

**PUBLIC**

upon tabling of Committee's Report

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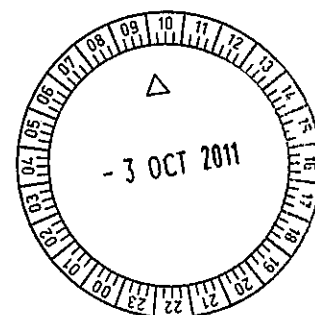
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30 September 2011

Standing Committee on Uniform Legislation and Statutes Review  
Parliament House  
Perth WA 6000By fax to: 9222 7809, c.c. to email: [council@parliament.wa.gov.au](mailto:council@parliament.wa.gov.au)

Attention: Hon Adele Farina MLC

**Dear Madam, RE: COMMERCIAL ARBITRATION BILL 2011**

Thank you for your invitation to respond to your committee in regards to the above.

Of interest, when I initially reviewed the Bill in July this year I highlighted a selected number of sections that raised my curiosity; one of them s.27 to which I now respond.

**s.27D: MEDIATION ETC, COMMON PRACTICE**

It has long been the common practice of graded arbitrators for several decades that once an arbitrator (or nominee) understands the matter might settle by means other than arbitration that person will enter into dialogue with the parties making it understood that if her/she adopts the role of a conciliator or mediator then he/she will not continue as the arbitrator.

Such dialogue often occurs at a directions hearing (with both parties present) wherein the (nominee) arbitrator will outline the position that:

- a. If the parties believe that mediation or conciliation may resolve some or all of the matters in dispute, then the parties should consider whether the (nominee) arbitrator should proceed as mediator or as the arbitrator.
- b. It will be made clear that if an arbitrator conducts a mediation or conciliation – whether private caucus sessions are conducted or not – and there are ongoing matters that will ultimately be referred to the arbitration process then he/she will be obliged to stand down and vacate the role as arbitrator.
- c. The reasons explained will go to the perception of bias insofar as the mediator/arbitrator may become aware of information that might not otherwise be presented or available during a formal hearing; whether that information is considered to be prejudicial to one or other of the parties is immaterial.

- d. Further, to publish an award in those circumstances leaves open the opportunity for an argument that the award is unsafe because of the possibility – or perception – that the arbitrator might have used information gleaned from the mediation sessions that could have (subconsciously) swayed the arbitrator's decision one way or another.
- e. Ordinarily (at least in my references) the parties would be given the opportunity to be heard on such things as the likelihood of reaching settlement of some or all of the matters in dispute and/or whether other opportunities for settlement have been discussed between them so the parties can make an informed decision as to the future conduct of their dispute.
- f. If there is a real possibility of a mediated settlement the (nominee) arbitrator may accept the invitation of the parties to act as the mediator/conciliator and in doing so confirming that if that process fails then he/she will leave it to the parties to arrange another arbitrator.
- g. The advantage for the parties in having an arbitrator divert to mediation/conciliation is because the parties will be aware of that persons' expertise could be of use to them in the further knowledge that whatever is discussed or divulged in the mediation will always remain confidential. Confidentiality is a powerful tool in the mediator's kit bag if used properly.
- h. However, the parties will be given the opportunity for them to engage another mediator – independently of the arbitration process, leaving the arbitrator waiting on the outcome.
- i. If the mediation with another person as the mediator is successful the parties may wish to bring back to the arbitration process the signed 'Heads of Agreement' which the arbitrator can convert to a Consent Award, thereby having the same effect as an award.
- j. Of course if the mediation/conciliation process fails then the arbitrator can proceed unencumbered with the reference.

The advantages seen for the above to occur is that:

- (i) The opportunity to appeal an award because of a perception of a 'manifest error of law' or misconduct for the reasons of conducting a mediation is eliminated
- (ii) The parties have the opportunity of testing their concept of settlement at an independently conducted mediation without compromising the arbitration process with the added benefit of a 'sitting arbitrator' to fall back on if the mediation is not entirely successful.  
If all goes well at mediation, they to have the security of a consent award to rely on if required.
- (iii) If my suggestions are supported, the arbitrator will have at his/her disposal 2 very powerful implements if he/she converts to mediation or conciliation being:
  - The parties are, by then, thinking of ways to settled and if the mediation fails the they will have to find another arbitrator (more time and cost)
  - The arbitrator will have confidence to proceed with a mediation knowing of the parties' willingness and that he/she cannot be compelled to disclose anything arising from the mediation.

- (iv) The arbitration and mediation processes will both have been, and been seen to be, beneficial to the commercial community.

#### **SUMMARY**

1. On my own experiences, most disputants have already contemplated or attempted mediation before the commencement of an arbitration and if it is likely to be successful they will not even commence arbitration.
2. It is only on isolated cases that the parties agreed to stay the arbitration process in preference to mediation and ultimately return to the arbitrator.
3. I believe it improper, and unacceptable, for an arbitrator to set aside that role, conduct a mediation/conciliation and then resume as arbitrator if it fails even in spite of the fact that private sessions were not conducted.
4. I respectfully suggest that the Bill be amended as per my proposed amendments with Appendix A being a marked up version and the final adjusted clause following as Appendix B.

