Wein Mediation
The dispute resolution specialists

The Med-Arb Model Dissected and Analysed in existing Academic and Practitioner Papers

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Alan Wein graduated in Law from Melbourne University in 1979 and following several years of practice in general commercial, property and litigation, Alan, was appointed the inaugural chair of the Victorian Government's Small Business Advisory Council and a member of the Infrastructure Planning Council. He was also an adjunct Professor at the RMIT School of Business Entrepreneurship. In 2003, Alan commenced practice in mediation and ADR and he has developed a successful practice in mediating complex commercial litigation, government, franchise, property and leasing, partnership and estate matters in all jurisdictions in both court and judge-ordered mediations. Alan is also a senior member of the Victorian Government's Small Business Commission Mediation Panel, the OFMA Panel. Alan has made a substantial contribution to mediation practice and standards and is a frequent presenter in law firms, law schools and other related training and coaching activities. Alan is a member of LEADR and the Law Institute Mediator's List. Alan is a member of the SME Committee of the Law Council of Australia. Alan was awarded the Australian Centenary Medal for his contribution to business. In 2013, Alan was appointed by the Federal Government, under Terms of Reference, to review the legislative and regulatory framework of the franchise sector in Australia and recommend changes to that framework. In 2015, the Australian Parliament legislated all of Mr Wein's substantive recommendations into law. In 2015, Mr Wein was appointed once again by the Federal Government, under Terms of Reference, to review the legislative and regulatory framework of the Horticulture sector in Australia and recommend changes to that framework. In 2018 Alan was appointed by the Federal Government as an independent Director of the Australian Financial complaints Authority (AFCA).

2 Jessica Rogers completed her Bachelor of Arts/Bachelor of Laws (First Class Honours) at Monash University in 2015. During her degree, she studied at the University of Copenhagen in Denmark as part of an exchange program. In 2014, Jessica undertook work experience in mediation and dispute management at the Victorian Small Business Commission. She has completed clerkships at three major Australian firms and will commence as a law graduate in February 2016.

Alan Wein is mindful that there should be no plagiarism of other people's work or ideas and that knowledge and ideas, works and copyright, should protected and recognised and be built upon in order to expand the knowledge base. In order to avoid plagiarism, proper recognition and acknowledgment of other people's work, copyright and ideas is essential and Alan Wein seeks to do so. This paper has been created through the compilation of excerpts and sections of works of other authors who have been acknowledged and referenced. Any failure to recognise or acknowledge anyone is accidental and unintended. In the event that any author has not been acknowledged or appropriately acknowledged then upon being notified, the paper will be amended to make the appropriate acknowledgement. Alan Wein has also incorporated his own ideas and commentary in forming conclusions and in raising questions and issues arising out of the topic and theme in the paper.

FOREWORD

Med-Arb as a description of a hybrid process of mediation and arbitration is more and more frequently promoted as a means of effectively and expeditiously resolving commercial, including consumer, disputes. It is, however, not a term of art and so it is necessary to examine the various manifestations of this process as so described. Alan Wein does, in this work, examine and explain the nature and content of both mediation and arbitration processes and their basis and options for combination of the two. In so doing he also discusses the fundamental issue and potential problem of this combination – namely, the maintenance of natural justice in post-mediation arbitration proceedings. As Alan Wein points out a real difficulty in this respect is that the steps necessary to ensure the impartiality of any arbitration will potentially prejudice the openness and candidness of parties in their discussions in public and private sessions in the mediation process. So the result may be a compromised mediation process and possibly a tainted arbitration process. There are, nevertheless, some techniques which minimize this problem, techniques which Alan Wein discusses.

There is no doubt a real attraction, particularly in less complex consumer disputes, in being as pragmatic as possible and applying quick and cost-effective processes. And there is much to be said for allowing a mediator who has become well familiar with such a dispute to simply resolve it with an informed determination. Nevertheless pragmatism cannot ride roughshod over basic fairness.

Additionally Alan Wein discusses the very important limitation on Commonwealth power in mandating determinative dispute resolution having regard to the requirements of Chapter III of the Commonwealth Constitution with respect to the grant and exercise of judicial power.

I have no hesitation in commending Alan Wein's important work as essential reading for those contemplating using or requiring Med-Arb type processes.

The Hon Justice Clyde Croft AM
Supreme Court
Melbourne

ACKNOWLEDGMENTS

1. **The Hon Justice Clyde Croft AM of the Supreme Court of Victoria.**

2. **George Golvan QC**

3. **Tony Nolan QC**

Introduction

There three primary objectives this Paper are to:

1. define the current Alternative Dispute Resolution (**ADR**) environment in Australia.
2. analyse the narrative and anomalies with determinative powers given to dispute resolvers and the **appropriateness and binding nature of such determinations must be carefully considered**; and
3. explain the development of hybrid ADR processes, in particular mediation-arbitration processes (**Med-Arbs**), and some of the difficulties with such processes.

In a paper I wrote in 2015 with Jessica Rogers,[2] I began with an introduction that I believe is worth repeating again and which is relevant to the issues in this paper.

> "Life is full of complex relationship issues where personalities, life experiences, emotions, intelligences, perceptions and expectations all converge into a theatre for potential conflict and dispute.
>
> As humans, the pathway to resolution of conflict and dispute can occur in two ways - either through an imposed direction, order or judgment of a third party individual or by a self-determined outcome with the assistance of a non-imposing or directing individual.
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> Ideally, a human issue or set of problems should be capable of resolution through processes and methods that are understood, accepted and embraced by the parties in dispute and those that advise and support those parties.
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> However, many parties in dispute find themselves in the chaos of litigation. This arises from an inability to communicate a willingness to discuss and understand the issues in dispute or from following advice of professionals who may not understand the client's "best interests" or real expectations. The resultant litigation comes with great physical and emotional cost, risk,

[2] Alan Wein and Jessica Rogers, 'The Wein Mediation Method - A Humanist Mediation Model', *Wein Mediation* (Article, 2015) < https://www.weinmediation.com.au/team/WEINMEDIATIONMODEL_Feb_2016.pdf>.

distraction and uncertainty. The cost is not only borne privately by the parties, but by the State in having judges, courts and personnel available to conduct proceedings.

There is certainly a time, place and need for litigation but it must be as a last resort, only after all alternative resolution options have been considered. This is the policy and modus operandi of most common law judicial systems and appears in the philosophy and strategic thinking of many corporate boardrooms, businesses and organizations."

Arbitration in Australia is predominantly augmented by contract between parties in a commercial relationship or in a commercial transaction. The ability and power of Australian courts to order parties to arbitration is limited and subject to the jurisdiction of the dispute. Courts have been primarily concerned with the enforcement of arbitral awards and the due process of the arbitration. The powers of federal courts to order parties to arbitration is constrained by the Commonwealth Constitution - Chapter 3. State courts are able to make orders for arbitration under state constitutions and subject to appropriate legislation. In Victoria the County Court has powers, pursuant to its Rules, to order arbitration, however this may be subject to an ultra vires argument. The Victorian Supreme Court substitutes a power to order arbitration through the appointment of judicial referees, with the cover of judicial immunity.

The philosophical question to be determined is whether legislation should impose the obligation of a mandatory and binding non judicial determinative process upon parties in a dispute without recourse to the courts. This threshold question has a fundamental consequence of substituting the party's ability to choose a judicial path as opposed to a contractual path in the resolution of their dispute. Parliament could seek to find a way around the constitutional potholes in the safeguard separation of powers and States sovereignty protections by developing legislation or regulations that in effect require contractual arbitration dispute resolution clauses in parties' commercial agreements. This may be subject to challenges, but may get through. The removal of the right to have the matter judicially determined poses some important issues for consideration. While some legislative and

regulated processes provide for a form of determinative process, outside the judicial processes - they are limited and may be problematic. (AFCA, Food and Grocery Code, Motor Dealers Code).

The ideal situation occurs when the parties have both agreed to a determinative process, other than though a judicial process, and that non judicial process is contained in clear and binding contractual terms, which the courts can then uphold as a binding contract, having no or limited regard to the determination made. Contract and freedom of choice to a determination process v a judicial process.

The rationale for parties choosing to contract for a non-judicial determinative process (of which Arbitration and Expert Determinations are by far the most adopted in Australia and flow out of well accepted Model Law frameworks in the Uniform Commercial Arbitration Acts) is based upon the "belief" that the process will be:

- **(a) Quicker**
- **(b) Cost effective**
- **(c) Determined by an expert**
- **(d) Based upon justifiable reasons**
- **(e) Enforceable**
- **(f) Less destructive for relationships**
- **(g) Certainty**

The truth of these "beliefs" must be made out in order that the surrender of the a right to a judicial litigation of ones rights, claims and entitlements is given in favour of a contractual or legislatively imposed determination process. The safeguards of legal and human rights require any government to carefully consider the consequences of any legislative or regulated determination process imposed upon parties. It is my belief that no Parliament should legislate a person's or entities right to have a matter judicially determined by imposing a non-judicial determinative process against the will and freedom of choice of a party.

The Hon. Marilyn Warren AC Chief Justice of Victoria stated "The judiciary has an essential role to play in both supporting and promoting arbitration. The majority of courts in developed arbitral jurisdictions are vested with at least some degree of supervisory, supportive and enforcement jurisdiction over all forms of arbitration. In my experience, it is often the degree of enforceability and support that the judiciary offers that determines the effectiveness of the arbitration experience."[3]

As George Golvan QC[4] has noted: "In my experience, parties in dispute desire as a primary goal to achieve a speedy and cost-effective negotiated resolution which takes into account risks, personal and commercial interests and future relationships."[5]

The narrative on increased determinative powers has been demonstrated in the recommendations of the Federal Parliamentary Inquiry into Franchising in 2019[6] and in some of the proposals mooted by the Australian Small Business and Family Enterprise Ombudsman[7] and the Victorian Small Business Commissioner (**VSBC**).[8] In addition, a new, voluntary Motor Vehicle Insurance & Repair Industry Code of Conduct (**Code**) commenced operation on 1 May 2017. The Code provides for the mediation

[3] Australia as a 'safe and neutral' arbitration seat The Hon. Marilyn Warren AC Chief Justice of Victoria, Australia ACICA 6 – 7 June 2012 Australian Centre for International Commercial Arbitration's 'The Australian Option' Chinese Tour Shanghai and Beijing, People's Republic of China

[4] George Golvan is a Queen's Counsel of the Victorian Bar who has also been an active mediator and arbitrator in construction and commercial disputes for over 30 years.

[5] George Golvan QC, 'What do clients really want – hybrid procedures, the new frontier of dispute resolution?' *Alternative Dispute Resolution Bulletin.*

[6] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Fairness in Franchising* (2019). The report made some recommendations for dispute resolvers including that the dispute resolution scheme under the Franchising Code should include binding arbitration with the capacity to award remedies, compensation, interest and costs and that the Franchising Code be amended to allow a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise.

[7] Small Business and Family Enterprise Ombudsman Submission 130 to Australian Parliamentary Joint Committee on Corporations and Financial Services, *Fairness in Franchising* (14 March 2019), page 2. The proposals included to "introduce mandated arbitration - the powers of the Office of the Franchising Mediation Advisor (OFMA) be expanded to be able to direct parties to arbitration where a resolution is not reached through mediation. Franchisees do not feel they are equal partners in a mediation based on 'good faith' as the franchisor can draw on information from across its network and its greater resources to build and represent its case. Where a resolution is not reached franchisees feel unable to fight the matter further due to the high cost and time taken to pursue civil action through the judicial system."

[8] The Victorian Small Business Commissioner (**VSBC**) provides a Determination function for motor vehicle smash repair disputes under the Motor Vehicle Repair Code where the dispute fails to settle at mediation. The VSBC is considering extending the Determination function for unsuccessful RLA, SBC Act and Owner Driver disputes.

and determination of smash repairer disputes by the VSBC. The VSBC is an Approved Determination Provider under the Code to determine smash repairer disputes, where mediation has failed. This is a new function for the VSBC under the *Small Business Commission Act 2017* which will be run as a pilot project to be reviewed after 12 months. The Victorian Small Business Commissioner is also looking into other determinative processes as part of ADR services in the VSBC.

There is an increasing momentum for determinative powers or hybrid processes such as early dispute evaluation to be given in some regulated sectors. The ASBFEO, OFMA and ACCC, the three main entities involved in regulating and resolving disputes in the franchise sector have all advocated for a need within the Franchise Code for a determinative process for the resolution of disputes.

The Parliamentary Joint Committee on Corporations and Financial Services on the operation and effectiveness of the Franchising Code of Conduct dated 14 March 2019 provided a valuable current insight into attitudes toward and support for determinative powers in ADR processes. Key findings and recommendations included:

> "15.23 As noted above, in many cases mediation is a desirable and effective dispute resolution mechanism. However, the absence of a determinative mechanism as another constituent part of the dispute resolution process is a serious shortcoming. Several submitters and witnesses supported the addition of a determinative system to the current dispute resolution process under the Franchising Code. Many of these submitters drew the committee's attention to the existence of such a mechanism under other codes, such as the Food and Grocery Code of Conduct.
>
> 15.24 In explaining the difference between mediation, conciliation and arbitration, ASBFEO noted:
>
> - A mediator is more like a facilitator and will raise questions that lead people to consider the range of options.

- A conciliator will guide and direct the parties, while acknowledging that the parties need to agree on an answer.
- An arbitrator can act much like a conciliator, but has the capacity to make a contractually binding ruling on the parties. [9]

15.25 The arguments set out in favour of some form of mandatory determination in circumstances where a resolution is not reached through mediation included:

- the lower cost of arbitration compared to a court process; [10] and
- the ability to secure a determination in circumstances where one party has declined to participate in mediation in good faith.[11]

15.48 Although not included in Appendix 4, the committee notes the Oil Code of Conduct has a determinative process and allows the Oil Code Dispute Resolution Adviser to act as an expert in making a non-binding determination. Similarly, under the Horticultural Code of Conduct, a horticultural assessor is able to make an assessment.[12]

15.64 The committee accepts that arbitration is more expensive than mediation because of the time and expertise required. But, it can deliver finality to parties who want to resolve a matter and move on. And arbitration is far cheaper and more flexible than pursuing court action, and this is the critical cost comparison in any attempt to deliver justice in a timely fashion at a reasonable price. Indeed, many of the concerns raised in the committee's 2008 report have now been addressed by a number of developments in arbitration during the ensuing decade.

