THE FEDERAL COURT OF AUSTRALIA'S INTERNATIONAL ARBITRATION LIST

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1. The *International Arbitration Act 1974* (Cth) represents the bedrock for those engaged in international trade and commerce, giving force of law in Australia to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the New York Convention) and the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law (UNCITRAL). Within the context of wholly domestic disputes in Australia, each State and Territory has also enacted a *Commercial Arbitration Act*[1]. These various statutes provide an enforcement mechanism for Australian Courts to refer matters to arbitration.

2. Australian Courts recognise that arbitration clauses should be read, and thus construed, as liberally as possible, as affirmed by the Full Court of the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2]. That approach won the endorsement of Lord Hope of Craighead in *Fiona Trust & Holding Corporation v Privalov*[3]. There, his Lordship referred to that principle as being firmly embedded in the law of international commerce. That theme has recently been re-endorsed by Allsop P in the New South Wales Court of Appeal[4].

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1 *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act* (NT); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1984* (Vic) and *Commercial Arbitration Act 1985* (WA)

2 (2006) 157 FCR 45 at 87 [165] per Allsop J (Finn and Finkelstein JJ agreeing); [2008] 1 Lloyd's Rep 119 at 144 [165]

3 [2007] 4 All ER 951 at 962–963 [31]; [2008] 1 Lloyd's Rep 254 at 260 [31]

4 *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618 at 622 [3]; Ipp and Macfarlan JJA agreeing

The Court's powers in international arbitrations

3. The Federal Court has original jurisdiction to deal with all matters arising under the *International Arbitration Act* as a law made by the Parliament by force of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth). Section 39B(1A) provides:

> "(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
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> (a) in which the Commonwealth is seeking an injunction or a declaration; or
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> (b) arising under the Constitution, or involving its interpretation; or
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> (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter."

4. A foreign award may be enforced in the Federal, State and Territory Courts under s 8(2) and (3) of the *International Arbitration Act* as if the award were a judgment or order of that Court, subject to the requirements in Part II of the Act. A party can enforce a foreign award in an international arbitration only in accordance with the procedure in Pt II of the *International Arbitration Act*. That is because s 20 of the *International Arbitration Act* excludes the operation of Pt VIII of the *Model Law*, including Art 35, when Pt II of the *International Arbitration Act* applies.

5. However, Pt II applies only to foreign awards, not ones made in an international arbitration in Australia. In the latter case, Pt VIII and, in particular, Art 35, of the *Model Law* applies to all domestic awards made in an international arbitration by force of s 16(1) of the *International Arbitration Act*. Article 35(1) provides:

> *"Article 35. Recognition and enforcement*
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> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."

6. The procedure provided in Art 35(1) of the *Model Law* would appear to be the only way in which a domestic award in an international arbitration can be enforced because s 21 of the *International Arbitration Act* provides:

> "21 Model Law covers the field
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> If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration."

7. Section 39(1)(a)(iii) of the *International Arbitration Act* requires a federal, State or Territory court in exercising, or considering the exercise of, a power to recognise or enforce an arbitral award under Art 35 of the *Model Law* as in force under s 16(1), to have regard to the objects of that Act (s 39(2)(a)) and to the facts specified in s 39(2)(b),[5] which provides:

> "(b) the fact that:
> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
> (ii) awards are intended to provide certainty and finality."

8. Thus, s 39(1)(a)(iii) expressly contemplates that domestic awards in an international arbitration will be recognised or enforced by courts in Australia that fall within the concept of "the competent court" in Art 35. This is also consistent with the objects of the *International Arbitration Act*, especially those identified in s 2D(c) and (e), namely, "to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce" and to give effect to the *Model Law*.[6]

9. There is no definition of "the competent court" for the purposes of Art 35(1) of the *Model Law*. It is unlikely that the Parliament intended that no Australian court could enforce a domestic award. The legislative device of creating jurisdiction by the Parliament declaring an international Convention to have the force of law in Australia as modified by the Act doing so is well known: see e.g. s 8 of the

