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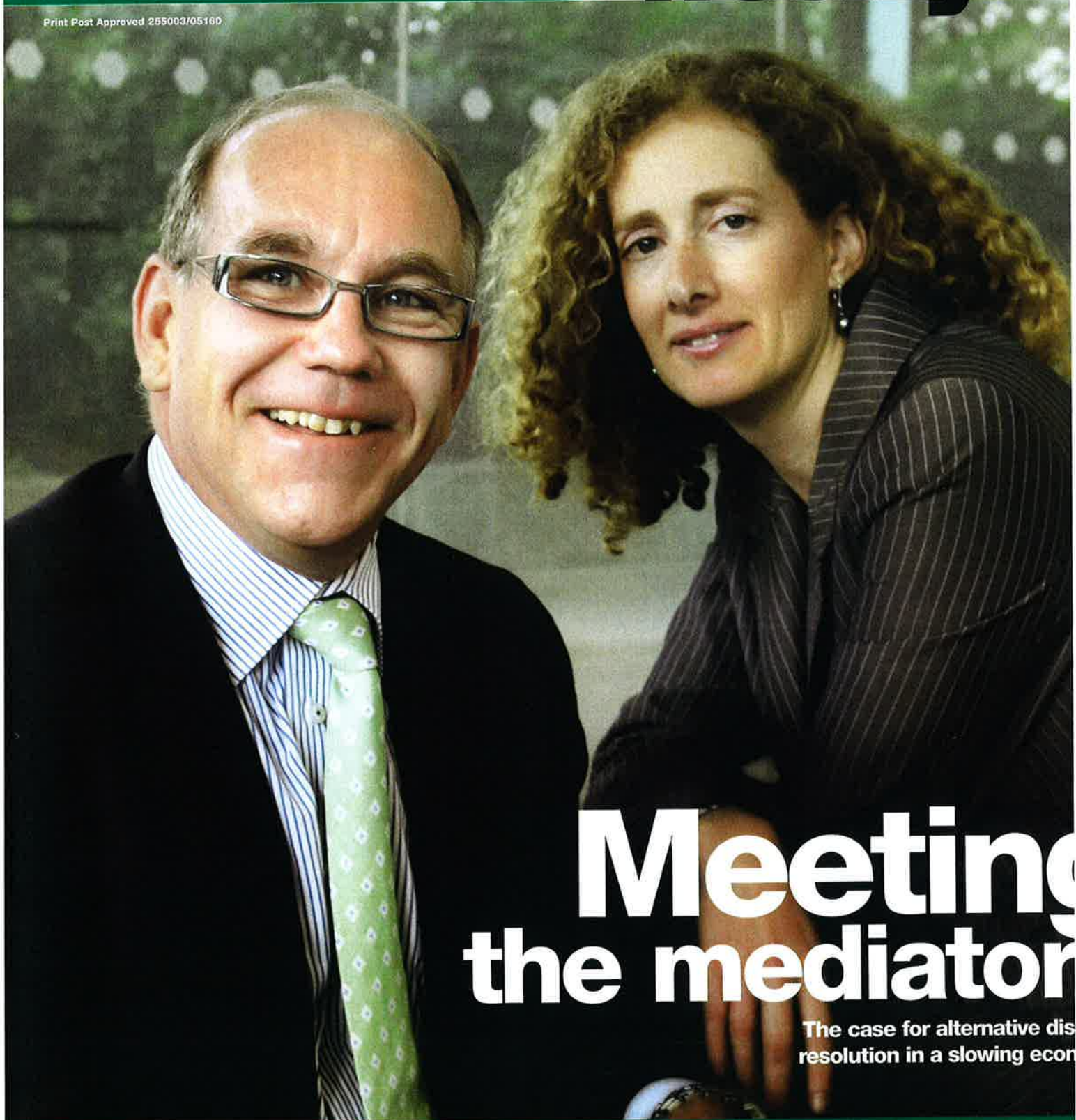
THE BUSINESS OF L

## weekly

ISSUE

FRIDAY 13 MARCH 2009 [www.lawyersweekly.com.au](http://www.lawyersweekly.com.au)

Print Post Approved 255003/05160



# Meeting the mediator

The case for alternative dispute resolution in a slowing economy

plus:

**Middle East Report**  
The region weathers the storm

**From Russia, with careers**  
Opportunity in Moscow?

**End of silence**  
Whistleblowers to get protection?

 Lexis



Once lawyers, now mediators: Steve Lancken and Shirli Kirschner believe the business world has a better understanding of just what mediation can offer in terms of resolving disputes

