ARBITRATION—THE COURTS PERSPECTIVE

Justice R.S. French, Federal Court of Australia

Text of Address delivered at the Institute's Conference held in Canberra, A.C.T. May 1992.

In times not so far in the past the arbitrator was seen in some circles as a dubious, below stairs figure, requiring close curial supervision, a quasi-judicial equivalent of Uriah Heap. He operated what was regarded by legal elites as a second rate system of backyard justice. In England before 1979 and Australia before 1984, he was subject to frequent judicial lashings and had only to stumble, however innocently, to be branded with the stigma of a very broadly defined concept of "misconduct". Moreover, in the view of many Australian legal practitioners the arbitrator's principal field of operation was paralysingly tedious. Clouds of papers, Scott schedules, points of claim and particulars with barely a principle of law to pass a beam of light between them—this was the picture of arbitration and the arbitration process that many lawyers and, perhaps some who became judges, once had.

Pity poor Edmond Barton, Australia's first Prime Minister, later a Justice of the High Court, who, when a member of the New South Wales Parliament in 1896 and a Queens Counsel agreed to become an arbitrator in a railway line construction dispute estimated to take six months. Not only did he have to spend nearly two years of his life hearing the case which involved 55 banks and cuttings, 70 waterways comprising bridges and box-drains and numerous claims for extras, but he also had to answer in detail allegations by his political opponents that he had deliberately lengthened it. A full account of the sad story is found in Ronald Fitch's book—*Commercial Arbitration in the Australian Construction Industry* (1989).

Today, the arbitrator is a new figure. Clothed in the armour of enhanced arbitral autonomy conferred in England by the *Arbitration Act* 1979 and in Australia by the uniform *Commercial Arbitration Acts* introduced in various States in 1984 and 1985, he and/or she has cast off the shackles of the stated case and rubbed off the tarnish of error on the face of the record. And as evidenced by a recent decision of Foster J. in *Q.H. Tours Ltd* v *Sazalo Pty Ltd* (1991) 105 ALR 371, the arbitrator now bears more than a passing metaphorical resemblance to Arnold Schwarzennegger in his screen role as the Terminator. Schwarzennegger as anyone with children over 7 years old will know, was cast as a robot warrior sent back in time by robots engaged in a future war against humanity. His task was to eliminate the mother of the leader of the human resistance before she gave birth. The paradox which the film makers overlooked, and which my children airily dismissed, was that it must have occurred to his highly intelligent masters that had he succeeded he would never have been sent. The arbitrator today in the role of contractual terminator can overcome a similar

paradox. According to Foster J.'s decision he can declare void ab initio the contract containing the very arbitration clause from which he derived authority. And beyond paradox, the arbitrator has moved upstairs to participate, through consensual and compulsory court annexed arbitration in the resolution of proceedings which have been instituted in the courts themselves.

The augmented role of the arbitrator as an important actor in modern dispute resolution and particularly in court annexed arbitration has inevitably led to a greater judicial respect for the process and its players. In this paper I present an overview of changing court perspectives of arbitration and some thoughts about court annexed arbitration. I should enter the disclaimer that I am a member of a court which has had only limited involvement with arbitral processes although there have been some cases including that decided by Foster J. in which the question of a stay of court proceedings or of a pending arbitration has arisen. The Federal Court has recently been empowered by the *Courts (Mediation and Arbitration) Act* 1991, with the consent of the parties to refer any proceedings or part of them or any matter arising out of them to a mediator or arbitrator for mediation or arbitration as the case may be in accordance with the Rules of Court. Interim rules have been made but the court's attention has been focussed on mediation and a form of non-binding assessment known as early neutral evaluation. Although it is possible at the present time for a party to apply for a matter to be referred to arbitration, I am not aware that any such application has been made. The court has before if the important task, bearing in mind such limitations as may be imposed by constitutional considerations, of considering as a matter of general principle the types of issue most adapted to resolution by arbitration and the extent to which arbitral procedures and the determination itself should be subject to judicial supervision. In approaching its task, it is assisted by an understanding of the evolving relationship between arbitrators and the judiciary in this country and in England. This is particularly so in those cases where courts already have experience in referring matters to arbitration. It will also be assisted by the views of members of the Institute on the mechanisms which can enable it to make the best use of the powers that have been conferred upon it.

