members attended the Workchoices course in the eastern states.

We gave a prize for the school which had most involvement in the SCRAM competition and one teacher from that school will be attending the Mediation course in October free of charge.

The Adjudication Course that was planned did not go ahead. IAMA has trained 53 adjudicators and many others have been trained by MBA and other organisations. There is not a great call now for further courses however we will call for expressions of interest again for October.

We launched a Bunbury branch of the Chapter but so far have been unable to organise a CPD session there. This needs to be locally driven and we will keep trying.

The View has been very well produced - thanks to Cal Pruiti and his relentless pursuit of timely contributions from me and others. My thanks also to Wendy Brown for her work and assistance to me personally.

There has been a growth in Chapter's Numbers to 200, however this may be skewed because of people not having paid their fees for 2006 but who are still on the books. Nevertheless there has been a net increase in numbers, most of which have come from the Mediation Courses.

National Committee elections have just been held and congratulations to Laurie James who was elected National President and is proudly wearing the recently dry-cleaned, one-and-only President's tie. I was also elected to the National Council and will be Chairing the Ethics and Professional affairs Committee.

WA will be hosting the 2008 IAMA National Conference. It is normally scheduled for May but may be earlier depending on the availability of the audited financial figures. The recent Conference at Palm Cove in far north Queensland attracted 200 attendees. I will be calling for assistance among members and the Queensland and South Australian Chapters have also offered assistance.

2006 - 2008 Committee: Graham Anstee-Brook
Kim Doherty
Scott Ellis
John Fisher
L James
Ian Johnstone

Barbara Kwiecien
Su Lloyd
Glynn Logue
Barry Tonkin
Peter Byrne (co-opted)
Clive Raymond (ex officio)

2006 - 2007 Office Bearers: Chairman: Graham Anstee-Brook
Vice-Chairman: Kim Doherty
Treasurer: Barry Tonkin

2006 - 2007 Executive: Chairman, Vice-Chairman and one other member, Barbara Kwiecien.

The Annual General Meeting was closed 5.35pm and was immediately followed by a General Meeting, the Minutes of which were published in the August 2006 edition of The View.

Minutes of the April 2007 General Meeting

Minutes of the General Meeting of the WA Chapter held on the 4th floor, Master Builders Association, 35 Havelock St, West Perth on Wednesday, 18 April 2007.

Present: G Anstee-Brook- Chairman, Kim Doherty (Vice Chairman), Barry Tonkin, Glynn Logue, Scott Ellis, Clive Raymond and Nova Oldfield.

In attendance: G Logue (Committee Member)

Meeting opened: 5.15pm

1 **Apologies:** L James, John Fisher and Wendy Brown (Administrator)

2 **Adjournment:**

The meeting was adjourned at 5.15pm due to the limited number of attendees.

A Q&A session was conducted with those in attendance.

Next Meeting - AGM: Wednesday 20 June 2007 at 5.15pm at the MBA, Havelock St, W Perth

Signed as a true record of proceedings

(Chairman)

(Dated)

ARBITRATION

PART2

ASSESSING EXTENSIONS OF TIME IN CONSTRUCTION CONTRACTS: COMMON CONTENTIOUS ISSUES IN DELAY ANALYSIS

By Tony Farrow¹

Part 1 of this article, regarding approaches for investigating project delays and the assessment of causation and entitlement to extensions of time, appeared in the previous edition of The View. Part 2, which appears below, summarises common contentious issues in delay analysis. Both Part 1 and Part 2 were originally published in the Trett Digest (<http://www.trett.com/digest>).

In last month's edition of The View, two broad approaches to delay analysis were outlined; theoretical and actual.

When establishing the best method of delay analysis for your specific circumstances, it is sometimes necessary to deal with a number of other issues. These include concurrency of delay events, ownership of program float and the dominance theory.

