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Balancing the Scales: The Standard of Reasons Required in Commercial Arbitration and Litigation in Australia[1]

Benjamin Hayward

William K.Q. Ho

1. Introduction

On October 5, 2011, the High Court of Australia handed down its decision in *Westport Insurance Corp v Gordian Runoff Ltd.*[2] This decision had been highly anticipated for a number of reasons. Primarily, it was the first decision for some time requiring the High Court to address issues of arbitration law directly. Secondly, it required the High Court to do this at a time when significant law reform initiatives relating to both international and domestic commercial arbitration were occurring in the various Australian jurisdictions. Thirdly, the decision was handed down in the context of strong support for commercial arbitration at the federal and state government levels in Australia. But most importantly from a practical point of view, *Gordian Runoff* required the High Court to settle an issue of difference that had arisen amongst the intermediate state courts in relation to domestic commercial arbitration: the extent of reasoning required in awards rendered by arbitrators under the uniform Commercial Arbitration Acts that had been in force in the Australian states and territories since the mid-1980s[3] (the Uniform CAAs) and the role played by inadequate reasoning in securing recourse against an award.

This article analyses *Gordian Runoff* in context. Part 2 considers the state of the law prior to the High Court's decision by providing an overview of the Victorian, New South Wales and Queensland positions on the reasoning issue. Part 3 reviews the High Court's decision in *Gordian Runoff* itself. Part 4 then explores the "scalability" of reasoning standards brought about by *Gordian Runoff* by comparing the standard of reasons required of arbitrators with that required of judges. Finally, Pt 5 considers the implications of *Gordian Runoff*, decided under the Uniform CAAs, for Australia's new domestic commercial arbitration legislation (the new Acts) based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).

2. Tension between the Australian Jurisdictions

The Uniform CAAs contained, in their s.29(1)(c), a requirement that arbitrators provide reasons for their awards. According to this provision[4]:

> "(1) Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator ... shall—

[1] The authors would like to thank Dr Julie Clarke for her assistance and direction in relation to the competition law and contract law issues discussed in this article. The opinions expressed in this article are those of the authors and do not necessarily reflect those of their respective organisations.

[2] (2011) 281 A.L.R. 593.

[3] Commercial Arbitration Act 1986 (ACT); Commercial Arbitration Act 1984 (NSW); Commercial Arbitration Act 1985 (NT); Commercial Arbitration Act 1990 (Qld); Commercial Arbitration and Industrial Referral Agreements Act 1986 (SA); Commercial Arbitration Act 1986 (Tas); Commercial Arbitration Act 1984 (Vic); Commercial Arbitration Act 1985 (WA).

[4] This provision is (save for slight differences in the use of punctuation) identical across the Uniform CAAs.

(a) make the award in writing;
(b) sign the award; and
(c) include in the award *a statement of the reasons for making the award.*"[Emphasis added].

What appears on its face to be a relatively straightforward requirement, in fact, contained a significant question as to the standard of reasoning required of arbitrators. In response, multiple and contrasting views were proffered by the Supreme Courts and Courts of Appeal in Victoria, New South Wales and Queensland. Needless to say, this was a highly undesirable state of affairs given the High Court's emphasis on the consistent interpretation of uniform State and Territory legislation in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd.*[5]

The Victorian position—at first instance

The line of intermediate state court cases dealing with the standard of reasons required of arbitrators began with the Victorian Supreme Court's 2006 decision in *BHP Billiton Ltd v Oil Basins Ltd.*[6] The proceedings concerned a major arbitration involving a dispute as to the interpretation of a royalty agreement in respect of the production of oil.

After having an interim award rendered against it, BHP appealed pursuant to the Commercial Arbitration Act 1984 (Vic) ss.38 and 42 on the bases that the arbitrators failed to provide adequate reasons for the award (constituting an error of law) and that the arbitrators had committed technical misconduct.

In discussing the standard of reasons required of common law judges, Hargrave J. referred to the decision of Nettle J.A. in *Hunter v Transport Accident Commission*[7] and noted that "the extent of reasons which are required will always depend upon the circumstances of the case".[8] His Honour then observed that

> "[t]he question remains as to whether the duty of an arbitrator to give reasons is to be equated to the duty of a judge, or whether some lesser duty is involved."[9]

After considering the relevant authorities, Hargrave J. held that the standard of reasons required of an arbitrator "depends upon the circumstances of the case"[10] which (in his Honour's opinion) included a number of factors such as:

- "the facts of the arbitration";
- "the procedures adopted in the arbitration";
- "the conduct of the parties to the arbitration"; and
- "the qualifications and experience of the arbitrator[s]".[11]

