Editor's commentary

Russell Thirgood[1]

Welcome to the July 2018 edition of *The Arbitrator & Mediator*.

The Honourable Justice Clyde Croft opens this edition with an insight into national and international arbitration developments. His Honour considers Australia's place in the international arbitration field, and moves to a brief consideration of the national uniform Commercial Arbitration Acts. Looking further afield, Justice Croft provides commentary on dispute resolution clauses in investment treaties and considers international arbitration from an ethical perspective. In a development closer to home, His Honour looks at the role of subpoenaing a witness to give evidence before an arbitral tribunal. Justice Croft then moves to thought-provoking discussions on topics, including discovery in arbitration, arbitrability and public policy, forced arbitration in consumer contracts and enforcing awards that have been set aside. To conclude, Justice Croft reflects that the reinvigoration of international and domestic arbitration in Australia is a result of not only action by the government and courts, but also the efforts of commercial parties, lawyers, arbitrators and arbitral institutions.

Mieke Brandon takes us away from arbitration and guides us through the benefits of mediators undertaking reflective practice. Through an analysis of the stages of professional development, Ms Brandon describes the significance of a mediator's personal qualities on their practice. After a discussion on the theories of reflective practice, her focus then turns to a practical guide on how readers can incorporate reflection in their practice. Ms Brandon surmises that professional development through reflective practice is one way mediators can meet the challenges of professionalism when faced with ethical obligations, standards and codes of conduct.

Christina Tay's article on restorative justice demonstrates reflective practice in action. Ms Tay's account of her experiences as an accredited restorative justice facilitator demonstrates the impact mediation can have on an offender and victim's life. She proposes that mediators must be aware of human interaction and how parties react in mediation. Situational awareness, a sense of how the situation is evolving and safety for all are some of the key factors Ms Tay says mediators must consider. Ms Tay concludes that there is much to be gained by listening to each other, acknowledging pain on a human level and working collaboratively.

The importance of listening, acknowledging pain and working together is brought home by Chris Marshall, who speaks of the value of an apology by a party to dispute resolution. Mr Marshall highlights the implications of receiving an apology, including reducing negative emotions, improving settlement negotiations, reducing feelings of guilt and promoting an ongoing relationship. These factors are all

[1] Partner and Head of Arbitration, McCullough Robertson Lawyers; Company Secretary, Resolution Institute; Director, Australian Centre for International Commercial Arbitration.

important to be cognisant of when undertaking dispute resolution. Mr Marshall acknowledges the challenges an apology brings, including the implication of fault and the consequences on legal liability. Mr Marshall leaves the reader with the thought that the power and moral significance of an apology should never be overlooked.

Another important element to consider in alternative dispute resolution is due process. Erika Williams, Hannah Fas and Tom Hannah provide a timely commentary on the international commercial arbitration arena and the impact on efficiency and fairness by overly cautious arbitrators, who are concerned about their awards being overturned or deemed unenforceable. The term to describe this perceived phenomenon is coined 'due process paranoia' and is characterised by arbitrators yielding to parties' demands for more time or extra processes. It is a particularly relevant consideration, given the objective of arbitration is for a timely and cost effective resolution. The article concludes with an insight into how transparency, proactivity, interactivity and proportionality can serve to provide a solution.

Alicia Hill takes the reader back to mediation with an exploration of different mediation techniques and provides an insight into what techniques are resonating most with those in the mediation field. Ms Hill conducts her analysis through relying on recent surveys undertaken in Australia and the United States. Those in the Australian mediation sector found mediators making genuine enquiries into the case and pre-mediation conferences to be the most helpful techniques. The most unhelpful conduct was found to be where a mediator fails to act in accordance with their perceived role or acts too forcefully in process control. These survey results demonstrate the impact a mediator's personal approach can have on parties. Ms Hill concludes by referring back to a common theme in this edition of the Journal, that mediators should take time to reflect on their own techniques.

In a link to the article on due process paranoia, Bronwyn Lincoln looks into the question of jurisdiction and challenging awards in international commercial arbitrations. Ms Lincoln discusses the active approach of challenging an award at the seat, compared to the passive approach of waiting to resist an enforcement order in a jurisdiction where the debtor has assets. The article goes on to analyse the tension where parties seek to enforce an arbitration award in a jurisdiction other than the seat. Ms Lincoln explores the questions that arise as to the validity of the arbitration agreement. In concluding, Ms Lincoln speculates that tribunals will continue to determine their own jurisdictions through reliance on the jurisprudential doctrine of competence-competence.

