Editor's Commentary

Russell Thirgood, Editor*

Welcome to the December 2021 issue of *the arbitrator & mediator*. We are delighted to bring together an engaging collection of articles, along with keynote contributions to our online international conference held in July 2021, that will be of interest to a wide range of readers. I thank all the contributors, peer reviewers and the production team for their efforts in facilitating the timely publication of this issue.

Dr Richard Manly QC opens the issue with an engaging examination of the potential for claims for damages to be proven by representative sample. That approach may well be essential to the 'just, quick and cheap'[1] resolution of complex claims such as those often encountered on construction lists. His analysis of Victorian and English decisions in the *Multiplex Constructions Pty Ltd v Epworth Hospital*, *Amey LG v Cumbria County Council* and *Standard Life Assurance Ltd v Gleeds (UK)* cases provide invaluable insights on the practical importance of representative samples as a means of proof, while also usefully highlighting potential pitfalls in the sampling process. The article concludes with clear practical advice on developing a representative sample set likely to survive judicial scrutiny.

Mieke Brandon and Elizabeth Rosa provide an insightful analysis of the approach of mediators in the context of workplace disputes. They analyse in detail the respective benefits and limitations of transformative, narrative and solution-focused approaches to facilitative workplace mediation that aims to develop more functional workplace behaviours. Brandon and Rosa conclude that the mediator will adapt their approach to the context of a workplace mediation; the mediator's experience will allow them to blend approaches with a view to improving group dynamics and enhancing teamwork into the future.

The next two articles highlight new developments that are likely of particular relevance to those with an interest in dispute resolution in the international commercial context. Nolan Lee's first contribution

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1 *Civil Procedure Act 2005* (NSW) s 56.

to this issue is an article that sets out three strategies for increasing the enforceability of agreements to mediate and the results of meditation. Although questions of enforceability are not typically relevant to the context of bare mediation, they are vital in the context of multi-tiered dispute resolution clauses often found in commercial contracts. Lee makes a persuasive and practical case for renewed attention to the drafting of those clauses to increase their enforceability. While Lee usefully outlines the new *United Nations Convention on International Settlement Agreements Resulting from Mediation* (the Singapore Convention), he also makes the important observation that the Convention will be of limited practical utility until it comes into force as a matter of international law. Lee explains how the use of arbitration-mediation-arbitration clauses may help to bridge the gap until the Singapore Convention is in force and effects international mediation practices.

John Southalan maintains that international focus by explaining the operation of the *OECD Guidelines for Multinational Enterprises* and the compliance mechanism they create in an attempt to ensure 'responsible business conduct'. He provides a clear and concise elaboration of those Guidelines and the myriad supporting documents that elaborate their content and operation. Southalan offers a useful explanation of the enforcement of the Guidelines by countries that 'adhere' to them and offers valuable illustrations of the complaints process operated by the Australian National Contact Point (AusNCP). As the AusNCP experiences an increase in complaints submitted to it, experienced dispute resolution professionals may be interested to engage with that body and its processes. Readers with an interest in the impact of multinational corporations on human rights might also be interested to learn more about this emerging mechanism.

Dawna Wright and Michael Kanan provide a helpful analysis of the demands placed on accountants who act as expert determiners in dispute resolution processes. Drawing on their extensive combined experience in forensic accounting and dispute resolution roles, Wright and Kanan speak to the challenges faced by expert determiners in balancing the need to provide efficient and accurate advice that enhances the dispute resolution process with the requirements of procedural fairness. Their practical advice on supporting efficient valuation might well make some headway in that regard. In highlighting the invidious position of an expert determiner required to interpret and apply 'ambiguous language', Wright and Kanan's incisive commentary will no doubt be of interest to practitioners who wish to further develop the drafting of expert determination clauses in future agreements.

Abann Yor's inspiring account of the Aotearoa Resettled Community Coalition's (ARCC) contribution to resettlement in Aotearoa New Zealand highlights the significance of lived experience as another form of expert knowledge. Yor explains ARCC as a 'mediating institution' that 'provides an authentic voice to vulnerable and marginalised forced migrant communities in Aotearoa, New Zealand' by drawing on the insights and experiences of those communities. The article demonstrates most effectively how the

Māori concept of manaakitanga – 'the process of showing respect, generosity and care for others'[2] – is reflected in and enriches ARCC's vital work. We join in Abann's call for the vital contribution of forced migrants to be recognised and valued, and for that same respect and generosity to be returned in the treatment of displaced people in Aotearoa New Zealand, Australia and around the world.

The final article in this issue highlights the importance of clinical supervision for the professional development and standing of mediators. Jane Silbereisen explains that, while clinical supervision has been identified as a national priority for many of the helping professions, there is much work to be done on integrating it in relevant regulatory frameworks. This article sets out a comprehensive analysis of that regulatory framework, and demonstrates that clinical supervision could well be accommodated within existing policies and regulations. Silbereisen also confronts the practical difficulty in making high quality clinical supervision opportunities available, especially to dispute resolution practitioners in private practice. She also explains that Resolution Institute is taking steps to address that lacuna in professional development opportunities, and sets out the results of a Peer Supervision pilot program conducted by the Resolution Institute State Facilitative Committee NSW in July of this year. Silbereisen and the NSW Committee have recommended the national adoption of a Supervision Practice Framework based on that highly successful pilot program.

