Arbitration law in Victoria comes of age*

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I. Introduction

Today's seminar heralds the recent enactment by the Victorian Parliament of the *Commercial Arbitration Act 2011 (Vic)* ('**the revised CAA**').[1] The revised CAA repeals and replaces the *Commercial Arbitration Act 1984 (Vic*). The latter Act was part of a compact of statutes enacted by the six States and two Territories in about 1984 to regulate domestic arbitration. They were progressively reformed until about 1990. From 1990 until June 2010, they had uniform status ('**the uniform Acts'**).

The enactment of this legislation must be seen in its proper context. It is part of the modernisation and harmonisation of Australia's international and domestic arbitration regimes. Arbitration is booming in the Asia-Pacific region. It is the preferred method of dispute resolution for disputes in respect of transnational commercial contracts. The impetus for the recent reforms is to position Australia as a hub for dispute resolution in the Asia-Pacific region.

Therefore, the reforms are relevant to Australia's international engagement. In that regard, Justice Croft has recently commented, extra-curially:

> If Australia, and its courts…do not take real steps to encourage and promote arbitration, Australia will be marginalised in an international arbitral system. This will be particularly acute as arbitration in the Asia-Pacific region continues to grow exponentially. This will have significantly adverse consequences in terms of the development of our international legal expertise and the involvement of Australia's legal and other professionals in international trade and commerce.[2]

In this paper, I will:

(a) briefly describe the history of the reform process;
(b) discuss the significance of the UNCITRAL Model Law ('the **Model Law'**);
(c) identify some major issues in respect of the operation of the revised CAA as compared with the uniform Acts; and
(d) identify some future challenges for domestic arbitration in Australia.

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1 The revised CAA was passed by the Victorian Parliament on 18 October 2011 and came into force on 17 November 2011

2 Clyde Croft 'International Arbitration and the Australian Courts' (paper presented at the ICC Australia's 'International Arbitration and Beyond' Conference, Melbourne, 10 August 2011) at 20.

II. History of the Reform Process

The uniform Acts had been under review by the Standing Committee of Attorneys' General (**'SCAG'**) as it was then known, since 2002. The reform process, however, stalled in about 2007, apparently because consensus could not be reached between the various States and Territories on the form of the amended legislation. [3]

Prior to the recent reforms, domestic arbitration was in a state of malaise in Australia. So what had gone wrong with domestic arbitration? There were two significant problems:

(a) first, too often domestic arbitration mimicked court proceedings (including by the adoption of elaborate pleadings and extensive discovery), and thereby failed to fulfil its potential as an efficient and cost-effective alternative dispute resolution process.[4] Meanwhile, the courts had "raised the bar" by adopting more efficient processes in the management of civil disputes; [5]

(b) secondly, there was too much scope for courts to interfere with arbitral awards under the uniform Acts – in particular, under section 38 (error of law) and section 42 (misconduct, including technical misconduct). While leave to appeal was required under section 38 of the uniform Acts, this requirement was often circumvented by rolling-up an application for leave to appeal under section 38 with an application to set aside an award for misconduct for section 42. [6] As a result, the perceived finality of arbitral awards was seriously undermined.

On 21 November 2008, the Federal Attorney-General announced a review of the *International Arbitration Act 1974 (Cth)* (**'IAA'**). At the same time, a discussion paper was released proposing certain amendments to the international arbitration regime in Australia so as to bring it line with 'international best practice'.[7]

On 10 December 2008, the Chief Justices of the various State and Territory Supreme Courts made a submission to the Federal Attorney-General in respect of the discussion paper. Their Honours stated:

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3 For a history of SCAG's attempts to reform the uniform Acts prior to 2007, see Robert Hunt 'Changes to the Uniform Commercial Arbitration Acts', paper presented to the IAMA National Conference in Adelaide on 1-3 June 2007.

4 See Peter Megens and Beth Cubitt, 'Meeting Disputant's Needs in the Current Climate: What has gone wrong with Arbitration and how can we repair it?' (2009) 28(1) *The Arbitrator & Mediator* , 115 – 139.

5 Including case management conferences (somewhat similar to the ICC Terms of Reference procedure), Chess-Clock Hearing procedures, Joint Expert Conferences and 'Hot-tubbing' of experts.

6 See Vicky Donnenberg 'Judicial Review of Arbitral Awards under the Commercial Arbitration Acts', (2008) 30 Australian Bar Review 177, 181-186.

7 The discussion paper can be accessed at <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.pdf/$file/Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.pdf>

The submissions made in response can be accessed at <http://www.ema.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_ReviewofInternationalArbitrationAct1974>.

> 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 [than the law with respect international arbitration]. 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.[8]

In an address given in February 2009, Spigelman CJ (as he then was), said:

> The focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective mode of resolution of disputes. Our uniform legislative scheme for domestic arbitration is now hopelessly out of date and requires a complete rewrite. The national scheme implemented in 1984 has not been adjusted in accordance with changes in international best practice. Of course, in our federation, agreement on technical matters such as this in multiple jurisdictions is always subject to delay. The delay with respect to the reform of the Commercial Arbitration Acts is now embarrassing. This is not an area in which harmonisation based on the lowest common denominator principle is appropriate.
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> In my opinion, the way out of the impasse is to adopt the UNCITRAL Model Law as the domestic Australian Arbitration law. It is a workable regime, itself now subject to review at the Commonwealth level. Its adoption *as* the domestic Australian arbitration law would send a clear signal to the international commercial arbitration community that Australia is serious about a role as a centre for international arbitration. Our competitors in this regard, such as Hong Kong or Singapore, do not create a rigid barrier between their domestic and international arbitration systems. Nor should we.[9]

Spigelman CJ's remarks were timely and re-ignited the debate concerning the reform of the domestic arbitration legislative regime in Australia. There is little doubt that his Honour's comments were a catalyst to SCAG's resolution at its meeting on 16-17 April 2009 to re-invigorate and update the uniform Acts. In particular, SCAG's Communique of 17 April 2009 recorded:

> Ministers agreed to the drafting of new uniform commercial arbitration legislation based on the UNCITRAL Model Law on international commercial arbitration, **supplemented by any additional provisions as are necessary or appropriate for the domestic** scheme. The aim of the draft model Bill is to give effect to the overriding purpose of commercial arbitration, which is to provide a method of finally resolving disputes that is quicker, cheaper and less formal than litigation… (emphasis added).

