

Your Ref:

Quote in reply: ADR Section:21000330/2

15 January 2010

Mr Laurie Glanfield
Secretary Standing Committee of Attorneys-General
NSW Department of Justice and Attorney-General
GPO Box 6
SYDNEY NSW 2000

Email: [REDACTED]

Dear Mr Glanfield

REFORM OF THE UNIFORM COMMERCIAL ARBITRATION ACTS

Thank you for your letter of 23 November providing the Issues Paper for Reform of the Uniform Commercial Arbitration Acts and draft Bill requesting the comments of the Queensland Law Society.

This issue has been considered by the Alternate Dispute Resolution Section of the QLS and that committee has contributed to this response.

Section 25 – The power of arbitrators in the event of a default by a party

The Society is supportive of expanded powers for the arbitrator in cases of default of a party as an important and necessary tool for an arbitrator to have recourse to to facilitate the fair and final resolution of disputes *quickly* and cost effectively.

It is our view, however, that in order to best achieve the over-riding objectives of the proposed Bill, powers relating to the conduct and progress of an arbitration should reside solely with the arbitrator. It may not be desirable for a party to be able to exert influence on an ongoing arbitration process by seeking court orders, rather, judicial oversight may be best applied at the conclusion of the determinative stage.

Section 27D – Settlement of disputes otherwise than by arbitration

The proposed provision seeks to make the default position for parties to an arbitration to be able to access other dispute resolution mechanisms or to have the arbitrator act as mediator or conciliator.

Interestingly this matter was the subject of advocacy by the Society in its June 1987 submission to the then Queensland Attorney-General on implementing in this State the uniform Commercial Arbitration Act, most relevantly stating:

“The section [section 27] is peculiar to the circumstance of attempted conciliation by the arbitrator or umpire. As stated those roles are considered to be incompatible. It is also

considered that there are adequate alternative dispute resolution forums available where parties can have a mini-trial or attempt at conciliation if they so choose. In any event parties would or should always voluntarily adopt a realistic approach to attempting to resolve the matter by negotiation before any final arbitration hearing if this is at all possible. The concern is to save both time and money by ensuring that parties not overcapitalise their efforts on points which should be resolved by agreement or which are disproportionate to the amount in issue. However, it is considered that proper regulation of this issues depends on the degree of sophistication and control exerted by the arbitrator in isolating the relevant issues and pointing the parties in the right direction. This should be done at the preliminary hearing and during interlocutory steps in a manner similar to that adopted by experienced Judges in the Commercial Causes jurisdiction in recent years.”

While terminology has matured and experience in the arbitration of matters has developed significantly since the composition of those submissions, the essential point remains valid today. There is much difficulty in explicitly seeking formal collaborative dispute resolution within a determinative framework ensuring that one mechanism does not have a detrimental impact on the processes of the other.

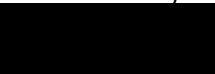
Additionally, given the significant difference in approach to dispute resolution, not all arbitrators are comfortable acting as mediators or conciliators. On this basis we suggest that the model of the provision be amended to an ‘opt-in’ approach with the agreement of the arbitrator.

Section 33B – Costs

The Society would be supportive of the introduction of provisions to the draft Bill to permit the arbitrator to limit or cap costs on the basis of proportionality as it is included in existing *Civil Liability* legislation in Queensland.

Thank you for providing the Society with the opportunity to provide comments on the draft Bill and we look forward to receiving any further consultation materials on this subject.

Yours faithfully



Peter Eardley
President