The New South Wales Bar Association

08/514

14 January 2008

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Dear Mr Bouwhuis

Please find enclosed the New South Wales Bar Association's comments on the Review of the International Arbitration Act 1974.

Please call me if you would like to discuss.

Yours sincerely

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Executive Director

enc.

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REVIEW OF THE *INTERNATIONAL ARBITRATION ACT 1974*

COMMENTS AND SUBMISSIONS BY THE NEW SOUTH WALES BAR ASSOCIATION

The New South Wales Bar Association provides the following comments and submissions on the areas of the review of the International Arbitration Act ("the Act") which have been identified by the discussion paper.

QUESTION A:

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

(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?

A The Act defines an "arbitration agreement" as an "agreement in writing" of the kind referred to in Article II of the 1958 New York Convention. Article II(2) of the New York Convention states "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties *or contained in an exchange of letters or telegrams*" (emphasis added).

A.2 The definition needs to be amended to ensure that the Act applies to contracts made and recorded by more modern means such as electronic communication. The proposal to use the revised definition of an "arbitration agreement" contained in the 2006 UNCITRAL changes to the Model Law (Article 7, Option I) achieves this result and is supported.

A.3 Further, although the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty* Ltd [2006] FCAFC 192 adopted a broad interpretation of the current definition of "arbitration agreement", there has been some difference in the approach

to the interpretation of the definition adopted by individual judges. The proposed use of Option I, with its more detailed and broadly stated definition, will assist in ensuring that other courts adopt a similar broad interpretation to that taken by the Federal Court in *Comandate* and is supported.

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?

B1 Yes. Section 8 represents the implementation of the obligation resting on Australia as a contracting state to the New York Convention to recognise and enforce foreign arbitral awards. Under Article V of New York Convention, the recognition and enforcement of the award may be refused "*only if*" certain specified matters are established.

B.2 It is well established that "there is in place a coherent international system for resolving commercial disputes by arbitration, which stands in marked contrast to the complex, incoherent 'jungle' of diverse provisions for international litigation".[1] The system is created by the "interlocked" New York Convention, UNCITRAL Model Law and the ICSID Convention. It is a consistent feature of these international instruments that the grounds for challenging and refusing to enforce international commercial arbitration awards are strictly limited and are confined to the specific grounds originally identified in the New York Convention.

B.3 As noted in the discussion paper, the Queensland Supreme Court in *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406, held that the court retained a general discretion under s.8 whether to enforce a foreign award even if none of the grounds for refusing to recognise a foreign award in s.8 was made out. This is contrary to the terms of the New York Convention. A party's ability to resist

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1 "*Transaction Costs and International Litigation*", an address by the Honourable JJ Spigelman AC, Chief Justice of New South Wales, to the 16th Interpacific Bar Association Conference, Sydney, 2 May 2006.

enforcement is greatly enhanced if there is a general discretion in the court to refuse enforcement.

B.4 The effectiveness of this international system is undermined if the courts of the place of enforcement have a general discretion to refuse to enforce the outcome of the arbitration process. The Act should be amended to provide that recognition and enforcement of a foreign arbitration award may be refused "only if" one or more of the grounds stated in the New York Convention have been established.

B.5 A consequential amendment should be made to the method of enforcement of the award. Sub-section 8(2) should also be amended to allow immediate enforcement as a judgement of the Court upon satisfaction that the conditions of the New York Convention have been met. Sub-section 8(2) presently provides that "[s]ubject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State of Territory in accordance with the law of that State of Territory." Under s.33 of the Commercial Arbitration Act (NSW) an "award made under an arbitration agreement *may*, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award" (emphasis added). This section has been held by the New South Wales Supreme Court in the case of *Tridon Australia Limited v ACD Tridon Inc* [2004] NSWCA 146 to confer a general discretion to refuse enforcement of an arbitral award.

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?

C1 The Act should be amended to address the issue raised by the question but consequential issues also arise and need to be considered and also addressed.

C.2 Article V of the Model Law states "[i]n matters governed by this law, no Court shall intervene except where so provided in this Law". One of the attractions of the Model

Law to users of the system of international commercial arbitration is that there is limited opportunity where the Model Law has been adopted for national or domestic courts to intervene in the arbitral process.