In late 2009, SCAG circulated an Issues Paper together with a draft *Commercial Arbitration Bill 1999* ('**the 2009 Bill'**). The main issues raised for consideration were whether the Model Law

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8 See Comments by the Chief Justice of the Australian States and Territories, available at <http://www.ag.gov.au/internationalarbitration/> submission addressed the question whether the Federal Court of Australia should be given exclusive jurisdiction in matters arising under the IAA.

9 Address by the Honourable J Spigelman AC, Opening of Law Term Dinner, 2009, the Law Society of New South Wales, Sydney, February 2009.

(drafted primarily to regulate international arbitration) was appropriate to regulate domestic arbitration and, further, what amendments to the Model Law and/or supplementary provisions were required to accommodate domestic arbitration.

Submissions in respect of the Issues Paper and comments on the 2009 Bill were requested by 15 January 2010. There was little opposition to the adoption of the Model Law as the backbone of the new domestic arbitration Act as proposed by SCAG. The 2009 Bill was further refined in light of the submissions received and on 7 May 2010, SCAG resolved that the various States and Territories should adopt a new Model Bill ('**the CAA Model Bill**') to replace the existing uniform acts.

New South Wales lost no time and the CAA Model Bill was introduced into its parliament on 13 May 2010. The *Commercial Arbitration Act 2010 (NSW)* commenced operation on 1 October 2010.

At the Federal level, the reform process culminated in the enactment of the *International Arbitration Amendment Act 2010 (Cth)* ('**IAA Amending Act**') on 17 June 2010 by the Federal Parliament. It received the Royal Assent on 6 July 2010.[10]

The CAA Model Bill has since been passed by the parliaments of Tasmania, South Australia and the Northern Territory. Victoria is the latest State to enact the CAA Model Bill. It is currently before the parliaments of Western Australia and Queensland. It is yet to be introduced into the parliament of the Australian Capital Territory.

The recent reforms in Australia have not occurred in a vacuum. Since 1996 there has been significant reform of arbitration legislation in other parts of the world, notably in the United Kingdom, New Zealand, Malaysia, Hong Kong and Scotland. Similarly, the institutional Arbitration Rules of various arbitral centres[11] have been updated and modernised. This is all part and parcel of the increasing global competition for arbitration work.

III. The UNCITRAL Model Law

Australia adopted the Model Law in 1989 by amendment to the IAA. It forms Schedule 2 to the IAA. It has the force of law by virtue of section 16 of the IAA.

Gary Born has described the Model Law, in his authoritative work, as "the single most important legislative instrument in the field of international commercial arbitration".[12] The Model Law was produced by the United Nations Commission on International Trade Law ('**UNCITRAL**') in 1985 after four years of drafting, involving delegates from many jurisdictions. It reflects

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10 For further detail of the reform of the IAA, see Albert Monichino, 'Arbitration Reform in Australia: Striving for International Best Practice' (2010) 29(1) *The Arbitrator & Mediator,* 29-37; see also Peter Megens and Adam Peters, 'International Arbitration Amendment Act 2010 (Cth) – Towards a new brand of Australian International Arbitration' (2011) 30(1) *The Arbitrator & Mediator,* 48-64.

11 Including the Singapore International Arbitration Centre ('SIAC'), the International Chamber of Commerce ('ICC') and the Australian Centre for International Commercial Arbitration ('ACICA').

12 Gary Born, 'International Commercial Arbitration' (Wolters Kluwer , 2009) Vol. 1, 115.

worldwide consensus on key aspects of arbitration practice. In general, it represents a compromise between Common Law and Civil Law tendencies.[13] The Model Law:

> …reflects the common denominator of laws applicable to international arbitration. It is a compromise which has stripped out national characteristics and contains provisions acceptable to most systems.[14]

The philosophy of the Model Law is to minimise judicial intervention in the arbitral process and, further, to affirm and promote party autonomy with regard to arbitral procedures. As its name suggests, the Model Law is a prototype of a law on international commercial arbitration. It need not be adopted verbatim. It may be amended and/or supplemented.[15]

While designed with international commercial arbitration in mind, the Model Law offers a set of basic rules that are also suitable for domestic arbitration:

> [It] consists of 36 articles, which deal comprehensively with the issues that arise in national courts in connection with international arbitration. Among other things, the Law contains provisions concerning the enforcement of arbitration agreements (Articles 7 – 9), appointment of and challenges to arbitrators (Articles 10 – 15), jurisdiction of arbitrators (Article 16), provisional measures (Article 17), conduct of the arbitral proceedings, including language, situs, and procedures (Articles 18 – 26), evidence-taking and discovery (Article 27), applicable substantive law (Article 28), arbitral awards (Articles 29 – 33), setting aside or vacating awards (Article 34), and recognition and enforcement of foreign arbitral awards, including bases for non-recognition (Articles 35 – 36).[16]

Indeed, New Zealand, Hong Kong and Scotland have adopted the Model Law to regulate both domestic and international arbitration.

The Model Law mandates the presumptive validity of both international arbitration agreements and international arbitration awards, subject to limited, specified exceptions.[17] It also requires the recognition and enforcement of foreign arbitral awards on terms identical to those prescribed in the New York Convention.[18] The grounds for non-recognition parallel the grounds for setting aside an award.[19]

In 2006, the Model Law was revised. Australia is one of the few countries to have adopted the 2006 revision of the Model Law (in both the amended IAA and also the CAA Model Bill).

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13 Jack Coe, 'The Serviceable Texts of International Commercial Arbitration: An Embarrassment of Riches' (2002) 10 *Willamette Journal of International Law and Dispute Resolution* 143, 148.

14 Julian DM Lew, Loukas A Mistelis and Stefan Kröll, 'Comparative International Commercial Arbitration' (Kluwer Law International, 2003) at vi.

