



## **Australia's Place in the World**

### **Remarks of the Honourable Marilyn Warren AC Chief Justice of Victoria to the Law Society of Western Australia Law Summer School 2017, Perth, Western Australia**

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#### **Introduction**

First things first, what is the world in which Australia is placed?

The rate of change seen particularly in 2016 with BREXIT and the election of Donald Trump to the Presidency of the United States is astonishing and must have far ranging and reaching consequences beyond the short term. The changes taking place abroad will have an undeniable impact at home. 'Australia's place in the world' was a prescient yet challenging choice of topic by the organisers of this conference as it asks us to draw up a map while the ground is shifting beneath our feet.

## Overview

Perth is a fitting location to discuss Australia's place in the world. At the Asia-Pacific Regional Arbitration Group conference some years ago, Chief Justice Martin noted that Perth is closer to Singapore than it is to Sydney, and that it enjoys the same time zone as many Asian commercial centres. He said that to appreciate Western Australia's orientation to Asia, he need only speak to his neighbours.<sup>1</sup>

With our location in mind, today I would like set the scene by looking at the shift from the old world to the new. I will look at some recent developments in global politics and trade, including President Trump's inauguration, Prime Minister May's Brexit plans, and China's increasing engagement with the global economy.

I will then discuss the internationalisation of litigation in Australian courts and arbitral tribunals, the challenges posed by investor-state arbitration, and opportunities for the Australian legal profession. In the

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<sup>1</sup> Chief Justice Wayne Martin AC, After Dinner Address (Speech delivered at the 10<sup>th</sup> Anniversary Conference of the Asia-Pacific Regional Arbitration Group, Sofitel, Melbourne, 27 March 2014).

course of this discussion I will suggest some ways in which Australian courts and tribunals and the Australian legal profession might enhance the reputation and appeal of Australia as a centre for the resolution of international disputes.

### **Setting the scene**

Michael Wesley, Professor of International Affairs and Dean of the College of Asia and the Pacific at the Australian National University, recently observed that ‘we do stand at a cross roads of world order’.

Almost a month ago President Donald Trump was sworn in as President of the US. He delivered a relatively brief inauguration speech with a clear message. Nationalism, protectionism and isolationism are back. Globalism is out, unless of course it promises to make America win again.

The President tied globalism to the striking image of ‘rusted-out factories scattered like tombstones across the [American] landscape’.

He blamed it for wealth being ‘ripped’ from middle-class American homes and being redistributed across the world.

He emphasised that from now on, it will be ‘America first’, saying ‘Every decision on trade, on taxes, on immigration, on foreign affairs will be made to benefit American workers and American families. *We must protect our borders* from the ravages of other countries making our products, stealing our companies and destroying our jobs. *Protection* will lead to great prosperity and strength’.

In line with his inauguration speech, and just three days after it, the President signed an executive order to withdraw from the Trans-Pacific Partnership.

The UK Prime Minister Theresa May gave her Brexit speech just days before the President’s inauguration. In stark contrast to President Trump’s speech, the pervasive themes of Prime Minister May’s speech were ‘a global Britain’, free trade, diversity, ‘old friends and new allies’ and being outward-looking. The Prime Minister explained that the

Brexit vote ‘was not a decision to turn inward and retreat from the world...[it was] not the moment Britain chose to step back from the world. It was the moment [Britain] chose to build a truly Global Britain’. The essence of the speech was that Britain would be not just a European Britain but a Global Britain.

While the ‘hard Brexit’ foreshadowed by the UK government suggests the raising of barriers and a corresponding retreat from freedom of trade and movement, Prime Minister May made it plain that Britain is ‘one of the firmest advocates for free trade anywhere in the world’, and that Britain would seek to ‘remove as many barriers to trade as possible’, because ‘the erection of new barriers to trade...means...less trade, fewer jobs, lower growth’.

In the course of her speech the Prime Minister emphasised Britain’s ‘profoundly internationalist’ history, culture and mindset, and its desire to ‘trade and do business all around the globe’. In this context she mentioned China, Brazil, India, Australia and other countries. Prime Minister May said that Britain will be able to strike its own trade

agreements now, and would 'become even more global and internationalist in action and in spirit'.

On the very same day as Prime Minister May's Brexit speech, Chinese President Xi Jinping spoke at the World Economic Forum in Davos and expressed even firmer support for free trade. He recognised that economic globalisation is a double-edged sword that creates opportunities but also poses challenges. Instead of being feared or avoided, however, globalisation should be guided and made more inclusive. President Xi spoke of balance and equity, and the need for improved global economic governance and a relentless pursuit of innovation. He called for openness and warned against protectionism.

He said that countries:

should view their own interests in a broader context and refrain from pursuing them at the expense of others...(saying)...

One should not just retreat to the harbour when encountering a storm, for this will never get us to the other shore of the ocean.

We must redouble efforts to develop global connectivity to enable all countries to achieve inter-connected growth and share

prosperity. We must remain committed to developing global free trade and investment, promote trade and investment liberalization and facilitation *through opening-up and say no to protectionism*. Pursuing protectionism is like locking oneself in a dark room. While wind and rain may be kept outside, that dark room will also block light and air. *No one will emerge as a winner in a trade war*.

Echoing President Xi's call for more inclusive global institutions, Professor Wesley has observed that a more multilateral world order is 'very much in the interests of countries like little old Australia'.

President Xi said China 'will keep its door wide open and not close it'. He welcomed all people 'aboard the express train of China's development', which he said is 'an opportunity for the world'.

So we have it that in the space of four days in January, the leader of Australia's closest strategic ally and largest investor, the leader of Australia's oldest ally and number two investor, and the leader of

Australia's number one trading partner, all put forward their positions on globalisation and global trade. A clear tension can be seen between communitarianism and individualism; globalism and nationalism.