CONCURRENCY

The SCL Protocol defines concurrency in the following way (Appendix A, page 53):

True concurrent delay is the occurrence of two or more delay events at the same time, one a Principal Risk Event, the other a Contractor Risk Event and the effects of which are felt at the same time. The term 'concurrent delay' is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time. To avoid confusion, this is more correctly termed the 'concurrent effect' of sequential delay events.

Essentially, concurrency seeks to consider the situation where both the Principal and the Contractor are causing delay and the question is, does the Contractor get an extension of time? The proposition in the SCL Protocol is that the contractor does get the extension of time but he is only entitled to any extra costs (damages or loss and expense) incurred as a specific consequence of the Principal-caused delay. This basically means that if the Contractor is able to identify extra costs at the activity or event level, he recovers these but not the general running costs of the project (refer to paragraph 1.10.4 of Guidance Section 1). On the other hand, the Principal foregoes recovery of liquidated damages.

¹ Tony Farrow is Managing Director of Trett Consulting, an international multi-disciplinary consultancy firm specializing in the provision of commercial and contractual advice to the construction and engineering industries. Their Australian Offices are managed by their Director, David Court (david.court@tret.com).

Examples of the SCL Protocol's position on concurrency are set out in its Appendix D but there are a number of very important issues to consider:

1. The Protocol is possibly at odds with Anglo / Australian Law, which it recognises at paragraph 1.4.11 of Guidance Section 1. The alternative position on concurrency is that the most 'dominant' delay event (which might be considered the longest or most critical) decides liability and entitlement. Hence, to follow the Protocol could be to ignore the law (that is, unless the parties have signed-up to the Protocol).
2. It is argued that concurrency only occurs where two events are actually delaying the progress and completion of the project. For example, if a Contractor is digging out a basement on Monday but his plant breaks down and production stops, it is said that he cannot claim there was a concurrent delay on Monday because he still had not received the next set of drawings which would allow him to progress with the next stage of the basement. Only when the contractor had finished the digging of the basement and was ready to commence the next stage, would the works be delayed by outstanding drawings. Essentially, it is said that any event must be delaying or impeding current progress for it to be considered a 'delay event'; when there are two or more of these events occurring at the same time, then there is concurrency.
3. If the project is in delay for which there is no entitlement of extension of time and a Principal causes a further delay after the contractual date for completion by issuing a late variation or changed requirement, it is said that the Contractor's entitlement is assessed on the 'net' method not the 'gross' method. By this, I mean that the extension of time is calculated by reference to the period of time needed to deal with the Principal-caused event, and this period is added on to the contract completion date; one does not consider the timing of the event and measure delay from that date.

OWNERSHIP OF PROGRAMME FLOAT

I mentioned earlier that there are critical and non-critical parts of a programme. Delays to critical parts cause the project's end date to overrun whereas delays to non-critical parts will only cause the project's end date to overrun when the entire available float on that part has been used up. A common question in delay analysis is, if a Principal causes delay and uses up the float, is a Contractor entitled to be compensated for the loss of it?

If the project owns the float, then the party using it first has the benefit. If the Contractor owns the float and the Principal uses it, the Contractor ought to be compensated, either by the return of the float or by payment of extra cost.

DOMINANCE THEORY

I have mentioned that where there are two or more events causing delay to the project at the same time, this is termed concurrency. Where there are concurrent Principal-caused and Contractor-caused delays, there is a legal argument which says that the delay is allocated to the more dominant of the concurrent events. Hence, if the dominant event is found to be a Principal risk event, then a Contractor is awarded an extension of time for the delay. However, if the dominant event is a Contractor risk event, no extension is allowed.

All these issues need to be considered against the facts of the case, the terms of the contract and the laws governing the contract. Even then, the choice between grant of extension of time or imposition of liquidated damages is often dependent on the skills of the professionals engaged to pursue or defend the Contractor or Superintendents position.



ARBITRATION cont...

