Jewell, Renae

From: John Hockley [jhockley@francisburt.com.au]
Sent: Monday, 31 October 2011 8:53 AM
To: Jewell, Renae
Subject: FW: SCommercial Arbitration Bill 2011

PUBLIC
upon tabling of Committee's Report

Dear Renate,
I do not know whether you are still taking material on this topic.
I have been away and busy.

In S27D the arbitrator acts as mediator and subsequently as arbitrator. This change of roles is difficult, if not impossible.

It is problematic where the mediator has received confidential information from a party in the conduct of the mediation with a duty not to disclose but later becomes the arbitrator. Ss 4 requires that the parties consent to the mediator acting as arbitrator and ss 7 requires the arbitrator to be to disclose confidential information to all parties if he/she considers that such information may be material in the arbitration and must do so before starting the arbitration.

On smaller but not minor point is what happens where the arbitrator later discovers that confidential information may be material (say, half way through the arbitration), what are they to do then?

The reality is that S27D is useless and unlikely ever to be used. This is because a party will first want to see what confidential information the arbitrator may wish to disclose to the other party before giving consent to the person to act as arbitrator.

The whole point is that arbitration is for the parties to decide – we do not need the level of prescription of S27D. If the parties wish to have a mediator carry on and be the arbitrator (as they can under the simple provisions of the present WA Arbitration Act) then let them do so. S27D however is an unnecessary construct to facilitate a mediator going on to be arbitrator.

It is quite likely that the best solution is to leave s 27 D out of the Act.
In doing so the WA would lead Australia in doing so and give the Act a commonsense practical approach to the Act. It would avoid "template" legislation and be in accord with the views of many lawyers throughout Australia.
Thanks,
John Hockley.

31/10/2011