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18 October 2011

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

Dear Ms Farina

Thank you for inviting me to comment on clause 27D of the Commercial Arbitration Bill 2011, in particular subclause 7.

Traditionally mediation has been a confidential process although this is not expressly stated in the NADRAC definition. There are exceptions to this where disclosure is required by law, usually to prevent harm or avoid the commission of an offence, or the clients themselves have agreed otherwise.

Contrary to this principle of confidentiality, subclause 7 requires the Arbitrator to disclose to all other parties to the arbitration proceedings information that the arbitrator considers material to the arbitration proceedings. I have a number of queries and concerns in relation to this subclause:

- There is no discretion as to whether or not to disclose. The only "discretion" relates to whether or not the information is material.
- Is the arbitrator the sole determiner of what is material or is the arbitrator's decision subject to review?
- Does the legislation include a process that will allow a client/party the right to be given notice of the arbitrator's intention to disclose and the information to be disclosed so that the client/party can object?
- What are the consequences if an arbitrator discloses information that is not material or does not disclose information that is material?
- Does the term "arbitration proceedings" refer to the process that commences after mediation ends or does it begin when the arbitrator is appointed and therefore includes the mediation and pre-mediation meetings?
- This subclause seems to conflict with subclause 2.

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Confidentiality is one characteristic of mediation that contributes to its success and avoids clients/parties commencing legal proceedings or continuing those proceedings. This subclause would make clients/parties wary of disclosing information to the mediator (especially if arbitration proceedings is defined to include the individual pre-mediation meetings with clients/parties) in case the mediation failed to result in an agreement and then confidential information was disclosed by the arbitrator. Alternatively the clients would ask that the matter be referred to another arbitrator which would have the effect of increasing costs. Another possibility is that it could lead to the amount of mediations prior to arbitration decreasing because arbitrators fear that they may not end up arbitrating if a matter is not settled in mediation.

One can also imagine the amount of litigation that will arise in relation to whether or not an arbitrator failed to disclose information that should have been disclosed or disclosed information that should not have been disclosed.

In conclusion the enactment of this subclause will very likely have a negative impact on what is commonly understood as the process of mediation.

Yours sincerely

Nicoletta Ciffolilli

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