Hargrave J. illustrated this view by way of two contrasting hypothetical examples:

> "For example, in a straightforward trade arbitration before a trade expert, a less exacting standard than would be expected of a judge's reasons should be applied in considering the adequacy of the reasons for the making of an award. On the other hand, in a large-scale commercial arbitration, where the parties engage in the exchange of detailed pleadings and witness statements prior to a formal hearing before a legally qualified arbitrator, a higher standard of reasons is to be expected. This is especially so where the arbitrator is a retired judicial officer."[12]

[5] (2007) 230 C.L.R. 89 at [135].
[6] [2006] VSC 402.
[7] [2005] VSCA 1.
[8] *BHP Billiton* [2006] VSC 402 at [14].
[9] *BHP Billiton* [2006] VSC 402 at [16].
[10] *BHP Billiton* [2006] VSC 402 at [21].
[11] *BHP Billiton* [2006] VSC 402 at [21].
[12] *BHP Billiton* [2006] VSC 402 at [21].

Notably, His Honour adopted the position taken by the Queensland Court of Appeal in *Cypressvale Pty Ltd v Retail Shop Lease Tribunal*[13] where McPherson and Davies JJ.A. held that whether reasons are adequate, required an examination of factors

> "including the functions, talents and attributes of the tribunal members or the individual in whom the duty of deciding questions of that kind has been vested."[14]

Ultimately, Hargrave J. agreed with BHP and held that on the facts of the case

> "the arbitrators were under a duty to give reasons of a standard which was equivalent to the reasons to be expected from a judge deciding a commercial case."[15]

The Victorian position—on appeal

The decision of Hargrave J. was appealed to the Victorian Court of Appeal (constituted by Buchanan, Nettle and Dodds-Streeton JJ.A.) which handed down its decision reported as *Oil Basins Ltd v BHP Billiton Ltd*[16] in 2007. The Court of Appeal in *Oil Basins* held that arbitrators ought to be held to a judicial standard of reasoning under the Commercial Arbitration Act 1984 (Vic).

In a joint judgment, their Honours held that "[t]he arbitrators' decision in the ... case called for reasons of a judicial standard", and that as with such reasons, "the extent to which an arbitrator needs to go in explaining [their] decision depends on the nature of the decision".[17] Like Hargrave J., their Honours illustrated the applicable standard by way of a hypothetical example:

> "[I]f the only issue before an arbitrator is whether a claimant has sustained injury and the issue turns solely on the credibility of the claimant's testimony, a simple finding that he or she fell and sustained injury might be enough. But if, in addition to the claimant's credibility, other matters are relied on as going to the probability or improbability of the claimant's case, such a simple finding will not be enough. Plainly, a judge is bound to refer to relevant evidence and, where there is a conflict of a significant nature, to provide reasons for choosing one side over the other. A judge is also bound to deal with central contentions, even if sometimes only briefly, and at least to the extent of explaining in general terms why he or she has rejected them. Accordingly, where evidence and contentions combine as they are prone to do in the form of expert evidence, and the dispute involves 'something in the nature of an intellectual exchange with reasons and analysis advanced on either side', it is plain that the judge is bound to enter into the issues canvassed before the court and to provide an intelligible explanation as to why the judge prefers one case over the other. In our view, an arbitrator is subject to similar obligations."[18]

The Court of Appeal only departed from Hargrave J.'s reasons in substance by distancing itself from *Cypressvale*, holding that "it is the nature of a dispute which sets the standard for reasons, not the nature of the arbitrator".[19]

Unsurprisingly, *Oil Basins* caused a measure of controversy within the arbitration community.[20] Megens and Cubitt observed that *Oil Basins*

[13] [1996] 2 Qd R. 462.
[14] *Cypressvale* [1996] 2 Qd R. 462 at 485.
[15] *BHP Billiton* [2006] VSC 402 at [23].
[16] (2007) 18 V.R. 346.
[17] *Oil Basins* (2007) 18 V.R. 346 at [54].
[18] *Oil Basins* (2007) 18 V.R. 346 at [55] (citations omitted).
[19] *Oil Basins* (2007) 18 V.R. 346 at [59].
[20] See, e.g. Peter Megens and Beth Cubitt, "Emerging Trends in Judicial Approach to International Arbitration in Australia: The Winds of Change" (2011) 77 *Arbitration* 33.

