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**SUBMISSION ON THE REVIEW OF  
THE INTERNATIONAL ARBITRATION ACT 1974**

**The Maker of the Submission:** I make this submission in my personal capacity. I am a Victorian Barrister of 18 years standing. I was a solicitor for 2 years. I was formerly a practicing civil engineer. Most of my practice has always been in arbitrations. I am a member of IAMA and I am a graded and practicing arbitrator with that organisation. This paper responds to the questions contained in the November 2008 Discussion Paper.

**The Submission:**

**Question B:** Yes. Certainty in the finality of an award is vital to parties and the attractiveness of Australia as a seat of arbitration.

**Question C:** No. While initially attractive one problem is the definition of what is an international arbitration:

“(3) An arbitration is international if: ..

...

(b) one of the following places is situated outside the State in which the parties have their places of business:

....  
(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed ...

The difficulty is that there can be argument whether the Model Law applies or not. As matters stand this sort of issue, particularly between domestic companies, can be resolved by negotiation. For example a recent major arbitration I was involved in was between two Australian companies that included the obligation on the part of one to manufacture an offshore gas platform in Indonesia. It wasn't *the* major element in the contract, but it was certainly substantial. The arbitration was conducted under the domestic act. To include an *exclusive* jurisdiction provision could give rise to jurisdictional arguments *after* an award has been handed down.

I would expect the introduction of an exclusive provision to increase litigation. It would introduce uncertainty rather than reduce it.

**Question D:** Yes. I agree with the intent, but the discussion paper oversimplifies the issue. The Singapore Act is not sufficiently clear. Rules of Procedure

adopted by a contract have the force of the contract. Nothing turns on the fact they are *called* rules of procedure. Those rules can be in conflict with the Model Law; many parts of which would ordinarily be called rules of procedure themselves. Therefore to address *Eisenwerk* what is need is a statutory provision that makes it clear that the Model Law remains in operation save for the operation of rules specifically adopted by the parties in their contract.

**Question E:** Yes. I am also in favor of the ability to make ex parte preliminary orders if a fair opportunity to be heard was given (a requirement of natural justice).

**Question G:** The suggestion ACICA be appointed to perform this function is opposed. In 20 year of being involved in a large number of arbitrations I have never been involved in an arbitration where ACICA has appointed the arbitrator. It is a minor player in terms of the appointment function in Australia. While there are many appointment bodies, the premier appointment body has been IAMA for the last 20 years.

Despite its name, my understanding is ACICA strives to increase its profile as a domestic appointing body. It's web site says it is the statutory appointing body under the Water Management Act (Tas) the Water Industry Act (Vic) and the Construction Industry Long Service Leave Act (Vic).

The problem in nominating a single organisation as the appointing body is that carries with it just the panel of arbitrators that that appointing body selects from.

The panel of Arbitrators ACICA would draw from is not available on ACICA's web site. I expect the ACICA panel arbitrators are the ACICA Fellows, many of whom are known to me as experienced arbitrators. A good number of the Fellows listed on its web site that I know are not Australian citizens and not residents of Australia. ACICA has its first objective as the promotion of Sydney as a venue for International Arbitration.

In my view the function of appointing arbitrators (in default of agreement) should be retained by the courts. The court has the ability to appoint from a wider pool of possible appointees. It should not be given to one of the competing nominating bodies that operate in Australia, each of which has its own panel.

**Question H:** On balance I oppose the exclusive jurisdiction of the Federal Court. My experience is that the Victorian Supreme Court has a wealth of experience in the supervision of arbitrations. That will remain the case through domestic arbitrations regardless of whether or not the Federal Court takes exclusive jurisdiction of the International Arbitrations. On balance, I am of the view the possible improvement in consistency does not make up for the greater familiarity the domestic courts have with arbitration.

Thank you for considering these submissions.

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