Submission 12

12 October 2011

PUBLIC
upon tabling of Committee's Report

Hon. Adele Farina MLC
Chairman Standing Committee
Uniform Legislation and Statutes Review
West Australian Parliament

REF: COMMERCIAL ARBITRATION BILL 2011

My submission, herewith, emanates from analysis of the Commercial Arbitration Act 1985 (the Act) pursuant to a specific case, which perforce, does not limit the generality of its application to the wider issues of the Act and the Bill. Community interest endemic in the Act postulates proactive attitude to enforcement by the Parliament, and the courts; referal to SAT is in point, Documents enclosed (letters to and from federal and state attorneys general) reflect an indeterminate attitude to arbitral practitioners and the operation of the Institute of Arbitrators and Mediators Australia, which suggests that in the implementation of our democratic justice system there is priority and a differential of interest. In this context the IAMA would be designated statutory and accountable to the Parliament and the Courts. Referal of civil or criminal matters to the courts is a citizen's democratic right, and logically should apply to any party requiring resolution of a problem, irrespective of a second party's opinion to the contrary, in the paradigm system of arbitration.

I now refer to Clause 21 of the Bill (COMMENCEMENT OF ARBITRAL PROCEEDINGS COMMENCE ON THE DATE THAT A REQUEST FOR REFERRAL TO ARBITRATION IS RECEIVED BY THE RESPONDENT. THE CLAUSE APPLIES UNLESS OTHERWISE AGREED BY THE PARTIES.). This is a salutary and recommendable amendment of the current system where (ref. decision of the Legal Practitioners Complaints Committee) proceedings commence post the preliminary conference. The contingency of parties or arbitrator with intent, by whatever means possible, to pervert the course of justice, was not entertained by the Legal Practitioners Tribunal, simply because "arbitral proceedings had not commenced and thecourse of justice started after the initial conference not during it", which manifestly constitutes a legalistic reductio ad absurdum.

I now refer to Clause 32 of the Bill (TERMINATION OF PROCEEDINGS) Reasons for terminating proceedings patently can be imputed or fabricated by the complainant, the respondent or the arbitrator. In the context of either party alleging reasons for termination or invalidation of the arbitral process Clause 33A (SPECIFIC PERFORMANCE) enables an arbitrator to make an order where the Supreme Court would have power to do so,

In respect of the conduct of the arbitrator in the matter, referral by either complainant, or respondent, or both shoudld be made to a court, preferably SAT or the Department for Consumer Protection. In the event of an adverse finding by the court, or the agency, the arbitrator should be deregistered and rendered accountable for any preceeding costs. The court or the agency should have the power to nominate a substitute arbitrator.

SIGNED. D. G. MacCarthy

Enclos: 4.

10 January 2011

The Hon Christian Porter MLA
Attorney General of WA
Level 29 Allendale Square
77 St Georges Terrace
PERTH WA 6000

Dear Minister Porter,

The enclosed letter from the Federal Atterney General's Department puts this letter in perspective.I have already taken up the recommendation in the letter referring the referral to the Legal Practitioners Complaints Committee.
It is unacceptable that in Australia,purporting to be a paradigm of the Western System of Law and Order,that the Institute of Arbitrators and Mediators is allowed to remain non-statutory.
Having said that,may I bring to your notice that the enforcement of the West Australian Commercial and Arbitration Act 1985,as mentioned in the letter,is with respect,your responsibility as delegated by the people of Western Australia.
The central issue is the functioning of the IAMA purporting to be an alternative to the Australian Court System. The perpetrators function in a part-time mode,and invariably have in parallel,a full-time profession or job.In general the system presumably must work adequately, but when the predictable hitch arises the system non-statutory,and in structure disseminated across the States,flounders and retreats to their states.On apersonal level the actual case which has led up to this complaint is outlined in the documents enclosed.

Yours truly
D.G. MacCarthy
D.G. MacCarthy

Encles.

Treasurer; Attorney General

Our Ref: 35-12652

Dear Mr MacCarthy

Thank you for your letter dated 10 January 2011 regarding your concerns about the conduct of a member of the Institute of Arbitrators and Mediators Australia (IAMA).

As the Attorney General, it is not possible or appropriate for me to provide legal advice or to become involved in a private matter. Should you wish to pursue the matter further, I suggest that you seek independent legal advice.