> "sent an unsettling shockwave throughout the Australian international arbitration community. Instead of taking the opportunity to clarify the distinction between two very different mechanisms for dispute resolution, the court in *Oil Basins* blurred the distinction further. Arbitration was looking more and more like litigation, and practitioners were concerned that the entrenchment of the principle in *Oil Basins* would hamper the efficiency and relative finality that made arbitration so attractive."[21]

The New South Wales position

In the 2010 decision of *Gordian Runoff Ltd v Westport Insurance Corporation*,[22] the New South Wales Court of Appeal was also asked to consider the standard of reasons required of an arbitrator.

The court declined to follow the position taken in *Oil Basins*. After a detailed examination of *Oil Basins*, the Model Law, international arbitration practices and authorities, and the legislative history of the Uniform CAAs, Allsop P. (with whom Spigelman C.J. and Macfarlan J.A. agreed) took the position that there was no requirement for an arbitral award to contain reasoning of a judicial standard. The court took the view that an arbitral award ought not to be burdened with the costs, complexities and technicalities associated with curial decision-making. The court adopted[23] the position taken in the English decision of *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No.2)*[24] where it was held that:

> "All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award'."[25]

Distancing itself from *Oil Basins*' equation of arbitral reasoning with judicial reasoning, the court noted that while the Uniform CAAs' s.29(1)(c)

> "describes at one level what a judge does [it] does not as a matter of language or logic impose all the obligations upon judicial officers in this respect on arbitrators."[26]

The court expressly noted that the differences between arbitration and litigation "should be borne in mind at all times"[27] and suggested that any "mimic[king] of court litigation" by arbitration was more "a failing of procedure and approach" than "reflecting any essential character of the arbitral process".[28]

Allsop P. (with Spigelman C.J. and Macfarlan J.A. agreeing) ultimately took the view that *Oil Basins* was plainly wrong and should not be followed in New South Wales:

> "I am persuaded to the point of conviction that it is wrong to equate the obligations of judges and arbitrators to give reasons as part of the ascription of meaning to s[.]29(1)(c) ... This is because of my view that to so equate the responsibilities of arbitrators and judges is not in accordance with the context of either s[.]29(1)(c) or the Model Law (being relevantly its source and inspiration) or with international arbitration practice as reflected by the cases and writing to which I have referred. To the extent that the Court of Appeal in *Oil Basins* can be seen to have so decided in relation to s[.]29(1)(c),

[21] Megens and Cubitt, "Emerging Trends in Judicial Approach to International Arbitration in Australia: The Winds of Change" (2011) 77 *Arbitration* 33, 35.
[22] (2010) 267 A.L.R. 74.
[23] *Gordian Runoff* (2010) 267 A.L.R. 74 at [220].
[24] [1981] 2 Lloyd's Rep. 130.
[25] *Bremer* [1981] 2 Lloyd's Rep. 130 at 132–133 (Donaldson L.J.).
[26] *Gordian Runoff* (2010) 267 A.L.R. 74 at [220], see also [218].
[27] *Gordian Runoff* (2010) 267 A.L.R. 74 at [216].
[28] *Gordian Runoff* (2010) 267 A.L.R. 74 at [217].

> I am of the respectful view that such view is plainly or clearly wrong and should not be followed."[29]

The Queensland position

Shortly after the New South Wales Court of Appeal's decision had been handed down, the Queensland Supreme Court took yet another differing position in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd*.[30] Acknowledging the disparity and inconsistency between the Victorian and New South Wales positions, the Queensland Supreme Court strictly followed the doctrine of precedent and aligned itself with the *Cypressvale* approach in order to avoid the difficulty of having to determine whether the Victorian or New South Wales position was correct.

The subsequent Victorian approach—Croft J.'s reconciliation of the authorities

In *Thoroughvision Pty Ltd v Sky Channel Pty Ltd*,[31] Croft J. sitting in the Victorian Supreme Court attempted to reconcile the existing authorities. His Honour considered both *Oil Basins* and the New South Wales position, and while acknowledging that he was bound by the Victorian Court of Appeal, Croft J. took the view that

> "a principle of proportionality applies with respect to the nature and extent of reasons which an arbitrator is obliged to provide in an arbitration award."[32]

3. The High Court's Decision in *Gordian Runoff*

Given the vast differences in views between the Australian jurisdictions, as well as the previously mentioned interest of the High Court in securing consistent interpretation of uniform legislation,[33] it is perhaps unsurprising that leave was granted for the New South Wales Court of Appeal's decision to be further appealed to the High Court of Australia.[34]

The High Court's decision was highly anticipated, given the conflicting approaches taken in Australia's intermediate courts and given its status as the first arbitration-related case to come before the High Court in quite some time. The case was also heard against the context of state and federal law reform concerning both international and domestic commercial arbitration, as well as strong pro-arbitration policies emanating from the Federal Government and the Standing Committee of Attorneys-General (SCAG).[35] Interest in the decision was further agitated by the time taken for the High Court proceedings to culminate in judgment, with special leave being granted on September 3, 2010,[36] the case being argued on February 3[37] and February 4, 2011,[38] and judgment ultimately delivered in *Gordian Runoff* on October 5, 2011. After a wait of more than one year, however, the High Court's decision was regrettably akin to an anti-climax from an arbitration scholarship perspective.