# Quiet on the litigation front

It is only natural that the economic downturn should bring about a spike in litigation activity. But this time, there is a more fundamental shift and a need for more creative dispute resolution through mediation, writes Angela Priestley

**D**uring a recession, organisations often turn to litigation in an attempt to salvage whatever they can from disputes. But this time around, the wave of litigation activity that law firms were preparing for has not necessarily transpired. Of course organisations are still having disputes, but growing weary of mega-litigations like C7 that have hit the headlines in recent years, caution is mounting over not just the rising costs of litigation, but also the potential for public questioning over why alternative forms of dispute resolution – like mediation – were not explored as an option.

While it is still too early to for hard evidence to suggest that organisations are turning away from litigation, anecdotal evidence is that during the current downturn, parties to a dispute may instead turn to mediation as a more cost-effective means for resolution.

According to the Institute of Arbitrators and Mediators Australia (IAMA), the trend of organisations choosing mediation and other forms of alternative dispute resolution as a means to solving their disputes is increasingly on the rise. Mediation nominations increased 100 per cent between 2007 and 2009.

Acting president of the IAMA, Gianna Totaro, says the figures reflect solid nominations only where IAMA has been written into contracts. “These don’t factor into account referrals via phone, email enquiries and direct access to our members via our website member database.”

Mediators contacted by *Lawyers Weekly* confirmed the increase in direct and indirect enquiries – via email and phone. However, some claimed this may or may not be due to the slowdown in the economy, noting that the March/April period can always be busy, given the commencement of the court season in February.

## All weapons out

It is logical that the cyclical nature of litigation should spike in a slowing economy. “In a downturn, companies can no longer just cut their losses and move into the next project,” says Georgia Quick, a litigator with Blake Dawson. Given, however, that litigation and other forms of dispute resolution can lag significantly behind the economic cycle, Quick believes it will be some time before she sees the precise effect of the global financial crisis (GFC) on her area of practice, and indeed on alternative forms of dispute resolution.



Quick notes that, regardless of the economic crisis, mediation is increasingly becoming a part of her work, especially with the emphasis on mediation coming from the courts and multi-tiered dispute resolution clauses. "As a result of the GFC, we will continue to see increased pressure by our clients to efficiently manage the costs of resolving disputes, and this may result in increased willingness to actively pursue mediation."

### Enter the peacemakers

Mega-litigations and their subsequent discussions at government level and in the public domain have raised the profile of mediation as an effective form of dispute resolution.

"My mum knows what I do," says Steve Lancken from the Trillium Group, laughing. "People understand better what services we're providing now. They ring me up with much more interesting requests and opportunities to work because they have a much broader view of the things mediators can do."

Part of it, says Lancken, involves people now viewing mediators as more than just chairpersons at meetings – possibly a result of the successful mediations that have occurred and a growing respect for the range of skills that mediators possess.

There is also the factor of legislative support. The range of cases where mediation is automatically recommended or even mandated as the first port of call for resolution has widened – especially through Legal Services Directions 2005 (amended in 2008), a set of binding rules regarding the performance of legal work for the Commonwealth.

And with the support of the Federal Government, particularly through the Attorney-General Robert McClelland, more and more organisations are realising that mediation can be the first stop for sorting out their grievances.