On one reading the title of this session might suggest two things, the first is that the word "arbitration" encompasses a single defined system for the determination of disputes. The second is that the Courts and the judges who make them up have a collective view about it. Neither of these statements is accurate. There are at least four types of arbitral process relevant to the present topic. They are:

1. Arbitration pursuant to a provision of a contract providing for disputes arising out of the contract to be so resolved.
2. Arbitration pursuant to an agreement by parties to refer an existing dispute to that process.
3. Arbitration by consent order of a court.
4. Arbitration by compulsory reference from a court.

The first type proceeds from contract and is supported and, to a degree, given a life of its own by regulatory statutes. In Australia these are the uniform Commercial Arbitration Acts of 1984 and 1985 or their older equivalents. In England the relevant statute is the *Arbitration Act* 1979. The second type, arbitration by consensual reference of an existing dispute, is conceptually similar and supported by the same legislation. The foundation for both is private law and to some extent that has shaped judicial perspectives. From one such perspective the arbitration agreement has been regarded as a bargain best left to the parties to perform as they see fit subject to judicial control of the legal content of the outcome which has in the past been extensive. From another, it has been treated as providing inferior justice and requiring supervision to ensure conformity with legal principle.

In Mustill and Boyd—*The Law and Practice of Commercial Arbitration in England*—2nd Edition at p.4, the importance of the private law theory was emphasised in these words:

> "It is essential to an understanding of the English law of arbitration to recognise that throughout its history the law has approached the relationship between the parties and the arbitrator and between the parties and each other unequivocally in terms of private law. At every stage in the development of the law of arbitration the courts have begun by studying the arbitration agreement, so as to ascertain what it says expressly about the problem in issue and what terms may reasonably be implied. The arbitration law of England is dominated by the law of contract."

The approach to arbitration which views it as a branch of private law, reinforced at points of weakness by the coercive powers of the State, was contrasted with a possible alternative view which would treat it as an aspect of public law in which the arbitrator is a delegate of judicial powers which are essentially the property of the State. On that view the State would be seen as "having the right and duty to ensure through the medium of the Courts, that the reference is conducted in accordance with the procedural norms which the State itself lays down". That alternative view, of course, has force in the area of court annexed arbitration.

A stranger to this topic might be tempted to think that the acceptance of a private law approach to contractual or private commercial arbitration would have supported a firm policy of judicial restraint in the regulation of the arbitral process. That has not always been the case although perceptions of what does and does not constitute judicial restraint vary according to the beholder. Consistently with their private law hypothesis, Mustill and Boyd observed that the instincts of the courts in England have been to use wide statutory powers only to support arbitration not to interfere with it. Judicial control over private arbitral procedures was said to have been limited since the 1920's by a court-created policy on non-intervention in such matters, emphasis being placed on the consensual nature of the reference. The courts did, however, intervene in the event of an error of law through the stated case procedure and the appeal

against error of law on the face of the record. There were thus, according to that commentary, concurrent trends away from judicial intervention in the reference so far as procedural aspects were concerned and towards judicial control over the legal content of the award. However, as with the later Commercial Arbitration Acts in Australia, the judicial role in England, particularly as embodied in the special case and appeal processes was altered by the Arbitration Act 1979. For despite the expressed philosophy of restraint there had developed a strong perception of excessive curial intervention. In his discussion of what he calls "interference by the courts" Ronald Fitch in *Commercial Arbitration in the Australian Construction Industry* (1989) quotes a statement by Mocatta J. in *Prodexpert* v. *E.D. and F. Man Ltd* (1973) Q.B. 389 that:

> "It is well known that English law is nearly unique in the degree of interference it permits the court in the conduct of arbitrations and the settlement of disputes thereby."

The philosophy which underpinned the policy of intervention in the legal content of the arbitral process was put, perhaps at its highest by Lord Scrutton in *Czarnikow* v. *Roth Schmidt & Co.* [1922] 2 KB 478 at 488:

> "There must be no Alsatia in England where the King's writ does not run."

It was, his Lordship said, contrary to English public policy for a court to recognise or support any "erroneous administration of the law". And in 1973, the same year in which Mocatta J. had made his complaint about the degree of permitted judicial interference in arbitration, Lord Denning in *Hafden Greig & Co. H/S* v. *Sterling Coal & Nav Corp* [1973] 1 QB 843 ("the Lysland" case) set down three criteria upon which a court would order a case stated over the arbitrator's objection. The point of law in issue should be:

1. Real and substantial such as to be open to serious argument and appropriate for decision by a court of law.
2. Clear cut and able to be accurately stated as a point of law.
3. Of such importance that the resolution of it is necessary for the proper determination of the case.

