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23 January 2009

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BARTON ACT 2600

BY POST, AND EMAIL to iaa.review@ag.gov.au

**COMMENTS AND SUBMISSIONS UPON A REVIEW OF THE
INTERNATIONAL ARBITRATION ACT, 1974**

Dear Mr Bouwhuis,

The Chartered Institute of Arbitrators (Australia) is pleased to provide the attached submissions in response to the discussion paper "*Review of the International Arbitration Act, 1974*" issued in November 2008.

As the Australian Branch of an international dispute resolution organisation, engaged in the training of arbitrators and the promotion of alternative forms of dispute resolution, the Chartered Institute is vitally interested in the development and support of international arbitration in Australia.

In making its submissions on the Discussion Paper, the Chartered Institute has had regard to "*Simply Resolving Disputes*" the Commonwealth Attorney-General's Key Note Address at the International Commercial Arbitration Conference: "*Making it Work for Business*", held at the Hotel Intercontinental, Sydney, 21 November 2008.

We have also taken the opportunity to consider the wider context for arbitration legislative reform, especially with respect to the needs of the Asian-Pacific market in terms of hybrid process and harmonisation of the international and domestic arbitration frameworks.

We commend these submissions to you and invite you to contact us if any clarification or further comment is required.

Yours sincerely,



Derek Minus
President, The Chartered Institute of Arbitrators (Australia)



Chartered
Institute of
Arbitrators

CIArb

The CHARTERED INSTITUTE of ARBITRATORS (AUSTRALIA)

**SUBMISSION UPON A REVIEW OF THE
INTERNATIONAL ARBITRATION ACT, 1974**

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Preamble

In order for Australia to establish itself as a credible venue for international commercial arbitration, it needs to take a leadership role in adopting progressive national arbitration laws that reflect international best practice.¹

The Commonwealth Attorney-General's Department has called for comments and submissions on its discussion paper 'Review of the *International Arbitration Act, 1974* (**the Discussion Paper**)', issued in November 2008. The Chartered Institute of Arbitrators (Australia) Limited (**CIArb**) provides its submission on the Discussion Paper.

The challenge faced in promoting Australia as a centre for international commercial arbitration, particularly in the Asia Pacific region, should not be under-estimated. Australia's neighbours (particularly Singapore and Hong Kong) are well in advance of Australia in establishing themselves as centres for international commercial arbitration.

The recent authoritative study by Pricewaterhouse Coopers in conjunction with the School of International Arbitration, Queen Mary, University of London, entitled '*International Arbitration: Corporate Attitudes and Practices 2008*', provides some critical data on the number of international arbitration cases administered by the different regional arbitral centres for the 2003 to 2007 years inclusive. The Hong Kong International Arbitration Centre ('HKIAC') is listed as having administered 1690 arbitrations, while the Singapore International Arbitration Centre ('SIAC') is listed as having administered 263 arbitrations. In contrast, the Australian Centre of International Commercial Arbitration ('ACICA') is listed as having administered only 7 arbitrations.²

In preparing its submission, CIArb has regard to:

- (1) the objects of the review, being to consider whether the *International Arbitration Act, 1974* (**the Act**) should be amended to:
 - (a) ensure it provides a comprehensive and clear framework governing international arbitration in Australia;
 - (b) improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration;
 - (c) consider whether to adopt 'best practice' developments in national arbitration from overseas (**the Objects**);³ and

¹ Being removed from the major Asian business centres, Australia has inherent geographical and cultural disadvantages which can limit its ability to truly compete with Singapore and Hong Kong as a centre for international commercial arbitration in the Asia Pacific region. However, there is no reason why, with appropriate funding and effort, Australia should not be able to capture a share of the international commercial arbitration activity in the Asia Pacific region.

² Of course, these figures do not include the number of ad hoc arbitrations conducted in the different regions nor take account of the monetary value involved in the subject arbitrations, but nevertheless the figures are strongly indicative of the arbitration activity in the respective regions.

³ Discussion Paper paragraph 2.

- (2) certain underlying policy objectives, being:
- (a) that the Act best supports international arbitration in Australia;⁴
 - (b) that international commercial arbitration *works* for Australian business;⁵
 - (c) that certainty and fairness are the keys to ensuring that international commercial arbitration works for Australian business;⁶
 - (d) that arbitral proceedings must be:
 - (i) just and efficient;
 - (ii) fair and economical;⁷
 - (e) that international arbitration remains an effective form of dispute resolution;⁸
 - (f) that the Act provides a comprehensive and clear framework for international arbitration in Australia;⁹
 - (g) that the Act provides a clear and comprehensive framework governing international arbitration in Australia;¹⁰
 - (h) that the Federal Court has an emerging role as a regional hub for commercial litigation;¹¹
 - (i) that Australia has the best possible framework to host international arbitration;¹²
 - (j) that Australia is developed as a regional hub for international commercial dispute resolution (**'the Underlying Policy'**).¹³

⁴ Discussion Paper paragraph 4.

⁵ '*Simply Resolving Disputes*' Commonwealth Attorney-General Key Note Address at International Commercial Arbitration Conference: 'Making it Work for Business', Hotel Intercontinental, Sydney, 21 November 2008 ('*Simply Resolving Disputes*') paragraph 5.

⁶ *Simply Resolving Disputes* paragraph 6.

⁷ *Simply Resolving Disputes* paragraph 17.

⁸ *Simply Resolving Disputes* paragraph 20.

⁹ *Simply Resolving Disputes* paragraph 31.

¹⁰ *Simply Resolving Disputes* paragraph 38.