NEW GENERATION ENTERPRISES PTY LIMITED -v- WESTERN AUSTRALIAN PLANNING COMMISSION [2007] WASCA 89

By Graham Morrow Lawyer, Quantity Surveyor, Arbitrator & Adjudicator, Downings Legal, Perth, WA

The subject matter of the arbitrated dispute under consideration by the Western Australian Supreme Court concerned the value of land (& method of valuing land) just south/east of Mandurah, under a regional planning scheme. Under the *Western Australian Planning Commission Act 1985 (WA)* (“**WAPC Act**”), an arbitration arose by virtue of sections 31(1), 32(1) and 32(2). Following a claim for injurious affection, and the Western Australian Planning Commission electing to acquire the land in lieu of paying compensation, the issue for determination was the price at which the land was acquired as determined by arbitration under the *Commercial Arbitration Act 1985 (WA)* (“**the Act**”). This review does not consider the planning issues discussed by the Court.

An appeal was sought from the Award made under sections 31 and 32 of the WAPC Act. Section 38 of the Act was given detailed consideration and application by Their Honours. Section 38(4)(b) indicates that leave to appeal an arbitration Award can only be granted if the court considers that:

- 38(5)(a) *having regard to all the circumstances the determination of a question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and*
- 38(5)(b) *there is:-*
- (i) *a manifest error of the law on the face of the award; or*
 - (ii) *strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add or may be likely to add, substantially to the certainty of commercial law.*

Following detailed consideration of the grounds raised, Pullin J found there was no error of law by the arbitrator in his Award in regard to the correct application of the Pointe Gourde Principle (for valuing land), or how the arbitrator had dealt with the evidence before him.

The Court then considered the remainder s35 of the Act and dismissed appeal against the arbitrator’s Award. In doing so, the Court stated:

- there is no error of law in making what is only a wrong finding of fact – *Waterford v Commonwealth* (1987) 163 CLR 54 at 77;

- there is no error of law in a wrong finding of fact even where the court or arbitrator's reasoning was demonstrably unsound – *RV District Court; Ex parte White* (1966) 116 CLR 644 at 654;
- if there exists the basis for a reasonably open inference then no error of law occurs – *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 of 356;
- if an error of law is found to exist, it will be “manifest” where there exist “powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law” – *Lamac Development Pty Ltd v Devaugh Pty Ltd* (2002) 27 WAR 287 at 318-9;
- a non-legal arbitrator is given greater leeway when considering whether the arbitrator's error of law is ‘manifest’ – *Masawa Austrasia Pty Ltd v J Corp Pty Ltd* [2000] WASC 5 at 5;
- non-legal arbitrators are cut more slack than legally trained arbitrators or judges;
- the underling policy to be applied to s 38 is that parties should be free to choose arbitration without the shadow of the court's over critical eye. The 1997 amendments to this section was enacted to strengthen the restriction against the grant of leave to appeal an award – *Ukranian Association of Western Australia in Perth (inc) v Squire Constructions Pty Ltd* [2004] WASC 4.

Pullin J considered this question of whether the determination of any question may (or be likely to) add substantially to the certainty of commercial law. This submission was made of the Pointe Gourde principle, which was conceded as settled law, but contended that the application of the principles to the facts would pass the certainty test.

The issues raised in seeking to overturn the arbitrator's Award were considered by His Honour to be matters which would only concern the parties in dispute, and therefore fail the ‘certainty’ requirement of section 38(5)(b)(ii).

This case confirms that an arbitrator in any Award, in order to reduce the likelihood of any appeal under s 35, should always:

- 1 refer to the evidence presented;
- 2 consider the evidence and give reasons why the evidence is preferred, qualified or not preferred (as the case may be);
- 3 give clear reasons; and
- 4 respond adequately to the issues raised for determination.



MEDIATION

'THE LIABILITY OF ADR PROVIDERS' – A Summary of a Colloquium Held on 17 April 2007

By Peter Byrne

The first part of the colloquium was lead by Laurie James. Laurie first considered the potential liability of arbitrators and adjudicators.

