Arbitration Reform in Australia: Striving for International Best Practice[1]

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Australia is undergoing substantial reform to its arbitral legislative regime regulating domestic and international arbitrations. The reforms are touted by politicians and some commentators as creating an international best practice legal framework in Australia. This article outlines the history of the reform process, the nature of the reforms, and considers whether the product of the reform process reflects international best practice (if there is such a thing).

Introduction

On 3 August 2010 an international dispute resolution centre was opened in Sydney. A joint media release put out by Commonwealth Attorney-General and the New South Wales Attorney-General stated:

> *Australia is poised to become a major player in the lucrative cross-border dispute resolution market, with the opening of the Australian International Dispute Centre in Sydney today…* [The Commonwealth Attorney-General] *said recent reforms to arbitration laws, at both a State and Federal level, have created an* ***international best practice*** *legal framework for arbitration in Australia…* (emphasis added)[3]

International commercial arbitration is thriving in the Asia Pacific region, in particular in Singapore and Hong Kong. Statistics produced by the arbitration institutions in those countries-namely the Singapore International Arbitration Centre ('SIAC') and the Hong Kong International Arbitration Centre ('HKIAC') reveal exponential growth in the past decade in the number of international arbitration cases administered by those institutions.[4] In contrast, very few international commercial arbitrations have been seated in Australia in the past 10 years.[5] No doubt this is due to Australia's competitive disadvantages in the field of international commercial arbitration – particularly its geographical location.[6]

As alluded to above, the Australian legislative regime governing arbitration has been undergoing

1 This is an edited version of a paper presented at the AMINZ/IAMA 'Challenges & Change' Conference 2010 held in Christchurch, New Zealand on 5 – 7 August 2010.

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3 See also Virginia Harrison, "Disputes Centre Primed to Tap into World Market", The Australian newspaper, 20 August 2010, pages 33 – 34.

4 The statistics produced by the various arbitral institutions need to be considered carefully as sometimes the arbitration in question is domestic as opposed to international in nature, alternatively may involve a domain name dispute. Further, the statistics do not capture ad hoc arbitrations conducted in those countries, which do not involve institutional activity.

5 See PriceWaterhouseCoopers survey entitled 'International Arbitration: Corporate Attitudes and Practices 2008' at p. 15.

6 See the Hon Justice Michael Kirby, 'Do Australians have a future in international commercial arbitration' (September 1999) Volume 18, Number 2, The Arbitrator, p. 103.

reform over the past 18 months or so. That process is continuing. It was initiated by the Commonwealth Attorney-General, the Hon Robert McClelland MP, on 21 November 2008 when he announced at the 2008 ACICA[7] conference the Federal Government's intention to review the *International Arbitration Act* 1974 (C'th) ('the IAA'). At that time the Attorney-General published a discussion paper ('the Discussion Paper')[8] which identified the objects of the review, which included to consider whether the IAA should be amended to, inter alia, adopt '*best-practice*' development in national arbitral law from overseas.

The current reform process presents a real opportunity for Australia to position itself as a regional hub for international commercial arbitration in the Asia Pacific region in the 21st century. The purpose of this article is to outline the history of the reform process, the nature of the reforms, and to consider whether the product of that reform reflects '*international best practice*'.

The Existing Dual Legislative Regime in Australia

Let us start by briefly outlining the legislative regime in Australia as it stood prior to the reform process. In Australia we have a bifurcated legislative regime governing arbitration matters. This is a product of the Australian federal system of government.

The IAA is a Commonwealth Act and governs '*international*' commercial arbitrations.[9] The IAA implements Australia's obligations to enforce and recognise foreign arbitration agreements and arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ('the New York Convention'). It also gives the force of law to the UNCITRAL Model Law ('the Model Law') as the primary arbitral law that governs the conduct of international arbitrations seated in Australia.[10] The Model Law was designed to promote harmonisation of the law of arbitration. It reflects worldwide consensus on key aspects of arbitration practice.[11]

On the other hand, domestic arbitrations in Australia are governed by a commercial arbitration Act enacted by one of the six States or two Territories, depending upon which State or Territory the arbitration is seated in (collectively 'the uniform Acts').[12] The uniform Acts were enacted in about 1984 and were progressively reformed to about 1990, such that (until 28 June 2010)[13], they had '*uniform*' status, although there are some subtle nuances between them.

The uniform Acts are not drafted to apply only to domestic arbitrations. They make no distinction

7 ACICA is short for the Australian Centre for International Commercial Arbitration. It is a not-for-profit public company established in 1985 that supports and facilitates international commercial arbitration in Australia.

8 Entitled 'Review of the International Arbitration Act 1974' available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_ReviewofInternationalArbitrationAct1974v.

9 Article 1 (3) of the Model Law defines the circumstances in which an arbitration is 'international' in nature.

10 Unless parties have excluded the Model Law by an agreement in writing, as permitted under section 21 of the IAA

11 The IAA also implements Australia's obligations under the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States, 1965 ('the ICSID Convention').

12 Commercial Arbitration Act 1984 (NSW); Commercial Arbitration Act 1984 (Vic); Commercial Arbitration Act 1985 (NT); Commercial Arbitration Act 1985 (WA); Commercial Arbitration and Industrial Referral Agreements Act 1986 (SA); Commercial Arbitration Act 1986 (Tas); Commercial Arbitration Act 1986 (ACT); Commercial Arbitration Act 1990 (Qld).

13 On 28 June 2010, New South Wales enacted a new domestic arbitration Act (see below).

between '*domestic*' and '*international*' arbitrations. Rather, they apply to all arbitrations seated in the jurisdiction of the relevant State or Territory. However, when the arbitration is '*international*' in nature, the IAA is attracted and by reason of section 109 of the Commonwealth Constitution overrides the operation of the relevant uniform Act to the extent of any inconsistency.

Unlike the IAA, the uniform Acts do not adopt the Model Law. There are a number of major differences between the uniform Acts and the Model Law regime implemented by the IAA. In particular, there is greater scope for judicial intervention in the arbitral process under the uniform Acts.

Under the IAA, the State Supreme courts and the Federal Court of Australia now have concurrent jurisdiction in all matters arising under the IAA[14] whereas the Supreme Court of the State or Territory where the arbitration is seated is conferred jurisdiction in matters arising under the relevant uniform Act.

