# Restoring Respectability – Providing a Service in Domestic Arbitration and Dispute Resolution

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## 1. INTRODUCTION

Arbitration has long had a proud place within the legal system to resolve disputes. In the Middle Ages, English merchants resorted to arbitration to settle disputes long before the Kings Courts found ways to enforce contractual obligations.

In 1698, the first Arbitration Act was passed:

> *An Act for determining differences by Arbitration, ... It shall and may be lawful for all merchants and traders and others desiring to end any controversy, suit or quarrel ... by a personal action or suit in equity, by arbitration whereby they oblige themselves to submit to the award or umpirage of any person or persons ... so agreed.*

Intended as resolution of commercial disputes by an expert in accordance with the standards of that trade or profession, over the centuries, and increasingly so recently, the law has interfered with, regulated, and some would say overtaken arbitration so as to subvert its purpose.

The historic notion underlying the process is that members of a trade, industry or profession are content to have their disputes determined by an expert member of their commercial peers. Whilst arbitration remained an acceptable means of dispute resolution in these circumstances, developments in other areas have, to some extent, overtaken it as a time and cost effective procedure. The need to set aside some of the constraints upon efficiency in arbitration has long been recognised, and a great deal of thought and effort has been directed to procedural reform.

Improvement to court practice and procedures and the development of a variety of alternative resolution methods has cast a shadow over arbitration. Aspects of these developments can be turned to advantage in the review of arbitral practice. Further, the historic models for dispute resolution, in particular, arbitration, need to be seen as subject to refinement, redefinition and redesign. The sources of inspiration in this process have to be as wide as possible.

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## 2. BACKGROUND

The present place of arbitration in dispute resolution and the immediate possibilities for changes to practice can best be viewed with an understanding of recent history.

### *A. Uniform Commercial Arbitration Acts*

The *Uniform Commercial Arbitration Acts* ('UCA Acts') were enacted in 1984 (NSW) through to 1990 (Qld) with a touch of optimism. The expectation was that, although modest, the incitement to procedural flexibility in some of their provisions would produce a sea change in the approach of arbitrators to their role and the use of the process by parties and their legal advisers.

The intended flexibility and procedural independence of arbitrators in the UCA Acts was not always met in practice. In theory arbitration could be streamlined as the arbitrator and parties thought appropriate.

The provisions of the *Uniform Commercial Arbitration Acts* dealing with procedure are ss 14, 19(3), 22 and 37, which provide:

> ***S 14 Procedure of arbitrator or umpire***
> *Subject to this Act and to the arbitration agreement, an arbitrator or umpire may conduct proceedings under that agreement in such a manner as the arbitrator or umpire thinks fit.*
>
> ***S 19 Evidence before arbitrator or umpire***
> *(3) Unless otherwise agreed in writing by the parties to the arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by the rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit.*
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> ***S 22 Determination to be made according to law or as amiable compositeur or* ex aequo et bono *(See UNCITRAL Arbitration Rules Article 33, paragraph 2)***
> *(1) Unless otherwise agreed in writing by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.*
> *(2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.*
>
> ***S 37 Duties of parties***
> *The parties to an arbitration agreement shall at all times do all things which the arbitrator or umpire requires to enable a just award to be made and no party shall wilfully do or cause to be done any act to delay or prevent an award being made.*

The terms of ss 14 and 19(3) are found in many pieces of legislation dealing with administrative tribunals and prescribe a limited concept of independence, without guidance as to what may be appropriate. A careful review of many appeals from such tribunals

indicates that the apparent flexibility and procedural freedom is often constrained by demands for justice and procedural fairness that are not always productive of economy and efficiency.

Critics of the manner in which domestic arbitrations are conducted often fail to recognise that the parties and their legal advisers have played a significant role in the resistance to reform. There are still many legal practitioners, even those with an appreciation of the distinction between commercial arbitrations and litigious procedure, who seek to impose the rigours and constraints of the latter upon the former. The concept of an efficient and expeditious arbitral procedure, let alone a *quasi* inquisitorial arbitral process remains an anathema to adherents to traditional procedural concepts.

The terms of the UCA Acts encourage adherence to the notion of the parties' ownership of the process and the requirement or perception that the arbitrator be submissive rather than directive.

Whilst the 1990 amendments, particularly to s 38 of the UCA Acts limiting judicial review of awards, generated a degree of finality, they have produced a redirection of the focus of attacks on arbitral awards by applications under s 42 to set aside awards for misconduct,[2] or s 44 to remove the arbitrator on the grounds of misconduct.[3]

This approach to challenging the process is not unique. Experience with both the UK adjudication scheme and international arbitrations indicates that the best, or last, avenue to undermine a decision is to find fault in the way in which it was produced. Notwithstanding legislative and contractual entreaties to speed and economy, a failure to adhere to an 'agreed' or 'foreshadowed' procedure will be a hazardous path for arbitrators. In *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation*,[4] Lord Justice Roskill said:

> *Indeed an arbitrator or umpire, who in the absence of express agreement that he should do so, attempting to conduct an arbitration along inquisitorial lines might expose himself to criticism and possible removal.*

Not all applications to set aside awards for misconduct are successful but the spectre of such an application undoubtedly haunts every arbitrator, and is hardly productive of procedural boldness and vigour. The inclination to finality in judicial review of awards does not extend, in many cases, to an acceptance of a right in the arbitrator to assume authority over the manner in which the arbitration will be conducted; that is, notwithstanding the apparent authority conferred by ss 14, 19, and the requirements of s 37.

It is no easy task for an arbitrator to reconcile the competing concepts of efficiency and finality within the demands of perceived justice and fairness. Is an arbitrator, when confronted by an application to amend a claim, to ignore what the High Court said in JL

2. See, eg *Mond v Berger* [2004] VSC 45; *Rocci v Diploma Construction Pty Ltd* [2004] WASC 18; *Milligan Contractors Pty Ltd v Jaxon Construction Pty Ltd* [2003] WASC 220; *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd* [2002] WASC 118; *Giles v GRS Constructions Pty Ltd* (2002) 81 SASR 575; *Sea Containers Ltd v ICI Pty Ltd* [2002] NSWCA 84; *Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2002] WASCA 255.
3. See *WMC Resources Ltd v Leighton Contractors Pty Ltd* [2002] WASCA 388.
4. [1980] 2 WLR 905 at 923.

Holdings,[5] to the effect that amendments to pleadings ought to be permitted except in limited circumstances, or likewise to refuse a request for an adjournment to file further evidence which will cause 'no prejudice that cannot be compensated with an order for costs or interest'? The answer will invariably be that they cannot, or at least if they do, a challenge is inevitable.

The bending to the will of the parties is seen by many critics as a weakness on the part of the arbitrator or a fault of the process. Without adequate procedural control or authority either in the rules of procedure or by agreement of the parties, the arbitrator and the process is inevitably restricted.

### *B. The Arbitration Act 1996 (UK)*

The necessity to alter the balance of procedural control within the legislation regulating arbitration was recognised in the 1990s in the United Kingdom. The reform process in Australia has been a little more lethargic.

The Arbitration Act 1996 (UK) ('the 1996 UK Act') was produced after reviews in 1989 by a Committee chaired by Lord Mustill and, more influentially, by an Advisory Committee chaired by Lord Saville, and an extensive consultative process. The significant reforms contained in the 1996 Act have been reviewed in detail in Robert Hunt's article 'The Uniform Commercial Arbitration Acts: Time for a Change Part 1'.[6] This article alone highlights the inadequacies of the UCA Acts.

