



**SUBMISSIONS OF THE VICTORIAN BAR
IN RESPONSE TO THE NOVEMBER 2008
DISCUSSION PAPER REVIEWING THE
INTERNATIONAL ARBITRATION ACT
1974**

Summary

1. On behalf of the Victorian Bar, the International Law Section of CommBar* makes the following submissions in response to the November 2008 Discussion Paper (the “*Discussion Paper*”) proposing certain amendments to the International Arbitration Act of 1974 (the “*Act*”).
2. As a general matter, the Victorian Bar supports the purposes of the proposed reforms to modernise the Act to ensure the Act provides a clear and comprehensive framework governing international arbitrations in Australia and embrace best international practice developments.
3. As for the specific proposals in the Discussion Paper, the Victorian Bar:
 - supports adopting the revised UNCITRAL Model Law of 2006 (the “*Model Law*”), including article 7 (option 1) with respect to the writing requirement for the purposes of Part II of the Act.
 - supports amending the Act to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in subsections 8(5), 8(7) or 8(8) of the Act is made out in accordance with the New York Convention of 1958 (the “*Convention*”).
 - supports amending the Act to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the Model Law applies.
 - agrees that the effect of the dicta in the *Eisenwerk* decision should be reversed by providing, along the lines of section 15(2) of the Singapore International Arbitration Act, that a provision in an agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the operation of the Model Law.
 - supports remedying the drafting inconsistencies in Division III, Part 3 of the Act.
 - supports clarification that sections 25-27 (relating to interest up to the making of an award, interest on the debt under the award, and costs) apply on an ‘opt-out’ basis (that is, applying unless the parties agree otherwise).
 - supports adoption of the recent amendments to the Model Law.
 - agrees it is appropriate to provide for legislative recognition of a suitable arbitral institution to perform the functions set out in articles 11(3) and 11(4) of the Model Law and supports the conferral on that designated institution of authority with respect to the other functions

set forth in article 6 of the Model Law, such as hearing challenges to arbitrators under articles 13(3) and 14 (subject to judicial oversight), in each case provided the designated institution is properly funded, resourced and represented across the principal centres of arbitral activity in the Commonwealth.

- supports conferral of concurrent jurisdiction on the Federal Court with respect to all matters arising under the Act and recognises the importance of consistency of jurisprudence under the Act to Australia's competitiveness, but is opposed to what it sees as a drastic step in the suggested conferral of exclusive jurisdiction on the Federal Court. The Victorian Bar generally supports the desirability of steps to ensure consistency of jurisprudence and believes other non-legislative steps can be taken to promote a cadre of judges within Australia's integrated judicial system experienced in international commercial arbitration. The Victorian Bar however, supports the continuing jurisdiction and role of the various State and Territory Superior Courts, including the Victorian Supreme Court in applying the Act, as amended.
4. As to matters not specifically raised in the Discussion Paper, the Victorian Bar believes that the government should consider clarifying and narrowing the public policy ground in section 19 of the Act, but does not consider it necessary that any amendment to the Act is necessary to provide for the confidentiality of arbitral proceedings.
 5. Before addressing specific reform proposals, our submissions first address several general considerations that we believe should guide reform of the Act.

General

6. One of the most pre-eminent leaders in the field of international arbitration, Judge Howard Holtzmann, has observed that the system of international arbitration works most effectively within a framework that has the following five intertwined, yet separate, elements: (1) effective arbitration clauses; (2) efficient procedural rules; (3) experienced arbitral institutions, (4) national laws that facilitate arbitration; and (5) international treaties that assure the recognition of agreements to arbitrate and the enforcement of foreign arbitral awards.¹

* Commbar is the Commercial Bar Association of The Victorian Bar Inc.