¹¹ *Simply Resolving Disputes* paragraph 54. We note that this may be a contentious policy objective given the emergence of a national judiciary: see comments by the Chief Justices of the States and Territories dated December 2008 on the '*Review of the International Arbitration Act 1974*'.

¹² *Simply Resolving Disputes* paragraph 63.

¹³ *Simply Resolving Disputes* paragraph 64.

Questions

A Meaning of the 'writing' requirement of Part II of the Act

Question A (i)

Should the meaning of the written requirement for an arbitration agreement, in Part II of the International Arbitration Act (subsection 3(1)), be amended?

Yes. This would satisfy the Objects consistently with the Underlying Policy:

- (1) by bringing the meaning of the written requirement for an arbitration agreement into conformity with international best practice reflected in:
 - (a) the developing common law;¹⁴ and
 - (b) a broad interpretation of the New York Convention reflected in the 2006 UNCITRAL recommendation on interpreting the writing requirement (**'the 2006 UNCITRAL Recommendation'**).¹⁵

Appropriate amendments are desirable to bring the Act up to date with the evolution in the manner of modern communications – in particular, recognising electronic data messages (e.g. emails).

Question A (ii)

If so, should elements of the amended writing requirement in article 7 (option 1) of the UNCITRAL Model Law, as revised in 2006, be used in the amended definition?

CIArb supports the adoption of Option 1 in Article 7, which provides some relaxation of the writing requirement.¹⁶

Amendment of the writing requirement will remove uncertainty surrounding interpretation of Article II of the New York Convention contained in Part II of the Act and bring the requirement into conformity with international best practice reflected in those jurisdictions in which the 2006 UNCITRAL Recommendation has been adopted.

¹⁴ See for example *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* [2006] FCA FC 192 at para 152.

¹⁵ *Recommendation regarding the interpretation of article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its 39th session.*

¹⁶ See in particular paragraph (3) of Option 1 of Article 7. It does not dispense with the writing requirement altogether, which would be the effect of the adoption of Option 2 of Article 7.

B. Grounds on which a court may refuse to enforce a foreign arbitral award

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?

Yes. The decision in *Resort Condominiums International Inc. v. Bolwell & Anor*,¹⁷ providing that the Court might retain a general discretion whether to enforce an arbitral award even if none of the grounds for refusing to recognise a foreign award in section 8 of the Act is made out, is inconsistent with the Objects and the Underlying Policy.

The Objects can only be met if Australia adopts an approach to enforcement of foreign awards consistent with international best practice. In the New York Convention, recognition of foreign awards may be refused only if proof is established of the matters in paragraph (1) of Article V of the Convention or if there is a finding of the type specified in paragraph (2) of Article V. To fully implement the New York Convention, any general discretion should be removed. This is consistent with the pro-enforcement spirit of the Convention. Accordingly, section 8(2) of the Act should be repealed and sections 8(5) and 8(7) amended.

C. Application of the UNCITRAL Model Law to international commercial arbitrations taking place in Australia

Question C

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

Yes. The current situation, in which both the Act and State Commercial Arbitration Acts may have application to international commercial arbitration subject to the Model Law, is inconsistent with the Objects and the Underlying Policy. Presently, there is an uncertain overlap in the application of the dual legislative regime. There is particular uncertainty where parties, by their arbitration agreement, expressly refer to one of the State acts.¹⁸ Does this amount to an implied 'opting-out' of the Model Law regime?

The Objects cannot be met where there is uncertainty as to the operation of section 21 of the Act and what conduct of the parties might be construed by the courts as 'opting-out' of the operation of the Model Law.

¹⁷ [1985] 1 QD R 406.

¹⁸ See for example *American Diagnostica Inc. v. Gradipore Ltd* (1998) 44 NSWLR 312 at 321-322 and *Pahurpur Cooling Towers Ltd v. Paramount (WA) Ltd* [2008] WASCA 110.

There are two possible ways of remedying the situation:

- (a) first, section 21 of the Act could be amended to provide that the Model Law will apply unless the parties expressly opt-out of the application of the Model Law in relation to the settlement of the dispute;
- (b) alternatively, a subsection could be inserted in section 21 equivalent to section 15(1) of the Singapore *International Arbitration Act* as follows:

If the parties to an Arbitration Agreement have expressly agreed that [the Domestic Uniform Commercial Arbitration Act] shall apply to the arbitration, then for the purposes of section 21 the Model Law does not apply in relation to the settlement of that dispute.

CIArb prefers the former solution.

Essentially the difficulty lies in determining what constitutes an 'opting-out' of the Model Law for the purposes of section 21 of the Act. It is highly desirable that there should be certainty in relation to this critical question.

In summary, CIArb's preferred position is that the Act should be amended to expressly cover the field so that no State arbitration legislation applies to an international arbitration governed by the Act, subject to the parties' rights to clearly and unequivocally opt-out of the Model Law.

If the Act is to apply to the exclusion of the State domestic Commercial Arbitration Acts, it would be desirable to introduce express provisions in the Act which clarify the court's power to make orders in aid of an international arbitration seated in Australia, including conferral of power upon the court to:

- (a) issue a subpoena requiring a person to attend an arbitration for examination or to produce documents to the arbitral tribunal; and
- (b) compel an uncooperative witness to take an oath or affirmation or answer questions where they have refused to do so before the arbitral tribunal.

Similar provisions are contained in the Singapore *International Arbitration Act*.¹⁹ See also Question I, section (4), below.

¹⁹ See sections 13 and 14, Singapore *International Arbitration Act*.

D. Clarify that adoption of arbitral rules by the parties does not constitute ‘opting-out’ of the UNCITRAL Model Law

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?

Yes. CIArb agrees that the parties’ choice to adopt procedural rules of arbitration in an arbitration agreement is different from and should have no direct bearing upon the applicable arbitral law.