In response to your questions regarding IAMA's non-statutory nature, I note that it is a private organisation which provides arbitration and mediation services. The *Commercial Arbitration Act 1985* (WA) does not give any rights, privileges or powers to IAMA, and does not require the use of arbitrators from IAMA.

I further note that parties to a contractual dispute are free to choose an arbitrator from IAMA or from any other service provider, depending on the terms of the contract.

Yours sincerely

Hon C. Christian Porter MLA
TREASURER; ATTORNEY GENERAL

18 FEB 2011

Level 21, Governor Stirling Tower, 197 St Georges Terrace, Perth Western Australia 6000
Telephone: +61 8 9222 8800 Facsimile: +61 8 9222 8801 Email: Minister.Porter@dpc.wa.gov.au

4 November 2010

Hon.Robert McCleland MP
Attorney General Australia
3-5 National Circuit
BARTON ACT. 2000

Dear Mr McCleland,

REF; Institute of Arbitrators & Mediators Australia

May I bring to your attention a cultural,obviously , modus operandi which is perceptible in the IAMA . As a national statutory body it falls within your jurisdiction. What is clearly evident from close diagnosis of its operations and operatives,is that it is a loosely structured,and volatile system,devoid of the checks,balances,and transparency,which the Australian community ,if not global perspective,would anticipate from a statutory body,purporting to be a paradigm of the western system,and an alternative to our Australian judicial system.
While it is common ground that self regulatory agencies at State level, evince a discernible trend to bias in resolving complaints against their members,the IAMA functioning Australia wide in resolution ibidem,under stress,and or,opportunity,emanating from remoteness of control,and communication,has inclined to the easy way out, viz. intellectual abdication of responsibility and professional standards.Its quick-fix resort to employment of foreclosure of communication,is indicative of disregard of natural justice,and contempt of Australian justice system.With respect the Murdoch press would undoubtedly describe it as cop-out,and the Australian community would be on their wave length.. It might be claimed however,that if the IAMA chooses to underwrite a motley crowd of lawyers and trades people on its list of arbitrators and mediators a motley set of values and loyalties will emerge, The system functions on a hope and a prayer,distanced from the public eye,and in a democratic value system workable,but when the predictable hitch arises in the process the generalised system immune to moral will,has no answer,but to sweep it under the carpet and retreat to their fulltime occupations. The IAMA website I notice refers to an inhouse report concerning the necessity for wide reform in the systemm

Yours truly
D.G. McCarthy
D.G. McCarthy

Encles.

Response overleaf.

Australian Government
Attorney-General's Department

AG-MC10/13651

13 December 2010

Dear Mr McCarthy

I am writing in response to your letter of 4 November 2010 to the Attorney-General, the Hon Robert McClelland MP, expressing concern about the conduct of the Institute of Arbitrators and Mediators Australia. I have been asked to reply on behalf of the Attorney-General.

I acknowledge your frustration with the events you describe. However, the IAMA is an independent, non-statutory body, the operations of which fall outside the jurisdiction of the Commonwealth Attorney-General. Further, as you are aware, the legislation to which you refer, the *Commercial Arbitration Act 1985* is a Western Australian Act, and not Commonwealth, legislation. You may therefore wish to raise your concerns with the Western Australian Attorney General, whose contact details are set out below:

The Hon Christian Porter MLA
Attorney General of Western Australia
Level 29, Allendale Square
77 St Georges Terrace
PERTH WA 6000

Your correspondence suggests that you may also have a concern about the conduct of one of the lawyers in this matter. If you wish to pursue this issue, you could write to the Legal Practitioners Complaints Committee of the Western Australia Legal Practice Board at:

Legal Practitioners Complaints Committee
Post Office Box Z5293
St Georges Terrace
PERTH WA 6831

I hope the above information is of assistance to you.

Yours sincerely

Serena Beresford-Wylie
Acting Assistant Secretary
Justice Policy Branch

I refer to my letter enclosed, addressed to the Chair of the standing committee in reference, Par.1. "My submission emanates from.....a specific case." The specific case in reference is as outlined below. The major players in the case were:

(i) BGC Residential (Subsidiary company of the BGC group of construction, mining, manufacturing, building and retail companies.)

(ii) The Home Industry Association largely subsidised by the subsciptions of its members and building companies. A.Goold nominated from the HIA panel arbitrators.

(iii) T.Pritchet (Plunket Homes) HIA Vice President to A.Kinder (BGC Residential) and subsequently President.