Arbitrators are not liable for claims for negligence under the Commercial Arbitration Act. Laurie recounted the one instance of which he knew of an arbitrator who took on the defence of his own award. In doing this, he became a player and so made himself exposed to the possibility of costs being awarded against him. So the message, not a new one, is for the arbitrator to not take challenge of an award personally and to not enter the process. Laurie: "It has to be your decision. You are at liberty to get things wrong."

Adjudicators are similarly placed.

Mediators' liability was the subject that took up much of the rest of the evening. Laurie provided a synopsis of *Taphooi v Lewenberg*. In this matter, the mediator, a well recognised barrister, undertook a mediation about distribution of a substantial estate. One of the parties was in another country. Parties were represented by legal professionals. The Plaintiff took action against the solicitor because of the possible effect of taxation issues applying to the mediated settlement and the solicitor brought in the mediator as a third party. The case against the mediator rested on the claim that the mediator would provide advice on any proposed settlement.

In discussing this case, Laurie observed that it is wise for the mediator to have the agreement drafted by the lawyers. The importance of the Mediation Agreement was again emphasized. (Look out for a new model Mediation Agreement from IAMA soon). And then there was the matter of the time in which the mediation took place; and the responsibility of a mediator to look out for the interests of the parties. The case was settled, but the observations of the Judge raised some points for consideration by mediators.

There were other stories brought forward. Action was taken against a family law mediator in Queensland. It appears that she had drafted an agreement that was entered into and the words were later subject to other interpretation. The matter was settled out of court, however it had the potential of causing her to lose her home. She gave up mediation. In another matter closer to home, a mediator was subpoenaed to give evidence in a matter that she had mediated. She pleaded that she was bound by confidentiality, the magistrate disregarded that and she gave evidence under protest. The cost of her legal advice was considerable.

This led to useful discussion on the subject of confidentiality. Some mediators tell parties they will destroy their notes when the mediation is ended. The question was asked: “what would be the attitude of a PI provider to this common practice?” Would an insurer expect a mediator to keep notes? One mediator said that he keeps all correspondence regarding the arrangements of meetings and of shared documents, but destroys records of private meetings.

Another question posed was: “are lawyer/mediators more at risk than mediators without a legal foundation?” There is little doubt that some mediators act as conciliators and so do have a greater duty of care as they provide some level of advice to parties.

The range of interpretations of “confidentiality-in-mediation” around the room raised the possibility of another evening on just that subject.

Barbara Kwiecien had done some homework on the subject. She had found that there had been a number of actions against mediators in North America for: breach of confidence, Conflict of Interest, libel and slander, unauthorized practice of law, incorrect technical advice and fraud. There are only sketchy details available.

In summary, the lessons that came through were:

- For the ADR determinators – arbitrator, adjudicator – the awards are their decisions and they are at liberty to get things wrong;
- For mediators and conciliators, do not proceed without an agreement that defines roles and rules; avoid agreement drafting when there are legal representatives; look out for the interests of the parties in all respects (no twelve hour sessions!)

This session was arranged in response to expressed members’ interest in the subject. It seems there is enough interest in the subject of confidentiality to have a meeting devoted to that.



MEDIATION cont...

MEDIATION – A RECENT CASE CONSIDERING THE WITHOUT PREJUDICE NATURE OF MEDIATION AND WHEN IT DOES NOT APPLY

By Graham Morrow Lawyer, Quantity Surveyor, Arbitrator & Adjudicator, Downings Legal, Perth

The recent mediation colloquium led by experienced mediators, IAMA Chairman Laurie James and Barbara Kwiecien, raised for discussion various issues including the issue of privilege in mediation. This subject was considered to be a possible subject for a future colloquium. It was recently considered further in the UK by High Court Deputy Judge Stuart Isaacs QC, in *Brown v Rice and Patel* [2007] EWHC 625 (Ch). The reviewer suggests that the comments are applicable to mediations in Australia.

