THIRTY-EIGHTH PARLIAMENT

REPORT 67

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

COMMERCIAL ARBITRATION BILL 2011

Presented by Hon Adele Farina MLC (Chairman)

November 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)
Hon Nigel Hallett MLC (Deputy Chairman)
Hon Liz Behjat MLC
Hon Linda Savage MLC

Staff as at the time of this inquiry:

Anne Turner, Advisory Officer (Legal)
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Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

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REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE COMMERCIAL ARBITRATION BILL 2011

EXECUTIVE SUMMARY

1 The Commercial Arbitration Bill 2011 (**Bill**) is a legislative response to the fragmentation and inconsistencies between the various laws governing commercial arbitration in Australia. This causes inconsistency in the interpretation and application of those laws. These fragmentations and inconsistencies have in turn discouraged resort to arbitration within Australia both domestically and by parties to international transactions.

2 The Bill adopts international methods and processes for resolving domestic commercial disputes by arbitral tribunals with some local variations.

3 Clause 27D(7) of the Bill remains contentious amongst the arbitrator and mediator community. It provides that if mediation breaks down and then terminates, the mediator who resumes his or her role of arbitrator, must disclose material information provided confidentially during mediation. The safeguard is that the parties are at liberty to refuse to consent to the arbitration resuming with that same person.

4 Given the divergent views on the strengths and weaknesses of clause 27D(7) amongst the arbitrator and mediator community, the utility of it remains to be seen. 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.

RECOMMENDATIONS

5 The Committee has made two narrative form and one statutory form recommendations. The recommendations are grouped as they appear in the text at the page number indicated.

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Recommendation 1: The Committee recommends that the Parliamentary Secretary representing the Attorney General provide clarification as to what may constitute "exceptional circumstances" in clause 17D when an arbitral tribunal modifies, suspends or terminates an interim measure it has granted.

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Recommendation 2: The Committee recommends that the Parliamentary Secretary representing the Attorney General explain whether it is the intent that the word "copy" in clause 35(2) is intended to be read as meaning a certified or notarised copy. If so, to explain why this is not expressly provided for in the Bill.

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Recommendation 3: The Committee recommends that the Commercial Arbitration Bill 2011 be amended in the following manner:

Page 61, in the Table, Item 14, row 7 - To delete -"14(4)" and insert -

14(3)

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE COMMERCIAL ARBITRATION BILL 2011

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1 REFERRAL

1.1 On 22 September 2011, Hon Michael Mischin MLC, Parliamentary Secretary representing the Attorney General, introduced the Commercial Arbitration Bill 2011 (**Bill**) into the Legislative Council.

1.2 Following its Second Reading, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A. Under Temporary Standing Orders of the Legislative Council, the Committee must report to the Legislative Council within 45 days of referral of a bill. Therefore the last date for tabling the Committee's report into the Bill is Sunday, 6 November 2011 or the first sitting date thereafter.

2 INQUIRY PROCEDURE

2.1 The Committee's inquiry was advertised in *The West Australian* at the first opportunity on 1 October 2011 and details of the inquiry were published on the Committee's webpage. The Committee wrote to stakeholders inviting submissions. The list of stakeholders and submitters is at **Appendix 1**. The Committee extends it appreciation to those who made submissions.

2.2 The Committee held a hearing on 24 October 2011 with Mr Peter Richards, Legal Policy Officer, Department of the Attorney General.

3 UNIFORM LEGISLATION

3.1 The Bill resembles *Structure 2 - Model legislation*. Also known as mirror legislation, the objective of this structure is that it will be enacted in participating jurisdictions with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law. This structure and others are set out in **Appendix 2**.

3.2 When scrutinising uniform legislation, the Committee considers various 'fundamental legislative scrutiny principles' as a convenient scrutiny framework. These principles are set out in **Appendix 3**.

4 SUPPORTING DOCUMENTS

4.1 On 28 June 2011, well before the Bill was referred, the Committee received from the Attorney General:

- a Standing Committee of Attorney Generals (**SCAG**) *Communique* dated 7 May 2010*;*
- a copy of the Explanatory Note; and
- a copy of a model Commercial Arbitration Bill 2009 (**Model Bill**) adopted at SCAG's April 2009 meeting.

4.2 The Committee extends its appreciation to the Attorney General for the early provision of supporting documents.

Deviations from the Model Bill

4.3 The Committee noted that identical clauses 11(5A), 13(5A), 14(3A), 16(10A), 27H(6) and 27I(5) are the most significant deviations from the Model Bill. Being identical, these clauses are discussed at paragraph 7.32 in relation to clause 11(5A).

Other source material

4.4 The Committee referred to a book by Professor Doug Jones titled *Commercial Arbitration in Australia*,[1] finding it to be particularly useful. The author advised the NSW government on its bill and has written a textbook with commentary on each section of the *Commercial Arbitration Act 2010* (NSW) which Western Australia has essentially mirrored.

5 BACKGROUND TO THE BILL

Historical context

5.1 Since 1985, Australian domestic commercial arbitration legislation has been uniform legislation. This flowed from the work of SCAG in the late 1970s and early 1980s which was based on (then) new and innovative legislative developments in England, resulting in the enactment of new legislation in the form of the *Arbitration Act 1975* (Eng) and, principally, the *Arbitration Act 1979* (Eng).

5.2 Victoria was the first State to enact the legislation SCAG had developed, in the form of the *Commercial Arbitration Act 1984*. New South Wales followed shortly afterwards as, in due course, did the other States and the Territories. In 1985, Western

[1] Lawbook Co, Sydney 2011.

Australia enacted the *Commercial Arbitration Act 1985* which will, if the Bill is passed, be repealed by clause 44 of the Bill. Apart from New South Wales, as a result of its recent enactment of the *Commercial Arbitration Act 2010*, this is the domestic commercial arbitration regime still in force in Australia.

Problems with the current regime

5.3 At a recent presentation given to the *Financial Review International Dispute Resolution Conference 2010*, the Hon Justice Clyde Croft, Supreme Court of Victoria said:

> *At times, there has been a perception that the courts have hindered effective commercial arbitration, both by intervening too much in the arbitral process and by interpreting the arbitral law in an interventionist rather than a supportive way. This perception, as well as many other factors, was one of the reasons that our commercial arbitration legislation required attention; though the domestic legislation had also become very dated as a result of developments in legislation elsewhere.*
>
> *Prior to the enactment of the then new, uniform, domestic commercial arbitration legislation in the mid-1980s commercial arbitration had been constrained very significantly by the case stated*[2] *procedure which could be used, in effect, to force a retrial of the issues in an arbitration in the reviewing court. Naturally, the cost, expense and delay involved had the effect of making commercial arbitration very unattractive.*[3]

5.4 The Chief Justice of Western Australia, in supporting the Bill stated that he had reservations about clause 27D of the Model Bill which was controversial during passage of NSW's enactment.[4] The Chief Justice communicated his concerns to SCAG, making a number of suggested modifications but these were not embraced.[5] In his submission to the Committee, the Chief Justice outlined those suggested

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2 This is an appeal mechanism whereby a statement of facts is prepared by one court for the opinion of another on a point of law. Thus, an arbitrator would refer to the courts a question of law arising out of the course of the arbitration.

3 Can Australian courts get their act together on international commercial arbitration?, 15 October 2010, pp3-4: see http://acica.org.au/assets/media/news/conference-papers/Justice_Clyde_Croft.doc, (viewed on 19 July 2011.