You will note from the enclosures that they derive from an arbitration process. I will explain: Section 16 of the Housing Industry Association (HIA) contract format states that in the event that either party considers that the other party is resisting resolution, that party may request the president of the HIA to appoint an arbitrator. The retiring president of the HIA, Anthony Kinder, happend to be the general manager of the BGC Residential group of companies, and ipso facto constituted a major confliet of interest. His deputy and successer im the presidency appointed Adrian Goold to arbitrate, who started proceedings by writing a letter ~~by~~ informing the parties that he wasn't immediately available, and invited us to request somebody elsefor the job.
Notwithstanding, as a member himself of the HIA, he eventually did as he was instructed by his association, and conducted the Preliminary Meeting during which all future arrangements for process were discussed and confirmed. It was mandated by arbitrater Adrian Goold that my points of claim would be delivered on a specific date ; they were delivered before the due date; and BGC would respond by a specific date; BGC did not respond at all. On receipt of the points of claim Mr Goold retained the in judicial administrative mode, and enabled BGC to claim that they did not receive the points of claim, and were under no obligation to respond In the wake of events arbitrator Goold resigned and effectively went to ground. The HIA refused to appoint a replacement for him. Following a complaint to the IAAMA in Melbourne Mr Goold has returned the documents

D.L. MacCarthy

(i)&(ii) not relevant-deleted.

(iii) When Antony Kinder General manager of BGC Residential completed his term of office as President of the HIA his successor Tony Pritchett of Plunkett Homes was requested, pursuant to Section 16 of the Contract to appoint an arbitrator.

(iv) Adrian Goold was the appointee for arbitration, but he indicated an attitude to his appointment, and suggested to the parties to request a nominee other than himself. Patently the parties had been presented with an invidious and unprofessional situation. In the light of sequel to events (Tony Pritchett President HIA at later date refusing to appoint a substitute arbitrator) and compounded by the fact that the BGC party gave no indication that it would comply with the invitation to request another arbitrator, it could be concluded that had I deleted Adrian Goold from the contractual requirement and actually asked for somebodyelse, the president of the HIA could have argued that he had complied with contract and his case was per se rested.

(v) Section 16 of the Contract states that the initial fund was to be paid directly to the HIA by the party requesting the arbitration. I was the party who requested arbitration. The HIA ignoring the specific requirement of the Contract, in written statement ordered that expenses were to be paid to the arbitrator.

(vi) At the preliminary conference held on 3July 2009, Adrian Goold, nominee arbitrator conducted the conference, in the trust th[illegible] all parties were cognisant of ensuing process and committed to participate. No discussion in regard to money took place.

(vii) Arbitrator Goold ordered that my lawyers deliver my points of claim by 31 July 2009 and the defendant to respond within 14 days from that date. Cullen Babington Hughes Lawyers delivered the points of claim on 23 July 2009 to arbitrator Goold at the HIA Building, where the preliminary conference had taken place. He has since returned the points of claim, and acknowleged that Cullen Babington Hughes Lawyers delivered them to him.

(viii) Adrian Goold arbitrator held the points of claim in adjudication administration mode for an unconscionable time and ipso facto obstructed the course of justice.

(ix) BGC legal representative Toby Bishop claimed that he did not respond to the points of claim because he did not receive them.

(x) It defies credibility on the professional level that some communication did not occur between the arbitrator Goold and the lawyer Bishop. Conversely if they didn't commu[illegible]cate the charge of negligence is postulated. The code of conduct of legal practitioners encumbent on arbitrator Goold and lawyer Bishop between delivery of the points of claim on 23 July 2009 and the due date for response to them on 14 August 2009 would require both to follow the course of justice as discussed and agreed at the preliminary meeting.

(xi) In the month of August 2009 after 31 July 2009, the date when the defendant BGC Residential, was to receive the points of claim, but claimed it didn't, arbitrator Goold resigned, you could say it was a joint resignation. The reason that he gave for his action demonstrably is unacceptable. The president of the Housing Industry Association Tony Pritchett refused to appoint a replacement arbitrator.

(xii) His conduct may be construed as contempt of the Commercial Arbitration Act 1985. Part V Section 45.

"Party not prevented from alleging that arbitrator appointed by that party is not impartial, suitable or competent."

* N.B. The lawyer Bishop quit the case and the company approximately contemporaneously.

