

APPENDIX: AGD's Review of the *International Arbitration Act* - comparison of 24 Submissions (as of 13 March 2009)
 from http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_ReviewofInternationalArbitrationAct1974

By Sue Soueid (Sydney Centre for International Law intern), with Dr Luke Nottage (SCIL Program Director, Comparative & Global Law)

Submission (alphabetical ly) / DP question	A: (i) liberalise 'writing' in Pt II? (ii) option 1 (partly)?	B: only specific grounds for refusing to enforce ?	C: ML governin g exclusiv ely (no CAA) if arb in Aust?	D: overrule <i>Eisenwerk</i> , like Singapore?	E: (i) fix drafting errors re ss 25-7 (interest), (ii) so "opt-out"	F: adopt (other) rev'd ML, incl (i). interim measures (but w/o prel. orders), (ii) writing?	G: arb instn in lieu of court for (i) default apts, (ii) challenges	H: exclusive jurisdiction to Fed Ct?	I (other)
AA de Fina	(i) yes (ii) yes	yes	Yes –but need further definitiv e provision on what constitut es opting out	yes	(i) yes (ii) no	(i) yes – but not the provision for ex parte preliminar y orders (ii) option 1 only	(i) ambivalen t –would not be successful (ii) no	yes	Needs to be more empathetic to all codes of law
ACICA	(i) yes, (ii) yes	yes	yes	yes (etc)	(i) yes, (ii) yes	(i) yes (but not prel. orders);	(i) yes (ACICA), (ii) yes	NO (perhaps 'impracticable')	Extra submission soon

						(ii) yes (as for A)	(ACICA)		
AFIA	(i) yes, (ii) <u>“at least”</u> option 1	yes	yes (but add to ML, as in Singapore, to guarantee courts’ powers as wide as CAA)	yes (but Singapore Act s15A not needed)	(i) yes, (ii) yes (and ss 25-6 further amended to allow compound interest)	(i) yes (<u>with prel. orders on “opt out” basis</u>); (ii) yes, “at least” option 1	(i) yes (ACICA, but changeable by Reg – see Garnett/Nottage), (ii) NO	NO (impracticable, and constitutional problems – see Garnett/Nottage)	Expand resource like icdr.gov.au (also for arb practitioners visting from abroad)
The Honourable Neil Brown QC FC Inst A, Arbitrator and Mediator and Sam Luttrell	(i) yes (ii) yes – need to ‘adapt to [the] modern way of doing business’	yes	Yes (but not drafted with the words ‘to which the UNCITRAL Model Law applies’ as this presents problems when the	Yes	(i) yes (ii) no	(i) yes (ii) option 1	(i) yes (ii) yes subject to the Attorney being satisfied about certain other considerations	yes	

			parties opt out pursuant to s21)						
Chief Justices of the States and Territories	n/a	n/a	n/a	n/a	n/a	n/a	n/a	NO – ‘raises the prospect of consequential jurisdictional disputes’ re whether an arbitration is an ‘international commercial arbitration’	n/a
CI Arb	(i) yes (ii) yes	yes	Yes, but with some reservations about the application of the proposed amendment where the parties	Yes (but Singapore amendment not needed – favours an amendment providing that the Model Law will apply except where there is an express opt out of the	(i) yes (ii) yes	(i) yes, as long as new article 2A, article 7 (option), s4 of Chapter IVA and article 35(2) is supported, and s2 of Chapter	(i) yes, but has to be well funded – ACICA needs more funding). (ii) no (unless subject to judicial review)	Not at this time, but if the Cth govt were to properly resource an arbitral institution and appoint a panel of judges to the Federal Court with specialist international arbitration	Especially (1) Arb-med (pp 15-8), (2) public policy (= Vic Bar: “int’l”), (3) confidentiality (= NZ), (4) reform CAA based on ML, (5) foreign lawyers’ rights before Oz Cts

			exercise s21	application of the Model Law)		IVA is NOT supported. (ii) option 1		expertise then yes.	
Clifford Chance	(i) yes (ii) option 1 (option 2 insufficient)	Yes – should be amended along the lines of the NZ Act (or at least the English Act)	Yes (but provisos as to the wording of the proposed amendment esp. re s21)	Yes. Also adopt Singapore amendment (possibly also include s15A of Singapore Act)	(i) yes (ii) Section 22 should expressly state that ss23 and 24 apply on an opt in basis and ss25-27 on an opt out basis	(i) yes, esp. articles 2A and articles 17-17J (ii) option 1 (refer A)	(i) no (ii) no – existing hierarchy reflects an appropriate level of judicial intervention	Yes –but with provisos (i.e. the creation of an education program)	Express: (i) inclusion of the principle of confidentiality (with exceptions) (ii) stipulation of matters that cannot be referred to arbitration (iii) stipulation of the appropriate test re whether an arbitrator is independent and impartial
The Hon. Justice de Jersey, Chief Justice of Queensland	n/a	n/a	n/a	n/a	n/a	n/a	n/a	NO –see <i>Australian Securities Commission v Marlborough Goldmines Ltd</i> (1993) 177 CLR 485, 492.	n/a
Prof Garnett	(i) yes, (ii)	yes	yes	Yes (etc)	(i) yes, (ii)	(i) yes	(i) yes, (ii)	NO (eg	MANY!

