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# Review of the International Arbitration ACT 1974 Comments by the Law Council ADR Committee

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## **Submission to the Attorney-General's Department**

**23 January 2008**

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## Table of Contents

<b>Introduction</b> .....	<b>3</b>
<b>Background</b> .....	<b>3</b>
A. Meaning of the ‘writing’ requirement in Part II of the Act .....	4
Answer A (i) .....	4
Answer A (ii) .....	4
B. Grounds on which a court may refuse to enforce a foreign arbitral award .....	4
Answer B .....	4
C. Application of the UNCITRAL Model Law to international commercial arbitrations taking place in Australia .....	5
Answer C .....	5
D. Clarify that adoption of arbitral rules by the parties does not constitute ‘opting out’ of the UNCITRAL Model Law .....	6
Answer D .....	6
E. Drafting inconsistencies in Part III, Division 3 (sections 22 – 27) .....	8
Answer E (i) .....	8
Answer E (ii) .....	8
F. 2006 amendments to the UNCITRAL Model Law .....	8
Answer F (i) .....	8
Answer F (ii) .....	8
G. Court or other authority to perform functions under the UNCITRAL Model Law 9	
Answer G(i).....	9
Answer G(ii).....	9
H. Jurisdiction for matters arising under the Act .....	10
Answer H.....	10
I. Other matters .....	11
Answer I (i) .....	11
Answer I - (ii) .....	11
<b>Attachment A: Profile of the Law Council of Australia</b> .....	<b>12</b>

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## Introduction

1. On 21 November 2008, the Attorney-General, the Hon Robert McClelland MP, announced the Government's intention to review the *International Arbitration Act 1974 (Cth)* ('the Review').
2. The objectives of the Review are to consider whether the *International Arbitration Act 1974 (Cth)* ('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, and
  - (c) consider whether to adopt 'best-practice' developments in national arbitral law from overseas.
3. The Attorney-General seeks comments on these areas of review and any related matters. Further, the Attorney-General seeks to review the Act in the context of promoting Australia as a place for international arbitration.
4. The Law Council notes the growing demand for excellent and cost-effective arbitration services in the Asia-Pacific. The Law Council believes that it is important that Australia has an internationally recognised and consistently applied international arbitration law and system.
5. The Law Council supports the objects and the consultative nature of the Review and welcomes the opportunity to make a submission to the Review.
6. The Law Council's submission to the review has been prepared by its Alternative Dispute Resolution Committee with input from its constituent bodies and sections.
7. The Law Council notes the submissions of the NSW Bar Association and the Victorian Bar Association to the Review.

## Background

The Act was enacted in 1974 to give effect to the 1958 *New York Convention on the Recognition and Enforcement of Arbitration Awards* ('New York Convention'), sections 7, 8 and Schedule 1 of the Act. The Convention has over 130 state parties. In 1989, the Commonwealth Parliament amended the Act by enacting the 1985 *UNCITRAL Model Law on International Commercial Arbitration* ('Model Law'), section 16 and Schedule 2 of the Act.<sup>1</sup>

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<sup>1</sup> [R. Garnett, *International commercial arbitration in Australia: legal framework and problems*, (2008) 19 ADRJ 249 at 249 and 253]

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## A. Meaning of the ‘writing’ requirement in Part II of the Act

### **Question A**

(i) Should the meaning of the writing requirement for an arbitration agreement, in Part II of the International Arbitration 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?

### Answer A (i)

Yes. The Law Council recommends that any proposed amendment require the arbitration agreement to be in writing.

### Answer A (ii)

Yes. The Law Council agrees with the recommendation that the Act be amended to allow for a broad interpretation of the *New York Convention* which is consistent with international best practice as reflected in the 2006 UNCITRAL Recommendation on interpreting the writing requirement in Part II of the Act. The form as outlined in Article 7, Option 1 of the revised Model Law as adopted by UNCITRAL in 2006 is preferred.