C.3 Accordingly, parties to international transactions who may be attracted to arbitrate their dispute in Australia in the belief that their international arbitration will be governed by the provisions of the Model Law may be dissuaded from agreeing to an international arbitration in Australia if they were aware that various pieces of State and Territory legislation dealing with arbitration also apply to the arbitration process.

C.4 The discussion paper notes that one of the objectives of the review is to ensure that the Act provides "a comprehensive and clear framework governing international arbitration in Australia". This objective is not presently being achieved. In *American Diagnostica Inc v Gradipore Limited*[2] it was held by the Supreme Court that international arbitrations in Australia are also subject to State laws governing commercial arbitration and further, in *Raguz v Sullivan* it was held by the Court of Appeal that state courts retain the power to remove the arbitrator and exercise "supervisory jurisdiction to police arbitrators' misconduct" under provisions such s.42 and s.44 of the Commercial Arbitration Act (NSW)[3].

C.5 The uncertainty caused by the various state and territory laws on arbitration being applicable to an international arbitration taking place in Australia in addition to the Act (and with it the Model Law), is being compounded by the debate as to whether these decisions were correctly decided. This is a contentious area of the law on which different views have been expressed. On 16 August 2008 the Hon Justice RV Gyles AO[4] said "[i]t seems to have been assumed that [the various State and Territory uniform commercial arbitration legislation] apply to international commercial arbitrations conducted in Australia, at least those with the seat of the arbitration being in Australia. In my opinion, that is debatable in view of the operation of section 109 of the Australian Constitution, which provides that Commonwealth law prevails in the event of an inconsistency between Commonwealth law and State law ... . The

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(1998) 44 NSWLR 312
(2000) 50 NSWLR 236 at 249 per Spigelman CJ and Mason P
A paper presented to a conference of the New Zealand Bar Association in Sydney on 16 August 2008

decision in *American Diagnostica Inc v Gradipore Limited* (1998) 44 NSWLR 312 found that the [State legislation] applied, but the section 109 point was not argued".

C.6 Furthermore, international arbitration has evolved and developed as a product of international conferences (eg the 1958 New York Convention) and international organisations such as UNCITRAL (eg, the Model Law) and the International Bar Association (eg, IBA's Rules on the Taking of Evidence in International Arbitration, and IBA Guidelines on Conflict of Interest in International Arbitration) and from the efforts of arbitration practitioners and writers.

C.7 It has been a feature of this global evolutionary process that there is continual public discussion and examination of the features of national arbitration laws and the consequences of those laws applying to international arbitrations taking place in a particular country. National laws are often compared to the Model Law which is regarded as being the benchmark of arbitration laws currently applying to international commercial arbitrations.

C.8 The "suitability" of different arbitration laws is frequently raised in these discussions and conferences. An examination of the suitability of national arbitration laws which are potentially applicable to an international arbitration, is seen as critical in determining the venue for the arbitration. The importance of this consideration[5] is evidenced in the UNCITRAL publication, "Notes on Organising Arbitral Proceedings," which provides in paragraph 22 the following;

> *"22. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration, ...".* (underlining added)

C.9 The uncertainty as to which laws apply to international arbitrations in Australia and the possible overlapping operation of the state and federal laws casts some doubt on the "suitability" of the present law on arbitral procedure for international arbitrations in Australia. This uncertainty provides a positive disincentive for those parties

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[5] The suitability of the arbitration laws of different countries is also the subject of decisions made by international arbitration tribunals on the place of the arbitration which are increasingly accessible on the internet, eg decision on the place of the arbitration in *Methanex Corporation v United States of America,* at http://www.state.gov/documents/organization/6038.pdf

involved in international arbitrations to agree to their arbitration taking place wholly or partly in Australia. It is desirable that the Act covers the field in relation to international arbitrations occurring in Australia.

C.10 If the Act containing the Model Law were to be amended to cover the field a consequential matter arises. It is important that the Act be a comprehensive arbitration law for international arbitrations taking place in Australia. Accordingly, it is necessary to ensure that the Act makes provision for those ancillary but essential aspects of the arbitral process which are not dealt with by the Model Law.

