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Queensland Government

Office of the
Director-General

Department of
Justice and Attorney-General

Ms Barbara Stone MP
Chair
Legal Affairs, Police, Corrective Services and
Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Stone

I refer to your letter of 14 December 2011 in relation to the Committee's examination of the Commercial Arbitration Bill 2011.

I enclose, for the assistance of the Committee, an initial written briefing on the Bill, prior consultation and fundamental legislative principle issues (including matters raised in the report of the Technical Scrutiny of Legislation Secretariat).

As previously advised, Ms Imelda Bradley, Director, Strategic Policy, is the Committee Secretariat's point of communication on the Bill. Ms Bradley may be contacted by telephone on 07 3239 3299 or by email at imelda.bradley@justice.qld.gov.au.

Yours sincerely

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1/2/12

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Parliamentary Committee Briefing Note
Commercial Arbitration Bill 2011

For the Legal Affairs, Police, Corrective Services and Emergency Services Committee

Background and Policy Intent

- Arbitration is a dispute resolution process, which has been formalised by a legislative framework, in which two or more parties contractually consent to the referral of their dispute to an independent third person (the arbitrator) for determination. It applies to disputes which are commercial in nature.
- The term 'commercial' covers those matters arising from relationships of a commercial nature, including such things as trade transactions for the supply or exchange of goods and services; leasing; construction of works; licensing; banking and carriage of goods and passengers.
- The result of the arbitration, known as the award, is enforceable in the same manner as a Court judgment.
- Arbitration is a creature of contract. Parties consent to the use of this framework so as to avoid litigating their dispute before the courts, which is more costly and time-consuming.
- The main purpose of this Bill is to:
    1. replace the *Commercial Arbitration Act 1990* (Qld) (CA Act) which currently governs domestic commercial arbitrations in Queensland, with a new model bill agreed to by the Standing Committee of Attorneys-General (SCAG) that is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law) and supplemented by provisions relevant for the domestic commercial arbitration setting;
    2. make Queensland's commercial arbitration law as consistent as possible with the new commercial arbitration legislation already enacted in other Australian jurisdictions and help align the domestic commercial arbitration regime with the Commonwealth's *International Arbitration Act 1974*;
    3. create an environment which encourages better use of the domestic commercial arbitration regime to ensure that businesses have better access to processes for the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense; and
    4. ensure Queensland is recognised as a jurisdiction which meets world standards for facilitating the resolution of commercial disputes.
- The CA Act was developed under the auspices of SCAG and is one of a series of substantially uniform laws across Australia that are commonly referred to as the Uniform Commercial Arbitration Acts.

- In April 2009, SCAG agreed to develop a new uniform commercial arbitration law, updating and modernising the Uniform Commercial Arbitration Acts to ensure that arbitration provides an efficient and cost effective alternative to litigation which is consistent with international best practice.
- In May 2010, SCAG agreed to implement the model Bill and in July 2011, all aspects of the Bill were settled.

Main features of the Bill

- The paramount object of this Bill is to facilitate the fair and final resolution of commercial disputes by impartial arbitrators without unnecessary delay or expense.
- The Bill, which is consistent with the Model Bill, represents a significant shift in the legislative framework for domestic commercial arbitration in Queensland. For instance:
    1. The Bill aims to provide parties with greater flexibility and autonomy in structuring the procedures around the arbitration.
    2. The Bill provides that the court may only intervene in the arbitration process where expressly allowed under the Act.
    3. Parties can challenge the appointment of an arbitrator on the grounds that there are justifiable doubts as to the arbitrator's impartiality or independence or the arbitrator is not sufficiently qualified, with challenges to be resolved by agreement or in default by the court.
    4. Arbitrators will have significant powers with respect to interim measures, that is, temporary measures granted prior to the finalisation of a dispute to prevent a party taking action to circumvent the effect of a potential award (for example, requiring a party to preserve evidence or provide security for costs).
    5. The Bill narrows the options available to parties who wish to challenge an award – with an opt-in appeals mechanism on questions of law (which requires consent of parties as well as leave of the court) and provision for applications to be made to set aside of awards on stated grounds.
    6. The Bill provides a framework for the confidentiality of information relating to the arbitration or award, including a statutory duty of confidence, subject to stated exceptions.
    7. There are provisions dealing with procedural matters not previously dealt with in the CA Act, for example, requiring parties to commence proceedings by providing statements of claim and defence; allowing an arbitrator/s to appoint experts to report on specific issues; and, if parties settle their dispute during the course of arbitral proceedings, enabling the tribunal to make an award on those settled terms.

