GLOBAL ENGAGEMENT BY AUSTRALIAN LAWYERS

OPENING OF LAW TERM DINNER, 2011

LAW SOCIETY OF NEW SOUTH WALES

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

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This is the thirteenth Opening of Law Address I have delivered on the first day of the new Law Term. I commence by thanking the Law Society of New South Wales for publishing a book of my first twelve addresses, Sir Anthony Mason for his generosity in writing the Foreword and Sir Gerard Brennan for launching the publication last year. It is, of course, flattering that anyone should think it pertinent to transform one's periodic remarks into so permanent a form. I am honoured by the Law Society complimenting me in this way.

One of the themes of a number of these addresses has been the significance of global engagement by Australian lawyers, including judges. It is that theme which I wish to further develop on this occasion.

During the period of almost thirteen years that I have occupied the office of Chief Justice I have had numerous occasions to witness the expansion of international contact on the part of Australian lawyers, particularly judges but also practitioners and academics. It is clear to me that the process has personally enriched the individuals who have been so involved. More significantly the process has served the broader Australian national interest including, not least, our economic interest.

Our legal system and the quality of our lawyers is one of our national strengths or, to use economist's terminology, a sphere of comparative advantage. Recognition of this strength has been affirmed to me in literally hundreds of conversations that I have had over my period of office with judges and lawyers from many different nations.

Over recent years a month has not gone by in which I was not engaged in some manner or another in this process of global engagement: arranging for judges of the Supreme Court to travel overseas; receiving judicial delegations; attending governmental launches or announcements on international matters; speaking at international legal conferences; launching books with an

international focus at universities; attending the announcement of alliances or mergers between an Australian law firm and an overseas firm; engaging in discussions and decisions about the admission of overseas lawyers in Australia or of Australian lawyers in overseas jurisdictions; negotiating formal memoranda of understanding between the Supreme Court of New South Wales and two overseas courts; writing letters to Attorneys-General and giving speeches to a variety of audiences, both in Australia and overseas, notably in Asia, about dispute resolution involving cross border issues, the promotion of co-operation between courts and the need to develop international arrangements and domestic legislation to reflect the requirements of globalisation.

Tonight is the most recent of more than a dozen speeches in which I have discussed such themes. There are a number of distinct bodies of law that now must be understood in a global context. In this address I will focus on transnational commercial law. I will also focus on our relationships in the Asia/Pacific region.

We have the good fortune to live in the most economically dynamic region in the contemporary world. What used to be referred to as “The Tyranny of Distance” should now probably be

referred to as “The Pleasures of Proximity”, although in certain respects there may be reason to categorise particular matters as “The Perils of Proximity”. No one now doubts the fundamental significance of our engagement with our region. This is as much true of the law as it is of other sectors of our society and of our economy.

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There has been a liberalisation of international trade in services, including legal services, over recent decades and a number of Australian legal institutions are playing a significant role in this respect. I refer, for example, to the International Legal Services Advisory Council (“ILSAC”) which, while focused on the export of Australian legal services, recognises that the process of liberalisation of trade is based on the principle of reciprocity. The benefits of global engagement must be shared or they will not materialise at all.

In Australia a number of our law firms have expanded into international legal services provision, either by means of strategic alliances with overseas firms or by establishing a presence in an overseas market to service a number of jurisdictions on a “hub and

spokes" model. Last year we witnessed two English firms setting up an Australian hub to provide services into Asia. These are welcome and important developments in the process of our global engagement.

I am well aware that many young Australian lawyers find the international dimension of legal work particularly appealing. Many work in such fields overseas, including former staff members of mine employed by global firms in London and Paris. Increasingly, by reason of the visa regimes for young Australians available under the USA Australia Free Trade Agreement, many work in New York.

In London the major law firms enjoy employing Australians for three reasons. One, they are very well trained. Two, they work very hard. And three, they go home. Not all do so. Some develop an international practice that cannot be replicated here. The Australian legal diaspora constitutes an international network from which many other Australians will benefit. However, most return home with a higher level of skill and a global orientation, which will reinforce Australia's global engagement. We are building skills of future strategic significance in this respect.