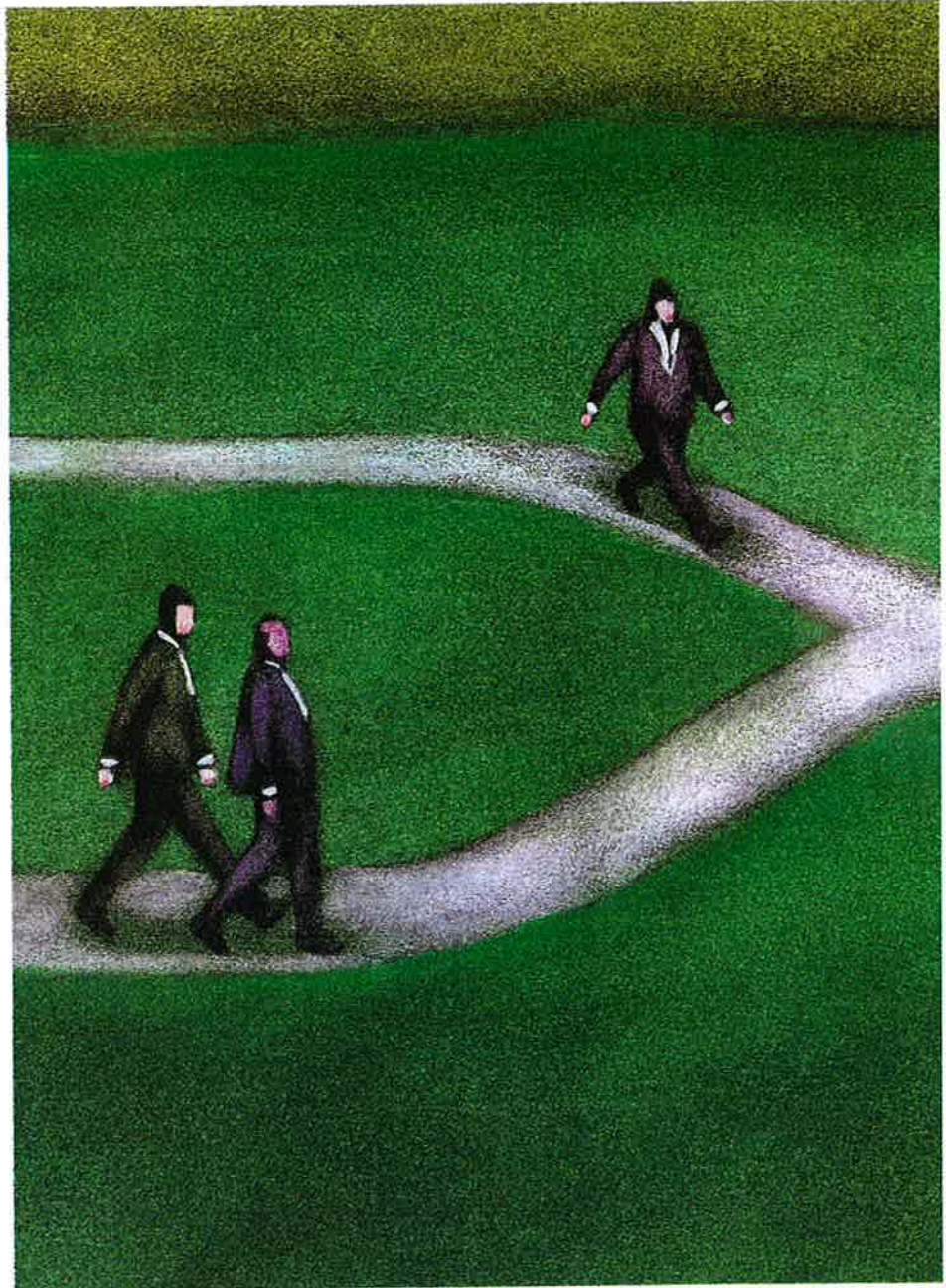
### The cost of negotiations

It can be tempting to attribute the rising number of mediations to the escalating costs of litigation. That may have played a role, but Lancken believes that, while people are increasingly mindful of costs – especially in this environment – he does not want to overemphasise cost as a reason for people using alternative processes.

"Different processes are for different issues and if I chose litigation or have an investigation, there could be a reason for me for doing it," he says. "That's the hope. If business is going to spend money, it should be based on a conscious decision about processes. Sometimes businesses are driven to a grievance process because that's the only process they've got or the only thing they know."

Philip Argy, chief executive of mediation and arbitration firm ArgyStar.com, again turns to the case of C7 as the poster-child of how costs and time can escalate in litigation.

"Who won?" he asks. "It takes so long to find out who was legally right that it's passed the point of anybody actually caring. ... People are incredulous when you tell them



