Law Council
OF AUSTRALIA

19 March 2019

Hon Roger Gyles AO QC
c/o ABA International Committee
Sydney NSW 2000

By email: contact@austbar.asn.au

Dear Mr Gyles

Inquiry by Roger Gyles AO QC on international arbitration

The International Law Section (ILS) of the Law Council of Australia welcomes the opportunity to make this submission to the Australian Bar Association's inquiry on international arbitration, led by the Hon Roger Gyles AO QC. This submission has been prepared by the ILS's International Arbitration Committee and is offered on its behalf.

International arbitration and other forms of alternative dispute resolution (ADR) are an increasingly important component of the legal services industry. The Law Council, as the national body representing the Australian legal profession, has an important role to play in supporting the profession to take full advantage of the opportunities that international arbitration can provide.

The Law Council has had a longstanding involvement in developing opportunities for Australian arbitrators, including through work on legal services market access. In 2019, this involvement has been given greater focus through inclusion in the Law Council's Presidential Plan 2019. The Presidential Plan addresses the need to:

> *"Promote and defend the interests of Australian ADR practitioners internationally and improve the standing, business opportunities and competitiveness of Australian Arbitration Hubs in the Asia-Pacific region."*

The Presidential Plan includes the following priority:

> *"Advocate for the establishment of a world class arbitration and mediation centre in a capital city that is close to Asia and promote improved cooperation and collaboration between Melbourne and Sydney to improve their standing as global hubs in ADR."*

Relevant excerpts from the Presidential Plan are provided at **Attachment A**.

Although the Presidential Plan focusses on key locations for Australian arbitration, this should not be understood as a suggestion that broader development of arbitration throughout Australia and into the region is not preferred. Equally, it is important to note that a key aspect of successfully achieving these parts of the Presidential Plan will be the existence of a unified Australian position on arbitration that incorporates the views and

priorities of the broadest possible group of stakeholders, especially arbitrators, arbitration centres and client groups.

The Law Council believes that the report of this inquiry will be especially significant in this regard.

The ILS notes that the focus of your report will be how to enhance opportunities for Australian barristers to practise in international disputes. The Law Council has a broader remit, representing as it does all legal practitioners in Australia. This submission will focus on broad initiatives to increase arbitration opportunities for all practitioners.

The Honourable Croft J outlined the potential that Australia has to be a frontrunner in international arbitration in the Asia-Pacific region. He complains that Australia needs to be "out there telling people about it. We are not out there enough telling people about the arbitration-friendly environment in Australia and educating fellow practitioners and in-house counsel about how they can draft arbitration clauses which make Australia the seat of any arbitration, and Melbourne, Sydney or another capital city the venue."[1] He goes on to identify the following five principal factors which he believes demonstrates Australia's potential to become a regional frontrunner in international arbitration:

1. A comprehensive legislative framework that is now well established;

2. A supportive judiciary (at both a state and federal level) and well-equipped courts;

3. World-class alternative dispute resolution facilities;

4. A high-quality profession; and

5. Broad stakeholder involvement and support.

Specific issues

Geography

Geography is often given as the telling factor in explaining why arbitration has not flourished in Australia, as it has in other locations in the region. While geography is a factor, this does not give due recognition to other important issues. For example, Singapore's transformation into a leading arbitral seat in the region has only been possible because of a consistent, high level of support for arbitration from government and the judiciary, including significant resources from government for the development of state-of-the-art facilities for arbitration.

Lack of a single point of access to the Australian arbitration market

The importance of a single point of entry will help to deliver clients to the most appropriate Australian arbitration service for their needs. At present, there is no single entry point for potential clients looking to engage an Australian arbitrator or conduct arbitration in Australia. Instead, clients need to identify the best service for their needs from among a range of

[1] The Hon. Justice Croft, "Promoting Australia as Leader in International Arbitration," (Speech made at the Law Institute of Victoria PD Intensive: Commercial Law, Melbourne on 26 March 2015) accessed https://www.supremecourt.vic.gov.au/about-the-court/speeches/promoting-australia-as-leader-in-international-arbitration accessed 15/3/2019.

