

**AUSTRALIAN BAR ASSOCIATION  
BIENNIAL INTERNATIONAL CONFERENCE**

Joint Keynote Address with Chief Justice Susan Kiefel AC

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The Honourable Chief Justice Sundaresh Menon\*

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**I. Introduction**

1. Let me begin by thanking you for choosing to hold this conference in Singapore and by extending you a very, very warm welcome. Indeed, I am delighted to share this stage with Chief Justice Kiefel and High Commissioner Gosper who have just provided us with a wonderful introduction to how our two jurisdictions – Australia and Singapore – share a great deal in common in terms of our legal history, systems and development and enjoy a wonderful relationship that is broad as it is deep. I am also grateful to High Commissioner Gosper for his thoughtful remarks that touched on the storm clouds that threaten the order that we have all grown up with and had perhaps taken for granted. Amidst these clouds which are undoubtedly there, I suggest, as the High Commissioner suggested, that our shared heritage is something to be

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cherished, because it affords us an excellent platform from which develop even deeper collaborations with each other in order to strengthen our prospects of finding sustainable solutions to some of the legal issues and challenges that confront us in common.

2. Convergence is the idea around which this entire conference has been organised and I think it will be useful to begin by first unpacking at least two different senses in which it may be understood. I will then consider how our respective stakeholders have already been forging links that have helped in the quest for convergence before closing with some brief suggestions on how we might take this even further forward. I focus my remarks on the key aspect of trade and commerce leaving other issues to one side.

## **II. The idea of convergence**

3. The ordinary meaning of the word “convergence” suggests the tending together with the view towards the production of a common conclusion or result. In this *broad* sense, convergence *is* occurring at a macro level as a daily reality because the twin forces of globalisation and technology are working to compress the world in a way that increases the incidence of interactions and the degree of interdependence between states. This creates a shared reality among all our communities. In this context, Professor Kishore Mahbubani of the Lee Kuan Yew School of Public Policy has observed that

we are already beginning to see the “logic of one world” take shape as this convergence around a “consensual cluster of norms” continues apace.<sup>1</sup>

4. This is something that we see being played out in many domains, but it is perhaps starkest in how the world’s economies have grown so intertwined over the last three decades. The figures that bear this out are astonishing. In 1990, the value of world merchandise trade stood at some US\$3.5 trillion but it has since multiplied fivefold to almost US\$20 trillion.<sup>2</sup> During the same period, global foreign direct investment has also grown by similar orders of magnitude,<sup>3</sup> while international trade in services has risen from less than US\$1 trillion to almost US\$6 trillion.<sup>4</sup>

5. In this paradigm, commerce operates on a transnational plane and its smooth and orderly conduct is critical to the economic prosperity of states. This has driven policymakers to establish and refine multilateral frameworks and institutions that can support cross-border trade and investments. An outstanding example of this is the World Trade Organization whose watershed establishment in 1995 provided the global community with a forum for governments to negotiate trade agreements, a place to settle trade disputes, and a transnational system of trade rules.<sup>5</sup>

6. Legal stakeholders across the world have at the same time seen the need to do their part to shape an ecosystem of congruent processes and laws just because the growth of cross-border interactions has inevitably given rise

to a whole host of legal issues bearing international dimensions. Consider international commercial arbitration for a moment. Its status as the preferred mode of resolving international commercial disputes today rests in large part on the fact that there exists a considerable degree of uniformity in its rules and processes, which then engenders confidence in users. At a general level, the UNCITRAL Model Law on International Commercial Arbitration helps states wishing to reform and modernise their domestic laws on arbitral procedure to do so in a way that takes into account the particular needs and features of international commercial arbitration in a broadly consistent manner. This is further supplemented by other widely subscribed multilateral instruments such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the IBA Rules on the Taking of Evidence in International Arbitration.

7. This convergence of laws, legal processes and systems is the *narrow* and more specific sense in which we might understand the term, and I suggest that, as lawyers and judges, we should all be particularly invested in driving it. This is not only because fragmented laws and processes increase uncertainty, delay and transaction costs – which is ultimately bad for business – but also because the pursuit of legal harmonisation is how we can secure the conditions for ensuring that, as far as possible, like cases are treated alike; and that, in the end, is no more than what justice demands.