15 This is to be contrasted with a convention, such as the New York Convention, which, apart from certain reservations, can generally only be ratified verbatim.

16 See Born, note 12 above, 117.

17 See Born, note 12 above, 117-118.

18 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

19 Compare Article 36 with Article 34 of the Model Law.

The Model Law has now been adopted (in one form or another) by almost 60 jurisdictions around the world[20], including by many of our Asian-Pacific neighbours (notably, including Hong Kong and Singapore).

There is considerable advantage in a jurisdiction being able to describe itself as a "Model Law jurisdiction":

> the enacting state is commonly able to attract more foreign business to its shores. This is due to the fact that potential investors can rely on a minimum legislative standard in the adopting state, much without the danger of unwanted legal surprises in an unknown jurisdiction.[21]

Australian courts have had relatively little experience in applying the Model Law. Most of that experience relates to applications for stays of court proceedings (under Article 8 of the Model Law) brought in the face of an arbitration agreement which refers the relevant category of dispute to arbitration.[22] To a lesser extent, Australian courts have considered the Model Law (in particular, Articles 35 and 36) in the context of recognition and enforcement of arbitral awards.[23] Another issue that has arisen in the context of the Model Law is whether the parties have impliedly opted-out of the Model Law for the purposes of section 21 of the IAA (prior to its recent amendment).[24] Accordingly, the adoption of the Model Law in the domestic arbitration legislation will pose a challenge for both the courts and legal practitioners.

IV. Westport v Gordian

On 5 October 2011, the High Court of Australia handed down a decision in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 which was expected to resolve the apparent conflict between the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 and the NSW Court of Appeal in *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57, concerning the standard of reasons required of an arbitrator under section 29 of the uniform Acts. Section 29 (1)(c) relevantly provides that:

> (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator…shall -
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> …
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> (c) include in the award, a statement of the reasons for making the award.

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20 There are various ways in which the Model Law can be adopted. First, by incorporation by reference (as has been done in the IAA). Secondly, by direct adoption (as has been done in the CAA Model Bill). See Dr Peter Binder, 'International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions', (Sweet & Maxwell , 2010), 17-18.

21 Binder, note 20 above, 13

22 For example, *Gilgandra Marketing Co-Operative Limited v Australian Commodities & Merchandise Pty Ltd & Anor [administrator appointed]* [2011] NSWSC 16 (4 February 2011).

23 For example, *Uganda Telecom Ltd v Hi-Tech Telecom Ltd (No 2)* (2011) 277 ALR 441.

24 See *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* [2011] ACTSC 59. Opting-out of the Model Law is no longer permitted under section 21 as it is now amended following the enactment of the IAA Amending Act.

It is in substantially identical terms to Article 31(2) of the Model Law which provides:

> The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms…

The High Court decision provides an interesting counterpoint between the judicial treatment of the uniform Acts and the Model Law.

In *Oil Basins*, the Victorian Court of Appeal held that in the case before it (involving a high dollar, complex arbitration) the arbitrators were required to provide reasons of a judicial standard. In contrast, in *Gordian*, the NSW Court of Appeal held that insofar as the Victorian Court of Appeal suggested that an arbitrator's duty to give reasons for an award was equivalent to a judge's duty to give reasons, that decision was plainly wrong. Instead, the NSW Court of Appeal adopted the relatively low standard laid down by Donaldson LJ in *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)*[25].

> All that is necessary is that the arbitrators should set out what, in their view of the evidence, did or did not happen and should explain succinctly why, in light of what happened, they have reached their decision and what that decision is. That is all that is meant by a 'reasoned award'.

In doing so, the NSW Court of Appeal stressed the fundamental difference between arbitration and litigation:

> Though courts and arbitration panels both resolve disputes they represent fundamentally different mechanisms of doing so. The court is an arm of the state; its judgment is an act of state authority, subject generally in a common law context to the right of appeal available to parties**. The arbitration award is a result of a private consensual mechanism** intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making (emphasis added).[26]

When the matter came on before the High Court in early February 2011, the parties conceded that the appropriate test to apply was the test in *Bremer*. Therefore, it was not necessary for the High Court to resolve the differences between the Victorian Court of Appeal and the New South Wales of Appeal.

Reflecting the importance of the decision for arbitration in Australia (and the risk of collateral damage to the Model Law scheme), five parties appeared as amici curiae: the Federal Attorney-General, ACICA, the Australian International Dispute Centre ('AIDC'), the Institute of Arbitrators and Mediators Australia ('IAMA') and the Chartered Institute of Arbitrators, Australia ('CIArb'). In their written submissions, the amici curiae all argued that an arbitrator's duty to give reasons for an award was not equivalent to a Judge's duty to give reason for judgment.

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25 [1981] 2 Lloyds Rep 130.

26 *Gordian* per NSWCA at [216].

Relevantly, the High Court held that:

(a) the reference in *Oil Basins* to reasons of a 'judicial standard' was an 'unfortunate gloss';[27]
(b) the statement by the English Court of Appeal in *Bremer* was apt to describe the content of the obligation in section 29 (1)(c) of the uniform Acts;[28]
(c) what is required by way of reasons in any given case will depend on the circumstances of the case;[29]
(d) whether Article 31 (2) of the Model Law is to be construed in a similar manner to section 29 (1)(c) of the CAA, alternatively requires something less in terms of the standard of reasons, was left for determination on another day.

On the facts of the case, the High Court held that the arbitral tribunal had not met the test in *Bremer* because in the relevant respect the tribunal had merely stated its conclusion and not the reasons for arriving at that conclusion.