Australian arbitration centres competing amongst each other as well as against competition overseas.

This does not compare favourably with key markets in the Asian region, especially Hong Kong and Singapore, which can present a consolidated arbitration solution for prospective clients.

In a recent address, Justin Gleeson SC made the following cogent points

> "If Australia is to compete with the likes of Singapore, Dubai or Abu Dhabi, there needs to be, at a minimum, a substantial further investment in the arbitral institutions Australia has to offer. One of the core factors parties rely on in choosing a seat is the strength and depth of the arbitral institutions at the seat. All parties involved in promoting arbitration in Australia should be building a business case for new government investment – federal and state – of this character."[2]

He also highlighted the importance of government investment in the arbitral institutions, in order to raise Australia's profile and try and compete with the centres in Singapore and Hong Kong.

Gleeson SC argued that Australia needs to continue to build the skills and sophistication of local lawyers when it comes to negotiating dispute resolution clauses. "The terms of an arbitration clause should, in a commercial contract, be regarded as an important part of the overall pricing of a contract. Each part of a clause needs to be thought about, and if necessary argued over, carefully in the negotiating process." Whilst it is understood that organisations must put their commercial interests first, Gleeson SC stated, "very often those interests could be advanced by insisting in the negotiation on arbitration clauses that name Australia in as many guises as possible – whether as seat, as place of arbitration, as the governing law, as the arbitral institution, as the body of procedural rules, as the nationality of one or more of the arbitrators. Indeed, it would be helpful for the general counsel of our major companies to work in collaboration with each other, and with government, to discuss what can be done better in these areas."

Gleeson SC went on to submit that in order to overcome the geographical issue, "our arbitral institutions need to have and display world-leading technological facilities so that much of the administrative engagement with the institution and procedural hearings can be done easily without counsel and arbitrators from overseas having to travel here".

This theme was expanded on by Damian Sturzaker in a paper delivered as part of a Federal Court seminar series when he asserted that Australia needed to move to "Arbitration 2.0" and that there was a niche available via the use of technology and even that the Federal Court could assist in sharing technology with ACICA:

> "One option to achieve this is for Australia to advertise itself as a place of arbitration that not only permits the use of technical innovations in arbitration proceedings, but actively encourages parties to utilise technology to save costs and time. It would need to be flexible to parties' needs. It may also need to be subsidised by technology companies, state or federal governments or even private enterprises. Given the steps recently taken by the Federal Court to facilitate the use of technology there may be an opportunity for ACICA to jointly utilise such assets. If this occurred, then

[2] Justin Gleeson SC, remarks made at the CIArb Australia and Grossi Florentino Business Lunch on 20 July 2017, as reported in the following article: https://www.lawyersweekly.com.au/wig-chamber/21562-dynamic-developments-to-impact-aus-international-arbitration accessed 15/3/2019.

> ACICA could immediately find itself propelled as a leader amongst international institutions in the use of technology."[3]

There is also the need to educate young lawyers including young barristers. Gleeson notes that, "in our universities, there needs to be a greater emphasis than at present on the training for every future Australian lawyer as one which equips them to see most legal problems as potentially raising issues that travel beyond our borders. The next generation of Australian lawyers should be fully at home in advising on or running any international dispute – whether arbitral or otherwise. It should be second nature to them to bring a comparative law and cultural mindset to a problem. If the skill base of our lawyers is higher, the prospects for Australia as a whole will be enhanced. And our young lawyers should be trained and capable from an early age in sitting as arbitrator, at first in smaller disputes, as is very much the norm overseas."[4]

Briefing of Australian ADR providers by law firms in Australia

The capacity within the domestic profession to appropriately advise clients in relation to arbitration (and broader international legal matters) cannot be assumed. Education of the profession can be improved by developing tools to assist businesses and clients to go international. Courses at universities such as UNSW have a focus on international arbitration taught by experienced practitioners. The Arbitration Branch of the Chartered Institute of Arbitrators has accreditation for practitioners wishing to learn how to be an arbitrator. Counsel should undertake these courses.