I attach to this email that part of my curriculum vitae that outlines my involvement in building disputes since 1988 as well as my usual CV.

I mentioned earlier that I had an interest in other parts of the Bill; one of those being s.33D. Please advise if you would like commentary on that part.

Please advise if I can be of further assistance.

Yours faithfully,

P.D. FAIGEN

## APPENDIX A – PROPOSED AMENDMENT

### **27D. Power of arbitrator to act as mediator, conciliator or other non-arbital 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.

#### **ADD NEW CLAUSE: (b) the arbitrator consents in writing to so act.**

(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.

#### **ADD NEW CLAUSE: (c) an arbitrator acting as a mediator cannot be compelled to divulge any information obtained when acting as a mediator**

(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),~~

#### **ADD NEW CLAUSE (5) in the case of failed mediation proceedings** 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.~~

## APPENDIX B – 'CORRECTED VERSION'

### **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) each party has consented in writing to the arbitrator so acting, and,
- (b) the arbitrator consents in writing to do so.

(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.
- (c) an arbitrator acting as a mediator cannot be compelled to divulge any information obtained when acting as a mediator

(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 may not conduct subsequent arbitration proceedings.

(5) In the case of failed mediation proceedings 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.

About **Philip (Phil) David Faigen** (B. Arch., FRAIA, MIAMA, reg builder) and his involvement in building disputes.



P.D. (Phil) Faigen is a practicing architect, registered builder, grade 1 arbitrator, accredited mediator and adjudicator who has been active in all aspects of the building industry for longer than he cares to remember.

He graduated in architecture at UWA in 1972, registered builder in 1977, a member of IAMA since 1988, a member of the Builders Registration Board of WA (1999-02), graded arbitrator in 1990 (grade 1 in 2003), W.A. Chapter Chairman of IAMA 2000-03 and has served on several committees within IAMA both at Chapter and at National level.

Since 1990 Phil has been involved in building disputes, investigative reporting (including expert witness) of building defects acting for insurance companies, owners, strata companies, builders sub-contractors and tradesmen.

He has been involved in more than 90 arbitrations or mediations, published more than 50 awards, a number of expert determinations and, of late, adjudications – all of this while keeping his architectural practice active.

Many arbitrations in which Mr Faigen has acted as arbitrator have followed the less formal procedures such as ‘look and sniff’ arbitrations, the inquisitorial approach or ‘time restricted’ references with some results being known to the parties in less than a week of commencement. He is nonetheless comfortable and capable dealing with disputes involving complex contractual issues.

Phil has developed an understanding certain aspects of the Strata Titles Act so as to deal with determination and rectification of building defects involving strata properties.

Although he is an experienced mediator Phil prefers to act as a conciliator so that he might make suggestions to the parties as to best solve their dispute – a role that he adopted on numerous occasions.

In his spare time he has found time to lecture at Curtin University (1990-2004), lectured, tutored and delivered papers for the Institute of Arbitrators and Mediators Australia involving arbitration and mediation courses, and been a member of the Minister for Planning Appeals Committee (since defunct) and is currently a Senior Sessional member of the State Administrative Tribunal.

Phil Faigen, a man always with an alternative point of view .... and wanting to share it.

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## **CURRICULUM VITAE: PHILIP DAVID FAIGEN January 2011**

Phil Faigen B.Arch, FRAIA, MIAMA, registered builder 4831

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[www.allpointsbuilding.com.au](http://www.allpointsbuilding.com.au)
- **Date of birth:** 11 April 1948



### **• QUALIFICATIONS, MEMBERSHIPS AND ASSOCIATIONS :**

Graduated University of W.A.(B.Arch)	1972
Registered as Architect	1974
Associate Royal Australian Institute of Architects (R.A.I.A.)	1974
Fellow Royal Australian Institute of Architects (F.R.A.I.A.)	1982
Registered Builder (no. 4831) - still current	1977
Real Estate Sales course, R.E.I.W.A.	1982
Committee member Practice Committee, R.A.I.A.	1991 - 95
Member Institute of Arbitrators Australia	1988 - 04
Member Documentation Committee of Housing Industry Assoc.	1989 - 96
Graded as Arbitrator, Institute of Arbitrators, Australia	1990
Chairman of Institute of Arbitrators and Mediators, Australia, W.A. Chapter Education and Promotions S/c'tee.	1990 - 97
Committee member Institute of Arbitrators and Mediators, Australia, W.A. Chapter, vice Chairman in 1998	1991-04
Institute of Arbitrators and Mediators, Australia, W.A. Chapter Chairman	2000 - 03
Deputy Member of Builder's Registration Board of W.A.	1996 - 99
Full Member of Builder's Registration Board of W.A.	1999 - 02
Grade 2 Arbitrator status, accredited Mediator	1999
Member of Town Planning Appeal Committee	2001 - 02
Grade 1 Arbitrator status	2003 - current
Sessional Member of State Administrative Tribunal	2005
Senior Sessional Member of State Administrative Tribunal	2011 -current
Accredited Adjudicator	2005 - current
Member International Panel of Arbitrators @ KLRCA	2005 - current
Currently a Member of	Royal Australian Institute of Architects, Master Builders Association, Institute of Arbitrators and Mediators, Australia



## HISTORY: SELF EMPLOYED 1978 – 2011

### **PHIL FAIGEN**

**Arbitrator since 1990 (currently grade 1) and accredited Mediator**, having been involved in more than 120 references varying from the most simple to the complex; some settling very promptly, others requiring lengthy hearings involving legal argument and technical expert witnesses.