8. Promoting legal convergence in this narrow sense will therefore be integral to how we respond to the internationalisation of legal issues. But we can only do so *effectively* if there is a unity of purpose among stakeholders across jurisdictions. The convergence of our legal mechanisms and systems cannot after all be expected to happen organically; it has to be *actively* driven by us and the more closely we, as the key participants in this undertaking, share in the common vision, the better our prospects of realising it. This underscores the importance of building strong and enduring relationships with one another, and that brings me specifically to our two jurisdictions.

### **III. The links we have forged**

9. There clearly is great value in our maintaining strong links with one another because, as two of the largest commercial common law centres in the region, we can do so much more *together* to develop better responses to the challenges we face. Fortunately, we recognise this and have already been working to this end for some time. This is reflected in some of our areas of common engagement that Chief Justice Kiefel mentioned earlier.

10. Let me first add a personal note. The Asian Business Law Institute, or ABLI for short, was launched in 2016 as a research institute to advance the convergence of business laws in our region through practical scholarship. Among the first persons I presented the idea to was the then Chief Justice of Australia, Bob French. Chief Justice French was not only extremely

supportive, he was instrumental in getting the project off the ground. He lent his commitment, support and breadth of vision to the project, agreeing as well to sit on its inaugural Board of Governors, a position he continues to hold today. The excellent working relations between us have been integral to the work of ABLI. More recently, Chief Justice James Allsop of the Federal Court of Australia and Justice Kannan Ramesh of the Supreme Court of Singapore have agreed to work together on the Advisory Committee for ABLI's project on the development of a set of "Asian Principles of Business Restructuring", which hopes to formulate common principles, procedures and practices for business reorganisation regimes in Asia-Pacific in an effort to eliminate cost inefficiencies. Notably, legal practitioners from Singapore and Australia account for about a fifth of the jurisdictional reporters for this project.

11. It is through such exchanges that we strengthen the soil of our relations for the true convergence of our laws, practices and processes to take root. Let me highlight just five ways in which we have been working together at various levels to give a sense of the span of our relations.

12. First, we have **deepened our court-to-court networks** in recent years to help strengthen the framework for the resolution of cross-border disputes. In 2010, the Supreme Court of Singapore signed a Memorandum of Understanding with the Supreme Court of New South Wales on mutual references of questions of law, and we affirmed this with the signing of another

memorandum in 2015. More recently, in 2017, the Singapore International Commercial Court and the Supreme Court of Victoria (Commercial Court) also had an exchange of letters on the cross-border enforcement of money judgments. At the multilateral level, judges from both our countries actively participate in newly established forums such as the Judicial Insolvency Network and the Standing International Forum of Commercial Courts which are designed to sustain judicial dialogue and collaboration on, among other things, the development of best practices in the resolution of cross-border commercial matters; and Chief Justice Kiefel has already spoken of the Asia-Pacific Judicial Colloquium.

13. Second, one of the advantages of the common law is that we invariably have regard to how the law is developing elsewhere so that we might develop our own jurisprudence in a way that as far as possible promotes **common legal outcomes to shared legal problems**. Again, Chief Justice Kiefel has touched on this but let me mention a recent empirical study of the number of foreign cases cited by the Singapore courts from 1965 to 2008, which found that, after English judgments, Australian judgments were the next most frequently cited here.<sup>6</sup>

14. Third, and looking beyond the courts, our law makers too have **drawn inspiration from one another's statutory laws**. A prime example in Singapore is our implementation of the Torrens system of land registration

through the enactment of the colonial Land Titles Ordinance 1956.<sup>7</sup> Other notable examples include our Companies Act,<sup>8</sup> parts of which have roots that can be traced to the companies' legislation in Victoria.<sup>9</sup> Similarly, our insider trading laws were originally modelled after,<sup>10</sup> and have recently been amended with further reference to, the equivalent Australian legislation.<sup>11</sup>

15. Fourth, convergence has driven the **cross-fertilisation of innovative ideas** between our two jurisdictions. I can offer three quick examples of how Singapore has benefitted from this.

(a) First, in the area of family justice, we followed Australia's lead in employing a more judge-led approach to promote the more conciliatory—rather than adversarial—resolution of family disputes.<sup>12</sup> Our ability to appoint “Child Representatives” to independently represent children in appropriate cases is also modelled after what has been done in the Australian Family Court, which has developed various techniques over the years to safeguard the best interests of the child.<sup>13</sup>

(b) Second, in the area of civil litigation, we recently concluded a review of our civil justice system in which we took special notice of the regime instituted by the Supreme Court of New South Wales that generally requires parties to serve their evidence before discovery. This inverts the conventional sequence in which these two stages of



litigation occur for what seem to us to be sound reasons and we are looking into whether we should adopt a similar approach.

