# ARBITRATION AND THE PATH TO JUSTICE

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It is, perhaps, illustrative of the power of words over our perceptions that the chant of "Alternative Dispute Resolution" which has emerged in recent times has an aura about it suggesting that there are now different ways of resolving disputes that are both new and alternative. On closer inspection, of course, the various "alternatives" are both age-old and orthodox. Naturally, the adjective "alternative" assumes the existence of a mainstream model of dispute resolution. And that may lead some to think that because ADR exists side by side with traditional court proceedings, it is, in some way, less real or effective. It is neither. And, it hardly needs to be said that the resolution of disputes, by resort to non-litigious methods, such as negotiations, mediation, conciliation or arbitration has a long and respectable history.

As Julian Riekert points out in his paper, *Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis?*[1], mediation is the preferred form of dispute resolution in China, Japan and under African customary law. Forms of mediation were, and are, practised by certain religious groups, including Jews[2] and Quakers. Indeed, as Riekert also points out, Saint Paul's advice to the Corinthians was that they should avoid using the Courts for the settlement of disputes and should rather appoint members of their own community as arbiters[3].

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# THE 1992 KEAYS MEMORIAL LECTURE

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Perhaps it is useful to view judicial and non-judicial approaches to dispute resolution, not in terms of opposing forms, but rather as colours in the spectrum. At one end, there is negotiation between parties acting on their own behalf and in their own interests; landlord and tenant, for example, discuss rent arrears and work out a solution. Slowly, one moves through the various shades of mediation, where a third party assists in the achievement of, but never imposes, an agreement. Then, the colour subtly changes with arbitration in which disputants voluntarily submit to a neutral third party who must ultimately determine the dispute by making an award if it cannot be settled by other means.

Finally, there is litigation where the parties submit their dispute for resolution by the courts in accordance with the judicial process, involving, as it does, formalised adversarial proceedings with precise rules governing evidence and procedure and with the outcome being determined by the application of the law to the facts as ascertained in accordance with those rules. None of these approaches is necessarily perfect in itself. In any given situation, the various approaches may intersect and interact. So much so, for example, that it is estimated, that 80% of commercial cases submitted to the courts are settled short of a full trial.

Today we are concerned with Arbitration and the Path to Justice. You, as members of the Institute of Arbitrators, represent one crucial part of a whole justice system. Indeed, in some areas, such as the construction and civil engineering industries, you play the major role[4]. Thus, it is appropriate that this lecture celebrates the memory of John Keays.

John Keays was a civil engineer who lived and worked in Queensland. In addition to being an outstanding engineer, he developed, in the latter part of his career, an interest and very considerable expertise in the field of commercial arbitration. With this interest and with the growing demand emanating from within the construction industry and, perhaps, the ascendancy of consumerism in the public mind, Keays amongst others, saw the need for a national body of arbitrators. This body would nominate arbitrators who were independent of, and, crucially, seen to be independent of, particular trades and professions and sectional organizations representing aspects of those trades and professions. The aim was that a dispute between, say, a builder and an owner, would no longer be resolved by another builder nominated by a Master Builders Association. From its small beginnings in 1975, the Institute now boasts approximately 1,500 members, and is involved in hundreds of arbitrations each year.

Arbitration, as I have already said, is neither novel in itself nor a novel adjunct to or companion of the traditional judicial processes. Despite this, the significance of its role varies from time to time, as do the demands made upon it. Thus, for example, those demands increase whenever there is an upturn of activity in the home building industry. And its role, along with that of ADR generally, is enhanced whenever disputes of some kind or another are made non-justiciable, as, for example, in the case of retail tenancy disputes in Victoria[5].

Undoubtedly, the most significant change since the pioneering work of Keays and his colleagues, has been the enactment, in the last decade, of legislation in all Australian jurisdictions formalising the procedures for and regulating the conduct of arbitration. These Acts[6] are essentially identical and are normally cited as the Uniform Acts. That legislation, in conjunction with the common law, provides a firm basis for dispute resolution by arbitration in this country.