## 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?

### Answer B

The approach, as exemplified in *Resort Condominiums International Inc v Bolwell and Another*,<sup>2</sup> has created an anomaly. In this case, the Queensland Supreme Court decided to retain a general discretion as to whether to enforce a foreign arbitral award, even if the grounds for refusing to recognise a foreign award in section 8 are made out. This decision has been considered controversial because it could be seen to allow the courts a broader discretion to refuse to enforce foreign arbitral awards than is provided for in the *New York Convention*. This approach is clearly inconsistent with the *New York Convention* and has not been followed in subsequent Australian cases.<sup>3</sup>

Despite the approach not having been followed, the Law Council notes the comments made in *obiter* by McDougall J in *Corvetina Technology Ltd v Clough Engineering Ltd*<sup>4</sup> which suggest that the existence of a general discretion remains open to interpretation.

The existence of a general discretion creates uncertainty in Australia’s international arbitration system. Having regard to the objects of the review, the Law Council supports the amendment of subsections 8(5), 8(7) and 8(8) in order for the Act to be consistent with international best-practice.

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<sup>2</sup> [1995] 1 Qd R 406

<sup>3</sup> [R. Garnett, *International commercial arbitration in Australia: legal framework and problems*, (2008) 19 ADRJ 249 at 252]

<sup>4</sup> (2004) 183 FLR 317 at 320.

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The Law Council notes the opinion of the New South Wales Bar Association at paragraph B.5 of its submission and recommends that the Review consider amending the method of enforcement of the award to further the objective of clarifying the Act.

### **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?*

Answer C

Yes. There is uncertainty about the applicability of State and Territory Commercial Arbitration Acts to international commercial arbitrations in Australia to which the Model Law applies. Such uncertainty spreads across a gamut of issues, including enforcement of foreign awards<sup>5</sup> and powers to remove arbitrators.<sup>6</sup>

The Model Law applies to international commercial arbitrations where the place of arbitration is Australia subject to section 21 of the Act. Section 21 provides:

*If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.*

The Act currently lacks a mechanism to expressly exclude the potential application of State and Territory Commercial Arbitration Acts to an international commercial arbitration in Australia to which the Model Law applies.

The Law Council submits that amending section 21 to provide that the Model Law should prevail unless the parties expressly opt out would further the objectives of the Review to provide 'a comprehensive and clear framework governing international arbitration in Australia.'

The Law Council notes with approval the opinions of the New South Wales Bar Association at C.1 to C.12 of its submission, in particular the opinions expressed regarding the need for the Act to be a comprehensive arbitration law for international arbitrations taking place in Australia.

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<sup>5</sup> *Biakh v Hyundai Corp* (1988) 15 NSWLR 734

<sup>6</sup> *Raguez v Sullivan* (2000) 50 NSWLR 236

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**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?*

Answer D

Yes. The Law Council agrees with the proposal to amend the Act to reverse the decision of the Queensland Court of Appeal in *Eisenwerk v Australian Granites Ltd*,<sup>7</sup> but such an amendment should not affect the laws applying to arbitrations which are not subject to the Model Law.

In *Eisenwerk* the parties to the arbitration formed an agreement about the procedural rules for the arbitration. The Court held that the Model Law did not apply to the arbitration because the agreement on the procedural rules for the arbitration amounted to an agreement in accordance with section 21 of the Act, that the arbitration was to “*be settled otherwise than in accordance with the Model Law.*”

This decision has had undesirable consequences and parties who wish for the Model Law to apply are prevented from nominating an alternative set of rules to govern their arbitration, unless those rules expressly state that by selecting the rules the parties do not intend to exclude the operation of the Model Law.

There is a fundamental distinction between the Model Law and institutional arbitration rules such as the ICC and SIAC Rules. The rules are essentially procedural whereas the Model Law prescribes the law governing the arbitration. As stated on the UNCITRAL website:<sup>8</sup>

*The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.*

Further, the third paragraph of the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 states:

*Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make as few changes as possible when incorporating the Model Law into their legal systems.*

The intent of the Model Law to create uniformity amongst contracting states has influenced the view of the Law Council in its submission to Question D.

