FOREWORD

THE HONOURABLE IAN CALLINAN[*]

Arbitration, particularly in relation to construction and commodity contracts, has long been an alternative, and not infrequently, preferred to curial resolution of disputes in Australia. Mediation on the other hand, in this country at least, has been a much less familiar mode of settling disputes. Indeed, when mediation first came into play, many lawyers were resistant to it. There was a tendency for them to regard it as a black art.

Times have changed. Many commercial contracts now make provision for it as a necessary, and the contracting parties hope, a final step in the resolution of their differences. The Commonwealth and its agencies insist on it, even before the initiation of litigation. Few superior courts will allocate trial dates for substantial matters unless the parties have attended, and have genuinely attempted to resolve their cases by mediation.

In a sense however, mediation in this country is a work in progress. The extent to which it should be compulsory, the role of the courts in relation to it, and whether judges may, or should conduct mediations remain issues on which strong opinions are held.

One matter does however seem clear. Executive government is likely to continue to do anything it can to encourage, even compel mediation and other forms of dispute resolution, because of the saving in cost to the state that it provides. The imposition of far from negligible daily hearing fees is an example of this.

This collection of articles will make a valuable contribution to the debate about the issues. As the Honourable Chief Justice Bathurst and other authors point out in their contributions, the tensions are palpable and not easy ones to resolve.

Governments do need to be aware however, that the courts will not stand by if they regard intervention as warranted. This is apparent from the two recent decisions of the High Court in *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 (arbitration), and *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305 (expert determination), the latter becoming more common in commercial contracts, as the intended sole means of ending disputes. Most of the states have now enacted a uniform arbitration act (eg, *Commercial Arbitration Act 2010* (NSW)) with the intention of adopting the

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same regime as applies in most of the jurisdictions with which we do business. Those jurisdictions are opposed to the susceptibility of awards to judicial review, except for bias or fraud. It will be interesting to see how the courts respond to the legislation.

A great deal of scholarship and thought has gone into this collection. Its publication is timely. Lawyers, academics, commercial parties, mediators, arbitrators and judges will all benefit from reading it. I would also commend it to anyone interested in public affairs for the reason that it provides insights into the relationship that the judiciary has or should ideally have with any suggested alternative to it.