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[9] Dr Craig Latham, Deputy Ombudsman, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 21 September 2018, p. 41.
[10] Professor Andrew Terry, Submission 108, p. 8; Mr Brian Keen, Founder and Chief Executive, Franchise Simply, *Committee Hansard*, 8 June 2018, p. 62; Office of the Franchising Mediation Adviser, Supplementary Submission 37.1, p. 21.
[11] See, for example, Office of the Franchising Mediation Adviser, Supplementary Submission 37.1, pp. 13–21; Australian Small Business and Family Enterprise Ombudsman, Submission 130, p. 2; Dr Craig Latham, Deputy Ombudsman, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 21 September 2018, p. 39; Franchisee Federation of Australia, Supplementary Submission 113.1, p. 4.
[12] Mr Derek Minus, Franchising Code Mediation Adviser, Office of the Franchising Code Mediation Adviser; Oilcode Dispute Resolution Adviser, Office of the Oilcode Dispute Resolution Adviser, *Committee Hansard*, 8 June 2018, p. 5.

Recommendation 15.1

- Enhancing the powers of any combined body so that it may refer and direct parties to binding arbitration under the Franchising Code of Conduct.

Recommendation 15.2

- Require that mediation and then arbitration commence within a specified time period once a mediator or arbitrator has been appointed;
- Restrictions on taking legal action until alternative dispute resolution is complete (along similar lines to those used by the Australian Financial Complaints Authority);
- Immunity from liability for the dispute resolution body…"

Determinative forms of ADR will, in most circumstances, be legally binding on the parties. Non-determinative forms of ADR seek to reach an outcome which is acceptable to all parties. The chief determinative dispute resolution option is commercial arbitration with expert determination sometimes used.

1. Australian Financial Complaints Authority (AFCA) Model

If a dispute is not resolved by agreement between the parties, then it will be resolved by a decision about the merits of the dispute. The decision will be in the form of a Determination and will take into account all the information provided by the parties. All decisions will be based on what is fair in all the circumstances, taking into account the law, any applicable industry codes of practice, as well as good industry practice.

What is a Determination?

A Determination is a final decision on the merits of a dispute, made by:

- an Ombudsman; or
- a Panel of three decision-makers chaired by an Ombudsman.

Before a Determination is made, we will:

- advise the parties.

The Ombudsman or Panel will take into account all information provided by the parties during our investigation of the dispute, the law, any applicable industry codes of practice, as well as good industry practice. If a Determination is made by a Panel in relation to a medical indemnity dispute, the other members of the panel will be a medical representative and a medical indemnity insurer representative. In other disputes the members of the Panel will be a consumer representative and an industry representative, both with relevant experience. All Ombudsmen and all Panel members are appointed by the Financial Ombudsman Service Board on the basis of their objectivity, qualifications, experience and relevant personal qualities, and their ability to make decisions on the merits of financial services disputes.

When will a Determination be made by a single Ombudsman and when will it be made by a Panel?

We will decide whether a dispute should be determined by a single Ombudsman or by a full Panel, based on a range of factors including the nature complexity and significance of the dispute, any expertise required and where this can best be found, and other considerations.

Can a party appeal from a Determination?

A Determination is a final decision on the merits of a dispute. There is no further “appeal” or review process within the Financial Ombudsman Service. An Applicant has the right to accept or reject the Determination within 30 days of receiving it (or within any additional time we have allowed). If the Applicant accepts the Determination, then it is binding on both parties. If the Applicant does not accept the Determination, it is not binding on the Finacial Service Provider (FSP) and the Applicant may take any other available action against the FSP, including action in the courts.

The FSP cannot accept or reject the Determination.

What must an FSP do if there has been a binding Determination requiring action by the FSP?

If the Determination requires action by the FSP and it is accepted by the Applicant, then the FSP must implement the Determination. We ask the Applicant to sign a Confirmation of Settlement accepting the Determination, in full and final resolution of the dispute. An FSP can ask the Applicant to sign a Deed of Release in addition to the confirmation of settlement, but only if it provides us with a copy of the Deed within 14 days of being told the Applicant has accepted the decision. The Deed must also be consistent with the Determination

When determining complaints other than superannuation complaints, the AFCA decision maker must do what is fair in all the circumstances, and have regard to:

- legal principles
- applicable industry codes or guidance
- good industry practice
- previous relevant determinations of AFCA or predecessor schemes.

When determining any other (non-superannuation) complaints, we decide what is fair in all the circumstances. This is not limited to considering what is legally permissible, although we do take legal principles into account.

Legal principles

When considering a complaint, we identify the relevant legal principles and take these into account. Legal principles are drawn from relevant legislation (e.g. the *Corporations Act 2001* (Cth) or the *Insurance Contracts Act 1984* (Cth)) and case law. If there is a contract between a financial firm and the complainant, we will take these terms into account. We are not, however, required to strictly apply legal principles.

Where we consider that it is fair in all the circumstances to depart from legal principles, we will explain in the written determination our reasons for doing so.

Industry codes, guidance and good practices

We consider industry codes, practice guides and good industry practice. Guidance may be developed by industry bodies or by regulators, such as the ASX listing or operating rules, ASIC and ACCC debt collection guidelines.

When considering good industry practice, we may draw on the expertise of AFCA's staff, ombudsmen, adjudicators or panel members.

On occasions, we may obtain expert advice as to what is good industry practice.

We will not, however, necessarily be bound by the minimum standard that may be set in a particular industry code. We may consider that it is fair in all the circumstances for the financial firm to meet a higher standard than this.

Previous decisions

We do not treat previous decisions as precedents.

There may be circumstances when a previous decision is not applicable because the facts are somewhat different, or we have changed our approach to a particular class of complaint.

However, generally we do try to be consistent in our decision-making. To promote consistency, we are committed to providing information about our decision-making approach.

This includes publishing case studies and anonymised determinations.

Superannuation decisions

When determining a superannuation complaint, the AFCA decision maker:

- may refer a question of law to the Federal Court in accordance with section 1054C of the Corporations Act
- must apply the approach specified in section 1055 of the Corporations Act.

When an AFCA decision maker determines a superannuation complaint, it has all the same powers, obligations and discretions of the trustee, insurer, retirement savings accounts (RSA) provider or other decision maker whose decision or conduct is being reviewed.

On reviewing a decision of a trustee, insurer, RSA provider or life company (or other decision maker joined to the complaint), the AFCA decision maker must do one of the following:

- Affirm the decision if they are satisfied that the decision operated fairly and reasonably in relation to the complainant (and, in the case of a decision about payment of a death benefit, all joined parties).
- Vary the decision.
- Set aside the decision and send it back to the decision maker to reconsider, in accordance with the AFCA decision maker's directions or recommendations.
- Set aside the decision and substitute their own decision.

An AFCA decision maker can only make a determination for the purpose of placing the complainant (and, in the case of a decision about payment of a death benefit, all joined parties) as nearly as practicable in a position where the unfairness and/or unreasonableness no longer exists.

In addition, an AFCA decision maker must not do anything that would be contrary to law, the governing rules of the fund or, if a contract of insurance between the trustee and an insurer is involved, the terms of the insurance contract.

For example, in superannuation determinations, an AFCA decision maker cannot:

- change the definition of disablement in an insurance policy.
- change the eligibility conditions in an insurance policy.
- pay a death benefit to someone who is not a dependant under the governing rules of the fund.
- increase the amount of a member's benefit beyond the member's entitlement under the governing rules of the fund.
- ignore a valid binding death benefit nomination.

In determining superannuation complaints, an AFCA decision maker will have regard to relevant decisions of the Federal Court about the nature and jurisdiction of the determination-making powers of the Superannuation Complaints Tribunal (because our powers are based on the Tribunal's powers).

An AFCA decision maker will also have regard to relevant Tribunal and AFCA determinations, but will not be bound by those determinations because each complaint must be considered on its merits. We will, however, try to achieve consistency where similar circumstances arise. In determining whether a decision (or related conduct) is fair and reasonable, we may also consider whether the superannuation provider has acted consistently with any relevant industry code or best practice guidelines.

The AFCA decision maker must give written reasons for their determination of a superannuation complaint to each party.

AFCA RULES

A.13 Decision makers

A.13.1 A complaint may be determined by an Ombudsman, an Adjudicator or an AFCA Panel. AFCA's Chief Ombudsman or his or her delegate allocates complaints to AFCA Decision Makers as they consider appropriate taking into account:

a) the complexity of the complaint;

b) the amount of loss as well as other potential consequences of the complaint;

c) whether the complaint raises a systemic issue;

d) whether the complaint raises new issues for AFCA of law or good

industry practice; and

e) considerations of efficiency.

A.13.2 When forming an AFCA Panel to determine a complaint, AFCA's Chief Ombudsman or his or her delegate must consider the Panel Members' expertise and experience and whether as a group they will be able to determine the complaint fairly and impartially.

A.13.3 When allocating an Ombudsman or Adjudicator to determine a complaint, AFCA's Chief Ombudsman or his or her delegate must consider the Ombudsman's or Adjudicator's expertise and experience and whether they will be able to determine the complaint fairly and impartially.

A.14 Decision making approach

A.14.1 When determining a Superannuation Complaint, the AFCA Decision Maker:

a) may refer a question of law to the Federal Court in accordance with section 1054C of the Corporations Act; and

b) must apply the approach specified in section 1055 of the Corporations Act.

A.14.2 When determining any other complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

a) legal principles,

b) applicable industry codes or guidance,

c) good industry practice and

d) previous relevant Determinations of AFCA or Predecessor Schemes.

A.14.3 An AFCA Decision Maker is not bound by rules of evidence or previous AFCA or Predecessor Scheme decisions.

A.14.4 A Determination must be in writing with reasons. Any remedy must be within AFCA's jurisdiction as set out in Section D.

A.14.5 AFCA will publish its Determinations in a form which does not identify the parties to the complaint. A Determination will not be published if to do so would risk identifying the parties, or there are other compelling reasons not to publish it.

A.15 Effect of Determinations

A.15.1 In the case of a Superannuation Complaint, a Determination by an AFCA Decision Maker has effect and comes into operation as prescribed by sections 1055B, 1055D and 1057A of the Corporations Act. AFCA must give each party a written notice informing the party that they may appeal its decision to the Federal Court on a question of law under section 1057 of the Corporations Act.

A.15.2 In the case of a complaint about Traditional Trustee Company Services that involves Other Affected Parties, a Determination by an AFCA Decision Maker:

a) has effect and comes into operation on the date specified by the AFCA Decision Maker; and

b) is binding upon the Financial Firm from that date.

A.15.3 In the case of any other complaint, a Determination by an AFCA Decision Maker is final, and is binding upon the parties if accepted by the Complainant within 30 days of the Complainant's receipt of the Determination.

If Rule A.15.3 applies, the Financial Firm may ask the Complainant to provide it with a binding release from liability in respect of the matters resolved by the Determination, provided the release:

a) is limited to the matters dealt with in the Determination,

b) is consistent with the Determination, and

c) is provided to the Complainant within a timeframe specified by AFCA.

If a Financial Firm asks a Complainant to provide it with a binding release in accordance with this rule, the Complainant must complete the release. The release shall be effective from the date on which the Financial Firm

fulfils all of its obligations under the Determination.

A.15.4 If a Complainant does not accept a Determination, the Complainant is not bound by the Determination and may bring an action in the courts or take any other available action against the Financial Firm.

2. Food & Grocery Code

Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015

Select Legislative Instrument No. 16, 2015

Division 3—Mediation and arbitration

38 Supplier may seek mediation or arbitration

(1) A supplier may seek either mediation or arbitration of a complaint or dispute relating to a matter covered by this code.

(2) However, if the supplier has begun a process under Division 2 (complaints) in relation to the complaint or dispute, the supplier must not seek mediation or arbitration of the complaint or dispute until the process:

(a) has been completed; or

(b) should have been completed.

(3) The retailer or wholesaler:

(a) must take part in the mediation or arbitration in good faith; but

(b) is not required by this code to take part in both mediation and arbitration in relation to the same complaint or dispute at the same time.

Note: See subclause 39(3) for when the retailer or wholesaler will be:

(a) taken to take part in the mediation or arbitration; and

(b) taken to be trying to resolve the dispute in good faith.

(4) In any dispute, the retailer or wholesaler has the onus of establishing the matters in subclause (3).

(5) Despite paragraph (3)(a), the retailer or wholesaler is not required to take part in the mediation or arbitration if the mediator considers or the arbitrator determines that:

(a) the complaint or dispute is vexatious, trivial, misconceived or lacking in substance; or

(b) the supplier is not acting in good faith.

(6) However, if the complaint or dispute relates to clause 9 (unilateral variation of agreement) or 10 (retrospective variation of agreement), the mediator or arbitrator must not consider or determine that the complaint is vexatious, trivial, misconceived or lacking in substance only because the supplier's only ground in relation to the complaint or dispute is detriment to the supplier.

39 Conduct of mediation and arbitration

(1) Mediation or arbitration for the purposes of this code must be conducted in accordance with the rules of the Resolution Institute Australia.

(2) If the mediator or arbitrator is not agreed by the parties within 10 business days of a supplier referring a matter, the mediator or arbitrator must be appointed by the Resolution Institute Australia in accordance with the rules[13] of the Institute.

(3) For the purposes of paragraph 38(3)(a), the retailer or wholesaler:

(a) is taken to take part in the mediation or arbitration if the retailer or wholesaler is represented at the mediation or arbitration by a person who has authority to enter into an agreement to settle the dispute on behalf of the retailer or wholesaler; and

(b) is taken to be trying to resolve the dispute in good faith if the retailer or wholesaler approaches the resolution of the dispute in a reconciliatory manner, including by doing the following:

(i) attending and participating at meetings that are arranged at reasonable times;

(ii) at the beginning of the mediation or arbitration process, making it clear what the retailer or wholesaler is trying to achieve through the mediation or arbitration;

(iii) observing any obligation relating to confidentiality that applies during or after the mediation or arbitration process;

(iv) not taking or refusing to take action during the dispute, including refusing to accept goods or to make payments, that has the purpose or effect of applying pressure to resolve the dispute.

(4) All costs of any mediation or arbitration are to be determined under the rules of the Resolution Institute Australia.

(5) The Minister may, by legislative instrument, modify the operation of this clause by substituting another body in place of the Resolution Institute Australia

[13] Reference to "Rules" presumes current Rules.

Independent Review of the Food and Grocery Code of Conduct

Final Report SEPTEMBER 2018

Recommendation 5

The Code Compliance Manager should be replaced with an independent Code Arbiter, which would be governed by specific new provisions added to the Grocery Code that set criteria including independence from the signatory, confidentiality requirements, ability to make binding decisions and annual reporting and surveying requirements.