The author of the 20th Edition of Russell on Arbitration, considered that following this decision of the Court of Appeal it was virtually impracticable for an arbitrator to refuse to state a case when requested. In the result, it was perceived that Courts would consider that an arbitrator's refusal to state a case would amount to "misconduct" under s.23 of the *Arbitration Act* 1950 and a ground upon which the award could be set aside—Park *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*—(1980) 21 Harv. Int. LJ 87 at 93. On the other hand, Professor Park argued that a survey of 54 cases stated between 1960 and 1979 demonstrated that the case stated procedure was not merely the tool of unmeritorious parties. Substantive

legal issues were raised in many of them and the arbitrator's decision reversed in 21 out of those reviewed. A lower court decision on a case stated was reversed on 20 of the cases reviewed. The time scale in stating such cases ranged from 2 months to 42 months with an average of 16 months. According to Professor Park, the review indicated that the procedure played a positive role in the law. Nevertheless, it seems to have been regarded by those who had a choice of arbitral forum as a factor militating against the use of arbitration in England.

One of the points made in favour of the changes in the law affected by the *Arbitration Act* 1979 was that judicial interference in arbitrations held in England was so great that parties to disputes avoided holding arbitrations there with a great resulting loss to export income derived from such sources as lawyers and expert witness fees, travel and accommodation expenses. This view was reflected in the Parliamentary debate upon the Arbitration Bill that became the Arbitration Act of 1979. Lord Hacking recounted, perhaps apocryphally, that it was alleged by a distinguished partner of a well known Wall Street law firm to be a matter of professional negligence to allow an English arbitration clause in any contract made by the firm's clients. The point about lost export income was made by Lord Cullen who put a figure of 500 million pounds per year on it. And Lord Lloyd of Kilgerran, a barrister, said "the main object of the bill is to attract arbitration to London"—see *Park* (supra) at 95-96. Similar concerns were expressed in relation to the conduct of arbitrations in this country prior to the *Commercial Arbitration Acts* although respect for their processes was asserted judicially. Sir Garfield Barwick in a judgment written in 1972, said:

> "Finality in arbitration in the award of the lay arbitrator is more significant than legal propriety in all his processes in reaching that award established only after successive appellate processes—*Tuta Products Pty Ltd* v *Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 257-258."

With the exception of Queensland, the law in Australia prior to the enactment of the uniform *Commercial Arbitration Act* was based on pre-1950 English legislation and allowed for judicial intervention on the same bases, that is by way of case stated or application to set aside an award for error of law on the face of the record. Nevertheless, it has been suggested by one commentator that the case stated procedure in this country was not viewed as interfering in the arbitral process or creating undue delays as few such cases came to court, partly because of their technical procedural difficulty—Klaric—*Judicial Intervention and International Commercial Arbitration: The Australian Perspective* (1988) 16 Aust.Bus.L. Rev. 440 at 444-445.

At a level less elevated than that of the adjustment of contractual freedom to the proper supervisory jurisdiction of the Courts under the common law of contract and statutes dealing specifically with the private arbitral process, there has been a perception of rivalrous behaviour. Messrs. Sharkey and Dorter in their text *Commercial Arbitration* (1986) at p.16 called it a "tug of war". Professor Park described it as "reminiscent of the seventeenth century struggle between

Court and Crown in which King James I claimed that his representative should have the right to adjudicate disputes according to "natural reason" not according to the "artificial judgment of the law". The tug of war hypothesis might have been influenced by a view that judges think or have thought that arbitration threatens to take away the interesting commercial work of the courts. But in today's world of an overburdened and under-resourced judiciary which in some courts depends upon a 90% plus settlement rate just to keep civil lists operating with waiting periods of a year or more before trial, this is hardly tenable.

