REMARKS OF THE HON. MARILYN WARREN AC
CHIEF JUSTICE OF VICTORIA
AT THE AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION RECEPTION AT THE MELBOURNE OFFICE OF MALLESONS STEPHEN JACQUES ON 13 MAY 2010

'Victoria's Commitment To Arbitration Including International Arbitration And Recent Developments'

Importance of Arbitration

As I emphasised when I announced the launch of the Arbitration List of the Commercial Court in December of last year, arbitration, and ADR more generally, plays a fundamental role in the dispute resolution process. There is much that courts and arbitrators can learn from each other, as experience of the last twenty-five years or so has shown.

That brings me to the topic I would like to address today – Victoria's commitment to arbitration, domestic and international, and recent developments in those areas.

May I say at the outset, the Victorian Supreme Court is strongly committed to promoting and supporting ADR. To the extent that parties choose an ADR process – whether overseen or provided by the Court itself, or by an external provider – the Court is essentially pre-disposed to accept and support that choice. Where parties choose to arbitrate, for example, the Court will play a supportive, collaborative and facilitative role.

Where emphasis is placed on supporting, rather than directing and reviewing, arbitral proceedings, the incidence of procedural delay and inefficient 're-review' is minimised. Costly duplication of proceedings is avoided in a process of review where the legislative review criteria limit or exclude merits review. The legislative basis for review and support is, domestically, the *Commercial Arbitration Act* ("the CAA") of each State and, internationally, the Commonwealth *International Arbitration Act* ("the IAA").

The current legislative reform proposals will establish regimes which are similar in both the domestic and international spheres as they are based, primarily, on the UNCITRAL Model Arbitration Law ("the Model Law"). They recognise the inherent variability and flexibility that arbitration offers, and accept the principle of party autonomy. Review processes in the courts are necessarily limited or excluded. This is the key to effective arbitration.

Although the IAA and the Model Law do not permit merits appeals, the possibility remains, in limited circumstances, in domestic arbitration. In these circumstances it may be, for example, that a particular judge reviewing an arbitral award, would not have come to the same decision as the arbitrator. Of course, an appeal court does not substitute its own decision in place of a trial judge's decision simply because it would have decided the matter differently at first instance. So, in the arbitration sphere, a court will resist this temptation and only act on the basis of relevant error.

Consequently, the Court's role in arbitration is primarily a supportive one.

The reasons for this are many. Supportive courts provide certainty and predictability in arbitration and ADR generally, and encourage the speedy and efficient resolution of disputes: the backbone of a sophisticated, complex and dynamic modern economy. It avoids second guessing for the sake of it and the consequent costly duplication of proceedings. This makes good sense at many levels. And it is increasingly necessary: Victoria competes as a venue for arbitration against many other jurisdictions, both domestically and internationally.

We have been fortunate in Australia to have survived the global financial crisis – its impact has largely been minimised. However, as its impact continues to reverberate globally, many companies are facing an increased incidence of disputes, as is evident from the

significant rise in new cases received by international arbitral institutions. The caseload of many arbitral centres has skyrocketed – take, for example, the Singapore International Arbitration Centre, whose caseload has increased by over 153% between 2005 and 2009. Demand for dispute resolution services has increased, and continues to increase steadily, hence the pressure to resolve disputes in a timely, cost-efficient, predictable and final way.

Support for arbitration

The Supreme Court encourages the development of arbitral expertise, the provision of facilities to support and promote arbitration and development of improved education of arbitrators and other ADR providers.

The new Arbitration List G of the Commercial Court commenced on 1 January 2010. This is a specialised List, with a designated judge in charge, hearing the full range of both domestic and international

arbitration matters. Its practice is governed by the Green Book of the Commercial Court[1], and also the new Arbitration Business Practice Note[2], which outlines, comprehensively, court procedures with respect to disputes involving arbitration, the nature of arbitration matters which will be heard and the support that may be provided.

In List G, matters may be heard throughout all stages of an arbitral dispute – including urgent matters which might formerly have been heard in the Practice Court. Despite a common perception that domestic commercial arbitration is in serious decline in Australia, List G has attracted a very promising amount of work in a short time.

Developing awareness of the particular nuances of arbitration in a domestic context is crucial in reinforcing the positive perception of international businesspeople and lawyers about the Court's expertise

---

1 Practice Note 1 of 2010
2 Practice Note 2 of 2010

in international arbitration. Indeed, one of the benefits of the Arbitration List in Victoria, and similar efforts across Australia, is that a consistent body of arbitration-related decisions will be developed by a group of expert judges. This will provide greater certainty if litigation becomes necessary.