Providing dispute resolution Authorities, Ombudsman, Panels and providers with determinative powers requires careful consideration. There are potential Commonwealth constitutional matters with regard to Chapter III of the Commonwealth Constitution and State legislative and judicial considerations, due process of law matters and safeguards (right to evidence, question and cross examine witnesses), issues of natural justice, rights of appeal that are fundamental to understanding the distinction between arbitral and judicial and Tribunal functions. The key question relates to proper power. Essentially, are there the powers to require parties to attend and be bound by “determinations” outside the *Commercial Arbitration Acts* in place in each State and Territory? This question also raises further uncertainties for dispute resolvers themselves, such as whether they are properly or suitably experienced or qualified to conduct determinative processes and whether they will be able to obtain suitable Professional Indemnity cover for such activities.

Fundamental Principles relating to Dispute Resolution

Before dissecting some of the issues to be considered in med-arb or any hybrid dispute resolution process, it is important to understand some fundamental principles that impact upon the ability of courts, tribunals and independent neutral dispute resolvers to engage in decision-making processes. Constitutional issues, procedural fairness and due process and domestic and international legislation are matters that are critical to understanding how arbitrations and hybrid processes have developed.

The Commonwealth Constitution

The sections of the Commonwealth Constitution relevant to ADR processes are as follows:

> Chapter III. The Judicature.
>
> 71. Judicial power and Courts
>
> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.
>
> Commonwealth restrictions
>
> - Section 51(xxxi): By giving the Commonwealth the power to acquire property "on just terms" for a purpose that is within its law-making power, it prevents the Commonwealth from acquiring private property without providing some form of compensation to the owner.
> - The Australian Constitution, s51 (xxxv), identifies power in the Commonwealth Government to make laws for the peace, order, and good government of the Commonwealth with respect to "conciliation and arbitration" for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

- Section 80: States that a person, who is on trial for a Commonwealth indictable offence, will have his or her trial by jury, and additionally that the trial "shall be held in the state where the offence was committed". Therefore, the Commonwealth cannot deny a person on trial their jury, or try an accused in a state outside where the offence was committed.
- Section 92: Outlines that the Commonwealth cannot impose duties or customs on trade between states. Additionally, it implies that the Commonwealth also cannot prevent people from moving between states.
- Section 99: Restricts the Commonwealth from giving preference to one state over another in areas of "trade commerce or revenue".
- Section 116: Restricts the Commonwealth from making law which establishes a state religion, imposes religious observance, or prohibits the exercise of religion.
- Section 117: Prohibits the Commonwealth from discriminating against a person based on his or her state of residence.
- Section 128: Prohibits the Commonwealth from altering the constitution by outlining the referendum process.
- Residual powers: By omitting certain areas of law-making from the Constitution, it therefore restricts the Commonwealth from making law on such areas.

State Restrictions

- The Constitution makes certain law-making powers exclusive to the Commonwealth, therefore restricting states' power.
- Section 109 restricts the states from making valid law in a concurrent area, if it is inconsistent with Commonwealth law on the same area.

Case Law

In his article, William Shrubb summarises the High Court's decision in *R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254* handed down on 2 March 1956, was an important statement of the doctrine of the separation of powers in Australia as well as relevant judicial and administrative principles.

The facts of the case[14]

The *Boilermakers'* case centred on the Commonwealth Court of Conciliation and Arbitration (**CCCA**). The CCCA's jurisdiction related to preventing and settling industrial disputes that extended beyond the borders of one state. To that end, it was granted the power to determine the terms and conditions of industrial awards, and also to enforce compliance with those awards.

The *Boilermakers'* case arose out of such an industrial dispute. The Boilermakers' Society of Australia (**BSA**) and the Metal Trades Employers' Association (**MTEA**) had been parties to an arbitration process in the CCCA, which set the employment terms and conditions for boilermakers around Australia. Subsequently, the MTEA alleged that the BSA had breached those terms and conditions, and applied for an injunction-type order from the CCCA, ordering that the BSA comply. An order was granted, but the BSA was alleged to have continued to breach the terms and conditions. Accordingly, the CCCA found the BSA guilty of contempt, and fined it.

The *Boilermakers'* case was brought by the BSA, challenging the CCCA's power to make the finding of contempt. The key issue in the case was the distinction between judicial and non-judicial bodies and powers. Was the CCCA a non-judicial body, because of its arbitral focus? If so, could it be granted judicial powers by the Commonwealth Parliament, such as the power to issue injunctions, or the power to make findings of contempt? Or did this breach the separation of powers?

Judicial and arbitral power

The High Court was careful to distinguish between the arbitral functions and the judicial functions of the CCCA. The majority (made up of Chief Justice Dixon, and Justices

[14] William Shrubb, 'The Boilermakers' case: the separation of powers in Australia', *The Rule of Law Institute of Australia*, (Blog Post, 2 March 2016) <https://www.ruleoflaw.org.au/boilermakers-separation-powers/>.

McTiernan, Fullagar, and Kitto) cited a previous High Court case, *Alexander's* case,[15] where the Court had held that:

"[Arbitral powers are] essentially different from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision.

But the essential difference is that that judicial power is concerned with the ascertainment, declaration, and enforcement of the rights and responsibilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what, in the opinion of the arbitrator, ought to be the respective rights and liabilities of the parties in relation to each other."

The majority considered this history, and decided that:

"Plainly the Arbitration Court remained a tribunal established and equipped primarily and predominantly for the work of industrial conciliation and arbitration."

Thus, said the majority, it was not a judicial body. So, did the Constitution permit a non-judicial body to exercise judicial power?

The separation of powers

Chapter III of the Constitution

The Australian Constitution is organised by chapter. Chapter I deals with the legislative branch, Chapter II deals with the executive branch, and Chapter III deals with the judicial branch.

After considering this structure of the Constitution, and the limited powers expressly granted to Parliament, the majority of the High Court decided that if Parliament wanted to give particular powers to a federal court, it must be able to point to something in Chapter III that allowed them to do that. As the majority said:

[15] *Waterside Workers' Federation of Australia v J W Alexander Ltd* [1918] HCA 56; (1918) 25 CLR 434.

> "When an exercise of legislative powers is directed to the judicial power of the Commonwealth, it must operate through or in conformity with Chapter III."

In other words, there is no other source of power in the Constitution allowing Parliament to confer certain functions on a court. If Parliament wanted to confer both arbitral and judicial powers on the CCCA they must be able to point to something in Chapter III that allowed them to do so.
The majority held that there was no way that Parliament could do this. There was nothing in Chapter III that authorised the conferral of arbitral powers onto a federal court:

> "Chapter III does not allow powers that are foreign to the judicial power to be attached to the courts created by or under that chapter for the exercise of the judicial power of the Commonwealth."

As a result, the High Court held that the CCCA could not exercise both its arbitral functions, and judicial functions, like granting injunctions, or finding people in contempt. Given that its dominant function had been as an arbitral tribunal – as discussed above – the High Court held the CCCA's judicial powers could no longer be validly exercised.

The combined effect of the *Boilermakers'* case has often been expressed as follows:

1. Only Chapter III courts can exercise the judicial power of the Commonwealth; and
2. Chapter III courts cannot exercise any non-judicial power.

Boilermakers' was the high point of the interpretation of the separation of judicial power in Australia. Its strict interpretation has been progressively relaxed over the last 60 years.

Procedural Fairness

In *Re Refugee Tribunal; Ex parte Aala,* the High Court espoused the key aspects of procedural fairness. In this case, the High Court held that the denial of procedural fairness by an officer of the Commonwealth, where the duty to observe it has not been validly limited or extinguished by statute,

will result in a decision made in excess of jurisdiction and thus attract the issue of prohibition under section 75(v) of the *Constitution*.[16]

> "Procedural fairness promotes sound decision making: A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power."[17]

Furthermore:

> "Can anything more be stated, on this limb of procedural fairness, than that the person affected should have a reasonable opportunity to be heard and the following elements may be identified:
>
> - prior and adequate notice of the decision;
> - adequate disclosure so that effective representations may be made: see *Alphaone* above. A recent working example is *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125 at [97] and following (2 September 2015);
> - the reasonable opportunity (or real chance) to present the person's case to a tribunal or to make representations to a decision-maker, and the requirement to consider the case or the representations – this is how I would explain the decision of the High Court in *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 389 where it was held at [24] that to fail to respond to a substantial, clearly articulated argument relying upon established facts was to fail to accord natural justice;

[16] *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [17], [41] (Gaudron and Gummow JJ, Gleeson CJ agreeing); [132], [151]–[152] (Kirby J); [169]–[171] (Hayne J). Prohibition is a prerogative remedy issued by a court to prevent a tribunal or inferior court, which is acting or threatens to act in excess of its jurisdiction, from proceeding any further: Ray Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (2015). Where there is a decision-making procedure that has been statutorily prescribed, failure to comply with it in making a decision may also amount to jurisdictional error, known as 'procedural ultra vires', and the decision will be invalid: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, [77] (McHugh J); [173] (Kirby J); [204]–[208] (Hayne J).

[17] Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 25, 47 referred to in the Australian Law Reform Commission, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report No. 129, March 2016) 14.2.

- the issue of whether there should be a hearing and, if so, the form it should take, including whether or not representation should be afforded."[18]

However, a fair hearing will generally require the following:[19]

Prior notice that a decision that may affect a person's interests will be made This has been referred to as a 'fundamental' or 'cardinal' aspect of procedural fairness.

Disclosure of the 'critical issues' to be addressed, and of information that is credible, relevant and significant to the issues.

A substantive hearing—oral or written—with a reasonable opportunity to present a case. Whether an oral hearing should be provided will depend on the circumstances. The 'crucial question is whether the issues can be presented and decided fairly by written submissions alone'. In some circumstances, there may be a duty to allow a person to be legally represented at a hearing.

Due Process

William Bateman has summarised the Content of a Due Process Principle[20] as follows:

> "The requirements of natural justice are often cited as a primary source of procedural due process standards. These requirements are predominantly procedural in nature and, although flexible, are generally satisfied by a 'fair hearing' and 'lack of bias'.[21] As such, certain procedural features of the curial process — personal service of originating processes,[22] cross-examination,[23] the leading of evidence,[24] a public hearing,[25] legal representation [26], and an absence of bias[27] — may be expressions of natural justice.

[18] Justice Alan Robertson, "Natural justice or procedural fairness" (2015) *Federal Judicial Scholarship* 15: 29.
[19] Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia 2013) 5th edition.
[20] William Bateman 'Procedural Due Process under the Australian Constitution' (2009) 31(3) *Sydney Law Review* 16, 411 <*http://www.austlii.edu.au/au/journals/SydLawRw/2009/16.html*>
[21] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 34 (McHugh and Gummow JJ).
[22] *Pino v Prosser* [1967] VicRp 107; [1967] VR 835.
[23] *Barrier Reef Broadcasting Pty Ltd v Minister for Post and Telecommunications* (1978) 19 ALR 425.
[24] *Beckner v Minister for Immigration, Local Government and Ethnic Affairs* [1991] FCA 264; (1991) 30 FCR 49.
[25] *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198; (2000) 181 ALR 694.
[26] *Maksimovich v Walsh* (1985) 4 NSWLR 318, 329 (Kirby P).
[27] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, 362–3 (Gaudron J), 372–3 (Kirby J).

What is Mediation?

The National Alternative Dispute Resolution Advisory Committee (**NADRAC**) provides a good definition of mediation:

> "Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement".[28]

Robert Angyal SC, Chairman of the New South Wales Bar Association Mediation Committee defined the broad aspects of a mediator's role in his 2013 paper as follows:[29]

> "3.4 The mediator has no power to impose an outcome on the parties and thus is not an adjudicator like a judge or an arbitrator.
>
> 3.5 The mediator does have power to control the mediation process (who talks next and how long; what issues are discussed; whether the parties are together or separated; when to have lunch, etc.).
>
> 3.6 The mediator thus has power to control the process but does not control the outcome of the process.
>
> 3.7 Because the mediator has no power to impose a result on the parties, the rules of natural justice do not apply. It is standard practice for the mediator to talk to the parties in private and be told things that must be kept confidential to the party imparting them.

[28] National Alternative Dispute Resolution Advisory Committee*, Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution,* September 2003, <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>.

[29] Robert Angyal SC, 'Advocacy at Mediation: An Oxymoron or an Essential Skill for the Modern Lawyer' in M. Legg (ed) *The Future of Dispute Resolution* (Lexis Nexis Butterworths 2013), 3.23.

3.8 The mediator can and should help the parties work out what issues (factual, legal and emotional) have to be resolved in order to make settlement possible.

3.9 The mediator can and should help the parties work out what each party needs (as distinct from what it says it wants) to satisfy itself with respect to each issue.

3.10 The mediator can and should help the parties to create and explore options for resolving the dispute. The parties are not limited to results that a court or arbitrator could order. They are limited only by their imagination, by the practicality of the option being considered, and by their ability to agree on it.

3.11 A mediator should not give legal advice or advice about the likely outcome of factual disputes. It is almost impossible for mediators to be regarded as neutral and impartial if they do these things.

3.12 The mediator can and should, however, "reality test" the position taken by a party. This is usually done in a private session, without the other party or parties being present. There is a fine but important line between vigorous reality testing and giving legal advice.

3.13 The mediator can and should help the parties (usually in private) consider how attractive is their best alternative to settling at mediation (usually a successful conclusion to litigation).

3.14 Because the mediator has no power over the substantive outcome of the process, the rules of natural justice do not apply. It is normal practice for the mediator to talk to the parties privately and to be told things by one party that must be kept confidential from the other party or parties."

What Is Arbitration and Where Does It Sit as a Determinative Power?

The Resolution Institute outlines that:

"Arbitration is a formal dispute resolution process governed by the *Commercial Arbitration Act 2010 NSW* (or the equivalent in other states) in which two or more participants refer their dispute to an independent third person (the arbitrator) for determination. Providing that the arbitration is conducted according to the principles of natural justice its procedures may be varied by the participants to suit the size and complexity of their dispute. A small case, for example, may be heard on the basis of documentary submissions alone which can reduce its

costs significantly. Other more complex cases may benefit from a judicial style hearing in which formal claims and defences are lodged, evidence is put forward by each participant and tested by cross-examination etc. The result of the arbitration, known as the Award, is enforceable in the same manner as a Court judgement."[30]

In addition, Australia has been a party to the *New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards 1958* (**New York Convention**) since 1975 and has adopted the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on International Commercial Arbitration 1985 (**Model Law**), including the 2006 amendments, as its procedural law under the *International Arbitration Act 1974* (Cth) (**IAA**).

