NATIONAL CONFERENCE PATH TO JUSTICE—ARBITRATION

Address by
His Excellency The Honourable Bill Hayden Governor-General of the Commonwealth of Australia on the occasion of opening the Annual Conference of The Institute of Arbitrators Australia Canberra, Monday, May 4th, 1992

Thank you for the introduction. It is a pleasure for me to be with you this morning for the official opening of the 1992 Conference of The Institute of Arbitrators Australia, here in the national capital.

As I understand it, this is the first time that Canberra has hosted your annual conference. It was only two years ago that a local chapter of the Institute was established, and as Governor-General may I welcome all delegates and distinguished speakers to the city.

I am sure that you will find these two days to be stimulating and rewarding ones—professionally and also socially, I hope, as you renew those friendships and personal contacts that are such an important part of belonging to any national body such as The Institute of Arbitrators.

The theme of this year's conference, *Arbitration—Path To Justice,* is one of great significance: and not just to the 1500 members of the Institute but to all who are concerned with the administration of justice in this country.

This is so, I believe, whether one considers the subject as judges or adjudicators, as legal practitioners, as legislators, or as lay members of the public for whom involvement with a civil action at law can be a daunting, not to say alarming prospect.

And I say that because there has scarcely been a legal commentator in recent years who has not expressed some increasing concerns.

Concerns, firstly, at the long delays before so much civil litigation reaches the courts for hearing and, secondly, the often exorbitant costs facing the parties once they get there.

No doubt these things are well enough known to you, but I suppose it is always useful in a forum such as this to quote from one or two authorities.

In a paper given to the Australian Council of Churches a year or two ago, the President of the New South Wales Court of Appeal, Mr Justice Michael Kirby, reminded his audience that "Justice delayed may be justice denied—but it remains a feature of justice in the courts in Australia."

In its discussion paper number 4 last September, the Senate Standing Committee investigating the cost of legal services and litigation remarked that it had received numerous anecdotal submissions expressing frustration with expense or delay in the court system.

It went on: "A common complaint is that 'Middle Australia' has been excluded from access to the law. That is, unless people are poor enough to qualify for legal aid, or very wealthy, access is restricted by the inability to afford the high cost of the traditional legal system."

When I was opening the Judges' Conference in Canberra last January, I noted that even a glance through some recent newspaper reports would show cases where civil litigants had faced costs of some hundreds of thousands of dollars.

And that being so, it is not at all surprising that many people increasingly have been considering alternative methods of dispute resolution—arbitration, mediation, court annexed procedures, greater use of various statutory tribunals, community law centres and so on.

They are not necessarily *substitutes* for the traditional legal process—although sometimes they may seem to be so, and I acknowledge the reservations that many judges have about the trend as expressed, for example, by some of the speakers at the Judges' Conference earlier this year.

On the other hand, there is no doubt that the movement towards alternative methods of dispute resolution does represent an attempt to both shorten the process—to give a greater degree of choice, to quote the Senate Committee—and to curb some of the more exorbitant costs.

I was very interested to look at some of the statistical information sent to me by The Institute of Arbitrators to assist me in the preparation of this opening address.

The survey is based on the responses of a little over 10 per cent of your membership—162 people—and I found it fascinating to learn that three quarters of the cases heard involved claims for sums of less than half a million dollars. In fact, 45 per cent of them were under $50,000.

I don't want to take up your time this morning by going through the report in detail.

What is significant, is the fact that over 20 per cent of the matters were dealt with in one day—and over 60 per cent were dealt with in one week or less. Indeed, less than 4 per cent of cases took more than eight weeks to resolve.

I should add over half the cases involved seven days or less in preparatory time other than in hearings.

In the context of this discussion, I also note that for 67 per cent of the cases, the total costs to resolve the matter were less than $5000—and they exceeded $100,000 in less than 2 per cent of the cases.

What such statistics show, I think, is the very great success that Arbitration and conciliation or mediation enjoy in saving time and money for the overwhelming majority of people involved with commercial disputes of this kind. There is no doubt that it offers *one* important path on the journey towards justice for many people.

Of course it is true that not every dispute is amenable to the process of arbitration, and that some litigants prefer to seek remedies through the courts. Even there, however, most disputes are settled before the matters come to trial.

There was a very combative editorial in *The Canberra Times* in March last

year, which concluded, if I may quote: "The only good thing that can be said about the present legal system in Australia is that it is so cumbersome and costly that it forces people to resolve their own disputes."

I don't think it is necessary to agree with the extravagance either of the language or the sentiment to accept the general point.

I gather that over 90 per cent of the disputes that come before members of your Institute are settled by agreement before the arbitrator makes a formal award or decision—and this reflects a similar trend in the courts where it is estimated that perhaps up to 95 per cent of cases are settled before judgement.

Sir Laurence Street, a former Chief Justice of New South Wales who has written extensively on the subject, commented in a paper he gave to the young lawyers section of the NSW Law Society in March 1990:

> " . . . I believe that we may be fast approaching the time when failure to bring to the notice of a client the availability of a mediation process could leave a lawyer open to criticism."

Indeed, you will be aware of a growing trend for various legislatures to authorise superior courts to refer proceedings to arbitration or mediation.