4 The Chief Justice had responded to SCAG's invitation to comment on a *Discussion Paper* on clause 27D by SCAG.

5 For example, 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 arbitration following the termination of the mediation proceedings. The Chief Justice suggested this would be desirable. See Submission No 3 from the Honourable Wayne Martin, 30 September 2011.

modifications taking the view that these would enhance the Bill. However, the Chief Justice said that on balance:

> *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*.[6]

5.5 The Chief Justice referred to how:

- the fragmentation and inconsistencies between the various laws governing commercial arbitration in Australia causes inconsistency in interpretation and application of those laws;
- these fragmentations and inconsistencies have in turn discouraged resort to arbitration within Australia both domestically and by parties to international transactions;
- globalisation of trade has reduced the significance of national boundaries;
- the structure of federation has been a significant disadvantage to Australian commerce and the legal profession; and
- our disparate laws have been a disincentive to use Australia as a seat for commercial arbitration and have been exploited by Australia's commercial rivals, especially Singapore and Hong Kong.[7]

6 OVERVIEW OF THE BILL

Impetus for the Bill

6.1 The Bill is a necessary legislative response to the Commonwealth Parliament implementing international treaty obligations to which it has voluntarily subscribed, including those in the field of international law.[8] The Committee was advised that this is a rare legislative event.[9]

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6 Submission No 3 from the Honourable Wayne Martin, 30 September 2011, pp2-3.

7 Ibid, pp1-2.

8 The relevant obligations are under the following: (1) the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States [1991] ATS 23 signed by Australia on 24 March 1975, Instrument of Ratification deposited 2 May 1991 and entry into force on 1 June 1991. (2) General Assembly resolution 40/72 (11 December 1985). (3) The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1975] ATS 25 (entry into force 24 June 1975) the so called 'New York Convention'.

9 Ms Lyn Genoni, Executive Director, Strategic Policy, Department of the Premier and Cabinet, *Transcript of Evidence*, in relation to the Treaties Inquiry, 7 September 2011, p11.

6.2 The Bill adopts *international* methods and processes for resolving *domestic* commercial disputes by "*arbitral tribunals*" (defined in clause 2(1) as a sole arbitrator or a panel of arbitrators) with some local variations. NSW was the lead jurisdiction.[10] Queensland, South Australia and Victoria have not yet enacted legislation but Tasmania is in progress.

6.3 The *UNCITRAL Model Law* referred to in clause 2 of the Bill is the international, *UNCITRAL Model Law*. The acronym stands for United Nations Commission on International Trade Law Model Law on International Commercial Arbitration.

Scope of the Bill

6.4 Under clause 1, the Bill applies only to *domestic* commercial arbitrations. By contrast, the *International Arbitration Act 1974* (Cth) which was amended for the *UNCITRAL Model Law* and assented to on 6 July 2010 covers *international* commercial arbitrations and the enforcement of foreign arbitral awards.[11]

Broader application of the Bill

6.5 The academic literature suggests adopting the *UNCITRAL Model Law* is desirable so that Australia can establish itself as a hub for international disputes (hence the Commonwealth passing the international version in 2010 by making amendments to its *International Arbitration Act 1974).*[12]

6.6 Domestically it is preferable for all jurisdictions to follow suit; that is, adopting the *UNCITRAL Model Law* in the domestic sphere is seen as enhancing Australia internationally. Clause 2A of the Bill reinforces that in interpreting the enactment, promoting uniformity between the application of the proposed Act to domestic commercial arbitrations and the application of the *UNCITRAL Model Law* to international commercial applications via the Commonwealth's *International Arbitration Act 1974* is desirable.

Structure of the Bill

6.7 Structurally, the clause numbering of the Bill follows the various numbering of "Articles" in the *UNCITRAL Model Law*. Variations to the *UNCITRAL Model Law*

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10 New South Wales was the first state to adopt the reformed commercial arbitration legislation in the *Commercial Arbitration Act 2010* (NSW). This legislation commenced on 1 October 2010.

11 These submissions formed the basis for the International Arbitration Amendment Bill 2009, which the Commonwealth Attorney General introduced into Parliament on 25 November 2009. The bill was passed by the Commonwealth Parliament on 17 June 2010 and received Royal Assent on 6 July 2010.

12 One author, Mr Albert Monichino, Barrister, Arbitrator and Mediator, referred to a malaise in domestic arbitration in Australia: See *Arbitration Reform in Australia: Striving for International Best Practice*, The Arbitrator and Mediator, October 2010, p40.

have a 'Note' at the foot of the clauses helpfully stating they are not in the *UNCITRAL Model Law*.

7 SELECTED CLAUSES

Clause 1C(1) - the 'paramount' object of the Act

7.1 This clause states:

> ***1C. Paramount object of Act***
>
> *(1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.*

7.2 The Committee noted that this clause is a feature of the Model Bill but the Commonwealth's *International Arbitration Act 1974* is absent a paramount object provision, using a general "*Objects of this Act*"[13] provision. The *UNCITRAL Model Law* is itself absent both a general, objects clause and a paramount object clause. During passage of the NSW bill, that Government said:

> *Stakeholders advocated for and endorsed the inclusion of a paramount object clause, noting the absence of such a provision as a weakness in the present uniform commercial arbitration Acts.*[14]

7.3 One academic states that the undoubted objective of a paramountcy clause is to promote the development of a single body of jurisprudence regulating commercial arbitration, both domestic and international in Australia.[15]

7.4 Professor Doug Jones in *Commercial Arbitration in Australia*,[16] states that "*paramount*" means overriding. Of clause 1C in the NSW equivalent enactment, Professor Jones states:

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13 It states: *The objects of this Act are: (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.*

14 Mr Barry Collier, Parliamentary Secretary, NSW Parliamentary Debates, *Hansard*, Legislative Assembly, 22 June 2010, p24529.

15 Mr Albert Monichino, SC, Barrister, 'Arbitrator and Mediator, Arbitration Reform in Australia: Striving for International Best Practice', *The Arbitrator and Mediator*, October 2010, p43.

16 Lawbook Co, Sydney 2011, p37.

> *The manner in which the section is drafted supports the conclusion that the tribunal has the ability to amend agreed procedure which offends the paramount object of the Act. This is because s1C(3) specifically states that the tribunal's functions should, as far as practicable, be exercised, to achieve the paramount object of the Act.*[17]

7.5 Clause 1C is a very specific clause as opposed to a general objects clause.[18] Paramountcy clauses have been described as:

- absolute language;[19]
- determining;[20] and
- overriding.[21]

7.6 A paramountcy clause is powerful because priority is to be given to the considerations in that particular section in the enactment.[22] In clause 1C the paramount object is not to deliver justice in its traditionally understood meaning of rights between parties in proceedings but justice which facilitates a fair and final resolution of commercial disputes.

7.7 This view was endorsed in the 2009 High Court of Australia (**High Court**) case of *Aon Risk*[23] which overturned a 1997 case which had held 'justice' to be the paramount

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17 Professor Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co, Sydney 2011, p39.

18 The High Court has said that general statements as to purpose or object are to be treated with caution. In *IW v City of Perth*, Brennan CJ and McHugh J said such statements should be understood by reference to other provisions contained in the legislation, that is, you treat it like any other provision and it must be interpreted in context. Hence, a general statement of purpose may be qualified by specific provisions in the legislation. In the seminal case of *Victims Compensation Fund Corp v Brown* (2003) 201 ALR 260 Heydon J (the leading judge) said it is difficult to state the legislative purpose except at such extreme levels of generality that it is not useful in construing particular parts of the legislative language.

19 *Benson v Hughes* [1994] FamCA 30, para 70.

20 Lord MacDermott in the House of Lords case of *J v C (an infant)* [1969] UKHL 4.

21 *In the Marriage of Kress* (1976) 30 FLR 508.

22 *Hutchings v Clarke* (1993) 112 FCR 450, at paras 456-457.

