Editor's Commentary

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Welcome to the June 2021 edition of *the arbitrator & mediator*

I am delighted to give this introductory message on the occasion of the 40th anniversary of *the* a*rbitrator & mediator*. This is a milestone event in the journal's history and sees it continue to explore new and innovative ideas in the dispute resolution space. As Australia continues to grapple with the COVID-19 pandemic, innovation is key, if dispute resolution wishes to continue to adapt so as to serve the needs of parties.

I am also happy to announce that we have partnered up with the Newcastle Law School, a unit within the University of Newcastle, in the publishing of the journal. Senior students of the Newcastle Law School will assist my team and I with proofreading of submissions. The purpose of this partnership is to ensure that the journal continues to strive for excellence both in the substance and form of the various submissions that are received.

The coronavirus global pandemic has been challenging on many fronts for so many people. In the dispute resolution industry practitioners and parties alike have had to adapt and use technology and new processes to ensure that disputes are either avoided or resolved in fair and efficient ways. It may be that historians of the future will look back to this moment in time and regard it as a turning point in the way that communities, families, work colleagues and businesses have been forced to communicate and adapt to a new way of life. Adversity brings with it innovations and many of the authors who have submitted papers to this edition of the *arbitrator & mediator* explore this theme, perhaps with a degree of optimism as to what the future may hold.

My board colleague, Mieke Brandon writes an interesting and innovative paper on the use of 'genograms' or pictorial charts within the practice of family dispute management. The background information about the cultural heritage, familial relationships and personality traits of each party to a family dispute management, Ms Brandon writes, provides invaluable aid in better managing family disputes. Not only are genograms immediately easy to read, Ms Brandon argues, but are a valuable additional systems' thinking tool in the dispute resolution toolbox. Much can be learned from the addition of visual aides to an area which is so dominated by verbal and written materials.

Dr Richard Manly QC and Toby Shnookal QC explore the importance of determining exactly when an arbitration matter was commenced, otherwise known as when the arbitrator 'entered upon the reference.' The authors explore the various legislative and common law stances on how to determine when an arbitrator has entered upon the reference, as well as Resolution Institute's Arbitration Rules. Although

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the case-law is as yet unsettled, headway is made in finding the common ground and a path towards a coherent set of principles.

Richard Chesterman QC provides a valuable and insightful 'cautionary tale' about arbitrators asking for security for costs. The author examines both the 2016 and 2020 versions of Resolution Institute's Arbitration Rules and delves into the powers that arbitrators have in respect to making orders in respect of security for costs and staying proceedings.

Jill Goldson navigates the complexities involved in including children in difficult and protracted family disputes. Ms Goldson writes in favour of a social science backed, judicially approved, professional intervention in ossified family disputes which she christens Therapeutic Family Facilitation (TFF). These interventions are extremely effective, Goldson argues, for combatting the resistance/refusal dynamics of child contact which so often create painful impasses in family dispute situations. This innovation may be the key to resolving the often damaging back and forth of protracted legal disputes which are so often damaging to the children caught in the crossfire.

Sylvia Tee and Andy Lau examine the various approaches to insolvency arbitrations through different jurisdictions around the world. Although insolvency disputes have traditionally been conceptualised as being within a court's domain, the authors show that many facets of such disputes are arbitrable and, in fact, more suited to arbitration. Encouragingly, the general sentiment in Australian courts is that insolvency-related proceedings may be stayed in favour of arbitration in certain circumstances.

Elizabeth Harris writes regarding her reflections on the creation of the Court of Arbitration for Art (CAfA), established in 2018, for the purpose of reviewing authenticity disputes in the art world. Ms Harris takes the position that the confidentiality of CAfA is a perfect fit for the art world. The author examines the background conditions, negotiations and issues which brought about the need for the CAfA, as well as the process of its creation. It is argued that CAfA's success was because it was built around the idiosyncratic needs and nature of the art industry, and that it therefore stands as a case study for the adaptability of arbitration as a dispute resolution model.

Albert Monichino QC rounds out the journals section with a paper arguing that the 'notoriously protracted and acrimonious' world of shareholder and trust disputes may be best dealt with through arbitration rather than public litigation. This article lays out, step by step, the anatomy of a typical shareholder or trust dispute including the relevant legislative context. The author contends that these disputes are not only arbitrable, but the privacy, flexibility and finality of an arbitration is perhaps the preferred method for resolving such disputes which are often acrimonious and personal in nature.

The *arbitrator & mediator* is excited to introduce a new category of entry into the journal titled 'Practitioner's Notes.' This category includes the practical observations and insights of dispute resolution practitioners made during the course of their work. These accounts, written outside the context of academic writing, will speak to other practitioners from a professional development viewpoint.

The first of these Practitioner's Notes is a deeply moving account by Barbara McCulloch about the mediations attempting to repair the relationship between deeply religious parents and their gay son. The life story of this young man, who remains anonymous throughout the piece is powerfully punctuated by the mediator's commentary on how she is feeling throughout the mediation process. The overall effect is to place the reader in the mediator's shoes to gain a better appreciation of the enormous importance that 'peacemakers' like Ms McCulloch provide to the communities that they serve.

Rod Holm contributes a Practitioner's Note examining and comparing the language used in criminal justice and restorative justice systems. Using the powerful story of a car crash between a pregnant mother and a professional truck driver as a case study, Mr Holm matches the various labels applied to each party on the path that was taken to the resolution of their dispute and healing of their relationship. This case study describes what many dispute resolvers know on an instinctive level; that the strict

binaries of the criminal justice system often lead to unanticipated and perhaps unhelpful issues, where the more inclusive language of restorative justice can be transformative to both parties' understanding of a dispute.

Anthony Fawcett provides the final entry setting out from a practical viewpoint the operation of the *Construction Contracts Act* 2002 (NZ). Similar in many ways to the various Security of Payment Acts in Australia which govern the building and construction industry, Fawcett sets out the time, cost, and enforcement advantages of bringing claims under this Act.

Rounding out this edition of the journal, we are also pleased to offer a variety of case notes and book reviews. We would like to thank the Hon David Byrne QC, Donna Ross, Sharin Ruba, and Phillip Greenham for their contributions.