In *Gordian*, the High Court addressed the juridical nature of arbitration, and its relationship with the court system. The majority said:

> [19] [The] statutory provisions [under the uniform Acts] indicate that **the making of an award** in arbitration proceedings **is more than the performance of private contractual arrangements between the parties** which yields an outcome which rests purely in contract. They also suggest the importance which the provision of reasons by arbitrators has for the operation of the statutory regime. That statutory regime involves the exercise of public authority, whether by force of the statute itself or by enlistment of the jurisdiction of the Supreme Court. It also, as explained later in these reasons, displays a legislative concern that **the jurisdiction of the courts** to develop commercial law **not** be **restricted by the complete insulation of private commercial arbitration.**
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> [20] No doubt it is true to say that the provision of an award under the [uniform Acts] lacks distinctive hallmarks of the exercise of judicial power, namely the maintenance of public confidence in the manner of its exercise and in the cogency or rationality of its outcomes, and the operation of the appellate structure and of the case law system. However, **it is going too far to conclude that performance of the arbitral function is purely a private matter of contract, in which the parties have given up their rights to engage judicial power, and is wholly divorced from the exercise of public authority** (emphasis added).

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27 *Gordian* per High Court at [53] (French CJ, Gummow, Crennan and Bell JJ); [169] (Kiefel J).
28 *Gordian* per High Court at [54] (French CJ, Gummow, Crennan and Bell JJ); [169] (Kiefel J).
29 In this respect, the observations of the Victorian Court of Appeal in *Oil Basins* (at [57]-[58]) that what is required to satisfy section 29(1)(c) will depend upon '*the nature of the disputes in the particular circumstances of the case*' were accepted by the High Court as correct. A similar 'proportionality' test had been adopted by Croft J in *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139 at [54] – [58].

The above observations do not apply with equal force to the Model Law regime which has now been adopted in the revised CAA. The new Act redefines the relationship between arbitration and the courts. Similarly, in *Lesotho Development v Impregilo SpA*[30], Lord Steyn noted that the *Arbitration Act 1996 (UK)* had brought about radical changes:

> The [UK] Act has…given English arbitration law an entirely new face, a new policy, and new foundations…**the Act embodies a new balancing of the relationships between parties**, advocates**, arbitrators and courts** which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature (emphasis added).

While arbitration under the Model Law may not be 'purely a private matter of contract', it is to a much larger degree insulated from intervention by the court. Indeed, section 5 of the revised CAA (which implements Article 5 of the Model Law) provides that:

> In matters governed by this Act, no court must intervene except where so provided by this Act.

The Solicitor-General, who appeared for the Federal Attorney-General as amicus curiae, sought to distinguish section 29 of the uniform Acts from Article 31 of the Model Law. He contended that Article 31 required no more than a statement of reasons to demonstrate whether the arbitrators had addressed the dispute referred to determination. The High Court refused to be drawn and said that the proper construction of the Model Law may be left for determination on another occasion.[31] The relevant point here is that notwithstanding similarity in language between the uniform Acts and the revised CAA Model Law; it does not follow that the Model Law should be interpreted in the same manner. I will deal further with questions of interpretation of the revised CAA below.

Next, the dissenting judgment of Heydon J illustrates continuing judicial distrust of (or even antipathy towards) arbitration in certain judicial quarters.[32] This is notwithstanding that there is a shift underway in Australian courts towards greater judicial support and less judicial intervention in the arbitral process.[33] In Victoria, we are fortunate to have a Chief Justice who is extremely supportive of arbitration, Further, we have a specialist Arbitration List (List G) presided over by a judge with international and domestic arbitration expertise (Croft J). Let me return to the remarks of Heydon J who said:

> <u>The merits of arbitration</u>
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> [111] **The arbitration proceedings began on 15 October 2004 when Gordian served points of claim. This appeal comes to a close seven years later.** The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy. It is not intended to make any criticisms in these respects of the arbitrators, of Einstein J, or of the Court of Appeal, for on the material in the appeal books none are fairly open. But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more

30 (2006) 1 AC 221 at 230.

31 *Gordian* per High Court at [23].

32 The history of judicial ambivalence towards arbitration is traced by Spigelman CJ and Mason P in *Raguz v Sullivan* (2000) 50 NSWLR 236 at [47]-[48].

33 Keane C J, 'Judicial Support for Arbitration in Australia' (2010) 34 Australian Bar Review 1, 2.

> speed and less expense. On the construction point **it is unlikely that the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal.** The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous (emphasis added).

The remarks are unfortunate and, with respect, were wholly unnecessary. They do little to promote Australia's reputation as an "arbitration-friendly" jurisdiction. The observation about the relative expertise of the arbitral tribunal is highly debatable. The tribunal comprised an ex Court of Appeal Judge and two expert reinsurance lawyers. It is difficult to imagine a more expert panel to determine the dispute at hand. I will return to the delay and privacy points below.

V. Some Important Themes

(A) Minimal court intervention

I have already touched on the minimisation of court intervention in the arbitral process under the Model Law regime, as now encapsulated in the revised CAA. In summary, court intervention is limited to:

(a) support of the arbitral process, inter alia, in the appointment of arbitrators, challenges to arbitrators, and the grant and enforcement of interim measures, the enforcement of procedural orders made by the arbitral tribunal,[34] and issuing subponae to give evidence and produce documents in aid of an arbitration;

(b) stay of court proceedings brought in the face of an arbitration agreement;

(c) setting aside an award on limited grounds; and

(d) recognition and enforcement of arbitral awards.

(B) Judicial recourse against award

The greatest difference between the uniform Acts and the revised CAA is that the revised CAA substantially limits the capacity of the courts to set aside an arbitral award. Section 34 of the revised CAA adopts Article 34 of the Model Law in respect of judicial recourse against arbitral awards. Article 34 provides for judicial recourse against an arbitral award on (internationally) well-known limited grounds.[35]

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34 Arbitrators under the revised CAA have much expanded powers, including powers to order security for costs and interim measures (for example, interlocutory injunctions and Mareva orders).

35 See Redfern & Hunter on International Arbitration (OUP, 5th ed, 2009), [10.32].

The Issues Paper raised the question whether the CAA Model Bill should provide for further grounds of judicial review – in particular, 'error of law' and/or 'serious irregularity', and if so the details of such provisions.