& A/Prof Nottage	<u>possibly even option 2 (fully)</u>		(possibly with AFIA proviso)		yes	(and possibly prel. orders); (ii) yes (as for A)	NO	constitutional problems)	
ICC Australia	(i) yes (ii) option 1	Yes – should be exclusive (i.e. Court should not have discretionary power)	yes	Yes, no response re Singapore	(i) yes (ii) yes	(i) yes (ii) option 1	(i) yes - ACIC (ii) yes	yes	Section 25 should be amended to make it clear that an arbitral tribunal can award compound interest
ILSAC	(i) yes (ii) option 1 only	Yes – also (cautiously) supports the removal of Court discretion	Yes – recommends guidance be drawn from ss 12-14 of the Singapore IAA	Yes – adopts 15(2) of Singapore Act	(i) yes (ii) yes	(i) yes (ii) option 1	(i) Yes – ACIC (ii) not at this stage	No for enforcing arbitration agreements, but yes for the supervision of arbitration and the enforcement of foreign arbitral awards	(i) confidentiality provision (ii) allow a tribunal to adopt inquisitorial processes if necessary
Law Council	(i) yes	Yes –	Yes –	Yes –favours	(i) yes	(i) yes –	(i) yes	No	(i) Incorporation

of Australia	(ii) option 1	existence of a general discretion creates uncertainty	with amendment of s21 to further clarify	adopting s15(2) of the Singapore Act	(ii) yes – delete s22 and amend s24 to ensure it remains on an opt-in basis	excluding preliminary orders (ii) option 1	(ii) no		of other dispute resolution processes (ii) Express confidentiality provision
Mr David K S Lim JP	(i) no reason to, but if yes then for (ii) option 1	Yes –no discretion should exist	Yes	Yes (no response as to s15(2) of Singapore Act)	(i) Yes (ii) Should be clarified as an opt-out basis unless the parties agree otherwise	Refer question A	(i) no (ii) no	Yes	Separate Act to deal with investment disputes
NSW Bar Association	(i) yes (ii) option 1	Yes –no discretion	Yes –but consequential issues should be addressed	Yes (but not s15(2) of the Singapore Act unless other necessary amendment are made)	(i) yes (ii) yes	(i) yes (ii) yes	(i) yes (ii) yes – ACIC for both	No	Suggestions (i) Allow arbitrator to also act as mediator where it is in the interests of the parties (ii) Ensure confidentiality
NSW Law Society	(i) yes (ii) option 1	Yes	Yes	Yes – supports s15(2) as a	(i) yes (ii) yes	(i) yes – except for preliminary	(i) yes (ii) no	No	(i) Ensure confidentiality (ii) Allow foreign

				second position only		y orders (ii) option 1			practitioners appearing before the Tribunal to also appear before the Court in the event of a challenge (iii) Provide for arbitrators to also act as mediators
NSW Young Lawyers International Law Committee	(i) not necessary (ii) <u>no concluded view</u> but option 1 preferable	Yes (?)	Yes	Yes –but s15(2) may not be sufficient to address this.	(i) yes (ii) yes –but with some reservations as to the wording of the proposed sections	(i) no final view as to form, content or extent of possible amendments –have to consider best practice (ii) Should be determined by Australia’s particular needs and by	(i) not necessary to fulfil obligation under the treaty	No conclusive view but notes that giving the Federal Court exclusive jurisdiction may not necessarily lead to more consistent jurisprudence	Clarification of the interpretative approach to be taken to legislation and the international instruments.

						reference to the particular legal context			
Piper Alderman	(i) yes (ii) option 1	Yes	Yes – although consideration should be given to the inclusion of a provision similar to s17 of the <i>Commercial Arbitration Acts of the States and Territories</i>	Yes –s15(2) of the Singapore Act appropriate	(i) yes (ii) yes	(i) yes (but not ex parte preliminary orders) (ii) option 1	(i) yes (ii) no	No	Assist participation of foreign national in the arbitration process –e.g. visa entry requirements, rights to practice, etc
Mr John Rundell	(i) Yes (ii) Yes	Yes	Yes	Yes –s15(2) of the	(i) Yes (ii) Yes	(i) Yes, <u>without</u>	(i) Yes (ii)	Yes	Should look at the practices in

				Singapore Act appropriate		<u>any modifications</u> (ii) option 1	Objections re the appointment of an arbitrator should be made to the relevant institutions, with the Courts an option of last resort		Singapore and Hong Kong for guidance
Mr B. A. Shnookal	n/a	Yes	No – problem of definition	Yes – although Singapore Act is not sufficiently clear	Yes (also in favour of ex parte preliminary orders if a fair opportunity to be heard is given)	n/a	(i) No (ii) No	No	n/a
Technology Dispute Centre	(i) Yes (ii) option 1	Yes	Yes	Yes	(i) Yes (ii) Yes	(i) Yes (ii) Option 1	(i) Yes – ACICA appropriate (ii) No	Yes	More certainty and clarity in the judicial framework desirable.
Vic Bar	(i) Yes	Yes	Yes –	Yes –along	(i) Yes	(i) Yes,	(i) Yes –	No	(1) still don't add

	(ii) option 1		although this would require amendment of s21	the lines of s15(2) of the Singapore Act	(ii) Yes	but not ex parte preliminary orders	ACICA most suitable (ii) no response		confidentiality provisions, (2) "int'l" public policy (pp 9-11)
Victorian Chief Justice Marilyn Warren	n/a	n/a	n/a	n/a	n/a	n/a	n/a	No	n/a
A/Prof Bruno Zeller	(i) Yes (ii) Option 1 – <u>but option 2 should also be considered</u>	Yes	Yes	Yes	Prefers an opt out option	(i) Yes(?) Should first look at developments in other countries (ii) Option 1	Yes – ACICA adequate	Yes	n/a