European Australian Business Council

Luncheon Address

Chief Justice Robert French AC

10 November 2016, Sydney

Thank you for the opportunity to meet and talk with you. The people here all have a close interest in Australia's business relations with Europe. Those relations are of great importance. As a bloc the European Union (EU) is Australia's largest source of foreign investment and our second largest trading partner.[1] It is also our largest services export market.[2] We are currently negotiating an Australia-European Union Framework Agreement, building upon the Australia-European Union Partnership Framework which was signed in 2008. One of the objectives of the Partnership Agreement which is relevant to my remarks is the promotion and support for the multilateral rules based trading system and the consolidation and expansion of our bilateral trade and investment relationship.

My remarks are made against the background of the United States' Presidential election. It is not necessary to say more about that for present purposes than to acknowledge its stark message to all who engage in global dialogue, whether about trade or the movement of peoples or the harmonisation of laws, or the protection of human rights, that ultimately 'all politics is local'.

In November 2015, the Prime Minister of Australia, the President of the European Commission and the President of the European Council agreed to commence work towards the launch of negotiations for a free trade agreement between Australia and the EU.[3] Those developments are necessarily of importance to the judicial systems of Australia and of Europe particularly in relation to the need for mechanisms for the resolution of transnational

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1 EU foreign direct investment in Australia was valued at $169.6 billion in 2014 — see Australian Government, Department of Foreign Affairs and Trade, *Australia-European Union Free Trade Agreement* <http://dfat.gov.au/trade/agreements/aeufta/Pages/aeufta.aspx>.

2 Valued at nearly $10 billion in 2014 — see Australian Government, Department of Foreign Affairs and Trade, Australia-European Union Free Trade Agreement, *Australia-European Union Free Trade Agreement* < http://dfat.gov.au/trade/agreements/aeufta/Pages/aeufta.aspx>.

3 European Commission, 'Statement of the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Australia Malcolm Turnbull' (Media Release, STATEMENT/15/6088, 15 November 2015) http://europa.eu/rapid/press-release_statement-15-6088_EN.HTM..

commercial disputes and, if a free trade agreement is concluded, Investor State disputes which might arise within the framework of such an agreement.

Let me begin with a few remarks about the international dimension of the work of Australia's superior courts. The work of those courts, including the High Court, primarily concerns cases arising under our domestic law including under our Constitution. However, important elements of that work are subject to international influences particularly in relation to international trade and commerce, intellectual property, competition law, maritime law, taxation, insolvency, family law, migration law and criminal law. Our courts routinely refer to the decisions of judges and academic writings from other countries when they are seen to be helpful as suggesting modes of reasoning or particular solutions to problems similar to those facing our courts. There is also from time to time the need for cooperation and mutual assistance between our courts and the courts of other countries in order to avoid duplication and complexity when they are dealing with transnational disputes. In transnational corporate insolvency for instance, more than one judicial system may be engaged at the same time. Australia has a *Cross-Border Insolvency Act 2008* (Cth), which applies the UNCITRAL Model Law on Cross-Border Insolvency one aim of which is to promote cooperation between the courts and other competent authorities of countries involved in cases of cross border insolvency. We have agreements with a number of countries for the recognition and enforcement of the judgments of the courts of those countries in Australia. We also have an *International Arbitration Act 1974* (Cth), which gives the UNCITRAL Model Law on International Commercial Arbitration the force of law in Australia. Under Pt III of that Act, our courts can give effect to awards made by arbitral tribunals anywhere in the world.[4] Australian courts can also give effect to awards made under Investor State dispute settlement processes in free trade agreements and bilateral investment treaties. That may be achieved by the recognition and enforcement of awards under Pt III of the Act of tribunals constituted ad hoc, or under Pt IV, which allows for the recognition and enforcement of awards made by tribunals exercising the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID), an organ of the World Bank which administers the majority of the world's investment disputes. The efficacy of those provisions in their application to Investor State dispute settlement has not been tested, the only investment dispute to which

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[4] A challenge to the constitutional validity of these provisions was rejected by the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533.

Australia has been a party having been dismissed upon a preliminary objection to the tribunal's jurisdiction.[5]

There are also now, in our region and around the world, many meetings of judges from different countries in which Australian judges participate. Some are large gatherings with a wide range of topics, while others are smaller, more specialised and intimate colloquia. The judges are able to get to know each other, identify common areas of interest, exchange ideas and information and importantly build mutual trust and confidence.