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5 see *Westport Insurance Corporation v Gordian Runoff Limited* [2011] HCA 37 at [22] per French CJ, Gummow, Crennan and Bell JJ

6 see also C Croft, *Can Australian Courts get their act together on international commercial arbitration?* (2011) 10(3) TJR 361 at 368-369

Carriage of Goods by Sea Act 1991 (Cth). Under the *Judiciary Act*, s 39B(1A)(c) provides that the Federal Court, and s 39(2) provides that, within the limits of their jurisdictions, the Courts of the States, have jurisdiction in any matter arising under a law made the by the Parliament. It follows that the power to enforce a domestic award to which Art 35(1) of the *Model Law* applies, is a matter arising under a law made by the Parliament.

10. Thus, it appears that a party can seek to enforce an award made in an international arbitration, whether foreign or domestic, in either the Federal or a State Court only under the *International Arbitration Act*, although that Act provides different mechanisms in Pts II and III depending upon where the award is made. In addition, s 54(1) of the *Federal Court of Australia Act 1976* (Cth) gives the Federal Court power to make an order in terms of an award made in any arbitration in relation to a matter in which the Court has original jurisdiction.

11. The Federal and Supreme Courts also have jurisdiction under s 18 of the *International Arbitration Act* to perform the functions set out in Art 6 of the *Model Law*.

12. Division 3 of Pt III of the *International Arbitration Act* confers additional powers on the Federal and Supreme Courts to assist in international arbitrations to which the *Model Law* applies, in certain circumstances[7]. Some of those powers[8] apply automatically, by force of s 22(2) and (4), unless, in their arbitration agreement or otherwise in writing, the parties agree that they will not apply. These powers include the making of orders for the issue of subpoenas to assist arbitral proceedings, for the attendance in Court for the examination of a witness who refuses or fails to assist an arbitral tribunal in the performance of its functions and for the production in Court of documents which a party refuses or fails to produce in the arbitration[9]. Other powers[10] will only apply, by force of s 22(3) and (5), if

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7 s 22A
8 ss 23, 23A, 23B, 23J, 23K, 23H, 25, 26, 27
9 ss 23 and 23A
10 ss 23C, 23D, 23E, 23F, 23G, 24

the parties, in their arbitration agreement or otherwise in writing, specially have agreed that they will apply.

13. The *International Arbitration Act* also gives the Courts power to order and enforce interim (or temporary) measures in relation to an arbitration, so as to maintain or restore the *status quo* while the dispute is determined[11]. An example is the Court's power to make a freezing order.

14. The Federal and Supreme Courts are designated by s 35 of the *International Arbitration Act* for the purposes of Art 54 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (also known as the *Investment Convention*). That Article provides, essentially, that each contracting State shall recognise an award under the *Investment Convention* as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State. The *Investment Convention* was signed by Australia on 24 March 1975 and, under s 32 of the *International Arbitration Act*, Chapters II to VII (inclusive) have the force of law in Australia.

The meaning of "arising under any laws made by the Parliament"

15. The Federal Court is a court of general civil jurisdiction in federal matters[12]. The term "federal matters" links back to the jurisdiction for the exercise of the judicial power of the Commonwealth identified in Ch III of the Constitution, especially ss 75 and 76. The latter sections delimit the bounds of the original jurisdiction for the judicial power of the Commonwealth[13]. A federal matter involves a single justiciable controversy of which a matter arising under a law made by the

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11 s 7(3) and Art 17J of the *Model Law*

12 see *Transport Workers Union v Lee* (1998) 84 FCR 60 at 67-68 per Black CJ, Ryan and Goldberg JJ; *National Union of Workers v Davids Distribution Pty Ltd* (1999) 91 FCR 513 at 519-520 per Wilcox, Burchett and Cooper JJ; see also *Adsteam Harbour Pty Limited v The Registrar of the Australian Register of Ships* [2005] FCA 1324 at [6]–[7] per Allsop J

13 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ

Parliament may form only a small part. This was a lesson from *Re Wakim; Ex parte McNally*[14].