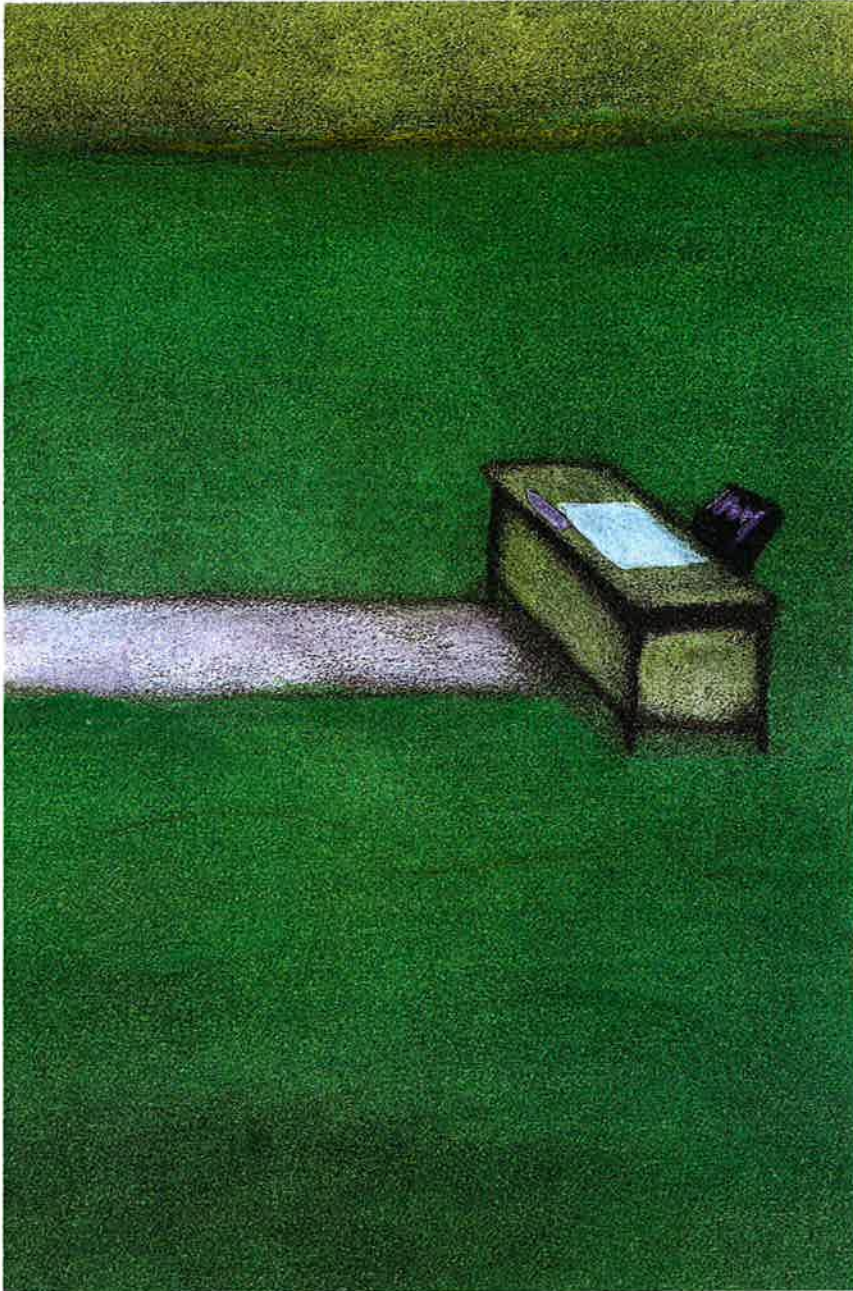
**"If you can get everybody's business case salvaged out of the mess, then you've done well"**

you can get \$70 and \$100 million disputes based on people not agreeing on what they were supposed to do."

And during an economic slowdown, businesses will be more likely to watch every dollar they spend, and to ensure any spend is absolutely necessary.

Totaro believes the ballooning costs of litigation – alongside subsequent commentary through judgements and in the public domain by leading members of the judiciary and government – have significantly contributed to the uptake of alternative forms of dispute resolution. She says that a further slowdown in the economy may continue this trend.

"Mediation offers flexibility in so many areas that a court cannot. ... (They) have the ability to design business solutions that provide parties with a real alternative to a lengthy, public, costly court battle," says Totaro.



### Those who mediate...

They are architects, psychologists, planners and business experts, but more often than not, they are lawyers.

And there is a common theme that runs in those who move from law into mediation. Usually, it's about finding a way of creating value for clients.

"I spent 32 years as a litigator making a good living, but really it was very unsatisfying," says Philip Argy, chief executive of mediation and arbitration firm ArgyStar.com. Argy refers to his days as president of the Australian Computer Society having to constantly defend the IT industry when major court disasters became front page news. "I thought: 'There's got to be a better way, why can't we stop these things from happening, when it's the same thing everywhere on the planet?'"

Steve Lancken, now working as a mediator with the Trillium Group, had a similar experience: "I realised that while I enjoyed litigating and the intellectual challenge, I didn't really like the thought that I wasn't creating any value in big transactions."