There are five main features of the Uniform Acts: They are:

(1) Party autonomy-parties may choose to do what they wish.

(2) Relaxation of judicial control over arbitrations;

(3) Abolition of the procedure of the stated case. This has been described as an instrument of "abuse in the hands of disputants determined to postpone the delivery and enforcement of an award or to crush an economically weaker opponent by making the proceedings both longer and more expensive."[7]

(4) The arbitrator is not bound by rules of evidence, unless otherwise agreed in writing by the parties (see, for example, s. 19 (3) of the NSW Act), thus allowing flexibility in approach and the greater application of the arbitrator's own expertise;

(5) While arbitrators are obliged to resolve all questions according to law (see, for example, s. 22 (1) of the NSW Act), parties are able to agree in writing that the arbitrator may determine any question as an *amiable compositure* or *ex aequo et bono*. This means, at least theoretically, that arbitrators are able to reach results which more accurately reflect "the sense of the commercial community"[8]. As Justice Rogers has pointed out, if this avenue is taken then it makes any right of appeal from the decision of an arbitrator for an error of law extremely difficult if not impossible to pursue.

The procedural and substantive changes effected by the Uniform Acts give strength to a proposition that many may see as heretical: in the main, lawyers should have only a limited role to play in arbitration proceedings. For a variety of reasons, not the least of which are the expense and the specialised nature of the issues usually involved, that proposition may have always been valid, although, admittedly, far more arguable. But since the changes wrought by the Uniform Acts, the need for the direct and constant involvement of lawyers in arbitration proceedings is much less obvious.

As already indicated, the Uniform Acts provide an environment where rules of evidence may be disregarded by the arbitrator unless otherwise agreed by the parties, and where, by agreement between the parties, the arbitrator can make a determination by application of notions of equity and good sense, rather than by application of the strict letter of the law. Given these considerations and the specialised nature of the issues involved, the necessity for lawyers appears minimal.

The Uniform Acts deal with the question of legal representation. Generally, leave must be granted[9]. However, in New South Wales, Queensland, the Northern Territory and the ACT, leave is not required if another party is legally represented or the amount in dispute exceeds $20,000 or such other amount as is prescribed[10]. And, in South Australia leave is not required if another party is a legal practitioner or the amount in issue exceeds the prescribed amount[11], currently set at $42,500[12]. Notwithstanding these provisions and notwithstanding those features of the arbitral processes to which I have already referred, it is estimated[13] that between 80% and 90% of disputants are legally represented in arbitration proceedings.

My experience of arbitration, although in the entirely different field of industrial relations, leads me to think that the full advantages of arbitration may not be realised if arbitration proceedings are seen as requiring, or, even, as generally facilitated by the participation of lawyers. On the contrary, I suspect that the participation of lawyers, if not confined to cases of difficulty or cases which

are otherwise exceptional or unusual, will detract from the essential advantages of arbitration and will result in the arbitration process being seen as a second class legal system. I appreciate that it is easy to denigrate lawyers in any company. That is not my intention. Rather, I wish to speak of my impressions of the proceedings and processes involved in industrial arbitration, for, so far as legal representation is concerned, there may be lessons to be learned from that area, particularly lessons of history.

Compulsory arbitration for the resolution of industrial disputes was a uniquely Australasian response to a set of problems besetting most industrialised nations at the end of the last century. The concept is not one that has been universally applauded, even in this country. Nor has it been perceived in the same light, even by persons acting in the same interest. Thus, initially, it was advocated in Australia by the leaders of the labour movement. But it was rejected in the United Kingdom and in the United States of America because it was repugnant to their working class leaders[14].

Two matters should be noted with respect to industrial arbitration as it developed in Australia. The first is that it was, in its early days, seen as a judicial function to be undertaken by a court or, in the States, by tribunals constituted by judges. Thus, the *Conciliation and Arbitration Act* 1904 (Cth)[15] established the Commonwealth Court of Conciliation and Arbitration and required that its President should be a Justice of the High Court[16]. Its first president was Mr Justice O'Connor who was succeeded in 1907 by Mr Jutice Higgins. It was Mr Justice Higgins, who as the Court's second President, set the course of industrial arbitration for the better part of this century.