In that context, it is worth noting the significance of Europe and European based organisations as a generator of international conventions and instruments which affect Australian commercial law and practice. One organisation worthy of particular mention is the International Institute for the Unification of Private Law (UNIDROIT). It was set up in 1926 as an organ of the League of Nations and re-established in 1940 under a multilateral agreement known as the UNIDROIT Statute. It has 63 member countries including Australia. Among its membership from our region are China, India, Indonesia, Japan and South Korea. It counts 36 members in its European group. The United Kingdom, the United States and Canada are also members. The function of UNIDROIT, which is based in Rome, is to study needs and methods for modernising, harmonising and coordinating private and in particular commercial law as between States and to formulate uniform laws, instruments, principles and rules to achieve those objectives. Its work has given rise to many important international instruments including conventions relating to uniform laws for the international sale of goods, international wills, financial leasing, factoring, franchise disclosure and international securities. Of particular importance are its published Principles of International Commercial Contracts. A former Australian Federal Court Judge and distinguished legal academic, Paul Finn, has had a continuing involvement in the preparation and revision of those Principles which he has described as 'in the nature of default rules which can readily be incorporated into the terms of a domestic contract made in this country.'[6] They have had a significant impact on contract law globally and are widely accessible in many languages.

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5 *Philip Morris Asia Ltd (Hong Kong) v Commonwealth of Australia (Award on Jurisdiction and Admissibility)* (PCA Arbitral Tribunal, PCA Case No 201-12, 17 December 2015). A redacted version of the award may be retrieved from the Permanent Court of Arbitration's website at <https://pcacases.com/web/sendAttach/1711>.

6 Justice Paul Finn, 'Symposium Paper, The UNIDROIT Principles an Australian Perspective' (2010) 17 *Australian International Law Journal* 193, 194.

They are taught in all major law faculties whether in civil or in common law jurisdictions. The Principles have been said to provide an actual formulation of the norms of the modern lex mercatoria in concrete black letter wording. They can be used for filling gaps in the law applicable to transnational contractual disputes and international uniform law instruments. That is just one among many examples.[7]

There are also forums in which judges can work together to try to improve the legal systems in which they operate. For example, two leading Australian commercial courts, the Federal Court of Australia and the Supreme Court of New South Wales, have regular meetings with their Singaporean and Hong Kong counterparts on matters of common concern including commercial litigation.

At the beginning of this year the High Court of Australia became a founding member of the Asia Pacific Business Law Institute along with the Supreme Courts of China, India and Singapore. The Institute, established in Singapore, seeks to promote projects for the convergence of commercial laws between different countries in the region. The term 'convergence' describes the rather modest aim of some degree of similarity in commercial laws after allowing for inevitable differences that arise because of particular legal systems of each country and their social and economic conditions.

The first project which the Institute has agreed to carry out concerns the way in which countries in the region provide for the recognition and enforcement of foreign judgments. For example, if a court in Singapore issues a money judgment against a person or company which has assets in Australia, then under our law and because of an agreement with Singapore, the Singaporean judgment can be accepted by an Australian court and treated as a judgment of that court. It can then be enforced in Australia against the assets of the judgment debtor.[8]

The ability to enforce the judgments of the courts of one country in another is obviously an incentive to investors who may be concerned about their ability to obtain

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7 Chief Justice Robert French AC, 'Convergence of Commercial Laws — Fence Lines and Fields' (Speech delivered at the Doing Business Across Asia —Legal Convergence in an Asian Century Conference, Singapore, 22 January 2016).

8 See generally *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975 in which the High Court upheld the power of the Supreme Court of Western Australia to freeze the assets of a defendant to proceedings in Singapore in light of the possibility of a Singaporean judgment in the plaintiff's favour that would be recognised and enforced in Australia.

effective remedies if they are wronged in the country in which they are investing. At the moment most agreements for the mutual recognition and enforcement of judgments are bilateral. It is to be hoped that the project to be undertaken by the Institute will be able to identify similarities and variances in the procedures for the recognition and enforcement of judgments in the region. Their identification may create opportunities for agreements between the various jurisdictions to remove or reduce unnecessary differences. Beyond that regional engagement, Australia is a member of the Hague Conference on Private International Law, whose Judgments Projects has since 1992 been trying to set up a multilateral system for the recognition and enforcement of judgments. The major challenge for the establishment of such a system is that not all national court systems are equal in quality. Nobody wants to sign a blank cheque to recognise and enforce judgments issued out of courts in another country where there is, for example, a high incidence of judicial incompetence or corruption. In the meantime, Australia is looking to accede to the Hague Conference's *Convention on Choice of Court Agreements* under which parties to a contract can nominate the court of a State party to the Convention as the exclusive forum for determining disputes arising between them.[9] That choice will then be honoured by the courts of the other parties to the Convention by refusing to exercise their jurisdiction in the dispute, and recognising and giving effect to the judgments of the nominated court.[10]