C.11 By way of example, the Model Law provides in Article 27 for the court assistance in *taking* evidence. Article 27 states:

"The Arbitral Tribunal or a party with the approval of the Arbitral Tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

C.12 It would be advisable to clarify the operation of this provision in relation to court assistance in *obtaining* evidence to be taken by the tribunal itself. The Act, if it is to be the only arbitration law which applies, should be amended to allow a party to approach the court for assistance. It is the current practice in relation to international arbitrations taking place in Australia to utilise the provisions of the State and Territory commercial arbitration legislation to approach the various courts of the States and Territories to issue subpoenas requiring a person to attend for examination before the arbitrator or to produce to the arbitrator documents specified in the subpoena (see ss.17 and 18 of the *Commercial Arbitration Act 1984* (NSW). If the Act is to cover the field then similar provisions should be included in the Act.

C.13 If, as it is submitted there should be, there is a single arbitration law which covers the field in relation to international arbitrations occurring in Australia, then a related issue arises as to whether s.21 should be removed from the Act. This consequential amendment, which it is submitted is both desirable and necessary, is dealt with in relation to Question D.

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*?

D1. There should be an amendment but in different terms as the unitary legal system which exists in Singapore is different to the federal system operating Australia.

D.2 Under s.21 of the Act the parties to an arbitration agreement may agree that any dispute that has arisen or may arise between them shall *"be settled otherwise than in accordance with the Model Law"* and where there is such an agreement the Model Law does not apply *"in relation to the settlement of the dispute."*

D.3 The expression "settled otherwise than in accordance with the Model Law" as found in s.21 has been generally understood to mean that if the parties choose another law to govern their arbitration both as to procedural matters and substantive matters then that law applies and the Model Law has no application in relation to the "settlement" of that dispute.

D.4 However, as noted in the discussion paper, the parties to an arbitration agreement may agree to incorporate into their arbitration agreement procedural rules of an arbitration institution such as the ICC or ACICA. This agreement between the parties as to the procedure to be followed has no direct relationship to the issue of which country's arbitration law applies to the arbitration. Nevertheless, the court in the *Eisenwerk* case controversially held an agreement as to the procedural rules did amount to an agreement that the arbitration was to *"be settled otherwise than in accordance with the Model Law*" and as a result the Model Law did not apply.

D.5 The issue in *Eisenwerk* was whether the Court should apply the test in Article 8(1) of the Model Law for granting a stay of court proceedings or the test in s.7(2) of the Act. If the Model Law applied then Article 8(1) did not permit the Court to grant a stay because a defence had been delivered in the action. If s.7(2) applied then the Court was required to grant a stay. The Court held that the parties' agreement to use the procedural rules of an arbitration institution (the ICC) satisfied s.21 and therefore the Model Law did not apply and a stay was granted under s.7(2). Critically, where it

was held that the Model Law did not apply, there was another legislative provision which the Court could, and did, apply.

This identifies a more fundamental question which has to date been overlooked, namely which arbitration law applies if the Model Law does not apply? It also raises as the related issue namely, whether there is any current need for a provision such as s.21 in a modern law dealing with international arbitrations or in any enactment of the Model Law.

D.7 As to the first question, the Model Law as enacted in Australia is both a procedural and substantive law regulating international arbitrations in Australia. It governs matters of procedure such as how the arbitral tribunal is to be appointed and how the arbitral proceedings shall be conducted. It also covers substantive matters in that it creates and defines the nature and extent of a party's rights to challenge or set aside any award. If international arbitrations are to be conducted effectively and efficiently in Australia, then there must always be an applicable arbitration law which parties can call in aid to support the arbitral process such as a law which allows the parties to obtain subpoenas to compel the attendance of witnesses and the production of documents. It is also desirable that any award made in an international arbitration in Australia be binding and that the parties have the universally accepted, but limited, rights of challenge as found in the Model Law.

This was demonstrated by the revised terms of the International Arbitration Act in Singapore following the decision of *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262 which followed the *Eisenwerk* decision.

Section 15 of the Singapore Act now relevantly provides:

"Law of arbitration other than Model Law
15. (1) If the parties to an arbitration agreement have expressly agreed either

(a) that the Model Law or this Part shall not apply to the arbitration; or
(b) that the Arbitration Act (Cap. 10) or the repealed Arbitration Act (Cap. 10, 1985 Ed.) shall apply to the arbitration,
then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act or the repealed Arbitration Act (if applicable) shall apply to that arbitration.
(2) 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" (emphasis added)

D.10 Thus, the Singaporean legislation provides that the *Singaporean Arbitration Act* still applies to that arbitration even if the parties opt out of the Model Law. If a provision similar to subsection 15(2) of the *Singaporean International Arbitration Act* is adopted then the legislation must also provide for an Australian arbitration law to apply to that arbitration. There would be a legislative vacuum if there was not an arbitration law which was otherwise applicable.