International Best Practice

To speak about '*best practice*' in international commercial arbitration is somewhat contentious. International commercial arbitration involves a blend of procedures which are not wedded to any single legal system. What may be '*best practice*' to a common law lawyer may be perverse to a continental lawyer – consider, for example, US – style depositions.

In the arbitral process there are common issues that arise which are treated differently in the national arbitral laws of various countries – for example:

(a) confidentiality (or otherwise) of the arbitral process;
(b) the availability of ex parte interim measures from the arbitral tribunal; and
(c) the level of judicial supervision of arbitral awards.

It is not always possible to say that one nation State's treatment of such an issue is superior to the treatment of another nation State.[15] Hence, '*international best-practice*' is an illusive concept and not an objective, measurable standard. While the Model Law represents an accepted world standard for arbitrating commercial disputes, the mere adoption of the Model Law by a nation state does not justify a claim that its national arbitration law reflects '*international best-practice*'.[16]

Nevertheless, there are largely accepted core values or elements of a desirable national arbitration system.[17] National laws that facilitate arbitration are one of the essential elements of an effective national arbitration system. That begs the question, what are the necessary elements of national laws that facilitate arbitration? Perhaps this is best answered by turning to the expectations of parties who elect to have their disputes resolved by international arbitration. In the recent decision of the House of Lords in

14 Following the recent enactment of the *Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008* which amends the IAA to give the Federal Court of Australia concurrent jurisdiction with the State and Territory Supreme Courts in all matters arising under the IAA.

15 Indeed, it may border on arrogance to so contend.

16 For example, the United Kingdom deliberately did not adopt the Model Law but instead enacted the *Arbitration Act 1996 (UK)*, in part because it considered that the Model Law was incomplete.

17 Holtzmann, 'A task for the 21st Century; Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards', published in Hunter, Marriott & Veeder, The Internationalization of International Arbitration (1995), p.109

Premium Nafta Products Ltd v. Fili Shipping Co Ltd.[18] Lord Hoffmann identified those expectations as follows:

> *They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and in too many cases, partiality, in proceedings before a national jurisdiction.*[19]

To extrapolate (and to embellish), for national arbitration laws to reflect '*international best practice*', they should have the following features:

(a) they should be easily accessible, set out in logical order, and be expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman;
(b) they should be in harmony with the arbitral procedural laws in other parts of the world - in particular, reflecting, or at least informed, by the UNCITRAL Model Law;[20]
(c) there should be consistency in the procedural laws governing domestic arbitration and international arbitration;[21]
(d) they should provide for a quick, cost effective and impartial determination by a neutral arbitral tribunal;
(e) they should provide for judicial support (as opposed to judicial intervention) of the arbitral process, which is consistent and predictable;[22]
(f) they should provide for confidentiality, or at least privacy, in respect of the arbitral process;
(g) they should provide for enforcement of parties' agreement to arbitrate; and
(h) they should provide for enforcement and recognition of arbitral awards.

I will return to the question of whether the Australian reforms reflect '*international best practice*'.

Reform of the IAA

A. Background

The Discussion Paper

The Discussion Paper identified eight key questions.[23] It elicited 24 submissions from eleven professional associations, two law firms and individuals (including two State Supreme Court Chief Justices).[24]

18 [2007] UKHL 40.
19 At [6]
20 Which has been adopted by more than 50 nation states around the world, including by most of Australia's Asia Pacific neighbours.
21 Section 5 (c) of the *Arbitration Act 1996 (NZ)* goes so far as to identify the promotion of consistency between the international and domestic arbitral regimes in New Zealand as one of the express purposes of the Act.
22 As to the distinction between judicial support and judicial intervention, see the recent decision of the High Court of Justice (Queen's Bench, Commercial Court) in *Emmott v. Michael Wilson & Partners* [2009] EWHC 1 (Comm).
23 Malcolm Holmes QC outlined the eight key questions in the December 2008 (Issue 9) of the Australian ADR Reporter.
24 The responses to the eight key questions are summarised in the March-June 2009 (Issue 10/11) of The Australian ADR Reporter at p.11.

The issues raised for discussion were largely uncontroversial. By far the most controversial question was whether exclusive jurisdiction should be conferred on the Federal Court of Australia in all matters arising under the IAA. This is a vexed question giving rise to a number of difficult issues and considerations.

Conferral of exclusive jurisdiction on the Federal Court

In launching the Discussion Paper, the Commonwealth Attorney-General spoke of the Federal Court of Australia having an emerging role as a '*regional hub*' for commercial litigation (inferentially in the Asia Pacific region).

In posing the question '*should the Federal Court of Australia be given exclusive jurisdiction for all matters arising under the [IAA]*', the Discussion Paper merely stated:

> *One advantage is that this may lead to a more consistent jurisprudence in applying the [IAA].*

The question elicited mixed responses in the submissions advanced. In particular, the question elicited vehement opposition by the Chief Justices of the Supreme Courts of the various States and Territories.[25]

While it is widely accepted that it is critical to the competitiveness of Australia as a desirable seat for international commercial arbitration that our courts project themselves with one unified voice to the international arbitration community, those opposed to the exclusive jurisdiction proposal (including the Chief Justices of the States and Territories Supreme Courts) argued that the proposal ignored the existence of an integrated judicial system in Australia whereby intermediate courts of appeal and single judges are required to follow the decisions of other intermediate courts of appeal in respect of the interpretation of Commonwealth legislation and the fact that the High Court of Australia (at the apex of the Australian judicial system) sits as the ultimate court of appeal.[26]

Many of the opponents to the exclusive jurisdiction proposal prayed in aid the conferral of concurrent jurisdiction in respect of the *Corporations Act* 2001 (C'th) and the *Trade Practices Act* 1974 (C'th), arguing that conferral of concurrent jurisdiction with respect to those statutes had not resulted in an inconsistent body of jurisprudence. That said, there are precedents for the conferral of exclusive jurisdiction on the Federal Court of Australia. Take Part IV of the *Trade Practices Act* dealing with restrictive trade practices.[27]

Some of the submissions opposing the exclusive jurisdiction pointed out that uniformity could be achieved (or at least promoted) by non-legislative means – in particular, by encouraging State and Territory courts to establish panels of specialist arbitration judges[28] and, further, by offering common judicial education programs to judges responsible for arbitration matters across the State, Territory and Federal courts.

