RNT;dgr

Commercial Arbitration Bill 2012
Submission 002

BAR ASSOCIATION OF QUEENSLAND

29 November 2012

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By Email: lacsc@parliament.qld.gov.au

Dear Sir

Re: Commercial Arbitration Bill 2012

Thank you for your letter of 5 November 2012.

The Association supports the Bill. It notes that:

(a) The draft Bill you provided is in substantially the same form as the enacted NSW Act and that form has been adopted by other States;
(b) Uniformity in this sphere, which has previously been the case and is desirable generally in respect of legislation, is important;
(c) An unsatisfactory state of affairs will ensue if disparate legislation exists across the States;
(d) It would be desirable that the Bill be introduced into the House, and enacted, as a matter of urgency.

However there are some aspects of the Bill that the Association believes require amendment. The amendments proposed would not deprive the Bill of the general uniformity sought with other jurisdictions. The Association identifies the relevant aspects of the Bill and its suggested amendments under separate headings below.

Part 4A – Interim measures

The list of orders that the arbitral tribunal may make appearing in s. 17(3) is not in the nature of the "interim measures" appearing in s. 17(2) and are in fact primarily in the nature of ordinary interlocutory and procedural orders.

It would be more logical for the content of s. 17(3) to appear in Part 5 of the Bill.

The Association recommends that the opening words "Without limiting subsection (2)" be deleted and the balance of s. 17(3) be inserted as new s. 19(2A).

Section 27D – Mediation proceedings

The reference in each of ss. 27D(3)(a), (b) and (c) to "proceedings" should be replaced by a reference to "mediation proceedings" so as to make it clear that the intention is to refer to the defined "mediation proceedings" and not to any other proceedings.

BAR ASSOCIATION
OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000

Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au

Constituent Member of the Australian Bar Association

The Association recommends the reference in each of ss. 27D(3)(a), (b) and (c) to "proceedings" be replaced with "mediation proceedings".

Section 31 – Form and content of award

Section 31(2) allows for the signing of the award by less than all arbitrators in certain circumstances. That relaxation is not carried through into s. 31(6).

The Association recommends that in s. 31(6) after "subsection (1)" be inserted "or (2)".

Use of the word "settlement" – ss. 32(2)(a) and 34(b)(i)

"Settlement" of an arbitral proceeding is specifically contemplated by s. 30. The Association considers the use of the word "settlement" in ss. 32(2)(a) and 34(b)(i) to be undesirable.

The Association recommends that "settlement" in ss. 32(2)(a) and 34(b)(i) be replaced with "resolution".

Superseded terminology – ss. 17(3)(b), 33B(4) and (5)

In Queensland, "discovery" is now referred to as "disclosure". Costs are "assessed" not "taxed" and the basis for assessment is either on the "standard" or "indemnity" basis, not "party and party" or "solicitor and client".

Use of the superseded terminology introduces unnecessary ambiguity.

The Association recommends –

(a) "discovery" in s. 17(3)(b) is replaced with "disclosure";
(b) "tax" and "taxed" in ss. 33B(4) and (5) are replaced with "assess" and "assessed" respectively;
(c) "settle" in ss. 33B(4) and (5) is replaced with "fix";
(d) "as between party and party or as between legal practitioner and client" be replaced with "on a standard basis or on an indemnity basis".

Section 33F(1)(b) – Interest

The Association recommends the words "due date" in s. 33F(1)(b) are bolded and italicized, so as to maintain consistency of form with the other sections which define terms.

The limits of the Court's authority – ss. 11(5), 13(5), 14(3), 27H(5), 27I(4)

These sections all provide that decisions of the Court of various types are "final", so long as they are conducted within the applicable limits of the authority of the Court.

"The Court" is defined as the Supreme Court, unless in certain particular circumstances, s. 6(2) operates so that it is the District Court. The reference to limits of the authority of the Supreme Court is problematic given that it is a superior court of record.

More significant is the reference to finality. It is unclear what legitimate purpose is sought to be achieved:

(a) If it is intended that the purpose of the subsections is to ensure that there is no appeal from the Court exercising the jurisdiction concerned, then that should be said in terms. That could legitimately be done in terms of appeals from State Court to State Court.
(b) However, the exclusion of appeal from the Supreme Court to the High Court other than by the Commonwealth would be constitutionally invalid: s. 73, *Constitution* and cf *Judiciary Act* s. 35).

Of course it could be that the section simply intends to clarify the distinction between decisions which are final and decisions which are interlocutory, but that seems to be an unlikely intention to attribute to the section.
The Association simply draws this issue to your attention, rather than make any specific recommendation for change.

Conclusion

Subject to the above matters, the Association supports the enactment of the proposed legislation.

Thank you for the opportunity of providing consideration and comment.

Yours faithfully

Roger N Traves S.C.
President