The joint judgment of French C.J., Gummow, Crennan and Bell J.J. (the joint judgment) found that the requirement in *Oil Basins* that arbitral awards display a judicial standard of reasoning "placed an unfortunate gloss upon the terms of s[.]29(1)(c)".[39] Kiefel J., in a

[29] *Gordian Runoff* (2010) 267 A.L.R. 74 at [224].
[30] [2010] QSC 94.
[31] [2010] VSC 139.
[32] *Thoroughvision* [2010] VSC 139 at [54].
[33] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 C.L.R. 89 at [135].
[34] For the special leave decision, see *Westport Insurance Corp v Gordian Runoff Ltd* [2010] HCATrans 233.
[35] Now known as the Standing Council on Law and Justice.
[36] See *Gordian Runoff* [2010] HCATrans 233.
[37] See *Gordian Runoff* [2011] HCATrans 12.
[38] See *Gordian Runoff* [2011] HCATrans 13.
[39] *Gordian Runoff* (2011) 281 A.L.R. 593 at [53].

separate judgment (the Kiefel judgment), agreed with this view and observed that there was nothing in the Uniform CAAs to suggest that reasons in arbitral awards were required to be of a judicial standard.[40]

In any event, as the joint judgment noted, the parties agreed that the standard should be governed by the *Bremer* formulation.[41] Both the joint judgment and the Kiefel judgment endorsed Donaldson L.J.'s description of the standard required in that case, and held that what is required by way of reasons in a given case will depend upon the circumstances of that case.[42]

The High Court's decision is interesting in two respects: in that it was not strictly required to specifically clarify whether it accepted the Victorian or the New South Wales position; and in that it does not discuss the differing Queensland approach. While the court was keen to avoid attaching the words "judicial standard" to the reasons required under the Uniform CAAs s.29(1)(c), the finding that the circumstances of the case dictate the standard suggests that, at least philosophically, the court was not completely moving away from *Oil Basins*.

The best conclusion that can be drawn from *Gordian Runoff* is that the standard of reasoning required of arbitrators under the Uniform CAAs is the one set out by Donaldson L.J. in *Bremer*. However, that standard is "scalable" in the sense that its extent is dictated by the circumstances of each case. That said, regardless of how complex a proceeding may be, the applicable standard is never required to be the standard to which a common law judge would be held in an identical case.

4. Calibrating the Scales of Justice: Comparing the Standard of Reasons Required in Commercial Arbitration and Litigation

As explored in Pt 3 above, the High Court of Australia's decision in *Gordian Runoff* requires arbitrators to provide a sufficiently reasoned decision in accordance with the *Bremer* formulation. Failure to do so constitutes an error of law,[43] which the Uniform CAAs adopt as one basis for which recourse may be had against an award.[44]

In the High Court appeal in *Gordian Runoff*, it was confirmed that the duty on arbitrators to give reasons does not import a judicial standard. Rather, in relation to *Oil Basins*, the High Court suggested that

> "[m]ore to the point were observations ... to the effect that what is required ... will depend upon the nature of the dispute and the particular circumstances of the case."[45]

Thus, according to the High Court in *Gordian Runoff*, a judicial standard of reasoning is not required of arbitrators. However, on a closer analysis, it can be queried whether the standard expounded in *Gordian Runoff* is in fact materially different to the standard of reasoning required of common law judges in Australia.

The obligation of Australian judges to give reasons for their decisions has been described as "an essential incident of the judicial function".[46] The standard of reasoning required in judicial decisions in Australia has been explored in depth in case law from New South

[40] *Gordian Runoff* (2011) 281 A.L.R. 593 at [169].

[41] *Gordian Runoff* (2011) 281 A.L.R. 593 at [54]. As to the *Bremer* formulation, see discussion in Pt 2 of this article (above).

[42] *Gordian Runoff* (2011) 281 A.L.R. 593 at [53]–[54] (joint judgment) and [169]–[170] (Kiefel judgment).

[43] *Gordian Runoff* (2011) 281 A.L.R. 593 at [36]. It may also constitute misconduct—see *Yesodei Hatorah College Inc v The Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622 at [80] (Croft J.).