Judicial perception of private arbitration may be affected to a degree by views formed by judges as practitioners based upon their experience of arbitration at work. Positive experiences of competent, efficient and speedy arbitration would no doubt have a powerful impact on underlying attitudes. But for some practitioners in years past, the arbitration process may have left a negative picture. Mr Justice McGarvie of the Supreme Court of Victoria (now Governor of that State) wrote in 1986 in the following terms:

> "During my years at the Bar I always regarded it as my duty to my client to recommend the deletion of the arbitration clause from any draft agreement I settled. From a client's point of view, arbitration seemed usually the worst mode of dispute resolution. If the arbitrator was a lawyer the hearing was often fitted into such spare time as he and counsel for the parties had in common and each new instalment took place when recollections of earlier hearings had dimmed. If the arbitrator was not a lawyer the application of the rules of evidence tended to create chaos. To impress the lay arbitrator the parties tended to brief more senior counsel than the issues justified. The concept of arbitration as an alternative to a court hearing was often blurred. The court could order an arbitrator to state a special case of a question of law and the court then determine the question. The court could set aside an arbitrated award for an error of fact or law shown on the face of the award. About the only advantage to the client was the hearing in private."

Notwithstanding this adverse impression formed in practice, his Honour acknowledged that "decisive changes in the nature of commercial arbitration and its institutional setting have now made it an attractive forum of dispute resolution". The changes in the nature of arbitration to which he referred were those effected by the Commercial Arbitration Acts and the new institutional setting included the establishment of the Australian Commercial Dispute Centre and the Australian Centre for International Commercial Arbitration. The availability of a highly reputable mechanism for the training and accreditation of arbitrators through the Institute is, of course, another such factor.

It was interesting in preparing this paper to see the view of experienced practitioners in the field of arbitration in Western Australia expressed in papers given at a seminar held by the Law Society of Western Australia in November 1985. One, who is a senior partner in a large national commercial law firm, listed as the disadvantages of arbitration the following:

1. Expense—including the arbitration fee, the cost of the venue and the cost of transcript whether the parties want it or not.
2. Delay—the capacity of an obstructive party to delay proceedings because of the lack of power in private arbitrators to enforce interlocutory orders. Although arbitrators have been given by agreement in some cases the procedural powers of a Supreme Court Judge, there is difficulty with this in relation to non-legal arbitrators and even greater difficulty getting them to exercise the powers appropriately.
3. Preconception—arbitrators with expertise in the area of the dispute may bring to the arbitration preconceived ideas about some of the ways in which certain disputes should be resolved. There is little that either party can do to avoid any error which such a preconception may create.
4. Evidence—judicial rules of evidence which reflect the accumulated experience of the fairest and best way to place evidence before a tribunal will not be known to the arbitrator without legal training. Arbitrations can also begin to meander into the irrelevant.
5. Third Parties—arbitration proceedings cannot bind third parties unless they join in the proceedings by agreement with the original parties.
6. Absence of reasons—some arbitrators take the view that finality is more important that justice being seen to be done.
7. Solomon like dispositions—some arbitrators have a tendency to give the claimant something in the hope that both parties will go away reasonably happy with the result.
8. Costs—Arbitrators rarely understand the various options open to them in dealing with the question of who should pay their own fee and whether there should be an order for party and party costs.

This of course was a list of disadvantages perceived by the author of that paper. They do not however reflect uncommon perceptions which in some respects may persist. On the other hand, the same practitioner was able to point to the advantages of the process in the following terms:

1. Speed—if both parties clearly identify the dispute and want to have it solved expeditiously a final and binding decision can be achieved far more quickly through arbitration than through the courts.
2. Expertise—parties may select an arbitrator with expertise in the area of the dispute. As a consequence it is not necessary to educate the arbitrator in that area.
3. Privacy—it is within the control of the parties and the arbitrator to ensure that arbitration proceedings take place in private. This is particularly so where allegations of professional negligence are made, for example against an engineer or a builder.
4. Finality—if an arbitrator has not "misconducted" himself in the sense used

prior to the introduction of the uniform Commercial Arbitration Acts and has not made an error of law apparent on the face of the award and does not attempt to give reasons for it then the award is not open to appeal.

5. Simplicity—the procedure to be adopted is in the hands of the parties and the arbitrator and they can adopt whatever procedures they think appropriate to reach a decision. There is a limited ability to short circuit rules of court.
6. Flexibility—there is greater flexibility in matters such as venue and the fixing of hearing dates.