31 August 2010

Ron Salter Chairman
Institute of Arbitrators & Mediators
Law Courts, Melbourne Victoria 3000

Dear Mr Salter,

REF: 317/09

I refer to your letter dated 16 July 2010,and also to my letter in response dated 5 August 2010. With respect,I have perforce to point out that the protocol and time frame for handling complaints against a member (Ref. Adrian Goold) as proclaimed on the Institute's website,has not been followed in this matter,nor prima facie,been accorded the respect that the community would anticipate from a statutory body. May I take the liberty to quote:—
(i) The Adjudication Administrator must acknowledge receipt of complaint and forthwith inform the complain-ant that the complaint would be forwarded to the CEO,for referral to the Chair of the National Professional Affairs Committee.
(ii) The material shall be forwarded to the PAC within three days of receipt.
(iii) The Chair of the PAC shall review the material within five business days after receipt.
(iv) The complainant shall be given a written response from the member.
(v) I-f the Chair of the PAC determines that the case possesses substance it shall be referred to the Council for inquiry under Article 37A of the Articles of the Association.

Within the context of aforesaid protocol this is what actually occurred:

(i) Monday 24 Dec.2009. I telephoned the WA Chapter of the Institute and spoke to Helen Goddard(read Adjudication Administrator). Helen perceptibly,was professional and cooperative.She assured me that the CEO,John Fisher would respond to me later. John Fisher,CEO WA Chapter of the Institute did not respond.
(ii) Tuesday 12 Jan.2010. I telephoned the WA Chapter of the Institute once more,on the number 62782022. I anticipated speaking to Helen Goddard and instead I was through to CEO John Fisher,via an answer phone. I left a message for the CEO thatHelen Goddard had confirmed to me that he had received my message and would respond. John Fisher did not respond
(iii) 30 Jan.2010 I wrote to the President of the Institute of Arbitrato and Mediators at the National address,Melbourne.
I have already referred to Chairperson Laurie James in my letter dated 5 August 2010,and in context noblesse oblige,reserve comment.
At this juncture I rest my case,seemingly in limbo.
The central consideration in this matter is that arbitrator nominee Gool unprofessionally resiled from his office , and the case,and by so doing, occluded my contractual right to an arbitral appointment by the President of the HIA. The principle of cui bono is endemic in this context and would be addressed in a court situation.I have asked the current president of the HIA to appoint a substitute arbitrator and he has refused.His immediate predecessor in the officewas the managing director of BGS Residential , Anthony Kinder, the principal defendant in the case, who in virtue of office,was empowered to appoint an arbitrator.
It is apposite in this scenario to put Arbitrator Goold's CV as it appears on the Institute's website,in perspective:
(i) He states that he obtained builder's registration by exam,in 1962. which seems to indicate that he has passed retiring age,and conceivably without the incentives and/or need to conform.

(ii) He claims that he was owner/manager of Nairda Constructions from 1977-2005 and also 1977-2000, which dates require explanation. ASIC has informed me that Naida Constructions was deregistered in 1983. ASIC also informed me that it had no information on Nairda's principal place of business. With a modicum of research it emerged that there was a company with the name of Nairda Constructions based in Nigeria, perceptibly with a higher profile than its West Australian namesake, in global terms. Whether the latter has implication for the Business Names Act 1962 is amatter of interest. Hypothetically, legalistical consideration would suggest a stock exchange concern.

(iii) He claims that he possesses a diploma in real estate without quoting the source, date of the award, or evaluation of significance.

(iv) He states that he is a member of the HIA (builders union) which can be purchased for a fee.

I enclose arbitrator A.Goold's letter dated 12 April 2010 in which he admits that he received my Points of Claim delivered by Cullen Babington Hughes Lawyers on 23 July 2009 to which lawyer Toby Bishop (BGC Representative) was to respond, as mandated by arbitrator Goold, within 14 days. It would now appear that we must accept that the defendant's lawyer did not respond to the points of claim as prearranged at the preliminary conference, because in effect the arbitrator precluded him from doing so. and moreover, after eleven days of adjudication administration of the material withheld, he abandoned the case.

An investigative journalist, in the light of the facts of this scenario, would suspect collusion. Within a few weeks, in the wake of these events, Toby Bishop resigned from his firm, and went elsewhere.

Mr Salter, there is, demonstrably, sufficient evidence in the process of this case, for the next conference of attorneys general to review the Commercial Arbitration Act 1985. Whether the Western Australian CCC would in context, identify a role for itself, remains to be seen.

Yours truly

D.G.MacCarthy.

D.G.MacCarthy.

Enclos.