

International Arbitration Act Review - our eleven page report starts here

Federal Attorney-General receives 24 submissions on IAA proposals

The Commonwealth Attorney-General's office has received twenty-four submissions in response to the Discussion Paper which was issued in regard to the proposed redrafting of the International Arbitration Act.

The review of the Act was announced at the ACICA Conference in Sydney last November and respondents were given until 16 January to make submissions - a relatively short period of time considering that it coincided with the Christmas and New Year holiday period.

Eleven professional associations, two law firms and 11 submissions from individuals including States and Territories Chief Justices made up the number (see adjoining box).

The most surprising omission was that of the Institute of Arbitrators and Mediators Australia (IAMA) which did not submit a response.

Of Australia's legal bodies, submissions were received from the Law Society of New South Wales, the NSW Bar Association, the Victorian Bar Association and the Law Council of Australia.

Two law firms submitted responses - Piper Alderman from Australia and Clifford Chance from London.

The Chief Justices of the States and Territories made a joint statement and referred only to Question H of the Discussion Paper which was concerned with whether or not the Federal Court should be given exclusive jurisdiction in matters of international arbitration. As would be expected they were opposed to such a proposal. The Chief Justices of Queensland and Victoria also made separate submissions only on the same point.

A very detailed joint submission from Professors Richard Garnett of Melbourne University and Luke Nottage of Sydney University was the only academic response to the review.

This issue of *The ADR Reporter* contains a summary of the main points they made which covered many areas beyond the

original eight questions under discussion.

One particular submission of interest came from South America where eleven practitioners and academics from Argentina, Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela banded together to submit a combined response to the Discussion Paper.

Questions and answers

There were eight questions posed in the Discussion Paper. A number of the questions produced almost unanimous answers from the respondents. This is a summary of the answers that were received:

Question A(i) - *Should the meaning of the written requirement for an arbitration agreement, in Part II of the International Arbitration Act (subsection 3(1)) be amended?*

All respondents except two replied yes. David Lim wrote that there was no reason to make the amendment and NSW Young Lawyers International Committee considered that it was not necessary.

Question A(ii) - *If so, should elements of the amended writing requirement in article 7 (option 1) of the UNCITRAL Model law, as revised in 2006, be used in the amended definition?*

All respondents replied yes and supported the adoption of Option 1.

Question B

Should the International Arbitration Act be amended to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in subsections 8(5), 8(7) or 8(8) is made out?

Generally, all respondents replied yes and several suggested that they supported the removal of the Court's discretionary powers

Question C

Should the International Arbitration Act be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies?

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Who made submissions and comments:

Professional Institutions(11)

The Chartered Institute of Arbitrators (Australia) Limited
 Australian Centre for International Commercial Arbitration (ACICA)
 Australasian Forum for International Arbitration (AFIA)
 International Chamber of Commerce Australia (ICC)
 International Legal Services Advisory Council (ILSAC)
 Law Council of Australia
 NSW Bar Association
 NSW Law Society
 NSW Young Lawyers International Committee
 Technology Dispute Centre
 Victorian Bar Association

Law firms(2)

Clifford Chance
 Piper Alderman

Individuals (11)

Neil Brown QC and Sam Luttrell
 Comments by the Chief Justices of the States and Territories
 A A De Fina
 Professors Richard Garnett and Luke Nottage
 Chief Justice Paul de Jersey (Queensland)
 David K Lim
 John Rundell
 B A Shnookal
 South American Scholars and Practitioners
 Chief Justice Marilyn Warren (Victoria)
 Bruno Zeller

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The general response to Question C was yes. Where respondents commented further, most expressed some reservations about the application of the proposed amendment where the parties opted to exercise s.21 of the Act.

Question D

Should the International Arbitration Act be amended to reverse the Eisenwerk decision, by adopting a provision similar to subsection 15(2) of the Singaporean International Arbitration Act?

All those who answered Question D answered in the affirmative. However, several respondents argued that s.15A of the Singapore Act was not needed. These included AFIA, CI Arb, and the NSW Bar. Clifford Chance, ILSAC, Piper Alderman, John Rundell and the Victorian Bar Association believed that s 15(2) of the Singapore Act was appropriate. The South Americans proposed the abrogation of s 21 of the International Arbitration Act altogether.