I witnessed this process at first hand last year at a conference on international investment treaty law held at the University of Sydney Law School. The conference attracted the major academics and practitioners from many nations who work in this specialised area of international arbitration. As one person observed in my presence: "Everyone who matters is here". He wasn't referring to me. It was noticeable that young Australian lawyers have important jobs in key international institutions in this field.

Of particular significance from a long term strategic point of view has been the involvement of Australian lawyers in creating regional institutions which bring together lawyers from throughout Asia. I refer, for example, to LawAsia, which is now well established as a focus for interaction amongst lawyers throughout Asia and which has an Australian based secretariat. As an Australian initiative many years ago, a Judicial Committee was formed under the banner of LawAsia. It has now become the forum where all the Chief Justices of Asia and the Pacific meet, again organised from Australia.

Another example is the development of the Asia Pacific Judicial Reform Network, which has emerged as an important forum for exchange of views amongst judges of the region. Again its secretariat is in Australia.

Similarly, it was the Australian Centre for International Commercial Arbitration ("ACICA") which instigated a regional grouping of all arbitration centres in the region as the Asia-Pacific Regional Arbitration Group ("APRAG").

Three years ago I reported in this address on the NSW Supreme Court's initiation of the first Judicial Seminar on Commercial Litigation which we organised together with the High Court in Hong Kong. The first Seminar was held in Sydney the second in Hong Kong and in March this year the third Seminar will be held in Sydney, again with high-level judicial representation from the major commercial nations of Asia.

These forums for mutually beneficial exchanges of legal expertise thicken Australia's relations in the region and do so, not in a manner involving an arrogant assertion of superiority on our part, which has so often marred our exchanges with our

neighbours in the past, but in a collaborative manner, with full recognition that the traditions, practices and interests of other nations are not only entitled to respect, but have much to teach us and about which, in the national interest as much as in private interests, we need to be much better informed.

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International trade in legal services is not a one-way street. Such services will be provided by lawyers in our regional neighbours to Australian clients. In this respect, solicitors who are members of this Society may not all welcome the process of liberalisation of the market in legal services. You will, however, need to adapt to that development. Our legal system produces lawyers of high quality. There is, however, another relevant factor in commercial decision-making.

One of the themes that I have mentioned in many of these Opening of Law Term addresses has been the need to control the cost of provision of legal services. I have indicated, probably more frequently than many of you wanted to hear, that the legal profession in Australia is in danger of killing the goose. I warned personal injury lawyers about this before the Civil Liability Acts and

the abolition of the Workers Compensation Court. I have warned commercial lawyers more than once.

There is no area of commercial life that has not been subject to significant change with a view to minimising the cost of inputs. The law will not be insulated from such changes. Those responsible for purchasing legal services in commercial corporations are subject to pressure to reduce costs, in the same way as those responsible for any other cost centre.

The outsourcing of legal services through the use of electronic communications is now well established. One source I have consulted lists dozens of websites offering various forms of legal services by electronic means. Many of them are in India, a low cost jurisdiction – with hourly billing rates about one tenth of those in the USA – and with a high level of legal expertise and high level English language capacity.

United States law firms now advertise their capacity to reduce costs by the use of Indian based outsourcing centres. Some US attorneys have said that the reduced costs arising from outsourcing have meant that they can defend unmeritorious claims

on their merits, rather than surrender to what is, in substance, commercial blackmail. I appreciate that their cost structure is higher than ours. It does not appear to me, although I accept that I am not totally in touch with this matter, that Australian law firms make as much use of this form of outsourcing as American lawyers have come to do in recent years. The commercial pressures to follow the Americans in this respect will increase.

I repeat what I said a few years ago when I was informed that for any significant commercial dispute the flagfall for the discovery process was something of the order of $2 million. That level of expenditure is not sustainable. Outsourcing through the use of Indian based support services – such as digital dictation transcription and document management for discovery and due diligence – is an available way of containing such costs.