—Chappell—*Arbitration and the Alternatives*—Law Society of Western Australia Arbitration Seminar, November 1985

Another experienced practitioner considered that the weakness in the arbitration process in Western Australia derived from the parties treating it as though they would a normal civil proceeding. He compared the practice he had observed in Western Australia with that in the City of London where people make full use of the versatility of the system. An example was given of Lloyds Open Salvage Form Arbitration, conducted by senior maritime barristers in Queen Elizabeth Chambers. The arbitrations relate to disputed quantum claims by professional salvors under the Lloyds Open Form of Salvage Agreements. There is very seldom any oral evidence. Statements or proofs of evidence are treated in the same way as any other documents and bound up in a book of papers which include logs, charts, photographs and other documentary evidence. Because witnesses are often located in various parts of the world, oral testimony is generally not economic and is dispensed with. The general thrust of the writer's perception was that the cost of a thorough fact finding process is higher than the difference in quality of outcome would warrant. In mainstream commercial arbitration in the City of London conducted by persons with appropriate experience and some form of legal qualification who are fulltime arbitrators, the proceedings are also normally done on the documents with witnesses called only to clarify points in proofs of evidence. The role of lawyers was seen as simple one of "serving up the information". The writer made the point that it was the strong established tradition associated with the conduct of those arbitrations that enabled them to proceed speedily and efficiently—Foss—*Procedure—Getting an Arbitration off the Ground*—Law Society of Western Australia—Arbitration Seminar, November 1985.

The preceding observations are anecdotal but reflect what one would expect in a major international business centre with a long established tradition of commercial arbitration. No doubt the development in the numbers, experience and qualification of arbitrators in Australia and a correspondingly increasing acceptance of them by commerce and the legal profession is moving us in the same direction. It does, however, require a degree of effort and imagination in applying to arbitration procedures which are not pale imitations of civil litigation in the courts. It also requires judicial acceptance to the different procedural philosophy.

Beyond matters of expertise and tradition there is no doubt however, that the perceived efficiency of the arbitral process in England has been considerably advanced by the 1979 Act and the reduced opportunities for parties to invoke disruptive judicial intervention.

An important aspect of the altered supervisory role of the Courts with respect to private arbitrations is the replacement of the case stated procedure by a process under which questions of law arising in the course of an arbitration may be determined only on an application made with the consent of the arbitrator or all parties. The Court is not to entertain the application unless it is satisfied that its determination might produce substantial savings in costs to the parties and the question of law is one in respect of which leave to appeal would be likely to be granted in respect of the final award. This is the "preliminary point" mechanism found in s.2 of the English Arbitration Act 1979. It is reflected in the Commercial Arbitration Acts in Australia. The need for the procedure to be limited to cases in which the point can be determined speedily with minimal interruption to the arbitration was emphasised by Donaldson LJ in a statement reported in The Times 23 April 1982. He described the use of the preliminary point application in terms of the parties nipping down the road to pick the brains of one of Her Majesty's Judges and thus enlightened resuming the arbitration. He added the caveat however that:

> "If, other than in the wholly exceptional case it were used to obtain definitive decisions from the Court of Appeal or the House of Lords it would create unacceptable interruptions in the course of the arbitration. An exceptional case would be one where the preliminary question of law if rightly decided determined the whole dispute between the parties."

Whatever else it says, the statement reflects a clear commitment to judicial restraint in the supervision of the arbitration process. The generality of that development following the introduction of the 1979 Act is borne out by the observations of Mustill and Boyd at p.28 of the 1989 edition of their text:

> "The 1979 Act has not only meant that there are fewer appeals than previously but also that there are markedly fewer successful appeals. It is now possible to say that the 1979 legislation marked the occasion of a profound psychological change in the relationship between the courts and the arbitral process."

A modern approach to the arbitral process in the light of the reform of the law in Australia was expounded by Rogers J. of the Supreme Court of New South Wales in *Qantas Airways Ltd* v. *Dillingham Corporation* [1985] NSWLR 113. His Honour there decided to remit certain matters arising under a building contract in proceedings pending before him to arbitration. In doing so, he undertook a consideration of the changed relationship between the court and the arbitration process. At p.118 he said:

> "It is now more fully appreciated than used to be the case that arbitration is an important and useful tool in dispute resolution. The former judicial

> hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created. It used to be thought that complex questions of fact presented a sufficient reason for relieving a party from the obligation to abide by an arbitration clause . . . That approach should be treated now as a relic of the past. The courts should be astute in ensuring that where parties have agreed to submit their disputes to arbitration they should be held to their bargain even if this may involve additional cost and expense."