An excellent summary of the advantages and disadvantages of arbitration were described by Clement Lo, James Hamilton and Peter English:[31]

"Benefits of Arbitration

The benefits of arbitration include:

1. ***Privacy and Confidentiality*** – Arbitration proceedings remain unknown except to the parties themselves. It is confidential,[32] away from the potential for publicity in an open court. No documents are filed at a court registry. This is particularly so for private companies, with no obligation to comply with stock exchange material disclosure rules. Less privacy is obviously afforded to a public company, with its material disclosure obligations.

   This privacy extends to the initial stages and conduct of proceedings and to any award or determination and the reasons for decision given by the arbitral tribunal. The

[30] Resolution Institute is the largest dispute resolution membership organisation across Australia and New Zealand.
[31] Clement Lo, James Hamilton and Peter English, 'Arbitration Clauses: Positives and Pitfalls' *Surry Partners* (Blog Post, February 2018) <https://www.surrypartners.com.au/arbitration-clauses-positives-and-pitfalls/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>.
[32] However Section 27E of the 2011 Commercial Arbitration Act allows parties to agree not to keep matters confidential.

outcome of the arbitration and the details of any award, if it is paid according to the terms of the arbitration decision, is not published or made available to credit reporting agencies.

Of course, this privacy only remains in place if enforcement of the award is not required, or an appeal (if a right exists) is not filed in the Supreme Court.

2. ***Ability to "forum shop"*** – In the court system, the presiding judge hearing the case is sometimes not known until a few weeks or days before a hearing. The parties have no ability to choose a presiding officer. An arbitrator/arbitral panel, however, is usually determined by the parties themselves with protections afforded them by legislation. For certain matters, the parties may agree to appoint an arbitrator who may have specific technical knowledge or practical experience concerning the subject matter of the arbitration, which may expedite the hearing process and focus on the key technical issues impacting on the case.

3. ***The availability of appeal rights can be somewhat controlled*** – This is both a benefit and a downside to arbitration. In line with the arbitration regime that commenced in 2010, a right to appeal must be agreed between the parties: s34A(1) of the Act. This has the benefit in most cases, of bringing a greater degree of certainty and finality to the arbitration. Of course, there is a risk in agreeing to a "no appeal regime" – if something occurs that does not assist your client, then you are stuck. Clearly a case of "you make the bed you lie in".

4. ***Speed of Determination*** – Depending on the complexity of the proceedings and the efficiency of the arbitrator, an arbitration can be quicker than court proceedings, particularly if the arbitration covers discrete points and specific questions for determination. This is partly due to the fact that the parties are not restricted by the Court's availability to hear the matter.

Downsides of Arbitration

There are downsides to arbitration which are outlined below:

1. ***Cost*** – Arbitrations can be far more costly than court proceedings. In addition to each side's legal fees, which would be about the same in a court, arbitrators charge hourly and daily rates for work they do. This includes attending directions hearings, dealing with interlocutory issues such as timetable slippages, applications for special orders and presiding at the final trial. Their time also includes preparation for those hearings involving corresponding with the parties, reading the pleadings and evidence filed. Suitable venues have to be found to hold those directions hearings. These may need to be hired.

   Significant costs are also likely to be incurred by the arbitrator writing the reasons for decision when determining the arbitration and handing down the "award". These costs must be factored into commercial considerations when strategising your case.

   Court filing and hearing fees, of course, include all this. Transcript fees are also higher than in court proceedings as the transcription companies to have to set up audio at the arbitration venue.

   If you are a defendant, you will be required to pay a share of the hearing fees, whereas in court the plaintiff is initially responsible for those costs.

2. ***Not all disputes are suited to arbitration*** – There are some disputes that simply do not lend themselves to arbitration. These include:
   a. ***Disputes involving a determination as to who the true parties to a contract are***. This is due to the contractual nature of being bound to an arbitration. For instance, if you are attempting to enforce a contract against an individual, but the individual refuses to consent to arbitration arguing that the real party is the company of which the individual is a director, a

preliminary question will likely arise as to who the real contracting party is. In the absence of agreement, this may need to be dealt with and determined by a court;

b. ***Disputes not involving a contract, or are a hybrid claim involving another area of law*** – This includes, for instance, a trade practices dispute where there is a possibility of joining a director personally for aiding and abetting a contravention of the Australian Consumer Law. In that situation, although the company that signed the contract would be contractually bound to arbitration, if you wished to join the director personally, they would have to consent to being in the arbitration, which is unlikely to happen.

c. ***Smaller matters*** – As a by-product of the cost factor, arbitration is not suited for matters concerning relatively small amounts of money. Where the threshold lies, differs in each case depending on the complexity of the matter, however, it is safe to say that matters that would ordinarily be litigated in the Local Court (less than $100,000) are not generally suited to arbitration.

3. ***Depending on the arbitrator, procedural timetables may not be as strictly enforced*** – Courts are presided over by judges and registrars who usually manage the court lists with a degree of firmness and can apply costs penalties and other orders to encourage compliance with timetables. Arbitrators can, in our experience, be hesitant to enforce compliance with timetables, with the result that costs often escalate due to timetable breaches.

Other factors to consider

Other factors to note in relation to commercial arbitrations include:

1. ***Arbitrators are not bound by the rules of evidence*** – this can be a benefit, particularly if the evidentiary aspect of the case is not particularly strong, or can only be strengthened by hearsay, or other normally inadmissible evidence. Often,

submissions will be made as to the weight that can be given to that evidence, but arbitrator(s) will be required to at least deal and engage with that evidence.

2. ***Costs are still able to be awarded*** – Although the rules governing costs orders differ slightly between courts, unless the parties agree otherwise, arbitral tribunals are likely to exercise a discretion in respect of costs when making their award and follow the court protocol in respect of costs orders. It should not be assumed that arbitration means less costs pressure."

The paramount objective of the *Commercial Arbitration Act* was clearly and succinctly defined by Justice Croft[33] in a paper presented in May 2011:[34]

> "The paramount object of the CAA [the *Commercial Arbitration Acts*] "to facilitate the fair and final resolution of commercial disputes without unnecessary delay or expense" is an addition to the Model Law. The CAA is to be interpreted "so that (as far as practicable) the paramount object is achieved."[35] While this section is aimed more at parties and arbitrators it is also a reminder to judges interpreting and applying the Act that one of the main advantages of commercial arbitration, in the domestic context, is the ability of parties and arbitrators to tailor arbitration procedures for the most efficient resolution of the dispute. Sometimes parties will want an arbitration that is just as formal as a court proceeding and sometimes, they will want a "look and sniff" arbitration, and between these extremes lies the spectrum of possible arbitration procedures. If parties agree to procedures, which are less formal than court proceedings, courts should not interfere with this choice. The same applies if the parties have clearly agreed to procedures which replicate full, traditional, litigation. The problems always

[33] The Hon Justice Clyde Elliott Croft AM is a Trials Division Justice at the Supreme Court of Victoria and sits as a judge of the Commercial Court.
[34] The Hon Justice Clyde Croft AM, ''Arbitration in Australia: The Past, the Present and the Future' (Remarks to the Chartered Institute of Arbitrators, London, 25 May 2011).
[35] *Commercial Arbitration Act 2010 (NSW),* s. 1AC(2)(b)*; Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) ,* s. 1AC(2)(b)*; Commercial Arbitration Act 2013 (QLD),* s. 1AC(2)(b)*; Commercial Arbitration Act 2011 (SA),* s. 1AC(2)(b)*; Commercial Arbitration Act 2011 (TAS),* s. 1AC(2)(b)*; Commercial Arbitration Act 2011 (VIC),* s. 1AC(2)(b)*; Commercial Arbitration Act 2012 (WA)*, s. 1AC(2)(b)*; Commercial Arbitration Act 2017 (ACT),* s. 1AC(2)(b)*.*

arise when there is a mismatch of expectations and reality, where a party or parties and the arbitrator see themselves at different points on the “spectrum”.”

The Model Law on International Commercial Arbitration was prepared by UNCITRAL and adopted by the United Nations Commission on International Trade Law on 21 June 1985. "Put simply, the Model Law is directed at States, while the Arbitration Rules are directed at potential (or actual) parties to a dispute."[36] The model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law (as, for example, Australia did, in the *International Arbitration Act 1974*, as amended).

The Model Law gives users of arbitration broad freedom to tailor the arbitral procedure to their needs and also provides that local courts can only set aside arbitral awards where:

- there was no agreement to arbitrate, or the dispute falls outside the scope of the arbitration agreement;
- there was an actionable breach of procedural fairness in the making of the award; or
- enforcement of the award would be against public policy.

Apart from this, the parties are bound by the decision of the arbitrators.

In Australia, international arbitration is governed by the *International Arbitration Act 1974 (Cth)* **(IAA**), which adopts (with amendments) the Model Law [37] and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[38] Domestic commercial arbitration is governed by the Uniform Commercial Arbitration legislation[39] and was not, until recently, based upon the Model Law.

[36] United Nations Commission on International Trade Law, *Frequently Asked Questions – Arbitration* <https://uncitral.un.org/en/texts/arbitration/faq>.
[37] United Nations Commission on International Trade Law , *Model Law on International Commercial Arbitration 1985,* GA Res 40/72 (21 June 1985) with revisions, GA Res 61/33 (4 December 2006).
[38] United Nations Commission on International Trade Law, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 38 (7 June 1959).
[39] *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1990* (QLD); Commercial Arbitration Act 1986 *(Tas); Commercial Arbitration and Industrial Referral Act 1986* (SA).

All Australian States and Territories have adopted and enacted (subject to the note below) versions of the Model Law creating a uniform framework for domestic arbitration in Australia "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense."[40]

Case Law regarding Arbitrations

The case of *Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors*[41] is significant for the conduct of international arbitration in Australia because:

a. the High Court held that the phrase "any dispute under this deed" in an arbitration clause was sufficiently broad in the context of the deeds in question to encompass disputes about the validity of the arbitration agreement as well as substantive claims; and
b. the High Court found that in this case, third parties who were not contractual parties to the deed in question, but who wished to rely on certain releases and clauses in the deed containing the arbitration agreement could be treated as a party to the arbitration under the *Commercial Arbitration Act 2010* (NSW) (***Commercial Arbitration Act***).[42]

Setting Aside an Arbitral Award

Chapter I of the Model Law sets out the general provisions in respect of setting aside an arbitral award. The relevant sections of the Model Law and the IAA are excerpted below.

Article 34 of the Model Law, which is incorporated into Australian law by section 16 and 18 of the IAA, provides that a court may only set aside an arbitral award in limited circumstances, including where the underlying agreement to arbitrate is invalid, the arbitrator purports to decide matters outside the scope of the agreement to arbitrate or an award is contrary to public policy. Consistent with the intention of Article 34, Australian courts have consistently demonstrated a reluctance to set aside

[40] Ibid.
[41] *Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors* [2019] HCA 13.
[42] Leon Chung, Andrew Mason, Christopher Chiam and Mark Peters, 'High Court Rules on Arbitration Clauses', *Herbert Smith Freehills* (Blog Post, 9 May 2019) <https://www.herbertsmithfreehills.com/latest-thinking/high-court-rules-on-arbitration-clauses>.

arbitral awards, even if an error of law has allegedly been made by the arbitrator. Australian courts have construed “public policy” narrowly.

Article 34 - Application for setting aside as exclusive recourse against arbitral award

1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

2. An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4. The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

***International Arbitration Act* 1974 (Cth) - SECT 16 Model Law to have force of law**

(1) Subject to this Part, the Model Law has the force of law in Australia.

(2) In the Model Law:

"arbitration agreement" has the meaning given in Option 1 of Article 7 of the Model Law.

"State" means Australia (including the external Territories) and any foreign country.

"this State" means Australia (including the external Territories).

***International Arbitration Act* 1974 - SECT 18A**

Article 12--justifiable doubts as to the impartiality or independence of an arbitrator

(1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration.

(2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.

***International Arbitration Act 1974* - SECT 18C**

Article 18--reasonable opportunity to present case

For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.

***International Arbitration Act 1974* - SECT 19**

Articles 17I, 34 and 36 of Model Law--public policy

Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

(a) the making of the interim measure or award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.

***Commercial Arbitration Act 2011* (Vic)**

The relevant sections of the *Commercial Arbitration Act 2011* (Vic) are as follows:

34 Application for setting aside as exclusive recourse against arbitral award (cf Model Law Art 34)

(1) Recourse to the Court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3) or by an appeal under section 34A.

Note: The Model Law does not provide for appeals undersection 34A.

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party to the arbitration agreement referred to in section 7 was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitral tribunal or of the arbitral proceedings or was otherwise unable to present the party's case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict

with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

34A Appeals against awards

(1) An appeal lies to the Court on a question of law arising out of an award if—

(a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section; and

(b) the Court grants leave.

(2) An appeal under this section may be brought by any of the parties to an arbitration agreement.

(3) The Court must not grant leave unless it is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more parties; and

(b) that the question is one which the arbitral tribunal was asked to determine; and

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

In *Mango Boulevard Pty Ltd v Mio Art Pty Ltd & Anor* [2018] QCA 39**,** the Full Court relied on what the Full Court of the Federal Court held in *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 (**TCL**) (a case under the **IAA**). In *TCL*, the Full Court held that an award should not be set aside under article 34 of the Model Law (which is fundamentally the same as s 34 of the IAA) *unless* there was "…demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness" (at [55] of *TCL*).

The Court of Appeal dismissed Mango Boulevard's appeal, finding that there was no departure from procedural fairness and, accordingly, that no ground was established under sections 34(2)(a)(ii) or 34(2)(b)(ii) of the IAA. The Court of Appeal found that:

- the arbitrator clearly raised the possibility of his reasoning during final addresses;
- Mango Boulevard had made oral submissions on the subject in the arbitration after the subject was first raised by the arbitrator; and
- Mango Boulevard did not attempt to lead further evidence or recall any of its witnesses to address the arbitrator's reasoning, despite not being denied the opportunity of doing so.

An excellent summary of the Federal Court of Australia's decision in *Hui v Esposito Holdings Pty Ltd*[43] defining the principles in assessing whether to set aside the arbitral award and remove the arbitrator, was provided in an article by Ashurst in 2017:[44]

- Article 34 of the UNCITRAL Model Law significantly limits the circumstances under which a court may set aside an arbitral award.
- If a procedural fairness challenge is made, the context and practical consequences are all important, including that well-represented and resourced commercial operators have chosen arbitration rather than litigation as the relevant dispute resolution mechanism.