This was perhaps the most significant policy question to be grappled with in the drafting of the CAA Model Bill. In particular, should there be a higher level of judicial supervision in respect of domestic arbitrations as opposed to international arbitrations, and if so, what should be the desired level of recourse against domestic arbitral awards? There is no uniform approach to this question in the various overseas jurisdictions which have recently reformed their domestic arbitration law. [36]

In the end result, the CAA Model Bill introduced a new section 34A which provides for parties to opt-in to judicial review of domestic arbitral awards on the grounds of error of law (by way of supplementation of the limited grounds for judicial recourse contained in Article 34 of the Model Law, as reflected in section 34 of the CAA Model Bill).

Before section 34A of the revised CAA will apply, the parties must have agreed (either in the arbitration clause, or at some later date)[37] that an appeal may lie on the ground of 'error of law'. Further, for an appeal to lie, the court must grant leave to appeal.[38] Section 34A(3) mandates that the court must not grant leave unless it is satisfied of a number of matters.

It is noteworthy that the new section 34A is not modelled on section 38 of the uniform Acts. In my view, it provides for a more limited review of an arbitral award on the grounds of 'error of law'. For example:

(a) the court must assess whether the decision of the tribunal is 'obviously wrong', alternatively 'open to serious doubt', on the basis of the findings of fact in the award.[39] This would appear to shut out a side-door application to review an arbitral award on the basis of 'error of law' constituted by insufficient evidence supporting the findings of fact made in the award;

(b) secondly, the court, in the usual course, is expected to determine an application for leave to appeal without a hearing – that is, 'on the papers';[40] and

(c) the setting aside of an award on the grounds of 'error of law' is a last resort. In the usual course, the defective award is to be remitted for reconsideration by the arbitral tribunal.[41]

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36 Albert Monichino, 'Reform of the Australian Domestic Arbitration Acts – It's Time' (1999) 28(1) *The Arbitrator & Mediator* 83, 93.

37 Not later than three months following the date on which the party instituting the appeal received the award: section 34A(1)(a) and (6).

38 Section 34A(1)(b).

39 Section 34A(3)(c).

40 Section 34A(5).

The exact scope of section 34A remains to be worked out by the courts.

One thing is clear; the risk of parties to an arbitral award being sucked in to the judicial appellate vortex (alluded to by Heydon J in his remarks above) is substantially diminished. Instead, the revised CAA promotes the finality of arbitral awards.

(C) Stay of court proceedings

The revised CAA also departs significantly from the uniform Acts in its approach to stay of court proceedings. Under section 53 of the uniform Acts, the court had a discretion whether or not to stay court proceedings brought in the face of an arbitration agreement referring disputes to arbitration. In contrast, section 8 of the revised CAA adopts Article 8 of the Model Law and therefore brings the new domestic arbitration regime in line with the position in the IAA. Thus, if the subject matter of a court proceeding is the subject of an agreement to refer the matter to arbitration, the court is mandated on the request of a party to the arbitration agreement[42] to stay the court proceedings and refer the parties to arbitration. The limited exceptions are if the court finds the arbitration agreement null and void, inoperative or incapable of being performed.[43]

The fact that there may be an overlap of issues with claims between one or other of the parties to the arbitration agreement and third parties, with the consequent risk of inconsistent findings arising out of a multiplicity of proceedings, is no longer a relevant factor to be considered by a court in refusing a stay of court proceedings in favour of arbitration.[44]

(D) Interpretation of the revised CAA

The revised CAA introduces a new approach to interpretation of domestic arbitration legislation in this country. In particular, section 2A implements Article 2A of the Model Law (which was introduced in 2006).[45]

Section 2A of the revised CAA mandates that in interpreting the Act, regard should be had to the need to promote, so far as practicable, uniformity between the application of the CAA to domestic commercial arbitrations and the application of the Model Law (as given effect by the IAA) to international commercial arbitrations. In turn, the revised CAA (section 2A(3)) and the IAA (sections 39 and 2D) contain interpretation provisions which require regard to the international origins of the Model Law.

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41 Section 34A(8).

42 Before the party files its first statement of the substance of the dispute – usually a defence.

43 See, for example, *Gilgandra Marketing Co-Operative Ltd v Australian Commodities & Marketing Pty Ltd* [2010] NSWSC 1209.

44 Contrast the position under section 53 of the uniform Acts as outlined in *Murrumbidgee Irrigation Limited v Goodwood Services Pty Limited* [2010] NSWSC 914 at [30]-[32] where the risk of inconsistent findings arising out of the multiplicity of proceedings was held to be a powerful factor in the exercise of the court's discretion whether or not to compel adherence to an arbitration agreement.

45 See Binder, note 20 above, 47-49.

In particular, section 2A(3) provides:

> (3) … in interpreting this Act, reference may be made to the documents relating to the Model Law of -
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> (a) the United Nations Commission on International Trade Law, and
> (b) its working groups for the preparation of the Model Law.

Accordingly, it is highly desirable for Australian superior courts to interpret the revised IAA and CAA in light of jurisprudence in other nation-states which have adopted the Model Law:

> it **is critically important that the IAA and CAA are not treated as standalone pieces of legislation devoid of the international jurisprudence**… The Model Law and the New York Convention, are... instruments which have been drafted internationally and which were intended by the drafters to apply to international disputes, between entities from different countries… **It is beneficial to all countries which have adopted the Model Law**… and the New York Convention **if a harmonised system is maintained**. In a practical sense, this means that **Australian courts should have regard to decisions of overseas courts applying and interpreting the Model Law.** In my view, the CAA and the IAA encourage this approach, as the interpretative provisions specifically direct judges to have regard to the international origins of the provisions applied by the IAA and to the desirability of the uniform application of these provisions internationally. The same result is contemplated with respect to the Model Law provisions adopted in the CAA provisions.[46] (emphasis added)

An illustration of the proper approach to the interpretation of the revised CAA can be found in the judgment of Allsop P in *Gordian*, where his Honour traced the international jurisprudence in relation to Article 31 of the Model Law (which his Honour treated as the inspiration for section 29 of the uniform Acts).[47]

For legal practitioners, assistance in interpretation of the Model Law can be found in Dr Binder's authoritative work,[48] as well as the authoritative work of Howard Holtzmann and Joseph Neuhaus, 'A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary",[49] a copy of which can be found in the Supreme Court of Victoria Library. Also, reference should be made to relevant case law from other Model Law jurisdictions, including case law reported by UNCITRAL in its CLOUT database.[50]

And last, but not least, there is the excellent recent work of Professor Doug Jones, 'Commercial Arbitration in Australia'.[51]

(E) Med-Arb

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46 Clyde Croft, 'The Development of Australia as an Arbitral Seat – A Victorian Supreme Court Perspective' (paper presented at the ICCA 50th Anniversary Conference, Geneva, 19-20 May 2011) 29–30.