However, overseas legal services are not limited to administrative matters of this kind. Amongst the web based legal service providers, one of the most successful has been the Indian based firm Pangea3, which offers on line legal services by US and UK lawyers, as well as Indian lawyers, extending beyond legal processes to research, advice and drafting. Late last year

Pangea3 was taken over by Thomson Reuters, one of the world's major financial and legal information providers.

A clear indication of the future in this respect occurred about a year ago when Rio Tinto moved a major part of its contract writing and review team from London to New Delhi, by engaging an outsourcing company. This is high-end legal work, not merely legal process outsourcing.

Whilst such high level legal services have been particularly effective in truly international contexts, such as intellectual property work, they are not now limited to such matters. They will extend to advice on drafting of commercial contracts, even for medium size businesses. Indian lawyers will come to constitute on line competition for all commercial lawyers, not just for the major law firms. Just as outsourcing has changed many other spheres of commerce, legal outsourcing will change the way law is practiced.

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The shift in the global balance of economic power from Europe to Asia, opens opportunities for lawyers throughout the region. In some respects we will be competitors – for example,

Sydney, Hong Kong and Singapore in commercial arbitration. However, we also have common interests. It is difficult for a large federation to match the focus and speed of decision-making of a city state. However, we can do so and we must try.

It is appropriate to acknowledge important policy developments with respect to global engagement. Of particular significance last year was the establishment of a more effective foundation for international commercial arbitration in Australia. The widespread adoption of the interlocked provisions of the UNCITRAL Model Law, the New York Convention on Recognition of Arbitral Awards and the Washington Convention on Investment Disputes is a coherent and successful international regime.

After a process in which the Commonwealth Attorney-General, Robert McClelland, and the New South Wales Attorney General, John Hatzistergos, were co-operatively involved, important steps were taken to extend Australian involvement in this regime by updating the Commonwealth's *International Arbitration Act*, adopting the *UNCITRAL Model Law* as the law for domestic commercial arbitration law in substitution for the out-of-date

uniform *Commercial Arbitration Acts* and the establishment of the Australian International Disputes Centre.

There are formidable difficulties in ensuring that Australia becomes the seat of arbitrations in the Asian region, but at least now we have a fighting chance to maximise our participation in this respect. Australian based practitioners are active participants in this global system. This is significant, even if our local hotels and restaurants are not amongst the commercial beneficiaries of such involvement.

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Over the years I have given a number of addresses on cross border legal dispute resolution, encompassing various aspects of international commercial litigation such as cross border insolvency, choice of court agreements, international commercial arbitration, freezing orders, comparative civil procedure, venue disputation and forum shopping, assistance with evidence and service and the enforcement of judgments. In each of these contexts there are international treaties or model laws, most of which we have adopted, but many of which our neighbours have not adopted. I

have written to Attorneys on these matters advocating various strategies in this respect.

The development of an international reputation that Australian lawyers, including practitioners, judges and academics, are actively engaged with transnational commercial law, and bring to it a cosmopolitan, not a parochial, perspective, is a worthwhile objective. It can only be attained if we adopt a broad based, integrated approach across a wide range of legal and legal institutional issues.

It is now fifteen years since the Australian Law Reform Commission produced its Report No 80 on the subject of “Legal Risk in International Transactions”. That Report identified a large number of distinct aspects of our substantive law and procedure which warranted further investigation with a view to enhancing Australia’s involvement in international legal transactions. Few of them have been acted upon. Some have only been acted upon recently. More significantly, since that Report, there has been no attempt, at any level, to approach these matters in a coherent and integrated manner, with the exception of the issues which fall within the remit of ILSAC.

A worthwhile comparison is with the work of the Australian Financial Centre Forum, chaired by Mark Johnson, which made a series of recommendations last year in a Report entitled "*Australia as a Financial Centre: Building on our Strengths*". That Report indicated the interrelationship of a multitude of disparate issues which must be acted upon if the government decides to develop a financial centre in this nation. The process of internationalisation, analysed from a financial perspective in that Report, finds ready parallels in the legal system.