(c) Third, in the area of witness evidence, we have learnt and benefitted from the practice earlier developed in Australia of having experts give their evidence concurrently.<sup>14</sup>

16. Finally, there have also been **initiatives to deepen the relationship between our respective Bars**. Last July, the Law Society of Singapore led a delegation of lawyers to Sydney as part of its “Lawyers Go Global” programme.<sup>15</sup> I am told the team was warmly received by the Law Society of New South Wales, visited an international law firm to learn of its technological initiatives, and heard from a series of leading legal technology companies disrupting the traditional practice of law. The feedback following that visit has been very positive and I hope this spurs more such initiatives in the future.

#### **IV. Taking convergence forward**

17. Let me turn briefly then to consider how we might strive to drive legal convergence in the future. I outline three areas that come to mind.

18. First, ethics in international arbitration. Arbitration practitioners today come from all over the globe, carrying with them their own understanding of what constitutes ethically acceptable conduct as shaped by their own diverse legal cultures and backgrounds. Against this backdrop, it is unrealistic to

expect the practice of international arbitration to be underpinned by a set of *shared* ethical norms. At the same time, it is far from ideal that there should be a lack of transnational consensus on what it means to behave ethically.

19. Almost two decades ago, Prof Catherine Rogers described international arbitration as dwelling in an “ethical no-man’s land”.<sup>16</sup> She lamented then that “[w]here ethical regulations should be, there is only an abyss”. Since then, we have made some progress in filling the regulatory void. As I noted in an address which I delivered last year, there are now “dozens of efforts at international codes of ethics”, with some gaining traction within the arbitral community, such as the IBA Guidelines on Party Representation in International Arbitration and on Conflicts of Interest.<sup>17</sup> This is encouraging but if we are to give international arbitration a real boost, we should set our sights higher on forging an international consensus on key ethical issues for arbitration practice. Time will of course be needed for consensus to develop around such an international framework but if jurisdictions like ours, which are important nodes within the international arbitration network, pledge our commitment to this, then we might accelerate the process of getting there.

20. The second area concerns third-party funding. Compared to Singapore, which only enacted legislation three years ago to allow for such funding primarily in international arbitration proceedings, Australia has had a somewhat longer experience with the practice, having permitted it in civil

litigation since the mid-1990s. But as a whole, third-party funding remains a relatively new and contested practice. Indeed, even the definition of what constitutes “third-party funding” continues to be the subject of debate given that it may be provided through a variety of structures which are constantly evolving and growing ever more sophisticated.<sup>18</sup> We can therefore expect the regulation of this area to become more challenging as policymakers grapple with questions such as how third-party funders are to be identified, and whether, how, to what extent and by whom disclosure of third-party funding arrangements should be made in order to allow courts and tribunals to assess potential or actual conflicts of interest.<sup>19</sup>

21. These are matters that concern us all and certainly we can learn from each other’s experiences to develop robust responses. Notably, the Australian courts exercise “an increasingly broad and active supervisory role” in this area, having shown a willingness in some cases to scrutinise the capital adequacy of litigation funders, the commercial terms of litigation funding agreements and to intervene if a funding commission is considered to be excessive.<sup>20</sup> The Australian courts have also on more than one occasion used their inherent power to stay proceedings where unconventional funding arrangements threatening the legitimacy of the legal process were involved.<sup>21</sup> Beyond the rich jurisprudence that Australian courts have developed in this area, we might also benefit from studying the procedural frameworks you have established to deal with third-party funding. For example, the Supreme Court of Western

Australia has rules requiring “interested non-parties” such as third-party funders to be identified to the court; this can then give rise to duties in relation to the conduct of the case, including a duty to co-operate with the parties and the court and not to engage in misleading or deceptive conduct.<sup>22</sup>

22. In a related vein, I note that the Australian Law Reform Commission has recently published a report on this subject.<sup>23</sup> The commission helpfully identified some of the guiding principles for constructing a regulatory framework in this area,<sup>24</sup> and also made some recommendations that included greater court oversight of third-party funding agreements. Again, I have no doubt that the discussion in the report will reveal many important insights for Singapore as we seek to negotiate the same tensions in this fast-moving space.