Brown v Rice – Background

By way of introduction, His Honour in this case commenced by stating:

“This case raises interesting, and to some extent, novel issues concerning the scope and application of the without prejudice rule and the exceptions to it in the context of mediation, one of the most common means of alternative dispute resolution.”

A mediation occurred, following a bankruptcy / matrimony / property sale dispute. The parties signed an agreement to mediate and proceeded to mediate for 13 hours until late in the evening, without reaching settlement. The parties had been represented at the mediation by solicitors and counsel.

The Applicant alleged that a settlement was reached the next day, which was disputed by the Respondent, who then sought a court declaration that there was no settlement agreement. The mediator was asked to attend the proceedings by the County Court judge, and did so without being required to give evidence. The issue of whether the matter was settled or not was remitted to the High Court, and ordered to be heard as a preliminary issue. Evidence was heard by agreement without prejudice as to its admissibility.

The “Without Prejudice” Rule

His Honour indicated that there are two well established justifications for this rule:

1. the underlying public policy that parties:
 - (a) should be encouraged to settle their dispute without resort to litigation; and
 - (b) should not be discouraged by the knowledge that what transpires in the course of negotiations may be used against them in litigation; and
2. the express (or implied) agreement of the parties (between themselves) that what transpires in their negotiations should not be admissible in evidence in the litigation, if a settlement does not result.

In *Unilever plc v The Proctor and Gamble Co* [2000] 1 WLR 2436 His Honour, Walker LJ, identified various situations where the without prejudice rule does not prevent the admission into evidence of what a party (or parties) said or wrote. In *Brown v Rice*, the relevant context was:

1. where the issue is whether without prejudice communications have resulted in a concluded agreement between the parties; and/or
2. where a clear statement by one party on which the other negotiating party relies may give rise to an estoppel.

Mediation and the “Without Prejudice” Rule

There is a clear public policy to encourage mediation over litigation as a preferred means of resolving disputes, for example as espoused in the various court rules, both in the UK and Australia.

Probably without realising, His Honour has provided yet another definition of mediation; “mediation takes the form of assisted without prejudice negotiations”. He noted generally that what occurs in mediation is privileged, and if the mediation is unsuccessful it generally cannot then be relied on (or referred to) in subsequent court proceedings. No distinction was made between negotiations between the parties and those involving a mediator – both are subject to this without prejudice rule, and therefore subject to the exceptions to the rule as noted in *Unilever* (above).

In *Brown v Rice*, a distinct mediation privilege was argued. It was alleged under this rule that a mediator could not be requested to appear as a witness or produce his/her records of the mediation, and further that the parties could not waive the mediator’s right to not do so. His Honour, who indicated that the case before him fell ‘fairly and squarely’ within the recognised exception to the rule as stated in *Unilever*, did not accept this argument. The mediation was viewed as having the same status as without prejudice negotiations. His Honour suggested that:

“it would be an odd result if in any given case the Court was prevented from determining the existence of a concluded settlement solely because the alleged settlement arose within the context of mediation”.

A further submission was made that a provision of the mediation agreement (stating that settlement did not occur until there was a signed agreement in place) prevented the Court peering into the events of the mediation to ascertain if there had been a concluded settlement. This was given short shift by His Honour, who then considered the confidentiality claim (“clause 7”) in the agreement to mediate.

A clause similar to clause 7 was considered in *Aird v Prime Meridan Ltd* [2006] EWCA CIV 1866 where the Court of Appeal considered it was a clause aimed at reinforcing the without prejudice nature of the mediation. This clause:

“... could not be taken absolutely literally because it obviously did not apply to documents produced for other purposes, such as the antecedent pleadings in the litigation, which were needed for and produced at the mediation, but that the general intent of those provisions was clear and associated with the without prejudice nature of mediation”.;

In reviewing its purpose, His Honour considered that it was “... permissible and indeed necessary for the Court to consider the evidence relating to the issue whether there was a concluded settlement in this case”.

A Binding Agreement?

