



President's Message

Ian Nosworthy, President

This will be my last President's Message for *The Arbitrator & Mediator* as my term as President expires in May.

I face this prospect with some regret. While the last two years have been demanding and have involved a great deal of work, the achievements we have made as a Council have been considerable. I am delighted to think that many of the initiatives which we have pursued reflect credit on the Institute, and demonstrate a steadily increasing professionalism in our dealings with Government, the Courts and the public, as well as in the presentation of our professional courses.

This Journal is, in my opinion, of a very high quality, and reflects a great deal of credit on our Editor, Russell Thirgood, and the Journal Committee. The difficulty of producing the Journal should not be underestimated. It involves a great deal of hard work, careful selection of material submitted, and a variety of technical skills which are brought together against tight timelines. Having said this, I encourage potential contributors to submit material for consideration. Many of our contributors commence by making a case note about a topical decision against a particular view they have had on a point of law or practice in arbitration or mediation. Sharing your ideas with all of us is an important way in which you can contribute to our learning.

When I reviewed what I have written previously for the Journal, I noted that I promised to come back to some of my pet themes, and it is perhaps appropriate for me to try and put some coherence to those themes in this message.

Several months ago, I was privileged to hear Justice Austin of the Supreme Court of New South Wales deliver an address in which he reflected on some of the issues involved in managing corporate and commercial cases.

A number of the issues discussed by his Honour are relevant to us in our dispute resolving roles. Some of the key points made by his Honour were:

- The importance of pre-trial directions and the need to ensure a cards-on-the-table approach to litigation.
- The use of different forms of conference to help the parties to distil the real issues for determination.
- The use of a round table discussion to help understand complex financial evidence.

- The use by a Court of a mediator to resolve difficult discovery issues.
- The use of a single joint expert as occurs in some litigation in the United Kingdom.
- A willingness to direct mediation over the objection of one or even both parties.
- Stopwatch trials in which the parties agree as to the amount of time allotted to the presentation of their respective cases.

It was extremely interesting to observe that His Honour acknowledged the value of intervention in this way, because that acknowledgement reflects an interest by the Court in precisely the issues which responsible arbitrators and mediators focus upon, namely the application of commonsense principles and practical steps to save time and costs while adhering to the principle of appropriate dispute resolution. It was gratifying to see the Court's endorsement of specific time and cost saving techniques which Arbitrators currently use.

It seems to me that this leads me logically to the final message which I offer parties, their advisors and dispute resolvers. That message is to ensure that where possible appropriate "cost protection" offers, whether they be pursuant to rules of the Court or of the Calderbank variety, are used and encouraged. It mystifies me that there is still some litigation and arbitration which proceeds without a respondent (who is likely to be paying something) taking any steps to protect themselves against the claim and the costs of the proceedings. Just so in both mediation and arbitration it is desirable that cost protection offers should be made in a way which encourages the parties to take a realistic approach to resolution. Indeed there well may come a time when it will be found that an advisor has been negligent if they have not alerted their client to the making of such offers where there are significant costs involved in the dispute process. The earlier and more realistic such offers are, the greater pressure this will bring to bear to promote sensible dispute resolution.

I thank you all for your support as President. I will continue to maintain an active and enthusiastic involvement with the Institute and look forward to your support for my successor.