

**ADDRESS BY THE HONOURABLE T F BATHURST
TO THE CONTINUING PROFESSIONAL DEVELOPMENT
SEMINAR
ARBITRATION AND INTERNATIONAL ARBITRATION
WEDNESDAY, 21 SEPTEMBER 2011**

It is a pleasure to have the opportunity to speak tonight. I believe that arbitration is a significant and important area of legal practice that is deserving of a great deal of attention. It is also an area which provides considerable opportunities to the bar.

In recent times, alternative dispute resolution has become an integral part of the operation of the legal profession. In assisting clients to resolve disputes in a more harmonious and less costly way, a great emphasis has been placed on mediation. There is no doubt that mediation has produced benefits to clients with a range of legal problems. It has also required courts and practitioners to change the way in which we do business, encouraging a more holistic approach to dispute resolution whereby clients are informed of out-of-court non-litigious dispute resolution options as a matter of course.

To some extent, though, I fear that the legal profession's focus on mediation may have come at the cost of a focus on equally important developments in other areas of dispute resolution. Specifically, if we are serious about this State providing a forum for the resolution of major commercial international and intranational commercial disputes, it is essential to understand, facilitate and effectively utilise arbitration. Moreover, it is vital that we establish a body of jurisprudence on when, and to what extent, courts will review arbitral awards.

Arbitration is fast becoming recognised as a primary forum for dispute resolution. This is particularly the case where disputes involve major transactions and parties operating in multiple jurisdictions. The New York Convention provides parties with reasonable certainty that arbitral awards can be enforced in multiple jurisdictions. Arbitration allows parties a high degree of control over proceedings that may involve a very technical subject matter. Arbitration offers parties more flexibility and privacy and can be more cost-effective than litigation, assuming it is effectively managed. It is important to remember that unlike the outcome of mediation, arbitral awards are usually binding, meaning that there is a greater chance of resolving a dispute with some finality.

Over the past two years, the importance of arbitration as a means of dispute resolution has been reflected in significant legislative reforms. The Commonwealth and NSW Attorneys-General heralded 2009 changes to Commonwealth laws and 2010 changes to NSW laws as the pathway to Australia becoming “a significant player in the booming international commercial dispute resolution market”¹. The law reform that occurred during this time allowed parties greater control over their proceedings and creates an environment of judicial support, rather than unwanted intervention or interference, in arbitration proceedings². The reforms created a uniform scheme for arbitration throughout all Australian states and territories and represent an important step in enhancing the role of arbitration in this country. However, the legislative reform we have seen over the past two years will not produce the full extent of their desired benefits unless lawyers, arbitrators and parties take advantage of the new system.

¹ Robert McClelland and John Hatzistergos, Joint Media Release: ‘Agreement on New Model Commercial Arbitration Bill’ (7 May 2010) accessed at: http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_7May2010-AgreementonNewModelCommercialArbitrationBill.

² The Hon Clyde Croft, ‘Arbitration Reform in Australia and the Arbitration List (List G) in the Commercial Court – Supreme Court of Victoria’ (24 May 2010) accessed at: <http://www.austlii.edu.au/au/journals/VicJSchol/2010/10.pdf>.

In 1989, Australia was one of the first countries to adopt the UNCITRAL Model Law on International Commercial Arbitration. Many things have changed since then. Particularly, since that time, London, Singapore and Hong Kong have made every effort to establish themselves as international hubs for arbitration. We cannot be left behind. In fact, we should be leading the charge. Australia is in the unique position of having familiarity with the laws of Europe and Asia due to our heritage and our location. In NSW, we need to capitalise on Australia's unique position to attract arbitration work to our jurisdiction. The model laws go some way towards doing that, but we need both institutional change and cultural change.

In the context of institutional change, I strongly believe that the NSW Supreme Court, exercising its supervisory jurisdiction, should do whatever it can to support the legal profession in attracting, maintaining and efficiently conducting arbitration work in NSW. In furtherance of that objective, I propose to issue for consultation in the next couple of days a Practice Note which will significantly modify the manner that the arbitration list presently operates and I hope will provide an efficient inexpensive and relatively informal procedure for resolving disputes arising in the

context of arbitration agreements, arbitration awards or arbitration proceedings.