Essentially, this question raises similar considerations to Question C above. The Court in *Eisenwerk v. Australia Granites Ltd*²⁰ held that the adoption of ICC Rules of Arbitration amounted to an opting-out of the Model Law for the purposes of section 21. This was a highly curious conclusion. We note that the decision has not been followed subsequently in other cases.

Again, there are two methods of dealing with the *Eisenwerk* decision:

- (a) first, section 21 of the Act could be amended to provide that the Model Law will apply unless the parties expressly opt-out of the application of the Model Law in relation to the settlement of the dispute;
- (b) alternatively, by adopting a provision similar to sub-section 15(2) of the Singapore *International Arbitration Act*, which provides:

For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned.

Again, CIArb prefers the former solution.

If, however, section 21 is not so amended, CIArb otherwise agrees with the amendment proposed by Question D.

²⁰ [2001] 1 QD R 471.

E. Drafting inconsistencies in Part III, Division 3 (sections 22-27)

Question E (i)

Should these drafting inconsistencies in Part III, Division 3, of the International Arbitration Act be remedied?

Yes. Amendment is required to remedy the apparent anomaly in the drafting of the Act so that the parties have the benefit of clear statutory direction in the interests of achieving the Objects.

Question E (ii)

If so, should it be clarified that sections 25-27 (relating to interest up to the making of the award, interest on the debt under the award, and costs) apply on an 'opt-out' basis (that is, applying unless the parties agree otherwise)?

The 'opt-in' provisions in Division 3 do not apply unless the parties agree but can confer essential arbitral powers, including interest, costs and consolidation. An arbitrator should have these powers unless the parties agree otherwise. Accordingly, in furtherance of the Objects and consistently with the Underlying Policy, the Act should be amended to provide that sections 25-27 apply unless the parties 'opt-out'.

F. 2006 amendments to the UNCITRAL Model Law

Question F (i)

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

The 2006 amendments to the UNCITRAL Model Law in large measure further the Objects and are consistent with the Underlying Policy.

CIArb supports the amendments subject to the following:

- (a) New Article 2A: The promotion of a uniform interpretation of the UNCITRAL Model Law is supported.
- (b) Amendment of the definition of 'Arbitration Agreement' in Article 7, Option 1, is supported.
- (c) Section 2 of Chapter IVA, providing for arbitral tribunals to make preliminary orders on the application of one party without the other party being notified, is not supported. International arbitration is of its nature consensual. The proposed amendment is anathema to the consensual nature of arbitration. The hearing of an application and making of preliminary orders without notice to another party is also in conflict with the basic right of both parties to procedural fairness.

- (d) Section 4 of Chapter IVA of the UNCITRAL Model Law, insofar as it provides for recognition and enforcement by courts of interim measures made by an arbitral tribunal, is supported. This would overcome the problem arising out of the decision in *Resort Condominiums International Inc.*,²¹ in which it was held that the Act in its present terms does not afford jurisdiction to the courts to enforce an interim award.
- (e) The amendment of Article 35(2) to delete the requirement for the supply of a 'duly authenticated' original award or a 'duly certified' translation upon an application for enforcement is supported.

It is desirable that the Act maintain consistency with the Model Law as it evolves over time.

Question F (ii)

If article 7 of the revised Model Law (amending the definition of an 'arbitration agreement') is adopted, should option I (providing a broad interpretation of the writing requirement) or option II (removing the writing requirement) be adopted?

CIArb supports the adoption of option I of Article 7 of the revised Model Law. This option is in furtherance of the Objects and consistent with the Underlying Policy. The requirement for a written arbitration agreement ensures both that there is objective evidence of the parties' intention to submit to arbitration and co-ordinately that such intention cannot be evidenced by other conduct not comprised in an agreement at least partly evidenced in writing. This approach would give certainty to the contracting parties, in contrast to the uncertainty that might otherwise attend the possibility that an agreement might be construed from a verbal exchange or from conduct alone. For the same reasons, option 2 of Article 7 should not be adopted.

G. Court or other authority to perform functions under the UNCITRAL Model Law

Question G (i)

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

The current approach by which some of the functions referred to in Article 6 of the UNCITRAL Model Law are to be performed by designated courts is inconsistent with the Objects. CIArb supports the amendment of the Act to allow regulations to be made designating an arbitral institution to perform the functions set out in Articles II(3) and II(4) of the suitable UNCITRAL Model Law (concerning the appointment of the arbitrator or arbitral panel). Such articles, being mechanical in nature, do not require the intervention of a court in the interests of giving effect to an arbitration agreement

²¹ Supra.

between the parties. This should be subject to recourse to a court should the arbitral institution fail to perform its function.

Such arbitral institution, however, needs to be properly resourced and supported by Government, as well as having a national presence across the principal arbitral centres in Australia. Of the existing arbitral institutions, ACICA is a logical choice to perform these functions.

CIArb notes that the major international arbitral centres in the Asia Pacific region have all been established with government support and funding to build a physical arbitration centre to attract international commercial arbitrations. It would be desirable, if ACICA were to be selected as the arbitral institute to be designated under the Act, that it was also provided with adequate funding to establish an arbitration venue in Australia and the administrative and marketing resources to run it.

Question G (ii)

Would it be appropriate for other functions referred to in article 6 of the UNCITRAL Model Law, such as hearing challenges to arbitrators under articles 13(3) and 14, to be performed by an arbitral institution similarly designated under the International Arbitration Act?

It is not appropriate for the other functions referred to in Article 6 of the UNCITRAL Model Law to be performed by an arbitral institution similarly designated under the Act.