D.11 If the parties were to agree that the law of another country applied to their arbitration, such an agreement would not authorise a court to grant assistance such as issuing subpoenas. The parties cannot by their agreement confer on a court jurisdiction which it does not have. Thus if the parties agree that their dispute "is to be settled" by the law of another State such as England, Singapore or New Zealand, but the arbitration takes place in Australia for reasons such as the convenience of the parties or witnesses or the subject matter of the dispute, what is the law of arbitration which applies to that arbitration and which court can the parties approach for assistance?

D.12 As to the related issue, in 1988 when s.21 was inserted into the Act, the Model Law had not achieved its present level of worldwide acceptance. At the time Australia was one of the first countries to adopt the Model Law. The Model Law has since been adopted in over 60 countries[6]. Any concern that may have existed in 1988 about the "suitability" of the Model Law was assuaged by giving the parties the right to opt out of the Model Law. No such concerns exist in 2008 as evidenced by the widespread adoption the Model Law. As noted above, the Model Law is now recognised as an integral part of "a coherent international system"[7] for dealing with the settlement of disputes by international arbitration.

D.13 In 1988 the Act was seen as merely "supplementing" the then domestic arbitration law and s.21 was included as one of a number of *"minor additional provisions to facilitate arbitral proceedings"*[8]. Section 21 is no longer necessary and should be

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6 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

7 "Transaction Costs and International Litigation", an address by the Honourable JJ Spigelman AC, Chief Justice of New South Wales, to the 16th Interpacific Bar Association Conference, Sydney, 2 May 2006.

8 Second Reading, Mr Lionel Bowen, Attorney General, 3 November 1988, Hansard, 2399

removed. The suggested amendment along the lines of the change introduced in Singapore requires consequential amendments to the Act to ensure that it is a comprehensive arbitration law for international commercial arbitration.

QUESTION E:

(i) Should the drafting inconsistencies in Part III, Division 3 of the *International Arbitration Act* be remedied?

(ii) If so, should it be clarified that ss.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)?

E.1. (i) and (ii),Yes. As noted in the discussion paper, there are internal inconsistencies in Part III, Division 3. These inconsistencies should be removed and the legislation should make it clear that the Arbitral Tribunal has power to award interest up to the making of the award, interest on the debt under the award and costs unless the parties agreed that the Tribunal should not have that power.

E.2. This may be achieved by changing the heading of Division 3 from Optional Provisions to Supplementary Provisions and deleting s.22. Sections 25, 26 and 27 then apply in accordance with their present terms unless the parties have agreed otherwise.

E.3. Section 24 would then give the statutory power of consolidation of arbitral proceedings. This power is strictly regulated by provisions of s.24 and may be seen to be to improve the effectiveness and efficiency of the arbitral process whilst respecting the fundamental consensual basis of arbitration.

QUESTION F:

(i) Should the *International Arbitration Act* be amended to adopt recent amendments to the UNCITRAL Model Law?

(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?

(i) and (ii) Yes. The recent amendment to the Model Law to include Article 2A which is designed to promote the uniform interpretation of the UNCITRAL Model Law is desirable and should be adopted.

F.2. The recent amendment to the Model Law in Article 7 contains two options for the definition of an "arbitration agreement." Option 2 removes any requirement for the agreement to be made or recorded in any written form. Option 1, which is be preferred, provides that the arbitration agreement must be in writing and specifies that the arbitration agreement is in writing if its content is recorded in any form whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means. As indicated above in relation to Question A it is submitted that Option 1 should be adopted and the same definition of an arbitration agreement should apply throughout the Act. The amendment of the definition in Part II of the Act should be reflected in Part III of the Act.

F.3 The recent amendment to the Model Law in Chapter IVA introduces extensive provisions on interim measures and preliminary orders. As noted in the discussion paper, provisions allowing preliminary orders to be made by the arbitral agreement without the other party being notified conflicts with the underlying consensual basis of arbitration. In all other respects, these additional powers enhance the efficiency of the arbitral process and should be implemented. As a consequence s.23 which partially deals with the same subject matter becomes redundant and should be repealed.

