



"Australian Commercial Arbitration"

By

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Western Australian Launch by
The Honourable Wayne Martin AC
Chief Justice of Western Australia

Supreme Court of Western Australia
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Western Australian Launch of *Australian Commercial Arbitration*
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Welcome and Introduction

Dr John Hockley, Mr William Ho and Mr Kieran Hickie, joint authors of *Australian Commercial Arbitration*, Ms Susan Hunt, Development Editor, Mr Jim Pitts, Relationship Director, Government and Barrister Markets WA, LexisNexis Australia, who are our hosts this evening, and other distinguished guests too numerous to mention. It is a great pleasure to have been asked to speak at the Western Australian launch of *Australian Commercial Arbitration*. My only regret is that I am unable to welcome the other joint author of that work, the Honourable Justice Clyde Croft of the Supreme Court of Victoria. Unfortunately, judicial commitments, ironically to a case originating from Western Australia, have precluded his Honour's travel to Perth. I know from a letter I have received from his Honour that this is a matter of great regret.

Before going any further I would like to acknowledge the traditional owners of the lands on which we meet, the Wadjuk people, who form part of the great Ngunyar clan of south-western Australia, and pay my respects to their Elders past and present. Visitors to this State might not be aware that this building was built on a site which was and remains of particular significance to the Wadjuk people, as this site used to be the bank of the river which we know as the Swan River, and which is known to the Wadjuk as Derbyl Yerrigan, and which is one of the homes of the Wagyl, a serpentine creature which is very prominent in the beliefs and customs of the Wadjuk.

Australian Commercial Arbitration - rejoining the fragments

Until recently, the legal regime governing commercial arbitration in Australia could be metaphorically described as an elaborate china vase, fractured by our federal system of government into a number of

fragments, one in each State and Territory, with another fragment pertaining to international arbitration. The launch of this electronic publication celebrates the rejoinder of these fragments into a single and coherent whole. It may be going too far to describe the composite work as a thing of beauty, because the glue lines where the fragments were rejoined are still visible to the eye, but the vase does hold water and will much better serve the Australian commercial community, and those from other countries who do business with Australia. The alignment of the legal regimes governing domestic and international arbitration is one of a number of steps that have been taken in recognition of Australia's increasing role in international commerce and the consequent need to harmonise our legal and regulatory structures with the expectations of the international commercial community.

Federal systems of government have their strengths and weaknesses. It might be fair to say that recent commentary from Western Australia has tended to focus upon the asserted fiscal weakness of a federal structure, rather than its strengths. Perhaps federation could be described in the same way as democracy has been described - that is, as the worst way of running a country except any other.

When I started practising law, which is now too long ago to mention in polite company, one of the weaknesses of our federal system of government was apparent in the different legal regimes governing commercial arbitration in each State and Territory, although each, broadly speaking, had their origins in the legal regime applicable in England. About 30 years ago, when Australian commerce started to lose its regional focus and developed an increasingly national outlook and approach, the first step towards rationalising the field of commercial arbitration was taken when the States and Territories passed what was misleadingly described as uniform legislation. I call the description misleading because there remained significant legislative differences between the various Australian jurisdictions, and the so-called "uniform" model was itself quite different from the legal regime governing international arbitration.

Between 2010 and 2013 the second, and most significant step in the development of a rational and coherent structure governing commercial arbitration in Australia was taken with the enactment of what can truly be described as uniform legislation in each State and Territory (other than the ACT) which, like the *International Arbitration Act 1974* of the Commonwealth (as amended in 2010), is modelled on the same international legal instrument - namely, the 2006 version of the United Nations Commission On International Trade Law (UNCITRAL) International Commercial Arbitration Model Law. Leaving to one side the ACT for the moment, the alignment of Australian arbitration law into what may now be fairly described as a single, consistent and coherent body of law was complete on 7 August 2013 when the *Commercial Arbitration Act 2012* of Western Australia came into force.

The alignment of domestic and international arbitration law

The alignment of domestic and international arbitration law is long overdue. It makes good sense for at least three reasons. First, in the context of the increasingly prominent role in Australian commerce played by international investors, the question of whether a particular arbitration agreement is governed by the legal regime relating to domestic arbitration, or the legal regime relating to international arbitration, will often turn open the question of whether the relevant international investors are conducting business in Australia through subsidiary companies incorporated in Australia or through a corporate vehicle incorporated outside Australia. So, the applicable legal regime can turn more upon matters of form than upon matters of substance. If the legal regimes are similar, there will be few material differences arising from the choice of form.

Second, as commerce has become globalised, increasing reliance has been placed upon international instruments and treaties, including such instruments as the UNCITRAL Model Law. Growing international acceptance of the legal regime provided by that model law continues to produce a coherent body of jurisprudence developed in different jurisdictions, but with the common objective of facilitating

the fair and final resolution of commercial disputes by arbitration without unnecessary delay or expense. It is highly desirable to utilise that developing body of jurisprudence in Australia.

