# President's Message

As an organisation committed to the peaceful resolution of conflict, on behalf of the Institute I would like to express our deepest sympathy to the people of the United States of America and all other nations who lost loved ones in the violence and terror which struck Washington, Pennsylvania and New York on 11 September 2001. The world community is diminished by these criminal acts, and united in grief. The horror and disbelief we felt as we witnessed the attack on the World Trade Centre will never leave us; nor will our tremendous admiration for the courage, tenacity and spirit of sacrifice of the rescuers. They have reminded us of the best of humanity in the face of the worst.

Through dialogue and exchange, the great principles of resolution, we may yet achieve peace. If we can do so, it will be a fitting tribute to those who died so tragically on 11 September, and to the many others in the world whose suffering we have not witnessed, mourned or marked.

Closer to home, the Institute held its National Colloquium in Canberra, *'AMA — The Next 25 Years* on 25 - 27 May 2001. I am pleased to say that this was the best-attended Institute function I can recall in more than 20 years as a member of the Institute.

As well as the discussion sessions (and social functions) which provided a great opportunity for delegates to meet and exchange ideas on the Institute and its future, the Colloquium program included some thought-provoking presentations from eminent speakers on the future of arbitration and ADR in Australia. We hope to publish those papers in future issues of *The Arbitrator & Mediator*.

In his paper, 'The State of ADR in Australia', Professor Laurence Boulle dealt with whether Australian ADR is keeping abreast of global trends in dispute resolution, and said that Australia is regarded as one of the two mature ADR environments in the world (the other being the USA).

The Institute has taken a leading role in promoting resolution of disputes in a timely and cost-effective manner, dating back at least to the various papers delivered at our 1996 National Conference. Our commitment is reflected in our *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)*, and our various education and CPD activities.

I have found that there is a good deal of overseas interest in what we have done in Australia to make commercial dispute resolution more efficient and

cost-effective. This seems to indicate that arbitration and ADR practice in Australia are at the leading edge of global trends in dispute resolution. Recently, the Asian Dispute Review and Committee D (Arbitration and ADR) and Committee T (International Construction) of the International Bar Association have published papers I have written on the Institute's new Arbitration Rules and the cost-effective resolution of construction disputes in Australia. Judging from the emails I have received in the short time since those articles have been published, there is significant international interest in the various techniques in common use in Australia to narrow issues and minimise time and cost, including the use of experts' conferences or conclaves.

Cost-effective arbitration of international disputes will be the subject of a full day session by Committee D at the Business Law International Conference of the IBA, to be held in Cancun, Mexico from 28 October to 2 November 2001. Hopefully the ideas exchanged during that session will provide food for thought on how we can further improve efficiency and reduce costs in arbitration and ADR in Australia.

In my view, one explanation for arbitration and ADR practice in Australia being at the leading edge of global trends in dispute resolution lies in the great support provided to the Institute, arbitrators and other third party neutrals by our courts. This is borne out by the (oft-quoted) remarks of the Honourable Justice Michael Kirby AC CMG of the High Court of Australia, namely:

> Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology.

I understand, however, that an area of concern to some judges is compliance by arbitrators with the rules of natural justice. Non-legal arbitrators sometimes experience difficulty in the practical application of the rules of natural justice to particular situations, including dealing with a party who is a reluctant participant in the arbitration and who may set about to delay or frustrate the arbitral process by declining to co-operate.

There are of course two aspects of the arbitral process in which non-co-operation may give rise to natural justice issues. The failure of a party to comply with directions made by the arbitrator may give rise to procedural fairness issues, in relation to whether a party has been given a reasonable opportunity to present its case or rebut the case of its opponent. The answer to those sorts of issues is readily ascertainable from the case law and various provisions of the Uniform *Commercial Arbitration Acts* (particularly sections 18, 34(7) and 37).

A more difficult situation arises where the non-co-operation involves declining to agree with something sought by the arbitrator, such as joint and several liability for the arbitrator's fees and expenses or provision of security for the arbitrator's fees and expenses. Some consideration was given to this question in a casenote which I prepared for the last issue of the *The Arbitrator & Mediator*, dealing with the decision of the English Court of Appeal, in *Andrews v Bradshaw* [2000] BLR 6. Another view of that decision is expressed in Toni de Fina's article in this issue.

This question has been the subject of consideration at the Master Classes for Grade 1 and Grade 2 arbitrators held in Sydney, Melbourne, Brisbane, Perth and Adelaide this year. Having taken part in Master Classes around Australia since 1999, I always find the debate engendered in the Master Classes particularly stimulating. The debates on this question in 2001 have been no exception.

I believe it is worth reinforcing the point made in Toni de Fina's article, that the nominee arbitrator should not be deterred from entering on the reference to arbitration simply because one party does not agree to be jointly and severally liable, or to provide security for, the arbitrator's fees and expenses.

To allow non-co-operative parties to frustrate the arbitral process in this manner would cause as much damage to the future of arbitration in Australia as the expenditure of excessive time and cost in the arbitral process. ⌘

*Robert Hunt, President.*