



## **Can Australian courts get their act together on international commercial arbitration?\***

**The Hon. Justice Clyde Croft<sup>1</sup>**

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## Introduction

Now that the Commonwealth *International Arbitration Act* 1974 (the IAA) has been reviewed and, as a result, substantially revised and updated,<sup>2</sup> and the new *Model Commercial Arbitration Bill* (the CAA) has been adopted by the Standing Committee of Attorneys General (SCAG),<sup>3</sup> Australia has an opportunity to reinvigorate its approach to domestic and international commercial arbitration.

Reinvigoration of international or domestic arbitration in Australia cannot be achieved by governments or the courts acting alone. Governments have now made a crucial contribution to the process by procuring the enactment of substantially enhanced international arbitration legislation and groundbreaking domestic arbitration legislation. Rather, responsibility for this reinvigoration falls on the various commercial arbitration stakeholders – commercial parties, lawyers (whether they be corporate, in-house lawyers, barristers or solicitors), arbitrators, arbitral institutions (particularly as educators and the custodians of ethical standards),<sup>4</sup> the Commonwealth, State and Territory governments and the courts. I will concentrate on the latter but it should be observed that the role or roles of each of these stakeholders are, naturally, interconnected and so collective, coordinated, action is required. In this light, and having regard to the role of other stakeholders, I turn to the position of the courts.

At times, there has been a perception that the courts have hindered effective commercial arbitration, both by intervening too much in the arbitral process and by

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<sup>2</sup> The *International Arbitration Amendment Act 2010* (Cth) was introduced into Parliament in November 2009, passed on 17 June 2010 and received royal assent on 6 July 2010.

<sup>3</sup> New South Wales was the first state to adopt the reformed commercial arbitration legislation in the *Commercial Arbitration Act 2010* (NSW). The NSW legislation commenced on 1 October 2010. It is anticipated that Victoria will enact this legislation in early 2011.

<sup>4</sup> Including the Australian Centre for International Commercial Arbitration (ACICA), the Chartered Institute of Arbitrators (Australian Branch) and the Institute of Arbitrators and Mediators Australia (IAMA).

interpreting the arbitral law in an interventionist rather than a supportive way. This perception, as well as many other factors, was one of the reasons that our commercial arbitration legislation required attention; though the domestic legislation had also become very dated as a result of developments in legislation elsewhere.<sup>5</sup> Prior to the enactment of the then new, uniform, domestic commercial arbitration legislation in the mid-1980s commercial arbitration had been constrained very significantly by the case stated procedure which could be used, in effect, to force a retrial of the issues in an arbitration in the reviewing court. Naturally, the cost, expense and delay involved had the effect of making commercial arbitration very unattractive.

There were great hopes for the uniform legislation, based on the English experience. For example, it was expected that the new constrained appeal and review provisions, based as they were on the 1979 English legislation, would lead Australian courts to adopt the same “hands-off” approach which came to be expressed by Lord Diplock in the, so called, “Nema guidelines”.<sup>6</sup> With the hindsight of history we know that this did not occur, at least not uniformly, and a good deal of uncertainty resulted which did not assist the development of commercial arbitration.

In defence of the courts it might be said that the legislatures could have included *The Nema* guidelines in the new Acts if this had been the legislative intent, but given the provenance of the legislation and the English case law I think it would have to be

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<sup>5</sup> The domestic commercial arbitration legislation, prior to the enactment of the *Commercial Arbitration Act 2010* in New South Wales was uniform (or substantially uniform) legislation which flowed from the work of SCAG in the late 1970s and early 1980s which was based on the then new and innovative legislative developments in England which resulted in the enactment of new legislation in the form of the *Arbitration Act 1975* (Eng) and, principally, the *Arbitration Act 1979* (Eng). Victoria was the first State to enact the legislation SCAG had developed, in the form of the *Commercial Arbitration Act 1984*. New South Wales followed shortly afterwards as, in due course, did the other States and the Territories. Apart from in New South Wales, as a result of its enactment of the *Commercial Arbitration Act 2010*, this is the domestic commercial arbitration legislation still in force in Australia.