Third, the fragmentation of arbitration law in Australia has provided competitive jurisdictions, particularly those within our region, with a "free kick" in the market for the provision of dispute resolution services.

This publication arrives at just the right time to assist those who practise in the field of arbitration in Australia to manage the transition into a legal framework which corresponds closely to that which has applied in the field of international commercial arbitration. It augments the important work published by Professor Doug Jones AO, and I was privileged to attend the launch of that work in Western Australia a couple of years ago. With these two publications, Australian arbitration practitioners are now well served with contemporary insightful commentary in this important and developing area of the law.

A retrospective look at arbitration in Australia

Before moving forward it is often useful to spend a little time looking backwards. In retrospect, it must be said that arbitration has not been as prominent a means of resolving commercial disputes in Australia as in other comparable jurisdictions. I think there are a number of reasons for this. First, until changes were made to the powers of the Australian Centre for International Commercial Arbitration (ACICA) in 2011, there had been no central body in Australia taking responsibility for the supervision of arbitrations or the promulgation of rules governing arbitrations in a manner analogous to the Singapore International Arbitration Centre (SIAC), or the Hong Kong International Arbitration Centre (HKIAC), or the London Court of International Arbitration (LCIA). Domestically, organisations like the Master Builders' Association and Engineers Australia have played a role in relation to the appointment of arbitrators upon request, and more recently, the Institute of Arbitrators and Mediators Australia has

adopted a much more active position in relation to the facilitation of arbitration. However, it is I think not unfair to say that none of these institutions has secured the recognition of the bodies in Singapore, Hong Kong and London to which I have referred.

Historically, arbitration in Australia has also confronted other more practical problems, including a limited supply of capable and experienced arbitrators with appropriate legal qualifications and experience, and a very limited supply of appropriate premises in which to conduct arbitrations. The latter problem has been addressed recently in both Sydney and Melbourne, but it remains a problem in Perth. I will say more of this a little later.

Given these difficulties, one might ask why there have been any arbitrations in Australia. One obvious advantage is confidentiality, which may be a significant advantage to parties to a dispute who do not wish their dirty laundry to be aired publicly, giving significant advantages to their commercial competitors. In the area of international disputes, arbitration has another enormous advantage over judicial determination in terms of the enforceability of an award, as a consequence of the widespread acceptance of the New York convention with respect to enforceability of arbitral awards.

In past decades, arbitration was also considered to have significant advantages in terms of flexibility, speed and cost, when compared to litigation. However, as a result of the very significant reforms which have taken place in the area of civil litigation, it is I think doubtful whether arbitration can continue to claim these advantages. It is incumbent upon contemporary arbitrators to ensure that they take full advantage of the opportunities which arbitration provides for greater expedition and flexibility of procedure. Arbitrators need to continue to think innovatively and creatively in respect of the most effective means by which the real issues in dispute can be identified at a very early stage in the dispute process, and to resolve those issues without falling into the pitfalls which can attend discovery and expert evidence in the litigation process. These can become black holes for both time and money.

Without such innovation, at least in Western Australia I am not sure that empirical analysis would reveal that commercial arbitration is quicker and cheaper than litigation in the Supreme Court, given that our contemporary procedures for case management quite closely resemble those which have evolved in the field of commercial arbitration. Regrettably, however, I cannot be confident that this will continue to be the case, given the limited judicial resources now available to our Court and which can be expected to impede our capacity to provide judicial attention to cases within the time-frames which the commercial community has come to expect.

Looking at commercial arbitration within the Asia-Pacific region, it must be acknowledged that Australia has missed a golden opportunity which has been actively and aggressively pursued by others, notably in Singapore and Hong Kong. Prior to the emergence of those centres, the City of London had established a very significant market for the provision of international dispute resolution services, which it continues to maintain and enjoy. It was able to establish that market as a consequence of being an international centre for trade in its own right, geographically proximate to the major trading countries of western Europe, and with a legal profession and judiciary, the integrity of which was beyond question. Australia enjoys many of the same advantages with respect to the fast developing economies in the Asian region, but has not yet realised the capacity for market development which is provided by those advantages.

Of course, I do not overlook the significant steps which have been taken in Sydney, with the development of the Australian International Disputes Centre, and in Melbourne, with the recent opening of the government sponsored Melbourne Commercial Arbitration and Mediation Centre. It is a matter of great regret that no similar step has been taken in Perth, and it seems most unlikely that any government support will be provided for the creation of such facilities or for an institution like SIAC in the foreseeable future.