47 *Gordian* per NSWCA at [207]-[213].

48 See note 20 above.

49 Kluwer Law International, 1989.

50 The acronym CLOUT stands for 'Case Law On UNCITRAL Texts'. The database may be accessed via the internet at <http://www.uncitral.org/clout/showSearchDocument.do>

51 Lawbook Co, 2011.

Section 27 of the uniform Acts empowered an arbitrator to act as 'a mediator, conciliator or a non-arbitral intermediary' provided he was authorised to do so. Likewise, section 27D of the revised CAA also contains a provision which empowers an arbitrator to act as a mediator or conciliator, provided the arbitration agreement provides for this, alternatively if each party later consents in writing to the arbitrator so acting.

Section 27D expressly provides that an arbitrator when acting as a mediator may communicate separately with the parties (section 27D(2)(a)). In other words, it permits the arbitrator to engage in private mediation sessions. However, if the mediation is unsuccessful, the arbitrator cannot continue with the arbitration unless all of the parties to the arbitration provide their written consent to him doing so (section 27D(4)). The arbitrator must, before proceeding with the arbitration proceeding, first disclose to all other parties in the arbitration proceedings any confidential information it obtained from another party during the mediation – in particular, during any private sessions (section 27D(7)).[52] This disclosure requirement engendered consternation by some commentators on the basis that it undermined the confidentiality of mediations.[53]

Section 27D is by way of supplementation of the Model Law. There are divergent views amongst the arbitration community as to the utility of the provision. Australia is a common law jurisdiction where parties and practitioners are highly suspicious of the notion that a judge or arbitrator may engage in private communications with parties before proceeding to determine a dispute involving them. While the practice of a neutral moving seamlessly between the role of arbitrator and mediator may be a commonly accepted practice in China or Japan, I doubt very much whether it will ever attain any traction in Australia. Likewise, while Singapore and Hong Kong (both common law jurisdictions) have arbitration legislation which, for some time, has allowed arbitrators to engage in private sessions with the parties pursuant to an Arb-Med process, anecdotal evidence reveals that there has been little or no uptake in those jurisdictions of such a process (except where the parties, or at least one of them, come from mainland China).

In my view, the vice in section 27D is that it permits the arbitrator, when acting as a mediator, to meet separately with the parties. I have no difficulty with the concept that an arbitrator should be empowered to promote settlement of disputes referred to arbitration by way of a conciliation process, with both parties present at all times.[54]

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52 This requirement appears to derive from section 17 of the *International Arbitration Act* (Cap 143A) (Singapore).

53 See Hansard transcript of NSW Legislative Council, 9 June 2010 concerning the Commercial Arbitration Bill 2010 (NSW).

54 As permitted by the Rules of the Centre for Effective Dispute Resolution ('CEDR') published in about November 2009. See <http://www.cedr.com/about_us/arbitration_commission/>.

VI. Future Challenges

(A) Confidentiality of court proceedings

Sections 27E to 27I of the revised CAA introduce an elaborate confidentiality regime. This regime is substantially identical to the new regime contained in sections 23 to 23G of the IAA, except that it applies on an opt-out basis (as opposed to an opt-in basis). That is, unless parties otherwise agree, arbitration proceedings under the revised CAA are inherently confidential (subject to defined exceptions). This is a very welcome reform as, at the domestic level, confidentiality is the most obvious advantage that arbitration offers in comparison with litigation.[55] Again, this statutory confidentiality regime is by way of supplementation of the Model Law.

The new confidentiality provisions derive from sections 14B to 14E of the *Arbitration Act 1996* (NZ). However, the New Zealand provisions go further. In particular, sections 14F to 14I of the New Zealand Act deal with the conduct of arbitration-related matters in court. Broadly speaking, the New Zealand Act contemplates that:

(a) arbitration-related proceedings in court shall proceed in open court unless the court otherwise orders;

(b) the court may make an order that an arbitration-related proceeding in court be conducted in private if it is satisfied that the public interest in having the proceeding conducted in public is outweighed by the interest of any party to the proceeding in having the whole or any part of the proceeding conducted in private;

(c) in considering an application that the whole or any part of an arbitration-related proceeding be conducted in private, the court must consider the privacy and confidentiality of the arbitral proceedings.

In contrast, the arbitration Acts in Hong Kong[56] and Singapore[57] contemplate that arbitration-related proceedings in court shall be heard otherwise than in open court, thus protecting the confidentiality of the underlying arbitration.

On the other hand, the Australian provisions are silent on the question of whether arbitration-related proceedings in court are to be held in open court or in private.

The *Arbitration Act 1996* (UK) is similarly silent on the question of whether arbitration-related proceedings in court are to be held in open court or in private. However, through a combination of Rules of Court and case law, the confidentiality of the arbitral process[58]

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55 In contrast, at the international level, the most obvious advantage of arbitration over curial litigation is superior enforcement of arbitral awards by reason of the operation of the New York Convention.

56 Section 16 of the *Arbitration Ordinance 2010* (Hong Kong).

57 See section 56 of the *Arbitration Act* (Cap 10) (Singapore). See also section 22 of the *International Arbitration Act* (Cap 143A) (Singapore).

