

Jewell, Renae

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From: Charles Anderson [charles@mbawa.com]
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 To: Jewell, Renae
 Subject: Inquiry into Commercial Arbitration Bill 2011

upon tabling of Committee's Report

Submission 11

Dear Ms Jewell

The Master Builders Association of Western Australia thanks the Standing Committee on Uniform Legislation and Statutes Review and its chairman, the Hon. Adele Farina MLC, for the opportunity to comment on the Commercial Arbitration Bill 2011.

Master Builders represents about 1700 building businesses throughout Western Australia. It produces and sells a range of building industry contract documents which include dispute resolution clauses providing for arbitration.

Among the Association's membership are a number of arbitrators and firms which assist and represent parties in arbitration. Master Builders asked a small number of such members for their views on clause 27D of the Bill. Generally, the responses showed that clause 27D was acceptable.

However, clause 27D(7) was viewed as flawed or unacceptable. Comments were that:

- It could lead an arbitrator who conducts mediation to think he or she must disclose confidential information given in the mediation even though the arbitrator is not continuing with the arbitration.
- It should not be left to an arbitrator who conducts mediation to make decisions as to what information is material to subsequent arbitration proceedings and what should be disclosed.
- An arbitrator who decides that information disclosed during mediation is not material to arbitration proceedings nevertheless might be influenced by that information unbeknown to the parties.
- An arbitrator to whom confidential information has been disclosed during mediation should disqualify himself or herself from continuing as arbitrator.
- Supreme Court mediations are conducted by Registrars. If unsuccessful, hearings proceed before Judges who have no knowledge of information disclosed during the mediations. It would be strange to impose a different level of responsibility on arbitrators.
- Arbitration and mediation should be separate proceedings.
- Clause 27D would be more helpful if it provided arbitrators with discretion to refer matters to mediation (by a separate mediator) where that was considered to be potentially beneficial in, for example, simplifying or narrowing the issues.

From consideration of the draft clause and from the member responses, Master Builders concludes that while clause 27D generally is acceptable, clause 27D(7) is not and that the Bill should provide that if an arbitrator conducts mediation proceedings which are terminated without a resolution to the matters in question, that arbitrator should be disqualified from conducting any subsequent arbitration proceedings on those matters.

Thank you again for the opportunity to comment.

Regards

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