23. The final area which I would mention is the regulation of alternative legal service providers or “ALSPs” for short. I have spoken elsewhere of how technology is radically transforming the legal industry, with ALSPs at the forefront of this disruption.<sup>25</sup> ALSPs might seem an eclectic group, comprising as they do such formidable players as the Big Four accounting firms down to much smaller outfits that seek to deliver legal services often with the integrated support of non-lawyers such as coders, process engineers, project managers and data analysts. But what unites these ALSPs at some level, is their commitment to integrate technology into their practices to enable them to

deliver legal services at lower costs. The fact of the matter is that ALSPs are here to stay. Notably, a report published this year by Thomson Reuters in partnership with Georgetown University Law's Centre on Ethics, the Saïd Business School at the University of Oxford, and Acritas, a UK based legal research firm, revealed that, based on their total revenue, ALSPs in North America and the UK have grown by a quarter in size in just the last two years.<sup>26</sup>

24. The growing presence of ALSPs in our midst should cause us to think about whether they should be regulated and, if so, how. Indeed, the idea that non-legally qualified persons have now become so intimately involved in the delivery of a whole range of legal services must surely give us some food for thought. Take for example the growing number of chatbots that we see today offering the public answers to their legal queries. More likely than not, the chatbot—and its underlying algorithm—will have been created by a non-lawyer and one questions whether we should regulate this type of interaction. Are we comfortable, for example, allowing the chatbot to provide the consumer not only with legal *information* but also legal *advice*? If not, how can we practically draw the line between the two? To further complicate matters, ALSPs may operate from beyond our jurisdictions, offering their legal services to our domestic markets through online channels. If we are concerned about maintaining the quality of legal services offered within our respective jurisdictions, then it seems this too is something to be closely studied.

25. These are thorny issues that do not admit of straightforward resolution. Indeed, they take us deep into uncharted territory which can be uncomfortable. Yet I suggest that it is precisely in such situations that we have the most to gain from one another, and the kind of valuable opportunity for jointly developing truly innovative solutions to address common legal challenges.

## **V. Conclusion**

26. Let me conclude by returning to the observation with which I began. We are blessed with a shared heritage, excellent relationships, strong bonds and good connections at many levels. These are ideal conditions for promoting greater collaboration in order to advance legal convergence. That being the case, I think it would be a lost opportunity if we were not intentional about tapping into that resource to develop responses that will help us navigate our increasingly interconnected world. This conference is an ideal forum for doing precisely that. I hope that you will all benefit from productive exchanges and form more lasting connections in the days ahead.