<sup>6</sup> See *Pioneer Shipping Ltd v BTP Tioxide Ltd* (“*The Nema*”) [1982] AC 724 at 742; and see JA Sharkey and JB Dorter, *Commercial Arbitration* (1986, LBC), 268 – 274.

conceded that there were some “unfortunate” decisions. There were some problems with over intervention in the arbitration process by way of judicial review of awards and as a result of an increasing tendency for parties to challenge awards on the basis of, what is generally best described as, “technical misconduct”. This should not, however, overshadow the very effective and useful work of the courts in expediting and supporting arbitration through very “arbitration friendly” decisions on the operation of the arbitration legislation, and more generally. This is unsurprising and consistent with the approach of the common law over a long period of time. In this respect it is, in my view, worth noting that the common law courts were as far back as the eighteenth century, extraordinarily supportive of commercial arbitration as Professor James Oldham’s account of the work of Lord Mansfield in the latter part of that century illustrates.<sup>7</sup> More recently, the English, Singapore and Hong Kong courts, for example, have been very supportive, as many of our courts have been, and continue to be.

### **Which Courts?**

Both the Federal Court and the State and Territory Supreme Courts have jurisdiction under the IAA. Under the CAA, the relevant State or Territory Supreme Court has jurisdiction unless the parties have agreed that the District (County) Court or Local (Magistrates’) Court has jurisdiction.

### **What are we trying to achieve?**

It is clear that the aim of the present arbitration reinvigoration process is to increase the use of both domestic and international commercial arbitration in Australia. It is also aimed at encouraging international disputants to choose Australia as their seat for

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<sup>7</sup> J Oldham, *English Common Law in the Age of Mansfield* (2004, University of North Carolina Press), 68 – 72.

arbitration. If Australia does not promote itself in the arbitration world it will be marginalised in this globalised world. This will have significantly adverse consequences, particularly in terms of the development of our international legal expertise and the involvement of Australia's legal and other professionals in international trade and commerce.

International experience indicates that countries which have been successful in establishing busy international arbitration centres and attracting significant international arbitration work also have active and significant domestic arbitration sectors. The two feed off each other. The vibrant domestic arbitration sector provides significant experience for its domestic arbitrators – and also for its courts. All the more so where the domestic arbitration law is based on an international regime, such as the UNCITRAL Model Arbitration Law (the Model Law).<sup>8</sup>

Australia has not developed a high volume of commercial arbitration business, contrary to the experience in many other Western countries. There are many reasons for this – and all stakeholders bear some responsibility. As noted, Australia's domestic arbitration law has been in need of modernisation for some time and the courts have been, or at least perceived to be, more interventionist rather than supportive in some parts of the country. Also of concern has been the actual performance of arbitration itself. Although the education programs of the arbitral institutions seek to develop and promote innovative techniques which save time and cost, all too often arbitration as practised has tended to replicate traditional litigation. I say "traditional litigation" as for many years the Commercial Courts in this and other countries have embraced

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<sup>8</sup> United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration 1985 (as adopted by UNCITRAL on 21 June 1985). Adopted by the UN General Assembly 11 December 1985 (General Assembly Resolution 40/72), with revisions (as amended by UNCITRAL and adopted on 7 July 2006) adopted by the UN General Assembly on 4 December 2006 (General Assembly Resolution 61/33).

aggressive case management and time saving techniques which have made “innovative litigation” far more attractive than domestic commercial arbitration in many instances

In more recent times this healthy competition and the example provided by these courts has fed into arbitration processes and emboldened arbitrators to be more robust in applying active case management and more innovative techniques. This process has also been assisted by cross fertilisation from international arbitration where innovation in arbitration processes has tended to be in advance of domestic arbitration, if only because of very significant time, cost and logistical constraints applying to the former. Interestingly the approach of international arbitrators has also assisted the courts and we now see the application of such techniques as “chess clock” time management being used by the courts. Other positive influences include the very successful special reference procedures available and applied extensively by the Supreme Court of New South Wales – which provide, in effect, an expedited, supervised, commercial arbitration process with minimal appeal potential and no enforcement problems.

