

# ***Opening Address***

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*Attorney-General*  
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# **INTERNATIONAL COMMERCIAL ARBITRATION IN AUSTRALIA: MORE EFFECTIVE AND CERTAIN**

## **Acknowledgements**

- First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

## **Other Acknowledgements**

- I would also like to thank Professor Doug Jones AM, President of the Australian Centre for International Commercial Arbitration and Partner at Clayton Utz for his introduction and welcome.
- The Hon. Michael Kirby AC CMG.
- The Hon. Justice John Middleton, Judge, Federal Court of Australia.
- The Hon. Marilyn Warren AC, Chief Justice, Supreme Court of Victoria.
- The Hon Clyde Croft, Judge, Supreme Court of Victoria.
- Dr Michael Pryles, Chairman, Singapore International Arbitration Centre.

## **Introduction**

- I am delighted to be opening this conference on international commercial arbitration.
- On 25 November 2009, I introduced the International Arbitration Amendment Bill 2009 into the House of Representatives.
- The Bill is the most significant reform to the *International Arbitration Act 1974* since Australia implemented the UNCITRAL Model Law in 1989.

### **Alternative Dispute Resolution**

- this reform is part of the Commonwealth's broader push to promote more effective resolution of commercial disputes, including through alternative dispute resolution.
- Last week at the International Commercial Litigation and Dispute Resolution Conference I described key reforms underway to facilitate cross-border commercial dispute resolution.
- Last month I also launched the National Alternative Dispute Resolution Advisory Council (NADRAC) report on alternative dispute resolution in the Civil Justice System.
- This report looked at ways of encouraging greater use of alternative dispute resolution in Australia.

### **Reforms at the State and Territory Level**

- In addition, as you will all be aware, the States and Territories are also in the process of reforming the Commercial Arbitration Acts.
- This is an issue which the Commonwealth is fully supporting.
- I warmly welcome the proposal by State and Territory governments to adopt uniform Commercial Arbitration Acts based on the UNCITRAL Model Law.
- Adopting legislation in line with the Model Law should ensure a more uniform system of arbitration in Australia.
- In fact, the move by the States and Territories to adopt the Model Law was instrumental in my decision not to confer exclusive jurisdiction on the Federal Court of Australia in the field of international arbitration – an option canvassed in the discussion paper on the International Arbitration Act I released in November 2008.
- Nonetheless, the relationship between the Commonwealth legislation and State and Territory legislation—and the courts which have jurisdiction under the International Arbitration Act—is something I am prepared to revisit should the proposed reforms be sidetracked or discontinued.

## Reforms at the Federal Level

- Since coming to office, I have been determined to make Australia a regional centre for international arbitration. If this is to occur—and I believe it can—we need to create an Australian brand of arbitration, a brand that sets us apart from our competitors such as Singapore and Hong Kong.
- What might such a brand look like?
- The starting point—and I stress it is only a starting point—must be the International Arbitration Act.
- The critical feature of the Act is that it implements the UNCITRAL Model Law.
- The benefit of this is that businesses thinking about using Australia as a venue to resolve a dispute— or their legal advisers—are likely to be familiar with and trust the Model Law.
- Familiarity and trust brings confidence.
- A key feature of the International Arbitration Amendment Bill is that it picks up key reforms to the Model Law adopted by UNCITRAL in 2006.
- It also includes additional provisions that supplement the Model Law, including provisions for court assistance and confidentiality and addressing the consequences of the death of a party.
- As with any piece of legislation, it is essential that there is consistency in the application and interpretation of the Act.
- This becomes particularly important in the area of international arbitration where “strange” or “unusual” interpretations of the Model Law risk placing Australia out of step with other Model Law countries. This has the potential to dissuade businesses from coming to Australia to resolve their disputes.
- I am sure no one here needs reminding of the impact that the *Eisenwerk* decision has had on Australia’s reputation internationally.
- The Bill contains significant measures to provide *certainty* in the way the Act and the Model Law is applied and interpreted.
- Firstly, the Bill will repeal section 21 which currently allows the parties to opt out of using the Model Law as the arbitral law governing their dispute.
- In doing so, the Bill “kills off” *Eisenwerk* once and for all. Without section 21, that decision is of no effect.