[43] [2017] FCA 648.
[44] Jos Mulcahy, James Clarke and Roderick Kennedy, 'When will a court set aside an arbitral award and remove the arbitrator due to the procedural unfairness?' (Blog Post, 4 September 2017) < https://www.ashurst.com/en/news-and-insights/legal-updates/arbitration-alert-when-will-a-court-set-aside-an-arbitral-award-170904/>.

- Denying a party a reasonable opportunity to present its case is a breach of the rules of natural justice that may warrant setting aside an arbitral award.
- In order to justify the setting aside of an award, real unfairness must have resulted from the denial of the opportunity for a party to present its case.
- Real unfairness can be demonstrated by showing that there was a realistic rather than fanciful possibility that the award may not have been made or may have differed in a material respect but for the denial of the opportunity (ie the submissions that would have been made must be reasonably arguable).
- Real unfairness will not arise if the loss of opportunity is merely a result of the party's own failures or strategic choices.
- The onus rests on the party seeking to set aside the award to establish the above matters.

Justice Croft has provided a clear explanation of the impact of Sections 34 and 34A – Setting aside and appealing awards:[45]

> "Section 34, which is based on the Model Law, sets out the very limited grounds under which a party can apply to have an award set aside. The grounds do not cover errors of law or fact in the arbitral award, but rather deal with situations where there was no power to issue the award in the first place. Among other things an award can be set aside because the dispute is not covered by the arbitration agreement; there is not a properly constituted tribunal; the arbitration agreement is void; or the award is in conflict with the public policy of the state. The grounds are very narrow, and are unlikely to be successfully relied upon on a frequent basis. Similar grounds apply under the enforcement provisions in section 36.
>
> In the domestic context the grounds in section 34 are thought to be too narrow. Therefore, there is an appeal right given under s 34A. This section is an addition to the Model Law.

[45] The Hon Justice Clyde Croft AM, 'The Role of the Courts in Arbitration And Key Provisions of the Commercial Arbitration Act 2010' (Presentation to the Rabbinical Arbitration Course, Melbourne, 2 August 2010) <https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/12/91/a5ca51375/Roleofcourtsinarbitrationandkeyprovs ofCommercial.pdf>.

> Section 34A allows an appeal on a question of law if the parties agree that appeals are allowed and the Court grants leave. This section is the high point of the Court's supervisory role and goes further than the grounds set out in section 34. While it does go further than section 34, the appeal right is still restricted. Determinations of fact cannot be subject to appeal, but, of course, there is often difficulty in separating law from fact. The decision of the tribunal must be "obviously wrong" or the question must be one of "general public importance" and the arbitral decision is open to "serious doubt". These tests are somewhat similar to those under the previous *Commercial Arbitration Act*."

The 2010 amendments to Section 34, *Commercial Arbitration Act 2010* (NSW), as will be adopted by most other States, based on the Model Law, were designed to align Australian domestic arbitration law with international best practice. The amendments aimed to "facilitate the fair and final resolution of commercial disputes by impartial arbitration tribunals without necessary delay or expense." The new section 34A(1) provides that parties:

- agree that an appeal may be made, either in the arbitration agreement itself or otherwise before the expiration of the appeal period (3 months); and
- seek leave of the court.

There is now no right of appeal from a domestic arbitral award without the agreement of the parties. This position was confirmed in the NSW Supreme Court decision of *Ashjal Pty Ltd v Elders Toepfer Grain Pty Ltd* (**Ashjal**)[46] and reinforces the need for proper and accurate drafting of an arbitration agreement.

In *TCL Air Conditioner (Zhongshan) Co Ltd v. The Judges of the Federal Court of Australia and Anor*[47] (**TCL**) the High Court unanimously upheld the constitutional validity of the *International Arbitration Act 1974* (Cth) (**IAA**), which by section 16(1) gives the Model Law, the force of law in Australia.

[46] *Ashjal Pty Ltd v Elders Toepfer Grain Pty Ltd* [2012] NSWSC 545.
[47] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

Article 35 of the Model Law provides that an arbitral award "shall be recognized as binding and, upon application ... to the competent court, shall be enforced" subject to the provisions of Articles 35 and 36. Article 36 states the exhaustive grounds for refusing recognition or enforcement of an arbitral award.

A paper written by Robert McClelland,[48] in The Arbitrator & Mediator,[49] described procedural fairness in the light of recent changes to s18 of the *Commercial Arbitration Act* (**Act**):

> "Procedural Fairness in terms of the arbitration process itself, section 18 is the important procedural fairness provision. But even there, the Act introduces some relaxation of the standard usually associated with strict adherence to the principles of 'natural justice.' Section 18 provides that the parties must be treated with equality and each party must be given a 'reasonable opportunity' of presenting the party's case. This is another area where the Act has been modified from the previous Model Law which required the parties to be given a 'full' opportunity."

Justice Clyde Croft, in an extra-judicial paper,[50] has described the significance of this difference in the following terms:

> "Article 18 of the [previous] Model Law states '… each party shall be given a *full* opportunity of presenting his case' [Emphasis added]. In situations where a party wants to delay arbitration proceedings it can rely on this provision to argue that it can present evidence and submissions no matter how costly, lengthy and unnecessary they are.
>
> To remove doubt, the amendments to the …new Commercial Arbitration Act 2010 (s 18) changes the 'full opportunity' provision in the Model Law to be read as a 'reasonable

[48] The Hon Robert McClelland MP was the Federal Member for Barton (NSW). Mr McClelland served as the Federal Attorney-General from 2007 to 2011.
[49] Robert McClelland, 'Future Opportunities for Commercial Arbitration' (November 2012) *The Arbitrator and Mediator* 17.
[50] The Hon Justice Clyde Croft AM, 'Arbitration Division of the Commercial Court' (2010) *Victorian Judicial Scholarship* 13.

opportunity'. This will encourage parties to consider the flexibility of arbitral procedure. There needs to be proportionality between the complexity of the dispute and the procedures adopted."

This change is potentially very significant. As noted, the requirement for a party to be given a 'reasonable opportunity' of presenting its case does not mean that a party must be given 'every opportunity'. Significantly, this will give the arbitrator the ability to control the extent of evidence that a party can present if, for instance, the arbitrator considers that it will be of little value and may unnecessarily prolong the process and inflate costs. In that sense, the reform enables the arbitrator to adopt practices akin to those permitted in Part 6 of the *Civil Procedure Act 2005* and Part VB of the *Federal Court of Australia Act 1976*.

James Whittaker of Corrs Chambers Westgarth in Sydney provided an excellent summary and ramifications of the TCL judgment:[51]

"In circumstances where the Federal Court under Arts 35 and 36 of the Model Law has no power to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award, TCL argued that section 16(1) of the IAA:

- substantially impairs the institutional integrity of the Federal Court, by enlisting the Court in an arrangement to facilitate arbitration and then enforcing the resulting arbitral awards, thereby requiring the Court to knowingly perpetrate legal error; or
- impermissibly vests the judicial power of the Commonwealth on the arbitral tribunal that made the award, by reason of the IAA's enforcement provisions which render an arbitral award binding and conclusive, thereby giving the arbitral tribunal the last word on the law applied in deciding the dispute submitted to arbitration.

TCL's submissions in relation to both objections were underpinned by the proposition that courts must be able to determine whether an arbitrator applied the law correctly in reaching an award. In

[51] James Whittaker, 'High Court Upholds Constitutional Validity of Australia's International Arbitration Act Which Gives the UNCITRAL Model Law The Force Of Law In Australia' *Lexology* (Blog Post, 13 March 2013) < https://www.lexology.com/library/detail.aspx?g=051dacee-647b-455e-9e62-5cce238a38ae>.

further support of that proposition, TCL argued that Art 28 of the Model Law which requires the arbitral tribunal to "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute", confines an arbitrator's authority under an arbitration agreement to deciding a dispute correctly, and therefore an award founded on an erroneous principle is not binding upon the parties. Alternatively, it was submitted that such a term could be implied into every arbitration agreement.

Article 28 of the Model Law

Article 28 is primarily directed to questions of choice of law. French CJ and Gageler J rejected TCL's argument that Art 28 limits the authority of the arbitral tribunal to a correct application of the chosen rules of law. Rather, their Honours found that the working papers of the UNCITRAL working group for the preparation of the Model Law reveal that the understanding of Art 28 is that a mis-application (as distinct from a non-application) of the rules of law chosen by the parties does not amount to an excess of power leading to nullification of an arbitral award. Article 36 makes it plain that recognition and enforcement of an arbitral award could only be denied in limited circumstances and legal error is not one of those circumstances.

The majority judgment rejected TCL's argument based on a common sense approach – TCL's argument their Honours said depended on treating the language of part of Art 28 as forming part of the agreement between the parties, whilst simultaneously treating the provisions of the Model Law regulating the recognition and enforcement of awards as not forming part of that agreement.

The High Court also rejected the plaintiff's alternative argument, that it is an implied term of every arbitration agreement governed by Australian law that the authority of the arbitral tribunal is limited to a correct application of law. That argument, in French CJ and Gageler J's judgment, is answered by the combination of the autonomy of the parties guaranteed by Art 28 and the absence from Art 36 of any ground to refuse recognition or enforcement of an arbitral award under Art 35 for error of law.

No Impairment of Institutional Integrity

TCL's arguments were to the effect that judicial independence was said to be "distorted" by the absence of scope for substantive review of an award for error of law when the Federal Court determines the enforceability of an award under the IAA. To this, the High Court's response was unanimous – the submission fails to take into account the consensual foundation of private arbitration.

The distinction is stated clearly in the joint judgment of French CJ and Gageler J: "Enforcement of an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration". To that end, their Honours point out that the making of an appropriate order for enforcement of an arbitral award does not signify the Federal Court's endorsement of the legal content of the award any more than it signifies its endorsement of the factual content of the award.

The majority judgment also point out that a court undertaking the task of enforcing an award pursuant to the IAA has power to refuse to enforce an award (Art 36) or to set aside an award (Art 34) in a multiplicity of circumstances, including that an award is in conflict with the public policy of Australia. Those provisions, their Honours held, are protective of the institutional integrity of courts in the Australian judicial system which are called upon to exercise jurisdiction under the IAA.

To the extent that TCL sought to draw support from the existence at common law of a rule that an arbitral award could be set aside for error of law on the face of the award, the High Court found that that common law jurisdiction was an exception to the general rule concerning the finality of awards, and that it operated in haphazard and anomalous ways. Those circumstances, their Honours found, make it plain that the absence of a specific power to review an award for error of law does not distort judicial independence when a court determines the enforceability of an award.

No Delegation of Judicial Power

Contrary to TCL's submissions, the High Court ruled that the conclusion that an arbitrator is the final judge of questions of law arising in the arbitration does not demonstrate that there has been

some delegation of judicial power to arbitrators. The High Court was at pains to spell out the essential distinction between the judicial power of the Commonwealth and arbitral authority, of the kind governed by the Model Law, based on the voluntary agreement of the parties.

To conclude that a particular arbitral award is final and conclusive does no more than reflect the consequences of the parties having agreed to submit a dispute of the relevant kind to arbitration. The majority judgment explained that one of those consequences is that the parties' rights and liabilities under an agreement which gives rise to an arbitration can be, and are, discharged and replaced by the new obligations that are created by an arbitral award.

Further, it was held that these conclusions stand unaffected no matter what may be the ambit of permitted judicial review of an arbitral award. Even if there could be judicial review for error apparent on the face of the award, the award would nonetheless be the ultimate product of the parties' agreement to submit their differences or dispute to arbitration.

Comment

The High Court's unanimous judgment is a strong confirmation of the commitment of Australian courts to enforce arbitral awards, subject only to the discrete grounds of refusal spelt out in the IAA. The High Court decision should enhance Australia's position as an attractive jurisdiction within which private parties can effectively conduct international arbitral disputes. Justice Murphy's two first instance judgments also suggest to us that the Federal Court is willing to take a more active role in matters involving international arbitration, by being the gatekeepers to the pro-enforcement bias of the New York Convention.

However, there is also an additional implication. Where parties engage in commercial activity and voluntarily agree that any disputes will be determined by private arbitration, they must carefully consider whether that is the most appropriate course. Recourse to the courts in an effort to overturn or nullify an award will, it seems, rarely be effective, except to the extent of the limited exceptions spelt out in the Model Law (and adopted in the IAA). Thought should also be given by parties as to the binding and determinative nature of arbitral awards and whether it is more

preferable to submit their disputes through the domestic judicial system, in which the possibility of an appeal is more likely to be open to the parties."

WHAT IS MED-ARB?

In Med-Arb, as in conventional mediation, the mediator endeavours to facilitate a negotiated resolution between the parties. If, however, the mediation fails, the mediator then becomes the arbitrator and authoritatively determines the dispute.

Med-Arb has become increasingly popular in the United States, Japan and Singapore.[52] Due to concerns about disclosing confidential information and the potential impact on the fairness of existing arbitration or litigation proceedings med-arb is less commonly used in common law and Western jurisdictions.

The power of an Arbitrator to conduct a mediation in the same process already exists in the various uniform Commercial Arbitration Acts.[53]

How Does Med-Arb Work?[54]

1) Facilitative mediation, followed by

2) Binding arbitration, perhaps before the same neutral.

The two key points of Arnold's definition are as follows:

• the mediator does not evaluate the strength of the parties' cases during the mediation phase, and

• the arbitrator might be a different person than the mediator.

[52] See Singapore International Mediation Centre, 'SIAC-SIMC ARB-MED-ARB Protocol' <http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf>.
[53] See section 27D.
[54] Tom Arnold, 'A Vocabulary of Alternative Dispute Resolution Procedures' (October 1995) *Dispute Resolution Journal*.

In Med-Arb, if the mediation ends in an impasse, or if issues remain unresolved, the process isn't over. At this point, parties can move on to arbitration. The mediator can assume the role of arbitrator (if he or she is qualified to do so) and render a binding decision quickly based on her judgments, either on the case as a whole or on the unresolved issues. Alternatively, an arbitrator can take over the case after consulting with the mediator.[55]

As Martin C. Weisman[56] reminded practitioners and parties:

> "It is important to note that Med-Arb is not a "one size- fits-all" kind of process; each Med-Arb should be tailored to the circumstances of the dispute and needs of the parties and should be undertaken only with the parties' full, voluntary consent."