Building physical infrastructure to support arbitration

The Supreme Court is also supportive of moves to develop physical infrastructure to support arbitration and ADR more generally. I note the recent development of the multi-purpose dispute resolution facilities established in Singapore, known as Maxwell Chambers. The facility houses 14 custom-designed and fully equipped hearing rooms, ample preparation rooms, and offices for many of the top international ADR institutions.

Closer to home, the Commonwealth and New South Wales Governments have supported an arbitral centre in Sydney. It is

modelled on the Singaporean centre. It is a centre in which Australian Centre for International Commercial Arbitration (ACICA) will play a major management and supportive role. This will provide a significant boost to arbitration in Australia. It should be the first step in a national arbitration grid. Australia is poised with its arbitration expertise to provide a truly competitive service. So, next, after Sydney, Victoria should be ready to support this development with similar facilities in Melbourne.

Recent developments: reforming Australia's arbitration laws

Now, more than ever in recent times, the Australian legislative approach to arbitration has come under increased scrutiny. The Supreme Court supports measures to modernise and streamline Commonwealth and State international and domestic arbitration legislation.

Over recent months, various government, legislative, commercial and not-for-profit bodies within Australia (including ACICA) have

been working, in conjunction, to reform both the legislative regimes for domestic and international arbitration.

The new regimes will clarify a number of ambiguities in the current law, reinforce Australia's and Victoria's support for arbitration and arbitral best practice, and provide clear guidelines and support for judges in determining and resolving arbitral disputes, domestically and internationally.

At the Standing Committee of Attorneys-General last week, the ministers agreed to implement the model CAA. The Supreme Court has been a strong supporter. Significantly through the model bill there will be an overriding objective for arbitrations to be conducted economically and expeditiously.

International arbitral reform

The *IAA* has not been reviewed comprehensively since the Model Law was first adopted in Australia in 1989. The IAA is now lagging

comparable arbitration law across the world. As it stands, this legislation does not enhance Australia's attractiveness as a venue for arbitration.

The need for reform was recognised by the release of a Discussion Paper by the Commonwealth Attorney-General in late 2008. This reform process led to the introduction of the IAA Bill into the Commonwealth Parliament. This Bill is currently in committee stage, with further amendments that may follow. As the Bill stands, it offers significant improvements to the existing law.

I have, on behalf of the Court, taken an active role in providing submissions on this legislation. A number of drafting amendments, in particular, have been suggested which would provide for arbitral best practice, and clarify and clearly explain the relationship between courts, arbitrators, and associated arbitral entities.

Promoting ADR in legal and judicial education

The Supreme Court encourages moves to integrate a greater focus on non-curial dispute resolution techniques within legal education, at all levels. In Victoria, I am aware, as Chair of the Council of Legal Education, that there is greater focus on ADR at an undergraduate level. Through that Council I anticipate expanded annual training for lawyers involved in providing ADR services and greater judicial training in the range of ADR options available. As Chair of the Judicial College of Victoria we are placing extensive focus on our ADR programmes. Within the Supreme Court we have sent judges – Justices Weinberg and Judd – in March to investigate judge-led ADR in the United States and Canada. I expect we will shortly send two other judges to participate in an ADR programme in California.

Amongst other things, the Court works in conjunction with external providers to host seminars and promote discussion on ADR, for

example, a recent seminar led by Justice Davies on early neutral evaluation within the Commercial Court. This assists in developing a higher level of awareness of, and expertise in, arbitration as an ADR mechanism amongst Australian lawyers and the judiciary.

Where to from here?

The passage of the Commonwealth legislation and the respective State CAAs will represent a clear improvement of the arbitration environment in Australia. The new laws will give parties the scope to choose procedures that match the complexity of their disputes in an environment of judicial support. This will make Australia more competitive as an international arbitration venue as well as enabling more effective resolution of domestic commercial disputes.

However, changes in the arbitral laws alone will not provide benefits unless lawyers, arbitrators and parties take advantage of the new regime. To do so, legal education, facilities and expertise will all

have to develop. This will place Victoria, and Australia more broadly, on a better footing to compete with other international arbitration 'hubs' – particularly those in the Asia-Pacific region, such as Singapore and Hong Kong.

I look forward to the opportunities the new international and domestic legislative regimes will provide for a strengthened partnership between the courts and arbitrators in pursuit of the goal of efficient, effective and appropriate dispute resolution. Victorian Supreme Court, through the Commercial Court, will play a significant part in this respect.

In closing, I extend warm congratulations to Justice Clyde Croft upon the recognition and honour bestowed on him by ACICA.