23 *Aon Risk Services Australia Ltd v Australian National University*, (2009) 239 CLR 175 at 181, French CJ said; "*The history of these proceedings reveals an unduly permissive approach at both trial and appellate level to an application which was made late in the day, was inadequately explained, necessitated the vacation or adjournment of the dates set down for trial, and raised new claims not previously agitated apparently because of a deliberate tactical decision not to do so. In such circumstances, the party making the application bears a heavy burden to show why, under a proper reading of the applicable Rules of Court, leave should be granted.*"

consideration, meaning in that case, it was not appropriate to punish a party for delay in bringing an application to amend a statement of claim.[24]

7.8 In *Aon Risk*, the High Court held that a trial date should not be vacated in order to allow a late amendment of pleadings where there was no reasonable excuse for the delay. *Aon Risk* is therefore an important development by the High Court because a majority of the judges noted that a just resolution of the proceedings was to be understood "*in light of the purposes and objectives*" stated.[25] Speed and efficiency, in the sense of minimum delay and expense, were seen as essential to a just resolution of the proceedings.[26]

7.9 As a result of *Aon Risk* 'justice' is no longer limited to rights between parties to the proceedings. Now considerations of 'justice' may include the potential effects of dilatory tactics on parties to other disputes, when matters are postponed as a result. French CJ said that the courts have to consider:

> *the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification, whether they be for adjournment, for amendments giving rise to adjournment, or for vacation of fixed trial dates resulting in the resetting of interlocutory processes.*[27]

7.10 The Committee noted the term "*paramount*" does not mean the only objective. Any other prescribed objectives would be of secondary importance. A paramountcy clause necessarily implies the existence of other objectives but no others are expressly stated in the Bill. The Committee noted the insertion of a paramountcy clause is unusual. Such clauses are primarily found in family law and child welfare legislation.[28]

7.11 The "*paramount*" purpose in clause 1C(1) is for "*impartial arbitral tribunals*" to "*facilitate fair and final resolution*" of commercial disputes yet clause 27D(7) states that confidential information can be given to the other party when the arbitrator acts as a mediator.

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24 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 155. Here, "*case management considerations, including the availability of court resources, were not irrelevant, but the paramount consideration was "justice as between the parties*".

25 *Aon Risk Services Australia Ltd v Australian National University*, (2009) 239 CLR 175 at 213 Gummow, Hayne, Crennan, Kiefel and Bell JJ.

26 Professor Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co, Sydney 2011, p38.

27 *Aon Risk Services Australia Ltd v Australian National University*, (2009) 239 CLR 175 at 192.

28 Interestingly, the Family Court has held that the 'welfare of the child' paramountcy provision there overrides public interest considerations such as the right of parties to privileged communications with their legal advisers: *Hutchings v Clarke* (1993) 112 FCR 450.

Clause 1

7.12 This Act applies to domestic commercial arbitrations. Professor Doug Jones in *Commercial Arbitration in Australia* states that "*commercial*" has been deliberately left undefined so that a wide (as opposed to exhaustive) interpretation of the term can be considered.[29]

7.13 Overseas case law has held that some matters are not commercial: for example, a dispute arising under an employment contract which created a master/servant relationship was not a commercial dispute.[30]

Clause 2 - definitions

7.14 The Committee noted an absence of definitions for the following terms:

- conciliator;[31]
- arbitrator;[32]
- mediation;[33] and
- conciliation.[34]

29 Lawbook Co, Sydney 2011, p42.

30 *Borowski v Heinrich Fielder Perforiertechnick GmbH* (1994) 158 Alberta Reports 213.

31 Is a person who engages in conciliation which is a method of alternative dispute resolution in which a third party attempts to facilitate an agreed resolution of a dispute in accordance with relevant legal principles. It is an intervention. In Australia, conciliation is distinguished from mediation in terms of the conciliator's input to the substance of the agreement. (The Honourable Dr Peter Nygh and Associate Professor Peter Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Sydney 1997, p238-9). For example, in Family law, the conciliator would be the court counselling service. *"A conciliator, unlike a mediator does not come into possession of confidential information and therefore the obligation to disclose under proposed subclause 27D(7) does not arise."* Submission No 13 from Mr Albert Monichino SC, 18 October 2011, p3.

32 The Honourable Dr Peter Nygh and Associate Professor Peter Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Sydney 1997 defines it as a person to whom a dispute or difference is referred to be resolved by arbitration, p70.

33 Is a method of dispute resolution which provides for a third party neutral to assist parties to identify relevant issues, develop and evaluate options for resolution which focuses on the needs and interests of the parties rather than their legal rights. The mediator facilitates discussion, he does not provide advice on substantive issues or make determinations, he remains neutral and unbiased: Professor Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co, Sydney 2011, p23.

7.15 The Committee noted that being undefined, they will be given their ordinary meanings.

"Arbitration" and "mediator"

7.16 The Committee noted the following definitions: "*Arbitration*" is defined in clause 2(1) as meaning "*any domestic commercial arbitration whether or not administered by a permanent arbitral institution*". Butterworths Australian Legal Dictionary defines arbitration as "*a system of determining disputes by a private Tribunal constituted for that purpose by the agreement of the disputants*".[35]

7.17 "*Mediator*" is defined in clause 27D(8) thus: "*a reference to a **mediator** includes a reference to a conciliator or other non-arbitral intermediary between parties*".

Clause 2 - the rules of interpretation

7.18 Although not expressly stated in the Bill, the principle of comity[36] applies in its interpretation by the courts. This principle provides that:

> *Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.*[37]

7.19 The principle was reaffirmed by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.[38] This principle applies to both the Bill as part of the national scheme and the Commonwealth's *International Arbitration Act 1974* as Commonwealth legislation. The application of this principle in the domestic arbitration context will

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34 This is a method of alternative dispute resolution in which a third party attempts to facilitate an agreed resolution of a dispute in accordance with relevant legal principles. It is an intervention. In Australia, conciliation is distinguished from mediation in terms of the conciliator's input to the substance of the agreement (The Honourable Dr Peter Nygh and Associate Professor Peter Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Sydney 1997, p238-239). Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co, Sydney 2011, p25 states: "*The main point of differentiation between mediation and conciliation is that the conciliator has a wider mandate and is required to advise the parties on both the substantive matters in dispute and options for settlement*." The role includes power to issue recommendations, power to give directions and assessment of the parties genuine attempt to conciliate- referring to D, Bryson "And the leopard shall; lie down with the kid", A conciliation model for workplace disputes (1997) 8 *Australian Dispute Resolution Journal*, pp245- 246.

35 The Honourable Dr Peter Nygh and Associate Professor Peter Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Sydney 1997 p69.

36 Comity is the body of rules developed in international law by which the courts of a state demonstrate respect for the rules, customs and laws of another state.

37 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

38 (2007) 230 CLR 89 at 150 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.

assist further in the development of international arbitration jurisprudence as decisions on the Bill in Western Australia and elsewhere feed interpretation of the *International Arbitration Act 1974* (Cth) and the *UNCITRAL Model Law* provisions generally.

Clause 1E - Act to bind Crown

7.20 This clause is carried across from the current *Commercial Arbitration Act 1985* which itself inserted this provision as a result of a 1974 Western Australian Law Reform Commission Report into the old 1895 Act which replaced that Act.[39] The inclusion of clause 1E means the State has capacity to enter into an arbitration agreement.[40]

Clause 2A - International origin and general principles (cf. UNCITRAL Model Law Art 2A)

7.21 This clause makes it clear that when interpreting the Bill this is to be done so as to promote uniformity between domestic and international arbitrations. As noted above, the High Court has stated that this is the correct approach.

Clause 5 - Extent of court intervention (cf. UNCITRAL Model Law Art 5)

7.22 It is expressly stated that no court must intervene in the arbitration process except where so provided in the Bill. Overall this is limited to giving assistance to that process but in respect of appeals from awards, wide power is provided[41]. These include such things as:

- rulings on a preliminary question that the arbitral tribunal has jurisdiction in clause 16(9);
- prohibiting disclosure of confidential information and determining preliminary points of law in clause 27H;
- interim measures in clause 17J;
- the taking of evidence and when a person refuses to attend or produce a document in clause 27; and

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39 Western Australian Law Reform Commission Report, Project No. 18 "Commercial Arbitration and Commercial Causes", 18 January 1974.

