CHIEF JUSTICE OF WESTERN AUSTRALIA
Chief Justice's Chambers, Supreme Court of Western Australia,
Stirling Gardens, Barrack Street,
Perth, Western Australia 6000

Telephone: +(08) 9421 5337 Fax: +(08) 9221 3833
Email: chief.justice.chambers@justice.wa.gov.au

Submission 3

Our ref: LEGN5010

28 September 2011

The Hon Adele Farina MLC
Chairperson
Standing Committee on Uniform Legislation and Statutes Review
Parliament House
PERTH WA 6000

Dear Ms Farina

Inquiry into Commercial Arbitration Bill 2011

Thank you for your letter of 23 September 2011 in which you request my comment upon cl 27D of the Commercial Arbitration Bill 2011.

Before responding to that request, I would like to make some general observations with respect to the desirability of uniformity in the legislation of the various Australian jurisdictions dealing with commercial arbitration. The particular significance of the Bill currently before the Parliament, and in my respectful view one of its major advantages is that it will, at last, bring the legislation governing commercial arbitration in all Australian jurisdictions into line with the legislation which governs international commercial arbitrations (that is, arbitrations conducted in Australia between parties based in different countries).

The fragmentation and inconsistencies between the various laws governing commercial arbitration in Australia has caused inconsistency in interpretation and application of those laws, which has in turn discouraged resort to arbitration within Australia both domestically and by parties to international transactions. Recent decades have seen State and Territory boundaries become increasingly irrelevant to national commerce and more recently, the increasing globalisation of trade has similarly reduced the significance of national boundaries. The structure of our federation which provides each of the various polities with a degree of control over the law relating to commercial arbitration, and the utilisation of those powers to enact different laws, has been a significant disadvantage to Australian commerce and to the legal profession of Australia. Those disadvantages and the consequential disincentive to use Australia as a seat for commercial arbitration have been exploited by Australia's commercial rivals. The fact that Australia has not been seen to be uniformly in step

with international trends in relation to commercial arbitration has been utilised by each of Singapore and Hong Kong to establish themselves as the dominant seats for commercial arbitration in our region. For these reasons, I cannot emphasise too strongly the desirability of Western Australia staying in step with other Australian jurisdictions, and the undesirability of making any amendments to the uniform legislation unless agreement is reached to make that amendment in all Australian jurisdictions.

This is an issue to which I will return after responding to your specific request in relation to cl 27D of the Bill.

My comments were sought in relation to cl 27D of the Bill earlier this year, by the Secretary of the Standing Committee of Attorneys-General. That advice was sought in the context of a discussion paper which had been issued in relation to the clause, which identified a number of issues upon which I commented.

The first issue raised in that discussion paper and upon which I commented was the question of whether the authority conferred by the clause upon arbitrators should extend to forms of alternative dispute resolution other than mediation. I supported the provision in para (8) of the clause which has the effect of extending its operation to all forms of non-arbitral intermediary functions performed by an arbitrator, given the increasing diversity of differing forms of alternative dispute resolution. I remain of that view.

The second issue raised by the discussion paper and upon which I commented was the question of whether there should be a time specified within which the consent of the parties had to be provided to enable an arbitrator to proceed with the arbitration following the termination of the mediation proceedings. I suggested that it would be desirable to identify a time within which such consent should be provided (subject to empowering the parties to extend that time by agreement), to avoid a situation in which there might be a substantial delay in the recommencement of the arbitration proceedings following the termination of the mediation proceedings. However, I note that this suggestion has not been included in the uniform Bill.

The third matter raised in the discussion paper concerns the provisions of the clause relating to the disclosure of confidential information obtained during mediation proceedings in the event that the arbitrator proceeds with the arbitration proceedings (with the written consent of the parties) following the termination of mediation. The suggestion contained in the discussion paper was to the effect that the arbitrator might be required to

disclose to all parties any confidential information which he or she considered to be material to the arbitration proceedings prior to a party consenting to the arbitrator resuming his or her arbitral function. I did not support that proposal, because it seemed to me to be likely to inhibit the candour of disclosure of information to the arbitrator by the parties during the course of the mediation process. Any inhibition upon that candour is likely to seriously reduce the efficacy of the mediation process.

On the other hand, a circumstance in which an adjudicator receives information from one party which is not disclosed to the other is, of course, contrary to basic principles of procedural fairness. It was my view that the best way of resolving these conflicting principles was to include a provision requiring an arbitrator to indicate to any party who had provided him or her with confidential information precisely which parts of that information the arbitrator would disclose pursuant to para (7) of the clause in the event that the party consented to the arbitrator continuing in office following the termination of the mediation proceedings. Such a provision would mean that each party would know, before providing their consent to the arbitrator proceeding with the arbitration, just what confidential information would be disclosed to the other parties in the event that consent is provided.

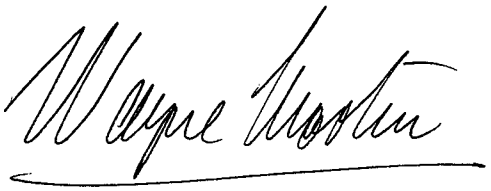
I note that the uniform Bill has not embraced this suggestion. However, I also note that any party concerned at the consequences of giving consent to the arbitrator to continue with the arbitration, having regard to the provisions of para (7) of the clause, could request the arbitrator to provide a statement as to the information that he or she would disclose in the event that consent was provided, prior to providing that consent. If the arbitrator declined to provide that statement, the party could simply refuse their consent to the arbitrator proceeding, and the default provision (contained in para (4)), precluding an arbitrator who has conducted mediation proceedings from continuing the arbitration would apply, and a new arbitrator would have to be appointed with the result that the confidential information disclosed to the previous arbitrator would not be disclosed to the parties.

I remain of the view that the Bill would probably be enhanced by the modifications which I suggested. However, the small advantages that might be achieved by such modifications are not, in my view, outweighed by the very substantial disadvantages which would flow if the Bill were amended in terms which were idiosyncratic to Western Australia. In other words, it seems to me that the great advantages which flow from uniformity in this area significantly outweigh any minor advantages that might be gained by tinkering with the precise terms of cl 27.

I trust these comments are of assistance and would, of course, be pleased to expand upon any aspect of them at your convenience.

Thank you for providing me with the opportunity to comment upon these issues.

Yours sincerely



The Hon Wayne Martin
Chief Justice of Western Australia