7. In the recent decision of the House of Lords in *Premium Nafta Products Ltd v Fili Shipping Co Ltd*² Lord Hoffman, correctly it is respectfully submitted, identified the expectations of parties who elect to have their disputes resolved by international arbitration:

They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.³

8. Much of what follows in these submissions is animated by the Victorian Bar's belief in the fundamental correctness of the preceding observations. Holtzmann's third requirement—national laws that facilitate arbitration—encompasses the subject of the proposed reforms to the Act. We believe adoption of the Model Law amendments is essential to this requirement. However, as he observes, the Act operates symbiotically with his other four elements. The Act is only as effective as the other four elements that underpin the effective operation of the Act and which themselves are sustained by principles embodied in the Act. To the extent the proposed reforms are directed at ensuring this synthesis, the Victorian Bar enthusiastically welcomes the reforms.
9. By way of general comment, something should also be said of the approach that Australian courts—as one of the experienced arbitral institutions Holtzmann refers to as essential to the proper and efficient functioning of international arbitration—should adopt with respect to matters arising under the Act. In articulating its judicial philosophy of minimal interference by courts in the arbitral process for breaches of natural justice, the Singapore Court of Appeal recently observed:

¹ Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards" in *The Internationalization of International Arbitration* (ed(s) Hunter, Marriott & Veeder, 1995) 109.

² [2007] UKHL 40.

³ [2007] UKHL 40 at [6].

These cases must be read in the context of the current judicial climate which dictates that courts should not without good reason interfere with the arbitral process, whether domestic or international. It is incontrovertible that international practice has now radially shifted in favour of respecting and preserving the autonomy in the arbitral process in contrast to earlier practice of enthusiastic curial intervention... This minimal-interference policy underscores two further considerations. The first is the need to support arbitration as a useful and efficient alternative dispute resolution (ADR) to settle commercial disputes... Aggressive judicial intervention can only result in the prolonging of the arbitral process and encourage myriad unmeritorious challenges to arbitral award by dissatisfied parties. Left unchecked, an interventionist approach can lead to indeterminate challenges, cause indeterminate costs to be incurred and lead to indeterminate delays.⁴

10. While Australian courts must be vigilant to protect the integrity of the arbitral process consistently with their general supervisory jurisdiction, decisions of Australian courts that create uncertainty or encourage a perception of unnecessary judicial intervention in the arbitral process need to be promptly addressed by appropriate changes to the Act. This is the approach adopted by Australia's major competitors for international arbitration work and should be the approach adopted by Australia also. Accordingly, the Victorian Bar welcomes those reforms directed at addressing problems caused by certain State Supreme Court decisions interpreting the Act.
11. The final general observation is that given Australia's inherent geographic disadvantage it must offer an additional inducement to parties if it is to compete with rival regional arbitral fora.⁵ It is not sufficient to merely match Singapore and Hong Kong in procedural rules, experienced arbitral institutions, arbitral law and judicial philosophy. Australia must be (and be seen to be) regarded as progressive in each of these areas if it is to realistically capture a decent share of the region's international commercial arbitration work. Any reforms to the Act should proceed with this consideration firmly in mind.

⁴ *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28 at [59]-[62]. See also the Commentary to the recent amendments to the Model Law: "Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties)."

⁵ See Mistelis, "International Arbitration—Corporate Attitudes and Practices 12 Perceptions Tests: Myths, Data and Analysis" (2004) 15 *American Review of International Arbitration* 525.

Specific Responses

Question A

- (i) *Should the meaning of the writing requirement for an arbitration agreement, in Part II of the International Arbitration Act (subsection 3(1)), be amended?*
12. The Victorian Bar, in principle, supports adopting the revised Model Law meaning of the writing requirement but would note that it is wise to reflect on the underlying rationale for the writing requirement. That rationale is twofold: (1) A written arbitration agreement represents the best evidence that an agreement to arbitrate is made; (2) to echo Redfern & Hunter,⁶ a valid agreement to arbitrate excludes the jurisdiction of national courts which is a serious step to take recognising the principle that access to superior courts of justice is so fundamental a right that no person ought to be deprived of it unless he or she has specifically consented to do so.⁷ These are powerful rationales and while the Victorian Bar supports appropriate amendments to the writing requirement to reflect the revolution in communications since 1958, the Victorian Bar cautions against an overly-expansive liberalisation of the writing requirement that may undercut these important underlying rationales. The Victorian Bar considers the expansion of the writing requirement in option 1 in Article 7 of the Model Law appropriately preserves the rationale of the writing requirement. For the same reason, however, the Victorian would not support adoption of option II in Article 7 of the Model Law because it obliterates the writing requirement.