There are sure to be divergent views among judges and courts about the proper extent of judicial intervention in the arbitration process. An example is seen in the differences of opinion between the South Australian Full Court in *South Australian Superannuation Fund Investment Trust* v. *Leighton Contractors Pty Ltd* (1990) 55 SASR 327 and Rogers J. in *Imperial Leather Wear Company Pty Ltd* v. *Macri and Marcellino Pty Ltd* (1991) 22 NSWLR 653 concerning the degree of control of arbitral procedures. But generally speaking the "profound psychological change" referred to in Mustill and Boyd in 1989 reflected in the views expounded by Rogers J., has also appeared from other judicial decisions. Some of these developments are referred to by Professor Frank Bates—*F. Bates, —Commercial Arbitration and the Courts of Australia: Signs of Change* (1987) J.B.L. 527 and *F. Bates, —Commercial Arbitration in Australia—Some Future Developments* (1988) J.B.L. 357. One of the cases referred to in the latter article was *Park Rail Developments Pty Ltd* v. *R.J. Pearse & Associates* (1987) 8 NSWLR 123, in which Smart J. referred a matter to arbitration under Pt. 72 r.2(1)(a) of the Supreme Court Rules over the objection of one of the parties saying as he did that:

> "There has been a change in the attitude of the Courts as to the value of arbitration and references and the desirability of people of suitable standing, experience and qualifications dealing with inter alia, technical matters and contract administration. In part this has been due to the training provided for arbitrators by bodies such as the National Institute of Arbitrators. Delay, costs and the effect have been important. With the heavy loads of the court lists it has often not been possible, despite the best will of the courts in organising lists and trying to streamline the hearing and the profession in preparing matters, to provide for the early hearing desired especially when the increasing complexity of construction cases often results in a two to four weeks hearing and sometimes longer."

The positive judicial response to arbitration may be seen not only as a reaction to the factors referred to by Smart J., but also as evidence of an increasing awareness of the possibilities of various forms of alternative dispute resolutions. There is considerable pressure today on the institutions of the justice system, and particularly the courts, to respond to community demands for less expensive more efficient resolution of disputes. Increasing education of lawyers, judges and court administrators in the armoury of techniques available for the resolution of disputes either outside the judicial system or annexed to it in someway, has

increased their readiness to regard them as something other than the legal equivalent of herbal medicines. The United States is the primary source of much of the experimentation and literature in this regard. Some of the techniques which come to mind include mediation, early neutral evaluation, mini-trials, first offer arbitration, arbitration and various combinations of all of the above.

There has been substantial investigation, discussion and, if I may so, evangelisation of different species of ADR in Australia. This pluralism is to be welcomed. The wider the range of effective dispute resolution techniques, the more opportunities can be created for people to deal with disputes in ways that are best adapted to their resolution. The motto "Horses for Courses" applied by Sharkey and Dorter to the choice between litigation and arbitration (at p.16) can be extended to the class if dispute resolution techniques generally.

Important issues of quality and efficiency have to be faced and in many areas of ADR they have not been fully answered—see generally Ingleby R.—*Why not Toss a Coin? Issues of Quality and Efficiency in Alternative Dispute Resolution*—Proceedings of Ninth AIJA National Conference August 1990, p.11. They have to be faced also in arbitration more particularly with the development of court annexed arbitration. This will inevitably require assessment of costs savings, speed and impact on court programs. The views of litigants diverted into such programs under consensual and non-consensual regimes will also require assessment. And as a study of the Pittsburgh court annexed arbitration program suggests, the way in which unrepresented litigants are heard by such programs will need to be monitored—Alfini and Moore—*Court Annexed Arbitration: A Review of the Institute for Court Justice Publications*—12 Justice System Journal (1987) p.260.

Court annexed arbitration has been introduced into New South Wales and Victoria. The system was described by Rogers J. in the 1989 John Keays Memorial Lecture. His Honour pointed out in that address that the extent to which this process, used extensively in the United States, achieves its objectives of reducing the expense and time taken by civil litigation without diminishing quality of justice is still the subject of hot debate. The evaluation problem was highlighted when his Honour said at p.126 of the address:

> "In spite of its apparent success court annexed arbitration remains controversial. Many judges and academics remain sceptical, questioning whether settlement should not be left to the parties. Moreover this disagreement is not likely to dissipate in the near future given the absence of unequivocal evidence that court annexed arbitration has a dramatic effect on the rate at which cases go to trial and settle."