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25 See comments by the Chief Justices of the States and Territories dated December 2008 available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/ConsultationsreformsandreviewsReviewofInternationalArbitrationAct1974.

25 See *Australian Securities Commission v. Marlborough Goldmines Ltd* (1993) 177 CLR 485 at 492.

27 See section 86 (2) and (4) of the *Trade Practices Act* 1974 (C'th).

28 So far the Supreme Court of Victoria is the only court in Australia with a specialist Arbitration List presided over by a judge with arbitration experience. The Federal Court of Australia and the Supreme Court of New South Wales have also established Arbitrtion Lists.

While the above points have force, they ignore the fact that the focus of the IAA is directed towards the regulation of the rights of parties, one or both of whom will invariably be a party from outside Australia. The perception (as opposed to the reality) of uniformity in the judicial interpretation of the IAA therefore matters. Foreign parties considering whether to submit a dispute to arbitration in Australia will no doubt take into account the supervisory jurisdiction of the relevant court(s). They are, I suggest, more likely to be willing to nominate an Australian city as the seat of the arbitration if their arbitration is subject to the supervision of a single court rather the supervision of one of several courts exercising concurrent jurisdiction.

Further, in a pragmatic sense the conferral of exclusive jurisdiction on a single court is more likely to produce a consistent approach to the interpretation and operation of the IAA.

The opponents to the exclusive jurisdiction proposal pointed out the spectre of jurisdictional skirmishes involving stay applications under section 7 of the IAA. This is a legitimate concern. For example, Party A may commence proceedings in the NSW State Supreme Court in respect of a dispute involving Party B. Party B may contend that the dispute is the subject of an international arbitration agreement. Under a concurrent jurisdiction regime, Party B could apply to the Supreme Court of NSW for a stay of the proceedings pursuant to section 7 of the IAA. If, on the other hand, the Federal Court of Australia were to be given exclusive jurisdiction, how is the Supreme Court proceeding to be dealt with? Is it contemplated that application would be made by Party B to the Federal Court to enjoin Party A from taking any further step in the Supreme Court proceeding? An alternative course would be to confer limited jurisdiction upon the State Supreme Courts to deal with stay applications under section 7 of the IAA.

Further, the opponents to the exclusive jurisdiction proposal argued that jurisdictional skirmishes may arise as to whether an arbitration was '*domestic*' or '*international*' in nature and therefore whether the matter fell under the IAA or the relevant State or Territory uniform Act, and in turn whether the Supreme Court or the Federal Court had jurisdiction. Again this is a legitimate concern. However, the spectre of similar jurisdictional skirmishes and sterile debates arises under the present proposal for the reform of the uniform Acts, whereby the State and Territory Courts will have jurisdiction under both the IAA and the relevant uniform Act but the Federal Court will only have jurisdiction under the IAA.

A further argument against the exclusive jurisdiction proposal was that the Federal Court of Australia cannot be said to possess any special expertise in international arbitration matters over and above the expertise possessed by the various State and Territory Courts. This underlines the point that the establishment of a single court is not sufficient in itself. Rather, if there is to be a single court responsible for international arbitration matters, there needs to be appointed to that court judges who have training and experience in international arbitration, including an awareness of international arbitration norms.

The Draft IAA Bill

On 25 November 2009, one year after the release of the Discussion Paper and following a number of submissions made by interested stakeholders,[29] the *International Arbitration Amendment Bill* 2009

29 Approximately 24 submissions were received. See 'International Arbitration Act Review', The Australian ADR Reporter (March – June 2009) Issues No. 10/11, pg 11.

('the IAA Bill') was introduced into the Commonwealth Parliament.[30] On 17 March 2010 the IAA Bill was referred to the Main Committee of the House of Representatives. On 13 May 2010 fifteen amendments to the IAA Bill were moved and agreed to. The IAA Bill (as amended) was then passed by the Commonwealth Parliament on 17 June 2010 ('the IAA Amending Act') and received the Royal Assent on 6 July 2010.

B. The major features of the IAA Amending Act

It is worthwhile analysing the main features of the *IAA Amending Act* with reference to the key questions raised in the Discussion Paper.

The writing requirement

The first area identified for review was whether the meaning of the requirement in the IAA that an arbitration agreement be in writing should be amended. The IAA presently applies to '*arbitration agreements*' as they were defined some 50 years ago by the New York Convention. In the meantime there have been great advances in technology and in the manner of conducting international commerce. In 2006, UNCITRAL updated the Model Law in the light of developments in modern technology and amended the definition of an arbitration agreement in writing, creating two options that a nation state could choose from – namely Options I and II as contained in Article 7 of the revised Model Law. Section 3(4) of the *IAA Amending Act* adopts Option I of Article 7, thereby liberalising the formalities required for a valid arbitration agreement but not dispensing with the requirement of writing altogether.[31]

No general discretion to refuse to enforce a foreign arbitral award

The second area of review concerned section 8 of the IAA. Article 5 of the New York Convention provides that recognition and enforcement of a foreign award may be refused *'only if'* certain specified grounds are established. Section 8 of the IAA was designed to implement Article 5. However, the Supreme Court of Queensland in *Resort Condominiums International Inc. v Bolwell & Anor*[32] interpreted section 8 of the IAA as conferring on an Australian court a general residual discretion to refuse to enforce a foreign arbitral award even if none of the specified grounds were made out. The IAA *Amending Act* amends section 8 to confirm the position that a court may *only* refuse to recognise a foreign arbitral award if one of the specified grounds listed in section 8(5) or (7) is made out.[33] No leave of the Court is required to enforce a foreign award. The foreign award may be enforced in either a State or Territory Supreme Court, alternatively the Federal Court, as if the award were a judgment or order of that Court.[34]

30 The second reading speech of the Commonwealth Attorney-General is available at: http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FourthQuarter_25November2009-SecondReadingSpeech-InternationalArbitrationAmendmentBill2009

31 See also the definition of '*arbitration agreement*' in section 16(2).

32 [1995] 1 Qd R 406.