The statement of the statutory duty imposed on the tribunal in s 33 of the 1996 UK Act is an example of the wider procedural controls conferred on the arbitrator by the legislation.

> ***S 33 General Duty of the tribunal***
>
> *(1) The tribunal shall –*
>
> *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
>
> *(b) adopt procedures suitable to the circumstances of that particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*
>
> *(1) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decision of matters or procedure and evidence and in the exercise of all other powers conferred on it.*

The 1996 UK Act, whilst permitting freedom for agreement as to procedure by s 4, made many provisions mandatory, having effect notwithstanding any agreement to the contrary. Significantly for our purposes, these include s 33 and s 40 that sets out the general duty of the parties to comply with procedural orders of the tribunal.

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5. *State of Queensland and Anor v JL Holdings Pty Ltd* (1997) 189 CLR 146; (1997) 141 ALR 353.
6. *The Arbitrator* (1999) 17 at 200.

***S 40 General duty of parties***

*(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.*

*(2) This includes -*

*(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and*

*(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).*

A number of sections in 1996 UK Act set out comprehensive provisions which deal with procedure:

- S 33 General duty of the tribunal
- S 34 Procedural and evidential matters
- S 37 Power to appoint experts, legal advisers or assessors
- S 38 General powers exercisable by the tribunal
- S 39 Power to make provisional awards

The extensive authority and procedural rigour which such provisions allow stand in stark contrast to the terms of ss 14, 19(3) and 37 of the UCA Acts. The clearest example is the difference between s 14 of the UCA Acts and s 33(1)(b) of the 1996 UK Act, the latter imposing a duty to adopt procedures intended to reduce delay and expense. Section 14 of the UCA Acts offers this as an option 'subject to the arbitration agreement'. Moreover, s 34(2)(g) also identifies as a procedural and evidential matter that the tribunal is to decide 'whether and to what extent the tribunal itself takes the initiative in ascertaining the facts and the law'.

### *C. New Zealand Arbitration Act 1996*

New Zealand introduced a new Arbitration Act based on the UNICTRAL model, as was the UK Act of the same year. It was designed to bring international and domestic arbitration within the one statute. The New Zealand Act has recently been the subject of a review by the New Zealand Law Commission, in which The Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) was very active.[7]

### *D. The 1999 IAMA Rules for the Conduct of Commercial Arbitration*

In 1999, the Council of the Institute approved Rules for the Conduct of Commercial Arbitrations, incorporating the Expedited Commercial Arbitration Rules ('the 1999 Rules'). Since then, proceedings where the parties have agreed that the arbitration be conducted in accordance with these Rules have, or should have benefited from the significant, though subtle changes the 1999 Rules introduce. The 1999 Rules echo many of the concepts of procedural control and flexibility embodied in the 1996 UK Act. Clearly these procedural initiatives are still subject to the UCA Acts and the regulation of the practice of commercial arbitration by the Courts.

7. See New Zealand Law Commission, *Report 83 Improving the Arbitration Act 1996* (February 2003).

The 1999 Rules, in Part II The Arbitral Procedure, include these key provisions:

***RULE 10: General Duty of Arbitrator***

1. *The Arbitrator shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost-effective and fair means of determining the matters in dispute.*
2. *The Arbitrator shall be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party, and a reasonable opportunity to be heard on the procedure adopted by the Arbitrator.*

***RULE 11: General Duty of Parties***

1. *The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the arbitral proceedings.*
2. *Without limiting the generality of the foregoing, the parties shall comply without delay with any direction or ruling by the Arbitrator as to procedural or evidentiary matters and shall, where appropriate, take without delay any necessary steps to obtain a decision of a Court on a preliminary question of jurisdiction or law.*

***RULE 13: Procedural Directions***

1. *Subject to any Statute Law or prior written agreement of the parties, and the requirements of Rule 10, the Arbitrator shall make such directions or rulings in respect of procedural and evidentiary matters as he or she sees fit.*
2. *Subject to any agreement of the parties to the contrary, and without limiting the generality of the foregoing:*
    a. *unless the arbitration is to be conducted in accordance with The Institute of Arbitrators & Mediators Australia Expedited Commercial Arbitration Rules, the provisions of Schedule 1 shall apply;*
    b. *where the arbitration is to be conducted in accordance with The Institute of Arbitrators & Mediators Australia Expedited Commercial Arbitration Rules, the provisions of Schedule 2 shall apply.*

These contain a substantial departure from the historic notion of the parties' ownership of the dispute and the process. The 1999 Rules impose obligations on the arbitrator and the parties respectively to comply with directions, and to avoid delay and expense. The provisions of Schedule 1 permit the arbitrator to make procedural directions or rulings, with several options given in the Schedule, that he or she considers 'reasonably appropriate' which, if adopted, could produce the 'expeditious cost-effective and fair means of determining the matters in dispute' as required by Rule 10. When the Expedited Rules apply, then the arbitration 'shall be conducted' in accordance with the procedure in Schedule 2 which prescribes in detail a tight timetable.

The procedural benefits only apply if the agreement to arbitrate states that the dispute will be determined in accordance with the Rules of the Institute. Not all contracts will include

such a provision in the disputes clause. The major standard form building contracts include procedural compliance with these Rules: AS 2124 (1992) cl 47; AS 4000 cl 42; PC 1 cl 15 and ABIC Section P. When the arbitration agreement does not so provide then the parties may agree, possibly at a Preliminary Conference, to adopt the Rules or the Expedited Rules.

It is not entirely clear, at least to me, why arbitrators have not taken up the challenge and opportunity provided by the Rules; or at least why there is a perception that they have not. My own experience has been that parties to disputes referred to arbitration would embrace the opportunity and do so when it is offered to them. In NSW 'procedural backbone' developed by use of the Court reference system, under Part 72 of the Supreme Court Rules and Part 28B of the District Court Rules with the benefit of judicial sideline umpires, is being transferred to arbitral practice.

The inadequacies of procedural guidance in the legislative background, and the application of the UCA Acts as it has been by some Courts, has played no small part in the slow progress to efficiency and economy in arbitration.

### *E. Review of the Uniform Commercial Arbitration Acts*

In 2002, SCAG (The Standing Committee of Attorneys-General) agreed to NSW conducting a review of the *Uniform Commercial Arbitration Acts*, having regard to the Arbitration Acts of England and New Zealand and the UNICTRAL Model Law on international commercial arbitration. IAMA has urged many amendments to the UCA Acts that would improve the viability and efficiency of the arbitration process. The matters under consideration most relevant to achieving procedural efficiency are that the UCA Acts incorporate powers of arbitrators to:

- permit them to appoint experts, legal advisers and assessors, subject to the rights of the parties to be given a reasonable opportunity to comment on that information;
- give the arbitral tribunal the initiative in ascertaining the facts and the law, to adopt inquisitorial processes, and draw on its own knowledge and expertise; and
- require arbitrators to act fairly and impartially, giving the parties a reasonable opportunity to put their case and adopting procedures suitable for the particular case;

## 3. FACTORS INFLUENCING, OR TO BE RECOGNISED WHEN CONSIDERING, PROCEDURAL REFORM

Apart from the motivation from within the Institute to reform arbitral procedure there are a number of external considerations, which relate to, or will impact upon, the process of reform.

One consideration will be to assess the demands or expectations of those using the Institute's processes, and to consider the attributes of alternative procedures, which might be pursued by disputants. In this respect the development of court procedures for reference out

in NSW[8] and court annexed ADR in many jurisdictions[9] impact upon disputants' choice of the best process to be employed.