Professor Wesley explained that US leadership of the world order is fraying, that the US and Europe are entering into an introspective phase, and that opportunities are arising for countries like China, India and Brazil to play a greater role in the institutions of world order. He said the world has been waiting for a long time now for those countries to play a more responsible leadership role. Peter Varghese, former Australian High Commissioner to India and Secretary of the Department of Foreign Affairs and Trade, takes a different view, and thinks that 'the capacity of the US system to regenerate is not only historically proven but likely to be a feature of the next 10-15 years'.<sup>2</sup> Although he does say that strategic and economic weight is shifting from the US to China, and an organic process of the two countries sharing strategic power has been set in train.

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<sup>2</sup> ABC Radio National, 'Australia and the World', *Between the Lines*, 1 September 2016 (Peter Varghese).



Australia's dilemma has been identifying the extent to which it can pursue its economic interests with China without fracturing its strategic alliance with the US. Wesley calls this security-prosperity dualism.<sup>3</sup> After China re-emerged as the 'industrial heart and economic hinterland of Pacific Asia', the 'alignment of security and prosperity dynamics' ended.<sup>4</sup> This dilemma is not unique to Australia. The bifurcation of security and prosperity interests 'dominates most regional countries' foreign policies', with countries that are not major powers seeking to balance the 'new dualism' and not be forced to choose between China and the US. Varghese puts it this way: 'for Australia the challenge has always been to know when you can say no to the United States and when you must say yes'.

How does Australia, as a middle power,<sup>5</sup> manage this meat in the sandwich role? Middle powers do not impose their policy preferences

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<sup>3</sup> Michael Wesley, 'Trade agreements and strategic rivalry in Asia' (2015) 69(5) *Australian Journal of International Affairs* 479, 481.

<sup>4</sup> Ibid.

<sup>5</sup> Andrew Carr, *Is Australia a middle power?*

<[http://www.internationalaffairs.org.au/australian\\_outlook/is-australia-a-middle-power/](http://www.internationalaffairs.org.au/australian_outlook/is-australia-a-middle-power/)>; the Honourable Gareth Evans, 'No Power? No Influence? Australia's Middle Power Diplomacy in the Asian Century' (2012 Charteris Lecture delivered at the Australian Institute of International Affairs, New South Wales Branch, Sydney, 6 June 2012); Australian Strategic Policy Institute, 'Are we a top 20 nation or a middle power? Views on Australia's position in the world', *Strategic Insights*, December 2014.

on other states. Rather, they build coalitions with like-minded states.<sup>6</sup> Middle power diplomacy requires flexibility and adaptability, because like-mindedness is not constant. The countries with whom Australia has shared like-mindedness have changed over time, from the UK, to the broader Anglosphere, and now to more immediate neighbours. This shift in attitude is seen in the 2016 Lowy Institute poll, in which China and the US tied when Australians were asked which relationship was the more important to Australia.<sup>7</sup> Just two years earlier, the US had come out on top.

If the US persists with its inward gaze, there may be increased opportunity for Australia to forge closer economic ties with its neighbours. With the exit of the US from the TPP, many expect that Australia's relations with China, building on its trade partnership and the shared preference for a global outlook would gain ascendancy. It would appear that Australia identifies to a large degree with the sentiments expressed by President Xi Jinping in Davos.

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<sup>6</sup> The Honourable Gareth Evans, 'No Power? No Influence? Australia's Middle Power Diplomacy in the Asian Century' (2012 Charteris Lecture delivered at the Australian Institute of International Affairs, New South Wales Branch, Sydney, 6 June 2012).

<sup>7</sup> Lowy Institute for International Policy, *The Lowy Institute Poll 2016* <<https://www.lowyinstitute.org/publications/lowy-institute-poll-2016>>.

However, Australia would miss the US' contribution to a global rule of law mentality. Professor Wesley says the US' great contribution to world order has been convincing all the other countries that their interests are served by following the rules and playing the game.<sup>8</sup> When countries do not follow the rules, and instead carve out for themselves exceptions to global norms when it suits them, such as China in the South China Sea, global norms and security and trading interests are all put at risk.<sup>9</sup> In this vein, the Australian Foreign Minister Julie Bishop gave a speech to the US noting Australia's 'concern about continued construction and militarisation of disputed features in the South China Sea, in particular the pace and scale of China's activities'. The Minister called the US an 'indispensable power' in the region and said '[m]ost nations wish to see more US leadership, not less, and have no desire to see powers other than the US calling the shots'.<sup>10</sup>

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<sup>8</sup> ABC Radio National, 'World Order Under Threat', *Saturday Extra*, 4 February 2017 (Michael Wesley).

<sup>9</sup> Ibid.

<sup>10</sup> Henry Belot, 'Julie Bishop calls on US to increase role in region, raises concerns over South China Sea', *ABC News* (online), 27 January 2017 <<http://www.abc.net.au/news/2017-01-27/bishop-calls-on-us-to-increase-role-in-region/8216704>>.

Varghese says that it is hoped that China ‘will be more and more a player in a rules based system’. He also asks what kind of strategic culture we want — a strategic culture that rests on the rule of law and responsible behaviour, or one that approximates the law of the jungle, where might is right?<sup>11</sup>

As a staunch advocate of the rule of law, Australia may need to pick up some of the slack if the US retreats from the role it has played in encouraging countries to play by the rules. To this end Dr Michael Fullilove, Executive Director of the Lowy Institute for International Policy, says Australia needs to work with its allies and ‘like-minded partners in Europe and in Asia to try to hold together this global liberal order ... and need[s] to try to protect the international institutions like the United Nations’.<sup>12</sup> He also says Australia must be a vigorous participant in international institutions and a leader in Asia.<sup>13</sup> Hugh White, Professor of Strategic Studies at the Australian National

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<sup>11</sup> Varghese, above n 2.

<sup>12</sup> ABC News, ‘A big, big time for Australian foreign policy’, *The World Today*, 3 February 2017 (Michael Fullilove).

<sup>13</sup> ABC Radio National, ‘The Birthplace of the Fortunate’, *Boyer Lectures*, 18 October 2015 (Michael Fullilove).