Indeed, there is a close connection between a financial centre and the provision of legal services to financial institutions. For example, one of the matters raised in the Johnson Report was the recognition of the significance of Islamic finance as a source of international capital. The focus of attention in the Report is on the taxation treatment of such products. However, there are important legal issues that arise, and changes that are required, if Islamic finance was to emerge as a source of international capital for Australia. The Johnson Report can serve as a model for a similar analysis of global engagement by Australian lawyers in transnational commercial law.

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On a number of occasions, I have advocated the inclusion of commercial dispute resolution issues into negotiations for bilateral free trade agreements. When making this suggestion, I was not concerned with reducing barriers to trade in legal services – important as that issue is. My focus was on broader issues affecting all forms of cross border trade and investment. There are additional and unique risks of, and burdens on, international trade commerce and investment, which do not operate, or operate to a lesser degree, on intra-national trade, commerce and investment.

Such additional transaction costs impede mutually beneficial exchange. Business lawyers have been described as “transaction cost engineers” who add value to commercial relationships by facilitating the resolution of the disputes that inevitably arise in commercial relationships. Other than by means of support for the international commercial arbitration regime, Australian lawyers and policy makers have not, in my opinion, been sufficiently engaged in these respects. There are many matters to which the international arbitration regime does not and cannot apply.

As is the case with all bilateral free trade agreements, such agreements on legal issues are a second best to multilateral or regional arrangements. However, where multilateral arrangements have been attempted over long periods of time, but failed – as in the recognition and enforcement of judgments – bilateral or regional arrangements are the only practical route.

Progress on multilateral discussions – such as updating the processes of communication under the Hague Conventions – is highly desirable and is under consideration. Agreements with regional institutions – such as the European Commission, which is under negotiation or ASEAN, where our free trade agreement was concluded without legal content – can overcome the complexities and inefficiencies of dealing with multiple nations.

It appears that, historically, the Attorney General's Department has never had a seat at the table in the negotiation of bilateral free trade agreements. I think this is regrettable. However, many of these agreements are now set in stone and the negotiation process for others is too well advanced. It now seems that the only way of pursuing these issues now is in the form of bilateral arrangements limited to co-operation for legal

proceedings. Australia does have two such treaties, with Thailand and Korea, but they do not cover many specific issues that require attention.

There are a range of matters where Australia has adopted a cosmopolitan, rather than a parochial, approach, either at common law or by enacting multilateral treaties or model laws, several of which have not been adopted by many nations in Asia. On the basis of the widely accepted principle of reciprocity, such matters could be incorporated in bilateral agreements.

I refer to matters such as:

- Service of legal process;
- Collection of evidence;
- Recognition of and assistance for insolvency regimes including preservation of assets, automatic freezing provisions and recognition of rules for unwinding antecedent transactions;
- Implementation of the Convention on Contracts for the International Sale of Goods;
- Protecting the integrity of legal proceedings by freezing and search orders;

- Proof of foreign law by reference to the foreign court.

The most detailed Australian bilateral arrangement on such matters, and of course the most practically significant relationship, is with New Zealand, reflected in the Treaty on Court Proceedings and Regulatory Enforcement. In terms of comparability of our systems and the sense of mutual trust and understanding, no two nations have as much in common as Australia and New Zealand. The list of matters upon which arrangements have successfully been made between us, could very well serve as a checklist for the purpose of promoting other bilateral arrangements, although by reason of differences in culture and legal systems, such agreement is unlikely to be as comprehensive as that between Australia and New Zealand.

On the other hand, there are rules of Australian common law that are more parochial than those developed in other legal systems, eg, our *forum non conveniens* test. As I have said before, attention must also be given to legislation, such as the *Trade Practices Act* and the *Insurance Contracts Act*, which stand in the way of any international commercial agreement adopting

Australian law as the applicable law or choosing an Australian court as the court to resolve disputes.

If we are to develop a reputation for global engagement, we need to play a proactive role in international issues. In my opinion, high priority should be given to international co-operation to prevent commercial misconduct, especially international commercial fraud. The ease with which funds and documents can be hidden from national enforcement agencies and courts constitutes a major challenge for all commercial nations.

