



CHIEF JUSTICE'S CHAMBERS
SUPREME COURT
MELBOURNE, 3000

22 December 2008

Mr Stephen Bouwhuis
Office of International Law
Attorney-General's Department
BARTON ACT 2600

Dear Mr Bouwhuis

International Arbitration Act 1974

I write in response to the Attorney-General's discussion paper on the *Review of the International Arbitration Act 1974* (the Act).

The aim of the review is ensure that the Act best supports international arbitration in Australia. Similar aims prompted this Court to issue a practice note, taking effect from 1 January 2007, to establish a panel of judges responsible for arbitration business in the Court and processes to deal with urgent applications. I attach a copy of Practice Note No 7 of 2006 for your reference. The practice note covers matters under both the State and Federal Acts and seeks to ensure this Court supports arbitration in Victoria as part of the Court's long standing commitment to supporting alternative dispute resolution processes.

The paper raises a number of issues of policy and consistency with the UNCITRAL model law. These matters are best left to others to address. The question of jurisdiction is a matter on which I wish to make a number of points.

The discussion paper refers to the Government's present proposal to amend the Act to give the Federal Court concurrent jurisdiction with the State and Territory Supreme Courts. I note that the Bill referred to in the paper has now been introduced into Federal Parliament. This is not a matter with which I have any difficulty. Indeed, it promotes the

desirable aim of allowing commercial matters to be brought in the most appropriate and convenient courts.

The proposal that jurisdiction be vested exclusively in the Federal Court would have the opposite effect. Parties would be denied the option of bringing matters in State and Territory Supreme Courts which have made significant contributions to the jurisprudence in this field.

The only matter offered in support of the proposal is a statement that exclusive jurisdiction may lead to more consistent jurisprudence in applying the Act. This is a statement without support or substance.

A brief survey of cases under the Act will reveal the application and citation of decisions of Supreme Courts in Federal Court decisions and *vice versa*. Equally, State and Territory Supreme Courts will apply and refer to decisions of other Supreme Courts. International jurisprudence in relation to the Model Law is considered by all courts where necessary.

The High Court has recently reaffirmed the long standing proposition that:

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.¹

Consistent jurisprudence between Australian courts in the application of Commonwealth legislation is provided for as a matter of comity, and ultimately through the appellate structure of the High Court.

There are significant difficulties with the proposal to vest exclusive jurisdiction in the Federal Court for matters arising under the Act.

In some cases there is uncertainty or dispute as to whether a matter falls under Federal or State legislation. Where such matters are brought before a State court at the moment, the court is able to resolve the issue as part of the substantive proceeding. If exclusive jurisdiction was vested in the Federal Court it would lead to sterile debates about jurisdiction which could be employed tactically by a party to achieve delay. International arbitration is not best supported by such an outcome.

¹ *Farah Constructions v Say-Dee Pty Ltd* 230 CLR 89, 151-152 see also *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

A brief survey of cases under the Act reveals that the most frequently invoked provision is section 7, with one party seeking a stay of proceedings on the basis that the parties agreed to resolve their dispute through arbitration.

It is axiomatic that the court seized of a matter should determine the application for a stay of proceedings. That court will be best placed to determine whether the dispute is one capable of settlement by arbitration and the conditions, if any, on which the stay is to be granted. Quite apart from questions as to the validity or propriety of the Federal Court staying a proceeding in a State Court, it would be waste of judicial resources for a court other than that seized of the matter to determine such applications at first instance.

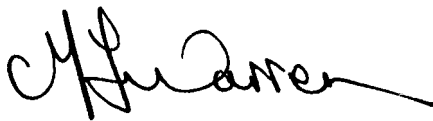
Accepting that exclusive jurisdiction cannot be vested in the Federal Court to determine all, or even most matters involving the application of the Act, the virtue of creating a pocket of exclusive jurisdiction under the Act becomes even more questionable.

The exclusive jurisdiction which could be created would be for the minority of matters and would only serve to hamper the ability of parties to have all matters resolved in a single forum in cases where related matters fell outside the jurisdiction of the Federal Court.

