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

12 October 2011

Dear Ms Farina

Thank you for inviting me to comment on clause 27D of the Commercial Arbitration Bill 2011. I am happy to do so.

My comments reflect my own views and are not necessarily the views of my firm or any of the arbitration panels of which I am a member.

Since the Commercial Arbitration Bill 2011 (**Bill**) does not define either arbitrator or mediator, I shall assume for the purposes of my comments that a mediator is not the lawyer for one of the parties to a dispute. This is because it is problematic in the extreme for a lawyer to one of the parties to act as a mediator and at the same time uphold the duty to act in the best interests of their client.

27D(1)

I suspect that that the majority of commercial contracts may not contain arbitration agreements providing for a staged approach.

In my work, although we sometimes draft commercial contracts with such a staged dispute resolution clause, this is generally done if we wish to distinguish between resolution of non-technical disputes and technical issues which are probably best adjudicated by an expert. In these cases, the ultimate stage is arbitration.

My one concern with the wording of clause 27D(1) is that it permits mediation proceedings to occur "after" proceeding to arbitration. This is fine, but I think it needs to be made clear that mediation can only be undertaken by an arbitrator prior to an award being made.

27D(7)

The treatment of confidential information is one of two main issues with the mediation-arbitration (med-arb) approach, the other being the perceived power of the arbitrator who mediates "under the shadow of arbitration proceedings".

This is because, while undertaking mediation, the arbitrator is likely to learn more about the dispute from the parties, particularly in private caucuses, than would be the case in arbitration proceedings. Some of this information will be provided in confidence.

In my view, the issue is whether it should be the arbitrator who decides how much and what information so obtained is disclosed to the other party to the arbitration proceedings (incidentally the same approach as in section 17 of the Singapore *International Arbitration Act 1994*) or whether the parties themselves should

determine what information disclosed confidentially at mediation should be subsequently revealed to the other party.

I am inclined to think that it should be the parties themselves who decide what information they wish to keep confidential. Parties to commercial contracts are familiar with confidentiality clauses. There is no reason to assume that they are unable to determine what information is "material to the arbitration proceedings".

For this reason, I would prefer that sub-clause 7 be re-drafted.

I shall be happy to expand further on the above points, although in the context of the overall Bill they are only of minor consequence.

Yours faithfully

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