⁶ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004, 4th ed), p 159.

⁷ A related example of the application of the importance of the writing requirement relates to appeal exclusion clauses as sometimes reflected in international arbitration agreements and can result in pernicious outcomes such as those warned of by Redfern and Hunter. Such an outcome can be observed in the application of such clauses to the Court of Arbitration for Sport in light of section 40 of the uniform State Commercial Arbitration Acts. See *Raguz v Sullivan* (2000) 50 NSWLR 237. See also *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312.

13. The proposed amendment, however, is concerned with that part of the Act addressing “Enforcement of awards” implementing the Convention, which as one distinguished commentator has observed is directed at an issue subtly different from the question of the writing requirement for the purposes of the Model Law.⁸ The Model Law is crafted primarily for the purpose of regulating the conduct of arbitrations through the supervisory court at the seat of arbitration. The objective of the Convention on the other hand is to facilitate the enforcement of an arbitration agreement and arbitral awards which have been made in another jurisdiction. The real issue, therefore, is not whether an arbitration agreement must always be in writing but whether the Convention, as implemented by Part II of the Act, ought to recognise only agreements satisfying the writing requirement in Article II of the Convention. Boo cogently articulates the reasons why extension of the Model Law’s liberalised writing requirement to the enforcement forum for the purposes of the Convention “could undermine the role of the court at the seat of arbitration, slow down the arbitral process, prolong the process of enforcement and fuel endless litigation in multiple jurisdictions”.⁹
14. On balance, the Victorian Bar is sympathetic to Boo’s concerns but, mindful of the importance of Australia projecting itself as a progressive leader to the international arbitration community, considers it appropriate to adopt the Model Law definition of “agreement in writing” for the purposes of enforcement of foreign awards in Part II of the Act. Preferably, such a change, as with the Model Law itself, should come by consensus through amendment to the Convention. Amendment to the Convention is unlikely, however, to occur in the foreseeable future and Australia should be prepared to embrace progressive reform that is consistent with revisions to the Model Law and international best practice provided it is in accordance with Australia’s treaty obligations under the Convention and defensible in principle.

⁸ Boo, “The Writing Requirement in Contemporary Practice: Is There Really a Need for Change” (2008) 2 *Dispute Resolution International* 75 at 80-83.

⁹ Boo, “The Writing Requirement in Contemporary Practice: Is There Really a Need for Change” (2008) 2 *Dispute Resolution International* 75 at 83.

- (ii) *If so, should elements of the amended writing requirements in article 7 (option 1) of the UNCITRAL Model Law, as revised in 2006, be used in the amended definition?*
15. As concluded above (and below under Question F), the Victorian Bar supports adopting the revised Model Law, including article 7 (option 1) with respect to the writing requirement for the purposes of the definition of the writing requirement in Part II of the Act.

Question B

Should the International Arbitration Act be amended to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in subsections 8(5), 8(7) or 8(8) is made out?

16. The Victorian Bar supports amending the Act to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in subsections 8(5), 8(7) or 8(8) of the Act is made out; that is, an Australian court may only refuse to enforce foreign arbitral awards on the grounds specified in Article V of the Convention. The amendment is in the interests of the goals of finality, certainty and uniformity that the Convention seeks to promote. It is also consistent with the pro-enforcement bias of the Convention and the procedural character of its enumerated grounds for refusing enforcement, each of which does not contemplate a second-guessing of the foreign award by the enforcement court on the merits. A residual general discretion invites the possibility of a more merits-based review that is inconsistent with the intention and spirit of the Convention.
17. At the same time, it is noted that courts of other jurisdictions have refused enforcement on grounds other than those set forth in the Convention. Thus, in the *Monde Re*¹⁰ decision the respected United States Court of Appeals for the Second Circuit refused enforcement of a Moscow award on grounds of *forum*

