Arbitration and Dispute Resolution in the Resources Sector

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Editors

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An Australian Perspective

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Foreword

The publication of this important work focusing upon arbitration and the resolution of disputes in the resources sector from an Australian perspective is most timely for a number of reasons.

First, Australia has consolidated its position as a significant supplier of natural resources, both minerals and energy, into the international market, particularly in the market for resources in the Asia-Pacific region, in which the fastest developing economies of the world are located. Australian companies are also significant participants in the global resources market and are significant investors in natural resource projects on all continents of the globe (other than Antarctica).

Second, after decades of fragmentation the Australian law governing commercial arbitration, both domestic and international, can now be described as uniform and consistent across the various Australian State and Federal jurisdictions. The schism between the law governing international arbitration and domestic arbitration in Australia is now largely a relic of Australian legal history, as a result of State, Territory, and Commonwealth legislation enacted over the last five years. It is difficult to overstate the significance of those reforms to the resolution of disputes in the resources sector, given that the distinction between domestic and international disputes within that sector often turns upon the corporate vehicle through which the parties to the dispute have chosen to contract. If foreign investors in an Australian resource project choose to contract through wholly owned Australian subsidiaries, with the consequence that their disputes are characterised as domestic rather than international, no longer will this make a significant difference to the legal regime governing the resolution of that dispute. All disputes, whether domestic or international, to the extent that they are governed by Australian law at all, will be governed by a legal regime which adopts the UNCITRAL Model Law, in common with many other significant trading jurisdictions in the Asia-Pacific region including New Zealand, Singapore, Malaysia, Thailand, Vietnam, the Philippines, Japan, South Korea, India, Sri Lanka and (effectively) Hong Kong.

The alignment of Australia's laws with the dominant international legal regime for the resolution of disputes in the Asia-Pacific region, and the significance of Australia's participation in the international resources market is not merely

serendipitous. The familiarity, predictability, consistency and neutrality of legal regimes governing the resolution of commercial disputes are as important to foreign companies investing in Australian resource projects or trading with Australian resource suppliers as they are to Australian companies investing in resource projects elsewhere. The combination of these factors suggests that the minor role previously played by Australia in the resolution of international commercial disputes may be about to change, particularly in the natural resources sector.

This book stems from a successful conference organised by the Australian Centre for International Commercial Arbitration (ACICA) on the subject of arbitration and the resources sector which was held in Perth in May 2013. Perth was an obvious choice as a venue for the conference, given the volume of minerals and energy produced and exported from Western Australia and the consequent location of many producers and their legal advisers in Perth, coupled with Perth's proximity to the significant Asian markets. Since that conference, the focus of attention has been expanded to include mediation and adjudication, and contributions on those topics have been included in this book even though they were not addressed at the conference, and the range of contributors expanded accordingly.

The quality of the contributions contained within this book is evident from the qualifications and experience of the contributors, all of whom are significant participants in discourse and commentary in the fields of commercial arbitration and dispute resolution within Australia, and many of whom are well recognised internationally in those fields.

The topics addressed in the 12 substantive chapters are succinctly reviewed in the first chapter. Rather than repeat that exercise, it is sufficient for me to note the breadth of the topics essayed. They include the role of mediation in the resolution of disputes in the natural resources sector which will, no doubt, become increasingly significant in the years to come—a significance which has been recognised in other jurisdictions, notably by the recent creation of the Singapore International Mediation Centre. Another topic addressed in this book which is of particular significance not only to foreign companies investing in Australia, but also to Australian companies investing elsewhere, concerns the rights conferred upon investors by bilateral investment treaties, including the capacity to enforce those rights against a State party by way of arbitration pursuant to the terms of the relevant treaty. Those rights have given rise to significant contention in both political and legal circles in Australia in recent years. The topics addressed in this book are of interest not only to those engaged in the resolution of disputes, but also to those interested in the formulation of contractual provisions which will not only reduce the risk of dispute, but enhance the timely and efficient resolution of disputes should they arise.