CIArb believes that the challenge procedure under Article 13(3), termination of the mandate under Article 14, determination of jurisdiction of an arbitral tribunal under Article 16(3) and the setting aside of an award under Article 34(2) are important matters for the parties to the arbitration and appropriately the subject of judicial supervision. This is consistent with the operation of the Act, which in certain respects reserves to the court a residual supervisory jurisdiction.²² It will also allow continuing development of jurisprudence in respect of these aspects of arbitration. These matters remain within the jurisdiction of the court in foreign jurisdictions, including Singapore²³ and Hong Kong.²⁴

If, however, these functions are to be performed by the relevant arbitral institution, it should be subject to the possibility of judicial review by an appropriate Court.

²² See for example s.7(2), which does not mirror Article II of the New York Convention and provides for the power to stay proceedings on conditions and refer the matter to arbitration.

²³ *International Arbitration Act* (Chapter 143A) (Singapore) section 8.

²⁴ *Arbitration Ordinance* (Chapter 341) (Hong Kong) section 34C(4).

H. Jurisdiction for matters arising under the Act

Question H

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

The Attorney General has anticipated the introduction of *Federal Court Justice Amendments (Efficiency Measures) Bill No. 1 2008*, which will have the effect of affording the Federal Court of Australia concurrent jurisdiction with the Supreme Courts of the States and Territories over all matters arising under the Act.²⁵

The separate question of whether the Federal Court of Australia should be given exclusive jurisdiction in all matters arising under the Act by removing jurisdiction from the State and Territory courts gives rise to a number of difficult issues and considerations, including:

- (a) Whether vesting of exclusive jurisdiction in the Federal Court overlooks the success of a cooperative national approach in respect of other Commonwealth statutes, including the *Corporations Act* and the *Trade Practices Act*.

The cooperative national approach referred to arises in the context of intra-Australian domestic matters. On the other hand, the focus of the Act is, however, directed towards regulation of the rights of parties, one of whom may be from outside Australia.

- (b) Whether nominating a seat subject to exclusive jurisdiction is more attractive to potential users of international arbitration services:

Foreign parties submitting a dispute to arbitration with a seat in an Australian city are likely to take into account the supervisory jurisdiction of the relevant courts. As a matter of perception (rather than reality), they may be more inclined to nominate an Australian city as the seat of their arbitration if their arbitration was subject to the jurisdiction of a single court rather than several courts holding concurrent jurisdiction. Australian common lawyers understand that the law will be applied by Australian courts exercising concurrent jurisdiction in a similar way. Foreign parties and those advising them, particularly from countries with a civil law system, may not have the same understanding. Accordingly, a conferral of exclusive jurisdiction on the Federal Court may be justified from the perspective of the perception (as opposed to the reality) of uniformity in the interpretation and operation of the Act.

- (c) Whether vesting exclusive jurisdiction in the Federal Court for the express purpose of leading to more consistent jurisprudence in applying the Act overlooks the command of the High Court of Australia and the fact that intermediate appellate courts respect comity in decisions between courts:²⁶

²⁵ *Simply Resolving Disputes* paragraph 52.

²⁶ *Australian Securities Commission v. Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

While it must readily be conceded that, under Australia's Constitutional arrangements, the High Court of Australia sits at the apex of an integrated Australian judiciary, leading ultimately to uniform interpretation of, inter alia, Federal legislation such as the Act, conferral of exclusive jurisdiction on the Federal Court would, we believe, promote in a pragmatic sense a more consistent approach to the interpretation and operation of the Act.

- (d) Whether it is desirable that litigants' choice of forum and/or convenience be reduced:

The conferral of exclusive jurisdiction on the Federal Court would to some extent limit litigants' choice of forum. In particular, litigants will be deprived of initiating proceedings in their preferred State Supreme Court. On the other hand, under the exclusive jurisdiction proposal, litigants will have access to convenient local registries of the Federal Court. This will not, we believe, ultimately limit choice or cause inconvenience in any way that is fundamentally detrimental to litigants.

- (e) At the present time, the Federal Court, with respect, cannot be said to possess any special expertise in international arbitration matters over and above the expertise possessed by the various State and Territory courts. This militates against the exclusive jurisdiction proposal at this time.
- (f) Whether exclusive jurisdiction would give rise to consequential jurisdictional disputes over matters, including whether or not an arbitration was one relating to 'international commercial arbitration' and subject to the Act:

There is a legitimate concern that the conferral of exclusive jurisdiction upon the Federal Court under the Act may result in unseemly jurisdictional skirmishes. For example, Party A may commence proceedings in a State Supreme Court in respect of a dispute involving Party B. Party B may contend that the dispute is the subject of an international arbitration agreement. Under the present concurrent jurisdiction regime, Party B would apply to the relevant Supreme Court for a stay of proceedings pursuant to section 7 of the Act. If, on the other hand, the Federal Court had exclusive jurisdiction, how is such a stay application to be dealt with? Is it contemplated that application would be made by Party B to the Federal Court to enjoin Party A from taking any further step in the Supreme Court proceeding? An alternative course would be to confer limited jurisdiction upon the State Supreme Courts to deal with stay applications under section 7 of the Act.

This is but one example of potential jurisdictional skirmishes that may arise if the Federal Court were to be given exclusive jurisdiction under the Act.

Serious thought needs to be given to obviating or diminishing the prospect of such jurisdictional skirmishes in the event that it is determined to give exclusive jurisdiction to the Federal Court.

