Editor's Commentary

Russell Thirgood, Editor

Welcome to the May 2012 edition of the Arbitrator and Mediator.

Our first contribution this issue is from Professor Tania Sourdin, the author of *Alternative Dispute Resolution* which is now in its fourth edition. She examines the science behind decision making, looking at factors many of us would not even consider, such as when and what a person had eaten, the time of day and how many other decisions a person has made that day. More importantly, and very usefully, Professor Sourdin provides us with useful frameworks, such as a four-step process to reduce or eliminate emotional bias. As arbitrators, adjudicators and experts we strive for excellence in decision making. Understanding how our brains work in that process can be invaluable.

Michael Sweeney's article focuses on the Victorian *Commercial Arbitration Act 2011*. Victoria like other jurisdictions has modernised its arbitration legislation. Like the Acts enacted in the mid 1980s, these updated Acts (except for Queensland, the ACT and Western Australia) are uniform. In Western Australia it is anticipated that the *Commercial Arbitration Bill* 2011 will soon receive assent – leaving Queensland and the ACT as the only jurisdictions still using the old Acts. Michael explores an understanding of the paramount object of the Act in the context of party autonomy. The article has significance beyond the Act. The paramount object in s1AC of the Victorian Act – to facilitate fair and final resolution of disputes without unnecessary delay or expense – is fundamental to all mediation and arbitration. This article offers a useful case study in how the underpinning rationale is carried through to practical application.

One of the most significant motivating factors behind electing to undertake arbitration is the savings in time and cost. For domestic arbitration to prosper in Australia it must be more competitive than other forms of final dispute resolution. To that end, Ian Nosworthy has contributed an article on how practitioners can make arbitration more efficient. Even though Ian's article is very practical, providing useful, easy to remember advice – such as reducing everything to writing which can be reduced to writing – he does not neglect to delve into the jurisprudential basis of his ideas.

A must read for arbitration practitioners, Albert Monichino SC has contributed a timely assessment of the new *Commercial Arbitration Act 2011* (Vic) which replaces the old 1984 Act and as noted above forms part of a suite of modern uniform arbitration acts across the country (except for Queensland, the ACT and for the time being, Western Australia). Albert puts the new Act in its context, that of a increasing modernisation and harmonisation of Australia's international and domestic arbitration law. He also

examines the rationale of the updated laws – apart from the inherent benefits for Australian litigants, they will make Australia more attractive as an alternative dispute resolution hub in the Asia-Pacific region. President Rowena McNally and the IAMA Council look forward to working with the new Queensland government so that Queenslanders might also benefit from modernisation and harmonisation of its arbitration laws.

Dr. Penny Webster has contributed a paper on selecting a workplace ADR process. She provides us with three Australian case studies, from diverse organisations. The case studies revealed that managers had a relatively unsophisticated level of understanding of the nature of conflict, ADR process that could assist in their workplaces and their potential applications. Dr. Webster also provides some useful recommendations arising from her case studies to help shift institutional cultures toward embracing internal ADR regimes.

AA de Fina AO gives us an in-depth analysis of the interrelation of public policy and arbitration in Australia. He delves into the rationale behind legislation enacted to regulate and support arbitration and grounds the concepts in concrete examples. I particularly recommend this article to readers who practice in or are interested in intellectual property, as there is an examination of arbitration as a dispute resolution mechanism in IP disputes.

Chinthaka Liyange has given us an analysis of the enforceability of online consumer arbitration clauses in the context of the *Competition and Consumer Act 2010* (Cth). Given the proliferation of online transactions between business and consumers and the relatively new legislation regulating them, this is a timely and interesting contribution. Chinthaka highlights problems with the Act and the vagueness of the scope of standard form contracts. A working understanding of those problems is vital, because as Chinthaka points out, the courts are an inappropriate avenue of redress for business to consumer e-commerce disputes. I suspect that this is an entire body of work that will develop and mature with time.

Queensland Chapter Chairman Khory McCormick and I-Ching Tseng provide us with the first of two case notes in this issue. In *Sugar Australia Pty Limited v Mackay Sugar Ltd*, the Supreme Court of Queensland found that it amounted to misconduct for an arbitrator to not give the applicant an opportunity to address a point not raised by the parties in their Points of Contention.

In the second case note, Brent Turnball looks at *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*. The case dealt with the enforcement of an international arbitration award in Australia. Brent takes two main points from the case. The first is that Australian courts follow the American example by allowing international arbitration awards to be enforced unless they offend the principles underlining the core of 'morals and justice in Australia.' The second point was that parties should ensure that the seat of arbitration should be consistent with where the parties have assets against which execution can be levied. I note that I am acting for one of the parties in these proceedings and I may, subject to confidentiality restraints, be able to provide readers with further insights as this case progresses through the Federal Court to a final hearing.

I recommend these articles to readers and thank all of the contributors for their hard work.