University, says that Australia needs to do whatever it can to help bring about a regional order that avoids escalating strategic rivalry between the US and China.<sup>14</sup>

However, Australia's ability to play such a role is disputed. Former Prime Minister Paul Keating thinks Australia's influence in the world is waning.<sup>15</sup> In response, Varghese said that influence flows from weight, and Australia brings a certain weight to issues. This weight comes from Australia:

- having the 12<sup>th</sup> or 13<sup>th</sup> largest economy;
- having the 12<sup>th</sup> or 13<sup>th</sup> largest most effective military;
- being an energy super power;
- ranking in the top half dozen in terms of soft diplomacy; and
- being close to a world leader in international education.

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<sup>14</sup> ABC Radio National, 'Let's talk about going to war with China', *Counterpoint*, 14 March 2016 (Hugh White).

<sup>15</sup> Caitlyn Gribbin, 'Paul Keating warns Australia to prepare for the 'rise of China' with strong foreign policy', *ABC News* (online), 31 August 2016 <<http://www.abc.net.au/news/2016-08-31/paul-keating-warns-australia-to-prepare-for-the-rise-of-china/7800062>>.

Fullilove points out that Australia's 'diaspora is one million strong: our own world wide web of ideas and influence'.<sup>16</sup> He urges against the cliché that Australia punches above its weight in the world, and argues that Australia is in fact significant.

Putting aside the dispute about whether Australia is a middle power or whether it is significant, these factors I have mentioned afford Australia the ability to be creative.

From the commentary it seems being creative means looking not just to China and the US. The focus for Australia will not only be on China and the US. Australia-India relations may now assume greater prominence,<sup>17</sup> and getting the Australia-Indonesia relationship right will also be a priority.<sup>18</sup> Creativity will be needed to engage with what Varghese calls a multi-polar Asia and multi-polar Indo Pacific.

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<sup>16</sup> Fullilove, above n 13.

<sup>17</sup> Dhruva Jaishankar, 'Australia-India relations: Poised for take off', *The Lowy Institute: the interpreter*, 10 January 2017 <<https://www.lowyinstitute.org/the-interpreter/australia-india-relations-poised-take-off>>.

<sup>18</sup> Evans, above n 6.

George Megalogenis, journalist and political commentator, also calls for long term planning rather than speeding up the political cycle by thinking in the short term. For Megalogenis, long term thought would involve reflection on Australia's true source of success; its people and its status as a great migrant nation. Migrants account for more than a third of the population in Perth, Melbourne and Sydney.<sup>19</sup> In Perth, the proportion is 37 per cent. Such proportions were last seen in the 1870s. And while the US has been losing its migrant diversity, Australia's migrant diversity has been increasing.<sup>20</sup> Megalogenis says that the migrants being drawn to Australia are the best qualified since the golden intake of the 1850s. Australia's prosperity is contingent on their continued arrival, and if they are not met with cultural acceptance, they will simply go elsewhere and Australia will suffer a diminution in demand, output, creativity and energy.<sup>21</sup> He says that one of Australia's unique strengths is its ability to turn the disparate, querulous cultures of the world into a unified people.<sup>22</sup> Megalogenis says that Australia's

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<sup>19</sup> George Megalogenis, *Australia's Second Chance* (Penguin, 2015) 278.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 279-280.

<sup>22</sup> Ibid 290.

standard of living depends on the migrant,<sup>23</sup> and that an open, globally minded Australia will thrive.<sup>24</sup>

Similar sentiments were expressed by John Edwards, Non-resident Fellow at the Lowy Institute. Edwards produced an analysis entitled ‘How to be exceptional: Australia in the slowing global economy’.<sup>25</sup> He sees Australia’s greatest strength in the context of global economic gloom as its human capital.

The Australian government is in the process of preparing a foreign policy white paper that ‘will provide a roadmap for advancing and protecting Australia’s international interests and define how we engage with the world in the years ahead’.<sup>26</sup> Australians will eagerly await to see where this roadmap places Australia in the world.

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<sup>23</sup> Ibid 288.

<sup>24</sup> Ibid 291.

<sup>25</sup> John Edwards, *How to be Exceptional: Australia in the Slowing Global Economy* <<https://www.lowyinstitute.org/publications/how-be-exceptional-australia-slowng-global-economy>>.

<sup>26</sup> Department of Foreign Affairs and Trade, Australian Government, *Foreign Policy White Paper* <<http://dfat.gov.au/whitepaper/index.html>>.



I have tried to set the scene as to the world Australia is within. It is now relevant, as lawyers, to ask: what part does the law play in these tricky times?

Our law is shaped by the policies our legislators choose to implement, and by the courts.

For some, a legal system that is internationally engaged might involve exporting a state's hard-won, closely-held principles far and wide. Last year, the Royal Commonwealth Society, reflecting on the Commonwealth, noted some of the crucial links that bind the Commonwealth, include 'shared values, common language and the *rule of law*'.<sup>27</sup>

For others, such as the former judge of the International Court of Justice, Professor Weeramantry of Monash Law School, an internationally-aware legal system is one that is informed by numerous

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<sup>27</sup> The Royal Commonwealth Society, 'Her Majesty the Queen celebrates Commonwealth Day at the Commonwealth Service at Westminster Abbey' (Press Release, 14 March 2016) <<https://www.thercs.org/assets/Press-Releases/14.03.16-Commonwealth-Service-2016.pdf>> (emphasis added).

sources, that can accommodate the lessons from many countries across millennia.

### **Internationalisation of matters before Australian courts**

One gauge of Australia's place in the world and its participation in international organisations is the extent of international interest in the jurisprudence of Australia's highest Court. A survey of recent High Court decisions in the last five or so years reveals an undeniable international interest. I will provide a snapshot.

In *Firebird Global Master Fund II Ltd v Republic of Nauru*<sup>28</sup> the High Court considered principles of public international law, in particular, foreign state immunity. *Firebird* held bonds issued by a Nauruan statutory corporation and guaranteed by the Republic of Nauru. *Firebird* obtained judgment against Nauru in Tokyo and registered that foreign judgment under the *Foreign Judgments Act 1991* (Cth). *Firebird* later obtained a garnishee order against the Australian bank in which Nauru's accounts were kept. Nauru applied to have the

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<sup>28</sup> (2015) 326 ALR 396.

registration and garnishee order set aside, relying on its entitlement to foreign state immunity from the jurisdiction of Australian courts and from execution against its property. The High Court held that under the *Foreign States Immunities Act 1985* (Cth) Nauru was not immune from the jurisdiction of Australian courts, but it was immune from execution against its property.