- This reform also brings Australia into line with most of the other significant common law countries.
- The Bill also provides that State and Territory arbitration Acts do not apply to international commercial arbitration.
- Finally, the Bill includes a new objects clause and a new interpretation clause to assist the courts in using and interpreting the Act.
- This is designed to promote a consistent application of the Act. One which respects the fundamental nature of international arbitration as an alternative and cost effective way of delivering justice.
- And I wish to reiterate what I said in my Second Reading Speech – the Government encourages all courts to adopt procedures that ensure any appeals of international arbitrations are heard by judges with particular expertise in this area.

### **Cultural Change**

- While the Bill includes other significant reforms, I note that Ian Govey from my Department will be speaking in more detail on the content of the Bill later in the morning.  
I acknowledge a couple of loose ends to tie together.
- As I have already indicated, in my view legislative change is only one part of what is required to build a truly Australian brand of international commercial arbitration.
- What is needed—and what I hope the legislative reforms contained in the Bill will spark—is cultural reform as to how arbitration is conducted in Australia.
- This isn't something the Government can legislate for – though the Bill gives a pretty good idea of what the Government has in mind.
- The Bill states that in using or interpreting the Act and the Model Law, a court must have regard to the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes.
- This is a clear statement of the Government's expectations for international arbitration.
- As the title of this conference suggests there is a real question mark as to whether international arbitration as currently practiced in this country lives up to that statement.
- Arbitrators need to stop thinking of themselves as common law judges without robes and start thinking of themselves as service providers.

- Similarly, courts need to respect this essential aspect of arbitration.
- If Australia is to ever emerge as an arbitration centre we need our arbitrators to provide a service that is not available in those seats – something that is more than “litigation-lite”.
- We need to invent a form of arbitration that is tailored to the needs of the parties – to the needs of business.
- A form of arbitration that is prepared to do away with unnecessary formalities and get on with identifying and solving the problem that exists between the parties.
- A form of arbitration that delivers swift and cost-competitive outcomes.
- A form of arbitration that is innovative and creative and allows the undoubted talents that exist in the arbitration community to flourish.
- We need to be able to put ourselves forward as the place you come to when you want your problem fixed, and fixed fast and fairly.
- The Act – once it has been amended by the Bill – will provide a strong legal framework to support that approach.

## **Conclusion**

- In conclusion, the International Arbitration Amendment Bill currently before Parliament will establish a more effective and certain framework for the conduct of international arbitration.
- At the State and Territory level, there is the genuine prospect of having commercial arbitration Acts that complement the Commonwealth Act to create a uniform system for arbitration based on the Model Law.
- Now it’s up to legal practitioners and arbitrators to get on with the job of building an Australian brand of arbitration – one recognised the world over for solving problems efficiently, impartially and quickly.
- The first necessary step is for contracts drawn up by Australian lawyers to include dispute resolution clauses that refer to Australian institutions – rather than New York or London.
- But more than that – such clauses need to reflect the needs of their clients and not just provide an off-the-shelf solution where this isn’t appropriate.

- Then we will need to ensure that arbitrations are conducted in a manner that meets the needs of clients.
- While I have focussed my remarks on arbitration, it is also important to consider mediation and other non-determinative processes.
- This is of course especially important in the context of international disputes because of the cultural and commercial benefits of parties reaching their own agreement on a dispute where that is possible.
- Having quality Australian arbitrators and mediators is essential.
- Bodies like ACICA can and, in my view should, play a key role in educating and training Australian arbitrators.
- I truly believe that with the reforms I have outlined today and the profession playing its role we can make Australia a significant market for arbitration.
- Thank you.

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