The recent amendment to the Model Law in Article 35(2) which simplifies the requirements on a party seeking to enforce an award, is easily understood and should be adopted.

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 11(3) and 11(4) of the UNCITRAL Model Law?

(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?

G.1. (i) and (ii) Yes. Any procedural reform which facilitates the arbitration process and reduces costs should as a general rule be adopted. The functions under Articles 11(3) and 11(4) of the Model Law relate to the appointment of an arbitrator where the procedure agreed upon by the parties has broken down. This function of making default appointments in international arbitrations, is commonly performed by the local international arbitration institution. There is no justification for requiring the parties to go to the trouble and expense of commencing court proceedings.

In Singapore this function is performed by the Singapore International Arbitration Centre and in Hong Kong by the Hong Kong International Arbitration Centre. International arbitration institutions have an expertise in this area and their reputation for effective and independent appointments serves to encourage parties to incorporate dispute clauses referring any disputes to be resolved according to rules of such institution. As was noted by the Attorney-General on 21 November 2008 the existence of a prominent and experienced international arbitration institution such as ACICA ensures "institutional support for international arbitration" in Australia[9].

When the Model Law was introduced into the Act in 1988 the Attorney-General Mr Lionel Bowen in his second reading speech said "International recognition of the Model Law means that its adoption should assist Australia's efforts to establish itself as a centre for international commercial arbitration"[10] and he expressly noted that "both Melbourne and Sydney have facilities for conducting international arbitrations with the establishment of the Australian Centre for International Commercial Arbitration in Melbourne and the Australian Commercial Dispute Centre in Sydney".

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9 Address opening the conference on "International Commercial Arbitration, Making it Work for Business", paragraph 26

10 Hansard, House of Representatives, 3 November 1988, 2400

The Australian Centre of International Commercial Arbitration has continued to be the pre-eminent international arbitration institution in Australia and its desirable that it be designated to perform these functions in regulations made under the Act.

Any such designation may also lessen the uncertainty created by the common practice in Asian countries where cross border transactions are involved to include an arbitration provision in a form such as:

> "1 *It is agreed that both parties shall settle any disputes arising from the implementation or interpretation of this agreement in an amicable manner by cooperation.*
>
> 2. *Contractual claims or disputes on which both parties cannot reach agreement shall be settled by arbitration of the Commercial Arbitration Board of the country in which the respondent of the claim or claims or disputes resides."*

The meaning and effect of such clauses will depend upon their precise terms and the applicable law, but where there is a recognised international arbitration institution which performs those functions of appointment in relation to international arbitrations in Australia there is likely to be less dispute as to their interpretation.

G.6 Further, ACICA has been recognised by government bodies such as the Australian Wheat Board, as the appropriate international arbitration institution to administer disputes which may arise in international transactions.[11]

QUESTION H:

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

H.1. The suggestion in the discussion paper that if there were exclusive jurisdiction "this may lead to more consistent jurisprudence in applying the Act" does not have regard to the fact that in the case of Commonwealth legislation such as the Act, the High Court has authoritatively stated that "uniformity of decision in the interpretation" of such legislation is an important consideration[12]. It does not take into account the requirement that, as a matter of ordinary practice, "where a Commonwealth statute

11 eg, *AWB (International) Ltd v Tradesmen International (PVT) Ltd* [2006] VSCA 201, 6/10/06

12 *Australian Securities Commission v Marlborough Goldmines Ltd* (1993) 177 CLR 485 at 492, per Mason CJ, Brennan J, Dawson J, Toohey J and Gaudron J.

has been construed by the ultimate appellate court within any State or Territory, that construction, should ... be accepted and applied by the courts of other States and Territories ... The risk of differing interpretations amongst the States is thus negatived and, in practical terms, a uniform application of Commonwealth laws throughout Australia is assured."[13] (emphasis added)

We recognise that individual judges of a court can manifest a difference in approach and demonstrate little familiarity with the international norms which may be applicable to an international commercial arbitration. This is so in litigation concerning international commercial arbitration in the Federal Court[14] as it is in relation to the State and Territory courts[15]. Other means such as more prescriptive legislative provisions providing greater guidance for judges, further training and the creation of specialist lists within the courts may assist in overcoming these problems.