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<sup>7</sup> [2001] 1 Qd R 461

<sup>8</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) accessed 8 January 2009.

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The Discussion Paper suggests that adopting a provision similar to subsection 15(2) of the Singapore *International Arbitration Act* would be sufficient to reverse the *Eisenwerk* decision.

Singapore amended its *International Arbitration Act (Chapter 143A)* after the decisions of *Eisenwerk* and *John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd v Toyo Engineering Corp (Japan))*.<sup>9</sup> Section 15 of the Singapore *International Arbitration Act* provides:

**Law of arbitration other than Model Law**

15. (1) *If the parties to an arbitration agreement (whether made before or after 1st November 2001\*) have expressly agreed either — \*Date of commencement of the International Arbitration (Amendment) Act 2001 (Act 38/2001).*
- (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)*

This amendment achieves two things:

1. it ensures that the Model Law is not excluded simply by the parties choosing an institution's set of arbitration rules; and
2. it ensures that an arbitration law will apply even if the parties opt out of the Model Law.

Regarding the first point, the adoption of a provision similar to subsection 15(2) of the Singapore *International Arbitration Act* would be effective in reversing the *Eisenwerk* decision. However, perhaps a more precise amendment would be to amend section 21 of the Act 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.

The Review may wish to consider the need for further amendments to the legislation to provide for the application of the Act where parties have expressly opted out of the Model Law.

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<sup>9</sup> [2001] 2 SLR 262

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## 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?*

*(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)?*

#### Answer E (i)

Yes.

#### Answer E (ii)

Yes. Consistent with other legislation, it would be preferable to have sections 25-27 relating to interest and costs apply on an “opt out” basis (that is, applying unless the parties agreed otherwise), which would be compatible with the present wording of sections 25-27.

Section 22 should be deleted.

Section 24 should be amended to ensure that it remains on an ‘opt in’ basis.

## 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?*

*(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?*

#### Answer F (i)

Yes, excluding section 2 ‘Preliminary Orders’ of the Chapter IV A amendments. Adopting the recent amendments – excluding section 2 – will increase the certainty and efficiency of the arbitral process.

Chapter IV A, section 2 provides for arbitral tribunals to make preliminary orders on the application of one party without the other party being notified. The hearing of an application and the making of preliminary orders without notice to another party is in conflict with procedural fairness and the consensual nature of the election of international arbitration as a dispute resolution process by the parties.

Adoption of section 2 would, furthermore, not ‘improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration’ and would thus be in conflict with the objectives of the review.

#### Answer F (ii)

Option 1 providing that an arbitration agreement must be in writing and noting the broad interpretation of the writing requirement should be adopted.

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## 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?

(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?

### Answer G(i)

Article 6 of the Model Law presently requires certain functions to be performed by designated courts. However, this is not consistent with the Objects. Accordingly, the Law Council supports amendments of the Act to allow, by regulation, a designated arbitral institution to perform the functions specified in Articles 11(3) and 11(4) of the Model Law, relating to the appointment of an arbitrator. These functions may be carried out without the supervision of a court unless the arbitral institution fails to perform them.

The Law Council notes that both Singapore and Hong Kong have centres for international commercial arbitration which have greatly improved both the efficiency of the arbitral process and the desirability of these countries as destinations for international commercial arbitration.

Amending the Act 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 would be an important step in "...*developing Australia as a regional hub for international commercial dispute resolution.*"<sup>10</sup>

The Law Council notes that the appointment of an arbitral institution is likely to be controversial and as such recommends that the Review engage in further consultation with relevant stakeholders.

### Answer G(ii)

The Law Council submits that the other functions referred to in Article 6 of the Model Law should not be performed by an arbitral institution. Supervision by the courts is necessary in respect of matters which may develop jurisprudence in international arbitration. The Law Council further notes that these matters remain within the jurisdiction of the court in Singapore<sup>11</sup> and Hong Kong.<sup>12</sup>

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<sup>10</sup> Commonwealth Attorney-General, Address opening the conference on "International Commercial Arbitration, Making it Work for Business", 21 November 2008, Sydney, at 24.