33 See section 8(3A) of the *IAA Amending Act.*

34 See section 8(3) of the *IAA Amending Act.*

Exclusion of the uniform arbitration Acts

The third area of review related to the contentious area of overlap of the operation of the IAA and the various uniform Acts. The most significant feature of the IAA Amending Act is that it has removed this overlap by providing (in a new section 21) that the IAA (and the Model Law) governs international arbitrations seated in Australia to the exclusion of the uniform Acts. That is, the new section 21 makes it clear that the IAA 'covers the field' with respect to international commercial arbitrations seated in Australia.

Reversal of Eisenwerk's Case

The fourth area of review related to section 21 of the IAA. Section 21 allows the parties to agree that the applicable arbitral law may be a law other than the Model Law. In *Eisenwerk v Australian Granites Pty Limited*[35] the Supreme Court of Queensland held that by adopting International Chamber of Commerce ('ICC') Arbitration Rules the parties had 'opted-out' of the Model Law for the purposes of section 21. This decision has been universally criticised on the grounds that the parties' choice to adopt procedural rules of arbitration in an arbitration agreement is different in character and nature from, and has no direct bearing on, the choice of the arbitral law (or the lex arbitri).[36] Under the *IAA Amending Act* it will no longer be possible for parties to 'opt out' of the Model Law and choose an alternative arbitral procedural law. The Australian legislative response to the *Eisenwerk* problem has been to fix the problem at the expense of party autonomy.[37]

Division 3 of the IAA

The fifth area of review concerned some drafting errors in Division 3 of the IAA which confers some important powers on an arbitral tribunal, including powers to consolidate arbitral proceedings, and to award interest and costs. There was some confusion in the IAA as to whether these provisions applied on an opt in or opt out basis. The *IAA Amending Act* substantially expands Division 3 of the IAA with new provisions and makes clear whether the relevant provisions apply on an opt-in or an opt-out basis.

Adoption of the 2006 amendments to the Model Law

The sixth area of review related to whether the IAA should be amended to adopt the recent 2006 amendments to the Model Law.[38] Amongst other things, the 2006 version of the Model Law introduced (in Article 17) a comprehensive regime for interim measures which may be granted by an arbitral tribunal. The response in the *IAA Amending Act* is to adopt the Model Law as revised in 2006 with the exception

35 [2001] 1 Qd R 461.

36 Indeed, *Eisenwerk* was not followed in *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887 (11 August 2010). In *Wagners Novelle Caledonie Sarl v Vale Inco Novelle Caledonie SAS* [2010] QCA 219 (20 August 2010), the Queensland Court of Appeal found it unnecessary to decide whether *Eisenwerk* was correctly decided.

37 Contrast the less drastic response in s 15(2) of the *Singapore International Arbitration Act*.

38 See www.ag.gov.au/internationalarbitration for a copy of the Model Law (as revised in 2006).

of ex parte interim measures which are dealt with in Articles 17B and 17C of the revised Model Law.[39] Australia is the fifth country to enact the 2006 version of the Model Law. Schedule 2 to the IAA has been amended to replace the 1985 original version of the Model Law with the 2006 revised version.

Conferral of powers on an arbitration institution

The seventh area for review concerned whether the IAA should be amended to allow regulations to be made designating an arbitral institution to perform certain functions, set out in the Model Law – in particular, appointing arbitrators in default of agreement, and hearing challenges to arbitrators. In other jurisdictions, including Singapore and Hong Kong, functions of this nature have been conferred on a national arbitration institution - in particular, SIAC in Singapore and the HKIAC in Hong Kong. The Discussion Paper asked whether an arbitration institution, like ACICA, should be designated to perform these functions in Australia. Section 18 of the *IAA Amending Act* lays the groundwork for an arbitration institution to be nominated in due course, by Regulations made under the IAA, to perform limited functions under the Model Law such as appointing arbitrators in default of agreement. Dealing with challenges to arbitrators, however, has been reserved to the courts.

Conferral of jurisdiction

The eighth and final area of review concerned the issue of whether the Federal Court of Australia should have conferred upon it *exclusive* jurisdiction under the IAA (as opposed to concurrent jurisdiction with the Supreme Courts of the various States and Territories). The IAA Amending Act confers concurrent jurisdiction on the Federal Court of Australia and the Supreme Court of the various States and Territories in all matters under the IAA where court involvement is required or permitted. In other words, the exclusive jurisdiction proposal has not been embraced at this time.

Other matters

The Discussion Paper concluded with a catch-all invitation for any other comments or recommendations for improving the IAA beyond the eight areas identified. As a result, the *IAA Amending Act* makes a number of other important amendments which should be mentioned.

Guide to interpretation

First, the *IAA Amending Act* addresses concerns about the future interpretation of the IAA by introducing a new section 39 which is designed to guide courts in the exercise of their powers under the IAA as well as in interpreting the IAA, the Model Law, an arbitration agreement or an arbitral award. The matters that the court must have regard to are:

- the objects of the IAA (contained in a new section 2D), which include to facilitate international trade by encouraging the use of arbitration as a method of resolving disputes, and to give effect to the Model Law (as amended);[40]

39 Thus see section 18B of the *IAA Amending Act* which expressly disallows ex parte orders.

40 In turn, Article 2A of the Model Law (introduced in 2006) provides that in interpreting the Model Law, regard is to be had to its international origin and the need to promote uniformity in its application.

- the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
- the fact that awards are intended to provide certainty and finality.

Court assistance

As a consequence of the amendment of section 21 by the *IAA Amending Act*, the powers in the uniform Acts (including powers for the arbitral tribunal to issue subpoenas) will no longer be available in aid of international commercial arbitrations seated in Australia. Accordingly, the IAA Amending Act amends Division 3 of the IAA to include provisions which allow for:

- the obtaining of subpoenas (section 23);
- failure to assist the arbitral tribunal (section 23A);
- default by a party to an arbitration agreement (section 23B);
- orders for inspection, property, plant or equipment, taking of samples or the conduct of experiments on such property, plant and equipment (section 23J); and
- security for costs (section 23K).