When industrial arbitration entered the Australian arena it brought with it a legal institution, very near the apex of the Australian legal system. One might imagine, on that account, that it also brought with it a high degree of legal formality.

Writing for the *Harvard Law Review* in 1915, Mr Justice Higgins described proceedings in the High Court concerning the jurisdiction of the Conciliation Court in these terms[17]:

> "The proceedings are very long and very costly, and it is astonishing what a wealth of learning is involved in the meaning of the word 'dispute' and the words 'extending beyond the limits of any one State'[18]. The discussions occupy a very considerable proportion of the Commonwealth Law Reports . . . ".

But significantly, he went on to add:

> "The legal discussions do not affect the principles or methods of action of the Court of Conciliation in cases where there is jurisdiction."

In the Conciliation Court itself, according to Mr Justice Higgins, the "first duty [was] to try to get agreement"[19], and the biggest expense was "that of bringing witnesses from long distances, and keeping them until they have given their

evidence"[20]. The expense occasioned by lawyers was not great, he said, because "in the hearing of a dispute lawyers cannot appear except by unanimous consent[21]."

It is, I think, salutary to bear in mind that at the turn of this century, when comparatively few had had today's educational advantages and when the law was, perhaps, even more rigidly formal than in present times, it was considered acceptable that proceedings should be conducted before a court constituted by a President who was also a Justice of the High Court without legal representation. And Mr Justice Higgins, who had been a participant in the constitutional debates[22], a member of the Parliament of Victoria[23] a member of the Australian Parliament[24], and a distinguished jurist[25] and was, then, a Justice of the High Court[26], not only accepted that as entirely appropriate, but, apparently, considered it a particular strength of the system over which he presided.

The second matter that should be noted with respect to industrial arbitration, as it was conceived in those early days, is this: It was clearly contemplated that the process would lead to the development of substantive arbitral principles to be applied in determining the substantive rights of employers and employees. Indeed, it was this feature that led Mr Justice Higgins to describe it as "a new province for law and order". And by 1920, he wrote that "there [had] been several . . . principles established which may have a far-reaching effect". He added that these principles were not "legally binding", but that merely obliged those who were undertaking the task of industrial arbitration to take even greater care to ensure that those principles commanded the respect of the community.

What is, I think, extraordinary is that neither the fact that the arbitral process would lead to the formulation of industrial principles of general application, nor that it would lead to the detailed prescription of the mutual rights and obligations of employers and employees nor the two in combination was seen as justifying legal representation in the ordinary course of industrial arbitration.

Of course, the Conciliation Court changed over time. And it must be conceded that by the 1940's it had become, to a large extent, an institution with formalised rules and procedures not very different from those applied in the ordinary courts. Even so, the parties were not invariably or even, usually represented by lawyers. Take, for example, a case which came before Chief Judge Beeby in 1941[27]. It involved a claim for a complete review of wages and conditions in the maritime industry and involved three separate unions, various shipowners, major employers, as well as several employer organizations, the Harbour Boards of various States, several Railway and/or Transport Commissioners, the Department of Public Works, Victoria and the State of Western Australia. All told, there were 25 separate appearances. Of these, six involved legal representation, ranging from a solicitor, in the case of the Department of Public Works, Victoria, to senior and junior counsel, in the case of W. R. Carpenter Ltd. Although the procedures became more formalised, it was not long until, in the *Boilermaker's Case*[28], the High Court held that the Conciliation Court was not a court at all, but a quite different kind of institution exercising powers and functions quite different from those belonging to a court.

The reconstitution of the Court as the Conciliation and Arbitration Commission, by the *Conciliation and Arbitration Act* 1956, did not result in significant changes to the processes involved in industrial arbitration. That Act repeated the substance of the provisions of the earlier Act with respect to legal representation so that the parties could be legally represented only with the leave of the Commission given if all parties consented, if having regard to the subject matter of the case, there were special circumstances, or, if the Attorney-General of the Commonwealth intervened.