¹⁰ 311 F 3d 488 (2d Cir 2002).

non conveniens. In so deciding, it rejected the contention that Art V of the Convention sets forth the only grounds for refusing to enforce a foreign arbitral award, and held that Article III of the Convention made enforcement of foreign arbitral awards subject to the rules of procedure where enforcement is sought, which included the rule of *forum non conveniens*. While the application of the doctrine of *forum non conveniens* in this manner has caused some concern,¹¹ the Victorian Bar considers it unwise to attempt to legislate against a similar decision by an Australian court. In principle, any enforcement of a foreign award by an Australian court would also be subject to applicable Australian rules of procedure and jurisdiction. If Australian courts were to apply the principle of *forum non conveniens* (which it is submitted is difficult to reconcile with the Convention), it is likely they would apply this principle of private international law more restrictively in the arbitral context given the special importance the Convention ascribes to international comity, enforcement of foreign arbitral awards and finality.

18. In terms of drafting, in light of the language that led to the result in *Resort Condominium*, the Act could simply be amended to add the word “only” in section 8(5) and substituting “may” for “shall” in section 8(2).
19. Of equal or greater significance, however, in limiting the scope for inconsistent, quasi-merits review of foreign arbitral awards, and in advancing the pro-enforcement bias of the Convention, is clarification of the public policy ground. It is this ground for refusing enforcement that has been productive of most uncertainty and divergence among signatories to the Convention.
20. In this respect the Government should consider narrowing and clarifying the definition of public policy in section 19 of the Act along the lines of the *Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* published by the International Law Association in 2002 (the “**ILA Report**”). The ILA Report concluded that greater harmonisation among

¹¹ See Friedman, “Jurisdictional Limits on Enforcement of New York Convention Awards” (2008) 2 *Dispute Resolution International* 150 at 162-165.

jurisdictions would lead to greater consistency and predictability, which would dissuade unmeritorious challenges to foreign arbitral awards. Accordingly, the ILA Report advocated the use of “international public policy” (or *ordre public international*), which is a narrower and less parochial concept than domestic public policy. It is that public policy which is applicable to foreign awards as opposed to domestic awards. This is the approach adopted in Article 31 of the OHADA Uniform Act on Arbitration enacted by the several African States, which is most modern and recent uniform arbitration law. In relevant part, Article 31 provides that recognition and enforcement shall be refused if the award is “manifestly contrary to the rule of international public policy of the member States”.

21. We consider that serious consideration should be given to amending section 19 of the Act to provide that an award is in conflict with the public policy of Australia (for the purposes of the preceding sub-paragraphs) only if “*it is manifestly contrary to widely accepted principles of international public policy*”. This would reinforce Australia’s commitment to being a pro-enforcement jurisdiction consistently with the spirit of the Convention and demonstrate a willingness to embrace progressive reform where appropriate.
22. It would also follow that the specific references to fraud and natural justice in sub-paragraphs (a) and (b) to section 19 of the Act would no longer seem appropriate or necessary. Intolerance of fraud and corruption is incontrovertibly part of international public policy. As for natural justice, the rationale at the time of insertion was seemingly a concern that civil law systems may not be as alive to natural justice considerations as common law systems. However, as the Court of Appeal of Singapore recently emphasised:¹²

At the outset, it must be acknowledged that it is an indispensable, one might even say universal, requirement in every arbitration that the parties should have an opportunity to present their respective cases as well as to respond to the case against them. This is more commonly referred to in common law

¹² *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28 at [44]. See also Commentary to revised Model Law describing public policy as “serious departures from fundamental notions of procedural justice”.

systems as due process or the Magna Carta of arbitration. In civil law systems, the right of the parties to have a full opportunity to present their case, the classic *droit de la défense*, invariably incorporates the *principal de la contradiction* which mandates that no evidence or argument can justify a decision unless it has been subject to the possibility of comment or contradiction by the parties. *It can be confidently stated that all established legal systems require parties to be treated fairly, although different terminology may be employed.* [emphasis added]