More recently, as I noted earlier, the Federal and Family Courts have both been given power under the *Courts (Mediation and Arbitration) Act* 1992 to refer matters to mediation or arbitration. The Family Court is empowered to make non-consensual orders while the Federal Court is not. The relevant section of the Federal Court Act as introduced by the legislation is s.53A which provides:

"53A. Subject to the Rules of Court, the court may with the consent of the parties to proceedings in the court, by order refer the proceedings or any part of them or any matter arising out of them to a mediator or an arbitrator for mediation or arbitration as the case may be in accordance with the Rules of Court."

Section 53C. provides for mediators and arbitrators in mediating or arbitrating anything referred under s.53A, the same protection and immunity as a judge has in performing the functions of a judge.

Order 72 of the Federal Court Rules has been made as an interim rule to provide a temporary framework for references under the Act. It has a sunset clause under which it ceases to have effect on 1 January 1993.

These developments and the provision for court annexed arbitration in New South Wales and Victoria signal the growth of the arbitral process into the area of public law and with it the possibility of a somewhat different approach to judicial supervision and review. There is, of course, a threshold conceptual question whether court annexed arbitration is arbitration at all in any relevant sense. Certainly so far as non-consensual arbitration is concerned, there is no bargain and much of the private law theory that has underpinned judicial perspectives on arbitration would fall away. What remains perhaps is the essential procedural flexibility and informality of the process. Nevertheless it is a part of mainstream litigation and one might pose the question—apart from the option of the rehearing de novo, what difference in concept is there between an arbitrator appointed by the court under this process and parttime commissioners of the court with a general licence to use such rules of procedure and evidence as they think appropriate to the proper determination of the case before them?

The public law aspect of court annexed arbitration was brought out by Cole J. in *The Commercial Court and Arbitration—A Marriage Not a Separation*, an address delivered to the Institute's Advanced Residential Course in Sydney in November 1988 and reprinted in The Arbitrator of February 1989. His Honour said at p.154:

"The court cannot refer matters entrusted to it to persons who are not competent, who do not adequately analyse matters referred to them and who do not properly express their understanding of the problem and the reasons for their decision. The standards of Arbitrators must be high. They must have the attitudes of judicial integrity, fairness and isolation. On this there can be no compromise."

The public law element extends to consensual court annexed arbitration of the kind now contemplated for the Federal Court. That derives from its integration into the court's own legislative framework. Questions are sure to arise of the enforceability of procedural directions made by arbitrators so appointed and the review of such directions by judges of the court. To divorce them from such constraints but to give them the power to make binding orders may result in difficulties with the limits of judicial power. In any event, the judges of the

court may well take the view that a process of arbitration annexed to the court in this way requires mechanisms to be put in place to ensure not only an appropriate standard in the legal content of arbitral decisions, but also an appropriate standard of procedural justice. To this extent some arbitrators might see such moves as turning back the clock. It is to be borne in mind, however, that any such measures are not indications of a shift in judicial perspectives but rather a different kind of arbitration. It is perhaps inappropriate to say much more on this topic at the moment beyond indicating that the input of the Institute in this area would, I am sure, be a valuable source of information to the court.

Finally, may I conclude this paper by suggesting that there is another way in which the arbitral process, whether private or court annexed, can influence judicial perspectives. That is in the area of procedural reform. One of the concerns of judges today is the cost associated with formal procedures and rules of evidence particularly in non-complex civil litigation involving people of limited means and sometimes people who have no legal representation. The AIJA is undertaking a reserch project to develop model rules to enable more flexible and efficient procedures to be adopted to reduce the expense and time associated with such cases. The Institute, I would hope, might be in a position to provide suggestions based upon its members' experience, of techniques which have been found to work in the fact finding aspects of the arbitral process. The application of some of these techniques to the cause of procedural reforms could be a valuable exercise in cross-fertilisation. The nature of the arbitral process in the spectrum of dispute resolution techniques brings it closer to the litigation process than any other. Its standing and the change in judicial attitudes to it, create an opportunity for experienced arbitrators to be heard in the public interest on reforms to the litigation process of the courts.