The development of administrative tribunals, such as VCAT in Victoria and the CTTT in NSW, to determine disputes which might previously have been suitable for resolution by arbitration or other ADR processes also has to be considered. The motivation or considerations that were applied by legislatures to reject or avoid arbitration or other ADR processes need to be recognised and, where possible, addressed in the process of procedural reform.

Apart from the obvious aspects of procedure and practice that impact upon arbitration, there are two matters that need particular consideration.

### *Apportionment and Contributory Negligence*

Significant consideration for the future conduct of domestic arbitrations are reforms recently introduced in New South Wales, Victoria and Queensland, and foreshadowed elsewhere, for the apportionment of liability for economic loss and for contributory negligence to be accounted for in contract. Precisely how these reforms are to be applied by the Courts is uncertain. Their possible impact on arbitral practice is even more unpredictable.

In the 1990s, governments in Victoria and New South Wales (at least) amended the law concerning development or planning approvals, and the approval or certification of the satisfactory completion of building work by other than the local government bodies that had previously had this responsibility. In allowing for such matters to be dealt with by private 'practitioners' or 'consultants' a requirement for compulsory professional indemnity insurance was introduced, along with provisions allowing for proportionate liability.[10]

The provision for apportionment in NSW was in Part IVC of the *Environmental Planning and Assessment Act 1979* (NSW) ('E P & A Act 1979') ss 109ZI and 109ZJ and are set out in an attachment to this paper. *The Building Act 1993* (Vic) was in similar terms.

The rush to reform the civil liability laws following the insurance and public liability 'crises' in the last few years has extended the scope of proportionate liability to other actions for economic loss or damage to property. As a consequence of these very recent 'reforms' to the law of civil liability, s 109ZJ E P & A Act 1979 will be repealed, as will s 131 *Building Act 1993* (Vic). These reforms will have a substantial impact on any proceedings where economic loss, whatever that means in each case, is being claimed by way of damages. In Victoria the provisions of the *Wrongs Act 1958* (Vic) Part IVAA – Proportionate Liability are now in operation, as are, I understand, the similar provisions, ss 28 and 30, of the Queensland *Civil Liability Act 2003* (Qld). In NSW, the amendments introduced by Part 4 Proportionate Liability to the *Civil Liability Act 2002* (NSW) are enacted but not commenced as yet, as are provisions in the *Civil Liability Act 2002* (WA). The provisions of Part 4 of the *Civil Liability Act 2002*

8. Part 72 Supreme Court Rules, Part 28B District Court Rules.
9. Both the Supreme and District Courts in NSW have developed procedures for court ordered mediation. Civil claims arbitration also are directed in both Courts. Similar procedures apply in Queensland and some other jurisdictions or courts.
10. S 109ZJ *Environmental Planning and Assessment Act 1979* (NSW); s 131 *Building Act 1993* (Vic).

(NSW) are set out in an attachment to this paper. Similar legislative 'reform' is proposed in other States.[11]

Whilst substantially uniform, the provisions for apportionment do vary as between the different jurisdictions. In particular there is a difference between NSW and Victoria as to whether the 'concurrent wrongdoer', against whom an apportionment by way of a reduction in damages may be sought is required to be a 'defendant' or a party to the proceedings. In NSW they do not need to be a party (see s 35(3)(b)) and further, it does not matter that a concurrent wrongdoer is 'insolvent, is being wound up or has ceased to exist or died' (s 34 (4)). In Victoria the position is different. The *Wrongs Act 1958* (Vic) s 24AI (3) only permits apportionment against non-parties if they are dead or being wound up.

Using the NSW Act as a guide, apportionable claims are defined in s 34 (1)(a) generally as:

> *a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury:.*

and by s 34 (1)(a) include (though other statutory definitions do differ):

> *a claim for economic loss or damage to property in an action under the* Fair Trading Act 1987 *for a contravention of section 42 of that Act (ie for misleading and deceptive conduct).*

In relation to building actions (see s 109ZJ E P & A Act 1979 (NSW) and s 131 *Building Act 1993* (Vic)) the definition included an action:

> *for loss or damage arising out of or concerning defective building work.*

Whilst in less prescriptive terms, the definition of 'economic loss in an action for damages (whether in contract, tort or otherwise)' is wide enough to include claims for damages by principals against contractors. How the concept for economic loss will extend into claims for damages, even for breach of contract, is uncertain. As was contemplated by s 109ZJ E P & A Act 1979 (NSW), a defendant to a building action concerning defective building work is entitled to a 'just and equitable' reduction in damages having regard to their responsibility for the loss or damage. A contractor may wish to assert that there were others, including the designers or contract administrators who were also responsible, at least in part, for the loss that is claimed. Presumably that responsibility would need to be founded on some legal liability also 'in contract, tort or otherwise'.

The issues for arbitration and parties to arbitrations will be, first, whether the legislation applies to the proceedings, and then, if so, can an apportionment be made so as to reduce the liability of one party, the contractor for example, by reference to the responsibility of others.

As to the first question, the issue is uncertain. The definition of 'court' in s 24AE Part IVAA *Wrongs Act 1958* (Vic) and s 3 *Civil Liability Act* 2002 (NSW) refers to 'any court or tribunal by or before which the claim falls to be determined'. It is doubtful that an arbitration under the UCA Acts could be regarded as a 'court'. This issue arose recently where the

11. The reforms are digested in Commonwealth of Australia, Treasury, *Reform of Liability Insurance Law in Australia* ID: 799 (27 February 2004) at <www.treasury.gov.au/> at Publications.

question was whether an arbitration was a court for the purposes of the corporations law, so that a stay of arbitration proceedings might not be effected under s 440D of the Corporations Law when an administrator is appointed.[12] The issue of whether an arbitrator was a 'court or tribunal' that made a costs order, when considering objections to an assessment of costs under the *Legal Profession Act 1987* (NSW) was raised, but not decided in *Steve Watt Constructions Pty Ltd v Formscan Pty Ltd*.[13]

It may well be that the wider reference in the definition of court to the body 'by or before which the claim falls to be determined' is sufficiently wide as to include a commercial arbitration as being a tribunal for the purposes of the apportionment legislation.

If, therefore, arbitrators are able, in a narrow jurisdictional sense, to make an apportionment of damages, then a number of considerations arise. Theoretically at least, in NSW an arbitrator can allow an apportioned reduction in damages for the responsibility of others who are not parties to the proceedings, and arbitrators in NSW, Victoria and Queensland can apportion against non-parties who are either deceased or insolvent corporations.

Arbitration is inherently limited as between the parties to an arbitration agreement. Provision for joinder exists under s 25 and s 26 of the UCA Acts for disputes between the same parties, or for consolidation of arbitration proceedings. Even if these were extended in any future amendment to the UCA Acts, it is likely that such amendments would be limited to disputes between the parties or to other arbitrations to which one party was also a party.

Apart from the 'reform' providing for apportionment of damages, most States have legislated to permit a reduction in damages by claimants in proceedings having regard to their own 'contribution' to the loss they have suffered even where the claim is in contract. Since the High Court decision in *Astley v Austrust Limited*,[14] States introduced legislation that dealt with the right for contributory negligence to be accounted for in claims for breach of contract.

An entitlement to rely on contributory negligence by principals might be extended to defective design and buildability issues or other devices to achieve some of the objectives of the apportionment reforms.