Meanwhile, for Shirli Kirschner from Resolve Advisors, who says she was destined for the bar while she was working in private practice, it was advice from her father that she took seriously: "He said something interesting on my 29th birthday: 'Don't accept partnership unless it's what you want to do for the rest of your life.' I didn't want to be partner for the rest of my life, but I didn't know what I wanted to do."

So what makes a good mediator? It's a different skill set to what makes a good litigator, and one that realises the importance of being flexible in approach and opening the lines of discussion for alternative conversations.

In 1997, former High Court judge Michael Kirby said successful mediation is about embracing techniques that may not come easily to people trained in the combative atmosphere of adversary trials before Australian courts.

"Mediation and arbitration are not just court proceedings conducted in a different place," he said. "They require distinct skills, novel approaches, different techniques and a new psychology."

In the business environment of 2009, these are skills that will no doubt be in strong demand.



It is with sadness that Trilby Misso Lawyers announces the passing of founder Trilby Misso, aged 92. Trilby Misso always fought to protect people's rights from the day he became a lawyer both in his native country Sri Lanka and then Australia. Trilby Misso established his law firm in Redcliffe in 1956 and his legacy lives on as the law firm that bears his name continues to champion peoples' rights.

*Because we care*

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LAWYERS



### A new world order

Shirli Kirschner from Resolve Advisors has a more philosophical view as to why mediation may be considered a more appropriate response to disputes now and into the future. She notes that there has been a period of rapid social, technological and generational change since the last recession: "In my view this, together with technology, means business can operate in diversified environments that are not centralised."

Kirschner adds that the last incentive for large companies was the share market, which incentivised conglomeration through market capital. The share market has all but collapsed, and Kirschner believes this recession will be different to previous recessions in that it will shift the fundamentals of how business is done – making "small, low overhead, nimble and creative" the new mantra for success.

The legal and regulatory systems built around large multi-dimensional corporates needs to change, she says, making way for small groups clustered in networks. "These entities will look to their service providers to provide allied dispute resolution services. I believe this will change the way the law is delivered, litigation is viewed and disputes resolved."

This may see competency in creative dispute resolution becoming a core skill for the way the law is practiced.

At Blake Dawson, Quick says it is essential that lawyers in litigation develop skills in all aspects of dispute resolution – a requirement that Blake Dawson offers by encouraging younger lawyers to attend mediations and gain first-hand experience of what the process involves.

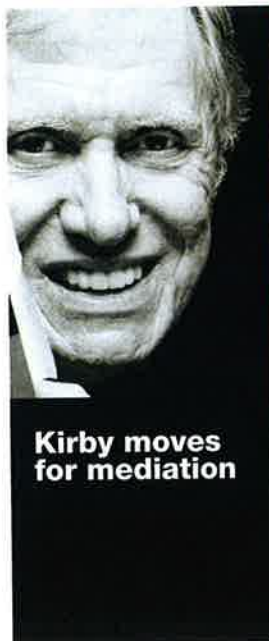
### Sophistication in peace

Aside from saving on court costs, mediation can also form a vital building block for resolution, which makes it so appealing in the current environment.

Kirschner likens it to Lego-building, noting that mediation, arbitration and expert determination can all come together, assisting different aspects of a dispute, and ultimately coming up with an answer suitable to all parties.

It is also a matter of saving the business case of the dispute's original cause – a situation that may especially be necessary when times are tough. As Argy says: "People forget that each party to an arrangement had some rationale for getting into it, so if you can get everybody's business case salvaged out of the mess, then you've done well."

And in this economy, salvaging anything is a worthwhile endeavour.



**Kirby moves for mediation**

After retiring from the High Court in February, Michael Kirby was last week elected to the council of the Institute of Arbitrators & Mediators Australia (IAMA)

Kirby's appointment marks the first time in the Institute's history that a former High Court Judge has been elected to the position.

The appointment comes after a long history with the IAMA for Kirby, who when acting as Chairman of the Australian Law Reform Commission in 1976, delivered a keynote address, "The Law and Commercial Arbitration" at the institute's inaugural dinner in Canberra.

"The views he outlined in that paper are as relevant today as they were 30 plus years ago," says Gianna Totaro, acting chief executive of IAMA.

"The conduct of the institute's affairs is vested in the governing council, and like other councillors, he is charged with the policy development, management and direction of the institute," says Totaro.

"It is a great honour and privilege for us at the institute to welcome him back in his new role as a member of the IAMA Council."