40 Doug Jones, *Commercial Arbitration in Australia* Jones, Lawbook Co, Sydney 2011, p459.

41 For example, in subclause 34A(3)(b)(3), the Court must not grant leave unless it is satisfied — (a) that the determination of the question will substantially affect the rights of one or more of the parties; and (b) that the question is one which the arbitral tribunal was asked to determine; and (c) that, on the basis of the findings of fact in the award — (i) the decision of the tribunal on the question is obviously wrong; or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

- appeals against awards in clause 34A.

7.23 This raises that thorny issue of whether the Parliament should or can oust the jurisdiction of the courts. Section 16 of the *Supreme Court Act 1935* contemplates that its general jurisdiction is "*subject … to any other enactment in force in this State*" (such as the Act proposed by the Bill).

7.24 The courts are seen as championing parties' rights. Historically, courts were reluctant to enforce arbitration agreements because they were perceived as creating injustice by interfering with parties' right to have their dispute heard before a court.[42] This, it was thought, was an impermissible ousting of the jurisdiction of the courts. However, this attitude was based on the most just way of determining matters regardless of the circumstances and parties involved. Over time, this attitude has been eroded, particularly in the context of commercial disputes. Professor Doug Jones in *Commercial Arbitration in Australia* refers to a modern trend to "*respect the bargain of the parties*", hence in the Bill, a court can only stay proceedings till arbitration has concluded.[43]

Clause 7 - Definition and form of arbitration agreement (cf. UNCITRAL Model Law Art 7)

7.25 The common law does not impose any formal requirements for arbitration agreements, thus they may be oral or implied in a contract.[44] By contrast, clause 7 is prescriptive that an arbitration agreement must be reduced to writing.

7.26 Under the Bill, an arbitration agreement can be a clause in a contract or a separate agreement. If in a contract and the contract is found to be null and void, under clause 16(3), the arbitration clause is severable and stands alone.

Clause 7(3) - an arbitration agreement must be in writing

7.27 The Committee noted that signatures to a written arbitration agreement are not required. Of this, Professor Doug Jones in *Commercial Arbitration in Australia* states Article 7 of the *UNCITRAL Model Law* dispenses with the need for signatures. The Case Law on UNCITRAL Texts (**CLOUT case law**) sees signatures as a mere formality.[45] Thus the absence of signatures would not result in an invalid arbitration agreement. The dispensing of the requirement for signatures evolved out of problems

42 Doug Jones, *Commercial Arbitration in Australia* Jones, Lawbook Co, Sydney 2011, p54.

43 Ibid, p54.

44 Ibid, p56.

45 Ibid, p94.

with former Article 7(2) of the 1985 model law provisions. That Article stated there was an agreement in writing "*if contained in a document signed by the parties*".[46]

7.28 According to Professor Jones, there were numerous cases where the arbitration clause contained in documents exchanged between parties was not valid and binding due to a failure to comply with signing. CLOUT case law Number 688 indicated that signing is only a formality under the model laws. Now under clause 7(4) an arbitration agreement is in writing if its content is recorded in any form, whether or not arbitration agreement or contract has been concluded orally, by conduct, or by any other means.

7.29 Of this, Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, said under clause 7(1):

> *an arbitration agreement is an agreement. Agreements are normally signed; however, increasingly, having regard to electronic transactions, there is no signature on documents. Requiring a signature may preclude the use of electronic transactions in creating an arbitration agreement.*[47]

7.30 The Committee noted that the sections 3(b) and (c) of the *Electronic Transactions Act 2003* state that the objects of the Act are:

- to facilitate the use of electronic communication as a way of entering into transactions; and
- promote business confidence in the use of electronic communication as a way of entering into transactions.

Further, things that can or have to be done under a law of the State for example, in relation to providing a signature can generally be done by electronic communication. Section 9 of that Act expressly provides for electronic signatures but it only applies "*if*" under a Western Australian law the signature of a person is actually required. The Bill, as a result of CLOUT case law, entirely omits the requirement for signatures, electronic or otherwise.

7.31 In view of the evidentiary importance of executing legal documents, the Committee expresses concern at the omission of the requirement for signatures especially when these can be transmitted electronically. However, the Committee notes that this is a policy decision of the Executive and conforms with the UNCITRAL Model Law.

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46 Doug Jones, *Commercial Arbitration in Australia* Jones, Lawbook Co, Sydney 2011, p94.

47 Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 24 October 2011, p6.

Clause 11(5A) Appointment of arbitrators (cf. UNCITRAL Model Law Art 11)

7.32 As stated at paragraph 4.3, clause 11(5A) and five other identical clauses represent the most significant deviations from the Model Bill. Clauses 11(5) and 11(5A) state:

> *(5) A decision on a matter entrusted by subsection (3)*[48] *or (4)*[49] *to the Court is final.*
>
> *(5A) Subsection (5) —*
>
> *(a) does not limit judicial review; and*
>
> *(b) is subject to the Constitution of the Commonwealth section 73(ii).*[50]

7.33 Clause 11(5A) is absent in both the Model Bill and the NSW enactment. Clause 11(5) states that a decision on a dispute over the number of arbitrators is final by the relevant Supreme Court. However, clause 11(5A) provides for judicial review of orders by the High Court. The Committee notes that the High Court has appellate jurisdiction to hear orders from the Western Australian Supreme Court pursuant to section 73(ii) of the *Commonwealth Constitution*.[51]

7.34 The Law Society complained that the inclusion of clause 11(5A) further delays the appointment process with another layer of challenge.[52] Mr Peter Richards, Legal Policy Officer, Department of the Attorney General explained that the inclusion of the clause was necessary following the High Court's decision in the 2010 case of *Kirk v Industrial Court (NSW)*.[53] It was held by the whole Court that:

> *State legislation which would take from a State Supreme Court power to grant relief for jurisdictional error on the part of inferior courts and tribunals is beyond State legislative power.*
>
> *Chapter III of the Commonwealth Constitution requires that there be a body fitting the description of "the Supreme Court of a State" and its supervisory jurisdiction enforcing the limits on the exercise of*

48 Failing agreement.

49 Appointment procedure.

50 It states that the High Court has appellate jurisdiction to hear orders from a Supreme Court.

51 Section 73 provides that "*The High Court shall have jurisdiction … to hear and determine appeals from all judgments, decrees, orders, and sentences … (ii) … of the Supreme Court of any State*".

52 Submission No 8 from The Law Society of Western Australia, 12 October 2011, p1.

53 (2010) 239 CLR 531.

State executive and judicial power is a defining characteristic of such a body.[54]

7.35 Mr Richards said the *Kirk case* essentially provided that it may well be beyond state legislative power to enact legislation to deprive a state Supreme Court of the power to review matters. One of the defining characteristics of a state Supreme Court is its supervisory role and to say something is final excludes that, especially in relation to prerogative writs.[55] The law appears to be in state of flux with other South Australian cases in the pipeline.[56]

7.36 The Committee is of the view that in allowing judicial review of Supreme Court orders and allowing the High Court to hear an appeal on a Supreme Court decision, clause 11(5A) and the other identical clauses constitute an attempt to resolve current constitutional uncertainty. However, there is doubt that the clause will remedy the uncertainty. Decisions on the pending South Australian cases may clarify the constitutional uncertainty and may require the Parliament to revisit these provisions at a later time.