Addressing another ever growing topic in international arbitration, Oliver Gayner looks at third party funding in international arbitration as it continues to become a more mainstream practice. This is an insightful article into the development of third party funding in Australia and internationally. Third party funding is an example of Australia leading the way, with the practice seen as an Australian export that is accepted in other common law jurisdictions. Mr Gayner discusses the measures that different jurisdictions are using to maintain ethics where professional funders are involved in an arbitration matter. It will be interesting to watch how developments on this topic unfold both in Australia and internationally.

The case note by Albert Monichino QC about the case of *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* [2017] VSC 97 provides a helpful analysis into what power an arbitrator has to issue an additional award after his or her mandate has expired. In this matter, an arbitrator delivered an award described as the 'final award' and declined to adjudicate on costs due to insufficient information. One of the parties applied to have the award overturned on the basis that the arbitrator did not determine the issue of costs, despite the issue falling within the scope of the arbitration agreement. This application failed, with the court finding that despite the award being styled as 'final award', the parties were still entitled to re-engage the arbitral process to determine the issue of costs. Mr Monichino concludes with a commentary on the consequences of styling an award as 'final award'.

In his second case note, Albert Monichino QC and Adam Rollnik look into a Western Australian matter dealing with determining the scope of an arbitration agreement. *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206 considers the interpretation of the uniform Commercial Arbitration Acts. These

uniform acts provide that where a matter is referred to court and is the subject of an arbitration agreement, the dispute must be referred to arbitration upon one party's request, provided the agreement is operative. Mr Monichino QC comments on the importance of the case, in that it illustrates the courts' preparedness to hold parties to their arbitration agreement and secondly that courts are prepared to take a broad, liberal and flexible approach in construing arbitration agreements.

Mr Monichino QC provides a final case note in his analysis into *Hui v Esposito Holdings Pty Ltd (No 2)* [2017] FCA 728; *Hui Esposito Holdings Pty Ltd* [2017] FCA 648. This is an important case for those in the arbitration field to take note of, as it deals with an instance where an arbitrator was removed by the court for a perceived bias. The Federal Court considered whether the arbitrator's conduct caused the parties to lack confidence in the arbitrator's ability to come to a fair conclusion. Mr Monichino QC concludes with an important summary of the case, that arbitrators must be cognisant of affording equal treatment to parties and hearing both sides of a matter.

Two cases that have received much attention in early 2018 are *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 and *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5. These matters deal with the New South Wales and South Australia Security of Payment Acts that regulate progress payments in the construction industry. Michael Heaton QC provides an astute commentary on the High Court's decision not to review an adjudication made under the New South Wales and South Australian Security of Payment Acts. An adjudicator's decision under the Act can only be quashed where there has been a jurisdictional error. This decision will strictly limit the grounds on which parties may appeal decisions made under the Security of Payment Act in New South Wales, South Australia and potentially other jurisdictions.

Erika Williams and Bronte Hearn conclude this edition with a case note on *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd* [2016] QSC 292 and the later cost judgment heard in *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd* [2018] QSC 48. These judgments serve as a reminder to parties to be cautious in their approach in seeking to set aside an arbitral award. The applicant in this matter submitted over 2,000 pages of evidence and hundreds of pages of written submissions and was criticised by the Court for the 'snow storm of material' submitted in the context of an application for leave to appeal. The application was dismissed because none of the grounds relied upon by the applicant satisfied the strict requirements for granting leave to appeal an arbitration award. In addition to criticising the applicant's conduct of the application as 'tantamount to an abuse of process' Justice Jackson awarded the respondent its costs on the indemnity basis. The case is an example of the strict approach the court will take in granting leave to appeal an arbitration award and the consequences of conducting an application in an 'oppressive' manner.

I trust readers will find the July 2018 edition of *The Arbitrator & Mediator* to be stimulating and insightful. I thank our new and returning contributors for their scholarly works and commend their articles to our readers.