The original IAA Bill provided that all of the provisions in Division 3 should apply on a '*opt-in*' basis. This caused some arbitration stakeholders to complain. In particular the Chartered Institute of Arbitrators ('CIArb') complained that this might create a procedural lacuna where parties have not opted in to the provisions of Division 3. Thus failure of the parties to turn their minds to the requirement to '*opt-in*' to the optional provisions may well cause significant procedural difficulties during any future international arbitration seated in Australia. The legislature then had a change of heart and made some of the provisions in Division 3 (recognised as fundamental tools of the arbitrator) apply on an opt-out basis.

The supplementary explanatory memorandum also recognised a concern expressed by some stakeholders that in removing recourse to State and Territory laws, parties will no long be able to access section 47 of the uniform Acts, which confers a broad power upon courts to make interlocutory orders in aid of arbitration proceedings seated in Australia.[41] There is no similar power contained in the IAA. Instead of conferring upon courts a general power to make orders in aid of an international arbitration, the *IAA Amending Act* introduces provisions which confer specific powers on a Court (see above).

Confidentiality

The *IAA Amending Act* introduces new sections 23C - 23G in Division 3 which create a statutory obligation of confidentiality (with defined exceptions) in connection with an international arbitration seated in Australia. These provisions apply on an '*opt in*' basis. It is not clear why the confidentiality regime applies on an opt-in as opposed to an opt-out basis. Therefore, the default position (that is, absent such opting-in) will remain that international arbitrations seated in Australia are not inherently confidential.[42] The new confidentiality provisions appear to derive from sections 14B to 14E of the *Arbitration Act* 1996 (NZ). However, the New Zealand provisions go further. For whatever reason, only

41 The scope of section 47 of the Uniform Acts was recently considered in *Arnwell Pty Ltd v Teilaboot Pty Ltd* [2010] VSC 123

42 As laid down by the High Court of Australia in *Esso v Plowman* (1995) 183 CLR 10.

part of the New Zealand confidentiality provisions have been adopted.[43] It is submitted that the new confidentiality provisions proposed for in the IAA do not go far enough. Further, it would be better if they applied on an opt-out basis, not an opt-in basis.

Reasonable opportunity

Article 18 of the Model Law provides that the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case. Section 18C of the *IAA Amending Act* provides that for the purposes of Article 18 a party to arbitral proceedings is taken to have been given a full opportunity if the party is given a '*reasonable*' opportunity to present his case. The supplementary explanatory memorandum explains that the amendment is intended to give arbitral tribunals a wider degree of flexibility in controlling arbitral proceedings.

New Bias Test

Article 12 of the Model Law provides that a person who is approached in connection with his possible appointment as an arbitrator, alternatively an arbitrator that has been appointed, may be challenged, inter alia, if circumstances exist that give rise to '*justifiable doubts*' as to his impartiality or independence. Section 18A provides that for the purposes of Article 12 of the Model Law there are justifiable doubts as to impartiality or independence if '*there is a real danger of bias*' on the part of the proposed or actual arbitrator.[44] This imposes a higher standard of disqualification than the well known reasonable apprehension of bias test.

Compound interest following the making of the award

The IAA Amending Act amends section 26 to confer power upon an arbitral tribunal to award interest from the date of making the award on a compound (as opposed to a simple) basis. Notwithstanding submissions by some stakeholders, section 25 (which deals with pre-award interest) has not been amended to confer upon an arbitral tribunal a like power to award interest on a compound basis up to the date of making the award. Rather, an arbitral tribunal may only award interest up to the date of making the award on a simple basis.[45]

Cap on recoverable costs

The IAA Amending Act amends section 27 by conferring upon an arbitral tribunal the power to impose a cap on the recoverable costs in an arbitration.

43 In particular ss 14F to 14I of the *Arbitration Act 1996 (NZ)* have not been adopted. Those sections set up a regime which allows for court proceedings relating to an arbitration to be conducted in private, at the discretion of the court.

44 The *'real danger'* test emanates from the House of Lords decision of *R v Gough* [1993] AC 646.

45 Compare section 49 of the *Arbitration Act 1996 (UK)* which confers power on an arbitrator to award both pre-award and post-award interest on a compound basis.

Med Arb

Somewhat surprisingly, the *IAA Amending Act* does not contain any '*Med-Arb*' provision – that is, a provision which provides a statutory acknowledgment that the arbitrator may act as both arbitrator and mediator (or conciliator). A similar power is already provided for in section 27 of the uniform Acts. This power, albeit in different terms, has been carried over into the *CAA Model Bill* (discussed below) which is intended to replace the uniform Acts.

The international arbitration legislation of nearly all of Australia's Asia-Pacific neighbours (especially our major competitors, Hong Kong and Singapore) provide for an arbitrator to encourage amicable settlement of a dispute by engaging the parties in negotiation, as opposed to determination.[46] Resolution through a process of conciliated negotiation is not only legislated in Asian countries but is part of a cultural ethos which prefers a face-saving resolution to a contest in which there is a winner and a loser. Moreover, the promotion of amicable settlement by international arbitrators is now touted as '*international best practice*'.[47] It is therefore disappointing that a medarb provision was not contained in the *IAA Amending Act*. [48]

Reform of the CAA

There is presently a malaise in domestic arbitration in Australia.[49] It is a hindrance to the development of Australia's reputation as a centre for international arbitration. The absence of a thriving domestic arbitration scene is not conducive to promoting confidence in Australia as a seat for international commercial arbitration. Hence, the reform of the uniform Acts is not only relevant to establishing arbitration as a credible alternative to litigation in respect of domestic disputes. It also bears upon Australia's aspirations to become a regional hub for international commercial arbitration in the Asia Pacific region.

A. Background

The uniform Acts have been under review by the Standing Committee of Attorneys-General ('SCAG') since 2002. The reform process, however, stalled in 2007.

In an address given in early February 2009, the Honourable J.J. Spigelman A.C., Chief Justice of the Supreme Court of New South Wales, said:

> *The focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective mode of resolution of disputes. Our uniform legislative scheme for domestic arbitration is now hopelessly out of date and requires a complete rewrite. The national scheme implemented in 1984 has not been*

46 See for example section 17 of the *International Arbitration Act (Cap 341) (Singapore).*

47 See CEDR Rules for the Facilitation of Settlement in International Arbitration (November 2009) at www.cedr.com .

48 The NSW Attorney General suggested in an opinion piece published in the Financial Review newspaper that a Med-Arb provision would be inserted into the IAA: John Hatzistergos, '*Arbitration reform must continue*', Financial Review, 18 June 2010 at pg 33.