The next four contributions to this issue reproduce keynote addresses to the Resolution Institute's 2021 International Virtual Conference. We remain extremely grateful to the Governor of New South Wales, The Honourable Margaret Beazley AC QC for opening the conference on 15 July. Her Excellency's opening address highlighted three important dimensions of good practice in contemporary dispute resolution. In emphasising that practitioners must recall that ADR mechanisms contribute to the administration of justice, complement legal knowledge and require that practitioners are conscious to identify and manage conflicts of interest, Her Excellency acknowledged the professionalism that inheres in Australia and Aoteraoa New Zealand's dispute resolution communities.

Senator for Queensland the Honourable Amanda Stoker addressed four key areas in which the Commonwealth Government has adapted Australia's dispute resolution services to the demands of the 21st century and in the context of the COVID-19 pandemic. Senator Stoker noted the government had funded a trial of lawyer-assisted mediation as part of the 2018 Women's Economic Security Package, and further extended that trial this year. This complements the extensive reforms of the Federal Circuit and Family Courts, which have now commenced following their passage through Parliament earlier this

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2 *Te Aka Online Māori Dictionary* (online at 15 November 2021) 'manaakitanga' available at <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=Manaakitanga>.

year. The Senator's address also highlighted the introduction of the online dispute resolution tool 'amica', which draws artificial intelligence further into Australian dispute resolution. Senator Stoker concluded by noting Australia's commitment to international commercial arbitration and mediation processes, including the future implementation of the Singapore Convention addressed by Nolan Lee earlier in this issue.

The Honourable Ruth McColl AO SC updated the conference on the development of the Australian Dispute Resolution Advisory Council's (ADRAC) search for the meaning of conciliation. As Chair of ADRAC she oversaw an extensive consultation process that culminated in the publication of the Council's *Conciliation: Connecting the Dots* report in November of this year. That Final Report sets out a definition of conciliation, which ADRAC hopes will be adopted by Parliaments and peak conciliation bodies in the hope of connecting conciliators and enhancing certainty for parties in dispute, but without compromising the flexibility of conciliation which is a hallmark of its contribution to the dispute resolution landscape.

The final conference proceeding sets out a set of ethical standards for application to arbiters. The Honourable Peter Vickery QC conducted an extensive survey of national and international sources to develop a model that reflects best practice in notable jurisdictions. The Overarching Principle that 'An Arbitrator should uphold the integrity and fairness of the Arbitration process and professionalism in its conduct' surely accords with the expectations of parties and the wider public in the conduct of arbitral proceedings. In combination with the 'core principles' of flexibility, efficiency and fairness, the proposed Ethical Rules are likely to prove an invaluable guide as arbitrators navigate the myriad ethical dilemmas encountered in resolving disputes.

The balance of the issue comprises two Practitioner Notes and two Case Notes. In the first Practitioner Note, Sharin Ruba provides a thought-provoking account of various mediations where bullying infiltrated the mediation process. Noting that bullying may pre-date or become apparent in the mediation process, Ruba stresses the importance of addressing the bullying conduct lest the mediation process itself be undermined. Ruba usefully highlights 'active listening, reflecting, reality testing, asking clarifying questions and paraphrasing' as just some of the tools available to mediators to support the bullied party in maintaining self-determination and preserving the integrity of the mediation process.

Geoff Charlton's note provides valuable insights into the potential benefits of 'early' mediation to demonstrate the strength of a client's position before they are put to proof in litigation. Charlton describes in detail two complex matters where considered early disclosure of the party's position – which involves clearly demonstrating the factual basis underpinning the party's claims – demonstrably

advanced settlement negotiations. In appropriate instances that approach may avoid some of the substantial costs associated with preparing the matter for litigation.

Nolan Lee returns in the first case note to address the Full Federal Court's recent decision in *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110. Lee's thoughtful analysis demonstrates that – somewhat paradoxically – by refusing to enforce the arbitral award in question, Allsop CJ, Middleton and Stewart JJ preserved the integrity of the arbitration process. Their Honours' emphasis on adherence to the terms of the arbitration agreement ensured that 'the very heart of arbitration' – the consent of the parties – remains a primary consideration for arbiters and parties to arbitral agreements.

Finally, in the second case note Michael Heaton QC addresses four cases in which the Victorian Supreme Court has grappled with the vexed issue of when liquidated damages are an excluded amount that cannot be taken into account when determining progress payments under the *Building and Construction Industry Security of Payment Act 2002* (Vic). Heaton's in-depth analysis of the reasoning in the *Seabay*, *Shape*, *VCON* and *Goldwind* cases highlights the challenges that confront judges in giving effect to the complex Victorian excluded amounts regime in the context of a statute that includes among its objectives (in s 3(1)) the entitlement to receive progress payments for work that has been carried out.

We trust that you will find the collection of articles, speeches and notes presented here to be engaging and informative.