The ultimate impact of apportionment and contributory negligence as ingredients in commercial disputation and assessment of damages has yet to be resolved, that is even when confined to a litigious process. The effect and complications these will add to arbitral proceedings is even more difficult to predict, but the potential hazards, and the need for account to be made cannot be avoided. In some senses there may be benefits to the exclusivity of arbitration if the web of complexity is eventually excluded.

12. *Auburn Council v Austin Australia Pty Ltd* (Admin App) [2004] NSWSC 141, 8 March 2004, Bergin J.
13. NSWSC No BC20004936, Malpass M, 24 August 2000, unreported.
14. (1999) 197 CLR 1.

### *Changes in Court Procedure*

In the last decade great progress has been made by courts throughout Australia to improve the administration of justice and case management procedures have been adopted by courts to ensure speedy and economic determinations. The emphasis on case management and improvements in the provision of legal services provides an opportunity for a flow-on effect for arbitrators to strengthen their own procedures to the same ends. The expectations from courts of arbitrators with respect to providing expeditious, cost-effective and fair procedures should be no less than they expect of themselves.

The focus of courts in NSW, particularly since *Makita (Australia) Pty Ltd v Sprowles*,[15] on problems associated with the reliability and admissibility of expert evidence, to say nothing of its cost, has provided guidance for arbitral procedure. In fact, many of the practices of experienced arbitrators and court referees for dealing with expert evidence have now found their way into rules of court. Conferences of experts, joint reports and conclaves are almost invariably used in arbitrations today. What may also be of value for arbitrators is to adopt an *Expert Witness Code of Conduct*, such as that found in the Federal Court and the NSW Supreme and District Courts, that emphasises that the expert's ultimate duty is to the tribunal, not the engaging party.

Another impact on arbitration and ADR practices generally has been courts throughout Australia embracing court-ordered mediation as part of case management. It should be recognised that arbitrators have a capacity to direct or manage the resolution of disputes before them by the adoption of the power (authority) offered by s 27 of the UCA Acts. The facility the section provides is often ignored because of the reference to the arbitrator acting as a 'mediator'. The section also refers to the role of the 'non-arbitral intermediary' which might be assumed. This, in addition to the procedural authority under the Rules, ought to permit an arbitrator to advise or to act in effect as a case manager and address particular issues in alternative procedures outside the arbitral process.

The practice of arbitration needs to develop, having regard to the changes in court practices, but so as to highlight the differences and benefits that arbitration offers. These lie in particular areas where the qualifications and expertise of the arbitrators can be exploited in a way that courts cannot. It is hoped that the amendments to the UCA Acts will address this aspect and emphasise the facility of using the skill and experience of the arbitrator even in the absence of expert evidence. A greater emphasis and reliance upon the arbitrator's own training and expertise should reduce or at least control the misuse and substantial cost of expert evidence that has so bedevilled the courts.

15. (2001) 52 NSWLR 705.

## 4. GUIDANCE AND INSPIRATIONS FOR REFORM

The process of reform of arbitral procedure and the development and refinement of the Institute's other ADR processes should draw upon the widest possible sources of inspiration, and be informed by the widest possible experience of forms of dispute resolution. Accordingly, this section of the paper looks to a number of substantial changes in dispute resolution which bear upon the future direction of arbitration as we practice it, and the focus and application of the services proffered by the Institute and its members.

Adjudication of progress payment disputes in the construction industry under statutory schemes operates (or very soon will do) across four Australian States and New Zealand. The *Building and Construction Industry Security of Payment Act 1999* (NSW), especially since the 2002 amendments, has had a substantial impact upon the resolution of disputes generally in the construction industry in this State. Similar consequences can be predicted elsewhere. The Australian adjudication process was based on a wider construction disputes adjudication scheme in the United Kingdom, which likewise has dramatically affected the use of arbitration (and litigation) as the default processes for resolution of disputes. One recent development in the UK, probably as a result of the pressure for reform produced by the use of adjudication, is the 100 day Arbitration process being developed by the Society of Construction Arbitrators.

Another statutory dispute resolution procedure to which the Institute should have regard is the procedure adopted by the Workers Compensation Commission in NSW, of which Justice Terry Sheahan is the inaugural President. Its radical procedure might provide some inspiration for a new process to deal with small consumer or business claims.

### *A. English Adjudication Scheme*

Since May 1998 construction disputes in the United Kingdom have been dealt with under a compulsory statutory scheme that provides for a 'short, sharp' provisional determination. The scheme of adjudication of construction disputes arose from recommendations in Sir Michael Latham's massive 1994 report *Constructing the Team*.[16] In response to the 'perceived complexity, slowness and expense' and 'constant spectre of appeal' that made arbitration an unattractive method for resolving disputes in the construction industry, he proposed an adjudication process that would permit speedy resolution of disputes, essentially as soon as they arose.

The *Housing Grants, Construction and Regeneration Act 1996* created a mandatory right to refer any dispute to adjudication.[17] The basic features are:

16. Latham, M. *Constructing the Team, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO, London, 1994) Chapter 9.
17. Housing Grants, Construction and Regeneration Act 1996 (UK) Part II, ss 104-117. See <http://www.hmso.gov.uk/acts/acts>1996/1996053.htm.

- It applies to 'construction contracts' as defined.
- Every such contract must provide for adjudication in conformity with the Act.
- In the absence of complying contractual provisions the statutory Scheme applies.[18]
- Unless otherwise agreed, the adjudicator's decision is binding until the dispute is finally resolved by arbitration, litigation or agreement.
- The decision is (rapidly) enforceable though the Court.
- A strict timetable is imposed on the appointment and making of an adjudication.
- The adjudicator has extensive powers to determine in each case the procedure to be used, but must act impartially.
- The process adopted may, and often is, inquisitorial and investigatory.

The Scheme for adjudication is supported by the Technology and Construction Court (TCC), a Division of the High Court, to which applications for enforcement of adjudicators' decisions are made. The TCC hears these matters promptly, takes a robust stance against challenges to valid adjudicator's decisions save where there was no jurisdiction, or the rules of natural justice have not been observed and rejects attempts to undermine enforcement by claims, e.g. for set-off, or stay for arbitration.[19]

An interesting aspect of the TCC approach to natural justice challenges is the acceptance that the system was unworkable unless 'some breaches of the rules of natural justice which have no demonstrable consequence are disregarded'.[20] The Court has also recognised that:

> *[I]t is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit.*[21]

In order to avoid adjudicator conduct that will provide opportunity for parties to challenge the determination on the grounds of natural justice, *Guidance for Adjudicators* has been published that highlights issues that can arise in the conduct of adjudications and offers suggestions rather than rules.[22]

It has been described, even in judgments, as a rough and ready process, a 'quick and dirty fix'. It is said that the timetable is unreasonably tight and likely to result in injustice because parties do not have enough time to present their case. Injustice can also flow from the flexible procedures, which can be inquisitorial, investigatory, adversarial or a mixture of all three.

