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Submission 6

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

PUBLIC
upon tabling of Committee's Report

Dear Ms Farina

Inquiry into Commercial Arbitration Bill 2011

I refer to your letter dated 23 September 2011 in which you invite me to provide my comments on clause 27D and particularly 27D(7).

I have acted as either a mediator or an arbitrator in a range of matters. I am aware that s27 of the *Commercial Arbitration Act 1985* provides for an arbitrator to also act as a mediator in the same dispute. However, based on my experience I am unable to see how an arbitrator who has acted as a mediator in mediation proceedings between the parties to a dispute can subsequently conduct arbitration proceedings in relation to the same dispute. In a mediation each party provides information to the mediator on a confidential basis. Whilst the mediator may not divulge that information to the other party, he may otherwise use the information in seeking to resolve the dispute but if the dispute is not resolved, clause 27D(4) envisages a situation in which the same person may then proceed to act as arbitrator in relation to the dispute as long as he has the written consent of the parties to do so.

I cannot imagine a situation in which the information received by the arbitrator in his role as a mediator will not (at least subconsciously) affect his analysis of the evidence in the arbitration proceedings and potentially his award. In my respectful view, if during arbitration proceedings the parties agree that the arbitrator will act as a mediator, then if the mediation fails to resolve the dispute the arbitrator should be disqualified from further acting as arbitrator in the matter regardless of whether the parties are prepared to consent to his continuing in that role.

If the above suggestion is ultimately implemented in the Bill, the provisions of clause 27D(7) will not be required. However, if you do not agree with my submissions in respect of clause 27D(4), I would have thought that the provisions of clause 27D(7) are fraught with difficulty.

First, what an arbitrator considers to be material to the arbitration proceedings must always be a largely subjective determination on his part. If he should omit to disclose to the parties information that he considers to be immaterial but which either party considers to be material, there is the risk that the award will be subject to appeal on the basis of the arbitrator's misconduct.

Second, clause 27D(7) is likely to open up an enquiry within the arbitration proceedings as to whether the arbitrator has disclosed to all parties such information as the parties consider material to the arbitration proceedings. This is likely to affect the progress of the arbitration proceedings and again expose the award to review on appeal.

Third, information conveyed to the arbitrator in his role as a mediator is not evidence in the arbitration proceedings. What status is to be afforded to information received by the arbitrator that he considers material to the arbitration proceedings but which is not before him as evidence in the arbitration proceedings? He can have no regard to that information unless it forms part of the evidence ultimately presented in the arbitration proceedings, yet it will be information held by the arbitrator which may improperly influence his decision in respect of the issues before him.

In order to preserve the integrity of the arbitration process, my view is that clause 27D(4) should state only that an arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute. This would then obviate the need to have clause 27D(7) in the Bill. I consider this to be a much safer course to adopt.

Yours faithfully

MH Zilko SC