Editor's Commentary

Russell Thirgood, Editor

Essential to the development of ADR processes within Australia is the involvement of government. The Government has an important role to play in terms of the promotion, endorsement and implementation of ADR schemes. We are fortunate to hear from the Australian Attorney-General, the Honourable Philip Ruddock MP in this edition of *The Arbitrator & Mediator*. In his article 'Towards a Less Litigious Australia: The Australian Government's ADR Initiatives', the Attorney-General discusses Government initiatives aimed at fostering the use of ADR processes on a number of levels and in various industry groups. The Commonwealth Government seeks to promote ADR in a number of ways.

One initiative has been the release for public comment a strategy paper on the federal civil justice system. The paper examines ways of encouraging early consideration of ADR, such as professional obligations and industry specific dispute resolution schemes. A number of reforms are proposed by the paper including changes to the *Federal Court Act 1976*, allowing the Federal Court or the Federal Magistrates Court to refer disputes to ADR forums, and the abolition of mediation fees in the Federal Court and Federal Magistrates Court.

Another effective means of encouraging the use of ADR is by governmental participation in such processes when the government itself is faced with litigation. The Legal Services Directions direct the Commonwealth to act as a model litigant, and to avoid litigation wherever possible.

The Attorney-General points to two bodies actively promoting the use of ADR in Australia, and on a broader scale. The National Dispute Resolution Advisory Council and the International Legal Services Advisory Council are both engaged in a number of projects aiming to provide education on, and further develop, ADR processes. The future of ADR in Australia seems bright.

This edition of *The Arbitrator & Mediator* contains a number of interesting articles, case notes and practice notes. You will notice the extensive coverage of the NSW Security for Payment Legislation, an area that continues to attract a great deal of attention. With the Building and Construction Industry Payments Bill reintroduced to Queensland Parliament on 18 March and 20 April, Queensland practitioners will no doubt observe the treatment of the NSW legislation with keen interest. David Campbell-Williams provides a valuable analysis of the case law pertaining to the legislation, and Robert Hunt provides three case notes to give further guidance. Mr Hunt provides further case notes that will be of significance for all arbitrators.

Ian Nosworthy provides some important guidance on the incorporation of ADR into contracts. Mr Nosworthy considers the problems faced by parties attempting to do this, and outlines ways in which ADR clauses can effectively be incorporated into contracts.

Graeme Robinson considers the liability of arbitrators, mediators, referees and experts and the application of professional indemnity insurance – a topic which is of great interest to all ADR practitioners. Mr Robinson looks at where liability stems from in proceedings, and also examines what events will form the basis for a finding of misconduct.

Information technology promises new opportunities for ADR on an international scale. Zara Spencer considers the impact new technologies will have on international trade and commerce disputes. Plentiful opportunities bring with them a multitude of new considerations.

The high level of consumer debt in Australia is a significant social issue. Geoff Munck proposes a new, more equitable, system of civil recovery of debt centred around adjudication rather than litigation.

Dr Idornigie provides an interesting insight into the origins and development of commercial arbitration. He examines in depth the principles underpinning the process: party autonomy, separability, arbitrability, judicial non-intervention and jurisdiction.

We include a number of insightful case notes in this edition. Along with those provided by Robert Hunt, we include case notes submitted by Frank Nardone and Graham Morrow.

David Waldby considers the viability of expert determination as a proper dispute resolution process in a useful practice update. John Muirhead looks at the importance of a cancellation fee agreement in his practice note.

I trust that you will enjoy and benefit from this April 2004 edition of *The Arbitrator & Mediator.*

Finally, I take this opportunity to thank our outgoing President, Ian Nosworthy. For the last two years, Ian has led the Institute with distinction. He, as a member of the Journal Committee, has taken a very keen interest in improving the quality of the Journal. He has been very supportive at all times and we wish Ian the very best.