[44] Uniform CAAs s.38(5)(b). Under s.38(1), there is no power to set aside or remit an award on the basis of an error of law; however the remainder of s.38 provides a limited right of recourse where leave to appeal is granted by the Supreme Court (s.38(4)(b)). That leave must not be granted unless there are substantial rights of the parties at stake (s.38(5)(a)) and either there is a manifest error on the face of the award, or strong evidence that the arbitrator made an error of law and determination of the question may substantially add to the certainty of commercial law (s.38(5)(b)).

[45] *Gordian Runoff* (2011) 281 A.L.R. 593 at [53].

[46] *Wainohu v New South Wales* (2011) 243 C.L.R. 181 at [68] (French C.J. and Kiefel J.).

Wales[47] and was recently summarised by Coleman J. in the Family Court case of *Wen & Thom*,[48] in which a "reasons challenge" was unsuccessfully agitated. According to Coleman J.:

> "As the authorities make clear, there is no absolute standard by which the adequacy of judicial reasons can be gauged. The authorities suggest that the essential requirement is that judicial reasons reveal why a case was decided the way it was. How much needs to be said for that requirement to be met will vary from case to case in the light of the issues raised which require adjudication. In many cases, very little will need to be said whilst in other cases a good deal of the reasoning process which leads to the ultimate decision will need to be revealed."[49]

The application of this judicial standard is well demonstrated by a comparison of Australian case law concerning competition and contract law. Cases applying the competition law provisions of the Competition and Consumer Act 2010 (Cth) (or equally the now-superseded Trade Practices Act 1974 (Cth)) are notorious for being potentially very complex, particularly when they involve difficult questions of economics. The quintessential example is *Seven Network News Ltd v News Ltd*[50] (the *C7 case*). The *C7 case* was one of the largest and longest trials in Australian legal history.[51] The first instance judgment of Sackville J. runs to some 1,123 pages. So large is the judgment that the Unreported Judgments database of the LexisNexis Australia research service breaks its copy of the decision up into no fewer than four separate entries, even before the further appeal to the Full Court of the Federal Court of Australia and its own 251 page judgment are taken into account.[52] On the other hand, while it is hard to generalise, contract law cases are typically less complex and are often comparatively simpler. This generalisation is reflected in the fact that contract law cases, even those reaching the High Court of Australia, tend to be significantly shorter and less detailed. To take one example, the High Court case of *Baltic Shipping Company v Dillon*[53] fills a mere 64 pages of the Commonwealth Law Reports and even those 64 pages are comprised of 6 separate judgments.

Thus, according to *Gordian Runoff*, arbitrators must follow the formulation of Donaldson L.J. in *Bremer* and must give reasons appropriate to the nature of the dispute and circumstances of the case.[54] However, according to *Wen & Thom*, the judicial standard requires judges to render a decision that "reveal[s] why a case was decided the way it was" in a manner and level of detail that may vary according to the nature of the case at hand.[55] While the High Court in *Gordian Runoff* took care to distance the standard of reasoning required of arbitrators from the judicial standard, it could be queried whether these two standards are in fact the same or at least much more similar than the High Court acknowledged.

How is this to be explained and ultimately rationalised? The best conclusion that can be reached as to the effect of *Gordian Runoff* is that the standard of reasoning required of arbitrators and judges is not the same; but they share the same attribute in that they are both "scalable". For example, a highly complicated arbitration will require an arbitral award containing much more sophisticated and detailed reasoning than a simple court proceeding.

[47] See, e.g. *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 N.S.W.L.R. 378; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 N.S.W.L.R. 247.

[48] [2010] FamCAFC 81.

[49] *Wen* [2010] FamCAFC 81 at [57]. See also Hugh Dillon, "Judicial Technique: Giving Proper and Sufficient Reasons for Decision" (2008) 8 J.R. 107, 108.

[50] [2007] FCA 1062.

[51] For some interesting trivia regarding the sheer scale of the *C7 Case*, see Julie Clarke, "*Seven Network Ltd v News Ltd*" (2010) Australian Competition Law, available at: *http://australiancompetitionlaw.org/cases/c7.html* [Accessed August 28, 2012].

[52] For the Full Court decision, see *Seven Network Ltd v News Ltd* (2009) 182 F.C.R. 160.

[53] (1993) 176 C.L.R. 344.

[54] *Gordian Runoff* (2011) 281 A.L.R. 593 at [53]–[54].

[55] *Wen* [2010] FamCAFC 81 at [57].