But it does appear to work. The Chief Judge of the TCC considers adjudication to be the single most significant development in the last several decades in construction law.[23] Reviews

18. The *Scheme for Construction Contracts (England and Wales) Regulations 1998*, and the *Scheme for Construction Contracts (Scotland) Regulations 1998*, known as 'the Scheme'.
19. See *Macob v Morrison* (1999) BLR 93: Bouygues v Dahl-Jensen (2000) BLR 49.
20. See *Discain Project Services Ltd v Opecprime Development Ltd* (2000) BLR 402.
21. *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors Ltd)* (2001) BLR 207 at 218.
22. Construction Umbrella Bodies Adjudication Task Group, *Guidance for Adjudicators* (July 2000).
23. Mr Justice Thayne Forbes, 'Recent Trends in the TCC' Paper presented to the Chartered Institute of Arbitrators South East Branch, 20 March 2002.

seem to confirm that the scheme is working well in meeting its objectives,[24] and practitioners appear to be generally satisfied with the scheme.[25] 'Experience indicates that most disputes stop once the adjudication has been decided', with losing parties feeling that they have 'had their day in court'.[26] Costs to parties to adjudication have been minimal.[27] It has been claimed that adjudication now supersedes arbitration and litigation as the most popular dispute resolution mechanism in the construction industry.[28] The experience to 2001 showed that it was more successfully used in disposing of smaller cases, particularly where both parties were awarded some monies though, contrary to expectations, some very large final account disputes have been referred. In larger projects where multiple references to adjudication have been made in the course of the work, litigation or arbitration has been initiated to challenge the adjudicators' decisions.[29]

Seemingly endless ruminating about how the processes of adjudication are working and how they may be improved emanates from government, the construction industry and practitioners of adjudication in the United Kingdom.[30] These discussions provide fertile examples of the permutations and combinations of procedure that could be incorporated in any proposals for the development of a construction industry dispute adjudication scheme in Australia that I discuss below.

### *B. Australian Security For Payment Acts*

The British legislative model provided the basis for those Australian jurisdictions that have legislated the process of adjudication for parties to obtain progress payment under construction contracts. New South Wales was the pioneer with the *Building & Constriction Industry Security of Payment Act 1999*,[31] Victoria followed with the *Building and Construction Industry Security of Payment Act 2002* (Vic). In Queensland the *Building and Construction Industry Payments Bill 2004* (Qld) modelled on the NSW legislation has been introduced into

24. See, e.g. *Review of the Scheme for Construction Contracts*: A CIB Report to the Construction Minister, December 2000, available at www.ciboard.org.uk; Construction Industry Council Adjudication Board, *Adjudication The First Forty Months* (August 2002).
25. See eg The Adjudication Society www.adjudication.co.uk .
26. See Gaitskell, R, 'Adjudication – A Wish List' *Paper for the Society of Construction Law*, Dec 2001 at 1.
27. About 3% of the sums in dispute: see Kennedy P and J L Milligan, 'Research Analysis of the Progress of Adjudication Based on Questionnaires Returned From Adjudication Nominating Bodies (ANBs) and Practising Adjudicators' (2001) 17 *Const LJ* 231.
28. See Burns, M, 'Adjudication Legislative Changes' *The Adjudication Society Newsletter*, February 2003 at 6.
29. Gaitskell, *op. cit.* at 3.
30. See, e.g. The CIB Report note above; Department of the Environment, Transport and the Regions, *Improving Adjudication in the Construction Industry*, Consultation Paper (April 2001); Paterson F A and P Britton (eds) *The Construction Act: Time for Review* (Centre for Construction Law & Management, London, 2000); Construction Industry Council Adjudication Board, *Adjudication The First Forty Months* (August 2002); Scottish Executive Improving Adjudication in the Construction Industry Report Of Consultation And Proposals (May 2004).
31. Amended in 2002 to improve the enforceability and prompt payment of the adjudicated amounts, and to prevent abuses of the legislation's intent by both claimants and respondents: *Building and Construction Industry Security of Payment Act 2002* (NSW). Currently a review of the objects of the Act is being undertaken, and further, minor, amendment to the scheme is likely.

Parliament and awaits debate. In Western Australia the Construction Contracts Bill 2004 now before the Upper House embodies a different approach to that adopted in the eastern States. It seems that South Australia and the Territory Governments may be showing some interest in similar schemes.

Across the Tasman, the Construction Contracts Act 2002 (NZ) implements a similar system, applicable as in the UK to all disputes arising under relevant construction contracts, with a variant of adjudication as an alternative to mediation created within the Weathertight Homes Resolution Services Act 2002 (NZ). The Institute's partner body, AMINZ, is authorised nominating authority and members are adjudicators under the legislation.

The legislative schemes are intended to reform the law relating to progress payments under construction contracts, particularly to:

- facilitate timely payments between the parties;
- provide for the rapid resolution of payment disputes; and
- provide mechanisms for the rapid recovery of payments.

Though relatively minor differences characterise each enactment,[32] there are many commonalities:[33]

- Legislatively enshrined entitlement to payment for work done under a construction contract, and the provision of a means of rapidly securing and enforceable entitlement to payment.
- Adjudication being the central pillar for resolving disputes and obtaining security of payment.
- A speedy and relatively simple process specified in the legislation.
- Strict mandatory time limits for the initiation, conduct and finalisation of the adjudication process.
- Binding interim adjudication decisions which secure payment, unless and until overturned by adjudication or litigation.
- Adjudicator has limited duty to observe natural justice.
- Limited rights of appeal from the adjudication process.
- Statutory disallowance of 'pay when paid' clauses.

The NSW legislation was introduced in 1999 with only a limited number of adjudications being conducted in the first few years of its operation. Following a review by Government in 2001 amendments were made in 2002 which substantially improved the operation and enforceability of the adjudication process. A further review is presently being undertaken by the Department of Commerce that is looking at several possible improvements to the process,

32. An extensive analysis of the differences can be found in Queensland Parliamentary Library, *Rapid Adjudication of Payment Disputes under the Building and Construction Industry Payments Bill 2004(Qld)*, Research Brief 2004/05, at <www.parliament.qld.gov.au/Parlib/Publications_pdfs/books/200405.pdf>.

33. I am indebted to the analysis in P Adams, 'Security of Payment and Adjudication: A UK Perspective' (2002) 21(3) *The Arbitrator and Mediator* 73 at 75.

and, significantly, whether to extend the object and scope of the Act to cater for all non payment disputes under a construction contract.[34]

In *TransGrid v Walter Construction Group Ltd*,[35] McDougall J said that:

> *the requirements of natural justice must accommodate both the provisions of the legislative scheme and, more generally, the evident legislative intention underlying the Act*

From a practical viewpoint the adjudication process since early 2003 has been successful. It seems that to a large degree the participants in the process have benefited from the requirement to focus on the matters in dispute and in a sense are forced to seek a resolution that otherwise might be postponed. The substantial shift in the commercial risk allocation after an adjudication determination and payment is, it would seem, beneficial to the resolution of the disputes underlying the claim for payment. Another lesson from the experience of participation in the process is that advisers to the parties and adjudicators have found that it is possible to comply with a short sharp timetable for the preparation of and response to claims and determining them, albeit at the risk of physical exhaustion!

### *C. Cole Building Royal Commission*

The Cole Building Royal Commission addressed the question of security for payment in the construction industry and considered, *inter alia*, contract clauses and rapid adjudication.[36] Discussion Paper 12 contained a draft of Commissioner Cole's proposed national security of payments legislation, which received overwhelming support in submissions, though there was debate about how to achieve national consistency in security of payment reform, and over specific details of the draft bill. The Final Report recommended the Commonwealth enact the bill, as in the Final Report though subject to further consideration of detailed submissions made to the Royal Commission by nominated parties.

The Commonwealth legislation was intended to replace existing state and territory legislation where no adequate alternative is available, that is, a system for rapid adjudication of disputes concerning construction contracts comparable to the system created by the Act. The system focuses on mechanisms for rapid recovery of monies not paid when due for performance of work under the contract and for rapid resolution of disputes on the value of and payment for work arising under a construction contract.