Foreign state immunity was also considered by the High Court in *PT Garuda Indonesia Ltd v Australian Competition And Consumer Commission*.<sup>29</sup> In that case, Garuda, which was 95 per cent owned by the Republic of Indonesia, was unable to claim immunity under the *Foreign States Immunities Act 1985* (Cth).

The High Court looked at the legality of a foreign government's actions in *Moti v R*.<sup>30</sup> The appellant was extradited from Solomon Islands to Australia. It was alleged that he had committed extraterritorial child sex offences under the *Crimes Act 1914* (Cth). The High Court permanently stayed the prosecution due to the deportation being illegal

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<sup>29</sup> (2012) 247 CLR 240.

<sup>30</sup> (2011) 245 CLR 456.

under Solomon Islands law, and the Australian authorities' knowledge of such illegality.

Extradition was also at issue in *Minister for Home Affairs v Zentai*.<sup>31</sup>

The Republic of Hungary requested the Australian government extradite the respondent for prosecution for a war crime. It was alleged that the respondent had fatally assaulted a young Jewish man in 1944. The war crime offence in Hungary was enacted after the offence was committed, but it had retrospective effect. Murder, however, was an offence in Hungary at the time. The High Court was required to interpret the extradition treaty between Australia and Hungary, according to the Vienna Convention, and ultimately decided that the Minister was not empowered to accede to the extradition request.

There are many more international disputes resolved by courts below the High Court. I will provide some local examples.

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<sup>31</sup> (2012) 246 CLR 213.

In *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*<sup>32</sup>, the Court of Appeal considered whether the Supreme Court had jurisdiction to make freezing orders in anticipation of a money judgment from the Singaporean High Court, on the basis that the party would seek to register and enforce the Singaporean judgment in the Supreme Court of Western Australia. The Court of Appeal found that it did.

In *Samsung C&T Corp v Duro Felbuera Australia Pty Ltd*,<sup>33</sup> pursuant to the *International Arbitration Act 1974* (Cth), the Supreme Court stayed proceedings brought by Samsung and referred the subject matter of the proceeding to arbitration. In the course of reaching his decision Le Miere J considered jurisprudence from the UK and Singapore.

In *Ship "Sam Hawk" v Reiter Petroleum Inc*<sup>34</sup> the Full Federal Court, in the Western Australia registry, determined a maritime law dispute. A ship flagged and registered in Hong Kong had been supplied with fuel in Turkey under a contract alleged to be governed by US or

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<sup>32</sup> (2014) 320 ALR 289.

<sup>33</sup> [2016] WASC 193.

<sup>34</sup> (2016) 335 ALR 578.

Canadian law, and then arrested in Western Australia by the fuel supplier. The ship's owners sought to set aside the arrest. In setting aside the arrest, the five judge bench considered international conventions and jurisprudence.

These cases highlight the international nature of matters before Australian courts. This brings me to international commercial arbitration.

### **International commercial arbitration**

In a 2015 International Arbitration Survey, 90 per cent of respondents indicated that international arbitration is their preferred dispute resolution mechanism.<sup>35</sup> The most valuable characteristic of arbitration was enforceability of awards, and the most preferred and used seats were London, Paris, Hong Kong, Singapore and Geneva. Singapore, followed by Hong Kong, rated as the most improved seat over the last five years. Seat selection is predominately based on parties' 'appraisal

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<sup>35</sup> Queen Mary University of London and White & Case LLP, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>>.

of the seat's established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track record for enforcing agreements to arbitrate and arbitral awards'.

Australia is recognised as a safe and neutral seat for arbitration. It offers strong legal, institutional and administrative support for parties choosing to resolve their disputes through arbitration in Australia.

In terms of legal support, Australia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Commonwealth Parliament enacted the *International Arbitration Act 1974* (Cth) to give effect to the New York Convention and also the UNCITRAL Model Law on International Commercial Arbitration.

Australia's framework for the recognition and enforcement of international arbitral awards was challenged in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*.<sup>36</sup> In

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<sup>36</sup> (2013) 251 CLR 533.

that case TCL argued that the *International Arbitration Act 1974* (Cth) was incompatible with Ch III of the Constitution and therefore invalid, to the extent that it precluded the Federal Court from reviewing arbitral awards for errors of law. Had the challenge been successful, Australia's hopes of becoming a world-class centre for the resolution of international commercial disputes, would have been severely dampened. In the result, the High Court rejected TCL's constitutional challenge to the arbitration regime, holding that the 'arbitrator is the final judge of questions of law arising in the arbitration'.<sup>37</sup> In their judgment the plurality referred to the 'widely shared modern policy of recognising and encouraging private arbitration as a valuable method of "settling disputes arising in international commercial relations"'.<sup>38</sup> They also spoke of a 'legitimate legislative policy of encouraging efficiency and impartiality in arbitration and finality in arbitral awards'.<sup>39</sup>

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<sup>37</sup> Ibid 575 [107] (Hayne, Crennan, Kiefel and Bell JJ).

<sup>38</sup> Ibid 559 [45] (Hayne, Crennan, Kiefel and Bell JJ).

<sup>39</sup> Ibid 574 [105] (Hayne, Crennan, Kiefel and Bell JJ).