Question E (i)

Should these drafting inconsistencies in Part III, Division 3, of the International Arbitration Act be remedied?

Question E (ii)

If so, should it be clarified that sections 25-27 (relating to interest up to the making of the award, interest on the debt under the award, and costs) apply on an 'opt-out' basis (that is, applying unless the parties agree otherwise)?

On the matter of Question E, all respondents answered yes to E(i). and all but two of those who answered in the affirmative to (i) also answered in the affirmative to (ii). The NSW Young Lawyers International Committee expressed some reservations as to the wording of the proposed sections.

Question F (i)

Should the International Arbitration Act be amended to adopt recent amendments to the UNCITRAL Model Law?

Question F (ii)

If article 7 of the revised Model Law (amending the definition of an 'arbitration agreement') is adopted, should option 1 (providing a broad interpretation of the writing requirement) or option 11 (removing the writing requirement) be adopted?

With reference to the second part of the

Question F, option 1 was the preferred option of all respondents.

All respondents answered yes to F(i). The majority of those who expanded on their answer did not want the provision for ex parte preliminary orders. This view was supported by AA de Fina, ACICA, AFIA, CI Arb (wanted amendments to s 2 of Chapter IVA), Law Council of Australia, NSW Law Society, Piper Alderman, the South American Lawyers and Academics and the Victorian Bar Association.

Question G (i)

Should the International Arbitration Act be amended to allow regulations to be made designating an arbitral institution to perform the functions set out in articles 11(3) and 11(4) of the UNCITRAL Model Law?

There was an interesting divergence of

The second part of Question G produced the most negative response of all the questions posed by the Attorney-General in the Discussion Paper. Of the 18 respondents answering directly to this question 14 rejected the proposal in some form or another – that is 78% of those who expressed a view were against the proposal that it would be appropriate for other functions referred to in Article 6 of the Model Rules to be performed by an arbitral institution.

opinion with respect to this question. Of those who answered yes, the majority, including ACICA itself, proposed that ACICA should be designated as the arbitral institution to perform the functions set out in Articles 11(3) and 11(4) of the UNCITRAL Model Rules. Those who supported this proposition were AFIA, CI Arb, ICC Australia, ILSAC, NSW Bar Association, Technology Dispute Centre, Victorian Bar Association and Bruno Zeller. CI Arb held the view that if ACICA was to carry out these function successfully, then it needed to be better funded.

Question G (ii)

Would it be appropriate for other functions referred to in article 6 of the UNCITRAL Model Law, such as hearing challenges to arbitrators under articles 13(3) and 14, to be performed by an arbitral institution similarly designated under the International Arbitration Act?

There was more divergence regarding the second part of Question G. In fact, this question produced the most negative response of all the questions posed by the Attorney-General in the Discussion Paper. Of the 18 respondents answering directly to this question 14 rejected the proposal in some form or another – that is 78% of those who expressed a view.

The following did not support the notion that it would be appropriate for other functions referred to in Article 6 of the Model Rules to be performed by an arbitral institution:-

AA de Fina, AFIA, CI Arb, Clifford Chance, Garnett/Nottage, ILSAC, Law Council of Australia, David Lim, NSW Law Society, Piper Alderman, B A Shnookal, Technology Dispute Centre. The South American Practitioners and Academics believed that it would be appropriate with the exception of the functions set forth in s.34(2) which relate to arbitration law and should be discharged by judicial courts. The South Americans added that the best solution would be to make it clear that the parties have the option to opt out from the performance of the functions of s 13(3), 14 and 16(3) by judicial courts via making a reference to the rules of an arbitral institution or by directly appointing an arbitral institution to perform these functions.

Those who expressed a definite view in favour were: ACICA,

Brown/Luttrell, ICC Australia, NSW Bar.

Question H on the matter of whether or not the Federal Court should have exclusive jurisdiction, was deemed to be the most controversial of all the questions and was one which aroused some considerable passion. This answers to the question are detailed in the table below and have been dealt with by the Editor in his editorial at the end of this section reviewing the IAA Discussion Paper.