Clause 12 Grounds for Challenge (cf. UNCITRAL Model Law Art 12)

7.37 Under clause 12(5) an arbitrator's appointment may be challenged when there are "*justifiable doubts*" as to the impartiality or independence of that person but there has to be "*real danger of bias*". This clause is not in the UNCITRAL Model Law.[57] It means the arbitrator can disclose circumstances giving rise to justifiable doubts but the Bill imposes a higher threshold; that is, there must be "*real danger*" of bias.[58]

7.38 The test is higher than that of administrative law. The test is that a decision-maker should act without bias and there should not be a reasonable perception of *unfairness.* For example, where a decision-maker has a material interest in the outcome of the decision, or where there is partisanship, personal prejudice or prejudgement on the part of the decision-maker. Therefore a person should not be a decision-maker in a matter where they have expressed clear views about a question of fact which is a

54 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, Casenote at p531, per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

55 Prerogative writs are court orders that provide remedies of a particular character for different kinds of administrative action. Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 24 October 2011, p2.

56 Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 24 October 2011, p4.

57 The UNCITRAL Model Law states that "*An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence*."

58 The Commonwealth agreed to this after it was suggested by Brown and Luttrell: see http://www.ag.gov.au/internationalarbitration, (viewed on 3 August 2011).

significant issue or about the credit of a witness whose evidence is significant on a question of fact.[59]

7.39 The following information regarding the "*real danger*" of bias test is extracted from various submissions made to the Commonwealth's overhauling of its *International Arbitration Act 1974* in 2010.

7.39.1 The "*real danger*" test is a significant shift in the law from the current test for bias in Australia (the reasonable observer test) found in *R v Sussex Justices; Ex Parte McCarthy*:[60]

> *whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.*[61]

7.39.2 Australian courts used this test to determine bias challenges to arbitrators, including challenges brought under the *International Arbitration Act 1974* Cth.[62] However, at the suggestion of a submission made during consideration of *UNCITRAL Model Law* amendments to the *International Arbitration Act 1974* (Cth) in 2009 for the imposition of a higher bias threshold for arbitrators,[63] a "*real danger*" test or the "*Gough test*" as it is called was enacted. This test appears in both NSW's enactment and the Bill.

7.39.3 Gough was convicted of conspiracy to rob and sentenced to 15 years imprisonment. He appealed, amongst other things, that there was a material irregularity in the conduct of the trial in that one of the jurors was the next door neighbour of his brother. The House of Lords in dismissing the appeal held:

> *the test to be applied in all cases of apparent bias was the same, whether concerning justices, members of inferior tribunals, arbitrators or jurors… namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the*

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59 *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288.

60 (1924) 1 KB 356 and followed by the High Court of Australia in *Webb v The Queen* (1994) 181 CLR 41.

61 *Grassby v The Queen* (1989) 168 CLR 1 at 20; applied in *DiC v Burg* (1998) VSCA 139 at 16.

62 See for example *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWSC 77. See also *Ace Constructions & Rigging Pty Ltd v ECR International Pty Ltd* (Local Court of New South Wales, 26 October 2007).

63 The Honourable Neil Brown QC FC and Inst A, Arbitrator & Mediator; and Sam Luttrell, Solicitor, Law Lecturer, Murdoch University, Perth, *Submissions on Review of International Arbitration Act 1974 (Cth)*, 16 January 2009.

members of the tribunal in question that justice required that the decision should not stand.[64]

7.39.4 The "*real danger*" test makes it harder to challenge an arbitrator in Australia. Brown and Luttrell, who successfully submitted for a change in the test, argued that adopting a stricter test is considered to be a positive step because bias challenges are an increasingly common procedural tactic in high value international arbitrations; limiting the prospect of bias challenge would make Australia more attractive as a seat for international arbitration.[65]

Clause 17D Modification, suspension, termination (cf. UNCITRAL Model Law Art 17D)

7.40 This clause refers to how an arbitral tribunal may modify, suspend or terminate an interim measure it has granted in "*exceptional circumstances*" but there is no prescription of what those circumstances may be. Arguably, some prescription is needed. Of this, Mr Peter Richards, Legal Policy Officer, Department of the Attorney General could not provide an example of an exceptional circumstance.

7.41 The Committee is of the view that the Legislative Council may benefit from being provided with an example of an exceptional circumstance and therefore makes the following recommendation.

Recommendation 1: The Committee recommends that the Parliamentary Secretary representing the Attorney General provide clarification as to what may constitute "exceptional circumstances" in clause 17D when an arbitral tribunal modifies, suspends or terminates an interim measure it has granted.

Clause 24 Hearings and written proceedings (cf. UNCITRAL Model Law Art 24)

7.42 Clause 24 allows the arbitral tribunal to decide whether or not to hold an oral hearing for the presentation of evidence or for oral argument. This means the arbitral tribunal can determine whether to proceed merely on the basis of documents and other material in the absence of an oral hearing.

7.43 The Committee noted that the clause is qualified by its introductory words: the decision on whether or not to hold an oral hearing is "*subject to any contrary agreement by the parties*". The Committee is of the view that this is a significant

64 *R v Gough* [1993] AC 646 at 647.

65 The Honourable Neil Brown QC FC and Inst A, Arbitrator & Mediator; and Sam Luttrell, Solicitor, Law Lecturer, Murdoch University, Perth, *Submissions on Review of International Arbitration Act 1974 (Cth)* 16 January 2009.

safeguard for the parties given that there is no common law right to an oral hearing[66] and reinforces the parties' right to control proceedings.

Clause 27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary.

7.44 This clause states:

> *(1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement (**mediation proceedings**) if —*
>
> > *(a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration); or*
> >
> > *(b) each party has consented in writing to the arbitrator so acting.*
>
> *(2) An arbitrator acting as a mediator —*
>
> > *(a) may communicate with the parties collectively or separately; and*
> >
> > *(b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.*
>
> *(3) Mediation proceedings in relation to a dispute terminate if —*
>
> > *(a) the parties to the dispute agree to terminate the proceedings; or*
> >
> > *(b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings; or*
> >
> > *(c) the arbitrator terminates the proceedings.*
>
> *(4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration*

[66] Per Aickin J (of the majority) in the High Court decision of *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487.

proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.[67] (Committee emphasis)

(5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.

(6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.

(7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2)(b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.

(8) In this section, a reference to a ***mediator*** *includes a reference to a conciliator or other non-arbitral intermediary between parties.*

7.45 Clause 27D is known colloquially in the academic literature as a *Med-Arb* clause. This combination of mediation and arbitration can be traced back to ancient Greece and Ptolematic Egypt.[68] Although absent in the *UNCITRAL Model Law,* it echoes comparable legislation in Hong Kong[69] and Singapore.[70]

7.46 Arbitration is based on the rights of the parties. By comparison, the mediation process is essentially 'interest' based, the aim being to achieve a legally enforceable settlement based on consensus without reference to legal rights or obligations.[71] The Society of

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67 The underlined words were not in the Model Bill. The NSW Parliament inserted the phrase as an amendment during passage of its equivalent bill in 2010 which the Bill replicates.

68 Submission No 9 from Professor Ian Bailey SC on behalf of the Society of Construction Law Australia, 12 October 2011, enclosing an article by Alan Limbury, 'Med- Arb: getting the best of both worlds', p1.

69 See sections 2A-2C of the Arbitration Ordinance (Cap 341) (Hong Kong).

70 See section 17 of the International Arbitration Act (Cap134A) (Singapore), which followed the Hong Kong Arbitration Ordinance.

71 Submission No 7 from Dr Philip Evans and Professor Gabriel Moens, enclosing Reflections on the Role of Mediators and Arbitrators, Can a Good Mediator also be a Good Arbitrator, *Macquarie Journal of Business Law* (2009) Vol 6, pp270-271.