16. That jurisdiction extends to all controversies or "matters" across the range of areas that impact on activities with respect to which the federal Parliament has made laws. So long as a "matter" can be said to "arise under" a law of the Parliament, then the Federal Court is vested with jurisdiction to hear the whole of the dispute.

17. A "matter" involves the existence of a controversy as to some immediate right, duty or liability to be established by the determination of the Court[15]. A matter is identifiable independently of the proceeding that is brought for its determination[16].

18. What then is the meaning of the phrase "arising under any laws made by the Parliament" for the purposes of s 39B(1A)(c) of the *Judiciary Act* and s 76(ii) of the *Constitution*? Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ identified this in *Agtrack (NT) Pty Ltd v Hatfield*[17] when they said:

> "It is well settled that a 'matter' means more than a legal proceeding[18] and that 'an important aspect of federal judicial power is that, by its exercise, a controversy between parties about some immediate right, duty or liability is quelled'[19]. Further, federal jurisdiction may be attracted at any stage of a legal proceeding, as Barwick CJ emphasised in *Felton v Mulligan*[20]. Indeed, as early as 1907, this Court had remarked that federal jurisdiction may be raised for the first time in a defence[21]. In *Re Wakim; Ex parte McNally*[22], Gummow and Hayne JJ said:
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> > 'The central task is to identify the justiciable controversy. In civil proceedings that will ordinarily require close attention to the pleadings (if any) and to the factual basis of each claim.'
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> …

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14 (1999) 198 CLR 511

15 see *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at [43] per Gaudron J

16 *Fencott v Muller* (1982) 152 CLR 570 at 603-608 per Mason, Murphy, Brennan, and Deane JJ

17 (2005) 223 CLR 251 at 262-263 [29] and [32]

18 *In re Judiciary and Navigation Acts* 29 CLR at 265

19 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 [242]

20 (1971) 124 CLR 367 at 373

21 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1136

22 (1999) 198 CLR 511 at 585 [139]

> **If a party on either side of the record relies upon a right, immunity or defence derived from a federal law, there is a matter arising under s 76(ii) of the Constitution**. It is not a question of establishing an intention to engage federal jurisdiction or an awareness that this has occurred. Immediate ascertainment of the factual basis of a justiciable controversy and of the attraction of federal jurisdiction in a proceeding will not always be possible by regard simply to allegations pleaded. If the attraction of federal jurisdiction itself is disputed, it may require evidence of the factual basis of the controversy to permit an answer to that question. …" (emphasis added)

19. Further, a new party, against whom no federal claim is made, can be joined to proceedings already in federal jurisdiction (i.e. a claim for contribution or indemnity) and that claim will be part of the one controversy[23]. And, if the federal claim is dismissed, or the Court does not need to decide whether or not a right or duty based in federal law exists, even if that matter has not been pleaded by the parties, the Court nonetheless continues to have jurisdiction to determine the non federal part of the controversy[24]. Also, if a federal matter is pleaded, federal jurisdiction is exercised even though the Court finds it unnecessary to decide the federal question because the case can be decided on other grounds[25] unless, perhaps, the inclusion of the federal claim was "colourable"[26] (i.e. it does not raise any real federal question and is in truth fictitious[27]) or an abuse of process.