State and Territory courts, and Supreme Courts in particular, play a significant role in arbitration matters under State and Federal legislation. They will continue to do so whether or not this proposal goes ahead. However, it is my considered view that there is nothing to be gained and much to be lost in terms of experience and flexibility in hiving off areas of jurisdiction under the Act for the Federal Court to the exclusion of States and Territory Courts.

You will be aware that the view that exclusive jurisdiction should not be conferred on the Federal Court is shared by all State and Territory Chief Justices. I offer these comments in addition to those contained in the Chief Justices' joint statement.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Warren', with a long horizontal flourish extending to the right.

MARILYN WARREN
Chief Justice



PRACTICE NOTE No. 7 of 2006

ARBITRATION BUSINESS

1. The Court is supportive of the wishes of disputants to resolve all or part of their disputes by referral to arbitration. In this regard, the attention of practitioners is drawn to Chapter 1 Rule 50.08.
2. The Chief Justice has appointed a panel of two judges who, together with the Principal Judge of the Commercial and Equity Division, will be responsible for arbitration business in the Court. These judges will be responsible for all arbitration business, including arbitrations arising out of building cases and commercial list cases. The following judges are the panel judges:

The Hon Justice Hollingworth
Associate: 9603 6905 or 9603 6260

The Hon Justice Hargrave
Associate: 9603 6209 or 9603 7040

The Principal Judge of the Commercial and Equity Division is
the Hon Justice Byrne
Associate: 9603 6358 or 9603 6054

They will be assisted by Master Daly
Associate: TBA

3. The composition of the panel may change from time to time. Practitioners are referred to the Court website (www.supremecourt.vic.gov.au) for the current members of the arbitration panel and the Principal Judge.
4. Applications under the *International Arbitration Act 1974* (Cth) must be commenced by originating motion. Applications under the *Commercial Arbitration Act 1985* must comply with Chapter II Order 9.

5. Parties seeking to bring an application must first consult with the associate of the Principal Judge to establish a hearing date and to appoint a judge or master to hear the application. The Prothonotary will not accept a summons without a return date which has been authorised by this associate.
6. An application to enforce a foreign award pursuant to the *International Arbitration Act* s. 8, should, as far as possible, comply with the requirements of Chapter II Rules 9.04 and 9.05. Practitioners are reminded that upon an application for leave to appeal against an arbitrator's award under the *Commercial Arbitration Act* 1985 the requirements of Chapter II Rules 9.06, 4.06 and 4.07 must be complied with.
7. Subject to any direction of the judicial officer hearing the application, practitioners must deliver to the associate, not less than two clear days before the time appointed for the hearing of the application, a copy of all affidavits including exhibits together with a brief outline of argument in support of the application.
8. From time to time urgent interlocutory applications arise in the course of arbitrations. The Court is concerned that it be available on short notice to hear and to promptly determine such applications. The following provisions shall apply to applications which are accepted by the Principal Judge as urgent.
 - a. The applicant should deliver to the associate of the Principal Judge at the time of seeking to bring the application a copy of the application and of all affidavits including exhibits and a brief outline of argument in support of the application.
 - b. The practitioner for the respondent should as soon as practicable and in any event on the day prior to the hearing of the application deliver to the associate of the judicial officer appointed to hear the application a copy of all affidavits including exhibits filed in opposition together with a brief outline of argument.

c. If all parties to the application so request, the judicial officer appointed to hear the application may agree to determine the application within 24 hours of the completion of argument provided that in such a case no reasons for the decision will be provided at the time of determination. Any party requiring reasons must so advise the judicial officer at the time of the determination and the judicial officer will provide reasons, but they will be in short form. Reasons in short form will be simply statements, without elaboration, of the findings of fact and principles of law which lead to the determination.

9. This Practice Note takes effect on and from 1 January 2007.

10. This Practice Note is in substitution for Practice Note No. 3 of 2001 which is hereby revoked.

Vivienne Macgillivray
Executive Associate to the Chief Justice
20 December 2006