Construction Law Australia described arbitration as 'determinative' whilst mediation is 'facilitative'.[72]

7.47 Arguably, combining mediation and arbitration by the same neutral, third party person threatens to distort both aspects of the process by:

- inhibiting the parties' bargaining creativity and forthrightness tainting the *Med Arb* practitioner's interventions; and
- threatening the validity and enforceability of the award.[73]

7.48 The Master Builders Association of Western Australia argued that in being so different, the roles are incompatible and should be separated.[74] However, as was pointed out by one arbitrator, clause 27D is not a mandatory procedure and has safeguards to protect the parties and the arbitrator.[75]

7.49 Clause 27D is not an unusual provision. For example, section 27 of the current Act provides for disputes to be settled other than by arbitration and contracts include such clauses.[76] Mr Alan Limbury, Chartered Arbitrator, said:

> *Australian domestic uniform commercial arbitration legislation has long enabled arbitrators, with the parties' consent, to mediate and, likewise with consent, to hold private sessions, on the basis that no objection may be made if this course is followed. There has been little or no use of this provision since it was first enacted in New South Wales 1984 and adopted elsewhere shortly afterwards, most likely because the section does not make it clear whether the parties, once committed to both phases of the process, may opt out after the mediation phase, should the dispute not then be resolved.*[77]

7.50 Of this type of provision, the Law Council of Australia said:

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72 Submission No 9 from Professor Ian Bailey SC on behalf of the Society of Construction Law Australia, 12 October 2011, p2.

73 Submission No 9 from Professor Ian Bailey SC on behalf of the Society of Construction Law Australia, 12 October 2011, enclosing an article by Alan Limbury, 'Med- Arb: getting the best of both worlds', p2.

74 Submission No 11 from Master Builders Association of Western Australia, 17 October 2011, p1.

75 Submission No 10 from Kim Doherty, 13 October 2011, p1.

76 Kim Doherty, Arbitrator, said "*many arbitrators as a matter of course under the current legislation do not contemplate the mixing of the two processes as they considered the risk of appeals regarding natural justice are high. The new provisions in part eliminate this risk*". Submission No 10 from Kim Doherty, 13 October 2011, p1.

77 http://www.strategic-resolution.com/documents/Med-Arb%20%20getting%20the%20best%20of%20both%20worlds%202010.pdf (viewed on 3 August 2011).

> *There have been anecdotal reports supporting the use of hybrid dispute resolution methods on the grounds that the mediation part, being less formal is faster and cheaper than arbitration and any consequent arbitration is also faster and cheaper as it is restricted to unresolved issues.*
>
> *Section 27D provides a legislative framework for these hybrid processes and as it is drafted on an opt out basis; it may have a legitimising effect leading to parties accepting a hybrid resolution method more readily.*[78]

7.51 The Committee queried with SCAG's Secretariat the rationale for the inclusion of clause 27D in the Model Bill. The SCAG Secretariat referred this question to the Western Australian Attorney General who stated that in their consideration of an earlier draft of the Model Bill, SCAG decided to retain clause 27D because it had the support of the peak body of arbitrators. The clause would "*reduce the likelihood of delay, and lower costs particularly if there was a need to appoint a new arbitrator who would be required to start afresh.*"[79]

Clause 27D(3)

7.52 This clause provides that mediation proceedings in relation to a dispute terminate if any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings.

7.53 Professor Ian Bailey SC described this clause as: "*an important protection for a party who, at some stage in the mediation, considers that it is inappropriate to continue mediation. This decision might arise as a result of many factors including the issue of disclosure of confidential information.*"[80]

7.54 However, Mr Anthony Brand held a different view. He said that he found it difficult to "*accept the provision clause 3(b) allowing any party to the dispute to withdraw consent to the Arbitrator acting as Mediator in the proceedings once the mediation proceedings have commenced.*"[81] His reasons being:

> *(i) The provision allows for one party to withdraw consent on virtually any grounds. Such grounds could include dislike of the*

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78 http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=CC304518-DB54-AB63-E1D4-E6A482D34764&siteName=lca, p3 viewed on 3 August 2011

79 Letter from the Hon Christian Porter MLA, Attorney General, 27 October 2011, p2.

80 Submission No 9 from Professor Ian Bailey SC on behalf of the Society of Construction Law Australia, 12 October 2011, p4.

81 Submission No 1 from Anthony Brand AM, 30 September 2011, p1.

> *Mediator or a perception - whether right or wrong - that the Mediator appears to be not favouring the party concerned; and*
>
> *(ii) One party could extend the proceedings continually by withdrawing consent with subsequent Mediators.*[82]

In other words, the process could be continually frustrated by one party.

7.55 Mr Peter Richards, Legal Policy Officer, Department of the Attorney General agreed with that assessment.[83] He said:

> ***Mr Richards**: Yes, a party could, but is it to anyone's advantage for that to happen? It would eventually end up with a court situation. I agree; a party could continually frustrate the proceedings.*
>
> ***The CHAIRMAN**: Was there a view that there should be some sort of provision in the act to ensure that that did not happen?*
>
> ***Mr Richards**: No.*
>
> ***The CHAIRMAN**: Would the department consider an amendment to prescribe the grounds under which consent could be withdrawn?*
>
> ***Mr Richards**: If there is any amendment to prescribe the grounds, it would be referred to the Attorney and the Attorney would consider what to do.*[84]

7.56 The Committee noted that the Executive gave consideration to prescribing grounds under which consent could be withdrawn. Not prescribing grounds reflects a policy decision of the Executive.

Clause 27D(7)

7.57 This clause was contentious amongst arbitrators[85] during the passage of an equivalent bill through the NSW Parliament[86] and as a result, SCAG agreed to review it. At the

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82 Submission No 1 from Anthony Brand AM, 30 September 2011, p1.

83 Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 24 October 2011, p10.

84 Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 24 October 2011 and Hon Adele Farina MLC, Chairman of the Committee, p10.

85 For example, Mr Derek Minus, "Arbitrators condemn NSW bill", *The Australian Financial Review*, 4 June 2010, p47. Mr Michael Sweeney, "Flawed NSW bill threat to arbitration", *The Australian Financial Review*, 8 June 2010, p57; and Mr Alan Limbury, letter to the NSW Attorney General, 8 June 2010.

SCAG meeting on 21 and 22 July 2011, having noted that submissions to the consultation expressed different views on the formulation of the section, SCAG agreed to clarify that following mediation, consent to an arbitrator resuming arbitration should be obtained after the termination of the mediation.

7.58 Clause 27D(7) was not amended but SCAG agreed to adopt the wording of section 27D(4) of the *Commercial Arbitration Act 2010* (NSW) and amend clause 27D(4) in the Model Bill to reflect this decision.[87] The words underlined below are the words SCAG added to the Model Bill:

> *(4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration <u>given on or after the termination of the mediation proceedings</u>.*[88]

7.59 Western Australia's Bill was modelled on the NSW enactment which included the above underlined words.

7.60 The Committee notes that if mediation breaks down and then terminates, it is only at that point clause 27D(7) crystallises. The mediator (or conciliator if acting alternatively as a conciliator) who has now resumed his or her role of arbitrator, must disclose the confidential, material information but there is no provision for a party to be given notice of the arbitrator's intention to disclose that material so that the affected party can object.[89] The only safeguard is that the parties are at liberty to refuse to consent to the arbitration resuming with that same person under clause 27D(4).

Views of the arbitrator and mediator community from submissions on clause 27D(7)

7.61 The Committee noted that even with the enhancement made to clause 27D by clause 27D(4), divergent views of clause 27D(7) remain.

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86 For example, that Parliament's joint Legislation Review Committee into the bill said at paragraph 34: "*The committee is concerned that confidential information that is obtained separately from a party during mediation when the same arbitrator acted as a mediator, and when such information may not have been ordinarily obtained under arbitration, may be circumstances that do not justify any disclosure of confidential information and abrogation of the potential right against self incrimination*." See Parliament of NSW, Legislation Review Committee, Legislation Review Digest, No 6 of 2010, p19.