As one example, the Commonwealth *Courts (Mediation and Arbitration) Act* of last year inserted a new part on mediation and arbitration in the *Family Law Act* of 1975, and also empowered the Federal Court to refer proceedings to a mediator or arbitrator, with the consent of the parties.

I understand, in fact, that in some other jurisdictions the court may refer matters to an arbitrator for determination or to a Referee for enquiry and report, even if the parties do *not* necessarily agree to it.

It can, in other words, be compuslory—although I am aware of continuing debate within the profession as to the relative merits or otherwise of such a proceeding.

This is not something on which I should express a point of view, other than to note that over recent times your Institute has responded to perceived needs by publishing rules for commercial arbitration, rules for expedited or fast-track arbitrations, and rules for conciliation and mediation.

I might also observe that mediation, conciliation and arbitration have a long and honourable history in this country—and not merely in the settlement of private commercial disputes.

In a public political sense they trace back certainly as far as the bitter strikes of the 1890s, and the pressures from within the trade union movement and elsewhere that encouraged the founding fathers, when framing the Constitution, to give the Commonwealth power to make laws for the conciliation and arbitration of industrial disputes extending beyond one state.

In many respects Australia pioneered the system of compulsory industrial arbitration with the establishment of the Commonwealth Court of Conciliation and Arbitration in 1904—now, by a long process of evolution, the Industrial Relations Commission.

I notice, incidentally, that for the first time this year you will be considering

the changes taking place in the industrial relations system in this country.

In particular, there are implications for your members of enterprise bargaining and its consequences given that some contracts, as I understand it, now provide for disputes between employers and employees to be referred to private arbitrators rather than to the Commission.

One would not want to make too much of the historical and industrial background, I dare say.

Nevertheless, it does seem to me that a general acceptance of the arbitration process by the Australian community may well help to account for the remarkable success that the Institute of Arbitrators has enjoyed over the years in resolving a wide range of *commercial* disputes.

Until the last decade and a half, the majority of commercial arbitration work was confined to the construction industry—particularly, as I understand it, to the home building industry—and to maritime contracts.

But about the time the Institute was formed in 1975 as a professional body, responsible for training and grading arbitrators, the areas where arbitration has been used to settle disputes have expanded considerably.

I notice, for instance, that you have members skilled in such fields as accountancy, architecture, engineering, insurance, investment and finance, medicine, mining, real estate, transport, general commercial areas, and so on.

Last year, I believe, you conducted two very successful courses for barristers in Melbourne, and one of the priorities is to extend the training courses for lawyers and other target groups.

This is in addition, of course, to the very intensive general and advanced training sessions that you conduct for candidates from disciplines *outside* the legal profession, to bring them "up to speed" as it were, on the law of arbitration.

As I understand it, approximately 150 people do the three-day courses each year—and in fact one will be held at the conclusion of this conference.

Ladies and gentlemen, the only other point on which I want to touch briefly this morning is to acknowledge the considerable success enjoyed by the Australian Centre for International Commercial Arbitration.

The Centre was established by the Institute in 1985 in conjunction with the Law Council of Australia—a notable proponent of the process of mediation, if I may say so—the Australian Bar Association, and with certain support from the Victorian government.

At a time when there is growing interest in settling international disputes by arbitration, it was hoped that Australia might be able to share in the economic benefits of placing our expertise in arbitration on the world market.

I believe the Centre's operations have exceeded your expectations. It was thought that it might take up to half a decade for the first major international case to be brought here—in fact it was achieved after only 18 months.

Over the past five years it has been estimated that International Arbitrations have generated some $20 million in invisible income for Australia—not just in the cases heard *here* but also by Australian arbitrators who have travelled overseas to hear disputes.

Our professional arbitrators enjoy a high reputation—partly because of the quality of your formal education, and partly because of the emphasis given to arbitrators with technical expertise across a wide range of disciplines, as I have said.

In this, a great deal of the credit must go to The Institute of Arbitrators Australia which, over the past 17 years, has done so much to raise the standards, the level of training and accreditation, and the growing acceptance by the general community that arbitration and mediation is one of the paths by which people can reach a fair and just resolution to their disputes.

I congratulate you and wish you well in the important work that lies ahead of you. Let me thank you once again for having invited me here this morning, and in so doing it is my pleasure to officially declare open the 1992 Annual Conference of The Institute of Arbitrators Australia. Thank you.

THE INSTITUTE OF ARBITRATORS AUSTRALIA

PRELIMINARY ANNOUNCEMENT

INSTITUTE CONFERENCE—1993

Hyatt Hotel, Sanctuary Cove, Queensland
2nd May, 1993 (pm) until 4th May, 1993 (pm)

and

GENERAL RESIDENTIAL ARBITRATION COURSE

Bond University, Queensland
4th May, 1993 (pm) until 7th May, 1993 (pm)

Details of both the Conference programme and related activities and also of the General Residential Arbitration Course will be advised to all members in due course, in the meantime the date for each should be recorded.

Expenditure incurred by employers in respect of both the Conference and the Course may be eligible to be set off against their liability under the Commonwealth Training Guarantee (Administration) Act 1990.