<sup>11</sup> *International Arbitration Act* (Chapter 143A) (Singapore) section 8.

<sup>12</sup> *Arbitration Ordinance* (Chapter 341) (Hong Kong) section 34C(4).

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## 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?*

Answer H

The Government is presently proposing to amend the Act to give the Federal Court concurrent jurisdiction with the State and Territory Supreme Courts under Parts III and IV, and to clarify the Federal Court's jurisdiction under Part II (these amendments are expected to be contained in the *Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008*).

The Discussion Paper does not make a case for transferring exclusive jurisdiction over matters arising under the Act to the Federal Court of Australia.

The Law Council does not support such a proposal at this time.

The Law Council has received a copy of the joint submission of the Chief Justices of the States and Territories. The Law Council concurs with the opinions expressed in the submission. Should the Government be seriously contemplating vesting exclusive jurisdiction over international arbitration in the Federal Court of Australia, then the Law Council submits that clear and precise reasons must be given for the proposal and that further consultation, particularly with the State and Territory Supreme Courts and the Federal Court, is needed.

The Law Council believes that any concerns regarding the consistency of decisions in international arbitration matters can be adequately addressed by referring matters concerning the interpretation of the Act to a "specialist list" of judges within a court. The Law Council notes that this practice already occurs to varying extents within State and Territory Supreme Courts and that the Federal Court has recently appointed Justice Jacobson to head a specialist list for international arbitration in the Federal Court in Sydney.

The Law Council considers that concerns regarding the consistency of decisions between States and Territories are adequately dealt with by the High Court decision in *Australian Securities Commission v Marlborough Goldmines Ltd*<sup>13</sup> which requires all Australian intermediate courts of appeal to follow the judgement of another intermediate court of appeal with respect to an arbitration matter.

The Law Council notes that the creation of specialist lists is widely practised and that the High Court of Singapore has appointed several judges as specialist 'arbitration' judges. The Law Council supports and encourages the creation of specialist lists of judges to preside over international arbitration matters.

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<sup>13</sup> (1993) 177 CLR 485.

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## I. Other matters

### **Question I**

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

#### Answer I (i)

The Committee suggests that consideration be given to the incorporation of other Alternative Dispute Resolution (ADR) processes, such as mediation and med-arb (an hybrid of mediation and arbitration) within the provisions of the Act and/or the Model Law. There are an increasing number of international arbitration rules and legislation which provide for ADR processes in addition to arbitration.<sup>14</sup> Such a development would enhance the position of Australia in the provision of ADR services within the South-East Asian region. As accreditation and governance issues of ADR practitioners develop and consideration of the courts, institutions or centres to govern the activities of practitioners also matures, the profession and courts will require information and the capacity to consult in respect to these developments at the earliest opportunity.

#### Answer I - (ii)

The decision in *Esso Australian Resources Ltd v. Plowman*<sup>15</sup> found that arbitrations in Australia are private but not confidential. This is inconsistent with the law in England<sup>16</sup> and New Zealand.<sup>17</sup> Accordingly, the Act needs to be amended in order to fulfil the objects of this review.

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<sup>14</sup> See for example: *English Arbitration Act (1996)* section 51, *German Arbitration Law* section 1053, *Hong Kong Arbitration Ordinance 1996* subsections 2A(2) and 2B, *Singapore International Arbitration Act 1995* subsections 16-17, *Indian Arbitration and Conciliation Act 1996* section 30, *Taiwanese Arbitration Act*, Articles 44 and 45, and the *Japanese Arbitration Act (2003)* section 38(4).

<sup>15</sup> (1995) 183 CLR 10.

<sup>16</sup> see for example, *Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 WLR 314.

<sup>17</sup> section 14 of the *Arbitration Act 1996* (NZ).

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.