It is, therefore, questionable whether separate reference continues to be necessary with respect to principles of natural justice. The existing reference may also encourage a more parochial interpretation of natural justice in deciding whether to annul or enforce awards under the Act. This may substantially undermine the finality of international awards attracting the operation of the Act. Removal of the separate reference to natural justice combined with adoption of the narrower conception of international public policy may also assuage the concern held in some quarters of the international arbitration community that Australian courts may apply to foreign awards under the Act the more exacting conception of natural justice applied in some recent domestic arbitrations.¹³

23. As the ILA Report explains, international public policy is not to be confused with trans-national public policy. The latter is a broader incarnation of public policy with a distinctly substantive flavour that has been criticized as introducing an element of discretion and vagueness at variance with the certainty and finality that is central to the efficacy of international commercial arbitration.¹⁴ It may be prudent to specify in section 19 that “for the avoidance of doubt, international public policy does not include trans-national public policy”.

Question C

¹³ For example, there is a concern held by some that Australian courts may take the approach that the failure of arbitrator to provide adequate reasons for decision may amount to a breach of natural justice occurring in connection with the making of an award thus render the award “in conflict with the public policy of Australia” for the purposes of section 19 of the Act. See *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346.

¹⁴ Pryles, “Reflections on Transnational Public Policy” (2007) 24 *Journal of International Arbitration* 1.

Should the International Arbitration Act be amended to provide expressly that the Act governs exclusively an international commercial arbitration to which the UNCITRAL Model Law applies?

24. The Victorian Bar supports amending the Act to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the Model Law applies. Having regard to the importance of Australia projecting itself to the highly competitive market for international arbitration services as offering a clear and modern arbitral law, the uncertainty created by the current dual arbitration legislative regime in Australia needs to be removed insofar as international arbitrations attracting the Act are concerned.

25. More difficult, however, is the circumstance where the parties expressly designate arbitration under the Commercial Arbitration Act of a particular State in the arbitration clause of a commercial agreement.¹⁵ Should this be construed as an implied opting-out of the Model Law under section 21 of the Act? Arguably, that would be the correct interpretation of section 21 as it currently stands. It might be thought appropriate to amend the Act to provide that parties can only expressly opt-out of the Model Law and that a reference to the Commercial Arbitration Act of a State is insufficient in this respect to displace the exclusive operation of the Act. The difficulty, however, is that would clash with the parties express choice of law and is inconsistent with the principle of party autonomy. If the Act is amended, as is supported, to provide for the exclusive operation of the Model Law where it applies, the result would be to completely displace the parties' choice of a particular arbitral law. For that reason, while the result is imperfect and highlights the need for a unified arbitral code for domestic and international arbitrations, the Victorian Bar believes it is inappropriate to amend the Act to provide that the choice of a particular state Commercial Arbitration Act does not constitute an opting out of the Model Law.

¹⁵ See, for example, *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110.

26. At the appropriate time, the Victorian Bar also supports the Commonwealth and State governments initiating reform to consolidate the existing bifurcated legislative framework for the regulation of domestic and international arbitrations into a single, integrated national legislative framework for both domestic and international arbitrations akin to the English Arbitration Act 1996.¹⁶ The difficulty raised in the preceding paragraph underscores the need for this change. The continued fragmentation of Australia's arbitral law is not in the interests of Australia's competitiveness in the international commercial arbitration arena; nor is it in the interests of the users of arbitration in Australia. It is accepted, however, that such reform is a broader project that should not postpone the timely implementation of the proposed amendments to the Act.

Question D

Should the International Arbitration Act be amended to reverse the Eisenwerk decision, by adopting a provision similar to subsection 15(2) of the Singaporean International Arbitration Act?