However, if a court proceeding involving the same facts as the complicated arbitration had come before an Australian court, the judgment's reasoning would have to be of a higher standard than that contained in the arbitral award; though the question of how much higher might need some clarification. In any case, the standard of reasons required of arbitrators and judges in Australia can be seen to slide along two parallel "scales".

5. *Gordian Runoff*'s Implications for the New Commercial Arbitration Acts

The High Court's consideration of the standard of reasoning required in arbitral awards in *Gordian Runoff* was conducted in the context of the Uniform CAAs. As a result of law reform initiatives pursued through the SCAG[56]—prompted by a suggestion of Spigelman C.J. of the New South Wales Supreme Court[57]—the Uniform CAAs are in the process of being replaced in each Australian state and territory by new commercial arbitration legislation based on the Model Law. To date, such legislation has entered into force in New South Wales (the first jurisdiction to enact the new regime),[58] Victoria[59] and South Australia.[60] New legislation has passed through Parliament (but not yet entered into force) in Tasmania[61] and the Northern Territory.[62] Queensland and Western Australia have new commercial arbitration legislation currently passing through their parliaments, whilst the Australian Capital Territory is yet to act on the SCAG Model Bill.[63]

An important and as yet unresolved question which arises in the context of the present analysis is the extent to which *Gordian Runoff* will apply to the new Acts. Resolving this issue requires consideration of the reasoning and recourse-against-award provisions in both the Uniform CAAs and the new Acts, the purposes underpinning each body of statutory law, as well as the precedential value of statutory interpretation decisions in Australia.

The reasoning and recourse-against-award provisions of the Uniform CAAs and the new legislation compared

First and foremost, the continued applicability of *Gordian Runoff* depends on the extent to which there is convergence between the provisions of the Uniform CAAs and the new Acts.

One of the key provisions underlying the High Court's analysis in *Gordian Runoff* was the Uniform CAAs s.29(1)(c). This provision establishes the duty for arbitrators to give reasons (and is extracted in Pt 2 above). The equivalent provision in the new legislative regime is found in the SCAG Model Bill s.31(3), reproduced verbatim in the new New South Wales, Victorian and South Australian legislation. The SCAG Model Bill s.31(3), which nearly exactly mirrors the Model Law art.31(2),[64] provides that

[56] See generally Robert McClelland and John Hatzistergos, "Agreement on New Model Commercial Arbitration Bill" (Joint Media Release, May 7, 2010), available at: *http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1UNW6%22* [Accessed August 29, 2012].

[57] Chief Justice Spigelman, "Address to the Law Society of New South Wales" (Speech delivered at the Opening of Law Term Dinner, Sydney, February 2, 2009), available at: *http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman020209.pdf/$file/Spigelman020209.pdf* [Accessed August 28, 2012].

[58] Commercial Arbitration Act 2010 (NSW). The New South Wales legislation came into force on October 1, 2010.

[59] Commercial Arbitration Act 2011 (Vic). The Victorian legislation came into force on November 17, 2011.

[60] Commercial Arbitration Act 2011 (SA). The South Australian legislation came into force on January 1, 2012.

[61] Commercial Arbitration Act 2011 (Tas).

[62] Commercial Arbitration (National Uniform Legislation) Act 2011 (NT).

[63] Albert Monichino, "Arbitration Law in Victoria Comes of Age" (paper presented at The New Commercial Arbitration Act 2011 seminar, Melbourne, November 30, 2011), p.4. The SCAG Model Bill is available to download from SCAG, *Current Projects and Achievements* (September 15, 2011), available at: *http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_achievements#Commercial%20arbitration* [Accessed August 28, 2012].

[64] The only difference between the SCAG Model Bill s.31(3) and the Model Law art.31(2) lies in the former's reference to "section 30" and the latter's reference to "article 30", a necessary consequence of the respective domestic and international origins of the two instruments.

> "[t]he award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 30".

It can be seen that on a textual analysis, the provision of the new Act imposes the same obligation on arbitrators to give a reasoned award as the Uniform CAAs s.29(1)(c). Though the two provisions are expressed differently, they both in substance require the same thing: that arbitrators state the reasons for their award. With reference to the Commercial Arbitration Act 2010 (NSW), Jones argues that *Gordian Runoff* (albeit the Court of Appeal decision, which was the current law at the time Jones's commentary was published) "will continue to represent the law in New South Wales" as a result of "the parallels between s[.]29 of the Uniform Acts and s[.]31 of the 2010 Act".[65] The logical extension of this view is that the High Court's decision in *Gordian Runoff* should also apply to the new legislative regime.