In September I led a delegation to the Supreme People's Court of China at the invitation of its President and Chief Justice. That Court is reaching out in a systematic fashion. There have been more than 30 delegations from the judiciaries of other countries which have been invited to Beijing this year. The President of the Court and I signed a joint letter providing for continuing exchanges in which the Council of Chief Justices, comprising the heads of the Supreme Courts of the States and Territories, the Chief Justice of the Federal

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9 *Hague Convention on Choice of Court Agreements*, opened for signature on 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015). The Convention and a national interest analysis (*Australia's Accession to the Convention on Choice of Court Agreements* [2016] ATNIA 7) were tabled in Parliament on 15 March 2016. The national interest analysis and the Attorney-General's Department's Annual Report 2015-16 envisage that the Convention will be implemented domestically through a new *International Civil Law Act*, which will also implement the *Hague Principles on Choice of Law in International Commercial Contracts*.

10 See generally The Hon JJ Spigelman AC, 'The Hague Choice of Convention and international commercial litigation' (2009) 83 *Australian Law Journal* 386; Rosehana Amin, 'International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements' (2009) *Australian International Law Journal* 113.

Court and the Chief Justice of the Family Court, will be involved. It is likely that a delegation from the Supreme People's Court, including its President, will be able to visit Australia next year. Even allowing for the great differences that exist between the political and legal systems of China and Australia, the deepening of contacts provides opportunities not least for the delivery of legal services by Australian lawyers within the framework of the recently signed China-Australia Free Trade Agreement. The delegation comprised Justice Kiefel of the High Court, Chief Justice Allsop of the Federal Court of Australia and Fiona McLeod SC, the President Elect of the Law Council of Australia. We were also accompanied by Andrew Phelan who is the Chief Executive and Principal Registrar of the High Court and serves as the secretary of the Council of Chief Justices. There are many other exchanges in our region, some of a capacity building character, others involving specialised discussions in areas such as taxation law and maritime law.

The Chinese engagement is also occurring with Europe. By way of example, in June of this year, the website of the Supreme People's Court of China carried an announcement by the Legislative Affairs Office of China's State Council that China and the EU have set up a dialogue mechanism concerning legal affairs. The mechanism has been established following an agreement made during the 17th China-European Union Leaders Meeting in June 2015. More than 60 officials and experts from both sides participated in the first round of the dialogue which was undertaken in June of this year. They discussed e-commerce developments and the legal framework for consumer protection.

The European Commissioner for Justice, Consumers and Gender Equality was quoted as saying that China and EU legal cooperation would be lifted to a brand new level. This is to be seen in the context of the fact that China and the EU have had more than 60 ministerial level dialogue mechanisms established on issues of common concern in recent years. The next round of the dialogue concerning legal affairs is to be held in Brussels in 2017.[11]

For Australia and the countries of the EU, engagement with China at a variety of levels is obviously of great importance. There may well be some utility in that context in communication between the Australian judiciary and European courts to, as it were, compare notes on their experiences in exchanges with the Chinese court system.

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[11] The Supreme People's Court of the People's Republic of China, 'China, EU initiate legal dialogue mechanism' (Media Release, 21 June 2016) <http://english.court.gov.cn/2016-06/21/content_26627104.htm>.

The High Court has engaged recently with European constitutional courts by becoming a member of the World Conference on Constitutional Justice. That body was established in 2011 by the Venice Commission which is a creature of the Council of Europe. The members of the World Conference are constitutional courts and equivalent bodies. I attended the Third Congress of the Conference in Seoul in September 2014 as an observer. Subsequently, I recommended to my Court that we should join the Conference which covers a very wide range of courts from Europe, Asia, Africa and Latin America. One of the heads of jurisdiction present at that Congress was Geert Corstens, then President of the Supreme Court of the Netherlands and President of the Board of the Network of Presidents of Supreme Judicial Courts in the EU.