49 See Peter Megens and Beth Cubitt, 'Meeting disputants' needs in the current climate: What has gone wrong with arbitration and how can we repair it?' (October 2009) Vol 28, No 1, The Arbitrator & Mediator, p.115.

> *adjusted in accordance with changes in international best practice. Of course, in our federation, agreement on technical matters such as this in multiple jurisdictions is always subject to delay.* (emphasis added)[50]

His Honour's remarks were timely and re-ignited the debate concerning reform of the domestic arbitration regime in Australia.

On 17 April 2009, SCAG published a Communiqué by which it committed to re-invigorate the reform of the uniform Acts. The SCAG Communiqué referred to the adoption of the Model Law '*supplemented by any additional provisions which are necessary or appropriate for the domestic scheme*'. This raised the question, what additional provisions should be introduced to supplement the Model Law as the procedural law regulating domestic arbitration in Australia?

In about late November 2009 the Secretary of SCAG circulated an Issues Paper together with a *Draft Commercial Arbitration Bill* 1999 ('the CAA Bill'). The issues to be considered were whether the Model Law (drafted primarily to regulate international arbitration) was appropriate to regulate domestic arbitration and, further, what amendments to the Model Law and/or supplementary provisions were required.[51]

Submissions in respect of the Issues Paper and comments on the draft CAA Bill were requested by 15 January 2010. There was little opposition to the adoption of the UNCITRAL Model Law as the backbone of the new domestic arbitration Act, as proposed by SCAG. While designed with international commercial arbitration in mind, the Model Law offers a set of basic rules that are also suitable for domestic arbitration.

The CAA Bill was further refined in light of the submissions received and on 7 May 2010. SCAG resolved that the various States and Territories should adopt a new Model Bill ('the CAA Model Bill') to overhaul the existing uniform Acts.[52]

New South Wales lost no time and the *CAA Model Bill* was introduced into the New South Wales Parliament on 13 May 2010.[53] It was debated in both Houses of Parliament and enacted on 28 June 2010. It is hoped that the *CAA Model Bill* will be introduced into the parliaments of the remaining States and Territories of Australia in the foreseeable future.

B. The major features of the CAA Model Bill

Several features of the *CAA Model Bill* deserve mention.

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50 Address by the Honourable J Spiegelman AC, Opening of Law Term Dinner, 2009, the Law Society of NSW, Sydney, 2 February 2009.

51 *Reform of the Australian Domestic Arbitration Acts – It's Time*, Albert Monichino, The Arbitrator & Mediator, Volume 28, No. 1, October 2009 at page 83 and *The new CAA: The necessary amendments to the Model Law*, Doug Jones, ADR Reporter, March 2010 at page 23.

52 The text of the new *CAA Model Bill* is available at: http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Model_Commercial_Arbitration_Bill_2010.pdf/$file/Model_Commercial_Arbitration_Bill_2010.pdf

53 The second reading speech of the New South Wales Attorney General is available at: http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LC20100512

Adoption of the Model Law

The most noteworthy feature of the *CAA Model Bill* is that it adopts the Model Law (with some modifications) as the arbitral procedural law regulating domestic commercial arbitration in Australia. As a matter of drafting style the *CAA Model Bill* incorporates the Model Law in the body of the Act, unlike the IAA which appends the Model Law as Schedule 2. The *CAA Model Bill* maintains like numbering to the Model Law, cross-referencing the relevant section to the equivalent Article of the Model Law. Where a section is different to the Model Law, an editorial note alerts the reader to that fact. As well, the Model Law has been subjected to a '*plain english*' makeover which makes the Model Law provisions more intelligible.

Scope of application

Section 1 of the *CAA Model Bill* provides that it applies to '*domestic commercial arbitrations*'. That expression is defined in section 1(3). In contrast the IAA (upon its amendment by the IAA Bill) will only apply to '*international*' commercial arbitrations.[54]

Paramount object clause

The CAA Model Bill contains a new paramount object provision (section 1C). Relevantly the paramount object is expressed as follows:[55]

> *to facilitate the fair and final resolution of commercial disputes by impartial [arbitration] without unnecessary delay or expense [to be achieved by] … by… providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.*

Subtly, party autonomy appears to be subordinated to the achievement of the paramount object. Thus, section 1C(2) contemplates that parties are able to agree how their commercial disputes are to be resolved '*subject to subsection (3)*,' which provides that:

> *'This Act must be interpreted, and the functions of the arbitral tribunal must be exercised, so that … the paramount object is achieved.'*

Therefore, it is conceivable that an arbitrator under the *CAA Model Bill* may be able to override the parties' agreement in respect of procedural directions where those consent directions are inconsistent with the achievement of the paramount object.[56]

Consistent with the paramount objective, court intervention is minimised.[57]

54 Article 1(3) of the Model Law sets out when an arbitration is '*international*'.

55 Section 1AC(1) and (2)(b).

56 For example, where parties provide for a leisurely six month period to exchange Statements of Contention in a relatively simple dispute.