The mediator explained to the parties at the commencement of the mediation that there could be no settlement until a written settlement agreement had been signed by the parties. The mediator also kept contemporaneous notes of the mediation proceedings and issued a letter to the parties following the mediation. Both of these documents were given in evidence, and accepted by His Honour, unusually without the normal court requirement of giving oral evidence to substantiate documentary evidence where possible.

In concluding that an offer had been made, His Honour emphasised the experience and independence of the mediator in preferring the written evidence of the mediator to the other available evidence.

His Honour also considered the terms of the offer and noted that the litigation proceedings on foot could have been disposed of in either of two different ways. Each would have had a different consequential result and effect on the parties. Because the offer did not include an agreement provision for disposal of the litigation, His Honour found that the offer was incomplete and would not have given rise to a completed agreement, even if found to be accepted. In other words, the offer was not sufficiently certain to be capable of acceptance.

In addition, the offer was not contained in any signed agreement of the parties, and mediation did not therefore settle the issues between the parties, in accordance with the relevant mediation agreement clause.

As an aside, his Honour confirmed that:

- an offer made in without prejudice negotiations is “*covered by the cloak of the without prejudice rule*”, unless made on an open basis;
- an offer left open at the end of a mediation for a specific time period is made “*in the mediation*”.

Comment

Not all mediation discussions are protected by the without prejudice. Mediators should be aware that what occurs in mediation will not always stay in mediation. In some circumstances, mediators can be required to give evidence in a subsequent dispute about what was agreed at mediation.



NOTICE BOARD



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Photographer for **CONFERENCE 2008**
Contact John Fisher 0438 905 056

PROFESSIONAL DEVELOPMENT SESSION

18 July 2007

5.15pm

4th Floor, Master Builders Association, 35 Havelock St, West Perth

Personal Experiences with Adjudication
under the *Construction Contracts Act 2004*

Barrister **Roger Davis** and Solicitor **Graham Morrow** have kindly agreed to speak to the Chapter membership about their personal experiences of adjudication since the introduction of the *Construction Contracts Act 2004*.

Of particular note, these two speakers will comment on the sophisticated and not-so sophisticated players and the different challenges that each present to the adjudicator. In doing so, they will explore the power that the adjudicator has under s32 of the Act to request additional information and documentation to clarify or supplement the parties' written submissions.

This is a rare opportunity to gain insight into the realities of working as an adjudicator.

There is **no fee** for this session and no need to RSVP. Refreshments will be provided afterwards.

19
THE
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—  —
AUSTRALIA

CONFERENCE 2008

Fremantle, Western Australia

11-13 April, 2008

The Institute of Arbitrators & Mediators Australia (IAMA) is the nation's largest, independent and most experienced alternative dispute resolution (ADR) organisation. Founded in 1975, its membership comprises Australia's most eminent and experienced ADR professionals drawn from a diverse range of sectors including commerce, law, construction, education and government.

The 2008 Conference will bring together ADR experts from Australia, Asia and around the world. It will present unrivalled opportunities to network and improve knowledge in arbitration, mediation, conciliation, adjudication and expert determination.



Located just 20 minutes from Perth City and 30 minutes from the airport, Fremantle is renowned as one of WA's premier tourist destinations. Nestled against the Indian Ocean, it is rich in heritage and history and boasts a vibrant street culture extending from early morning well into the evening.

For those wanting to take advantage of their visit to WA, there are a host of places available for day trips or short stays. Get away to the holiday island of Rottnest; the Margaret River wine region or the beaches of Yallingup to the south. From Perth or Fremantle you are just minutes away from a sunset on the coast, a round of golf, a win at the Casino, wine tasting in the Swan valley, and fine dining in any number of establishments ranging from casual and relaxed to silver service.

The Conference is being held in the elegant and relaxed surroundings of the Esplanade Hotel.

This 'Grand Old Lady' of Fremantle combines the elegance of yesteryear with the service and facilities of today and is only a short walk from both the ocean and the centre of town.