20. In addition, the content of the law to be applied by the Federal Court in exercise of its jurisdiction under s 39B(1A)(c) may be derived from a State or Territory statute which is "picked up" as a "surrogate federal law" by the operation of s 79 of the *Judiciary Act*[28]. Where a cause of action is created by a statute of the Commonwealth Parliament, there will be no difficulty in determining that federal jurisdiction is attracted. Thus, a claim for damages under s 236 of the *Australian*

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23 *Re Wakim* 198 CLR at 587 [145] per Gummow and Hayne JJ

24 *Moorgate Tobacco Co Ltd v Philip Morris Inc* (1980) 145 CLR 457 at 476 per Stephen, Mason, Wilson and Aickin JJ; *Godeon v Commissioner of New South Wales Crime Commission* [2008] HCA 43 at [28] per Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ

25 *Moorgate* 145 CLR at 476

26 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 499 per Gibbs J

27 *Hopper v Egg and Egg Pulp Marketing Board (Vict)* (1939) 61 CLR 665 at 677 per Starke J, Latham CJ and Evatt and McTiernan JJ agreeing at 673, 681, 687

28 *Ruhani v Director of Police* (2005) 222 CLR 489 at 499 [8] per Gleeson CJ

Consumer Law[29] caused by an alleged contravention of s 18 of the *Law* (misleading or deceptive conduct) is within federal jurisdiction.

21. When will a matter arise under a law made by the Parliament so as to attract the jurisdiction of the Federal Court? It is not necessary that the form of relief sought in proceedings, or the relief itself, depends on federal law, as Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ held in *LNC Industries Ltd v BMW (Australia) Ltd*[30]. They said:

> "A claim for damages for breach or for specific performance of a contract, or a claim for relief for breach of trust, is a claim for relief of a kind which is available under State law, **but if the contract or trust is in respect of a right or property which is the creation of federal law, the claim arises under federal law. The subject matter of the contract or trust in such a case exists as a result of the federal law**." (emphasis added)

22. In that case, the High Court held that a contract for the sale of a licence to import motor vehicles granted under a Commonwealth regulation owed its existence to federal law. That is, an action arising out of a contract for sale, where the only federal aspect was that the property the subject of the contract was created by federal law, was held to be a matter arising under a law made by the Parliament. Thus, contracts for the sale of shares in corporations or licences granted under federal law (such as broadcasting licences) are likely to be within the jurisdiction of the Federal Court.

The Federal Court's International Arbitration List

23. Each registry of the Federal Court has an Arbitration Co-ordinating Judge who has general responsibility for the management of matters under the *International Arbitration Act*. Justice Foster performs this role in the New South Wales Registry. Justice Jacobson and I are the other judges who assist in this work in Sydney. Arbitrations in Admiralty matters, however, would ordinarily be referred to me as the New South Wales Admiralty convening judge.

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29 which is Sch 2 to the *Competition and Consumer Act 2010* (Cth)

30 (1983) 151 CLR 575 at 581

24. On 1 August 2011 when the new *Federal Court Rules 2011* (Cth) (**the new Rules**) commenced, the Chief Justice issued a Practice Note on proceedings under the *International Arbitration Act* which summarised the scope of the Federal Court's jurisdiction under the Act. According to the Practice Note, the Court's jurisdiction encompasses:

(a) applications for an order to stay a proceeding or part of a proceeding that is before the Court and which involves the determination of a matter that is capable of settlement by arbitration pursuant to an arbitration agreement between the parties;

(b) the enforcement of a foreign award under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*;

(c) applications under article 6 of the *UNCITRAL Model Law on International Commercial Arbitration* ('Model Law') for orders concerning:

(i) the appointment and termination of an arbitrator (articles 11 and 14 of the Model Law);

(ii) challenges against an arbitrator on the basis that the arbitrator lacks impartiality or independence or the necessary qualifications (article 13);

(iii) whether an arbitral tribunal has jurisdiction to deal with the issues before the tribunal (article 16);

(iv) the setting aside of an arbitral award (article 34);

(v) the recognition and enforcement of an interim measure (article 17H and article 17I);

(vi) ensuing interim measures (article 17J);

(vii) assisting an arbitral tribunal to take evidence (article 27);

(d) the enforcement of an award under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.

25. The Practice Note also recognised that the requirement under:

- s 8(3) of the Act for the leave of the Court to enforce a foreign award under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*; and
- s 35(4) of the Act for the leave of the Court to enforce an award under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*

mirrors the requirement for leave to enforce such awards in State and Territory courts under State or Territory commercial arbitration legislation.