57 See section 5.

Uniformity in application of the Model Law

Section 2A of the *CAA Model Bill* provides that subject to the paramount object, in the interpretation of the *CAA Model Bill*, regard is to be had to the need to promote as far as practicable uniformity between the application of the *CAA Model Bill* to domestic commercial arbitrations and the application of the provisions of the Model Law to international commercial arbitrations. The undoubted objective is to promote the development of a single body of jurisprudence regulating commercial arbitration (both domestic and international) in Australia. Given the international nature of the Model Law it is unlikely that past Australian court decisions concerned with the interpretation of provisions contained in the uniform Acts will be influential in the interpretation of like provisions contained in the Model Law.[58]

Judicial recourse against arbitral awards

Section 34 of the *CAA Model Bill* adopts Article 34 of the Model Law in respect of judicial recourse against arbitral awards. Article 34 provides for limited judicial recourse against an arbitral award. The Issues Paper raised the question whether the CAA Bill should provide for further grounds of judicial review – in particular, '*error of law*' and/or '*serious irregularity*', and if so the detail of such provisions. The *CAA Model Bill* has introduced a new section 34A which provides for the parties to opt into judicial review of a domestic arbitral award on the grounds of error of law.[59] Before section 34A will apply, the parties must have agreed (either in the arbitration clause or at sometime later) that an appeal may lie on the ground of '*error of law*'. Further, for an appeal to lie, the Court must grant leave to appeal.[60] Section 34A(3) mandates that the Court must not to grant leave unless it is satisfied of a number of matters. In the ordinary course, the Court will determine the application for leave to appeal without a hearing (i.e. '*on the papers*').[61] It is noteworthy that the new section 34A is not modelled on the existing section 38 of the existing uniform Acts.[62] Rather, it appears to be modelled on section 69 of the *Arbitration Act* 1996 (UK).[63]

Stay of court proceedings

Under section 53 of the uniform Acts, the Court has a discretion whether or not to stay Court proceedings in the face of an arbitration agreement referring disputes to arbitration. In contrast, section 8 of the *CAA Model Bill* adopts Article 8 of the Model Law and therefore brings the new domestic arbitration legislative regime in line with the position currently contained in the IAA. Thus, if the subject matter of a Court proceeding is the subject of an agreement to refer the matter to arbitration, the Court

58 Thus, the international approach in *Gordion Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57 concerning the requirement of an arbitrator to provide reasons for his award is likely to be preferred to the conservative common law approach in *Oil Basins Ltd v. BHP Billiton Ltd* [2007] VSCA 255..

59 By way of supplementation of the limited grounds for judicial recourse against an arbitral award contained in Article 34 of the Model Law, as reflected in section 34 of the *CAA Model Bill*.

60 Section 34A(1)(b).

61 Section 34A(5).

62 For example, the requirement to show a '*manifest error of law on the face of the award*' contained in section 38(5)(b)(i) - considered by Croft J in *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139 – no longer appears.

63 Although section 69 applies on an opt-out (as opposed to an opt-in) basis.

is mandated on the request of a party to the arbitration agreement[64] to stay the Court proceeding and refer the parties to arbitration. The exception is if the Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Interim measures

One of the major amendments to the Model Law in 2006 was to introduce an elaborate regime for the grant of interim measures. Interim measures are measures ordered by the arbitral tribunal (or the court) prior to the publication of the arbitral tribunal's final award which:

(a) maintain the status quo pending the final determination of the dispute;
(b) preserve evidence that may be relevant to the resolution of the dispute;
(c) preserve assets out of which the award may be satisfied; or
(d) otherwise avoids prejudice to the arbitration process.[65]

The *CAA Model Bill* adopts the new interim measures regime contained in the Model Law (as revised) except for provisions which allow the arbitral tribunal to order such measures on an ex parte basis.[66]

Confidentiality

Sections 27E to 27I of the *CAA Model Bill* introduces an elaborate confidentiality regime (based on the *Arbitration Act 1996* (NZ) (as amended)). This confidentiality regime is substantially identical to the new regime contained in ss 23C to 23G of the IAA, except that it will apply on an opt-out basis. This is to be commended in that at the domestic level confidentiality is the most obvious advantage that arbitration offers in comparison with litigation.[67]

Powers in default of compliance

Section 25 supplements Article 25 of the Model Law by conferring upon the arbitral tribunal certain powers that may be exercised in the event of non-compliance with procedural orders. Section 25 applies on an opt-out basis. It includes a power to make a peremptory (i.e. self-executing) order.[68]

Powers of Arbitral Tribunal

In addition to the grant of power on an arbitral tribunal to order interim measures, the *CAA Model Bill* expressly confers upon the arbitral tribunal certain additional powers:

(a) first, power to order security for costs (section 17(3)(a));
(b) secondly, power to order in respect of property the subject of the dispute, the inspection of such

64 Before the party files its first statement on the substance of the dispute – usually a defence.
65 See the definition of interim measures in Article 17(2) of the Model Law.
66 See Part 4A of the *CAA Model Bill* (ss 17-17J); Compare Article 17B and 17C of the Model Law (as revised) which provides for ex parte interim measures.
67 In contrast, at the international level, the most obvious advantage is superior enforcement of arbitral awards by reason of the operation of the New York Convention.
68 Also, section 24B of the CAA Model Bill supplements the Model Law by imposing a duty on the parties to do all things necessary for the proper and expeditious conduct of arbitral proceedings.

property, the taking of photographs of such property, the taking of samples from or the conduct of experiments on such property (section 17(3)(f), (g) and (h));

(c) thirdly, power to conduct an arbitral hearing on a stop-clock basis – that is, allocating a particular period of time for the oral hearing, dividing that time between the parties, and strictly enforcing that time allocation (section 17(3)(i)).[69]

Somewhat anonymously these new powers are contained in section 17 of the *CAA Model Bill* which deals with interim measures. They are not, however, interim measures. These provisions should have been included in a separate provision specifying the general powers of the arbitral tribunal. To include these additional provisions in the interim measures section confuses the nature of interim measures and causes potential problems. For example, section 17A outlines the conditions for the grant of interim measures. It is not sensible to apply those conditions when an arbitral tribunal is considering making orders of the sort referred to in (a) to (c) above.

Powers of Court

While the *CAA Model Bill* confers specific powers on a court,[70] no general power is conferred on a Court to make orders in aid of an arbitration.[71]

Med-Arb

Section 27 of the uniform Acts empower an arbitrator to act as '*a mediator, conciliator or a non-arbitral intermediary*' provided he is authorised to do so.[72] Likewise, section 27D of the *CAA Model Bill* also contains a provision which empowers an arbitrator to act as a mediator or conciliator provided the arbitration agreement provides for this, alternatively each party later consents in writing to the arbitrator so acting.