This may require further research to identify the profession's current state of knowledge and common practices. From among these common practices, examples of better practice can be identified and promoted across the profession. This research would also enable an assessment of the current proportion of contracts drafted by Australian lawyers that include an arbitration clause, including the seat identified by any such clause. This data would support broader promotion of Australian dispute resolution clauses, such as the ACICA Model Arbitration Clause.

It is the view of the ILS that the Government sector, at both Commonwealth and State and Territory level, should be asked to include Australian dispute resolution clauses, based on the ACICA Model Arbitration Clause, in all government contracts or otherwise explain why this is not feasible.

Former Chief Justice Warren AC urges for the need for collaboration between different parts of the legal profession. In a recent speech she said, "Australia's continued development as a national and regional commercial hub will require a collaborative and co-operative effort by the judiciary, the Bar and the profession. Support by Australia's superior courts of commercial litigation and arbitration will be crucial. However, the judiciary cannot do it alone: for the legal system in this State to operate at its best and become the regional forum of choice, all parties must work together. In the arbitration space, we continue to work towards more consistent processes and the development of a more consistent body of jurisprudence across the federation, to make Australia a more attractive arbitral seat for cross-border disputes."[5]

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[3] Damian Sturzaker, "Why Australia needs to move to Arbitration 2.0" Australian ADRL Bulletin, 2018 Vol 4 No 6.

[4] Above n 2.

[5] Marilyn Warren AC, "Australia – A Vital Commercial Hub in the Asia Pacific Region: Victoria – A Commercial Hub," (Speech delivered at the Federal Court and Supreme Court Commercial Seminar, Monash Law

In another speech, her Honour emphasised that, "if the Australian courts and legal profession are to give foreign litigants confidence that they will receive 'national treatment', meaning they will receive the same treatment that Australian nationals receive — equality — the Australian judiciary and the Australian legal profession will need to focus on two things. First, focus should be given on how Australia can educate and train our foreign counterparts in developing countries about Australian courts and what we do and how well we do it. Secondly, focus should be on what knowledge Australians may receive and learn from foreign counterparts. For many years now, Australian courts and judges have been active in education and exchange programs in the Asia-Pacific region. There is growing recognition, however, that the engagement between Australian and overseas judges and legal professionals should be an exchange of learning and ideas. This type of training may go some way toward assuring foreign litigants that they will receive national or equal treatment in Australian courts. It is important to reflect not only on what Australian courts, judges and lawyers may offer overseas counterparts in terms of jurisprudence, training and education, but also on what the world has to offer us."[6]

The outcomes urged by Chief Justice Warren AC can be obtained through increased training of overseas lawyers both here and in foreign locations about Australian arbitration.

Australia's visa system

The ILS is aware that Australia's visa system may present a barrier to conducting arbitration in Australia. Especially in comparison to other prominent seats of arbitration in the region, the Australian visa system is complicated. The range of visas available, and information required to support a successful application, varies greatly depending on nationality. ACICA advises on its website that relevant visas may include subclass 601, 651, 600 and 400. A person working for an Australian organisation, which would presumably include foreign arbitrators, would need to apply for a subclass 400 visa, which is typically valid for three months (although up to six months validity "may be allowed in limited situations") and cannot be extended.

While this may at first seem beneficial in terms of reducing overseas competition for positions on arbitral tribunals sitting in Australia, the larger consequence is that it will be administratively simpler to arbitrate in a different location without such restrictions on access. This will therefore tend to reduce the overall number of arbitrations held in Australia, with a corresponding reduction in opportunity for members of the Australian legal profession.