I found participation in the Congress instructive and enjoyable and was impressed by the diversity of the approaches taken by the member Courts. On the basis of my recommendation the High Court has joined the World Conference. Observers from the Supreme Courts of Canada and New Zealand were also present. Its main purpose is to facilitate judicial dialogue between constitutional judges on a global scale. It also provides informal peer support for members of constitutional courts particularly in relation to the maintenance of essential standards of independence.[12] 101 countries are represented in the World Conference which seeks to promote constitutional justice and ultimately the rule of law in the various member states.

I was going to say something about free trade agreements and the investor State dispute settlement mechanisms in use in such agreements which have been a hot topic in this country, in the United States and more recently in Europe. That debate may well have become academic at least so far as the proposed Trans Pacific Partnership involving the United States, Australia and 10 other Pacific Rim countries is concerned. It is also probably academic, for the time being, in relation to the Transatlantic Trade and Investment Partnership involving the United States and the EU**.** It may however be relevant to the terms of any Free Trade Agreement which may be negotiated between Australia and the EU.

Investor State dispute settlement is a means for resolving disputes which arise under bilateral investment treaties between different countries and under free trade agreements by the use of ad hoc arbitral tribunals. An important feature of these processes is that an investor

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[12] Council of Europe, *World Conference on Constitutional Justice* (2014) Venice Commission <http://www.venice.coe.int/WebForms/pages/?p=02_WCCJ>.

from one state, which is a party to a free trade or investment treaty, which has investments in another state party, can take action against the host state if it thinks the host state has made laws or done something in relation to its investment which is discriminatory or constitutes unfair expropriation in breach of the agreement or treaty. Sometimes, an investor may seek arbitration of claims that arise solely under the domestic law of the other state, such as claims of breach of contract by a government instrumentality. Thus Philip Morris, the tobacco company, claimed that Australia's plain packaging tobacco laws were in breach of a bilateral investment treaty between Hong Kong and Australia. Philip Morris placed itself in a position to make that claim by having its entity in Hong Kong acquire companies in Australia, and then claim that they represented investments by it in Australia which were being adversely affected by the plain packaging tobacco laws in breach of the investment treaty. Their claim was dismissed for want of jurisdiction by the tribunal, but not before a lot of time had passed and a lot of money had been spent.

A concern from the point of view of courts is that court decisions themselves can sometimes be treated by foreign investors as breaches of free trade or investment agreements. An example is the pharmaceutical company, Eli Lilly, which claims that decisions of Canadian courts affecting the validity of its patents are in breach of the North American Free Trade Agreement. Similar issues have arisen between Ecuador and Chevron in a long running investor state dispute settlement process arising out of an adverse judgment by Ecuadorian courts against Chevron's predecessor, Texaco.[13]

In January 2015, the European Commission published a report of the results of a public consultation on investment protection in investor state dispute settlement clauses in the proposed Transatlantic Trade and Investment Partnership. There was a very strong reaction against the Investor State dispute settlement mechanism.[14] In the event, the Commission favoured the creation of a permanent investment court to deal with such disputes rather than ad hoc tribunals. This model is reflected in the recent Comprehensive Economic and Trade Agreement between the EU and Canada. The Agreement provides for a tribunal for the hearing of claims submitted for arbitration by investors with a fixed membership of 15: five

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13 See generally, Chief Justice Robert French, 'ISDS — Litigating the Judiciary' (2015) 26 *Public Law Review* 155.

14 European Commission, 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement' (Report, 13 January 2015) http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

from the EU, five from Canada and five from third countries. Cases will be heard in divisions of three members; one from each of the three categories. Under the Agreement there is also an appellate tribunal which can correct awards made by the first instance tribunal for error or law or manifest errors in the appreciation of the facts. It will be interesting to see what model of investor state dispute settlement mechanism emerges as between Australia and the EU in the foreshadowed negotiations on the free trade agreement.

Australia's policy on these mechanisms has varied. For a while it refused to enter into any free trade agreement which included them. That followed the initiation of the Philip Morris proceedings in 2011. However since September 2013, Australia's position has been that it will consider such provisions on a case by case basis. The European negotiations are of particular interest because they may well set a model for the future evolution of these important provisions around the world.

There are obviously many important and interesting things happening between Australia and the EU in relation to the doing of business. I have touched on a few. Thank you for the opportunity to address you.