

Review of the International Arbitration Act 1974

Comments by the Chief Justices of the States and Territories

We refer to Question H in the Discussion Paper raising the possibility that the Federal Court of Australia could be given exclusive jurisdiction for matters arising under the International Arbitration Act. No reason in favour of this suggestion is advanced. The only observation made is that: "One advantage is that this may lead to more consistent jurisprudence in applying the Act".

Over the last decade or so there has been a considerable enhancement of the sense of collegiality amongst Australian judges. Important steps are being taken to ensure the emergence of a national judiciary. Nothing is more calculated to undermine the existence of this sense of collegiality or the prospect of a national judiciary than this kind of suggestion.

Any proposal for exclusive jurisdiction raises the prospect of consequential jurisdictional disputes. In the context of the International Arbitration Act those disputes could emerge over such issues as whether or not an arbitration can be classified as one relating to "international commercial arbitration" or whether or not the parties have agreed, as the UNCITRAL Model Law permits, that the arbitration should be governed otherwise than under that Law. The kinds of issues considered in Parts C and D of the Discussion Paper, which will need to be resolved by a court, will be transformed into a jurisdictional issue with all of the litigious possibilities that that involves.

We note the proposition that an exclusive jurisdiction may lead to "a more consistent jurisprudence". Nothing is set out in the Discussion Paper which indicates that there is any lack of consistency in this regard. We do not accept that it exists. Since the judgment of the High Court in *Australian Securities Commission v Marlborough Goldmines Ltd* (1993) 177 CLR 485 at 492, all Australian intermediate courts of appeal have been required to follow the judgment of another intermediate court of appeal with respect to such matters. In our experience that principle is frequently applied by all of our Courts.

Individual judges of a court can manifest a difference in approach. However, that is as true a point in relation to the Federal Court as it is in relation to a State Court. The application of the principle in *Australian Securities Commission v Marlborough Goldmines Ltd*, and the role of the High Court as the ultimate court of appeal, will ensure “consistent jurisprudence” in this aspect of the law. There is no reason to think that that can be achieved only by giving exclusive jurisdiction to the Federal Court.

Some judges of State and Territory courts have considerable expertise in this field. This expertise will continue to be deployed in judicial decisions with respect to domestic arbitration. It would not assist Australia’s position in relation to international arbitration if the law with respect to domestic arbitration develops in a significantly different manner. Creating a barrier between international and domestic commercial arbitration systems, in a way that does not exist, most relevantly, in Hong Kong and Singapore, would constitute a significant disadvantage. Any attempt to hold out Australia as a centre for international arbitration will not succeed if the domestic arbitration system does not operate consistently with the international arbitration regime.

The suggestion should be rejected.

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The Honourable Paul de Jersey AC	Chief Justice of Queensland
The Honourable J J Spigelman AC	Chief Justice of New South Wales
The Honourable Terence J Higgins AO	Chief Justice of the ACT
The Honourable Marilyn Warren AC	Chief Justice of Victoria
The Honourable Brian Martin	Chief Justice of the Northern Territory
The Honourable Wayne Martin	Chief Justice of Western Australia
The Honourable Ewan Charles Crawford	Chief Justice of Tasmania

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