Further legal support for commercial arbitration in Australia is found in the several Australian courts that have specialist arbitration lists headed by judges with expertise in international commercial arbitration. In the Supreme Court of Victoria there is an arbitration list available 24/7. Justice Croft is the judge in charge. There has been plenty of business, such as the Formula 1 case of *Giedo van der Garde BV v Sauber Motorsport AG*.<sup>40</sup>

Australian judges are of course aided by a highly competent legal profession with ‘specialist expertise in international business law and cross-border disputes’.<sup>41</sup> Australian lawyers are active in dispute resolution in Asia, as arbitrators and legal representatives, which enhances Australia’s reputation for expertise in arbitration.<sup>42</sup>

In terms of institutional and administrative support, in 1985 the Australian Centre for International Commercial Arbitration (ACICA)

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<sup>40</sup> (2015) 317 ALR 792 (application for enforcement); (2015) 317 ALR 786 (appeal against enforcement decision); [2015] VSC 109 (stay application).

<sup>41</sup> Deborah Tomkinson and Cindy Wong, ‘Promoting efficacy in arbitration practice: Australia’s pro-arbitration regime and key developments in the ACICA Arbitration Rules’ in *LexisNexis Dispute Resolution Law Guide 2017*, 9.

<sup>42</sup> The ACICA Review, December 2013, 18.

was established. ACICA maintains panels of international arbitrators and mediators from which parties may appoint arbitrators; it provides rules and model clauses for the conduct of arbitration and mediation; and it hosts seminars and conferences to provide thought leadership in international arbitration.<sup>43</sup> ACICA played a key role in the establishment of the Asia Pacific Regional Arbitration Group. Arbitration centres in Sydney and Melbourne provide hearing facilities for arbitrations. As part of the national arbitration grid, it is hoped that Perth will have facilities available very soon.

As would be expected of a modern arbitration seat with a global outlook, there is close co-operation between ACICA and the courts. ACICA has a Judicial Liaison Committee that promotes harmonisation of approach to arbitration-related court proceedings. On the Committee are judges and former judges from eight Australian jurisdictions. The Committee enhances the lines of communication between the different Australian jurisdictions, which assists with consistency in thinking and

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<sup>43</sup> ACICA <<https://acica.org.au/>>.

decision-making. Consistency, certainty and reliability are key considerations for parties selecting an arbitration seat.

Whether the chosen seat of arbitration is Australia, Singapore, London or Hong Kong, or elsewhere, opportunities for the Australian legal profession abound. In international commercial arbitration there are not the same restrictions on legal services as apply in domestic proceedings. For instance, while an Australian lawyer cannot appear for a party in the Singaporean courts unless s/he is admitted there,<sup>44</sup> s/he can act for a party in arbitration proceedings without local admission, including when Singaporean law governs the dispute.<sup>45</sup> Australian lawyers, and in particular dispute resolution lawyers, think and act globally. The profession needs to be acutely conscious of the competition with the presently dominant English Bar in arbitration in Singapore.

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<sup>44</sup> *Legal Profession Act* (Singapore, cap 161, 2009 rev ed) s 32-33; Ministry of Law, Singapore Government, *Alternatives for Working in the Legal Field in Singapore* <<https://www.mlaw.gov.sg/content/minlaw/en/practising-as-a-lawyer/alternatives-for-working-in-the-legal-field-in-singapore.html>>; Law Council of Australia, *Fact Sheet: Practise of Foreign Law – Singapore* <[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Country\\_Fact\\_Sheets/Asia/PFL%20Singapore\\_map.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Country_Fact_Sheets/Asia/PFL%20Singapore_map.pdf)>.

<sup>45</sup> *Legal Profession Act* (Singapore, cap 161, 2009 rev ed), s 35; Singapore Academy of Law, *Laws of Singapore, Overview: Ch.04 International and Domestic Arbitration in Singapore* <<http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-4>>.

In 2015 Australia exported \$713m in legal services. The five year trend in legal services exports was 5.8 per cent growth.<sup>46</sup> In the same year Australia imported \$239m in legal services.

The top importer of Australian legal services is North America (US and Canada), followed by the EU.<sup>47</sup> As trade in legal services in Asia is liberalised further, our closer neighbours can be expected to grow as export markets for Australian legal services.

Liberalisation is being seen with Singapore; on 13 October 2016 the Agreement to Amend the Singapore Australia Free Trade Agreement was signed. The amendment provides ‘greater certainty for Australian lawyers and law firms operating in Singapore, putting them on an equal footing with foreign competitors ... [and locks] in existing opportunities in the legal sector, including the ability for Australian

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<sup>46</sup> Department of Foreign Affairs and Trade, Australian Government, *Trade in Services Australia 2015* <<http://dfat.gov.au/about-us/publications/Documents/trade-in-services-australia-2015.pdf>>.

<sup>47</sup> Law Council of Australia, Submission to Department of Foreign Affairs and Trade, *Trade in Legal Services under an Australia-European Union Free Trade Agreement*, 2 March 2016 <<http://dfat.gov.au/trade/agreements/aeufta/submissions/Documents/law-council-of-australia-eufta-submission.PDF>>.

lawyers to practice Singapore law and to work in international commercial arbitration'.<sup>48</sup> The amendment also provides for Singapore to recognise *Juris Doctor* degrees from certain universities, including Western Australia and Murdoch. Former president of the Law Council of Australia Stuart Clark has noted that:

‘Increasing opportunities for Singaporean students to study law in Australia will assist in the internationalisation of the legal sector in both countries. It will also expand people-to-people links that inevitably foster increased understanding and cooperation between the legal professions of both countries’.<sup>49</sup>

### **Investor state dispute settlement**

DFAT defines investor state dispute settlement (ISDS) as ‘a mechanism that is included in a Free Trade Agreement (FTA) or an investment treaty to provide foreign investors, including Australian investors overseas, with the right to access an international tribunal if

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<sup>48</sup> Department of Foreign Affairs and Trade, Australian Government, *SAFTA third review – services outcomes* <<http://dfat.gov.au/trade/agreements/safta/Documents/safta-third-review-services-outcomes.pdf>>.