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34. See <www.construction.nsw.gov.au/sop/#SOP2004Review> Issues for consideration in the Review of the Act that summarises the issues raised during the review process.
35. [2004] NSW SC 21.
36. See Royal Commission Into The Building And Construction Industry, Discussion Paper Twelve: Security of Payments in the Building and Construction Industry. Royal Commission Into The Building And Construction Industry, The Hon TRH Cole, RFD, QC Royal Commissioner, *Final Report* (February 2003) vol. 8 Reform - National Issues Part 2 Chapter 14.

Following the broad concepts of the model already in operation, it establishes a regime by which parties are entitled to adjudication in accordance with a strict timetable. The adjudicator would have powers to conduct the procedure with flexibility, use an expert adviser, test or inspect any work, and call a conference, and determine whether legal representation was appropriate.

It is presently considered unlikely that the Commonwealth will introduce legislation creating a national scheme as Cole proposed, at least in the foreseeable future. So long as the State schemes are able to operate successfully, as the process has in NSW since the 2002 amendments, there is little impetus for a national scheme.

### *D. NSW Workers Compensation Commission Procedures*

Since January 2002 the Workers Compensation Commission has been the independent dispute resolution service for disputes arising under the Workers Compensation Acts, replacing the Compensation Court. Its objectives are to provide a timely, fair and cost effective system for the resolution of disputes. The financial ill health of the Scheme prior to 2002 meant that it was designed to dramatically reduce the costs associated with litigation. The consensual methods of mediation and conciliation are favoured as the first step in resolution; should these fail, disputes are determined by arbitration. The same person conducts both processes. The arbitrators are experienced in compensation law, injury management, and/or dispute resolution.

The process of conciliation/arbitration is tailored to the particular nature of the disputes, the prevailing culture, and the statutory scheme[37] within which it must operate. Obligations and powers of parties and arbitrators have statutory force in many instances.

Features of the system include:[38]

- All information to be used must be provided and exchanged at the beginning of the process (s 290).
- Settlement facilitated and encouraged at every stage (s 355).
- Arbitrators play an inquisitorial role, and the limited adversarial procedures are exercised in an informal manner.
- Hearing proceedings are informal and non-adversarial, legal representation is permitted, and it is recorded (as are preliminary teleconferences) and open to the public.
- Reliance on predominantly written evidence; where possible disputes are determined 'on the papers'.
- Unsuccessful conciliation conference is followed by an arbitration on the same day.
- Time limits apply to each stage of the process.
- Questions of law are referable to the Commission President for determination, and medical assessments are made by an independent Approved Medical Specialist.
- Time limits and quantum conditions govern the right to appeal.

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37. *Workers Compensation Act 1987*; *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act); Workers Compensation Commission Rules 2003.

38. See Guidelines, Practice Directions at <www.wcc.nsw.gov.au>.

Recognising the potential injustices that could occur in a speedy informal, settlement-focused dispute resolution process, especially replacing one with a strong litigious approach, the Commission holds that:

> *parties are entitled to procedural fairness consistent with the inherently inquisitorial character of the process and the Commission's objectives (S 367 (1)(a) and (2) of the 1998 Act. Timeliness and consistency of procedure are strong elements of fairness in this method of dispute resolution.*[39]

The difficulty in selling such a radical process to commercial parties is probably identified in this quotation. The Commission's scheme is designed for the particular disputes and their context and there may be those who argue that it is too sharp and fast for the interests of justice in commerce.

### *E. London Marine Arbitrators' Association FALCA Rules*

The London Marine Arbitrators have implemented a scheme of Fast and Low Cost Arbitration (FALCA). It is an intermediate stage between its Small Claims Procedure and its normal process. The FALCA Rules will be applicable to claims between US$50,000 and US$250,000 which comprise the majority of LMAA's business. The main components of the FALCA Rules are:

- A sole arbitrator will be agreed to by the parties.
- A strict timetable for exchange of submissions, with no pleadings. Submissions can be in any form.
- Discovery will be limited to relevant documents.
- Exchange of witness statements and experts' reports subject to a tight timetable.
- Time limits apply to the arbitrator making the award.
- No oral hearing unless the arbitrator deems it fitting.
- The Rules exclude, so far as possible, any right of appeal to the Court.
- The arbitrator is entitled to exercise appropriate powers if any party fails to observe the FALCA procedures.

### *F. Small Business-Specific Dispute Resolution Schemes*

The Institute has developed a set of Industry/Consumer Dispute Resolution Scheme Rules for adoption by industry associations for the quick and cost-effective resolution of claims by consumers against suppliers of goods and services who are members of the industry association. The intention is that the particular association appoint the Institute to provide dispute resolution services under a scheme adopted by the association. IAMA has recently been registered as a provider of dispute resolution services by .auDA, the organisation which administers the 'au' domain name. Supplemental rules have been developed appropriate to the way this activity operates, e.g. electronic communication. The Industry/Consumer Dispute Resolution Scheme procedures provide for a two stage process of conciliation, and if unsuccessful, arbitration.

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39. The Practice of the Conciliation/Arbitration Process in the Workers Compensation Commission, WCC Guideline at 1.

A range of dispute resolution schemes have developed under the guidance of government. ASIC, for example, has approved a number of external dispute resolution schemes in the company and financial services areas of commerce. These include the Financial Industry Complaints Services, Insurance Inquiries and Complaints, Banking and Financial Services Ombudsman, Credit Union Dispute Resolution Centre, and the Credit Ombudsman Service Ltd.[40] These Schemes deal with complaints and claims in a variety of ways, some of which are binding and others merely use mediation or conciliation methods.

There are also a plethora of schemes developed under self-regulation of industry and commerce. Those operating at a national level are included in the Directory of National Self-Regulatory Schemes.[41] Many of the industry schemes involve a complaints handling procedure and not dispute resolution. Further, there are many small disputes arising within small business and the professions for which no process is available except for the Local Courts or a consumer claims tribunal.

The Chartered Institute of Arbitrators in the United Kingdom operates several industry-specific dispute resolution schemes that are offered as quick and cost-effective alternatives to litigation in courts or tribunals. The processes are conducted by their arbitrator members, with tailor-made rules that specify the procedure and powers of the arbitrator, sometimes with reference to the arbitrator's jurisdiction and power to direct the procedure in s 34 Arbitration Act 1996 (UK). Some term the process an adjudication.

As with the Institute's Industry/consumer scheme, mediation or conciliation precedes arbitration or adjudication, which will preferably be conducted on written documents only. As with .auDA the scheme for the British Institute of Architectural Technologists actively promotes the use of the internet for online dispute resolution. Common features of the schemes are strict time limits and guillotine clauses, and immunity for arbitrators. Fees are usually fixed, according to the value of the matters in dispute and kept low for consumers. Decisions are binding, non-reviewable decisions, at least on the trader party. Limited appeal is available on a point of law to the High Court. An appeal by way of internal review is available through the Chartered Institute of Arbitrators Consumer Arbitration Scheme Review Procedure.

A wide range of trade and industry schemes exist, including for motor traders, communications and internet services, funeral directors, heating and ventilator contractors, architectural technologists, surveyors, travel agents and mortgage providers.

### *G Construction Industry Arbitrations – The 100 Day Arbitration*

In recognition of the difficulties of applying even the best general procedural rules to a range of sometimes complex disputes, a number of dispute resolution bodies have developed construction industry-specific rules for arbitral proceedings.

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40. See <www.asic.gov.au/ Financial Services, Dispute Resolution> for details of all approved Schemes.
41. See <www.selfregulation.gov.au/dir_nat_schemes.asp>.