87 Email to the Committee from Laurie Glanfield, SCAG Secretary, 11 October 2011.

88 The underlined words were not in the Model Bill. The NSW Parliament inserted the phrase as an amendment during passage of its equivalent bill in 2010 which the Bill replicates.

89 Submission No 15 from Nicoletta Ciffolilli, 18 October 2011, p1.

Strengths

7.62 The perceived strengths of clause 27D(7) are summarised as follows:

- It will expedite matters and save costs.[90] The parties are conscious of savings in fees likely to result from the fact that the mediator already has an understanding of what the dispute is about.[91]

- The parties view the mediator, when resuming as an arbitrator, with respect and see that person as the best person to arbitrate.[92]

- The parties are in a position to consent under clause 27D(4). They will know and will be reminded by the arbitrator that this will result in any relevant confidential information being disclosed under clause 27D(7). Unless the parties are willing to have this occur, they would clearly not consent to the mediator continuing.[93]

- If there is a mediated settlement the arbitrator may accept the invitation to act as mediator and in doing so confirm that if that process fails, then the parties can arrange another arbitrator. [94]

- The review by SCAG after NSW enacted its bill has not recommended any amendment to the clause.[95]

- It will be rarely used. It is only in isolated cases that the parties agree to stay the arbitration process in preference to mediation and ultimately return to the arbitrator. [96 & 97]

- It is unlikely an arbitrator when acting as a mediator will conduct private session during mediations or if they do, will avoid reference to confidential information.[98]

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90 Submission No 1 from Anthony Brand AM, 30 September 2011, p1.

91 Submission No 2 from Laurie James 30 September 2011, p1.

92 Ibid.

93 Ibid, p2.

94 Submission No 4 from Phil Faigen, 3 October 2011, p2.

95 Submission No 9 from Professor Ian Bailey SC on behalf of the Society of Construction Law Australia, 12 October 2011, p7.

96 Submission No 4 from Phil Faigen, 3 October 2011, p2.

97 Submission No 7 from Dr Philip Evans and Professor Gabriel Moens, enclosing Reflections on the Role of Mediators and Arbitrators, Can a Good Mediator also be a Good Arbitrator, *Macquarie Journal of Business Law* (2009) Vol 6, p275.

98 Submission No 9 from Professor Ian Bailey SC on behalf of the Society of Construction Law Australia, 12 October 2011, p6.

- The practical reality is that competent dispute resolution practitioners or the parties' legal advisers would bring to the parties attention the issues which are necessarily involved in adopting the *Med Arb* procedure.[99]

- In practice parties would only disclose to the mediator any information which could not prejudice their conduct of the arbitration proceedings, for example, a party would not disclose a weakness. [100]

Weaknesses

7.63 The perceived weaknesses of clause 27D(7) are summarised as follows:

- Possession of confidential information is a significant difficulty to the mediator proceeding with arbitration, since it is likely to influence him whether consciously or unconsciously in handling the arbitration. In that situation a party can be prejudiced by information which that party does not know and therefore cannot rebut.[101]

- If the mediator when resuming as an arbitrator feels compromised, he or she can withdraw with consequential time and costs to the parties.[102]

- It is 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.[103]

- A circumstance in which an adjudicator receives information from one party which is not disclosed to the other is contrary to basic principles of procedural fairness. [104]

- Publishing an award leaves open the opportunity that an award is unsafe because of the possibility or perception that the arbitrator might have used information gleaned from the mediation that could have subconsciously swayed the arbitrator's decision and potentially the award.[105 & 106]

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99 Submission No 9 from Professor Ian Bailey SC on behalf of the Society of Construction Law Australia, 12 October 2011, p6.

100 Ibid.

101 Submission No 2 from Laurie James 30 September 2011, p1.

102 Ibid, p2.

103 Submission No 3 from the Chief Justice of Western Australia, 30 September 2011, p3.

104 Ibid.

105 Submission No 4 from Phil Faigen, 3 October 2011, p2.

106 Submission No 6 from Matthew Zilko SC, 11 October 2011, p1.

- What an arbitrator considers to be "*material*" must always be a largely subjective determination. Whether an item of information is material could be the subject of an appeal on the basis of the arbitrator's misconduct. [107]

- The clause will open up an enquiry within 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.[108]

- If mediation fails, the parties can arrange another arbitrator but there will be additional costs. [109]

- Information provided to the arbitrator when acting as a mediator is not evidence in the arbitration proceedings. Its status is uncertain. The arbitrator can have no regard to that information unless it forms part of the evidence 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.[110]

- The clearly distinct roles of mediators and arbitrators as reflected in their attitudes to rules of natural justice[111] militate against a combination of these roles.[112]

- For a self represented party, mediation relies on trust. This will not be established in a person who may later selectively reveal what has been discussed in confidence.[113]

- The reality is that clause 27D is useless and unlikely ever to be used. This is because a party will first want to see what confidential information the

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107 Submission No 6 from Matthew Zilko SC, 11 October 2011, p2.

108 Ibid.

109 Submission No 4 from Phil Faigen, 3 October 2011, p2.

110 Submission No 6 from Matthew Zilko SC, 11 October 2011, p2.

111 A breach of the rules of natural justice (the hearing rule and the rule against bias) in arbitrations will generally lead to the invalidity of that decision, resulting in an arbitral award being overturned or remitted to the arbitrator. By comparison, the effect of a breach of the rules in mediation is far from clear, if in fact even relevant. Submission No 7 from Dr Philip Evans and Professor Gabriel Moens, 7 October 2011, enclosing 'Reflections on the Role of Mediators and Arbitrators, Can a Good Mediator also be a Good Arbitrator', *Macquarie Journal of Business Law* (2009) Vol 6, p268.

112 Submission No 7 from Dr Philip Evans and Professor Gabriel Moens, enclosing Reflections on the Role of Mediators and Arbitrators, Can a Good Mediator also be a Good Arbitrator, *Macquarie Journal of Business Law* (2009) Vol 6, p266.

113 Submission No 16 from Margaret Halsmith, 21 October 2011, p2.

arbitrator may wish to disclose to the other party before giving consent to the person to act as arbitrator. [114]

7.64 The Attorney General, when responding on behalf of the SCAG Secretariat about the inclusion of clause 27D in the Model Bill, included a view of the clause by Mr AA de Fina who said:

> *I observe that like provisions in the current domestic Uniform Acts anecdotally have been rarely used and arbitrator training and practice warns strongly against adopting the dual role.*[115]

7.65 Further, the Chief Justice noted:

> *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 arbitration 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.*[116]

7.66 The Committee notes that the inclusion of clause 27D is a policy decision of the Executive.

Clause 35 Recognition and enforcement (cf. UNCITRAL Model Law Art 35)

7.67 Clause 35 states as follows:

> *(1) An arbitral award, irrespective of the State or Territory in which it was made, is to be recognised in this State as binding and, on application in writing to the Court, is to be enforced subject to the provisions of this section and section 36.*

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114 Submission No 17 from John Hockley, 31 October 2011, p1.

115 Letter from Hon Christian Porter, MLA, Attorney General, 27 October 2011, p2.

116 Submission No 3 from the Honourable Wayne Martin, 30 September 2011, p3.

> *(2) The party relying on an award or applying for its enforcement must supply the original award or a copy of the original award.*
>
> *(3) If the award is not made in English, the Court may request the party to supply a translation of it into English.*

7.68 Clause 35(2) only refers to a 'copy' and although it may be implied, it is preferable that from an evidentiary value perspective, the term 'certified' be inserted so that something more than a photocopy is required.