27. The Victorian Bar agrees that the effect of the dicta in the *Eisenwerk* decision should be reversed by providing, along the lines of section 15(2) of the Singapore International Arbitration Act, that a provision in an agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the operation of the Model Law. As a matter of principle, the dicta in *Eisenwerk* fallaciously conflated the Model Law, as the controlling *lex arbitri* by its adoption and implementation under the Act, with the parties adoption of the procedural rules of a particular institution to regulate the conduct of the arbitral proceedings. Indeed, Article 19 of the Model Law expressly contemplates that the parties are free to determine the rules of procedure.

Question E

¹⁶ Preferably, such reform would proceed with the co-operation of the States but the Commonwealth may have the constitutional power to cover the field in this respect under the external affairs power in conjunction with section 109 of the Constitution.

- (i) *Should [the] drafting inconsistencies in Part III, Division 3 of the International Arbitration Act be remedied?*
28. The inconsistencies should be remedied.
- (ii) *If so, should it be clarified that sections 25-27 (relating to interest up to the making of an award, interest on the debt under the award, and costs) apply on an 'opt-out' basis (that is, applying unless the parties agree otherwise)?*
29. The proposed amendments should be adopted. For the avoidance of doubt, the Victorian Bar notes that it would not, however, be appropriate to apply section 24 relating to consolidation of separate but related arbitral proceedings on an opt-out basis because that goes to the essence of the consensual basis of arbitration.

Question F

Should the International Arbitration Act be amended to adopt recent amendments to the UNCITRAL Model Law?

30. The Victorian Bar supports amending the Act to adopt the revised 2006 edition of the Model Law, with the exception of Article 17 which provides for *ex parte* interim measures of protection. The power to order *ex parte* interim measures of protection in limited circumstances should be confined to courts whose institutional independence, impartiality and integrity rests on a secure constitutional foundation.¹⁷ This role is also consistent with courts' traditional supervisory jurisdiction of arbitrations at common law. More generally, the Victorian Bar strongly believes that the consistency of the Act with the evolution of the Model Law should be maintained. That is essential not only to Australia's international commercial arbitration regime but the effectiveness of the system of international commercial arbitration as a whole.

Question G

¹⁷ *Northern Australian Legal Aid Service Inc v Bradley* (2004) 218 CLR 147 at [29]-[31].

Should the International Arbitration Act be amended to allow regulations to be made designating an arbitral institution to perform the function set out in articles 11(3) and 11(4) of the UNCITRAL Model Law?

31. The Victorian Bar agrees it is appropriate to provide for legislative recognition of a designated arbitral institution to perform the functions set out in articles 11(3) and 11(4) of the Model Law. To maximise flexibility in light of any institutional developments, designation should be either by regulation or Ministerial nomination.
32. We emphasise that it is important that any designated body be adequately resourced and configured to be broadly representative of its stakeholders and act as a truly national body. As mentioned under “General” above, experienced arbitral institutions are an important element of an effective regime for international commercial arbitration. Accordingly, the designated arbitral body must be appropriately represented by (and engaged with) all of the principal centres of arbitral activity across the Commonwealth to ensure it receives the support of all those stakeholders critical to its ultimate success as an effective arbitral institution.
33. Of the existing arbitral institutions in Australia, ACICA is presently the most suitable body to perform these functions, subject to the observations made in the preceding paragraph about the importance of ensuring it operates as a truly national arbitral body with resources and representation spread appropriately across the principal arbitral centres of arbitral activity in the Commonwealth, particularly Melbourne and Sydney. Importantly, ACICA has developed modern model arbitration clauses and procedural rules, both of which are important elements of an effective international commercial arbitration architecture. ACICA’s role could also be expanded to perform other functions under article 6 of the Model Law, such as hearing challenges to arbitrators under articles 13(3) and 14 (subject to judicial oversight). The initial recognition of a body such as ACICA and expansion of its powers—provided it is properly funded and resourced and is broadly representative of Australia’s

arbitration community—would constitute an important advancement of Australia’s international commercial arbitration framework.

Question H

Should the Federal Court of Australia be given exclusive jurisdiction for all matters arising under the International Arbitration Act?