However, assessing the applicability of *Gordian Runoff* to the new legislation also requires consideration of another key provision underpinning the High Court's analysis: the Uniform CAAs s.38. This is the provision setting out the circumscribed bases upon which an error of law can justify recourse against an award. There is no equivalent provision in the SCAG Model Bill.[66] The New South Wales legislation does include an equivalent provision by way of the Commercial Arbitration Act 2010 (NSW) s.34A, as does the Victorian legislation in the Commercial Arbitration Act 2011 (Vic) s.34A and the South Australian legislation in the Commercial Arbitration Act 2011 (SA) s.34A.

Of fundamental importance to the present analysis is the prerequisite to the application of these sections set out in s.34A(1)(a) of the respective new Acts—that "the parties agree ... that an appeal may be made under this section". The provision therefore operates "only on an 'opt in' basis".[67]

The reason why the opt-in nature of the new Acts' appeal mechanism is so fundamental to the continued relevance of *Gordian Runoff* is that outside this mechanism, the only other avenues of recourse available against awards are the New York Convention-derived bases in s.34 of the respective Acts which, importantly, do not include an error of law.[68] As the High Court in *Gordian Runoff* characterised a failure to give adequate reasons as an error of law,[69] it becomes apparent that while the duty to give adequate reasons continues to apply under the new Acts, unless the parties opt into the new s.34A there will be no practical consequence should arbitrators fail to do so.

Thus, on a textual comparison of the relevant provisions of the Uniform CAAs and the new Acts, it can be concluded that the High Court's decision in *Gordian Runoff* may have continued relevance under the new legislative scheme. However, this potential only exists where the parties have opted into the new s.34A appeal mechanism.

The purposes of the two regimes

Notwithstanding the above analysis, an assessment of the continuing relevance of *Gordian Runoff* requires (as a point of statutory interpretation) consideration not just of text and context, but also of purpose.[70]

[65] Doug Jones, *Commercial Arbitration in Australia* (Rozelle, NSW: Lawbook Co, 2011), para.9.320.

[66] Jones, *Commercial Arbitration in Australia* (2011), para.10.360.

[67] Jones, *Commercial Arbitration in Australia* (2011), para.10.360. Also see Albert Monichino, "International Arbitration in Australia—2010/2011 in Review" (2011) 22 *Australian Dispute Resolution Journal* 215, 217; Doug Jones, "Commercial Arbitration Act: What are the Key Reforms, and What Will This Mean for Your Clients?" (paper presented at The New Commercial Arbitration Act 2011 seminar, Melbourne, November 30, 2011), p.12.

[68] And which also do not include misconduct, in relation to Croft J.'s characterisation of the failure to give reasons in *Yesodei Hatorah College Inc v The Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622 at [80].

[69] *Gordian Runoff* (2011) 281 A.L.R. 593 at [36].

[70] See generally Michael Kirby, "Statutory Interpretation: The Meaning of Meaning" (2011) 35 *Melbourne University Law Review* 113, 116—noting "that task [i.e. statutory interpretation] requires a combined exercise involving analysis of the *text*, *context* and *purpose* (or *policy*) of the statute in question" (emphasis in the original).

As indicated above, the duty placed on arbitrators to render a reasoned award contained in the SCAG Model Bill s.31(3) (and equivalent provisions in the new Acts) is derived nearly verbatim from the Model Law art.31(2). As Monichino noted, in the High Court appeal in *Gordian Runoff* the issue of

> "whether Art[.]31(2) of the Model Law is to be construed in a similar manner to [s.]29(1)(c) of the [Uniform CAAs], [or] alternatively requires something less in terms of the standard of reasons, was left for determination on another day".[71]

Consistently with Kirby J.'s admonition to consider statutory purpose, Monichino notes that

> "notwithstanding similarity in language between the [Uniform CAAs] and the revised CAA Model Law; it does not follow that the Model Law should be interpreted in the same manner."[72]

Allsop P. in the New South Wales Court of Appeal decision "treated [Model Law art.31] as the inspiration for [s.]29 of the [Uniform CAAs]".[73] While Allsop P.'s judgment has now been superseded by the High Court's decision, arguably this obsolescence has a narrow scope. Whilst the Model Law art.31(2) might have been the "inspiration" for the Uniform CAAs s.29(1)(c), it is the direct textual source for the SCAG Model Bill s.31(3) (and the state and territory legislative implementations of this provision). Therefore, its close analysis of the Model Law means Allsop P.'s reasoning in the Court of Appeal could remain relevant to the new Acts, while ironically the High Court's more recent decision could arguably be confined to the old Uniform CAAs regime.

