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Dear Sir,

**Re: Review of the International Arbitration Act 1974.
Discussion Paper November 2008 (Discussion Paper)**

The Law Society of New South Wales welcomes the opportunity to make comments and submissions regarding the Discussion Paper.

I attach comments and submissions in relation to the Discussion Paper for consideration.

If any further information is required in relation to the comments and submissions please contact Tony Parbery, Manager Community Referral Service and Dispute Resolution on (02) 9926 0284 or by email to adp@lawsocnsw.asn.au.

Yours sincerely

Joe Catanzariti
President



The Law Society of
New South Wales is a
constituent body of the
Law Council
of Australia



REVIEW OF THE INTERNATIONAL ARBITRATION ACT 1974

COMMENTS/ SUBMISSIONS BY THE LAW SOCIETY OF NEW SOUTH WALES IN RELATION TO DISCUSSION PAPER NOVEMBER 2008

The Law Society generally supports the objects of the review referred to in paragraph 2 of the Discussion Paper with a view to promoting Australia as a venue for international arbitration supported by the *International Arbitration Act, 1974* ("the Act").

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, the written requirement for an arbitration agreement should be amended to achieve consistency with the 2006 UNCITRAL recommendation on interpreting the writing requirement¹ and the developing common law²

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?*

Yes. Paragraphs (3) to (6) of Article 7 (option 1) should be used in the amended definition.

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*³ found that the court held a general discretion to refuse to enforce an arbitral award even if

¹ Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of 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 thirty-ninth session.

² See *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd* [2006] FCA FC 192 at paragraph 152.

³ [1985] 1QD R 406.

none of the grounds in section 8 of the Act was made out. This anomaly has created uncertainty for potential users of arbitration in Australia. The proposed amendment is consistent with the objects of the review.

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 overlap between state and federal legislation has lead to uncertainty.⁴ The Act should be amended to cover the field.

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?

The decision in *Eisenwerk v. Australian Granites Ltd*⁵ has lead to uncertainty in the operation of section 21 of the Act. This should be clarified. Arbitral law is not affected by a party's choice of procedural rules in an arbitration agreement.

The Law Society believes that section 21 of the Act should be amended so that the Model Law will apply unless the parties expressly opt out of its application. As a second position, the Law Society supports a reversal of the *Eisenwerk* decision by adopting a provision similar to sub-section 15(2) of the *International Arbitration Act* (Singapore).

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. In the interests of legal certainty for the benefit of the users of arbitration services in Australia the drafting inconsistencies should be remedied.

⁴ For example *American Diagnostica Inc. v. Gradipore Ltd* (1998) 44 NSWLR 312 at 321-322, *Pahurpur Cooling Towers Ltd v. Paramount (WA) Ltd* [2008] WASCA 110.

⁵ [2001] 1QD R 471.

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)?*

Yes. The Law Society believes that the arbitrators should have the arbitral powers specified in Division 3 of the Act including consolidation, interest and costs which are fundamental to the conduct of an arbitration except where the parties elect to '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 Law Society supports the adoption of the 2006 amendments to the UNCITRAL Model Law except section 2 of Chapter IVA which allows arbitral tribunals to make ex-parte preliminary orders. The Law Society believes that this would offend the consensual nature of arbitration and is not desirable in the interests of making Australia an attractive venue for international arbitration.

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?*

The Law Society believes that Article 7 (option 1) of the revised Model Law should be adopted. Article 7 (option 1) accommodates advances in electronic communication and contemplates different forms of arbitration agreements. It is to be preferred over option 2 which does not provide that an arbitration agreement must be in writing. Option 2 would provide less certainty to parties contemplating entering into relations in respect of the formation of an arbitration agreement. Article 7 (option 1) is in the process of being adopted in Ireland.⁶

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

⁶ *Arbitration Bill, 2008* (section 2).