Many references settle in the early stages, others require a number of interim awards involving contract reconciliations, workmanship and/or contractual matters.

**Adjudicator since 2005** when the CCA came into force P. Faigen not only assisted in the education of potential adjudicators but was one of the 1<sup>st</sup> to be accredited.

**Expert Determination:** generally with respect to workmanship, but some involving contractual issues; also providing advice to solicitors for potential use in Court applications.

Nominations have been offered by mutual agreement between the parties, nominating bodies (such as IAMA), Government Agencies or the Courts.

**Investigative reporting** for Legal Practices, Insurance Companies in relation to building faults, workers compensation claims, copyright actions and the like since 1991.

In many instances the reports require the compilation of a 'scope of work' which in turn can be used for costing purposes or to used to rectify the cause/s of such defects.

In some instances a detailed financial contract reconciliation is required to be established.

**Strata:** Many investigations have been carried out on behalf of strata companies where knowledge of strata titles is required. The liability of rectification is usually identified in the report together with recommendations as to how the rectification should take place and by whom.

**Architect:** Sole practitioner, design documentation and contract administration of variety of projects including:

- Medical – small hospitals/day surgeries,
- Service buildings – such as St John Ambulance
- Large Homes and residential complexes
- Alterations and additions.
- Replacing the current architect to complete documentation or to continue with contract administration.

**Project Management:** Reviewing and/or amending building contracts

- Design of and arrange for the construction of large commercial and industrial projects
- Coordinating rewriting of contracts, arranging tenders

**ALL POINTS BUILDING CONSULTANTS**

**1992 –current**

Consulting in all matters relating to building inspections, design and documentation, investigative reporting building defects, planning, specifying and arranging for carrying out remedial works. Having dispensed with such services as Due Diligence Reports, Pre-purchase inspections, Dilapidation Reports in 2009, the areas currently involved with are:

- Determination of causes of defects and providing Scope of Work for their rectification, in particular for strata managers, banks, and other corporations.
- Representation (expert witness) at tribunals (BDT, arbitration, Courts)
- Technical opinions and Reporting for solicitors and parties involved in building related disputes
- Opinions for Insurance companies regarding liability.
- Project management for commercial projects

**University Lecturer** (full-time / part-time)

Curtin University

**1990-2004**

School of Architecture Construction}	Lecturing in building technology,
and Planning }	professional practice, building
Department of Business. }	technology, building contracts,
School of Public Health }	dispute resolution, design and related
	subjects

University of Western Australia

**1999 –2002**

Law School tutoring in Professional Certificate in Arbitration and Mediation.

**PREVIOUS BUSINESS / ASSOCIATIONS**

**Faigen & Smit Architects** (in partnership with Hans Smit, B.Arch) **1987-93**

Design, documentation and contract administration of variety of projects, including house additions, home units, industrial, upper market housing, Building Management Authority works, taverns and large commercial works.

Schemes prepared for Maritime Museum (Mandurah) and large Hotel (Raffles), prepared design brief for government agency.

**Quill Building Services (P. Faigen, sole proprietor)**

**1985-92**

Design and / or construction of variety of projects including large residences, office refurbishment, tavern renovations, commercial, and Government projects. Completed the construction of variety of projects, until ceasing building activities in 1989.

**Q Corporation Pty Ltd Builders (P. Faigen, sole director)**

**1978 – 83**

Design and construction (package deal) and project management of various sized projects including:

- Shopping/retail centres,
- Residential home units,
- Warehouses, industrial/factories,
- Additions and town houses.

**Awards**

- Finalist Homes of the Year (Framed Housing) 1987
- Homes of the Year Winner (Group Housing) 1991
- Awarded Runner up Homes of the Year (Housing) 1993
- M.B.A Housing Excellence Award (house on small lot) 1993

**PHIL FAIGEN - COMMUNITY (PROFESSIONAL) ACTIVITIES**

- Editor of the Institute of Arbitrators newsletter ("*the VIEW*") since inception in 1990 until 1999, and again 2003 -2005
- Conducting and arranging tutorials for candidates of the Institute of Arbitrators and Mediators Australia grading examinations, general course, and various training programs in arbitration and mediation (1992 - 2003)
- Master Builders Association member judging panel, Home Building Excellence Awards (1994- 2003), member for 10 years.
- Member of Australian Cartoonists Association, curator of 100 years of cartooning in W.A. in 2004

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