While it is acknowledged that the Australian visa system seeks to balance a range of competing factors, there is room for improvement from the perspective of creating a system that makes arbitration in Australia simple and accessible for the broadest possible range of clients.

Conclusion

The ILS and the Law Council are well placed to contribute to the development and promotion of a strategy to improve opportunities for the Australian legal profession to provide arbitration services in Australia and internationally. We look forward to the outcomes

Chambers, Melbourne, Wednesday 25 February 2015): https://www.supremecourt.vic.gov.au/about-the-court/speeches/australia-a-vital-commercial-hub-in-the-asia-pacific-region-victoria-a accessed 15/3/2019.

[6] Marilyn Warren AC, "Australia's Place in the World," remarks to the Law Society of Western Australia Law Summer School 2017, Perth, Western Australia on 17 February 2017: https://www.supremecourt.vic.gov.au/about-the-court/speeches/australias-place-in-the-world accessed 15/3/2019.

of this review and hope to be able to play a constructive role as this important project moves forward.

Should you require further information, please contact Mary Walker (02 8815 9250 or inbox@marywalker.com.au) or Damian Sturzaker (02 8216 3066 or damians@marquelawyers.com.au) in their capacity as Co-Chairs of the ILS International Arbitration Committee.

Yours sincerely

Wolfgang Babeck
Chair, International Law Section

Attachment A

Excerpts from Law Council Presidential Plan 2019

Strategic Pillar 3: promoting, protecting and defending the interests of members of the Australian legal profession

The Law Council will:

- promote and defend the interests of the legal profession within Australia and internationally;
- promote effective legal practice for Australian lawyers;
- promote consistent and coordinated regulation of the Australian legal profession; and
- support the Constituent Bodies.

3.1 Promote and defend the interests of Australian ADR lawyers internationally and improve the standing, business opportunities and competitiveness of Australian ADR hubs in the Asia-Pacific region

Presidential Priority:

Advocate for the establishment of a world class arbitration and mediation centre in a capital city that is close to Asia and promote improved cooperation and collaboration between Melbourne and Sydney to improve their standing as global hubs in ADR.

Identify opportunities to promote and defend the interests of ADR practitioners across Australia, including in the lead up to and following signature of the United Nations' Singapore Convention on Mediation in 2019.

Improve the competitiveness of Australian ADR hubs against regional chairs and hubs including Singapore to promote greater opportunities in arbitration and mediation practice for Australian solicitors and barristers.

ADR represents underutilised international business and practice opportunities in Australia for Australian solicitors and barristers. Improving Australia's competitiveness and attractiveness as a seat of arbitration and hub for mediation would assist practitioners to realise these opportunities.

The genesis for this priority lies in the fact that the United Nation's Singapore Convention on Mediation will be signed in 2019 and may impact upon the way that businesses enforce mediated settlement agreements across borders, improving opportunities for trade and dispute resolution.

Increased cooperation and collaboration between Australian cities, in particular Melbourne and Sydney on the East Coast, and Perth and Darwin as gateways to Asia, would assist the Law Council to advocate for and support ADR practitioners in this changing international ADR landscape, to advance their global standing and improve competitiveness with other arbitration and mediation hubs in the Asia-Pacific including Singapore and Hong Kong.

Establishing a capital city close to Asia as a world class mediation and arbitration dispute centre that operates both as a general hub but also specialises in dispute resolution in the resources sector could provide valuable opportunities to attract disputes from Asian seats, consolidate resources and enable further practice development for Australian lawyers.

Additional consideration should be given to how the development of the hub might supplement and support the development of ADR practice in other states and territories to enhance Australia's overall standing in international ADR. This includes consideration of promoting dispute resolution opportunities in Darwin to capture a greater share of the Asian market, in conjunction and collaboration with the development of the hub.