IAMA National Conference 11- 13 April 2008
Esplanade Hotel, Fremantle
Western Australia

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NAME: (please print)

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Colloquium # 3

Community/Multi-party Mediations Organisation and Management

Tuesday 19th April 2007

6.30 – 9.00pm

(Refreshments will be served before the start of the colloquium)

Trinity Residential College

Council Room on the ground floor near the Administration wing
on the west side of the campus.
Entrance ... 230 Hampton Rd, Nedlands

In this colloquium the **organisation and management** of multiparty mediations will be scrutinized.

Mr Ben Schoeman, formerly a consultant in conflict management for more than a decade in South Africa will make a short presentation of a large multi-party process he mediated, highlighting some key issues of management, administration, planning and design.

Ms Mary Power of Henderson, Power and Associates will contrast the planning of a community mediation; what things to look out for, management, strategies and how to ensure that the right people are in the room.

Free flowing discussions will follow and cover:

- planning and administration issues
- known experiences
- a cautionary tale
- potential for disasters
- other management measures

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If paying by cheque/money order please make it payable to: Institute of Arbitrators & Mediators
and post to: WA Chapter, PO Box 558, Leederville, 6903 [Receipts given out on the night]

WA CHAPTER CPD PROGRAM: June-Sept 2007

Date	Events & Topics	Time & Place	Enquiries
June			
Friday - Sunday 1 - 3	IAMA National Conference 2007 (15 CPD points)	Glenelg, South Australia	Gianna Totaro T: 03 9607 6908
Tuesday 19	Mediation Colloquium #3 Organisation and Management of Community/Multi-party Mediations Coffee/tea and light meal provided) (2 hours for 4 CPD points)	6.30pm - 9.00pm Trinity Residential College Hampden Rd Nedlands	Wendy Brown T: 9201 0564
Wednesday 20	IAMA WA Chapter Annual General Meeting (Refreshments after) (1 hour for 1 CPD point)	5.15pm Master Builders Assoc 4 th Floor, 35 Havelock St West Perth	RSVPs to Wendy Brown T: 9201 0564
July			
Wednesday 18	Professional Development Session Personal Experiences with Adjudication under the Construction Contracts Act (Refreshments after) (1 hour for 1 CPD point)	5.15pm Master Builders Assoc 4 th Floor, 45 Havelock St West Perth	No registration required
August			
Tuesday 14	Mediation Colloquium #4 (Topic yet to be announced) Coffee/tea and light meal provided) (2 hours for 4 CPD points)	6.30pm - 9.00pm Trinity Residential College Hampden Rd Nedlands	Peter Byrne M: 0428 381 413
Wednesday 15	Chapter General Meeting followed by a Question and Answer Session (Refreshments after) (1 hour for 1 CPD point)	5.15pm Master Builders Assoc 4 th Floor, 35 Havelock St West Perth	No registration required
Wed - Fri 22,23,24 and Fri - Sat 30,31	Practitioner's Certificate in Mediation Presenters Archie Zariski & Su Lloyd (40 hours for 30 CPD points)	8.30 - 5.00 St Catherine's College Stirling Hwy Nedlands	Wendy Brown T: 9201 0564 Registrations essential
September			
Saturday 15	Arbitration Master Class (Morning/afternoon teas & Lunch provided) (6 hours for 12 CPD points)	9.00am - 4.00pm Mt Lawley Professional Centre 99 Central Avenue Mt Lawley	Wendy Brown T: 9201 0564 Registrations essential
Wednesday 19	Professional Development Session (Refreshments after) (1hour for 1 CPD point)	5.15pm Master Builders Assoc 4 th Floor, 35 Havelock St West Perth	No registration required

Chapter Committee Meetings are held on the third Wednesday of every month at 4.00pm (1 CPD point).

WA CHAPTER COMMITTEE CONTACT DETAILS

The Committee can be contacted for any matter relating to the Institute.

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National Councillor

Chairman Ethics and Professional Affairs Committee

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