27. Thank you very much.

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- <sup>1</sup> See Kishore Mahbubani, *The Great Convergence: Asia, the West, and the Logic of One World* (PublicAffairs, 2013).
- <sup>2</sup> See United Nations Conference on Trade and Development, “Merchandise: Total Trade and Share, Annual” (2019) <<https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=101>> (accessed 31 May 2019).
- <sup>3</sup> See United Nations Conference on Trade and Development, “Foreign Direct Investment: Inward and Outward Flows and Stock, Annual” (2019) <<https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740>> (accessed 31 May 2019).
- <sup>4</sup> See United Nations Conference on Trade and Development, “Services (BPM5): Exports and Imports of Total Services, Value, Shares and Growth, Annual, 1980-2013 (Discontinued)” (2019) <<https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=17648>> (accessed 31 May 2019); United Nations Conference on Trade and Development, “Services (BPM6): Exports and Imports of Total Services, Value, Shares, and Growth, Annual” (2019) <<https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=87010>> (accessed 31 May 2019).
- <sup>5</sup> See the official WTO homepage, [https://www.wto.org/english/thewto\\_e/thewto\\_e.htm](https://www.wto.org/english/thewto_e/thewto_e.htm).
- <sup>6</sup> See Goh Yihan & Paul Tan, “An Empirical Study on the Development of Singapore Law” (2011) 23 SAcLJ 176 at pp 208–209.
- <sup>7</sup> Land Titles Ordinance 1956 (Ordinance No 21 of 1956)
- <sup>8</sup> Companies Act (Cap 50, 2006 Rev Ed)
- <sup>9</sup> See Walter Woon, “Reforming Company Law in Singapore” (2011) 23 SAcLJ 795 at para 1, referring to the now repealed Companies Act 1961 (No 6839 of 1961) (Vic).
- <sup>10</sup> Section 128 of the Securities Industry Act 1980 (No 66 of 1980) (Cth) (which has since been repealed).
- <sup>11</sup> Corporations Act 2001 (No 50 of 2001) (Cth).
- <sup>12</sup> See Sundaresh Menon, Chief Justice of Singapore, “A Vision for Family Justice in Singapore”, address at the Family Justice Practice Forum (18 October 2013) at paras 12, 27.
- <sup>13</sup> See Committee for Family Justice, *Recommendations of the Committee for Family Justice: On the Framework of the Family Justice System* (4 July 2014) at pp 39–40.
- <sup>14</sup> See Steven Rares, Judge of the Federal Court of Australia, “Using the ‘Hot Tub’: How Concurrent Expert Evidence Aids Understanding Issues” (December 2013).
- <sup>15</sup> See Singapore Law Gazette news article, “Lawyers Go Global – Go Sydney” (November 2018), accessible at <https://lawgazette.com.sg/news/updates/lawyers-go-global-go-sydney/>.
- <sup>16</sup> See Catherine Rogers, “Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration” (2002) 23 Michigan Journal of International Law 341 at p 342.
- <sup>17</sup> See Sundaresh Menon, “The Special Role and Responsibility of Arbitral Institutions in Charting the Future of International Arbitration” (17 May 2018) at paragraph 31.
- <sup>18</sup> See Note by the Secretariat of UNCITRAL Working Group III, “Possible reform of investor-State dispute settlement (ISDS): Third-party funding”, Working Paper 157 (24 January 2019) at para 8, accessible at <https://undocs.org/en/A/CN.9/WG.III/WP.157>.
- <sup>19</sup> See Note by the Secretariat of UNCITRAL Working Group III, “Possible reform of investor-State dispute settlement (ISDS): Third-party funding”, Working Paper 157 (24 January 2019) at para 20, accessible at <https://undocs.org/en/A/CN.9/WG.III/WP.157>.
- <sup>20</sup> See the online article by Claims Funding Australia, “Litigation funding in Australia: a year of review and change?” (24 July 2018), accessible at <https://claimsfundingaus.com.au/news/litigation-funding-australia-year-review-and-change>.

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The article cites cases such as *oney Max International Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433.

<sup>21</sup> See the online article by Claims Funding Australia, “Litigation funding in Australia: a year of review and change?” (24 July 2018), accessible at <https://claimsfundingaus.com.au/news/litigation-funding-australia-year-review-and-change>.

The article cites cases such as *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187; *Walsh v WorleyParsons Ltd (No 4)* [2017] VSC 292; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2016] FCA 787.

<sup>22</sup> See the Australian Productivity Commission Inquiry Report (Vol 2), *Access to Justice Arrangements* (No 72, September 2014) at p 630, accessible at <https://apo.org.au/sites/default/files/resource-files/2014/12/apo-nid42575-1217831.pdf>.

<sup>23</sup> See Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC Report 134, December 2018) (“*Integrity, Fairness and Efficiency*”).

<sup>24</sup> See *Integrity, Fairness and Efficiency* at p 16.

<sup>25</sup> See, for example, Sundaresh Menon, “Deep Thinking: The Future of the Legal Profession in an Age of Technology” (25 April 2019), accessible at

[https://www.supremecourt.gov.sg/docs/default-source/default-document-library/deep-thinking---the-future-of-the-legal-profession-in-an-age-of-technology-\(250419---final\).pdf](https://www.supremecourt.gov.sg/docs/default-source/default-document-library/deep-thinking---the-future-of-the-legal-profession-in-an-age-of-technology-(250419---final).pdf).

<sup>26</sup> See the joint report, “Alternative Legal Service Providers 2019: Fast Growth, Expanding Use and Increasing Opportunity” at p 3, by Thomson Reuters Legal Executive Institute, in partnership with Georgetown University Law’s Centre on Ethics and the Legal Profession, University of Oxford Said Business School, and the UK-based legal research firm Acritas, accessible at <https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/reports/alsp-report-final.pdf?cid=9008178&sfdccampaignid=7011B000002OF6AQAW&chl=pr>.