- (g) Whether vesting of exclusive jurisdiction in the Federal Court would act as a barrier between international and domestic commercial arbitration systems and disadvantage Australia's position in respect of international arbitration in the light of competing international jurisdictions:

The development of jurisprudence in respect of the operation of the Act (which if amended will cover the field of international commercial arbitration in Australia) is distinct from development of the jurisprudence in respect of the domestic Arbitration Acts by State courts, although overlapping concepts are involved. Foreign parties seeking to arbitrate in Australia under the Act will not be affected by any inconsistent jurisprudence concerning the operation of the domestic Arbitration Acts. Any difference in approach would be better resolved by the domestic Arbitration Acts being brought into conformity with the operation of the Act (see Question I (4) below).

- (h) Exclusivity of jurisdiction would bring Australia into line with other international legal systems, including federal legal systems. According to our research, in no instance do the State and Federal courts (where applicable) of the countries surveyed have concurrent jurisdiction in respect of the recognition and enforcement of awards under the New York Convention.²⁷

- (i) Whether to enable international arbitration to be effectively conducted in Australia a central arbitral institution such as ACICA is to be adequately resourced to promote and administer international arbitrations?

If there was a central well resourced arbitral institution with the responsibility and capacity to promote and administer international arbitrations in Australia, it would make greater sense to confer exclusive jurisdiction under the Act upon a single court, which could work cooperatively with that institution.

In summary, CIArb supports interim concurrent jurisdiction being afforded to the Federal Court of Australia and the courts of the States and Territories. However, on balance CIArb does not at this time support the Commonwealth's proposal to vest exclusive jurisdiction in the Federal Court of Australia in respect of all matters arising under the Act. If on the other hand the Commonwealth Government were to commit to

²⁷ The *Federal Arbitration Act* (US) provides at Chapter 2 sections 201 and 205 that issues of enforcement are referred to the United States District Courts, which are federal courts. In Germany, Chapter 9 section 1062 of the *Zivilprozessordnung* provides that issues of enforcement are referred to the Higher Regional Court (Oberlandesgericht) in the district of the place of arbitration or if the arbitration is not in Germany the Higher Regional Court where the applicant has its place of business or failing that the Berlin Higher Regional Court. Such courts are state courts. In Canada, the *International Commercial Arbitration Act* (CAN) is uniform legislation adopted in each of the Canadian states. Application for recognition and enforcement is made to local state courts (see *International Commercial Arbitration Act* (Manitoba) or *Foreign Arbitral Awards Act* (British Columbia)). Only one Canadian State Court has jurisdiction in any international arbitration in Canada. The French Code on Judicial organisation provides at Article R212-8 that enforcement of foreign arbitration awards is submitted to the County Court (Tribunal de Grande Instance). This is a state court.

properly resource an arbitral institution such as ACICA to promote and administer international arbitrations in Australia (similar to HKIAC or SIAC) and appoint a panel of judges to the Federal Court with specialist international arbitration expertise, CIARB would then support the exclusive jurisdiction proposal.

I. Other matters

Question 1

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

In looking to take a leadership role in the region as a centre of excellence for international arbitration, CIARB makes the following submissions in respect of other matters to be considered upon an amendment of the Act.

Some of these matters, discussed below, have already been adopted by other arbitral jurisdictions – either in whole or in part. Other matters have only recently been discussed and considered. In raising these issues CIARB does not seek to offer a concluded view, only to highlight the options that are available.

1) **Med-Arb procedure**

CIARB submits that the Act should be amended to confer power on an arbitrator to act also as a mediator, subject to the parties' consent in writing to do so.

Mediation is a dispute resolution process in which the parties request a neutral person (namely, the mediator) to facilitate negotiations between them with a view to resolving their dispute privately and consensually. The mediator does not impose any decision upon the parties. On the other hand, arbitration is a dispute resolution process in which the parties appoint a neutral person (namely, the arbitrator) to decide their dispute, having regard to each party's legal rights and after affording each party an opportunity to present their case.

Med-Arb (short for mediation-arbitration), as it is sometimes referred to, is a hybrid dispute resolution process that brings together the elements of both mediation and arbitration. Under the Med-Arb process, the parties first attempt to resolve their dispute by mediation. If they are unsuccessful in doing so, the parties then proceed to arbitration. Med-Arb therefore strikes a balance between party autonomy and finality in dispute resolution.

Section 27 of the domestic Commercial Arbitration Acts in Australia provides legislative recognition of the Med-Arb procedure.

At the international level, there is ongoing discussion and debate concerning an arbitrator's role in promoting consensual settlement of disputes referred to

arbitration.²⁸ However, in the Asian region, physically closest to Australia and in which we are increasingly developing greater economic ties, the fostering of the settlement of disputes by arbitrators is particularly prevalent.²⁹ For example, the Japanese Arbitration Law,³⁰ based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, had some significant modifications, of which it was said:³¹

[It] includes provisions to recognize that arbitrators can have a role as mediators in amicable settlements. There is no doubt that as a general rule, lawyers from common law systems dislike the idea of arbitrators also being empowered to act as mediators. ... However, in Japan, it has been customary for both arbitrators and judges to encourage amicable settlement during proceedings. In Japanese arbitrations many cases have been amicably settled with the active involvement of the arbitrators. ... Article 38(4) of the New Law has therefore been provided for this Japanese custom but has also recognized that the international community may be more sceptical. The involvement of an arbitrator in a mediation is now possible but requires prior written consent from all parties.

Legislative recognition of the Med-Arb procedure in respect of transnational disputes exists in the international arbitration legislation of many Asia Pacific countries, including both Hong Kong³² and Singapore.³³ For example, Section 17 of the International Arbitration Act (Singapore) provides:

Power of arbitrator to act as conciliator

17. (1) *If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator.*
- (2) *An arbitrator or umpire acting as conciliator —*
- (a) *may communicate with the parties to the arbitral proceedings collectively or separately;*
- and*
- (b) *shall treat information obtained by him from a party to the arbitral proceedings as confidential,*

²⁸ See Kaufmann-Kohler, 'When Arbitrators facilitate settlement: towards a transnational standard', Clayton Utz/Sydney University International Arbitration Lecture delivered on 9 October 2007, available at www.ialecture.com/transcript_2007.html.