Advantages of Med-Arb

Kate Shonk outlines the benefits of Med-Arb as follows:

> "Typically, the med-arb process ends with a successfully negotiated agreement, and the arbitration stage is not necessary. Why? Because the threat of having a third party render a decision in binding arbitration often motivates disputants to reach an agreement. For this reason, med-arb can be a wise choice when parties are facing intense pressure to reach a resolution by a deadline, as in a labor dispute. It can also be beneficial when disputants need to work effectively with one another in the future. Finally, med-arb can also be cost-effective: when disputants hire one person to serve as mediator and arbitrator, they eliminate the need to start the arbitration from square one if mediation fails."[57]

Others key advantages of combining mediation and arbitration are usually said to be the following:[58]

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[55] Katie Shonk, 'The pros and cons of med-arb, a little known alternative dispute resolution process' *Program on Negotiation, Harvard Law School Daily Blog* (Blog Post, 16 July 2019) < https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/>.
[56] Martin C. Weisman, 'Med-Arb: The Best of Both Worlds' (Spring 2013) 19 *Dispute Resolution Magazine* 3.
[57] Kate Shonk, above n53.
[58] Herbert Smith Freehills, 'Med-Arb – an Alternative Dispute Resolution practice', *Arbitration Notes* (Blog Post, 28 February 2012) < https://hsfnotes.com/arbitration/2012/02/28/med-arb-an-alternative-dispute-resolution-practice/>.

"An arbitrator or judge will already be familiar with the case, the parties and their counsel, and so should be well-placed to help settle the matters in dispute. An arbitrator or judge is also often best-placed to identify the most appropriate time in the proceedings to hold a mediation. It can be an efficient way of reaching an early settlement, avoiding substantive hearings and the significant legal fees these incur – either by bringing the parties closer together (under the facilitative approach) or by giving an early indication of the likely outcome of the formal proceedings, and thereby encouraging the parties to settle.

Any settlement reached during med-arb can subsequently be recorded in the form of a final award by the tribunal, which would then benefit from the enforcement regime under the New York Convention.

A mediation under the facilitative approach can be particularly beneficial where there is an on-going business relationship which the parties would like to preserve. Indeed, a mediated settlement can cover issues outside the scope of the immediate dispute, and can therefore have a positive outcome on the relationship between the parties going forward."

In addition, the *Commercial Arbitration Acts* provide for a Med-Arb / Arb-Med process in section 27D (*Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary*):

(1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement ("mediation proceedings") if—

(a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration); or

(b) each party has consented in writing to the arbitrator so acting.

(2) An arbitrator acting as a mediator—

(a) may communicate with the parties collectively or separately; and

(b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.

(3) Mediation proceedings in relation to a dispute terminate if—

(a) the parties to the dispute agree to terminate the proceedings; or

(b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings; or

(c) the arbitrator terminates the proceedings.

(4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.

(5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.

(6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.

(7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2)(b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.

(8) In this section, a reference to a "mediator" includes a reference to a conciliator or other non-arbitral intermediary between parties.

Note: There is no equivalent to this section in the Model Law.

Concerns with the Med-Arb Process

Ashurst defined the three main concerns with Med-Arbs in its Arbitration Update in 2018:[59]

1. “A potential lack of procedural fairness: A mediator generally speaks with the parties in private. If something is said to a mediator by a party in private, it may lead to them

[59] Adam Firth, Luke Carbon, Prajesh Shrestha and Megan Fung, 'All right, Stop! Mediate and Listen: Guidance on the Use of Med-Arb in Australia', *Arbitration Updated, Ashurst* (Blog Post, 16 July 2018) < https://www.ashurst.com/en/news-and-insights/legal-updates/alright-stop-mediate-and-listen-guidance-on-the-use-of-med-arb-in-australia/>.

subsequently having a partial or skewed view of the parties' positions in the arbitration in circumstances where the counter-party has not had an opportunity to respond.

2. An apprehension of bias: Mediation is meant to be facilitative and conducted in confidence without having regard to the rules of evidence. Where mediation fails and the parties resume arbitration, the arbitrator may make an award with knowledge of matters disclosed by the parties confidentially and on a "without prejudice" basis during the course of the mediation. Although the arbitrator cannot technically rely on such matters in making an award, parties may apprehend that the arbitrator's views are informed by the information that was provided during the mediation.
3. A potential lack of candour: Parties may be less forthcoming in a mediation because they are aware that the mediator may be later acting as their arbitrator. This may reduce the likelihood of the parties being able to achieve a mediated outcome of their dispute."

Lucy Greenwood[60] stated that:

"Whilst advocating the use of arbitrators to facilitate settlement, citing the obvious 'increased efficiency of the dispute resolution process', Professor Kaufmann-Kohler[61] identified certain disadvantages, including a 'threat to impartiality', a 'risk of breach of due process' and a 'concern that the parties may not candidly express their positions' before a tribunal who will ultimately rule on the dispute if the mediation fails. Other commentators are more vociferous in their disapproval of the process, asserting that it is impossible to reconcile the confidentiality issues which arise when the mediator and the arbitrator are one and the same person ..and the possibility of the risk of appearance of bias."

George Golvan QC expressed concerns regarding blended processes:[62]

"It seems to me that the primary issue is concern about procedural fairness and natural justice. There is concern about a mediator who has met the parties separately in private

[60] Lucy Greenwood, 'A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in Order for Parties to Explore Settlement', (2011) *Arbitration International* 27(2), 207.
[61] Gabrielle Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard' (2009) 25(2) *Arbitration International* 187.
[62] George Golvan QC, above n3.

sessions, and received confidential information which is not subject to cross-examination or challenge, determining the dispute.

- There are difficulties with codes of conduct which discourage this kind of hybrid process. For example, the Rules of the Institute of Arbitrators and Mediators of Australia provide that a mediator cannot subsequently arbitrate in the same matter without the written consent of the parties.
- There is also the concern that parties are less likely to be candid and "*expose their real hand*" if they know that the mediator may also be required to determine the dispute, if the mediation does not succeed.
- Finally, a mediator who knows that he/she may also be required to act as an arbitrator may be more inhibited and less robust in the role of mediator."

Katie Shonk has expressed similar concerns:[63]

> "When disputants are aware that their mediator could ultimately make a binding decision about the case, they may feel inhibited about sharing confidential information with him or her about their interests. If the mediation moves to arbitration, it could be difficult for the mediator-turned-arbitrator to "forget" that confidential information and focus exclusively on jointly shared information. Disputants might avoid this possibility by having different individuals serve as mediator and arbitrator, though this solution requires additional time and cost. In addition, disputants may feel pressured to reach an agreement to avoid arbitration and the possibility that the mediator-turned-arbitrator will reach a decision that pleases them less."

This view was reinforced by Samuel Volling and Ashley Hill[64];

> "The danger in Med-Arb is that if the mediation fails, the mediator will be empowered to authoritatively determine the dispute as an arbitrator, despite being armed with information provided during the mediation in confidence and without prejudice. The potential for bias (actual or perceived) looms large. As such, the Med-Arb process may cause parties to be

[63] Katie Shonk, above n53.
[64] Samuel Volling and Ashely Hill, 'Mediation-Arbitration: Is There A Method Or Is It Madness?', Corrs Chambers Westgarth (Blog Post, 16 September 2012) < http://www.mondaq.com/australia/x/196568/Arbitration+Dispute+Resolution/MediationArbitration+Is+There+A+Method+Or+Is+It+Madness>.

less frank during the mediation phase...Knowing that the mediator will become an arbitrator, parties to Med-Arb may exploit the mediation phase, treating it purely as an opportunity to gauge the mediator-arbitrator's response to their case.

Common law principles of procedural fairness require that parties have adequate opportunity to respond to the case against them. If, in private discussions, a mediator-arbitrator learns of a matter adverse to a party, but then fails to disclose their knowledge of that matter before arbitration, that party could reasonably complain they were denied the right to respond to the case against them.

Australia's new uniform legislation seeks to deal with this problem in two ways. First, by requiring disclosure of all material matters learned during mediation. Second, the legislation provides that an arbitrator cannot previously have acted as mediator in a dispute unless the parties consent.

This consent must be given *after* the mediation ends. A party with a concern about the mediator's impartiality, or about any information that the mediator will disclose, can veto the arbitration. Of course, not going ahead with the arbitration destroys any efficiency gained through adopting the Med-Arb process in the first place."

Kari D. Boyle[65] highlighted further functional risk issues:

- "Risks of coercion: when the power to decide the dispute is invested in a person acting as a mediator, that person has power to pressure the parties into settlement. Evaluation by the mediator will be highly 'suggestive' of how he/she will decide the legal and factual issues in the arbitration phase. Parties may choose not to raise their concerns at that point in order to avoid alienating the decision-maker. How does this affect the parties' self-determination?
- Risk of perception of bias: particularly if the med-arbiter makes a "settlement suggestion" in the mediation phase.

[65] Kari D. Boyle, 'Med-Arb: From the Mediator Perspective', *Slaw* (Blog Post, 4 March 2013) < http://www.slaw.ca/2013/03/04/med-arb-from-the-mediator-perspective/>.

- Need for dual expertise: it is very important for the med-arbiter to be trained and skilled in both mediation and arbitration.
- Risk of posturing: when the neutral has decision-making power the parties attempt immediately to win the favour of the neutral. They may also be much less likely to be forthcoming about their true interests, goals, intentions and potentially harmful information.
- Risks of party confusion around the timing and nature of the med-arbiter's change of role.
- Change of focus: similarly, if the med-arbiter provides evaluations during the mediation phase the parties will likely engage in advocacy geared toward receiving a good legal evaluation instead of good problem solving."

In a manifestly critical article regarding Med-Arbs written by the respected Brian A. Pappas,[66] he attacks the process as not doing justice to either mediations or arbitrations, and ultimately not the parties in dispute. I have included a number of excerpts from Pappas's article as follows:

> "Instead of a creative solution to the legalization of ADR, Med-Arb, as it is practiced, Med-Arb is contributing to the legalization of both processes, and as a result is actually part of the problem…the key principles of both mediation and arbitration are compromised by Med-Arb. As presently practiced, Med-Arb cannot satisfy the core values of mediator neutrality, party self-determination, and confidentiality.
>
> Legalization of informal processes like mediation and arbitration exemplify the tension between the problem solving goals of mediation and the adversarial system's twin aims of finality and justice.
>
> Despite litigation's downward trend, discontent with arbitration has never been more widespread due to:
> (1) arbitration's increasing similarity to litigation,
> (2) the rise of mediation, and

[66] Brian A. Pappas, 'Med-Arb and the Legalization of Alternative Dispute Resolution' (2015) 20 *Harvard Negotiation Law Review* 157.

(3) the enforcement of binding arbitration clauses in standardized adhesion contracts. Arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost-efficient means of resolving commercial disputes.

Due to arbitration's trend toward litigiousness, mediation is quickly becoming the ADR "process of choice." First, mediation provides parties with a high degree of control over both the process and the agreement. Second, the process is customizable and the scope of the discussion may extend beyond the dispute into communications and relationship issues. The solutions crafted can transcend the typical forms of adjudicated relief into more creative, durable solutions. As a result, unlike arbitration, mediation is viewed more favourably by attorneys on issues of cost, speed, confidentiality, satisfaction, and maintaining relationships. Evaluative mediators tend to have more influence over the outcome, with the most evaluative directly impacting any settlements reached.

Med-Arb is promoted "to cure some of the problems inherent in both mediation and arbitration." These problems are not, however, "inherent" to both processes, and instead are due to the legalization and formalization of informal processes. Instead of resolving the legalization of these processes at their root causes, legalization, Med-Arb combines the two processes. MedArb formalizes and provides a mechanism of finality to a form of mediation that already looks in practice like non-binding arbitration. Legalization is mediation's problem. Evaluative mediators and adversarial advocates violate the core values of the process. The solution is not to provide the mediator with binding settlement authority, which only makes it even more impossible to fulfil the core principles central to the process.

In order to actualize mediation's core values of impartiality, self-determination, and confidentiality, lawyers and law students must be trained to effectively advocate in collaborative processes and mediators must be trained to facilitate instead of evaluate. Mandatory mediation itself needs to be reassessed because it furthers the legalization of the process given the dichotomy of mandating parties into a voluntary process. With a truly voluntary mediation process, fewer instances of "bad faith" or adversarial conduct will take

place, as no one will be forced to initiate mediation against their will. In order to fulfil arbitration's core values of due process and efficient justice, arbitrators' must limit extended discovery and advocates must create carefully crafted and tailored pre-dispute arbitration clauses that will guarantee efficiency.

The Med-Arb "solution" assumes that the initial problems of informality or lack of finality observed with mediation and arbitration are inherent to the processes, and can be resolved by combining them. However, legalization of arbitration and mediation cannot be fixed by further legalization. As the next Part describes, Med-Arb will be unable to "save" either process because harms the central tenants of each and will only further the legalization of both mediation and arbitration.

The process of Med-Arb harms the core principles of each procedure and will accelerate the legalization of mediation by limiting informality and accelerating arbitration's legalization by increasing the likelihood of judicial review. Though Med-Arb may encourage parties to mediate, it limits the core principles of mediation - impartiality, self-determination, and confidentiality - and strips mediation of its informal character. Med-Arb also places stress on the core principles of arbitration - due process, confidentiality, and arbitral neutrality by making the arbitral award increasingly susceptible to court review."

Skills and Qualifications

The ideal Med-Arb neutral will be suitably and adequately skilled in both facilitative mediation and arbitration notwithstanding that these are vastly different skills and mindsets, and finding the right neutral may take considerable time. As explained by Weisman:

"to create a productive and fair process, the neutral must have certain essential skills. First, he or she should be accomplished and experienced in both mediation and arbitration and understand the requirements and standards for both roles. (There are mediation and arbitration protocols governing the ethical standards in each process, but none of the standards encompasses their combination.) Second, the neutral must be able to move from a

facilitative role to an evaluative, decision making one. Third, the neutral must be able to disregard the information and the positions of the parties that he or she learned during the mediation. Finally, the neutral must be able to gain and keep the trust of the parties and establish and maintain credibility for the process. The neutral's personality, substantive expertise and experience all play significant roles in creating and promoting this trust."[67]

CONFIDENTIALITY

On confidentiality, Brian Pappas notes that:

"Med-Arb harms candour and confidentiality and further legalizes both mediation and arbitration by making one neutral both mediator and arbitrator. Mediation is legalized because putting the decision maker in the room formalizes the process and makes candid conversation, crucial to a voluntary process, unlikely. Arbitration is legalized because arbitral awards are exposed to increased judicial review through the use of confidential mediation conversations while rendering those awards. As a result, Med-Arb severely limits mediation's effectiveness while endangering the enforceability of any resulting arbitral award by making it more susceptible to judicial review.

