The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

12 October 2011

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

Dear Chairman

INQUIRY INTO THE COMMERCIAL ARBITRATION BILL 2011

Thank you for your letter of 23 September 2011. The Law Society strongly supports the Bill and urges the Committee to speed its passage through Parliament.

As you are aware, the Bill is based on draft legislation adopted by the Standing Committee of Attorneys General ("SCAG"). Legislation in the form adopted by SCAG has been passed in New South Wales and Tasmania. The WA Bill differs from the SCAG draft in a number of minor respects. Some of those changes are merely mechanical. However, two of the differences have the potential to impact on the effective operation of the legislation.

First, clause 34A deals with the circumstances in which appeals may be brought against an arbitrator's award. Section 34A (1) provides that an appeal lies on a question of law where the parties agree **or** the Court grants leave. Equivalent provisions in other states and the SCAG draft provided that an appeal lies where the parties agree **and** the Court grants leave. The WA Bill should be amended to reflect the SCAG draft and the provisions in other states. The purpose of this clause was to increase the level of certainty of arbitrations by reducing the opportunity for unsuccessful parties to challenge appeals. As it stands, clause 34A does not diminish the circumstances in which the Court may grant an appeal.

Second, in each of sections 11, 13, 14, 16, 27H and 27I an additional subsection has been inserted. Section 11 is typical. Section 11 deals with challenges to decisions of the Court about selection of arbitrators, where the procedure chosen by the parties has not been effective. Section 11(5) provides that the decision of the Court is final. Section 11(5A) then goes on to provides:

> (5A) Subsection (5) –
>
> (a) does not limit judicial review; and
> (b) is subject to the Constitution of the Commonwealth section 73(ii).

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This addition of subsection 11(5A) is not helpful. It is important that appointments be made quickly, so that an arbitration can get under way. Challenges to the appointment of arbitrators have the potential to delay commencement of the arbitration. It is appropriate that this issue should be capable of being reviewed by the Court. However, only one level of review is required or helpful. Selection of the arbitrator is not a substantive decision on the rights of the parties.

Further, the "Court" referred to in section 11 is the Supreme Court of Western Australia (see section 6). It is not apparent that a "right of judicial review" exists in respect of decisions of the Supreme Court. Judicial review is a power which the Supreme Court exercises in respect of inferior courts and persons exercising statutory powers. The Supreme Court does not "review" itself.

The reference to section 73(ii) of the Constitution is not helpful. To the extent that it applies, it applies in its own right. An equivalent provision is not found in the Supreme Court Act, 1935. Further challenges in the appointment process should not be encouraged by the inclusion of section 11(5A).

The Society is not in a position to make a substantive submission about the operation of Section 27D. However, I understand that individual mediators and arbitrators will be putting forward submissions setting out their views for the assistance of your Committee.

Yours faithfully

Hylton Quail
President