<sup>49</sup> Law Council of Australia, ‘Legal profession among winners in Singapore-Australia FTA review’ (Media Release, MR 1624, 6 May 2016) <[https://www.lawcouncil.asn.au/lawcouncil/images/1624\\_-\\_Legal\\_profession\\_among\\_winners\\_in\\_Singapore-Australia\\_FTA\\_review.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/1624_-_Legal_profession_among_winners_in_Singapore-Australia_FTA_review.pdf)>.

they believe actions taken by a host government breach its investment obligations'.<sup>50</sup>

ISDS allows investors in foreign states to challenge the actions of those states in a neutral arbitral tribunal, rather than in the foreign state's domestic courts. It also gives investors more freedom of choice when it comes to legal representation. When forced to resort to domestic courts, the host state's restrictions on legal representation come into play.

Australia has ISDS provisions in six operative FTAs – namely the FTAs with China, Korea, Chile, Singapore, Thailand and the ASEAN-Australia-New Zealand FTA. There is also an ISDS provision in the Trans-Pacific Partnership, the fate of which is now uncertain. Australia also has ISDS provisions in 21 bilateral investment treaties, including with China, Hong Kong, Indonesia and India.<sup>51</sup>

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<sup>50</sup> Department of Foreign Affairs and Trade, Australian Government, *Trade and investment topics: Investor-State Dispute Settlement* <<http://dfat.gov.au/trade/topics/pages/isds.aspx>>.

<sup>51</sup> Ibid.

When the Australian government negotiates trade and investment treaties, as Chief Justice French observed,<sup>52</sup> it seems to assume that Australian domestic courts are good enough for inbound foreign investors, but that foreign courts might not be good enough for Australian outbound investors. Where the foreign courts are up to standard, the Australian government would not see the inclusion of ISDS provisions as necessary. Indeed, the Australia-USA FTA and the Japan-Australia Economic Partnership Agreement do not have ISDS provisions.<sup>53</sup> By contrast, the proposed TPP does include an ISDS provision. Where the Australian government perceives that foreign courts are not efficient, functioning and independent, it may push for the inclusion of an ISDS provision.<sup>54</sup> There seems to be a double standard in that governments tend to favour ISDS to restrain

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<sup>52</sup> Chief Justice Robert French AC, 'National Judiciaries in a Global Economy' (Speech delivered at the 7<sup>th</sup> International Conference of the International Association for Court Administration, Sydney, 24 September 2014); Chief Justice Robert French AC, 'Investor-State Dispute Settlement – A Cut Above the Courts?' (Speech delivered at the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014).

<sup>53</sup> Chief Justice Robert French AC, 'Investor-State Dispute Settlement – A Cut Above the Courts?' (Speech delivered at the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014); Luke Nottage, 'Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?' (2014) 38 *Journal of Japanese Law* 37.

<sup>54</sup> Jurgen Kurtz and Luke Nottage, 'Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia' (2015) 30(2) *ICSID Review* 465, 469, 474-6.

interference by foreign governments with Australian investors, but disfavour ISDS proceedings filed against them.<sup>55</sup>

When foreign states negotiate investment treaties with Australia and consider whether to insist on an ISDS provision, they will be looking at Australia's courts and legal profession, just as Australia assesses the integrity of the foreign state's courts and legal profession. In other words, Australian courts and lawyers go under the microscope when Australia negotiates treaties. What foreign states see, and what we think or hope they will see, may differ.

It is worth considering then, how do foreign governments and businesses see Australia's courts and legal profession? Self-evidently, the higher the rating in terms of expertise, efficiency and neutrality, the more opportunities there will be for Australia's courts and lawyers in the area of international dispute resolution.

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<sup>55</sup> Leon Trakman, 'Australia's Rejection of Investor-State Arbitration: A Sign of Global Change' in Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 344, 372-373.



## **Increasing Australia's appeal as a centre for dispute resolution**

### *Neutrality*

Foreign parties litigating against Australian governments or Australian nationals may choose arbitration over our domestic courts for a variety of reasons. Many of those reasons are not cause for alarm for Australian courts. However, if foreign parties avoid domestic courts out of a fear of discrimination or perceived lack of impartiality or independence, there is work to be done by our courts.

If the Australian courts and legal profession are to give foreign litigants confidence that they will receive 'national treatment', meaning they will receive the same treatment that Australian nationals receive — equality — the Australian judiciary and the Australian legal profession will need to focus on two things. First, on how Australia can educate and train our foreign counterparts in developing countries about Australian courts and what we do and how well we do it. Secondly, on what knowledge Australians may receive and learn from foreign counterparts.

For many years now, Australian courts and judges have been active in education and exchange programs in the Asia-Pacific region. Australian judges and retired judges have undertaken judicial service in countries including Tonga, Vanuatu, Samoa, Kiribati, Fiji, the Solomon Islands, and Hong Kong. Library and legal resources have been provided to the courts of developing countries, and training programs have been conducted for foreign judiciaries.

Some examples:

- Since 1999 the Federal Court has had a strong relationship with the Supreme Court of Indonesia. The Federal Court has conducted training sessions in Indonesia and Australia to assist the Indonesian judiciary in building a strong and effective judicial system. Assistance has been given to develop and promulgate consumer protection regulations, develop institutional frameworks for class actions and mediation, improve budget and finance management and reduce case backlogs. The two Courts last year discussed the prospect of the Supreme Court of Indonesia establishing a Commercial Court,<sup>56</sup>

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<sup>56</sup> Federal Court of Australia, *International Programs: Activities in Indonesia* <<http://www.fedcourt.gov.au/about/international-programs/activities-by-country/indonesia>>.

- The Federal Court also managed the Pacific Judicial Development Programme, which provided regional capacity building assistance to judiciaries in 14 Pacific Island countries. In the coming years it will manage and implement the Pacific Judicial Strengthening Initiative.<sup>57</sup>
- In 2016 the Asian Business Law Institute was established. It has many founding partners including large law firms and legal organisations across Asia and Australia. The Institute has a Board of Governors including Chief Justice Menon of the Supreme Court of Singapore, the Honourable Robert French, judges from across Asia, the Honourable Kevin Lindgren AM QC, and myself, academics and others. The Ministry of Law of Singapore has committed funding in the amount of \$1.1 million (Singapore) dollars for the Institute's first year of operation. The Institute will be an active organisation supporting UNCITRAL and promoting seminars about engagement with Asia.
- In May 2017 the High Court of Australia will host the visit by a delegation of senior Chinese judges in Melbourne, Canberra and

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<sup>57</sup> Federal Court of Australia, *Annual Report 2015-2016*  
<[http://www.fedcourt.gov.au/\\_\\_data/assets/pdf\\_file/0004/39856/Annual-Report-2015-16.pdf](http://www.fedcourt.gov.au/__data/assets/pdf_file/0004/39856/Annual-Report-2015-16.pdf)>.