International arbitration under the Federal Court Rules 2011 (Cth)

26. Alternative dispute resolution, including arbitration, is dealt with in Part 28 of the new Rules. Relevantly, Div 28.5 of the new Rules deals with international arbitrations under the *International Arbitration Act*. The Rules empower a party to apply to the Court for an order to stay an arbitration, enforce a foreign award, obtain relief under various provisions in the *Model Law*[31] and obtain the issue of subpoenas and other processes in aid of an arbitration.

27. Division 28.5 of the new Rules prescribes in a straightforward way the procedure and forms for particular applications under the *International Arbitration Act*. The following rules are new or have been amended:

- Under r 28.43 a party to an arbitration agreement who wants an order under s 7 of the *International Arbitration Act* to stay the whole or part of a proceeding must file an originating application. Previously, under O 68 r 3 of the old Rules, this application was made by filing a notice of motion. A

[31] Arts 11(3), 11(4), 13(3), 14, 16(3), 17H(3), 17I, 17J, 27 and 34

copy of the arbitration agreement and an affidavit are still required to accompany the application.

- Under r 28.45, a party can file an originating application for relief under articles 11(3), 11(4), 13(3), 14, 16(3), 17H(3), 17I, 17J, 27 or 34 of the *Model Law*.

- Rule 28.46 deals with applications to the Court to issue a subpoena under s 23(3) of the *International Arbitration Act*. Section 23(3) of the *International Arbitration Act* provides that the Court may, for the purposes of arbitral proceedings, issue a subpoena requiring a person to attend for examination before the arbitral tribunal or produce documents.

- Rule 28.47 deals with an application for an order under s 23A of the *International Arbitration Act*. Section 23A provides that a party to arbitral proceedings may apply, in certain circumstances, to the Court for an order that a person attend before the Court for examination, produce documents, "do the relevant thing" or transmit to the arbitral tribunal certain documents or records, where the person fails to assist the arbitral tribunal.

- Rule 28.48 deals with an application for an order under ss 23F or 23G of the *International Arbitration Act*. Those sections deal with confidential information.

28. New specialised forms relating to international arbitration have been introduced with the new Rules:

- Form 51 – Originating application for stay of a proceeding under the *International Arbitration Act 1974*.

- Form 52 – Originating application to enforce a foreign award under the *International Arbitration Act 1974*.

- Form 53 – Origination application for relief under Model Law (s 18 of the *International Arbitration Act 1974*).

- Form 54 – Application for a subpoena under the *International Arbitration Act 1974*.

- Forms 55A, 55B and 55C – set out the form in which subpoenas (to attend for examination, to produce documents or to attend for examination and produce documents) are to be drafted under the *International Arbitration Act 1974*.

- Form 56 – Originating application under s 23A of the *International Arbitration Act 1974* (failure to assist arbitral tribunal).

- Form 57 – Originating application under s 23F or s 23G of the *International Arbitration Act 1974* (which relate to the disclosure of confidential information).

- Form 58 – Originating application to enforce an award under s 35(4) of *the International Arbitration Act 1974*.

Conclusion

29. It is unfortunate that the Parliament did not use a simple device of explicitly conferring jurisdiction generally under the *International Arbitration Act* on particular courts, but instead used a tortuous, and opaque, set of specific provisions in that Act as well as the *Judiciary Act*. Arbitration should be an efficient and inexpensive means for parties to resolve their dispute. The ability to enforce awards is critical to arbitration. Although Art 35 of the *Model Law* says that the award in a (domestic) international arbitration is enforceable in "the competent court", the Parliament chose to give no explicit guidance as to the courts that were competent in this respect. Parties should not have to sift through

a legislative morass and apply constitutional law principles to find a court in which to enforce an award. Hopefully, this paper will have correctly identified a path through the labyrinth.