The Law Society supports the making of regulations to designate an arbitral institution to perform the functions set out in Articles 11(3) and 11(4) of the UNCITRAL Model Law. Court intervention is not appropriately required to perform these functions which concern appointment of an arbitrator. Access to an arbitral institution would be less costly and more expeditious.

- (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 article 13(3) and 14, to be performed by an arbitral institution similarly designated under the International Arbitration Act?*

The Law Society believes that the other functions referred to in Article 6 of the UNCITRAL Model Law are appropriately the subject of judicial supervision. They include 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). The separation of the authorities performing the functions referred to in Article 6 would be consistent with the current law in Singapore and Hong Kong.⁷

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 Law Society supports the Federal Court of Australia having concurrent jurisdiction over all matters arising under the Act with the Supreme Courts of the states and territories. The Law Society does not support the Federal Court being afforded exclusive jurisdiction in respect of matters arising under the Act for the following reasons:

- (a) Presently litigants have a choice of forum. This will be extended upon the Federal Court having jurisdiction under Parts III and IV of the Act. Vesting exclusive jurisdiction to the Federal Court would remove this choice.
- (b) The Supreme Courts of the states and territories have established expertise in jurisprudence in arbitration. The proposal would prevent continuing access to that developed state and territory expertise and inhibit the development of jurisprudence in the area of arbitration under the Act.
- (c) Exclusive jurisdiction would not of itself allow for the development of more consistent jurisprudence concerning the Act when compared with concurrent

⁷ *International Arbitration Act* (Chapter 143A) (Singapore), section 8 and *Arbitration Award* (Chapter 341) (Hong Kong), section 34C(4).

jurisdiction. Trial judges and intermediate appellate courts are required to respect comity in decisions between courts⁸ and this will continue to provide for a consistency of approach by courts exercising concurrent jurisdiction.

- (d) There has been considerable success in Australia in the operation of a co-operative national approach in respect of statutes including the *Corporations Act*. There is no reason why a similar co-operative approach could not be adopted in respect of the Act with similar effect.
- (e) The Law Society is concerned that the vesting of exclusive jurisdiction may result in jurisdictional disputes (including whether or not a particular arbitration was subject to the Act as opposed to one of the domestic Acts) which would otherwise be avoided in a regime of concurrent jurisdiction.
- (f) The Law Society is concerned that the law of domestic arbitration may not continue to develop consistently with the law in relation to international arbitration if state and territory courts do not continue to have jurisdiction in respect of the Act. The Law Society believes that any inconsistency in the law between international and domestic legislation is undesirable and will make Australia a less attractive venue for international arbitration.

I. Other matters

Question I

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

- (a) Confidentiality

At common law it has been held that arbitrations in Australia are private but not confidential.⁹ The Law Society believes that this is inconsistent with the developing international position and recommends that consideration be given to adopting a provision similar to section 14 (and following) of the *Arbitration Act, 1996* (NZ) providing that there shall not be publication or communication of any information relating to arbitration proceedings under an arbitration agreement or to any award made in those proceedings.

- (b) Representation

Under the present operation of section 29(2) of the Act, foreign practitioners are entitled to appear before an arbitral tribunal. The Law Society believes that for consistency and at a saving of costs the section should be amended to provide

⁸ *Australian Securities Commission v. Marlborough Gold Mines Ltd* (1993) 177 CLR 482 at 492.

⁹ *Esso Australian Resources Ltd v. Plowman* (1995) 183 CLR 10.

that such person might also appear in any court proceedings arising out of or related to arbitration.

(c) Med-Arb Procedure

The Act should be amended to confer power on an arbitrator to also act as a mediator of the dispute subject to the parties consenting in writing. Such legislative recognition of Med-Arb procedure at least in respect of conciliation has been adopted in Singapore¹⁰ and Hong Kong.¹¹ This should be subject to preservation of confidentiality in respect of communications made in private sessions.

¹⁰ *International Arbitration Act* (Singapore), section 16(3).

¹¹ *Arbitration Ordinance* (Cap 341) (Hong Kong) section 2A-2C.