Question I

Do you have any other comments or recommendations for improving the
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International Arbitration Act?

The main issue raised by respondents was that of confidentiality in arbitration. All those who raised this issue – CIArb, ILSAC, Law Council of Australia, NSW Bar, NSW Law Society, Clifford Chance, Garnett/Nottage, espoused the view that the High Court decision in *Esso Australia Resources Ltd v Plowman* ((1995) 183 CLR 10 had adversely affected Australia's position as a seat for international commercial arbitration hearings.

ILSAC, for example, said in its submission: "The decision is often raised by international practitioners at conferences around the world and remains a concern of commercial organisations who might otherwise select

Australia as a venue for international commercial arbitration." The Victorian Bar took a contrary view and said that it was not convinced that a legislative reversal of *Esso* was necessary.

The other area that received broad support was that of incorporating a med-arb procedure into the legislation. CIArb submitted the most detailed position statement supporting the proposition. The Law Council of Australia, the NSW Bar Association and the NSW Law Society were amongst those organisations which also supported this idea.

Under the present operation of s.29(2) of the International Arbitration Act, foreign practitioners are entitled to appear before an arbitral tribunal. There was support for

the view that foreign lawyers should also be allowed to appear in any court proceedings arising out of or related to arbitration and that this should be enshrined in any amended legislation.

In preparation of this report, the Editor wishes to acknowledge use of the comparison table which was produced by Sue Soueid, an intern of the Sydney Centre for International Law together with Luke Nottage who, amongst many hats that he wears, is the SCIL Programme Director, Comparative and Global Law. Their compilation has saved him considerable time and effort. The table below is the editor's own work. The full version of their table can be found at http://www.law.usyd.edu.au/scil/pdf/2009/ArbitrationTableSummary_Nottage.pdf

The responses to the Question H - Should the Federal Court have exclusive jurisdiction ?

Respondent	Y/N	Reason
A A de Fina	Yes	Conduct and decisions of domestic courts, specialist judges in Federal Court
ACICA	No	Jurisdictional disputes;
AFIA	No	Jurisdictional issues; constitutional issues (see Garnett/Nottage)
Brown/Luttrell	Yes	Internal arbitration a federal matter, consistent jurisprudence; dedicated judges
Chief Justices of States/Territories	No	Jurisdictional disputes; jurisprudence cf <i>ASC v Marlborough</i>
CIArb	No	Yes if arbitral institution promotes and administers. Specialist judges in Federal Court
Clifford Chance	Yes	Consistent jurisprudence; dedicated judges aided by education programme
Paul de Jersey, CJ Queensland	No	Jurisprudence issue rejected – cf <i>ASC v Marlborough</i>
Garnett/Nottage	No	Constitutional issues
ICC Australia	Yes	Uniformity; enhance status of Australia as a jurisdiction hospitable to international arbitrations
ILSAC	Yes	Exclusive jurisdiction except for matter relating to enforcement of arbitration agreements
Law Council of Australia	No	Jurisdictional disputes; jurisprudence cf <i>ASC v Marlborough</i>
David Lim	Yes	Greater certainty, clearer direction to international arbitration users
NSW Bar Association	No	Jurisdictional disputes; consistent jurisprudence
NSW Law Society	No	Removes choice of forum; Sup Crts have established expertise; no evidence of more consistent jurisprudence; jurisdictional disputes
NSW Young Lawyers International Cttee	N/A	No opinion – arguments for and against
Piper Alderman	No	Jurisdictional disputes a major disincentive to change
John Rundell	Yes	Competition and variation in approach amongst States intl concern
B A Shnookal	No	Consistency vs familiarity of domestic courts with arbitration
South American Lawyers/Academics	Yes	Legal certainty and uniformity
Technology Dispute Centre	Yes	Simplified procedural order process
Victorian Bar Association	No	Jurisdictional disputes; consistent jurisprudence
Marilyn Warren, CJ of Victoria	No	Jurisdictional disputes; jurisprudence cf <i>ASC v Marlborough</i>
Bruno Zeller	Yes	Would follow successful Singapore model