58 In England, unlike Australia, the courts have held that there is an implied duty of confidentiality in relation to arbitral proceedings. See *Dolling Baker v Merrett* [1991] 2 All ER 890.

has been maintained. Rule 39.2 of the the *Civil Procedure Rules* (UK) enshrines the principle of 'open justice'.[59] This principle has been described as 'one of the most pervasive axioms of the administration of common law systems.'[60]

Notwithstanding, Rule 62.10 provides an exception in the case of arbitration matters. In particular, the court is granted a general discretion to order whether an arbitration matter be heard in public or private. Subject to that general discretion, the rule anticipates that other than with respect to the determination of a preliminary point of law or an appeal on a question of law arising out of an award, all other arbitration claims will be heard in private.

Moreover, English case law has gone further in relation to the publication of court judgments in relation to arbitration matters. In *City of Moscow v Bankers Trust Co*,[61] Mance LJ (as he then was), with whom Carnwath LJ agreed, held that while there was a presumption in favour of publication of court judgments, this should be done in a way that avoided revealing confidential information which may prejudice one or more of the parties (for example, by masking sensitive facts and only revealing issues that are crucial to the decision). This case reinforces the concept of confidentiality by extending it to court judgments and not simply the conduct of court proceedings.

Returning to the Australian position, irrespective of whether the revised CAA or the IAA expressly provide for arbitration-related proceedings to be conducted otherwise than in open court, the court has undoubted inherent jurisdiction to so order. It remains to be seen how Australian courts approach this question. One would hope that Australian courts adopt Rules of Court that follow the precedent contained in the *Civil Procedure Rules* (UK).

It would be a shame if the advantages brought about by the imposition of a statutory duty of confidentiality were to be eroded by the hearing of arbitration-related applications in open court (as alluded to by Heydon J in his remarks referred to above).

(B) Threat of proportionate liability reform

The future of domestic arbitration in Australia is threatened by proportionate liability reforms which are presently under consideration. Proportionate liability applies, at both the Federal and State levels, to varying extents, by way of a patchwork of legislation, often conflicting in respect of critical issues.[62]

In September 2011, the Standing Council on Law and Justice (formerly SCAG) released Consultation Draft Proportionate Liability Provisions and an accompanying Regulation

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59 In particular, Rule 39.2(1) provides that 'the general rule is that a hearing is to be in public.' Rule 39.2(3) then provides certain exceptions to this general rule.

60 'The principle of open justice: a comparative perspective', address by the Honourable J J Spigelman AC, Media Law Resource Centre conference, London, 20 September 2005.

61 [2004] EWCA Civ 314.

62 Such as whether the putative wrongdoer must be joined as a party to the proceeding before proportionate liability relief may be availed of, alternatively whether contracting-out of the proportionate liability regime is available.

Impact Statement. The commendable, underlying purpose of the new provisions is to promote greater national consistency of approach towards proportionate liability.

Relevantly, paragraph 4.1.1.9 of the Impact Statement raised the question whether proportionate liability legislation should apply to arbitration proceedings. The Impact Statement correctly stated that the issue of whether proportionate liability legislation applies to arbitrations is not specifically dealt with under current legislation enacted across the country.

In my view, the current position is that proportionate liability does not apply to arbitrations. The issue has only been considered by one court – namely, the Full Court of the Supreme Court of Tasmania in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3, in the context of the *Civil Liability Act 2002 (Tas)*. Under the Tasmanian Act, "court" is defined to include "tribunal", and there is no need to join a putative wrongdoer before seeking proportionate liability relief (s 43B(4)). The Full Court expressed the view (in obiter) that the proportionate liability provisions of the Tasmanian Act did not apply to arbitrations.[63] The view that proportionate liability relief does not apply to arbitrations is stronger in jurisdictions, like Victoria, where proportionate liability relief cannot be availed of unless the putative wrongdoer is joined as a party to the proceeding.[64]

In particular, the better view is that where proportionate liability legislation defines a "court" to mean a "tribunal", [65]that is meant to refer to a statutory tribunal (such as the Victorian Civil and Administrative Tribunal (**'VCAT'**)), and not a private arbitrator or tribunal.[66]

Thus, the Consultation Model Proportionate Liability provisions make proportionate liability apply to arbitrations (when it does not presently do so). This is proposed to be achieved by defining "court" to expressly include an "arbitrator". The Impact Statement asserts that there are strong policy arguments that proportionate liability legislation should apply to arbitrations, yet it does not articulate any. Indeed, there are strong policy arguments to the contrary.

Proportionate liability legislation provides an incentive to a plaintiff in court proceedings, who is faced with a proportionate liability defence, to join putative concurrent wrongdoers who are responsible for the same damage, thereby avoiding a multiplicity of proceedings. This is not, however, possible in arbitration. The arbitrator's jurisdiction is founded on the consent of the parties. The arbitrator has no jurisdiction to join third parties and to make an award against them (absent the consent of the respondent[67] and the third party). Indeed, the Impact Statement recognises that "arbitrators generally[68]

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63 At [26]-[33].

64 Section 24AI(3) of the *Wrongs Act 1958* (Vic).

65 See, for example section 24AE of the *Wrongs Act 1958 (Vic*).

66 See David Levin QC, 'The Choice of Dispute Resolution and its Implications for Proportionate Liability Claims' (2011) 15 *The Australian ADR Reporter*, 53-55.

67 "Claimant" and "respondent" are here used to identify respectively the party initiating the arbitration and the party responding to the claim brought by arbitration.

68 That is, absent consent of the parties to the arbitration and also the third party.

cannot make a binding award against a concurrent wrongdoer who is not a party to the arbitration agreement."

If proportionate liability legislation were to apply to arbitrations, this would have the unfortunate effect of increasing cost and delay in arbitrations (in many cases) by substantially expanding the issues to be determined in the arbitration. Furthermore, a claimant faced with a proportionate liability defence may well be driven to discontinue the arbitration and to commence separate court proceedings against the respondent and the other putative wrongdoers. Indeed, the application of proportionate liability to arbitration may well result in less referrals by domestic parties of disputes to arbitration.

The recent reforms to domestic arbitration were designed to make domestic arbitration a credible alternative to litigation before the courts. Arbitration is meant to be different to litigation.[69] Just because proportionate liability relief applies to court proceedings does not mean that it should apply to arbitrations. The application of proportionate liability legislation to arbitrations, as contemplated in the Impact Statement and the Consultation Model Proportionate Liability provisions, will, in my view, undo a lot of SCAG's good work.