When parties know that the mediator may later assume the role of arbitrator, both advocates and parties will not be as candid with the mediator about weaknesses in their arguments or offer information that may be detrimental to their positions.

Placing the decision maker in the room is detrimental to candour, and parties in same-neutral processes will carefully guard their statements in the mediation phase. As a result, the information needed to craft lasting, reasonable settlement will not be available as parties begin to adopt, in practice, a more legalistic and formal process".[68]

[67] Martin C Weisman, above n54, 41.

[68] Brian A. Pappas, above n65.

> “The arbitral award's enforceability of the arbitral award is open to challenge in Med-Arb due to the lack of confidentiality of mediation communications in the arbitration phase. In the role of the neutral, the future "judge" may learn information during mediation not normally introduced in arbitration such as points of flexibility in demands, potential offers, weaknesses, or prejudicial information.“[69]

Pappas, quoting Professor Ellen Deason,[70] provides the context regarding why legal challenges to combined process occur:

> “First, there is an inherent conflict created when a neutral obtains information while serving as both mediator and arbitrator. Second, challenges occur because the neutral improperly used information while acting as an arbitrator (including rejected settlement proposals) obtained while mediating. Mediation's confidentiality rules prevent an adjudicator from learning of, and thus being influenced by, mediation communications.”

Commenting further, Pappas notes that:

> “Med-Arb's confidentiality and candour problems lead to three major impartiality problems. First, acting as a mediator/arbitrator in Med-Arb harms the mediator's impartiality by making it more difficult for the neutral to mediate. Second, acting as the mediator harms the arbitrator's impartiality as information learned during the mediation may negatively implicate the neutral's impartiality in rendering the arbitral award. The third impartiality problem is created when parties attempt to avoid these problems, because the structure incentivizes the neutral to pressure settlement prior to arbitration.
>
> Confidential mediation caucus sessions provide Med-Arb parties to have ex parte conversations with their future arbitrator -an ideal opportunity for advocates to poison the well. Advocates may utilize these separate caucus sessions to reveal unfavorable information about the other side, knowing that the other side will not know of these communications and

[69] Brian A. Pappas, above n65, 173.
[70] Ellen E. Deason, 'Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review', (2013) 5 *Yearbook on Arbitration and Mediation* 1 225.

be able to rebut them. The potential exists for advocates to use the mediation, and the caucus sessions in particular, offensively in anticipation of arbitration."[71]

Weisman's view is that:

> "A common critique of Med-Arb is that information shared during confidential mediation caucus sessions will impact the arbitration award. Some arbitrators do not consider this to be a problem; others decline to serve as mediator-arbitrators for just this reason. Certainly, the influence of confidential information is a potential problem, but as long as the mediator-arbitrator informs the parties how confidential information will be handled throughout the Med-Arb, these concerns can be ameliorated. Specifically, the mediator-arbitrator should address how he or she will deal with information in caucus and in the arbitration hearings."[72]

Commenting on Weisman's perspective, Pappas further explains that,

> "Weisman states that the neutral must be able to disregard mediation communications during the arbitration phase. The weight of psychological evidence, however, suggests people have great difficulty deliberately disregarding information. Evidence, for example, indicates that judges do not disregard inadmissible information when making substantive decisions. Further, and especially relevant for Med-Arb, judges have been found to be less able to ignore inadmissible evidence when making determinations that they consider at low risk of being reviewed by a higher court. If judges are unable to reliably disregard information, how can we expect arbitrators (who face little risk of review) to not consider mediation communications during the arbitration phase? Weisman's own Med-Arb agreement provides: "Any confidential information received during the mediation will not be used [by him] in rendering a decision as arbitrator," which seems an aspirational statement at best. Weisman's Med-Arb agreement further notes, "nothing disclosed in [caucus] may be considered in the arbitration process unless introduced by either party independently during the arbitration."[73]

[71] Brian A. Pappas, above n65,178.
[72] Martin C. Weisman, above n54, 41.
[73] Brian A. Pappas, 'Med-Arb: The Best of Both Worlds May Be Too Good to Be True A Response to Weisman' (Spring 2013) 19 *Dispute Resolution Magazine* 42, 42.

Self-determination would be greater in Med-Arb if the parties could each opt out and select an alternative arbitrator. Most Med-Arb agreements require the parties to use the same neutral for both phases and thus, leave no recourse if either party is unhappy with the neutral's performance in mediation.

IMPARTIALITY

The obligation for impartiality continues throughout the mediation and arbitration. One criticism of Med-Arb is that allowing an arbitrator to confidentially receive representations from each party during the mediation may cause actual or apprehended bias on behalf of the arbitrator. If the neutral develops doubts as to his or her ability to remain impartial or independent due to information received during the mediation, or for other reasons, the neutral should resign, unless the applicable rules or the parties' agreement allows the neutral to continue under these circumstances.

If the mediation does not lead to a settlement, it is possible that a party might seek to challenge a subsequent arbitral award on public policy grounds, on the basis of some alleged irregularity or lack of due process at the mediation stage.

On this point, Brian Pappas states that:

> "The neutral's impartiality is also under pressure in the mediation phase because the parties have an opportunity to both influence the prospective award and to determine what that award might be, and to test whether settlement is preferred.
>
> The second impartiality issue occurs after the mediation phase when information learned during the mediation phase not normally introduced in arbitration, will likely "cast doubt on the judge's decision-making neutrality."[74]

[74] Brian A. Pappas, above n65, 179.

Pappas goes on to say that:

> “Med-Arb is not a judicial settlement conference process. Med-Arb proponents make three main arguments to rebut the impartiality problem. First, advocates argue that a process of informed consent, often accompanied by a waiver of liability for any perceived or actual partiality, resolves the issue. Second, advocates argue there is no conflict in using the same neutral for both the Med and the Arb because this blended process is analogous to a judicial settlement conference. Finally, advocates point to Arb-Med as a means of resolving impartiality concerns. Med-Arb proponents point to ostensibly 'impartial' judges in civil cases routinely acting as mediators in settlement conferences. If settlement does not occur, the case continues into the trial or "arbitration" phase.” [75]

Informed Consent Mitigates Med-Arb's Problematic Issues

Pappas further assists in our understanding on informed consent:

> “Proponents of Med-Arb believe that Med-Arb's detriments can be avoided through an informed and thorough mechanism of consent prior to agreeing to Med-Arb.
>
> Med-Arb, even when selected through a process of informed consent, does not provide for party self-determination due to five main reasons.
>
> First, lawyers and the increased legalization of mediation curtail party self-determination. Second, increasing the legality of mediation by making the mediator also the arbitrator further curtails party self-determination. Third, informed consent to formal processes is not the same as informed consent to informal processes. Fourth, barriers to educating clients and their advocates about the dangers of Med-Arb make achieving truly informed consent difficult. Finally, even assuming self-determination to use Med-Arb, issues with educated party choice exist beyond the initial agreement. The resulting picture is one in which self-determination is

[75] Ibid., 181.

not protected throughout Med-Arb by often complicated initial consent forms that in and of themselves further legalize the process." [76]

Case Law

USA

Edna Sussman, Distinguished ADR Practitioner in Residence at Fordham Law School, summarised the current legal position in the United Sates in her 2009 article:[77]

"The court in *Bowden v. Weickert*[78] dealt with an arbitrator who attempted to mediate the dispute. Upon failure of the mediation process, the arbitrator returned to his role as arbitrator and rendered his award. The court reviewed the med-arb process and delineated the nature of the agreement necessary for such a hybrid:

The mediation-followed-by-arbitration proceeding engaged in by the parties in this case is sometimes referred to as a combined, or hybrid, "med-arb" proceeding. Such proceedings, when properly executed, are innovative and creative ways to further the purpose of alternative dispute resolution. However, given the confidential nature of mediation, the high degree of deference enjoyed by an arbitrator, and the high probability that both proceedings are likely to be employed before their disputes are resolved, it is essential that the parties agree to certain ground rules at the outset. At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to

[76] Ibid., 189.
[77] Edna Sussman, 'Developing an Effective Med-Arb/Arb-Med Process' (Spring 2009) 2(1) *New York Dispute Resolution Lawyer.*
[78] *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio App. 6 Dist. June 20, 2003). The case went back for a second arbitration; see *Bowden v. Weickert*, No. S-05-009, 2006 WL 259642 (Ohio App. 6 Dist. Feb. 3, 2006).

waive the confidentiality requirements imposed on the mediation process … in the event that their disputes are later arbitrated.

Finding that the arbitrator had relied on information obtained in his role as mediator in violation of statutory protections of mediation confidentiality and that there had been no explicit agreement by the parties regarding the use of confidential information, the court found that use of the same neutral as arbitrator and mediator rendered the arbitrator's decision "arbitrary and capricious" on its face.

In *Gaskin v. Gaskin*,[79] the court noted that the mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator, creating the potential for a problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. The court concluded that it would be improper for the mediator to act as the arbitrator in the same or a related dispute "without the express consent of the parties."

Where the parties have consented, the use of confidential information by the arbitrator in the arbitration decision should not serve to provide a basis for vacating the award. In U.S. Steel Mining Company v. Wilson Downhole Services,[80] the parties had agreed to have the mediator serve as the arbitrator if the mediation failed to lead to a resolution and empowered the mediator, now arbitrator, to select between the parties competing proposals in a baseball arbitration. The parties expressly authorized the mediator-arbitrator to rely on confidential mediation disclosures in reaching his decision. The parties' agreement provided:

The Parties anticipate that ex parte communications with the Arbitrator will occur during the course of the mediation. The Parties agree that the Arbitrator, in evaluating each Party's best and final offer, may rely on information he deems relevant, whether obtained in an ex parte communication or otherwise, in making the final Award. In attacking the award, the challenging party claimed fraud in the presentation of information in the mediation.

[79] *Gaskin v. Gaskin*, No. 2-06-039-CV, 2006 WL 2507319 (Tex. App.- Fort Worth, Sept. 21, 2006).
[80] *U.S. Steel Mining Company v. Wilson Downhole Services*, No 02:00CV1758, 2006 WL 2869535 (W.D. Pa. Oct. 5, 2006).

The court held that such evidence of fraud had to be clear and convincing and no such finding could be made on the facts presented in the face of the consent given.

In an analogous case, in *Conkle and Olesten v. Goodrich Goodyear and Hinds*,[81] the court reviewed a challenge to an arbitration award where the party had waived disclosure by the arbitrator and did not know that the arbitrator had previously mediated a closely related case. The court refused to set aside the award finding that the "waiver was direct and unequivocal." The court said that to adopt an "absolutely-cannot-waive-disclosure rule would give one party the unilateral right to repudiate any arbitration it didn't like." Nor will the court necessarily vacate the award even absent express consent on use of confidential information in limited circumstances. In Logan v Logan,[82] the loser in the arbitration sought to set aside the award on the grounds that the mediator–arbitrator referred to confidential information from the mediation in his arbitral award.

The court noted that:
if there was an improper reference to the mediation in the arbitration proceedings,
this would constitute grounds for vacating or modifying the arbitration order and subsequent judgment, if the reference materially affected appellants' substantial rights. However, on the facts before it, the court refused to set aside the award, stating that no showing had been made that the reference in the arbitration order to matters that occurred at the mediation "materially affected substantial rights." Care must be taken in designing the process, crafting the consent document and in the terminology used if an enforceable award is to be achieved. In *Lindsay v. Lewandowski*, [83] the parties agreed to "binding mediation" by the mediator upon the conclusion of a failed mediation. The court refused to enter judgment on the stipulated settlement agreement, which included provisions determined in "binding mediation" on unresolved terms following a mediation by the same neutral. The court noted the confusion

[81] *Conkle and Olesten v Goodrich Goodyear and Hinds*, Nos. G033972, G034063, 2006 WL 3095964 (Cal. App. 4 Dist. Nov. 1, 2006).
[82] *Logan v. Logan,* No. F051606, 2007 WL 2994640 (Cal. App. 5 Dist. Oct. 16, 2007).
[83] *Lindsay v. Lewandowski,* 139 Cal. App. 4th 1618, 43 Cal. Reptr. 3d 846 (Ct. Appeals, 4th Dist. Div. 3, 2006).

that would result from allowing the development of myriad alternative dispute resolution processes such as “binding mediation” for which no legal guiding principles existed:

Thus the court in *Lindsay v. Lewandowski* expressly recognized that such a combined process could be developed by the parties. The court stated that it did not preclude the parties from agreeing, if the mediation fails, to proceed to arbitration with the same neutral. But the court warned that whether or not this arbitrator (née mediator) may consider facts presented to him or her during the mediation would also have to be specified in any such agreement. As confirmed in the concurring opinion, “only a clearly written agreement signed by the parties can set forth a process whereby an unsuccessful settlement conference (or mediation) morphs into a de facto arbitration. The key to approval of such agreement is clarity of language and informed consent.”

Current Headline Case In Australia

The leading case on Meb-Arb in Australia is *Ku-ring-gai Council v Ichor Constructions Pty Ltd*.[84] White & Case wrote a summary explaining the consequences of this case to conducting Med-Arb in Australia:[85]

"The case of *Ku-ring-gai v Ichor* reminds us that med-arb, where it is permitted, is often subject to prescriptive legislation, and that a failure to comply can compromise the validity of any subsequent arbitral award (if the mediation is unsuccessful, and the arbitration resumes)…

[In *Ku-ring-gai v Ichor*] the Court held that the arbitrator had assumed the role of a mediator during the proceedings, and that written consent of the parties was required by the Act in order for the arbitrator to recommence the arbitration. Such written consent was held to be required, even though the parties all agreed to re-commence the arbitration following the

[84] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610.
[85] Julian Bailey, Michael Turrini and Sarah Hudson, 'Med-Arb: NSW case highlights the importance of strict compliance with the relevant legislation', *Publications and Events, White & Case LLP* (Alert, 29 June 2018) < https://www.whitecase.com/publications/alert/med-arb-nsw-case-highlights-importance-strict-compliance-relevant-legislation>.

mediation. The issue was that the parties had not committed this apparent agreement to writing, and the award made by the arbitrator was invalid…

In this case, the legislative position was prescriptive. Although all parties appear to have been happy to proceed with the arbitration following the unsuccessful mediation, the lack of written consent from the parties resulted in the arbitrator's mandate being terminated."