There is also the important question of cost (arbitrators, experts and lawyers fees). In this context steps might be taken to limit or control fee structures which do not encourage efficiency, such as time costing, and which may cut across the aim of legislatures, courts and arbitrators to promote speed and cost effective processes.<sup>9</sup>

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<sup>9</sup> And see, in the litigation context, Justice Clyde Croft, ‘AON and its implications for the Commercial Court’, a paper presented at the Commercial Court CPD and CLE – *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27: What does this mean for litigation and how will it affect trial preparation?’ seminar on 19 August 2010, available at <http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/supreme+court/home/library/supreme+-+aon+and+its+implications+for+the++commercial+court>.

Courts aim to achieve the efficient and just settlement of commercial disputes. One way that courts achieve this is by supporting appropriate dispute resolution (ADR). Arbitration is an important aspect of ADR, broadly defined. Under the IAA and the CAA the courts have been given supportive, facilitative and supervisory roles with respect to commercial arbitration.<sup>10</sup> Effective implementation of these roles requires the courts to interpret both the IAA and the CAA consistently within Australia and, more broadly given the international provenance of both pieces of legislation, consistently with the current international jurisprudence applied to the Model Law and its derivatives.<sup>11</sup>

## How do we achieve it?

### The Model Law as the basis of the IAA and CAA

The 2006 version of the Model Law<sup>12</sup> forms the basis of both the IAA and the CAA. The use of the Model Law as the basis of both the international and domestic commercial arbitration legislation in Australia provides legislation which is based on international consensus and accepted practice and which is well understood internationally. Consequently the Australian legislation, at both levels, becomes immediately accessible and understood internationally – provided, of course, it is interpreted and administered by the Australian courts on the basis of accepted international jurisprudence. In terms of substance, the Model Law is an internationally drafted and accepted arbitration regime that is very supportive of commercial arbitration. It has been enacted in over sixty nation states. It allows parties the freedom

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<sup>10</sup> As is illustrated by Victorian Supreme Court Practice Note 2 of 2010 (Arbitration Business); which indicates, specifically, the nature of these roles and procedural arrangements for the Arbitration List (Commercial Court – List G).

<sup>11</sup> Which include the *Arbitration Act* 1996 (Eng), the *Arbitration Act* 1996 (NZ), *Arbitration Act* (Cap. 10) and *International Arbitration Act* (Cap. 143A) (Singapore), and the *Arbitration Ordinance* 1996 (Hong Kong).

<sup>12</sup> United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration 1985 (as adopted by UNCITRAL on 21 June 1985). Adopted by the UN General Assembly 11 December 1985 (General Assembly Resolution 40/72), with revisions (as amended by UNCITRAL and adopted on 7 July 2006) adopted by the UN General Assembly on 4 December 2006 (General Assembly Resolution 61/33).



to decide how they want their disputes resolved with minimal court intervention. The Model Law is the arbitration law against which all other arbitration laws tend to be judged.

The choice of the Model Law as the basis for the CAA will assist with achieving a great deal of uniformity between the international and domestic regimes. As both the IAA and the CAA apply the Model Law provisions, with some additions and adaptations to accommodate their particular contexts, judgments under one regime can and will inform judgments under the other. State and Territory Supreme Court judges, when making decisions under the CAA, will need to be more aware of the impact of their judgments on the interpretation of the IAA, as they have jurisdiction under both regimes.<sup>13</sup> Additionally, international and domestic parties are likely to assume that a decision on similar or identical provisions under one regime will be found to apply with equal force under the other regime. Consequently, decisions under the CAA will also be looked at overseas in determining whether Australia is an attractive seat for international arbitrations. Given that, at least initially, it is likely that there will be more decisions under the CAA than the IAA, it would seem that Australia's Model Law jurisprudence will be developed, at first, by the State and Territory Supreme Courts, as the Federal Court has no jurisdiction in the domestic regime. It will be recalled that there was some controversy surrounding the question whether the Federal Court should be given exclusive jurisdiction under the IAA during the process of review which led to the amending legislation.<sup>14</sup> At the time this issue was being discussed the only context was the proposed amendments to the IAA and not the effect of applying the Model Law domestically in terms of the CAA, which raises the variety of additional considerations to which reference has been made.

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<sup>13</sup> A position which is reinforced, and required, by s 2A of the CAA (see below).