²⁹ As Professor Kaufmann-Kohler says at p.5: "Confucianists consider that social harmony can only be achieved by the avoidance of disputes, with the result that settlement becomes the only respectable way of resolving difference".

³⁰ This is Law No. 138 of 2003, which came into force on 1 March 2004.

³¹ Article in the Japanese Commercial Arbitration Association (JCAA) Newsletter No 21, November 2008 by Peter Godwin, Partner and Head of Dispute Resolution at Herbert Smith, Tokyo.

³² See sections 2A-2C of the *Arbitration Ordinance* (Cap 341) (Hong Kong).

³³ See section 17 of the *International Arbitration Act* (Cap134A) (Singapore). The Singapore International Arbitration Act followed the Hong Kong Arbitration Ordinance in this regard.

unless that party otherwise agrees or unless subsection (3) applies.

- (3) *Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall before resuming the arbitral proceedings disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings.*
- (4) *No objection shall be taken to the conduct of arbitral proceedings by a person solely on the ground that that person had acted previously as a conciliator in accordance with this section.*

The express legislative recognition of the Med-Arb procedure in international arbitration legislation is desirable in order to promote the enforcement of an international arbitration award made in accordance with the Act. Otherwise, the losing party may subsequently seek to resist enforcement of the award on the basis that the arbitrators had (albeit with the consent of the parties) mediated or conciliated the dispute.

There is continuing controversy as to whether the same neutral should act as both mediator and arbitrator, as opposed to separate neutrals performing the respective tasks. As Professor Kaufmann-Kohler says:

There is indeed a risk of breach of due process when an arbitrator meets privately with a party. On this occasion, the party may reveal facts to the Tribunal which are unknown to the other party. As a consequence, the other party may be deprived of its due process right to rebut those facts.³⁴

The Singapore and Hong Kong Acts deal with this problem by requiring the arbitrator to disclose information obtained by the arbitrator in confidence from the other party during the mediation phase of the process before proceeding with the arbitration (in the event that the mediation fails).

CIArb does not agree with this approach. It undermines a fundamental tenet of mediation – namely, that private disclosures by a party to a mediator are to remain confidential. It also undermines frankness of communications to the mediator. Rather, CIArb's position is that there should be no impediment to a neutral acting as an arbitrator and a mediator in the same dispute provided that there is informed consent of the parties. Ultimately the parties (and the arbitrator) must decide for themselves whether or not the two processes should be kept separate or may be combined. Provision should be made for the combination of the two processes if the parties wish to proceed in this way.

³⁴ See Kaufmann-Kohler (supra).

Accordingly, in putting forward a proposed Med-Arb section for inclusion in the IAA, we would replace sub-section 3 of section 17 of the Singapore International Arbitration Act with a sub-section to the following effect:

- (3) *Where the arbitrator acts as a mediator and the mediation does not result in a settlement of the dispute between the parties, the arbitrator shall not resume the arbitral proceeding as arbitrator unless both parties agree in writing that the arbitrator shall do so.*

We also submit that the IAA should make clear that for the purposes of the Med-Arb provision:

- (a) mediation includes conciliation; and
- (b) the parties may consent in writing to the arbitrator acting as mediator by the adoption of procedural rules which permit an arbitrator to do so. In that regard, it is noted that CIArb is about to publish its own hybrid dispute resolution rules which facilitate a Med-Arb procedure.

In conclusion, CIArb proposes a Med-Arb provision for the IAA as follows:

Power of arbitrator to act as mediator*

- (1) *If all parties to any arbitration agreement consent in writing and for so long as no party has withdrawn its consent in writing, an arbitrator may act as a mediator,*
- (2) *An arbitrator acting as a mediator:*
 - (a) *may communicate with the parties to the arbitral proceedings collectively and, if the parties so agree in writing, separately; and*
 - (b) *shall treat information obtained during any separate communication in the mediation from a party to the arbitral proceedings as confidential and not disclose such information to such other party, unless the first party otherwise agrees.*
- (3) *For the purposes of sub-section (1), a party may consent in writing by making an agreement in writing to adopt procedural rules which permit the arbitrator to act as a mediator.*
- (4) *Where the arbitrator acts as a mediator and the mediation does not result in a settlement of the dispute between the parties, the arbitrator shall not resume the arbitral proceeding as arbitrator unless both parties agree in writing that the arbitrator shall do so.*
- (5) *No objection shall be taken to the conduct of the arbitral proceedings or any award made in the proceedings on the grounds that the arbitrator has acted as a mediator under this section.*

* In the definition section, the Act should provide that:

'Mediation' includes conciliation.

2) Section 19 of the Act/Public Policy

CI Arb has had the benefit of reading the Victorian Bar's Submission in response to the Commonwealth's Discussion Paper.³⁵ It respectfully agrees with the Victorian Bar's submission that consideration ought to be given to amending section 19 of the Act to narrow and clarify the definition of public policy. Presently, section 19 reads as follows:

19 Articles 34 and 36 of Model Law – public policy

Without limiting the generality of subparagraphs 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is hereby declared, for the avoidance of any doubt, that, for the purposes of those subparagraphs, an award is in conflict with the public policy of Australia if:

- (a) the making of the award was induced or affected by fraud or corruption; or*
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.*

CI Arb agrees that it is desirable for section 19 of the Act to embrace the concept of 'international public policy' as opposed to domestic public policy.³⁶ As stated in the Victorian Bar's Submission:

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.³⁷

Thus, section 19 should be re-drafted to provide that an award is in conflict with the public policy of Australia if 'it is manifestly contrary to widely accepted principles of international public policy'.³⁸

CI Arb agrees that, following such amendment, it would no longer be necessary for section 19 to specifically refer to either fraud or corruption, or a breach of the rules of natural justice in connection with the making of the award.