In an article written in the *Federal Law Review* in 1964, R. E. McGarvie Q.C.[29] said that, in practice, "in most cases where counsel or solicitors seek leave to appear this is granted without opposition"[30]. That was true also in the 1970's, but, and consistent with the observation made in 1964, the main participants in industrial arbitration (i.e. the trade union and the employer organizations) sought leave to be legally represented only exceptionally.

The cases in which leave was sought generally fell into clear and recognisable categories consisting of appeal cases, test cases involving some new industrial standard[31], cases raising a question as to the Commission's powers or jurisdiction and National Wage cases. However, by that time the A.C.T.U. had ceased to be legally represented even in national wage cases. To this catalogue of cases attracting legal representation, there should be added cases which a trade union did not expect to win, but which were fought as a result of strike or other industrial action initiated by its members. But, in the main, most matters were negotiated, and, if negotiations were not successful, argued by union officials and employed representatives of employer organizations. Some of these officials and employees had legal qualifications[32], others were qualified in the area of economics or personnel management, whilst very many trade union representatives were qualified tradesmen. And of course, it was about this time that it became accepted that persons might be appointed to deputy-presidential positions, even though not legally qualified[33].

My impression of proceedings in the Conciliation and Arbitration Commission during the 1970's is that, in the main, they were conducted as efficiently and effectively by non-lawyers as by lawyers. One of the techniques often employed was to call a matter on for a preliminary hearing within a very short time of the strike or other action which had led to the matter being notified as a dispute. At these hearings, the union and employers' representatives would be permitted, without calling witnesses, to give an account of the incident involved. Naturally, the union and employer versions differed in detail. But, for some reason, the accounts then given and, of course, re-produced in transcript, often became fused into a single coherent account which was accepted as the basis upon which the matter in question should be resolved. Of course, there were exceptions and it was sometimes necessary for witnesses to be examined, cross-examined and re-examined. But these exceptions were relatively rare, and, when they occurred, the representatives performed those tasks in a creditable fashion—sometimes with more flair and colour than one was used to in the case of lawyers.

One other aspect should be mentioned. Industrial arbitration was frequently

concerned with matters and situation in which passions ran high. I remember a few occasions when these passions were vented in a manner leading to an interruption to the proceedings. They all involved exception being taken to something said by a lawyer—in one case, by a most softly spoken and eminent practitioner in the area of industrial law.

The significant advantage of proceedings as they were conducted in the Commission in the 1970's was neither in cost saving nor in efficiency. Rather, it lay in the direct involvement of the parties in the proceedings and, hence, in the solution that emerged. That was a matter of some importance in an environment where the parties were obliged to work together, and, hopefully, in some harmony, notwithstanding their past, and, sometimes quite acrimonious differences. This may not be a significant consideration in commercial arbitration generally, but, one can envisage situations in which it may be a factor of some importance.

It is on the basis of my experience in the field of industrial relations that I venture to suggest that legal representation should be the exception rather than the rule in arbitral proceedings. It may be that the proposition, whatever its validity, is quite quixotic. No less than 9 undergraduate law courses in Australia currently, or, will soon offer courses in Alternative Dispute Resolution, with specific reference to arbitration[34]. Ironically, it is also now possible to graduate from some law courses without learning anything about wills or probate, the one area in which the public actually expects lawyers to be generally proficient. But testamentary expectations aside, the availability of these courses in ADR means that the next wave of law graduates will at least be aware of the possibilities of arbitration. Whether they attempt to incorporate it into their practices is another question, but, if past experience and current trends are any indication, we may expect that many will. The number of law schools is growing. The numbers of lawyers is also growing. Demands and expectations inevitably rise. New territory needs to be settled. The land of arbitration may appear to be a land of new opportunity. That is what it should be for disputing parties. Whether it should also be that for lawyers is far more problematic.