<sup>14</sup> The issue was raised in the Commonwealth Attorney General's Department 'Review of the International Arbitration Act 1974, Discussion Paper, November 2008 in section H.

## **Interpretation**

### **(a) Interpretation provisions in the CAA and the IAA**

Clearly, if the Supreme Courts of the States and Territories and the Federal Court do not interpret the Model Law, as applied by the IAA and the CAA consistently and in accordance with the legislative purpose and the provenance of the provisions, the present legislative reforms will not be successful in promoting and developing international and domestic commercial arbitration in Australia. The interpretation provisions of the Acts should, however, help in this respect, and it is to these that I now turn.

### **CAA - Section 1AC<sup>15</sup> – Paramount object of Act**

The paramount object of the CAA “to facilitate the fair and final resolution of commercial disputes without unnecessary delay or expense” is an addition to the Model Law. The CAA is to be interpreted “so that (as far as practicable) the paramount object is achieved.”<sup>16</sup> While this section is aimed more at parties and arbitrators it is also a reminder to judges interpreting and applying the Act that one of the main advantages of commercial arbitration, in the domestic context, is the ability of parties and arbitrators to tailor arbitration procedures for the most efficient resolution of the dispute. Sometimes parties will want an arbitration that is just as formal as a court proceeding and sometimes they will want a “look and sniff” arbitration, and between these extremes lies the spectrum of possible arbitration procedures. If parties agree to procedures, which are less formal than court proceedings, courts should not interfere with this choice. The same applies if the parties have clearly agreed to procedures

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<sup>15</sup> References to sections in the CAA are to SCAG’s Model Bill unless otherwise stated.

<sup>16</sup> CAA, s 1AC(2)(b).

which replicate full, traditional, litigation. The problems always arise when there is a mismatch of expectations and reality, where a party or parties and the arbitrator see themselves at different points on the “spectrum”. This is an issue to which arbitrators must direct their attention, and is a matter which many arbitration rules specifically require that they do give their attention and ensure that procedures are appropriate to the nature and value of the dispute.<sup>17</sup> This is also an issue addressed in the IAA as a matter to which the courts must have regard.

### **IAA – Matters to which the court must have regard; objects of the Act**

A court or authority in exercising the functions and powers listed in s 39(1) must:<sup>18</sup>

“have regard to:

(a) the objects of the Act; and

(b) the fact that:

(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes;

and

(ii) awards are intended to provide certainty and finality.”

The extensive list in s 39(1) seems to cover most, if not all, situations where a court or authority<sup>19</sup> will be applying or interpreting the IAA, the Model Law, the New York

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<sup>17</sup> See, for example, Australian Centre for International Commercial Arbitration Expedited Arbitration Rules, r 3 “Overriding Objective” and r 13.1.

<sup>18</sup> IAA, s 39(2).

<sup>19</sup> See IAA s 18:

“(1) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(3) of the Model Law.

Convention<sup>20</sup> or arbitration agreements and awards. A court or authority is directed to have regard to the objects of the IAA rather than obliged to apply the objects of the Act or the other considerations. Nevertheless, this probably makes little practical difference.

The objects of the IAA are set out in s 2D, as follows:

“The objects of this Act are:

- (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
- (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
- (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
- (d) to give effect to Australia’s obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
- (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July

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(2) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(4) of the Model Law.”

The functions referred to in Articles 11(3) and 11(4) of the Model Law are the appointment of arbitrators. At this stage, no authority has been prescribed, but a arbitral institution such as ACICA would be appropriate.

<sup>20</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (“New York Convention”).

2006; and

- (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.”

The Parliamentary intention and objective is made quite clear by the combination of both ss 39 and 2D – the efficient settlement of disputes by encouraging the use of arbitration in the context of international trade and commerce. Regard should also be had to Article 2A of the Model Law as amended in 2006 which provides:

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith
- (2) Questions concerning matters governed by the Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

**(b) Consistency in the interpretation of the CAA and IAA**

The most important provision for the achievement of consistency between interpretation of the CAA and the IAA is found in section 2A of the CAA:

“2A (1) Subject to section 1AC, in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) to international commercial arbitrations and the observance of good faith.