34. The Federal Court should not be given exclusive jurisdiction for all matters arising under the Act.
35. The Victorian Bar recognises the importance of uniformity and consistency of jurisprudence concerning judicial exegesis of the Act. It is critical to the competitiveness of Australia as a desirable seat for international commercial arbitration that our courts project themselves with one unified voice to the international arbitration community.
36. The Victorian Bar, however, has substantive reservations with respect to this proposed amendment relating to the premise from which it proceeds. That premise is that exclusive jurisdiction to the Federal Court “may lead to more consistent jurisprudence in applying the Act”. The Victorian Bar does not believe that conferral of exclusive jurisdiction on the Federal Court is a necessary or desirable step to achieve the stated premise of promoting uniformity of decision-making under the Act.
37. For one thing, exclusivity to the Federal Court does not flow naturally from Australia’s constitutional arrangements. Specifically, Chapter III of the Constitution establishes an integrated Australian judicature with respect to federal jurisdiction,¹⁸ which includes, of course, by operation of section 76(ii) of the Constitution, matters relating to the interpretation of Commonwealth statutes. In that sense, it is fallacious to view the Federal Court and State Supreme Courts as separate and distinct judicial systems productive of

¹⁸ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [34]. See also *Fardon v AG (Qld)*(2004) 223 CLR 575 at [15].

inconsistent jurisprudence when exercising concurrent jurisdiction with respect to the interpretation of Commonwealth statutes. It is largely in recognition of Australia's integrated judicial system that the High Court has repeatedly stated that intermediate appellate courts and trial judges in Australia should not depart from decisions of intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.¹⁹ Logically and as a matter of constitutional principle, it follows that concurrent jurisdiction with respect to the Act ought not lead to inconsistent jurisprudence.

38. Furthermore, to the extent such an inconsistency in judicial interpretation of the Act subsists it would constitute one of the clear grounds upon which special leave is granted by the High Court whereupon consistency will be restored by operation of section 73 of the Constitution.
39. Additionally, if the premise upon which the proposed amendment proceeds—that exclusive jurisdiction is necessary to achieve consistent jurisprudence—were sound it would follow, by parity of reasoning, that exclusive jurisdiction is necessary in respect of other major Commonwealth statutes in the commercial arena, including the Corporations Law and the Trade Practices. This has not been suggested and concurrent jurisdiction with respect to these statutes has not resulted in an inconsistent and incoherent body of jurisprudence.²⁰
40. To the extent that the changes currently being addressed are driven by the perceived benefits of conferring all matters concerning the interpretation of the Act on a specialist and relatively small list of judges of the same court experienced in international arbitration cases, we believe similar specialist

¹⁹ *Farah Constructions v Say-Dee* (2007) 230 CLR 89 at [135]; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

²⁰ Analogies to the position in the US—where jurisdiction under the Federal Arbitration Act is conferred exclusively on Federal courts—are inapposite in this respect because of its different constitutional arrangements. The US Constitution contains no counterpart to Australia's 'autochthonous' expedient' provided for in ss 71 and 77(iii) of the Constitution.

judges could (and, to the extent State Supreme Courts have not already, should) also be established within the State and Territory Supreme Courts and that other less drastic non-legislative steps could (and should) be adopted to promote uniformity of decision-making under the Act.

41. Specifically, practical steps could be taken to ensure those judges interact on a professional level with their colleagues on the Federal Court to promote a culture of collegiality among a relatively small group of judges throughout Australia's integrated judicial system. This might include, for example, a common Practice Note between the State and Territory Supreme Courts and Federal Court with respect to matters arising under the Act and a common program of judicial education and knowledge-sharing with respect to the Act. We believe such an approach affords procedural benefits and choice to litigants and is consistent with Australia's integrated judicial system without sacrificing the goal of consistent jurisprudence developed by judges experienced in international commercial arbitration matters.
42. The foregoing approach is also consistent with trends towards the evolution of a national judiciary, which fosters co-operation, collegiality and exchange among Federal, State and Territory judges, a point recently emphasised by the Chief Justice of Australia.²¹ Exclusivity to the Federal Court may also result in jurisdictional skirmishes for tactical reasons, even the spectre of which is calculated to discourage choice of Australian cities as the seat for international arbitrations. Furthermore, exclusivity is likely to have the effect of further splintering Australia's arbitral framework into separate streams of jurisprudence on issues of conceptual and doctrinal overlap between the Act and the uniform Commercial Arbitration Acts. That is not in the interests of Australia's efforts to promote itself as a jurisdiction with a coherent international arbitration regime.
43. Finally, to the extent certain decisions of State and Territory Supreme Courts have undermined the attractiveness of Australia's international commercial