*AAA Construction Industry Arbitration Rules*

The American Arbitration Association (AAA) in the 1990s developed and recently refined its Construction Industry Arbitration Rules, that are accepted as standard practice by the construction industry.[42] These Rules allow three discrete tracks for cases of different sizes and levels of complexity:

- **Regular Track Procedures** which are applied to the administration of all arbitration cases, unless they conflict with any portion of the other Procedures.
- **Fast Track Procedures** designed for cases involving claims of no more than $75,000 and two parties; parties may also agree to use these procedures in larger cases.
- **Procedures for Large, Complex Construction Disputes** suitable for cases administered by the AAA under the Construction Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000.00 (reduced in 2003 from $1,000,000) exclusive of claimed interest, arbitration fees and costs.

The Fast Track Procedures were designed for cases involving claims of no more than $75,000. The highlights of this system are:

- a 60-day 'time standard' for case completion;
- presumption that cases involving $10,000 or less will be decided on a documents only basis;
- requirement of a hearing within 30 calendar days of the arbitrator's appointment;
- a single day of hearing in most cases; and
- an award in no more than 14 calendar days after completion of the hearing.

*100 day Arbitration*

Following on the introduction of the Arbitration Act 1996 (UK), in 1998 the Society of Construction Arbitrators (SCA) in the UK developed the Construction Industry Model Arbitration Rules (CIMAR), endorsed by numerous bodies representing the construction industry. Simultaneously, a Review Body chaired by his Honour Judge Humphrey Lloyd QC monitored their implementation and use, and guidance for use of the Rules is published with Notes issued by SCA.[43]

Possibly due to the pressure upon arbitration as a dispute resolution procedure after the introduction of construction adjudication in the UK, SCA is in the process of developing rules for accelerated arbitration that has come to be known as the 100 day arbitration. It will operate as an additional alternative procedure within the CIMAR. The general concept is that the arbitration process will be accelerated, and that where parties agree to this procedure, from commencement of the arbitration or adoption of the procedure to final award the elapsed time will be 100 days.

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42. Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes) Amended and Effective July 1, 2003 at <www.adr.org>. See Rules and Procedures.
43. See *CIMAR 1st Edition February 1998 Notes Issued by the Society of Construction Arbitrators - Updated January 2002* at <www.arbitrators-society.org>.

The Rules have gone though several drafts, and the SCA is in the process of finalising the preferred version.[44] From the details made public it will have features like these:

- The arbitrator has a duty to make the award within 100 days from delivery of the statement of defence (in effect the close of pleadings).
- The parties only may agree to extend this period; if they agree, the arbitrator can direct shorter time periods and the 100 days is reduced accordingly.
- Submissions and an award on costs are made to fixed time limits applying after the main award is given.
- Time limits apply to service of documents, conduct of a hearing, written submissions, with the arbitrator setting the timetable at the outset.
- A maximum time will apply to an oral hearing, if one is held.
- The arbitrator has wide powers to give directions about conduct of the hearing, be inquisitorial, investigative, and use his or her own initiative in ascertaining the facts and the law.
- The parties commit to cooperating in order to make the process speedy.

The enforceability of the process is suggested to be the contractual commitment of the parties and the arbitrator.

It is clear that the process of developing this procedure has seen much discussion and negotiation. Some of the perplexing questions they have been grappling with include:

- Reconciling the arbitrator's conflicting obligations of duty of fairness under the Arbitration Act 1996 and the duty to comply with the time limits.
- On which basis are days counted – calendar or working?
- What to do about costs, and when?
- What can be done about parties reluctant to comply with their obligations under the model?
- How is failure to comply with time limits of the part of the parties and the arbitrator to be dealt with?

## 5. THE FUTURE – REFORM AND DEVELOPMENT

There have been a number of papers presented at this conference that have addressed the way in which procedural reform in the practice of commercial arbitration might be improved in Australia. There has been guidance as to the lessons which might be learnt from international arbitration practices, and extensive practical advice as to how the policies and authority in the IAMA Rules might be implemented. A great contribution to the process will be an effective legislative background under hoped-for amendments to the UCA Acts which will reinforce the Institute's procedural Rules.

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44. I have been provided with a copy of the most recent draft, but in deference to the SCA I have not distributed these with the conference papers.

The process of 'stiffening the backbone' of arbitrators is ongoing, and will be addressed by the various Chapters' CPD programs. The development of a greater appreciation by arbitrators of what the Rules require of them, and the procedural authority they permit them to exercise will be essential if arbitration is to remain the cost-effective and timely process it can be.

There are, however, three areas outside considerations of improvements in the practice of arbitration that I propose should be addressed by the Institute:

- The first is a binding programmed procedure for construction arbitration based on the SCA 100 day arbitration concept and other time limited models.
- The second area, and one of more general relevance to the commercial community and membership of the Institute is the development of a scheme, not necessarily by way of arbitration, providing for the speedy and economic resolution of small business and consumer claims.
- The last area in which I believe the Institute should focus some attention is as yet unresolved issue of whether an adjudication process should be implemented to include all construction disputes as provided in the UK. Such a scheme could develop in a number of ways and it would be sensible to ensure that the Institute is at the forefront of discussions and decision-making in this regard.

### *A. Construction Arbitration Binding Programed Process*

The problem with timetables in arbitration is that too often they are, as Kruschev said of promises, 'like piecrusts, made to be broken'. The sting in the tail of the IAMA Expedited Commercial Arbitration Rules, which are intended to be a fast-track process, is the facility in cl 10 of Schedule 2 for time limits to be extended by agreement or at the discretion of the arbitrator 'on proper cause being shown' and subject to a possible costs penalty. How many expedited proceedings, or for that matter expert determinations, ever finish on time?

Experience has shown that the very short and sharp time limitations under adjudications of progress claims, and under the UK scheme can be met. Further, Courts, certainly in NSW, are developing a hitherto unseen rigour with respect to timetables and case management directions.

There is absolutely no reason why a process could not be developed for a complete pre-set or agreed timetable to be imposed that could not be extended at <u>all</u> insofar as it applied to the parties and their legal advisers, and only in extenuating circumstances insofar as it bound the arbitrator.

A procedure could be introduced by adding an extra paragraph to the introduction to the Rules:

> *3. The Institute of Arbitrators and Mediators Australia Programed Construction Arbitration Rules.*

Rule 13 could be amended to add to subclause 2:

> *c. Where the arbitration is to be conducted in accordance with Institute of Arbitrators and Mediators Australia Programed Construction Arbitration Rules, the provisions of Schedule 3 shall apply.*

The drafting of Schedule 3 may take a little time, and ought to follow a process of consultation with the construction industry and the legal profession. The essential ingredients would include a requirement for the arbitrator to settle with the parties a binding timetable, including fixing a date for a hearing. The hearing time could be allocated in the same manner as occurs in international arbitrations.