In particular, reference in section 19 to the concept of 'natural justice' has the potential of undermining the finality of international arbitral awards attracting the operation of the Act if Australian courts apply parochial concepts of natural justice.

³⁵ Submissions of the Victorian Bar in response to the November 2008 Discussion Paper reviewing the International Arbitration Act 1974, dated 24 December 2008.

³⁶ Victorian Bar Submission, paragraph 20.

³⁷ Victorian Bar Submission, paragraph 21.

³⁸ Victorian Bar Submission, paragraph 21.

Thus, in a recent domestic arbitration it was held that the failure of arbitrators to provide adequate reasons for decision, and, further, to deal with important submissions and evidence, amounted to an error of law in the making of the award, and, further, misconduct of the Arbitral Tribunal, resulting in the setting aside of the award.³⁹ It is possible given the current drafting of the Act that a similar result may have been arrived at if the arbitration had been an international arbitration attracting the operation of the Act – in particular, the alleged failures of the Arbitral Tribunal might be said to have amounted to a breach of natural justice occurring in connection with the making of an award (within the meaning of section 19(b) of the Act) with the result that the award was deemed to be in conflict with the public policy of Australia for the purposes of sub-paragraphs 34(2)(b)(ii) and 36(1)(b)(ii) on the Model Law.

Such a result would not be consistent with the pro-enforcement bias of the Model Law and the Convention. In turn, this may be a substantial disincentive to parties choosing an Australian city as the seat for their international arbitration.

3) Confidentiality

The decision in *Esso Australia Resources Ltd v. Plowman*⁴⁰ held that arbitrations in Australia are private but not confidential. This is out of step with the law in some other jurisdictions,⁴¹ although it must be said that there is no universal international position as to the existence of an implied duty of confidentiality in respect of arbitral proceedings and awards. In fact, in many countries the relevant international arbitration legislation is silent as to whether or not arbitral proceedings are confidential in nature.

The absence of an implied duty of confidentiality in arbitral proceedings removes in Australia one of the factors by which parties are motivated to enter into an arbitration agreement.⁴² Accordingly, the current position under the Act is inconsistent with the Objects and Underlying Policy and is deserving of consideration as to whether amendment is required.

³⁹ *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346.

⁴⁰ (1995) 183 CLR 10.

⁴¹ See for example *Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 WLR 314; *City of Moscow v. Bankers Trust* [2004] All ER 476; *Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 (12 March 2008). Under English common law there is an implied obligation arising out of the private nature of arbitration not to disclose or use documents or information relating to the arbitration for any other purpose. However, the boundaries of the obligation of confidence are yet to be established definitively in England. Similarly, French law provides for confidentiality of arbitral proceedings and awards: see *Aita v. Ojeh* 1986 *Revue de l'arbitrage* 583 (Cour d'Appel de Paris, 18 February 1986). Currently, the US position governed by the common law is that there is no inherent duty of confidentiality unless the parties expressly contract for it: see *Baxter Intern Inc. v. Abbott Laboratories* (2002) 297 F.3d 544 (7th circuit). Similarly, the Swedish courts have reached the same conclusion: *AI Trade Finance v. Bulgarian Trade Bank*, Swedish Supreme Court Case No. 1881-99 (27 October 2000).

⁴² The Queen Mary University of London/Pricewaterhouse Coopers Survey Report (referred to above) identified confidentiality as the second highest ranking consideration for choosing international arbitration (ranking behind enforceability under the New York Convention).

Of course, the parties may by agreement provide that their arbitral proceedings shall remain confidential. For example, they may achieve this result by adopting the ACICA Rules as their procedural rules.⁴³

In 1996, New Zealand enacted an arbitration act which codified a duty of arbitral confidentiality. In particular, section 14 of that Act provided that, unless the parties agree otherwise, *'the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings'*. Sub-section (2) of section 14 provided for some limited exceptions to the duty of confidentiality. Apparently, New Zealand enacted section 14 to prevent the Australian *Esso* decision from serving as a precedent in New Zealand's courts.⁴⁴ In that regard, *Esso* was described by one commentator as a decision that *'crashed like a giant wave – a veritable Australian tsunami – on the shores of jurisdictions around the world'*.⁴⁵

One difficulty with a statutory default position of confidentiality is dealing with the necessary exceptions to the obligation of confidentiality.⁴⁶ In this regard, it is significant that section 14 of the 1996 New Zealand Act has recently been repealed and has been replaced by sections 14 to 14I of the *Arbitration Amendment Act 2007* (NZ), which, inter alia, define in greater detail the limits on prohibition of disclosure of confidential information relating to an arbitration.⁴⁷

CIArb is of the view that enacting a statutory duty of confidentiality (subject to defined exceptions) may operate to attract international arbitrations to Australia by signalling to the international community that the default position (that is, absent agreement to the contrary by the parties) in Australia is that arbitral proceedings and awards are confidential. We believe this is a progressive and desirable move.

In summary, CIArb submits that consideration should be given to amending the Act to adopt a position similar to the New Zealand position.

⁴³ See Article 18 of the ACICA Rules. Only a minority of the major arbitration centres have rules dealing expressly with confidentiality of materials generated in arbitrations.