Decades of negotiation for a treaty on enforcement of civil judgments resulted in only limited agreement for enforcement of choice of court agreements. This has the same core justification as the New York Convention on Enforcement of Arbitral Awards and it is worth pursuing in bilateral agreements, even before it comes to be adopted as a multilateral treaty.

Support for domestic legislation on commercial misconduct, particularly fraud, can be pursued on a bilateral or regional basis. Co-operation between police and regulatory agencies has developed. The OECD Financial Action Taskforce system for

control of money laundering has been widely adopted, particularly because of terrorist financing. Much has to be done, however, in support of enforcement by proceedings in court. In this respect, I do not exclude co-operation on criminal as well as civil proceedings, although I recognise that special considerations arise in criminal prosecutions.

A range of desirable reforms can be identified: mutual enforcement of proceeds of crime and assets preservation laws, including judicial co-operation in asset tracing, freezing, search and seizure laws; the collection and admissibility of evidence, including data collected under anti-money laundering laws; the development of extra-territorial arrest warrants and international surveillance orders; international enforcement of confiscation orders.

Australian lawyers can also play a proactive role in the development of the principles of international commercial contract law, including recognition of the international character of the lex mercatoria. This could extend to consideration of co-operative regional arrangements in maritime law, as proposed by Justice Allsop.

Progress on many of these matters will require some degree of harmonisation of domestic legislation by negotiation or implementation of a treaty or model law. That this is possible has already been manifest in a number of contexts, such as cross border insolvency or international sale of goods and, historically, in maritime law.

There are numerous bilateral, regional and multilateral contexts in which Australian lawyers – academics, practitioners, public servants and judges – have been involved on issues of this character. This involvement has, however, been issue specific, without recognition of a broader context. The principal object that I seek to achieve by this address, is to create an awareness of the interconnectedness of our involvement in the full range of matters that impinge on transnational commercial law. Only by active involvement on a broad front can we change the global reputation of the Australian legal system and of Australian lawyers.

The development of an international reputation in these respects is of particular significance for resolving third party disputes. There is an understandable suspicion in transnational

commercial dispute resolution that a party may receive a home town advantage. As the profession in London has found for over a century, both in its Commercial Court and in commercial arbitration, parties who have nothing to do with England will agree to be subject to English law and to submit their disputes to an English court or arbitral body. The reputation for quality and impartiality of Australian lawyers and judges is already high in our region. Our reputation for engagement is what needs work.

The various matters I have discussed may appear disparate and unconnected. Indeed, there are many other such issues which I have not mentioned. All should be understood as having a synergistic relationship. Progress in one context will establish personal connections and expand cross-cultural understanding which become applicable in other contexts. Significantly, such involvement in any context will help alter the reputation of Australian lawyers on the parochial/cosmopolitan spectrum. If we are to achieve the benefits of global engagement, and establish a reputation of being in the forefront of transnational commercial legal development, we have to proceed on multiple tracks, some of which will prove more successful than others.

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We must proceed gradually and pragmatically in a manner well described by the person who played a key role in my personal journey of engagement with our region. In 1974 I was part of Prime Minister Whitlam's delegation to Beijing. This was towards the end of the Cultural Revolution, when the Gang of Four was still in control.

Before our arrival the Chinese Premier, Zhou Enlai, warmly greeted Deng Xiaoping on the reception line at Beijing airport. In hindsight, this was a decisive turning point in Chinese, indeed world, history. Deng had not been seen in public for several years. He was to accompany the Australian delegation throughout our visit.

Deng Xiaoping said, when he started China on its remarkable journey of the last three decades, that the best way to achieve fundamental reform in a multifaceted context was by "crossing the stream feeling for the rocks with your feet". This is the way to negotiate the multiple rocks we will encounter as we attempt to expand Australia's global engagement in legal matters, as in other spheres. If we are to have a future as something more

than a quarry, we must cross that stream, and do so by feeling each of the many rocks along the way.