If a scheme were to be developed by the Institute for Binding Programed Construction Arbitration along the lines of the SCA 100 day arbitration and possibly the AAA Fast Track process, the procedures adopted would need to address issues such as:

- What is the jurisdiction? i.e. what disputes are appropriate or eligible for resolution in this manner?
- What are the conditions precedent to invoking the procedure?
- Establishing when the time period applies, and what must be/can be achieved with that period.
- What the internal timetable will be, e.g. time limits and interrelated limits for the conduct of the separate procedural steps, e.g. service of documents, hearing, written submissions, making of award?
- Whether, and in what circumstances will any extension of the time periods occur?
- What happens should a party or the arbitrator not comply with the time limits?
- Exclusion of documentation provided outside time limits.
- Duties imposed upon the parties, e.g. to cooperate and act expeditiously.
- Duties to be imposed upon the arbitrator.
- Powers conferred upon the arbitrator.
- Basis for an enforceability in the contractual commitments of the parties and the arbitrator.
- Arrangements for payment of and security for arbitrator's fees.
- Status of the award – provisional or binding, grounds of, or any exclusion of appeal.
- Dealing with errors on the face of the award or slip rule.
- Enforcement of awards and exclusion, by agreement, of judicial review.
- Interaction with the *Uniform Commercial Arbitration Acts*.

### *B. Small Business Dispute Resolution Service*

The need for some form of small claims dispute resolution or adjudication process has been recognised by a number of organisations and individuals in Australia. The schemes in place illustrate the creative and adventurous approach that is required to provide a modern and effective process to resolve small, but personally significant claims arising in commerce, industry and by consumers.

SPAN Services has introduced a dispute management and resolution service for the

service providers industry association conducted by Shirli Kirshner.[45] Adjudicate Today offers a Small Claims Adjudication Service for a fixed (graded) fee,[46] and the Australian Branch of the Chartered Institute of Arbitrators has introduced a new Chartered Arbitration Scheme.[47] The Scheme allows an arbitrator to implement a facilitated negotiation which, if unsuccessful, is followed by an arbitral process.

Without being too conclusive as to the model which the Institute might, but must, adopt, I suggest a binding, fixed (graded) fee fast track lawyer free process that is not arbitration. The process could allow a prescribed limited review of any matter of law arising from the determination. There is no reason why a tight process could not be developed that provided a quality of service seen in no consumer tribunal.

Further, I suggest that such a process ought to be based on the streamlined Workers Compensation Commission system. If you pause to reflect, how much would you spend pursuing a claim for less that $50,000?

The possible ingredients for a scheme to resolve small business disputes might be:

- Fixed but graded fee
- Prescribed process with time limits
- Documents exchanged with timetable
- Short 'hearing' one day only
- No lawyers
- Timetabled progression at the 'hearing conference' from facilitated negotiation (mediation) through to a determination
- An internal (within IAMA) review process and no fee if review is successful

### *C. Construction industry Adjudication Scheme*

A scheme for adjudication of all construction disputes ought to be investigated by the Institute, even if the proposal is ultimately not pursued. The simple reason why the Institute should be at the forefront of such an inquiry is because it is the only organisation which is involved nationally in the training and accreditation of adjudicators and the administration of payment claim adjudications. The Institute is therefore in a unique position to consult, consider and advise on the process. Another reason why the Institute would want to lead this consideration is because if we do not, it may happen without the Institute being in a position to influence many aspects of the process, in particular the role its membership may have in the process as adjudicators.

There are a number of ways in which construction disputes adjudication might be introduced in Australia. The procedures and means for its introduction will clearly depend upon which method was adopted for its implementation. There are vast differences between what might be required in the expression of a mandatory statutory scheme as opposed to a set of procedural rules adopted by a nominating body such as the Institute. The possibilities

45. See <www.span.net.au>
46. See <www.adjudicate.com.au>
47. See <www.arbitrators.org.au>

and hazards of each method would need to be considered. There is, of course, no necessity or reason for the Institute to design and implement a scheme either for a national approach or as an amendment or appendage to state legislation.

The preferred option, I suggest, is for the Institute to draft and issue for comment a set of Rules for Adjudication by way of non-binding determination of all disputes arising in the construction industry.

A model which could be proposed would provide for the following:

- Prescribed timetable for submissions
  - Graded by quantum
  - Tight but fairer than the NSW Security of Payment Act
  - Balanced 'equal' opportunity for both sides
  - Possible provision for once only agreed timetable
  - Extensions expressly excluded (guillotine) or limited to adjudicator's discretion
- Joinder of parties
  - Claims under related contracts – sub- and head contracts
  - default timetable for joinder
- Expertise of Adjudicator
  - Expressly to be relied on
  - Alternative, with the assistance of one expert or assessor engaged by adjudicator
  - Expert evidence to be limited
- Possibility of Conference/Hearing
  - For clarification of submissions
  - Allocation of time – to parties or issues as predetermined by adjudicator
- Adjudicator to determine procedures
  - Guideline alternatives in rules of procedure
  - Statements of issues and findings to form basis of determination
  - Written submissions
  - Adjudicator discretion for further submissions
  - Inquisitorial process permitted
- Procedural fairness
  - Recognised limitations
  - Generally at the discretion of adjudicator
- Determination to be provisional
  - Subject to formal determination by arbitration or litigation or agreement of the parties
  - Provision for agreement by parties for determination to be final and binding
- Enforcement of determination
  - Form of determination
  - Express exclusion of judicial review in enforcement proceedings
  - Slip rule exception

The introduction of such an adjudication process would necessarily involve consultation with the construction industry and professions, and with the legal profession and the Courts. It may not be welcomed by all but the water, if there is any left, should be tested.

## ATTACHMENT

### *Environmental Planning and Assessment Act 1979* (NSW) No 203

109ZI Definitions

In this Part:

**building action** means an action (including a counter-claim) for loss or damage arising out of or concerning defective building work.

**building work** includes the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of building work.

**subdivision action** means an action (including a counter-claim) for loss or damage arising out of or concerning defective subdivision work.

**subdivision work** includes the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of subdivision work.

109ZJ Apportionment of liability

(1) After determining an award of damages in a building action or subdivision action, a court must give judgment against each contributing party for such proportion of the total amount of damages as the court considers to be just and equitable, having regard to the extent of that party's responsibility for the loss or damage in respect of which the award is made.

(2) Despite any Act or law to the contrary, the liability for damages of a contributing party is limited to the amount for which judgment is given against that party by the court.

(3) A contributing party cannot be required:
   (a) to contribute to the damages apportioned to any other person in the same building action or subdivision action, or
   (b) to indemnify any such other person in respect of those damages.

(4) In this section contributing party, in relation to a building action or subdivision action, means a defendant or other party to the action found by the court to be jointly or severally liable for the damages awarded, or to be awarded, in the action.

### *Civil Liability Act 2002* (NSW) No 22

as amended by the
*Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) No 92
and the
*Civil Liability Amendment Act 2003* (NSW) No 94

**Part 4 Proportionate liability (not yet commenced)**

**34 Application of Part**

(1) This Part applies to the following claims (apportionable claims):
   (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,

(b) a claim for economic loss or damage to property in an action under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

(1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(2) In this Part, a concurrent wrongdoer, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

**34A Certain concurrent wrongdoers not to have benefit of apportionment**

(1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if:

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or

(c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3B.

(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

**35 Proportionate liability for apportionable claims**

(1) In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and

(b) the court may give judgment against the defendant for not more than that amount.

(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) In apportioning responsibility between defendants in the proceedings:
  (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law, and
  (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

**35A Duty of defendant to inform plaintiff about concurrent wrongdoers**

(1) If:
  (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the other person) may be a concurrent wrongdoer in relation to the claim, and
  (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
    (i) the identity of the other person, and
    (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and
  (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

  the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

**36 Contribution not recoverable from defendant**

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:
  (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
  (b) cannot be required to indemnify any such wrongdoer.

**37 Subsequent actions**

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

(2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

**38 Joining non-party concurrent wrongdoer in the action**

(1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

**39 Application of Part**

Nothing in this Part:

(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or

(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable, or

(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

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