...

(3) Without limiting subsection (1), in interpreting this Act, reference may be made to the documents relating to the Model Law of:

(a) the United Nations Commission on International Trade Law,  
and

(b) its working groups for the preparation of the Model Law.”

Even if this provision did not contain this express exhortation, it is hoped that courts will, nevertheless, interpret the two Acts consistently unless there is a good reason not to do so.

**(c) Having regard to the international origin and the need to promote uniformity**

Consistency of interpretation is important, but only if the interpretation is both consistent and in accordance with accepted international jurisprudence with respect to the Model Law. As indicated previously it is critically important that the IAA and CAA are not treated as stand alone pieces of legislation devoid of the international jurisprudence.<sup>21</sup>

The IAA and the CAA apply or are based on the Model Law that has been adopted in over sixty countries. The Model Law and the New York Convention, are, by their very nature, international. They are instruments which have been drafted internationally and which were intended by the drafters to apply to international disputes, between entities from different countries. Arbitrations are usually seated in a neutral country, and the arbitration award may be sought to be enforced in any country where the party liable, the award debtor, has assets; though far more easily if that country is a party to the New York Convention. Without uniformity of application, the international commercial

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<sup>21</sup> And see s 2A of the CAA, set out above, which requires this approach from the CAA perspective.

arbitration system would not be a system at all. It would encounter similar difficulties as arise when trying to resolve international commercial disputes in national courts and, ultimately, seeking to enforce judgments internationally. It is beneficial to all countries which have adopted the Model Law (or similarly supportive arbitration laws) and the New York Convention if a harmonised system is maintained.

In a practical sense, this means that Australian courts should have regard to decisions of overseas courts applying and interpreting the Model Law. In my view, the CAA and the IAA encourage this approach as the interpretative provisions specifically direct judges to have regard to the international origins of the provisions applied by the IAA, and to the desirability of the uniform application of these provisions internationally.<sup>22</sup> The same result is contemplated with respect to the Model Law provisions adopted in the CAA provisions.<sup>23</sup>

#### **(d) Practical matters for interpretation**

##### ***Principle of comity***

The High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* reaffirmed the principle that:<sup>24</sup>

Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.<sup>25</sup>

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<sup>22</sup> See IAA, s 2D.

<sup>23</sup> See CAA, s 2A.

<sup>24</sup> (2007) 230 CLR 89 at 150 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.

<sup>25</sup> *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

This principle would appear to apply to both the CAA as uniform national legislation and the IAA as Commonwealth legislation. The application of this principle is likely to be important in the international commercial arbitration context because of the dearth of High Court authority under the IAA and in relation to the Model Law provisions. It is also important in the domestic arbitration context and will assist further in the development of international arbitration jurisprudence as decisions on the CAA provisions feed interpretation of the IAA and the Model Law provisions generally, as discussed previously.

### ***Arbitration lists***

As more State and Territory Supreme Courts and the Federal Court create specialist arbitration lists, or nominate particular judges to hear arbitration matters, further expertise will be developed in the courts. The Federal Court has an “Arbitration Coordinating Judge” in each State and Territory. The Supreme Court of New South Wales has a Commercial Arbitration List, and I am the judge in charge of the Supreme Court of Victoria’s Arbitration List,<sup>26</sup> which is a specialist list (List G) in our Commercial

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<sup>26</sup> The Arbitration List was announced by The Hon. Marilyn Warren AC, Chief Justice of Victoria, 'The Victorian Supreme Court's Perspective on Arbitration' (Speech delivered at the ACICA International Commercial Arbitration Conference on 4 December 2009) available at <http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/supreme+court/home/library/supreme+-+speech+-+remarks+at+the+icac+-+warren+cj%28pdf%29>; see also the Hon. Marilyn Warren AC, Chief Justice of Victoria, 'Victoria's Commitment to Arbitration Including International Arbitration and Recent Developments', <http://www.commercialcourt.com.au/PDF/Speeches/Speech%20By%20Chief%20Justice%20May%202013.pdf> (13 May 2010).