7.69 The Committee noted that the UNCITRAL Model Law, the *Commercial Arbitration Act 2010* (NSW) and the *International Arbitration Act 1974* (Cth) do not require a certified copy. Mr Peter Richards, Legal Policy Officer, Department of the Attorney said:

> *I think in many cases you would be arguing for a certified copy, as you suggest. I think "copy" is meant to include things like certified or notarised copy. If you present documents from overseas, they have to be notarised anyway.*[117]

7.70 Given the evidentiary importance of the original award, the Committee makes the following recommendation

Recommendation 2: The Committee recommends that the Parliamentary Secretary representing the Attorney General explain whether it is the intent that the word "copy" in clause 35(2) is intended to be read as meaning a certified or notarised copy. If so, to explain why this is not expressly provided for in the Bill.

Clause 45 Acts amended

7.71 The Committee notes a minor drafting error in clause 45, Item 14. Item 14 makes various consequential amendments to the *Petroleum Act 1936*. There is a reference to a section 14(4) but this should be section 14(3). The Committee makes the following recommendation.

[117] Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 24 October 2011, p9.

Recommendation 3: The Committee recommends that the Commercial Arbitration Bill 2011 be amended in the following manner:

Page 61, in the Table, Item 14, row 7 - To delete -"14(4)" and insert -

14(3)

Review of the Act

7.72 There is no 'review of the Act' clause in the Bill. The Committee noted that neither the *UNCITRAL Model Law* nor the current Act contain such a clause.

8 FURTHER AMENDMENTS TO THE BILL

8.1 The Committee was advised that other than an amendment to correct the drafting error in clause 45, no other amendments to the Bill are contemplated.[118]

9 CONCLUSION

9.1 Except for the clauses mentioned at paragraph 4.3, the Bill implements provisions in the amended, model Commercial Arbitration Bill 2009 adopted at SCAG's April 2009 meeting.

Hon Adele Farina MLC
Chairman
8 November 2011

118 Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 24 October 2011, p9.

APPENDIX 1

LIST OF STAKEHOLDERS

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Stakeholders
Mr Hylton Quail, President, The Law Society of WA, Submission Number 8
Mr James Pearson, Chief Executive, The Chamber of Commerce and Industry Western Australia
Ms Mary Anne Kenny, Chair, The Law Reform Commission of Western Australia
Mr Alexander Ward, President, Australian Law Council
Professor Stuart Kaye, Dean, University of Western Australia Law School
Professor Phil Evans, Dean, School of Law, Murdoch University
Professor Mark Stoney, Head of School, School of Law and Justice, Edith Cowan University
Associate Professor Jane Power, Executive Dean, University of Notre Dame Australia
Mr Alan Bourke, President, Real Estate Institute of WA, Submission Number 5.
Mr Albert Monichino, SC, Barrister, Arbitrator and Mediator, Submission 13
Ms Michelle Sindler, Secretary General, The Australian Centre for International Commercial Arbitration
Ms Michelle Sindler, Chief Executive Officer, Australian International Disputes Centre
Mr Russell Welsh, Manager, The Royal Institution of Chartered Surveyors Dispute Resolution Service
Mr Malcolm Holmes QC, Chairman, The Chartered Institute of Arbitrators (Australia)
Mr Michael McLean, Executive Director, The Master Builders Association of Western Australia
Ms Helen Goddard, Chapter Administrator, The Institute of Arbitrators and Mediators Australia WA Chapter
Mr Peter Shears, Chief Executive Officer, The Institute of Arbitrators and Mediators Australia National Office

Stakeholders
Ms Margaret MacKay, Chapter Administrator, The Institute of Arbitrators and Mediators Australia NSW Chapter
Mr Grant Donaldson, President, Western Australian Bar Association
The Hon Chief Justice Wayne Martin, Chief Justice, Supreme Court of Western Australia, Submission Number 3
Ms Gail Archer, Mediator and Arbitrator, Francis Burt Chambers
Mr Graham Castledine, Mediator, Castledine Legal and Mediation Services
Ms Nicoletta Ciffolilli, Mediator, Submission Number 15
Mr Scott Ellis, Mediator and Arbitrator, Francis Burt Chambers
Ms Margaret Halsmith, Mediator, Submission Number 16
Mr John Hockley, Mediator and Arbitrator, Francis Burt Chambers, Submission Number 17
Dr Michael Underdown, Arbitrator, Clayton Utz, Submission Number 14
Mr Matthew Zilko SC, Mediator, Francis Burt Chambers, Submission Number 6
Mr Laurie James, Mediator and Arbitrator, Kott Gunning, Submission Number 2
Ms Susan Schmidt, Mediator, Karp Steedman Ross-Adjie Lawyers
Mr Eric Ross-Adjie, Mediator, Karp Steedman Ross-Adjie Lawyers
Mr Philip Faigen, All Points Building Consultants, Submission Number 4
The Hon Justice John Chaney, President, State Administrative Tribunal
Mr Greg Steinepreis, Partner, Minter Ellison
Mr Roger Davis
Mr Kingsley Vincent, Kingsley Vincent and Associates
Mr Philip Loots
Mr Graham Morrow

Stakeholders
Dr Philip Evans, Submission Number 7
Mr Ian Johnstone
Mr Bruce Phillips
Mr Patrick Pinder
Mr Barry Tonkin
Mr Kim Doherty, Submission Number 10
Mr Paul Wellington
Mr Sean McGarry
Mr Zvy Lieblich
Mr William Lau
Mr John Knuckey
Mr Glynn Logue
Mr Alan Riley
Mr Anthony Brand, Submission Number 1
Ms Angela Bowne, Chair, Alternative Dispute Resolution Committee

Other submissions received
Professor Ian Bailey SC on behalf of the Society of Construction Law Australia, Submission Number 9
Mr Charles Anderson on behalf of Master Builders Western Australia, Submission Number 11
D.G. MacCarthy, Submission Number 12

APPENDIX 2

IDENTIFIED STRUCTURES OF UNIFORM LEGISLATION

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IDENTIFIED STRUCTURES OF UNIFORM LEGISLATION

The Committee has adapted the following five structures from the Protocol on *Drafting National Uniform Legislation* by the national Parliamentary Counsel's Committee, 2008 Third Edition. Further detail of these structures may be found at: http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf or in the Committee's sixty fourth report titled *Information Report on Uniform Scheme Structures* tabled in August 2011.

Structure 1 - Applied laws. Also know as template, cooperative and complementary legislation, here legislation is enacted in one jurisdiction and applied (as in force from time to time) by other participating jurisdictions as a law of those other jurisdictions.

Structure 2 - Model legislation. Also know as mirror legislation, this legislation is enacted in participating jurisdictions with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law. It is drafted in either non-jurisdictional specific terms, or as the law of a particular jurisdiction.

Structure 3 - Legislation of the States referring legislative power to the Commonwealth. Legislation can either confer general authority to legislate with respect to a general matter described in the referral legislation or confer specific authority to legislate in the terms set out in the referral legislation.

Structure 4 - Legislation of the States adopting a Commonwealth law. The *Commonwealth Constitution* at paragraph 51 (xxxvii) enables a State, as an alternative to referral, to "adopt" a Commonwealth law enacted in reliance on a referral by other States. A referral of power gives the Commonwealth greater flexibility to make future changes and to ensure that those changes commence at the same time in all jurisdictions.

Structure 5 - A combination of structures. Here some provisions of a legislative project may be dealt with by way of an applied law scheme and other provisions by way of national model scheme. Those jurisdictions that are currently prepared to use an applied law model to achieve future consistency by delegation of legislative changes to the Parliament of another jurisdiction (the template jurisdiction) may also be prepared to enact national model legislation and delegate legislative changes that are agreed by government nationally to the executive of their own jurisdiction, subject to a power of the local Parliament to disallow the changes in the same way as they may disallow subordinate legislation made by the executive.

APPENDIX 3

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

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FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament.