



# alternative dispute resolution theory meets practice

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# types of ADR

- mediation
- expert determination
- adjudication (under BCISPA)
- arbitration
- fast track arbitration
- Med-Arb
- dispute resolution boards

# ADR goals

- resolve the dispute
- cost effective
- fast
- confidential
- final
- preserve the relationship

# MEDIATION

# EXPERT DETERMINATION

**ADJUDICATION:  
Building and  
Construction Industry  
Security of Payment Act  
(1999)**

# ARBITRATION

# advantages of arbitration

The advantages of arbitration are perceived to be:

- less expensive than litigation (doubtful)
- less formal than litigation
- fewer bureaucratic pre-trial delays
- technical issues resolved by technical experts
- privacy and confidentiality

# International Arbitration

Arbitration has a significant advantage in the cross-border context where concerns may arise about:

- the quality of jurisprudence in a country
- uncertainty as to the country in which disputes would be determined
- uncertainty as to the governing law, corruption and the like.

# BHP Billiton Limited v Oil Basins Limited

Hargraves J:

“My review of the authorities and the facts of this case lead me to conclude that the arbitrators were under a duty to give reasons of a standard which was equivalent to the reasons to be expected from a judge deciding a commercial case.”

# IAMA'S new Arbitration Rules

"The **Overriding Objective** of these Rules is that the arbitration is conducted:

- (a) fairly, expeditiously and cost effectively; and
- (b) in a manner which is proportionate to:
  - (i) the amount of money involved;
  - (ii) the complexity of the issues; &
  - (iii) any other relevant matter."

# the new Arbitration Rules

## “Rule 14 General Duty of Arbitrator

1. The Arbitrator must conduct the arbitration in accordance with the **Overriding Objective**, and shall adopt procedures suitable to the particular case, avoiding unnecessary delay and expense so as to provide a fair, expeditious and cost effective process for determination of the dispute (continued)

# the new Arbitration Rules

## **Rule 14    General Duty of Arbitrator (continued)**

2. The arbitrator shall [give] each party a reasonable opportunity to put its case and to respond to that of any opposing party, and a reasonable opportunity to be heard on the procedure adopted or proposed to be adopted by the Arbitrator."

# the new Arbitration Rules

## "Rule 15 General Duty of Parties:

1. The parties must do all things in the course of the arbitration:
  - (a) for the arbitration to be conducted in accordance with **Overriding Objective**; and
  - (b) necessary for the fair, expeditious and cost effective conduct of the arbitration.
2. The parties must comply without delay with any direction or ruling by the Arbitrator as to procedural or evidentiary matters."

# the new Arbitration Rules

## "Rule 17 Procedural Directions

Subject to any agreement of the parties to the contrary, in order to give effect to the **Overriding Objective** the Arbitrator shall have ... the widest discretion:

- (a) to exercise procedural control of the conduct of the arbitration including the power to limit the time to be taken for any aspect of the proceedings not otherwise agreed by the parties; and

# the new Arbitration Rules

## "Rule 17 Procedural Directions (Continued)

Subject to any agreement of the parties to the contrary, in order to give effect to the **Overriding Objective** the Arbitrator shall have ... the widest discretion:

- (b) to give appropriate directions in the event of default by either party in compliance with any agreed or fixed time period, or with a procedural direction by the Arbitrator."

**MED-ARB**

# Med-Arb: perceived “issues”

1. parties inhibited in mediation
2. mediation exploited as preparation for arbitration
3. mediators persuasion being taken as pressure or implied threat
4. perception of bias

# Med-Arb managing the concerns

Make the arbitration agreement provide:

- (a) arbitrator may mediate before conducting any arbitration;
- (b) arbitrator may hold private sessions during the mediation with the usual confidentiality requirements;
- (c) at conclusion of mediation, arbitrator inform the parties whether he/she thinks s/he is able to conduct the arbitration impartially (and the arbitrator has the option of not proceeding further);
- (d) either party be entitled to object to the arbitrator conducting the arbitration;
- (e) if neither party objects, then each party must expressly consent to the Med-Arbitrator proceeding further.

# Dispute Resolution Boards

(assuming we have time)



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