Court.<sup>27</sup> An additional advantage of having a specialist arbitration list is that procedural enquiries relating to arbitration applications can be directed to the one place.<sup>28</sup>

### ***Liaison between courts and with arbitration users***

The consultation process in relation to the new legislation should not end on the commencement of the Acts. If the goals of the IAA and the CAA are to be fully realised, the courts will need to communicate with and receive feedback from commercial arbitration stakeholders. I am in the process of creating an Arbitration Users' Group for the Supreme Court of Victoria. I expect that this Users' Group will be especially useful in discussing and developing the procedures for commencing and disposing of applications under the IAA and the CAA. This consultation may lead to further improvements to the Arbitration Business Practice Note.<sup>29</sup> I would expect that other courts are establishing similar consultative mechanisms.

The courts should also liaise with each other to develop and share their arbitration expertise. The existence of specialist arbitration lists will help in this regard by directing arbitration business to particular judges within a court who can then share their knowledge and experience with the arbitration judges from other courts. This consultation between judges of the Federal Court and the judges of the State and Territory Supreme Courts will be essential if, as I expect, the majority of Model Law decisions are initially made under the CAA.

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<sup>27</sup> See Practice Note No 2 of 2010 (Arbitration Business); and Justice Clyde Croft, 'Arbitration Reform in Australia and the Arbitration List (List G) in the Commercial Court – Supreme Court of Victoria', presented at a seminar of the Commercial Bar Association of the Victorian Bar on 24 May 2010, <http://www.supremecourt.vic.gov.au/wps/wcm/connect/cb14d780438d0ea1b2e2fb34222e6833/Arbitration+Reform+in+Australia+-+Combar+Commentary+-+24+May+2010.pdf?MOD=AJPERES>.

<sup>28</sup> In Victoria, Practice Note No 2 of 2010 (Arbitration Business) lists the contact details of my Associates.

<sup>29</sup> Practice Note No. 2 of 2010 – Arbitration Business.

### ***Raising the expectations on parties***

In order to achieve the general objectives discussed, courts need, and value, assistance from parties and their representatives. Solicitors and counsel can materially assist the courts in applying the Model Law provisions, as applied by the IAA or as adopted by the CAA, in a manner consistent with international and domestic jurisprudence. Assistance by reference to commentaries and case law in submissions informed by comprehensive research, including consideration of the broader policy considerations underlying the legislation – policy considerations which may have an international dimension, for the purposes of both the IAA and the CAA – is essential.

### **Procedure**

A consistent interpretation and application of the IAA and the CAA, and which is consistent with international thinking having regard to the Model Law base of both pieces of legislation, should lead to the minimum amount of court intervention necessary, as well as providing support for the arbitration process when required. In my view, another important area that the courts need to coordinate is the procedure to be applied with respect to the making of and dealing with applications under the IAA and the CAA. In this context, procedure must also include listing procedures and expedition.<sup>30</sup>

The procedural approach to applications under the IAA and the CAA will have a major impact on the way that Australian arbitration law is viewed. For example, staying court proceedings in favour of an arbitration is a pro-arbitration step, but if it takes an

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<sup>30</sup> Noting in this respect that the Victorian Supreme Court Arbitration List (List G) is available 24 hours per day, seven days per week and hearings can and do take place outside court hours as required.

excessive time for the stay application to be heard and determined, the arbitration process has probably been thwarted anyway.

Procedural consistency and expediency is far more likely to be achieved when there are specialist arbitration lists and judges; as the experience in leading commercial arbitration centres such as London, Singapore and Hong Kong shows. Specific arbitration practice notes and rules are essential to this process.

## **Conclusion**

Australia has world class courts, both in terms of expertise and independence. The quality of its leading arbitrators, international and domestic, and its leading lawyers practising in arbitration matters is beyond question. With Australia's new international commercial arbitration legislation in force, and the new Model Law based domestic commercial arbitration legislation soon to be in force throughout the country, I have no doubt that Australian courts can "get their act together on international commercial arbitration" and – more than that – play a leadership role in facilitating the development of commercial arbitration in Australia, both internationally and domestically. Nevertheless, as I have sought to emphasise, success can only be achieved by a combined effort of all stakeholders recognising the service to the commercial community, domestically and internationally, that commercial arbitration can provide.

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