The proposed application of proportionate liability legislation to arbitrations may also have an adverse impact on the concerted efforts to attract international arbitrations to Australia. The proposed amendments do not affect only domestic arbitration. They also apply (or at least, in the absence clarifying provisions, there is uncertainty whether they apply) to international arbitrations seated in Australia.[70] This may be described as an 'unwanted legal surprise'.[71]

For similar reasons, the leading arbitral institution in Australia (ACICA, CIArb and IAMA) opposed the proposal to make proportionate liability legislation expressly referrable to arbitrations seated in Australia.[72] I sincerely hope that SCAG (as it was previously known) will take heed of the concerns expressed by Australia's leading arbitral institutions. If not, the future of arbitration in Australia is imperilled.

(C) Removing unnecessary obstacles

If arbitration is to thrive in Australia, unnecessary roadblocks need to be removed. One such roadblock to be found is Section 14 of the *Domestic Building Contracts Act 1995 (Vic)* (**'DBCA'**), which provides:

> Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void[73]

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69 Indeed, arbitrators have in the past been criticised for mimicking court procedures.

70 Proportionate liability provisions may apply to an international arbitration by virtue of the fact that they may be considered to be a mandatory law of the seat. They alternatively may apply as part of the governing law of the arbitration if the governing law selected by the parties is Australian law.

71 See Note 21 above.

72 Which would include international as well as domestic arbitrations.

73 A similar provision appears in s 7C of the *Home Building Act 1989* (NSW).

The expression '*domestic building contract'* is defined in section 3. In broad terms, it essentially means a contract to carry out '*domestic building work'*. In turn, the expression '*domestic building work*' is defined by the operation of sections 5 and 6 of the Act.

The DBCA distinguishes between the referral of existing and future disputes to arbitration. It does not prohibit existing disputes from being referred to arbitration by the agreement of the parties.[74] Nonetheless, by the time a dispute crystallises, parties often are not able to agree on anything much at all.

The DBCA applies alike to a $10,000 kitchen renovation or the construction of a $10,000,000 luxury home. In both cases, it prohibits reference of future disputes under the relevant building contract to determination by arbitration.

The DBCA has uncertain application to:

(a) contracts between builders and developers (at times referred to as 'Developer Contracts') for, say, construction of a multi-storey apartment development; or
(b) mixed-use developments, involving a combination of apartments (or houses) and commercial space.[75]

There is no warrant, in my view, for Parliament to intervene to remove the choice by sophisticated parties to resolve their disputes by arbitration. A person who can afford to enter into a multi-million dollar contract for the construction of a home (*a fortiori*, the construction of a multi-million dollar multi-storey apartment dwelling or mixed-use development) can be reasonably expected to protect his or her own economic interests. They may well have legitimate reasons to arbitrate their disputes as opposed to have it determined by VCAT. This is especially so under the new arbitral regime, which provides for confidentiality of the arbitral process, something which is not obtained by litigating in VCAT.

If one goes back to the parliamentary debates, one can readily ascertain that the rationale for the introduction of the prohibition in section 14 was a concern to protect consumers from what was effectively mandatory arbitration; that is, builders inserting arbitration clauses in building contracts where arbitrations were presided over by individuals perceived to be partisan to builder's interests.[76]

Section 14 is a blunt legislative response to the perceived mischief. It overreaches in its response.

Twenty years ago, budding arbitrators, and arbitration practitioners, in Victoria 'cut their teeth' on domestic building disputes. With the conferral of exclusive jurisdiction on VCAT in respect of such disputes, the culture of arbitration in this State has slowly withered away. It is time to turn this around in high dollar domestic building disputes.

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74 See *Swintons Pty Ltd v Age Old Builders Pty Ltd* (2005) 13 VR 381.

75 Jane Hider, 'Domestic Building Contracts Act 1995 – Uncertainty reigns for developers and builders' (2009) 34 *BDPS News*, 4-9.

76 See Victorian Legislative Council, Second Reading speech, 15 November 1995, Hon. R. I. Knowles (Minister for Housing), Hansard, 359; see also Explanatory Memorandum at 1: 'The Act will ensure fairness to builders and consumers alike…'

I propose that section 14 of the DBCA be amended to limit the prohibition against referring future disputes under domestic building contracts to arbitration where the contract price is (say) less than $2,000,000. Thus, where the contract price exceeds $2,000,000 parties should be free to arbitrate their disputes, if they so wish.[77]

VII. Conclusion

The introduction of the revised CAA heralds a new era for arbitration in Victoria. It represents a 'coming of age' with the adoption of an internationally accepted Model Law regime. This new regime promotes party-autonomy and minimises judicial intervention in the arbitration process. The powers of arbitrators are substantially enlarged, thus enabling the achievement of procedural efficiencies by deployment of innovative procedures. `The new Act promotes the finality of awards and provides for judicial supervision of the arbitration process with a 'light touch'. By way of supplementation of the Model Law, the revised CAA makes domestic arbitrations confidential. This will represent a major attraction to many commercial parties. All in all, the foundations for the revival of domestic arbitration in Victoria have been laid.

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[77] Another roadblock is to be found in section 89(4) of the *Retail Leases Act 2003* (Vic), which provides that a retail tenancy dispute, other than an application for relief against forfeiture or a claim for unconscionable conduct, is not justiciable before any other tribunal (that is, other than VCAT), a court, or a person acting judicially. The latter would include an arbitrator. See also section 42A of the *Retirement Villages Act 1986* (Vic) which says that any provision in a 'residence contract' or a 'management contract' (both defined in section 3) which provides for a process of dealing with management complaints or resident disputes through arbitration, is void. At the Commonwealth level, see section 43(1) of the *Insurance Contracts Act 1984* which provides that where a provision included in a contract of insurance has the effect of requiring disputes in connection with the contract to be referred to arbitration, such provision is void. This applies to referrals of future (as opposed to existing) disputes to arbitration.

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