The new section expressly provides that an arbitrator acting as a mediator may communicate separately with the parties (section 27D (a)) - in other words, may conduct private mediation sessions. If the mediation is unsuccessful, the arbitrator cannot continue with the arbitration unless all the parties to the arbitration provide their written consent to him doing so (section 27D (4)). If the arbitrator continues with the arbitration, he must first disclose to all other parties in the arbitration proceedings any confidential information obtained from another party during the mediation (section 27D (7)) – in particular, during any private session.[73]

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69 See AA Monichino, '*Stop clock hearing procedures in arbitration*', Asian Dispute Review Journal (July 2009) at 76 for a description of the stop-clock procedure. While arbitrators may already have such power under section 14 of the Uniform Acts, anecdotal evidence suggests that arbitrators do not exercise this power absent the agreement of the parties.

70 Such as section 17J (court-ordered interim measures), 27 (court assistance in taking evidence), 27A (if parties may obtain subpoenas) and 27B (refusal or failure to attend before arbitral tribunal or to produce document).

71 Like section 47 of the current Uniform Acts.

72 Unless the parties otherwise agree in writing, the arbitrator is bound by the rules of natural justice when seeking a settlement (section 27 (3)).

73 This requirement appears to derive from section 17 of the *Singapore International Arbitration Act (Cap 143A).*

This disclosure requirement has engendered some consternation by some commentators on the basis that it undermined the confidentiality of mediations.[74]

Do the Australian Arbitration Reporms Reflect 'International Best Practice'?

So do the Australian arbitration reforms reflect '*international best practice*'?

If one were designing an ideal arbitration legal system (without the shackles imposed by federalism), one would, I suggest, establish:

(a) a single arbitration Act (covering both domestic and international arbitration in substantially like terms);

(b) a single court supervising arbitrations; and

(c) a single well-resourced arbitration institution (working hand in glove with that court).

Hong Kong has such an arbitration system. Witness its success.

In their joint submissions in respect of the *CAA Bill* made on 12 February 2010, IAMA and CIArb expressed a shared view that it would be preferable for a single arbitration Act to be enacted by the Federal Parliament, as opposed to separate Commonwealth and States/Territory Acts, covering the field of international and domestic arbitration.[75]

Increasingly, countries around the world are introducing a unified legislative regime based on (or at least informed by) the Model Law regulating both domestic and international commercial arbitration – for example, New Zealand,[76] Hong Kong,[77] Malaysia[75] and Scotland.[79]

The dual nature of the legislative regime in Australia is, I think, a '*design weakness*'. In particular, the desired consistency in the procedural laws governing domestic arbitration and international arbitration rests on somewhat shaky foundations. Unlike Singapore, for example, the legislature[80] does not have the ability to move quickly to respond to international developments. Nor is the arbitration law as '*easily accessible*' as if it were contained in a single Act.

A second *'design weakness*' is the conferral of concurrent jurisdiction on several Courts as opposed to the conferral of exclusive jurisdiction on a single Court. It is widely accepted that the development of a single, consistent body of jurisprudence in respect of the Model Law is essential for the establishment of Australia's reputation as a centre for arbitration. In the past, there have been a number of aberrant judicial decisions in Australia in the arbitration field. There is presently an unseemly conflict between intermediate courts of appeal in Australia in respect of the interpretation of the requirement in s 29 of

74 See Derek Minus '*Turning point for arbitration*' (4 June 2010) Lawyers Weekly 12; see also Hansard transcript of NSW Legislative Council, 9 June 2010 concerning the *Commercial Arbitration Bill 2010*.

75 The reasons why this is so a set out in the article published in Volume 28 of this journal referred to footnote 51 above.

76 In 1996 New Zealand introduced a new Arbitration Act. It was amended in 2007. The New Zealand Arbitration Act (as amended) is available www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html

77 Hong Kong is in the process of introducing a new arbitration Act.

78 In 2005 Malaysia adopted a new Arbitration Act. It is available at www.agc.gov.my/agc/Akta/Vol.%2013/Act%20646.pdf.

79 On 5 January 2010, the Arbitration Scotland Act was passed by the Scottish Parliament.

80 Comprising the several Australian Federal, State and Territory parliaments.

the uniform Acts for domestic arbitrators to state the reasons for their award.[81] It would be extremely unfortunate if similar inconsistencies developed between single or intermediate courts of appeal in respect of the interpretation of the Model Law. While measures might be taken to promote the uniformity of approach between different Australian courts to the interpretation of the Model Law[82] and to develop a '*national arbitration grid*',[83] time will tell whether such measures are enough. In the end result it may be necessary for the Commonwealth Attorney-General to revisit the question whether exclusive jurisdiction under the IAA should be conferred on the Federal Court.

Conclusion

An effective legislative regime is a necessary (albeit not a sufficient) condition for the promotion of Australia's aspirations to become a regional hub for international commercial arbitration in the Asia Pacific region. The reforms of the IAA and the uniform Acts modernise Australia's arbitral legislative regime and will assist in attracting international arbitrations to Australia. But, I do not think that we can pretend to describe them as reflecting '*international best practice*'.

Postscript: On 22 October 2000 it was announced that former Chief Justice of the High Court of Australia, Murray Gleeson AC, would chair a Judicial Liaison Committee which would include representatives from the various Supreme Courts and the Federal Court of Australia. The objectives of the Committee include the promotion of uniformity in rules and procedures concerning the judicial supervision of arbitrations seated in Australia.

81 Cf *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57 (1 April 2010) with *Oil Basins Limited v BHP Billiton Limited & Ors* [2007] VSCA 255. On 3 September 2010, the High Court of Australia granted leave to appeal the decision in *Gordian.*

82 For example, ACICA has recently established a consultative committee to liaise with members fo the Australian judiciary throughout Australia to promote a beter understanding of international arbitration and uniformity of approach.

83 See in the Remarks of the Hon Marilyn Warren AC at the ACICA international commercial arbitration conference on 4 December 2009, "The Victorian Supreme Court's perspective on arbitration", where her Honour said "*There is an opportunity to nationalise the services of courts to arbitrations. Court should focus on a national consistent service which, I expect, would be very attractive internationally. The service would be better if it was not centralised. It should operate on a harmonised basis just as corporations litigation is run…*"; see also the Remarks of the Hon Marilyn Warren AC at the ACICA reception on 30 May 2010, " Victoria's commitment to arbitration including international arbitration and recent developments" where her Honour said: [The establishment of a dispute resolution centre in Sydney] *should be the first step in a national arbitration grid…*"