²¹ French, "Cause for Celebration: Law Council of Australia: Law Council of Australia 75th Anniversary Dinner" (19 September 2008, available at www.hcourt.gov.au).

arbitration regime, the Act can and should be amended to overcome the effect of those aberrant decisions. Indeed, that is approach taken in other jurisdictions such as Singapore and Hong Kong, and the approach taken in the proposed reforms—supported by the Victorian Bar—contained in the Discussion Paper. This underscores that less drastic means are available to overcome isolated decisions than the wholesale dismantling of the jurisdiction of the State Supreme Courts with respect to matters concerning the Act.

Question I

Do you have any other comments or recommendations for improving the International Arbitration Act?

44. On issue not addressed in the Discussion Paper but which has evoked debate from time to time is the issue of confidentiality. While we acknowledge that the High Court’s decision in *Esso Australia Resources Ltd v Plowman*²² has provoked lively debate²³ and that the confidentiality of arbitral proceedings is one of its stated justifications, we are not convinced a legislative reversal of that decision is necessary or appropriate. As with a relatively recent decision of the Swedish Supreme Court in *Bulgarian Foreign Trade v Al Trade Finance*,²⁴ the High Court in that case drew a distinction between the undoubted privacy of the arbitral proceeding and the contended existence of a separate absolute duty of confidentiality in respect of the disclosure of documents and information provided in, and for the purpose of, the arbitration, including the award itself. It held that while a degree of confidentiality might arise in certain situations, it was not absolute and in the particular case before the Court the public’s legitimate interest in obtaining information about the affairs of the public authorities prevailed. As Redfern & Hunter observe, this

²² (1995) 183 CLR 10.

²³ The debate is canvassed in an entire edition of *Arbitration International* (1995), Vol 11. See also Trakman, “Confidentiality in International Commercial Transactions” (2002) 18 *International Arbitration* 1.

²⁴ NJA (2000).

is not inconsistent with the current international trends.²⁵ For example, in the US, neither the Federal Arbitration Act nor the Uniform Arbitration Act contains a provision requiring the parties or arbitrators to keep secret arbitration proceedings in which they are involved. The UNCITRAL Rules (Art 25(4) provides for the proceedings to held in private but contain no provisions as to confidentiality. It is true the English courts (most recently in *City of Moscow v Bankers Trust*²⁶) have reaffirmed the classical position as to the confidentiality of arbitrations but they have also acknowledged the boundaries of the obligation of confidence have yet to be clearly delineated and that exceptions to any confidentiality obligation are best worked out on a case-by-case basis.

45. In short, we are not convinced the High Court's decision is so obviously incorrect or inconsistent with international trends as to warrant canvassing its reversal in commenting on the proposed amendments to the Act. Moreover, we believe it is more appropriate to rely on an express provision of institutional procedural rules (eg, section 18 of the ACICA Rules) or the parties entering into a specific confidentiality agreement.²⁷ We would note that the foregoing conclusion is consistent with the position adopted by Stockholm Chamber of Commerce in The 2007 Arbitration Rules, which comprehensively considered the issue after surveying the approach in a number of jurisdictions.

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²⁵ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004, 4th ed), pp 34-36.

²⁶ [2004] All ER 476.

²⁷ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004, 4th ed), p 41.

A handwritten signature in black ink, appearing to read 'G John Digby QC', written in a cursive style.

G JOHN DIGBY QC
Chairman
Victorian Bar Council