Nevertheless, Western Australia does have particular features when compared to other Australian commercial centres which should

enhance the commercial viability of facilities for the conduct of commercial arbitration in this State. Western Australia now produces almost half of Australia's export income, and is a world renowned centre for the development of natural resources, including both mining and petroleum products. Perth has become a significant international commercial centre, and has attracted the legal expertise necessary to serve those commercial interests, particularly in the field of natural resources. Perth is in the same time zone as many major Asian centres, and is closer to Singapore than it is to Sydney. For these reasons I am very pleased to support the initiative which is currently under development in this State which will provide organisational support for commercial arbitrations, primarily in connection with disputes associated with the development of natural resources.

Court support

As it seems unlikely that any financial support will be provided by government for the facilitation of commercial arbitration in Western Australia, it is important for the courts to do whatever they can to encourage and facilitate that form of alternative dispute resolution. Anything less would be a denial of the legislative objectives evident in Part 1A of the uniform State and Territory legislation. So, consistently with that legislation, it is incumbent upon the courts to construe and apply the legislation so as to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense. In that context, the Supreme Court of Western Australia has acknowledged the weight properly given to international authority in the field of commercial arbitration, and where possible, consistently with the relevant legislation, the importance of following and applying principles developed in the international jurisprudence.

At a procedural level, the Supreme Court of Western Australia has Rules of Court which are intended to facilitate both domestic and international commercial arbitration by providing utmost flexibility, in the context of our general case management procedures, which also optimise flexibility and provide the opportunity for innovative

management of each case by reference to its particular circumstances. All commercial arbitration cases are automatically admitted to the list of cases managed by the judges of the court on a docket basis, and a de facto arbitration list has been created by an administrative direction to the effect that all arbitration cases will be referred to a single judge, which at present is me.

In the future there may be opportunities for the court to provide more practical assistance to the facilitation of commercial arbitration, after the court moves into the new premises that are to be provided for the conduct of civil work, currently under construction between the old Treasury building and the Town Hall in Barrack Street, and which we would expect to occupy in the latter part of 2016. Although it is difficult to currently predict the precise demand for premises at that time, there is at least a prospect that in the early period of our occupation of that building, we may be in a position to offer a range of hearing rooms and facilities, with varying degrees of formality and flexibility for use as commercial arbitration hearing rooms, or even for private mediations. Of course, any such arrangements would be subject to the approval of government, but as such arrangements would enable the derivation of revenue from premises that would otherwise be unused at the time, it is difficult to see any reasonable basis of objection to such a proposal. I well appreciate the natural reluctance of parties to conduct arbitral proceedings in a court building, but without descending into design detail, there are aspects of the building currently under construction which can mitigate those concerns.

The electronic publication

I fear that I may have digressed from my fundamental purpose, which is to launch the electronic publication *Australian Commercial Arbitration* by Dr John Hockley, the Honourable Justice Clyde Croft, Mr William Ho and Mr Kieran Hickie. The authors bring a vast array of experience and expertise to this publication, and include one judge, two barristers and a solicitor. Without diminishing in any way the other contributors to the work, Justice Clyde Croft's eminence and

experience in the field of commercial arbitration is renowned throughout Australia. Prior to his appointment to the bench he was a prominent practitioner in the field, and now runs the arbitration list in the Supreme Court of Victoria.

The work is being published in electronic form. This has a number of very real advantages. First, it is very easy to access and can be taken anywhere in the various forms of handheld devices that are now so popular. There is no need for the publication to be noted up from time to time with replacement pages being inserted into a loose leaf service - rather, the publication can be revised instantly by the authors when necessary, and those accessing the publication can be confident that it is the most up-to-date source of Australian law relating to arbitration.

The work takes the form of annotated commentary to the Victorian legislation. The choice of Victoria is explained in the following passage from the preface:

The *Commercial Arbitration Act 2011* (Vic) was chosen to be included in full and annotated, as it is the leading State in arbitration law with a well-developed commercial court with a specialist judge for arbitrations and the best rules to administer arbitration both domestically and internationally.

I assume that the authors had their tongues squarely in their cheeks when these words were written, and that they are a humorous response to the contestable characterisation some years ago of Sydney as the Australian "vortex" for the conduct of commercial litigation in general, and for litigation relating to commercial arbitration in particular. Of course, neither of the claims advanced on behalf of Melbourne and Sydney can be justified. But this is not an occasion for parochial sniping between jurisdictions. If Australia is to make inroads into the competitive market for the provision of dispute resolution services, it is vital that we present a united front, with each city drawing upon its particular expertise. For the reasons I have given, I am confident that Perth has a particular role to play in the field of commercial arbitration, and the promotion of Perth as a seat

for commercial arbitration would, in my view, enhance Australia's competitiveness within the international market in conjunction with Australia's other major commercial centres.

Intellectual resources such as those provided by this publication will also enhance the efficient conduct of commercial arbitration in Australia, to the benefit of the commercial community as a whole and therefore to the general public as a whole. For that reason I am very pleased to congratulate the authors on their work, and the publishers for having the foresight to provide this facility to those who practise in the field of arbitration, and to launch this publication in Western Australia.