Another topic addressed in this important work, and which is of particular interest to me, concerns the appropriate role of the courts in facilitating the achievement of the objective evident in the parties' agreement to endeavour to resolve their disputes through some means other than litigation. The various Australian cases reviewed in different portions of the book (and in which I have played some small part) justify the view that contemporary Australian courts, both

State and Federal, have willingly followed the lead of the Australian legislatures and have embraced an international perspective on the governance of commercial arbitration and dispute resolution generally. Consistently with the approach taken by courts in other comparable legal regimes, it is now clear that Australian courts will actively promote and support the attainment of the objectives embodied by the parties in their agreement. With well-drafted contracts, Australian courts are limiting the exercise of their jurisdiction to providing assistance in the gathering and presentation of evidence and to the enforcement of awards; they are not otherwise intervening unless the process has departed from public policies at a most fundamental level and is inconsistent with internationally accepted principles of fairness and justice, including the denial of natural justice.

The authors and editors of this important work are to be congratulated upon their significant contribution to this rapidly developing field. I am pleased to recommend this book to anyone with an interest in the resolution of disputes in the natural resources sector.

Wayne Martin
Chief Justice's Chambers
Supreme Court of Western Australia

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Editors and Contributors

About the Editors

Prof. Gabriël A. Moens JD, LLM, Ph.D., GCEd, MBA, FCIArb, FAIM, is professor of law and director of research, Curtin Law School, and emeritus professor of law at the University of Queensland. Prior to his current position, he served as provice chancellor (Law, Business and Information Technology) and as a long-serving dean and professor of law at Murdoch University. He also served as professor of law and head, Graduate School of Law, University of Notre Dame Australia and as Garrick professor of law and director, The Australian Institute of Foreign and Comparative Law, The University of Queensland. He is editor-in-chief of *International Trade and Business Law Review*. In 2003, the Prime Minister of Australia awarded him the Australian Centenary Medal for services to education. He is a fellow (FCIArb) and chartered arbitrator (CArb) of the Chartered Institute of Arbitrators, London, and fellow and deputy secretary general of the Australian Centre for International Commercial Arbitration (ACICA). He is the editor-in-chief of the *ACICA Review*. He co-authored a commentary to the ACICA Arbitration Rules. Professor Moens is also a *Membre Titulaire*, International Academy of Comparative Law, Paris, and a fellow of the Australian Institute of Management (AIM WA). He has taught extensively in the UK, Germany, Belgium, Italy, Austria, Australia, Indonesia, Thailand, Singapore, Hong Kong, Japan and the USA. He is co-author of *The Constitution of the Commonwealth of Australia Annotated* (8th ed., 2012), *Jurisprudence of Liberty* (2nd ed., 2011), *Commercial Law of the European Union* (2010) and *International Trade and Business: Law, Policy and Ethics* (2nd ed., 2006).

Prof. Philip Evans is professor of law at Curtin Law School, Curtin University. He is also the principal of PJ Evans and Associates; Lawyers, Arbitrators, Mediators and Adjudicators. He is a graded arbitrator, accredited mediator and registered adjudicator under the *Construction Contracts Act 2004* (WA). He holds a current legal practice certificate. In addition to his university teaching and research roles, Professor Evans conducts regular continuing professional development

programs and in-house training in the areas of contract law, trade practices law, administrative law, statute law, dispute resolution, construction law, and arbitration. In 2013, he was appointed by the Western Australian government as a sessional arbitrator to resolve workers compensation disputes. Prior to commencing his legal studies, Professor Evans practiced as a civil and structural engineer for 20 years. Before leaving to practice law full time with a national law firm in 1998, Dr. Evans was the head of the Department of Construction Management at Curtin University. In 2001, he joined the College of Law at the University of Notre Dame Australia, where he was professor and associate dean of the School of Law, director of Graduate Law Programs, and the course coordinator of the Graduate Certificate in Building and Construction Law. In 2009, he joined Murdoch University and was subsequently appointed professor of law, deputy dean and dean of law before leaving to take up the professorial appointment at Curtin University in July 2013. He has lectured extensively in contract law, torts law, trade practices law, intellectual property law, evidence, project management, construction contracts, construction claims and dispute resolution in the construction industry. His contribution to construction law education and dispute resolution has been acknowledged through the awarding of fellowships by the Institution of Engineers (Australia), the Australian Institute of Building, the Australian Institute of Management and the Australian Centre for International Commercial Arbitration.