The new legislative schema "promotes party-autonomy, finality of awards and it provides for judicial supervision of the arbitration process with a 'light touch'"[74]—all values deeply rooted in the Model Law. The purpose of the new Acts, being to reform Australia's domestic commercial arbitration law based on the Model Law template, may be a relevant factor in demonstrating that the High Court's decision in *Gordian Runoff* has a lesser relevance to the new statutory scheme than may be immediately apparent.

The precedential value of statutory interpretation decisions

Finally, the applicability of *Gordian Runoff* to the new Acts should also be assessed against the doctrine of precedent as it is applied in the Australian legal system—specifically, the precedential value of statutory interpretation decisions.

While decisions of the High Court of Australia are binding on all courts in all Australian jurisdictions (save for the High Court itself), the *Gordian Runoff* decision does not strictly bind courts considering the new Acts, as the Uniform CAAs and the new Acts are different pieces of legislation. However, this strict point of precedent has to be weighed against the fact that in undertaking statutory interpretation exercises, courts can and do refer to prior law.[75] This approach to statutory interpretation has been described as "[o]ften ... helpful, as it provides an informative background that assists in understanding the current law".[76]

[71] Monichino, "Arbitration Law in Victoria Comes of Age" (paper presented at The New Commercial Arbitration Act 2011 seminar, Melbourne, November 30, 2011), p.8. See *Gordian Runoff* (2011) 281 A.L.R. 593 at [23].

[72] Monichino, "Arbitration Law in Victoria Comes of Age" (paper presented at The New Commercial Arbitration Act 2011 seminar, Melbourne, November 30, 2011), p.9.

[73] Monichino, "Arbitration Law in Victoria Comes of Age" (paper presented at The New Commercial Arbitration Act 2011 seminar, Melbourne, November 30, 2011), p.13. See *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 A.L.R. 74 at [224].

[74] Monichino, "Arbitration Law in Victoria Comes of Age" (paper presented at The New Commercial Arbitration Act 2011 seminar, Melbourne, November 30, 2011), p.19.

[75] See generally D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, 7th edn (Chatswood, NSW: LexisNexis Butterworths, 2011), para.3.31.

[76] Catriona Cook et al., *Laying Down the Law*, 7th edn (Chatswood, NSW: LexisNexis Butterworths, 2009), para.10.21.

Still, while the interpretation of prior law may be "helpful", it is not necessarily controlling. Thus, as a strict matter of precedent in relation to the interpretation of statutes, it would appear that Australian courts considering the new Acts will not be bound by *Gordian Runoff*—though being a decision of the High Court of Australia, it would naturally be afforded great deference.

Conclusions on the reach of Gordian Runoff

Considering the text of the Uniform CAAs and the new Acts, the context and purpose of the new Acts, and the rules of precedent as they apply to statutory interpretation, it can be seen that assessing the applicability of *Gordian Runoff* to the new Acts is in fact a difficult issue to resolve. Whilst a strictly textual analysis supports the continued applicability of *Gordian Runoff* (subject to parties opting into s.34A), a consideration of statutory purpose could conceivably support a different approach under the new Acts and, as a point of precedent, *Gordian Runoff* is not strictly binding upon consideration of the new Acts. It is hoped that, either way, this uncertainty can be quickly addressed in case law considering the new Model Law-inspired legislative regime gradually coming into force across Australia.

6. Conclusion

Gordian Runoff is undoubtedly an important development in Australian domestic commercial arbitration law. However, the case is not the great beacon of light that some had hoped for. Rather, the importance of *Gordian Runoff* lies in providing some clarity (though not absolute clarity) in relation to the previously vexed issue of the standard of reasons required of arbitrators under the Uniform CAAs.

This article has shown, however, that *Gordian Runoff* does not close this chapter of Australian arbitration law. As demonstrated in Pt 4 above, a kind of "scalability" has emerged in relation to the standard of reasoning required in arbitral awards and of common law judges. While the High Court has asserted that the judicial standard does not apply in arbitration, its explanation of the standard that does apply is strikingly similar to the explanation given in other authorities of the judicial standard, leading one to conclude that both standards are "scalable" and that the judicial standard sits somewhere above the arbitral standard at every point on that "scale". However, determining how far the judicial standard is above the arbitral standard may require future clarification from the courts. Further, as demonstrated in Pt 5, uncertainty still exists as to the continued applicability of *Gordian Runoff* to the new Acts. If one thing is clear following *Gordian Runoff*, it is that scope still remains for subsequent case law to clarify these issues and further contribute in these respects to the certainty of domestic commercial arbitration law in Australia.