Of course, none of what I have said denies the need for lawyers in difficult or exceptional cases. Where the impetus for arbitration originates from a court order, where legal issues have already been raised, where complex issues of damages or contract law are involved or where arbitration is seeking to resolve international commercial disputes, the need for lawyers is beyond debate.

For the latter, the *International Arbitration Act* (1974) (Cth), as amended, has adopted for Australia the UNCITRAL[35] Model Law on International Commercial Arbitration. This now applies to all international commercial arbitration conducted in Australia, unless otherwise agreed in writing by the parties[36]. While the Model Law itself does not refer to the representation of parties, s. 29 of the *International Arbitration Act* provides for a party to be represented by any chosen person including a "duly qualified legal practitioner from any legal jurisdiction of that party's choice" (s. 29 (2) (b)). Admission to practice in Australia is not required (s. 29 (3)). Given the usual complexity of these cases, there will

continue to be an important role for lawyers in these disputes. And, as I have already indicated, there will be other cases of complexity which will warrant the intervention of lawyers.

There is one matter which may be thought to justify the routine involvement of lawyers in arbitral proceedings. It is this: arbitration must be conducted in accordance with the rules of natural justice[37], or, as it is now more commonly called, procedural fairness[38]. Arbitratiors who are not themselves legally qualified may be inclined to think that the requirements of procedural fairness are more likely to be brought out in the open, and, hence, complied with, if the parties are legally represented. That is, I think, generally true. However, it is also true that, on some occasions—hopefully rare—lawyers assert entitlements over and above what is required for procedural fairness in the particular circumstances, thus causing unnecessary confusion and expense.

There is no special magic involved in the notion of natural justice or in the requirements of procedural fairness. In the main, all that is required is a commonsense approach directed to ensuring that each party knows the nature of the case that is or might be put against him and that he has a fair opportunity to answer it and to put his own case. This is a task which has been required of a variety of persons lacking legal qualifications. And it is one that has been required for many years. Thus, for example, as early as 1879, it was said in *Fisher v. Keane*[39] that the committees of clubs or other bodies with power to decide on the conduct of others must give a person "an opportunity of either defending or palliating his conduct" before making a decision that might "blast a man's reputation forever". It is a task that Commissioners—persons who, in the main, lacked legal qualifications—have carried out in the field of industrial arbitration for the whole of this century. And it is a task which, by virtue of the *Administrative Decisions (Judicial Review) Act, 1977* (Cth)[40], many public servants must carry out in a wide variety of circumstances. It would be surprising if, in this regard, the members of this Institute could not acquit themselves very creditably.

It is worth remembering that it was a lawyer called Abraham Lincoln who urged his professional colleagues to:

> "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man."

For lawyer and non-lawyer alike, the role of peacemaker in the resolution of disputes is one of great honour. As arbitrators, you occupy a central place in the pursuit of the peaceful resolution of conflict. Ultimately, it is our success or failure in that regard that marks us out as a civilised and just society, or, as an unjust one. The recent events in Los Angeles are a timely reminder that we must all, judges, arbitrators, mediators, conciliators and, even, lawyers, work for just and fair dispute resolution.

## REFERENCES

[1] 1990 *Australian Dispute Resolution Journal*, at p. 31.
[2] See "Rabbinical Courts: Modern Day Solomons" (1970) 6 *Columbia Journal of Law and Social Problems* 49.
[3] 1 Corinthians 6: 1-5 Verses 4 and 5 state:

> "If then ye have judgments of things pertaining to this life, set them to judge who are at least esteemed in the church. I speak to your shame. Is it so, that there is not a wise man among you? No, not one that shall be able to judge between his brethren?"