Contributors

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Jeremy Coggins is a senior lecturer in construction law and contract administration at the School of Natural and Built Environments, University of South Australia. In 2012, Jeremy completed a Ph.D. in law at the University of Adelaide on the topic of harmonisation of construction industry payment and adjudication legislation in Australia, and he has published several journal articles on the topic of the legislation. Jeremy is a member of the Australian Legislative Reform Subcommittee of the Society of Construction Law Australia, which recently published a report on security of payment and adjudication in the Australian construction industry. He is also a member of the Royal Institution of Chartered Surveyors and an associate of the Australian Institute of Quantity Surveyors.

Prof. Richard Garnett is professor of Private International Law at the University of Melbourne and a consultant to Herbert Smith Freehills. Professor Garnett holds degrees in arts and law from the University of New South Wales and an LLM from Harvard University where he was a Fulbright scholar. He regularly advises on cross-border litigation and arbitration matters and has appeared as advocate before a

number of tribunals, including the High Court of Australia. Professor Garnett has written extensively in the fields of private international law and international commercial arbitration, with his work cited by leading tribunals around the world, including the European Court of Human Rights, United States federal district courts, the Singapore Court of Appeal and Australian superior courts. In 2012, Professor Garnett published the book *Substance and Procedure in Private International Law* in the prestigious Oxford Private International Law Series, which is the first major work on the subject in English. From 2004 to 2005, Professor Garnett served as expert member of the Australian government delegation to the Hague Conference on Private International Law to negotiate the Hague Convention on Choice of Court Agreements. Professor Garnett has also been an adviser to the American Law Institute in its project on transnational intellectual property adjudication, co-rapporteur on the International Law Association project on transnational group actions and a director of the Australian Centre for International Commercial Arbitration.

Michael Hales is a dispute resolution partner at Minter Ellison, based in their Perth office. Before moving to Western Australia, he was a partner in a major commercial law firm in London for 16 years. He has significant experience of international disputes and has conducted arbitrations under most of the leading arbitral institutions and rules. He is admitted in Australia, England and Wales and the British Virgin Islands and is a past co-chair of the IBA's Litigation Committee.

Michael Hollingdale is an accredited mediator and a partner of Allens in the energy resources & infrastructure practice. His specialty area of practice is construction and engineering law in the energy and resources sectors and government transport sector. Resources sector matters that Michael has advised on include power stations, gas pipelines, refineries, underground and surface mine developments, along with development of port and rail-related mining infrastructure. He has practised as a mediator for over 20 years. He also advises on commercial claims management and dispute resolution strategies. Michael is chair of the Law Council of Australia's Construction and Infrastructure Committee. Michael was a member of the Law Council of Australia's ADR Committee for over 10 years and assisted in drafting various mediation guidelines. He is a graduate member of the Australian Institute of Company Directors (GAICD).

Prof. Doug Jones AO graduated from the University of Queensland with a combined Bachelor of Arts and Laws degree in 1974, followed by a Master of Laws in 1977. Doug has held appointments to professional bodies including past president of the Australian Centre for International Commercial Arbitration ('ACICA') (2008–2014) and fellow, chartered arbitrator and past president of the Chartered Institute of Arbitrators, London ('CIArb') (2011). He holds professorial appointments at the Queen Mary University of London and University of Melbourne. He practices as an international arbitrator based in London, Sydney and Toronto. Doug is acknowledged as a leading arbitrator and is highly ranked in a number of leading publications such as Chambers Asia-Pacific where he has been recognised as a star

