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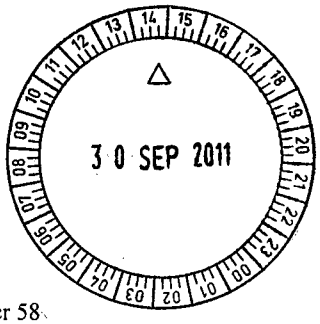

28 September 2011

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

Our Ref: LEJ:cr 58
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Dear Chairman

INQUIRY INTO THE COMMERCIAL ARBITRATION BILL 2011

My general view in relation to the Commercial Arbitration Bill 2011 is that so far as possible, there should be uniform legislation between the various States in Australia so that factors and precedent throughout the country are essentially the same. This is my only comment on the Bill as a whole.

So far as Section 27D is concerned and in particular clause 27D(7), I support the wording of the Section. This stems from my experience with the Institute of Arbitrators & Mediators Australia of which I have been a member since 1978. Indeed, I was involved with arbitration as a lawyer from about 1965 and it was this which led to the then WA Chapter Chairman of the Institute to invite me to join.

It is frequently the case that the mediator gains the respect of both parties to a dispute and they therefore perceive him as the best person to arbitrate. It is therefore quite understandable that all the parties to a dispute may wish the mediator to act as arbitrator if the mediation cannot result in a settlement. They are also conscious of the savings in fees likely to result from the fact that the mediator already has an understanding of what the dispute is about.

However, in most mediations, the mediator obtains confidential information from one or more parties in caucus sessions in the absence of the other parties. Possession of that information is obviously a significant difficulty to his proceeding with the arbitration, since it is likely to influence him, whether consciously or unconsciously, in his handling of the arbitration. In that situation a party can be prejudiced by information which that party does not know and therefore cannot rebut.

The writer is aware of a mediation before a very experienced mediator and arbitrator, in which the mediator later took on the role as arbitrator. However, in the course of the arbitration, the arbitrator realised that he was hopelessly compromised by the

confidential information which he had been given and which he was not authorised to disclose. Consequently, he was obliged to withdraw from the arbitration during the proceedings, with consequential time and costs to the parties.

This is a general view amongst the international arbitration community also. The writer once had a discussion with an experienced arbitration expert from the International Chamber of Commerce, who expressed the view that an arbitrator could not act if previously a mediator, except in a situation where the mediation did not involve a caucus between the mediator and one or more of the parties in the absence of the others. This would have precluded most mediators from continuing as arbitrators, since caucus sessions are the rule rather than the exception.

I perceive clause 27D as solving the problem. The parties are in a position to consent to the arbitrator having previously been the mediator, by unanimous written consent under clause 27D(4). However, they will know (and will certainly be reminded by the arbitrator) that this will result in any relevant confidential information being disclosed pursuant to clause 27D(7). Unless the parties are willing to have this occur, they would clearly not consent to the mediator continuing.

Consequently, it does seem to me that clause 27D does overcome the difficulties previously perceived to exist in what I describe as "med/arb" proceedings and I would therefore recommend to your Committee that they should endorse the clause.

Yours faithfully

Laurie James
Mediator & Arbitrator