Sydney. The visit follows a delegation from Australia to Beijing in 2016 led by Chief Justice French. For example, on the visit to Melbourne the delegation will observe a criminal trial and a civil trial and engage in a round table discussion with Supreme Court judges on the operation of the uniform evidence law.

Of course, LAWASIA, the Law Council of Australia and the Australian Bar Association play a very important role in engagement with Asia and other countries.

There is growing recognition, however, that the engagement between Australian and overseas judges and legal professionals should be an exchange of learning and ideas.

In 2002 Chief Justice Gleeson noted that engagement between Australian and foreign judges is essential, and that training and exchange activities enhance the level of performance of Australian judges. The Chief Justice said, ‘We also accept that there are valuable

lessons for us to learn from others’,<sup>58</sup> comments which were later echoed by Chief Justice French.<sup>59</sup> Recently, Chief Justice French noted that ‘[t]here are many areas of international engagement in which Australian judges and legal professionals with relevant expertise can both give and receive’.<sup>60</sup>

In terms of receiving, in February last year, the Judicial College of Victoria collaborated with the Asian Law Centre at Melbourne University to host a workshop called ‘Asian Cultural Awareness in the Courtroom’. When opening the workshop, the Victorian Attorney-General said that “Understanding different cultural perspectives is the first step towards helping our courts and tribunals provide culturally appropriate services.” The workshop focused on issues arising in commercial litigation and mediation, and it had three aims:

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<sup>58</sup> Chief Justice Murray Gleeson AC, ‘Global Influences on the Australian Judiciary’ (Speech delivered at the Australian Bar Association Conference, Paris, 8 July 2002).

<sup>59</sup> Chief Justice Robert French AC, ‘Interacting with Diversity: Australian Judges and Regional Courts’ (Speech delivered at the Australian Institute of International Affairs – ACT Branch, Canberra, 12 March 2010).

<sup>60</sup> Chief Justice Robert French AC, ‘Beyond our Borders: A Judiciary and Profession Looking Outwards’ (Speech delivered at the Australian Bar Association/Victorian Bar National Conference, Melbourne, 27 October 2016).

1. To provide judicial officers with insights and practical tools to ensure effective communications and court management in proceedings involving parties from an Asian background;
2. To give judicial officers a better understanding of the culture and perspectives of parties from an Asian background so that they can more effectively assess evidence and behaviour; and
3. To explore ways to increase the effectiveness of mediation within the context of commercial disputes.

In sessions chaired by judges of the Supreme Court of Victoria, the workshop covered topics including the legal systems in China, Vietnam and Indonesia, the effect of culture on communication, western and non-western approaches to mediation, and the legal profession's role in educating foreign litigants on the Australian system of dispute resolution.

The program was attended by 24 judges, mostly from the Supreme Court of Victoria. All of the Victorian Supreme Court's Commercial Court judges attended.

The ‘Asian Cultural Awareness in the Courtroom’ workshop was innovative and cutting edge. Importantly, it demonstrates the readiness of the courts to improve their understanding of cultural differences and to ensure their actual and perceived neutrality. This type of training may go some way toward assuring foreign litigants that they will receive national or equal treatment in Australian courts.

Similarly, Chief Justice Martin chairs the national Judicial Council on Cultural Diversity, which was an initiative of Chief Justice French and endorsed by the Council of Chief Justices of Australia. Chief Justice Martin has noted that a lack of experience of cultural and linguistic diversity in the judiciary ‘has the capacity to impede the provision of equal justice to all in a community which has become multicultural rather than monochromatic’.<sup>61</sup> The Judicial Council on Cultural Diversity is an ‘advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to our diverse

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<sup>61</sup> Chief Justice Wayne Martin AC, ‘Embracing Diversity in the Law: solutions and outcomes’ (Speech delivered at The Hellenic Australian Lawyers Association (Queensland Chapter), Brisbane, 10 June 2016).

needs'.<sup>62</sup> It aims to 'promote public trust and confidence in Australian courts and the judiciary'.<sup>63</sup>

Diversity is not only present in Court users. I have the privilege of presiding over most Victorian admission to legal practice ceremonies. Last year almost 1,400 new lawyers were admitted to the profession in Victoria. 59 per cent were female. In the 2016 financial year 49 foreign lawyers and foreign graduates were admitted in Victoria, 14 of whom were educated or qualified in Asia. The names of the admittees, the accents of counsel moving their admission, and the religious texts on which admittees choose to swear their oath, are becoming more and more reflective of the diversity in the Australian legal community.

Recognition of human rights, and protections against discrimination, provide the fertile ground for diversity to flourish. Since retiring, the Honourable Robert French, delivering the Victoria Law Foundation Oration just last week said that the rule of law 'might ... be thought, because it supports a society with respect for the human rights and

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<sup>62</sup> Judicial Council on Cultural Diversity <<http://jccd.org.au/#section-about-us>>.

<sup>63</sup> Ibid.



freedoms of its members, to attract human capital in the form of people coming from other places to live and work here and contribute to the common good. It gives shape and definition to Australia as a particular kind of society in the global community of nations'.<sup>64</sup>

In Victoria, human rights are largely recognised and enforced in the courts. This is an area in which Australia learns and borrows heavily from the world. When interpreting the *Charter of Human Rights and Responsibilities Act 2006* (Vic) the Victorian Supreme Court and then the High Court have looked to the *International Covenant on Civil and Political Rights (1966)*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)*, Canada's *Charter of Rights and Freedoms*, the UK's *Human Rights Act 1998*, New Zealand's *Bill of Rights Act 1990*, the *American Convention on Human Rights (1969)*, and to jurisprudence from those jurisdictions. The extent to which we look to UK jurisprudence may increase after Brexit. In any event, there is much Australian courts and lawyers may take

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<sup>64</sup> The Hon Robert French AC, 'Rights and Freedoms and the Rule of Law' (Victorian Law Foundation Oration, Melbourne, 9 February 2017).

from the world, but as Australia's human rights jurisprudence matures, it is expected we will also have something to give back.