individual in the Australian legal community for three successive years. In 2013, Doug was recognised as one of the most in-demand arbitrators and received a band one ranking in the international arbitration category. He was also ranked band one in the projects category and band two for dispute resolution/arbitration in Australia. At the Global Arbitration Review Awards 2013, Doug was joint runner-up in the category of the Best Prepared and Most Responsive Arbitrator of the Year Award. Most recently, he was awarded the Michael Kirby Lifetime Achievement Award at the 2014 Lawyers Weekly Law Awards in Sydney in recognition of his leadership and substantial contributions to the Australian legal profession. Doug is an officer of the Order of Australia, having received the award in June 2012 in the Queen's Birthday Honours List for distinguished service to the law as a leader in the areas of arbitration and alternative dispute resolution, to policy reform, and to national and international professional organisations.

Dr. Sam Luttrell is counsel in the International Arbitration Group of Clifford Chance, based in Perth, Western Australia. His practice covers both international commercial arbitration and investor-state arbitration, with a focus on high-value energy and resources disputes in the Asia-Pacific. In addition to his work as counsel, Sam is a member of the International Chamber of Commerce arbitrator nominations committee for Australia and a regular contributor to international arbitration journals. He published his first book (on bias challenges to arbitrators) in 2009 and is currently working on a new book on interim measures. Prior to joining Clifford Chance, Sam was with Freshfields in Paris.

Peter Megens LLB (First Class Hons), BComm Grad Dip Financial Law, University of Melbourne, is a partner in the Singapore office of King & Spalding where he specialises in litigation, arbitration and mediation, and in particular international arbitration. He was previously the immediate past vice-president of the Chartered Institute of Arbitrators in Australia. He is also a former adjunct professor in law at Murdoch University, a former national councillor and chapter chairman of the Institute of Arbitrators and Mediators Australia, former vice-president of the Australian Centre for International Commercial Arbitration, a chartered arbitrator and graded arbitrator and accredited mediator. Peter is a fellow of IAMA, ACICA, the Singapore Institute of Arbitrators, the Chartered Institute of Arbitrators, the Society of Construction Law and is active in ICC, LCIA and various other bodies. He is a former chair of the Construction and Infrastructure Law Committee of the BLS of the Law Council of Australia, a former member of the Victorian Supreme Court Technology Engineering and Construction Users Group. Peter is on the KLRCA and SIAC Panels of Arbitrators and the HKIAC List of Arbitrators. Peter has practised and published in arbitration, construction and resources matters in Australia and South-East Asia for over 30 years of which 25 years were as a partner with Australian firms practising in these areas. He is admitted to the Supreme Court of all Australian states and territories and to the Federal and High Courts of Australia.

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Greg Steinepreis has been a partner of the firm now known as Squire Patton Boggs (AU) since 1983. He is a construction and services contracts lawyer who heads the Construction, Engineering and Infrastructure team in the firm's Perth office. His clients include principals, financiers, public sector authorities, contractors and consultants. Greg has been involved in many major resources, engineering and infrastructure projects in Western Australia. In his construction practice, he has negotiated, drafted, amended and reviewed the full range of construction and engineering contracts. Greg's specific project experience includes Australia's major liquefied natural gas (LNG) and iron ore mining projects. He has advised government authorities as well as leading contractors and consultants on the delivery of public infrastructure, including major roads and rail and on urban redevelopment. He also has assisted governmental entities and power producers regarding electricity supply contracts and electricity industry regulation. Greg's involvement in the construction and engineering industry is supported by more than 25 years of experience in dispute resolution. Not only does he advise parties in litigation, arbitration (international and domestic), adjudication and mediation, he also is a fellow of ACICA, a Grade 1 arbitrator with IAMA and an accredited mediator. Greg is active in several major legal and industry bodies including the Construction and Infrastructure Forum of the Chamber of Commerce & Industry Western Australia.

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