Other Hybrid Models

George Golvan QC has stated that he prefers a different type of blended process:[86]

> "Another innovative procedure, what is sometimes referred to as “baseball arbitration”, (because it is used to resolve salaries of major league baseball players), has the acronym MEDALOA[87] - ‘Mediation and last offer Arbitration’, and seems to be very suitable to be used for commercial disputes beyond baseball salaries. At the conclusion of an unsuccessful Mediation, the mediator considers each parties’ final offers and hears submissions as to which offer is the most reasonable in all the circumstances, applying standards of justice and fairness. The mediator’s only role is to choose between the two offers without modification, and make a decision as to which offer is the most reasonable in the circumstances and should be accepted as the final settlement. So if one party offers to settle by paying $200,000 and the other party offers to settle by accepting the sum of $1m, the mediator can only choose between the two competing offers and cannot propose a middle ground.
>
> The MEDALOA procedure[88] creates the incentive on parties to put forward their most reasonable offer, to attract the mediator, rather than rely on an offer which is unreasonable and extravagant. The mediator is unlikely to select an offer which is perceived to be less reasonable than a competing offer that is available for acceptance. The process removes many of the concerns about the mediator having the power to make a decision, when the mediator has been compromised by meeting the parties privately, because the mediator’s discretion is limited.

[86] George H. Golvan QC, above n3.
[87] A term imported from the US and said to have been coined by Robert Coulson (Past President of the American Arbitration Association), see: Robert Coulson, “MEDALOA: A Practical Technique for Resolving International Business Disputes.” 11 *Journal of International Arbitration* No 2/1004, 111 to 113.

But its attraction is, informality, speed, low cost, the fact that the competing offers can incorporate lateral and interest-based features, and above all finality. It could be possible for the parties and the mediator to discuss the competing offers, before a decision is made, to allow amendments to be made to an offer if it contains potentially unacceptable components before the mediator decides which of the offers will be accepted. It also may be possible that the mediator can decide that neither offer should be accepted in certain circumstances. For example, if the mediator took the view that none of the offers is commercially acceptable, they contain 'unworkable' components which would be commercially unacceptable to each party."

Getting the Contractual Terms in Med-Arb Right

ACICA Model Arbitration Clause

Arbitration agreement

"ACICA recommends the following arbitration clause for international and domestic arbitration. Parties are free to insert this clause into their contracts:

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 10 of the ACICA Arbitration Rules]."

UNCITRAL Arbitration Clause

ACICA acts as an administering body and appointing authority under the UNCITRAL Arbitration Rules. ACICA recommends the following arbitration clause for parties adopting the UNCITRAL Arbitration Rules:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The arbitration shall be administered by the Australian Centre for International Commercial Arbitration (ACICA). The appointing authority shall be ACICA. The number of arbitrators

shall be [one or three]. The place of arbitration shall be Sydney, Australia [or choose another venue]. The language(s) to be used in the arbitral proceedings shall be […].”

Australian Disputes Centre ADC Dispute Resolution Sample Clauses Effective 1 March 2019

Arbitration (Australian-only Contract)

(a) Any dispute, controversy or claim arising out of, relating to or in connection with this agreement, including any questions regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Australian Disputes Centre (ADC).

(b) The arbitration shall be conducted in [insert location of arbitration] in accordance with the ADC Rules for Domestic Arbitration operating at the time the dispute is referred to ADC (the Rules).

(c) The terms of the Rules are hereby deemed incorporated into this agreement.

(d) This clause shall survive termination of this agreement.

Carol A. Ludington, succinctly defined some clear drafting issues in her 2017 paper:[89]

> "…ICC Mediation Rules[90] provide that the same person shall not act as both arbitrator and mediator, "unless all of the parties agree otherwise in writing" as follows:
>
> > ‘Unless all of the parties agree otherwise in writing, a Mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute which is or was the subject of the Proceedings under the Rules, whether as a judge, an arbitrator, an expert or a representative or advisor of a party.’
>
> SCC[91] rules contain a similar provision, as follows:

[89] Carol A. Ludington, '*Med-Arb: If the Parties Agree*', (2017) 5 *Yearbook on International Arbitration* 313.
[90] International Chamber of Commerce, 'Arbitration Rules' (2017) and 'Mediation Rules' (2014) *International Chamber of Commerce* <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf>.
[91] The Arbitration Institute of the Stockholm Chamber of Commerce, 'SCC Arbitration Rules' (2017) *The Arbitration Institute of the Stockholm Chamber of Commerce*, < https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf>.

'Unless the parties have agreed otherwise, a Mediator may not act as arbitrator in any future arbitrations relating to the subject matter of the dispute.'

Section 17(2) International Arbitration Act of the Republic of Singapore requires as follows:

'An arbitrator or umpire acting as conciliator

(a) may communicate with the parties to the arbitral proceedings collectively or separately; and

(b) shall treat information obtained by him from a party to the arbitral proceedings as confidential, unless that party otherwise agrees or unless subsection (3) applies.'

Section 17 (3):

'Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall before resuming the arbitral proceedings disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings.'

The med-arb agreement should be sufficiently detailed to avoid ambiguity….The CEDR[92] Commission on Settlement in International Arbitration, which recommended that to minimize risks associated with med-arb, the parties' consent to the following be documented in writing:[93]

- Consent to the mediator/conciliator resuming as arbitrator;
- Consent as to the way in which the arbitrator is to deal with information learned in confidence during the mediation/conciliation:
    - Whether the arbitrator will disclose any such information to all parties and provide them with an opportunity to comment on it; or
    - Whether the arbitrator should disregard any confidential information that may have been disclosed during private meetings, and he or she should be under no duty to disclose it.
- Consent to the arbitrator meeting with each party privately during the mediation / conciliation phase and either:

[92] Centre for Effective Dispute Resolution.
[93] CEDR Commission on Settlement in International Arbitration, 'Final Report', (November 2009) *CEDR Commission on Settlement in International Arbitration*, Appendix 2.

    - The arbitrator is under no obligation to disclose information obtained in confidence but should disregard it for the purposes of an arbitration award; or
    - The arbitrator is under a duty to disclose any information obtained relevant to a potential arbitration award so that the other party may comment.
- Consent that the parties will not at any later time use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).

Express waiver by the parties that they will not use the fact that the arbitrator acted as a mediator, or other issues raised above is also addressed in the IBA Guidelines on Conflicts of Interest,[94] as follows:

> 'An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings.'

However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process, or from information that the arbitrator may learn in the process.

If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver….

> 'The Parties agree that the Arbitral Tribunal's facilitation of settlement in accordance with these Rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal (or any member of it) or for challenging any award rendered by the Arbitral Tribunal.'"

Further safeguards evinced by the CEDR Commission are:[95]

> "7.1 The parties' consent to the mediator/conciliator resuming as arbitrator should include consent as to the way the arbitrator is to deal with information learned in confidence by the arbitrator during the mediation/conciliation. This may require the arbitrator to disclose any such information to all parties and provide them with an opportunity to comment on it.

[94] International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration' (Adopted by resolution of the IBA Council on Thursday 23 October 2014).
[95] CEDR Commission on Settlement in International Arbitration, above n96.

Alternatively, it may provide that the arbitrator should disregard any confidential information that may have been disclosed during private meetings, and he or she should be under no duty to disclose it.'

'7.3 The parties should give their consent in writing before the mediation/conciliation phase. Where parties wish to adopt a more robust protection against the risks inherent in the arbitrator acting as mediator, they should insert a requirement that consent is also required after the mediation/conciliation has concluded and prior to the mediator/conciliator resuming in the role of arbitrator. The consent given after the mediation/ conciliation phase is particularly important because it is given in the knowledge of developments during the mediation. Consent which is given at an earlier stage (for example in a dispute resolution clause, or by reference to the arbitral rules of an institution) may be less effective. In addition, a party knowing that it can withhold consent, may encourage a party to be more open during the mediation/ conciliation phase.

7.5 The consent should include a statement that the parties will not at any later time use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).

7.6 If as a consequence of his or her involvement in the mediation/ conciliation phase, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign."

CONCLUSION

In Australia, the uniform *Commercial Arbitration Acts* regulate the use of Med-Arb for domestic arbitrations.

Justice Croft concluded in his paper stated:

> "……. the importance of impartial, efficient, accessible, supportive and "arbitration friendly" courts cannot be overstated. In this context, all involved in arbitration have a role to play. The continued support of legislatures and governments is essential in ensuring international best practice in arbitral legislation, and the provision of financial assistance where necessary. Crucial also is the role of arbitrators and arbitral institutions in adopting flexible, timely, and innovative processes to maximise efficiency of arbitral disputes (and minimise unnecessary costs)."[96]

It might be too early to properly and accurately come to any specific view on Med-Arbs as being a successful hybrid ADR process, as the data and outcomes supporting research on the process is still too embryonic in the Australian legal and ADR system. There are also the constitutional issues in Chapter 111, that represent some concerns where determinative processes are sought to be imposed in federal matters such as franchising and interstate disputes. At best, we are able to highlight and monitor some issues to focus on in our analysis of Med-Arbs and look to our courts for guidance as to its use and legitimacy in specific circumstances.

[96] The Hon Justice Clyde Croft AM, above n31.

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Franchise ADR Addendum

Parliamentary Joint Committee on Corporations and Financial Services

Fairness in Franchising stated:

“Dispute resolution and arbitration;

Evidence to the inquiry included a litany of instances where the franchisee alleged the franchisor failed to engage in good faith in the mediation process, knowing that the only alternative was court action which was prohibitively expensive for the franchisee. Absent good faith, the mediation process fails by design. If all the issues are unable to be resolved satisfactorily through mediation, a determinative procedure such as arbitration is required. The committee accepts that arbitration is more expensive than mediation because of the time and expertise required. But, it can deliver finality to parties who want to resolve a matter and move on. Arbitration is cheaper and more flexible than pursuing court action and this is important in any attempt to deliver a just outcome in a timely fashion at a reasonable price. The committee therefore recommends that the dispute resolution scheme under the Franchising Code include binding arbitration with the capacity to award remedies, compensation, interest and costs. Further, the committee recommends that the Franchising Code be amended to allow a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise.”[97]

15.1 On page 203 of the Parliamentary Report noted “Accessible, affordable and effective dispute resolution under the Franchising Code of Conduct (the Franchising Code) is of fundamental importance to franchisors and franchisees, particularly given the power imbalance between the respective parties. An effective dispute resolution process should have a sufficient range of mechanisms in place to enable the parties to resolve disputes in the most timely, cost effective, flexible and fair way, without the need to resort to the court system except in rare cases.” [98]

[97] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Fairness in Franchising* (2019), 19.

[98] See Office of the NSW Small Business Commissioner, Submission 49, pp. 12–14; Office of the Franchising Mediation Adviser, Submission 37, pp. 17–18; Office of the Franchising Mediation Adviser, Supplementary Submission 37.1, pp. 13–21.

15.17 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) noted that one of the challenges for franchisees in going to court is the way cost orders operate. If a franchisee pursues litigation, but runs out of money to continue, it is possible for courts to order the franchisee to pay the franchisor's costs.[99]

Arbitration as an addition to the dispute resolution process;

15.23 As noted above, in many cases mediation is a desirable and effective dispute resolution mechanism. However, the absence of a determinative mechanism as another constituent part of the dispute resolution process is a serious shortcoming. Several submitters and witnesses supported the addition of a determinative system to the current dispute resolution process under the Franchising Code. Many of these submitters drew the committee's attention to the existence of such a mechanism under other codes, such as the Food and Grocery Code of Conduct.

15.24 In explaining the difference between mediation, conciliation and arbitration, ASBFEO noted:

• A mediator is more like a facilitator and will raise questions that lead people to consider the range of options.

• A conciliator will guide and direct the parties, while acknowledging that the parties need to agree on an answer.

• An arbitrator can act much like a conciliator, but has the capacity to make a contractually binding ruling on the parties.[100]

15.25 The arguments set out in favour of some form of mandatory determination in circumstances where a resolution is not reached through mediation included: • the lower cost of arbitration compared to a court process;[101] and the ability to secure a determination in circumstances where one party has declined to participate in mediation in good faith.[102]

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[99] Dr Craig Latham, Deputy Ombudsman, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard* (21 September 2018), 41.

[100] Dr Craig Latham, Deputy Ombudsman, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard* (21 September 2018), 41.

[101] Professor Andrew Terry, Submission 108, 8; Mr Brian Keen, Founder and Chief Executive, Franchise Simply, *Committee Hansard* (8 June 2018), 62; Office of the Franchising Mediation Adviser, Supplementary Submission 37.1, 21.

[102] See, for example, Office of the Franchising Mediation Adviser, Supplementary Submission 37.1, 13–21; Australian Small Business and Family Enterprise Ombudsman, Submission 130, 2; Dr Craig Latham, Deputy Ombudsman, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard* (21 September 2018) 39; Franchisee Federation of Australia, Supplementary Submission 113.1, 4.

15.32 Several submitters highlighted the importance of arbitration as a backstop to the mediation process. Both Dr Tess Hardy and the ASBFEO argued that the ability to direct parties to arbitration where a resolution is not reached through mediation would level the playing field between franchisors and franchisees in the dispute resolution process[103]

15.49 A key difference between the dispute resolution schemes compared in Appendix 4 is that, unlike the Franchising Code, the AFCA and the Food and Grocery Code of Conduct schemes include binding arbitration and the capacity to award remedies, compensation, interest and costs.

[103] Dr Tess Hardy, Private capacity, *Committee Hansard* (22 June 2018) 4; Australian Small Business and Family Enterprise Ombudsman, Submission 130, 2.

ISSUES CONCERNING ARBITRATION IN FRANCHISING

Examination of unintended consequences.

At the outset I support two premises:

A. There should be a range of ADR processes, that include determinative processes, including arbitration.
B. There must be a low cost consideration in any ADR process.
C. Process must be timely
D. Conducted by experienced and accredited professionals.

Court processes must also be refined to understand and adapt to the changing requirements of parties in dispute and find processes and outcomes that meet expectations.

1. Are there any constitutional issues requiring mandatory Arbitration in franchising disputes? Taskforce to examine determinative power to be given in the Code - constitutional?
2. What contractual terms are required to have an agreed Arbitration clause in a FA? Are there rights of appeal? Who pays costs? Appointment of Arbitrator?
3. Cost implications of an Arbitration
4. Will any obligation to Arbitrate be retrospective or commence from a certain date in the franchise?
5. Code - Any dispute resolution provision must comply with Part 4 of the Code – impact of any changes legislated?
6. Cannot contract out of Code
7. Rights of Appeal in a mandatory Arbitration?
8. Enforcement of any arbitral Award? What is party goes into liquidation - Award and costs lost!
9. Source of who should arbitrate?
10. Other alternatives to determinative processes.