### **Relevance of the Australian Federation**

Finally, I will say something about Australia's federal structure. It is a structure that presents the country with challenges and opportunities.

Constitutional Law Professor Anne Twomey of the Sydney Law School has propounded the advantages of federalism. We might not all agree with her, however, Professor Twomey says:<sup>65</sup>

- it is a system of government that is modern, flexible, efficient, highly competitive and best suited to deal with the pressures of globalisation;
- it is the best suited system for geographically large countries, because it allows differing local needs to be satisfied;
- federations tend to have smaller and less costly public sectors than unitary countries, and a study over 50 years showed that

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<sup>65</sup> Anne Twomey, *Federalism – the good, the bad and the opportunities* (26 April 2007) Australian Policy Online <<http://apo.org.au/node/6516>>.

federal countries economically out-performed unitary countries;  
and

- Australia's federalism is based on competition and cooperation. Competition among the states leads to greater efficiency, better economic performance, and innovation. Cooperation among the states and the Commonwealth results in greater scrutiny and legitimacy of proposals.

On the other side of the coin are the challenges. Kenneth Wiltshire, Professor of Public Administration at the University of Queensland, has looked at the business perspective on Australian federalism. He writes that the business community argues 'for the creation of truly national markets, greater uniformity in policies, greater certainty in policy regimes ... harmonisation of laws, and removal of other impediments to global competition for Australian business'.<sup>66</sup> Essentially, business has pressed for changes to federalism that would make its operations more certain. Certainly the Australian Productivity

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<sup>66</sup> Kenneth Wiltshire, 'Australian Federalism: The Business Perspective' (2008) 31(2) *UNSW Law Journal* 583, 584.

Commission has driven such a national approach, indeed, as shown in its *Access to Justice Arrangements* report.<sup>67</sup>

In 2006 the Business Council of Australia published a report entitled ‘Reshaping Australia’s Federation: A New Contract for Federal-State Relations’.<sup>68</sup> The Business Council estimated that weaknesses and inefficiencies in Australia’s federal system were costing Australians at least \$9b annually. It said we need to fast-track ‘a ‘common market’ for Australian business and consumers by removing the significant barriers to the movement of people, goods and services within Australia’. The Council also reported that ‘[t]he burden of regulation on the community and business grows yearly as governments add to the stockpile of overlapping, duplicated and inconsistent laws’. ‘At a time when globalisation is reducing the trade barriers and differences between countries, the differences across our states are growing.’ An example was given of the deleterious effects of competition among states — states compete for foreign investment, and incentives given

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<sup>67</sup> Productivity Commission, ‘Access to Justice Arrangements’ (Inquiry Report No 72, 5 September 2014).

<sup>68</sup> Business Council of Australia, ‘Reshaping Australia’s Federation: A New Contract for Federal-State Relations’ <<http://www.bca.com.au/publications/reshaping-australias-federation-a-new-contract-for-federal-state-relations>>.

by one state may benefit that state to the detriment of the nation as a whole. It was said by the Business Council that this competition has the potential to confuse foreign investors and leave them wary of investing in Australia.

There is a push for change. Twomey suggests, 'it is in the interests of all of us to make federalism work better'.

For those of us from a state base within the Federation, there is often hesitation even suspicion about federal centralism and the loss of our innate state differences and characteristics.

In terms of legal matters, as Australian lawyers, we understand the importance of uniformity in regulations, practices and procedures that affect foreign parties and parties doing business across state borders. In this respect at some point it may be relevant for Australia to revisit a national legal profession. So far the uniform profession merging New South Wales and Victoria has worked well and not led to any diminution of pre-existing, long established local standards.

For courts, harmonised court rules, harmonised practice notes, and the principle of comity as expounded in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*<sup>69</sup> are also important. The Corporations Rules are an example of harmonised court rules. Bodies such as the Council of Chief Justices and ACICA's Judicial Liaison Committee assist the courts in achieving harmony.

The aim of uniformity is to eliminate complexities and inconsistencies and provide for certainty. The aim is not necessarily to rob the federation of the benefits of diversity. In areas of State concern, uniform legislation and regulatory bodies cannot be imposed on the Australian States. Instead, they must be agreed to through a cooperative process that is enhanced by diversity and creative thinking. The national operation of the *Corporations Law 2001* (Cth) is an obvious example. In other words, in the suitable context, the uniform outcome is a better result.

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<sup>69</sup> (2007) 230 CLR 89.

## **Conclusion**

Where does this leave us? We have seen that Australia is placed in a world where isolationism has returned as a temptation in some quarters, while in others the agenda is liberalisation and engagement. We may predict that priorities for Australia will be using its creativity to advance relationships with China, India and Indonesia, and using its influence to encourage to the greatest extent possible multilateralism and respect for the rule of law in the region. For Australian courts and legal professionals, Australia's engagement with the world leads to an increase in involvement in disputes and legal work of an international character. Opportunities will present themselves in international commercial arbitration, both overseas and at home. Australia offers the world a seat for arbitration that is neutral, safe, and, critically, willing to learn from leading centres around the globe. It is important to reflect not only on what Australian courts, judges and lawyers may offer overseas counterparts in terms of jurisprudence, training and education, but also on what the world has to offer us. There is much to take from foreign jurisdictions in the area of human rights law and in general approaches to dispute resolution. It is also important to reflect on how

we are viewed from outside Australia. Opening up to the world and absorbing what it has to offer will assist Australia's courts and legal profession in their goal of providing, and being seen to provide, equal justice to foreign parties and to all members of Australia's diverse community.