[4] Riekert op. cit. p. 36.
[5] *Courts (Amendment) Act* 1990 (Vic.), ss. 7-11.
[6] *Commercial Arbitration Act* 1984 (N.S.W.);
*Commercial Arbitration Act* 1984 (Vic.);
*Commercial Arbitration Act* 1990 (Qld);
*Commercial Arbitration Act* 1986 (S.A.);
*Commercial Arbitration Act* 1985 (W.A.);
*Commercial Arbitration Act* 1986 (Tas.);
*Commercial Arbitration Act* 1986 (A.C.T.);
*Commercial Arbitration Act* 1985 (N.T.).
[7] Rogers J. The Changing Face of Arbitration (1986) 2 Australian Bar Review, at p. 16.
[8] Justice Rogers op. cit., at p. 18.
[9] Under the Uniform Acts, unless the parties otherwise agree in writing, there is no right for a party to be represented by a legal practitioner or other representative.
[10] *Commercial Arbitration Act* 1984 (N.S.W.), s.20(1); *Commercial Arbitration Act* 1990 (Qld.), s. 20(1) *Commercial Arbitration Act* 1985 (N.T.), s. 20(1); *Commercial Arbitration Act* 1986 (A.C.T.), s. 20(1).
[11] *Commercial Arbitration Act* 1986 (S.A.), s. 20(1).
[12] *Commercial Arbitration Regulations* 1987 (S.A.), reg. 4.
[13] According to Mr Ambrose, Executive Director, Institute of Arbitrators Australia.
[14] Higgins H.B.: *A New Province for Law and Order*, 1922, reprinted in 1968, p. 39.
[15] Section 11.
[16] Section 12(1) of the *Conciliation and Arbitration Act* 1904.
[17] Republished as Ch. 1 in a *New Province for Law and Order*. See Ch. 1, p. 29.
[18] See Constitution, s. 51 (xxxix).
[19] Ibid, p. 109.
[20] Ibid, p. 113.
[21] Ibid, p. 113.
[22] Delegate to the Federal Conventions in 1897 (Sydney and Adelaide) and 1898 (Melbourne).
[23] 1894-1900.
[24] 1900-1906.
[25] Attorney-General in J.C. Watson's Labor Government 1904.
[26] Appointed 1906.
[27] *Australian Institute of Marine and Power Engineers v. Commonwealth Steamship Owners Association* (1941) 45 C.A.R. 62.
[28] *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254.
[29] Late Mr Justice McGarvie of the Supreme Court of Victoria; now his Excellency, the Governor of Victoria.
[30] McGarvie R.E., Q.C. *"Principle and Practice in Commonwealth Industrial Arbitration after sixty years"*, (1964), 1 F.L.R. 47, at p. 90.
[31] Usually heard by a Full Bench of the Commission.
[32] Notably, R.J.L. Hawke of the A.C.T.U.
[33] Provision to this effect was first made in amendments to the *Conciliation and Arbitration Act* in 1972. In 1974 Joseph Ezra Isaac, an economics academic and Rees David Williams, the former Federal Secretary of the Australian Bank Officials Association, neither of whom were legally qualified, were appointed as Deputy Presidential members of the Commission.
[34] Universities of New South Wales, Melbourne, Adelaide, Queensland, Western Australia, Wollongong, Bond, Macquarie and the University of Technology (N.S.W.).

[35] United Nations Committee on International Trade Law.
[36] *International Arbitration Amendment Act* (1989) (Cth), s. 21.
[37] *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 C.L.R. 546, at p. 552.
[38] *Kioa v. West* (1985) 159 C.L.R. 550, at pp. 584-585, 600-601, 632.
[39] [1879] 11 Ch. D 353, at pp. 362-363.
[40] Section 5(1)(a) and s.6(1)(a).

# INSTITUTE COURSES/ CONFERENCES 1992-93

**Institute Conference**

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| 2-4 May 1993 | Hyatt Hotel, Sanctuary Cove, Gold Coast, Queensland |

**John Keays Memorial Lecture**

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| 3 May 1993 | Hyatt Hotel, Sanctuary Cove, Gold Coast, Queensland |

**General Residential Arbitration Course**

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| 4-7 May 1993 | Bond University, Gold Coast, Queensland |

**Advanced Residential Arbitration Courses**

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| Thursday 15 October 1992-Sunday 18 October 1992 | Kingswood College, Perth, Western Australia |
| November/December 1992 | Sydney New South Wales |

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The dates should be reserved now. Details of venues, programme, etc. will be mailed to members later on.