The Court, as you know, presently has an arbitration list. It is run in conjunction with the commercial list and subject to certain modifications, the same procedures are adopted in relation to the list as are adopted in respect of the commercial list.

The principal objective of the new Practice Note is to provide what I might describe as a completely stand-alone list and modify the procedure which is to be adopted to recognise that most disputes which will arise are ones where the Court will not be required to determine the ultimate dispute between the parties but rather to provide a mechanism which enables the Court to best perform its role to facilitate the resolution of disputes which parties have elected to arbitrate in this jurisdiction.

The types of proceedings that would be subject to the new list include:

- 1 Proceedings relating to the construction or effect or operation of the *International Arbitration Act* 1974 (Cth), the *Commercial Arbitration Act* 1984 (NSW) or any

equivalent legislation of any state, territory or foreign country;

- 2 Proceedings relating to or concerning the construction or effect or operation of the *UNCITRAL Model Law on International Commercial Arbitration* or any international instrument concerning arbitration or alternative dispute resolution;
- 3 Proceedings concerning the construction of an arbitration agreement;
- 4 Application for stay of proceedings arising out of an arbitration agreement or proceedings relating to the dispute in question;
- 5 Proceedings relating to the conduct of an arbitration including applications for any interim measures whether under the *International Arbitration Act 1974 (Cth)* or otherwise;

- 6 Proceedings relating to any challenge to or setting aside of an arbitral award; and
- 7 Proceedings relating to the enforcement of an arbitral award.

A matter in the List shall be commenced in the general form of summons proscribed under the *Uniform Procedure Rules 2005* but shall be endorsed with a note “The proceedings have been entered into the Arbitration List established pursuant to Practice Note No ???.” The provisions of the Practice Note shall apply to the proceedings.

There is to be filed with the summons:

- (a) A statement of the nature of the dispute;
- (b) A succinct statement of the issues of fact the plaintiff contends will arise;
- (c) A succinct statement of the issues of law the plaintiff contends will arise;

- (d) A statement setting out the interlocutory steps the plaintiff considers necessary to prepare the matter for hearing.

On the return date of the summons the following matters to the extent practicable shall be dealt with

- (a) Whether having regard to the extent of the factual matters involved in the proceedings it is more appropriate that the proceedings be dealt with in
 - (i) The Commercial List;
 - (ii) The Technology and Construction List;
 - (iii) Any other list.

- (b) In the event it is determined that the matters remain in the Arbitration List the following matters will be dealt with
 - (i) Directions as to the steps necessary to bring the matter to a hearing;
 - (ii) Fixing the hearing date.

You will see that the procedure is a summary one. No pleadings or contentions are required and the usual order for

hearing does not apply. Consistent with arbitration proceedings the parties will be required to consult amongst themselves as to the best method of bringing the matter forward to enable the Court to perform its supervisory function.

Consistent with the present Practice Note a date will be fixed for the hearing of any proceedings on the first return date. The earliest possible hearing date will be given particularly in cases where the proceedings are delaying the institution or completion of arbitral proceedings or the production of an award.

The list will be called over on Tuesdays before a judge who, to the extent possible, will case manage the dispute and conduct the hearing of the matter. One back-up judge will be allocated to ensure that all matters in the list are disposed of as quickly as possible.

The object of the new list is to provide speed, flexibility and informality in the resolution of arbitral disputes. Because the input of the profession is of considerable importance in this area, I do propose to give interested parties an opportunity to consider the Practice Note and make suggestions as to how it could be varied,

so that disputes falling within the list can be resolved in the most efficient way possible. I see that later in the evening there will be some discussion about the decision of the Court of Appeal in *Gordian Runoff*. That decision may well shape the type of litigation that will arise out of arbitration and depending on the result require some variation to the proposed procedure. However, irrespective of the Court's supervisory jurisdiction, it should be exercised promptly, flexibly and with minimum expense.

To conclude, I would like to stress again that I see arbitration as an important means of dispute resolution, particularly in matters in which parties operate across borders. Australian courts have a crucial role to play in facilitating the resolution of disputes through arbitration. The Supreme Court of NSW aims to support the use of arbitration wherever possible through the arbitration list. I hope you find it to be an effective and efficient vehicle for accessing the supervisory jurisdiction of the Court.