

Uniform Commercial Arbitration Law

REVIEW OF THE LEGISLATION

INTRODUCTION

In 1986 a Working Group was established by the Commonwealth Attorney-General, the Hon. Lionel Bowen M.P. to review, amongst other matters, the operation of the uniform arbitration legislation in Australia.

Members of the Working Group included Mr. John Dorter, President of the Institute, Mr. David Bailey a member of the Institute and a director and Honorary Treasurer of ACICA representing the Law Council of Australia, Dr C. E. Croft, a member of the Institute and Foundation President of ACICA (NT) and Foundation Vice-President of ACICA representing the Government of the Northern Territory as well as representatives of the Attorney-General's Department, Canberra and delegates of the various States Attorney-General of Victoria, New South Wales and Queensland.

RECOMMENDATIONS

The following is a summary of the recommendations of the Working Group.

1. Consolidation of arbitral proceedings

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|--------------------|---|---|
| : current position | — | all parties must apply to court |
| : recommendation | — | one party may apply to the arbitrator |
| | — | if there is more than one arbitrator and they cannot agree, the court may decide whether or not to consolidate the proceedings and give directions as to the conduct of the consolidated proceedings. |

2. Representation—right to legal representation

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| : current position | — | leave of arbitrator required |
| : recommendation | — | amend section 20(1) to provide for right to representation where: |
| | | • any other party or their representative, is legally qualified; or |
| | | • the amount in dispute exceeds \$20,000. |
| | — | amend section 20 to ensure non admitted practitioners can appear. |
| | — | WA should consider subsection 20(4) which prohibits non-WA lawyers appearing in arbitrations. |

- QLD should consider including a provision similar to section 20 in its arbitration legislation.
- 3. Non-arbitral settlement
 - : current position
 - arbitrator may, subject to contrary agreement of the parties, require the parties to attend a settlement conference
 - : recommendation
 - parties may contract into (rather than contract out of) any alternative resolution procedures and those procedures are to be conducted with regard to the requirements of natural justice.
- 4. Inconsistency of Part VII
 - : current position
 - Pt VII is invalid by virtue of section 12 of the Arbitration (Foreign Awards and Agreements) Act 1974
 - : recommendation
 - majority—repeal Pt VII of the State/Territory legislation
 - minority—amend section 12 to allow State/Territory mirror legislation.
- 5. Judicial review
 - : current position
 - in NSW courts will grant leave to appeal if an error of law is apparent considering all the circumstances of the case (including hearing argument). Position in Victoria is uncertain but may be the same.
 - : recommendation
 - enact the *Nema* guidelines (from UK) so leave only granted if an error of law is apparent on the face of the award (without hearing argument).
- 6. International provisions
 - : current position
 - sections 11, 40 and 55 contain provisions which exempt international arbitrations from the operation of those sections
 - : recommendation
 - Sections 11(2), 11(3) and 40(7) to be repealed upon enactment of the UNCITRAL Model Law. Section 40(6) to be amended to remove refer-

ence to 'domestic arbitration agreement'.

7. Inspection of arbitrator's notes

- : current position — arbitrators' notes not protected from discovery in subsequent proceedings.
- : recommendation — no change required.

8. Uniformity

- : recommendation — discrepancies of a drafting nature in the legislation be referred to the Parliamentary Counsels' Committee with a view to their removal
- Queensland should enact the uniform bill, not simply amend its current legislation to comply in substance
- the Attorneys-General of each State and Territory should write to the Chief Justice of the Supreme Court in their jurisdictions proposing uniform rules of court to govern procedures under the uniform arbitration legislation.

These recommendations will now considered by the Commonwealth and State Attorneys-General.

Apology

Owing to circumstances beyond the control of the Institute, the distribution of the May issue of "The Arbitrator" was considerably delayed.

The inconvenience which this has occasioned members is very much regretted.