More significantly, it would, with respect, be impracticable and may not be in the public interest to confer exclusive jurisdiction on the Federal Court. Although the adoption of the Model Law on international commercial arbitration is seen as an attraction to foreign parties to arbitrate within Australia comfortable in the knowledge that the law represents a universally recognised legal framework for the fair and efficient settlement of disputes arising in international commercial relations, it is necessary to consider the operation of the other provisions of the Act.

H.4 Whilst the overseas perspective of Australia as a "Model Law country" with a single court administering the Model Law may be very attractive to international parties and act as a substantial inducement to such persons to conduct their arbitrations in Australia, the implementation of the New York Convention requires that court proceedings be stayed where the parties are bound by an arbitration agreement and the subject matter of the litigation is capable of settlement by arbitration. Accordingly where proceedings are brought in any State or Territory court in Australia and the

13 *R v Abbredis* [1981] 1 NSWLR 530, per Street CJ at 542

14 eg, the narrow approach to construction of the arbitration agreement in *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29 (29 January 2008)

15 eg In 1976, UNCITRAL adopted the UNCITRAL Arbitration Rules and recommended that individual parties incorporate these procedural rules into their contract. In 1985, UNCITRAL adopted the Model Law on international commercial arbitration and recommended that sovereign states adopt this template as the terms of the national legislation enacted by those states. Nevertheless, in *Bitannia Pty Limited v Rossfield Nominees (ACT) Pty Limited* [2008] NSWSC 939, 1 September 2008, the Court accepted a submission that a reference to the UNCITRAL Arbitration Rules in an arbitration clause was a reference to the Model Law

proceedings involve the determination of a matter that may be capable of settlement by arbitration in accordance with the parties' arbitration agreement, a contest may arise as to whether that court should stay the proceedings under s.7 of the Act.

H.5 If the suggestion that the Federal Court should have exclusive jurisdiction in all matters is adopted, the consequence would be that a party to proceedings in one of the State and Territory courts who seeks to enforce an arbitration agreement to which the Act applied, would need to commence fresh proceedings in the Federal Court to obtain an order for a stay of the proceedings in the State or Territory court rather than raising the issue for determination by the court in which the proceedings had been brought, or at the very least, bring interlocutory proceedings in the Supreme Court to have the case transferred to the Federal Court (similar to the procedure used for "special federal matters" under the cross-vesting legislation) and then to seek a stay in the Federal Court. This is cumbersome. This would be impractical and result in a duplication of court costs and create unnecessary delay in the proceedings.

H.6 This fresh set of proceedings in the Federal Court may involve an application for an order to restrain the State or Territory court from proceeding to hear the matter. It would be in the public interest that the court in which the proceedings had originally been commenced, could determine the issue. Vesting exclusive jurisdiction in the Federal Court could generate the prospect of unseemly jurisdictional clashes, for example when the Supreme Court considered that the matter before it fell outside the scope of the arbitration clause or that the arbitration agreement had become inoperative or incapable of performance but where the Federal Court (subject to the possible application of the doctrine of issue estoppel) took a different view. Alternatively, it could lead to a "race" between the courts with the outcome being decided by the first court to reach a decision on the matter.

H.7 We have been provided with a copy of the joint submission of the Chief Justices and, with respect, there is force in the opinions there expressed. We would only add that in the interests of promoting unification of outcomes, the Supreme Courts and the parliament, to the extent that it is not already done, should adopt measures discussed in paragraph H.2 above.

QUESTION I:

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

Yes. Consideration should be given to amending the Act,

(a) To allow an arbitrator to also act as a mediator where appropriate and subject to consent of the parties. This would be consistent with the objective of adopting current "best practice" developments and reflect the increasing use of alternative dispute resolution processes in international commercial arbitration such as mediation and a combined mediation-arbitration process, and

(b) To ensure the confidentiality of the arbitration process. The current position in Australia is governed by the decision in the High Court in *Esso Resources Ltd v Plowman*[16]. The Court held that the process was private but not inherently confidential. As one of the perceived benefits and attractions of the international commercial arbitration is the resolution of disputes by a process which is both private and, subject to appropriate limitations, confidential, consideration should be given to reviewing the effect of the decision (as subsequently occurred in New Zealand[17]).

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[16] (1995) 183 CLR 10

[17] see s.14 of the Arbitration Act 1996 (NZ)