⁴⁴ See Williams, *"New Zealand: The New Arbitration Act"* (1998) 1 International Arbitration Law Review 214 at 216.

⁴⁵ L Yves Fortier, *"The occasionally unwarranted assumption of confidentiality"* (1999) 15 Arbitration International 131 at 134.

⁴⁶ For example, parties need to have the right to provide information about the arbitration where they are compelled by law to provide it to a regulator or in submitting corporate accounts.

⁴⁷ The amendments to the New Zealand *Arbitration Act* followed the recommendation of the New Zealand Law Commission in its 2003 report entitled *'Improving the Arbitration Act 1996'* (NZLC R 83, Wellington, 2003). Its summary of recommendations is to be found at paragraph 53. The report is available at www.austlii.com/nz/other/nzlc/report/R83/.

4) **Reform of domestic arbitration legislation and harmonisation of the domestic and international arbitration regime**

As previously stated in this submission, the dual legislative regime concerning arbitrations in Australia causes unnecessary uncertainty, and also unnecessary complication.

We agree with the sentiments expressed by the Chief Justices in their letter dated December 2008 to the following effect:

It would not assist Australia's position in relation to international arbitration if the law with respect to domestic arbitration develops in a significantly different manner...

and

Any attempt to hold out Australia as a centre for international arbitration will not succeed if the domestic arbitration system does not operate consistently with the international arbitration regime.

Presently, the domestic arbitration regime in Australia is in a state of malaise. Part of the problem, we believe, is that there is scope for excessive judicial interference which undermines the perception of finality of the arbitral process. Why should business people choose arbitration if it is merely a 'dress rehearsal' for litigation?

CIArb believes that it is highly desirable for the domestic arbitration Acts to be reformed to bring them into conformity with the standards contained in the Model Law (given effect to by the Act), which, among other things, promotes finality of arbitral awards.

We note that the domestic arbitration Acts have been under review for the past few years by the Standing Committee of the Attorney's General ('**SCAG**'), but that the review process has stalled. While we do not believe that it is desirable to delay reform of the Act pending reform of the domestic arbitration Acts, we encourage the Federal Government to do all in its power to bring about reform of the domestic arbitration Acts as this, we believe, will enhance Australia's competitiveness in the international commercial arbitration arena.

Alternatively, we recommend that the Federal Government should exert its influence with the States and Territories to adopt the Model Law, with appropriate modifications, to encompass domestic arbitration. International arbitration has its own specific needs and foreign parties will only choose to come to arbitrate in Australia if they are assured that their contractual wish to arbitrate and not to litigate their disputes will be respected. It is important that State Courts will not intervene in the arbitral process, save to support the arbitration and to ensure that the essential safeguards expressly provided for in the Act are respected.

5) Representation before the courts by foreign lawyers

Of its nature, international arbitration involves a party or parties from another jurisdiction. Section 29(2) of the Act provides that a party might appear in person before an Arbitral Tribunal attracting the operation of the Act and may be represented, inter alia, by a duly qualified legal practitioner from any legal jurisdiction of that party's choice.

CIArb submits that it would be consistent with the Objects and the Underlying Policy for an extension of section 29 to provide that such person might also appear in any court proceedings arising out of or related to the arbitration.

CIArb believes that it is desirable for Australia to offer additional inducement to parties to enable Australia to compete with rival regional arbitral jurisdictions. It believes that affording a right of appearance to a qualified legal practitioner from another jurisdiction in any court proceedings arising out of or relating to an arbitration would offer a point of differentiation to prospective users of international arbitration services in Australia. We note that similar reciprocity is not presently offered by any of Australia's Asia Pacific neighbours.

APPENDIX

The Chartered Institute of Arbitrators (Australia) Limited



The Chartered Institute of Arbitrators was founded in London in 1915, incorporated in 1924 and granted a Royal Charter in 1979. It is a professional body dedicated to the promotion, facilitation and determination of disputes by arbitration, mediation and adjudication. It has a multi-disciplinary membership of over 11,000 located in some 86 countries and an international network of 31 branches.

The Australian Branch of the Institute was formed in 1995, with headquarters in Sydney. However, the membership is spread through all Australian mainland States and Territories, with various Chapters established throughout Australia. In February 2006, the Australian branch was incorporated as a company limited by guarantee.

The primary objective of the Australian Branch is to promote and facilitate the determination of disputes by alternative dispute resolution (ADR) processes, including arbitration, mediation and adjudication. In pursuing this aim, it provides education and training programs for potential and practising arbitrators; maintains panels of members with expertise in specific fields; assists with the appointment and nomination of suitably qualified persons to act as arbitrators and/or mediators; and assists in establishing and administering adjudication and arbitration schemes.

The Branch focuses on international arbitration and mediation, publishes a newsletter to members with articles on current topics and events in the area, holds regular functions for members featuring addresses by experienced practitioners. The feature training course conducted by the Institute is the Diploma in International Commercial Arbitration, which is held annually in conjunction with the University of New South Wales in late June each year. This is a two-week post-graduate level course that teaches the principles and practice of international commercial arbitration. The course assists members in attaining Chartered Arbitrator status.

The Branch is active in assisting members obtain each of the four grades of membership of the Institute. These are: Associate Member (ACI Arb), Member (MCI Arb), Fellow (FCI Arb) and Chartered Arbitrator.

As befits the legal focus and experience of the majority of our membership, the joint Patrons of the Australian Branch are The Hon Justice Gleeson AC (former Chief Justice of Australia) and The Hon Garry Downes, AM (President of the Administrative Appeals Tribunal and Judge of the Federal Court of Australia and also a previous Chairman of the Australian Branch of the Chartered Institute).