Consultation

- During SCAG's development of the model Bill, stakeholder consultation has been undertaken at the national level. In November 2009, a draft model Bill was provided to the Chief Justice of Queensland, the Queensland Law Society (QLS) and the Bar Association of Queensland (BAQ) for consideration and comment. In early 2011, a further round of consultation was conducted with these stakeholders about a modified clause 27D (described below in comments on the Technical Scrutiny of Legislation Secretariat's report).
- During development of the Bill in Queensland consultation was undertaken with the following Queensland stakeholders - QLS, BAQ, the heads of jurisdiction, the Institute of Arbitrators and Mediators Australian (IAMA) and the Australian Centre for International Commercial Arbitration (ACICA).
- Stakeholder feedback on the model Bill and the *Commercial Arbitration Bill 2011* was generally supportive. However, QLS repeated concerns expressed during SCAG's development of the model Bill about the operation and usability of clause 27D.
- As there is strong stakeholder support for expediting the passage of the Bill in Queensland, and the Queensland Law Society did not wish their concerns to hold up introduction of the Bill, the Attorney-General did not delay introduction. However, the Attorney-General has indicated a willingness to receive a further submission from QLS on possible improvements to clause 27D to ensure it is utilised by parties and operates effectively and to delay commencement of this clause, pending further consideration of QLS's issues.
- Given that the Bill is consistent with the national model Bill, the Attorney-General has also invited the Law Council of Australia to make a submission on this issue and will raise any workable suggestions for improvement with the Standing Council on Law and Justice which has replaced SCAG.
- BAQ and ACICA urged the government to avoid departures from the model Bill as it would compromise true uniformity and create potential uncertainty. Accordingly, the Bill is drafted to mirror, as far as possible, the national model.
- Whole of Government consultation was undertaken during finalisation of the Bill.

Technical Scrutiny of Legislation Secretariat's report on the Commercial Arbitration Bill

- The Technical Scrutiny of Legislation Secretariat's report on the Bill discussed a number of issues arising from their examination of the Bill.

Clause 5

- As noted in the report, clause 5 of the Bill - which provides that the court must not intervene in the arbitration process unless expressly allowed under the Act

- interferes with the unlimited jurisdiction of the Supreme Court as articulated in section 58 of the *Constitution of Queensland Act 2001*.

- The limitation of court involvement is justified given that in nominating arbitration as a dispute resolution method parties are making a conscious decision to exclude court jurisdiction and resolve their dispute by alternate means. Parties consent to the use of this legislative framework to avoid litigating their dispute before the courts, which is more costly and time-consuming.

- Despite this, the Bill does enable court intervention at various stages to ensure the arbitral process is conducted in accordance with the arbitration agreement, principles of procedural fairness, relevant public policy and the law. The inclusion of clause 5 provides parties with clarity and certainty about the extent of judicial intervention and is consistent with the proposition that awards should be final and binding.

- This clause forms part of the model Bill and has been adopted unamended by all jurisdictions.

- The report notes that on balance the inclusion of clause 5 in the Bill may be considered to have sufficient regard for the rights and liberties of individuals, and also of the rights of corporations (who will be the greatest users of commercial arbitration) because it will facilitate the timely and efficient resolution of commercial disputes.

Clause 27D

- Clause 27D permits parties to an arbitration to seek an early settlement of their dispute, utilising mediation, conciliation or another dispute resolution method and allowing the arbitrator to act as the mediator, conciliator or other non-arbitral intermediary. If the non-arbitral dispute resolution method fails, parties can agree to the arbitrator continuing to act as an arbitrator. If this occurs, the arbitrator must reveal any confidential information gained in private mediation sessions if the arbitrator considers the information is material to the arbitration proceedings.

- The report indicates that the failure to include a time period for the giving of written consent for an arbitrator to continue to act after an unsuccessful mediation (clause 27D) creates uncertainty and could interfere with the timely resolution of the commercial dispute.

- Given the importance of national uniformity, the Bill follows the model Bill and is silent in this regard. It is noted, however, that clause 24B of the Bill imposes a general duty on parties to do all things necessary for the proper and expeditious conduct of arbitral proceedings.

- The report indicates that clause 27D(7) has potential to adversely affect the rights and liberties of individuals and the rights of corporations by breaching their right to, or expectation of, privacy and confidentiality.

- This issue is addressed in the Explanatory Notes, as follows:

> 'If the non-arbitral dispute resolution method fails, parties can agree to the arbitrator continuing to act as an arbitrator. If this occurs, subclause (7) allows the arbitrator to reveal any confidential information gained in private mediation sessions if the arbitrator considers the information to be material to the arbitration proceedings. The ability of an arbitrator to reveal confidential information can be said to affect an individual's or corporation's right to, and expectation of, privacy and confidentiality.
>
> This requirement forms part of the model Bill settled by SCAG. Under this clause, an arbitrator who conducted the mediation proceedings can only preside over subsequent arbitration proceedings with the consent of the parties. If parties were concerned about the arbitrator's obligation to disclose confidential information obtained during the mediation they could withhold consent. The requirement to disclose confidential information ensures parties are able to make informed decisions about continuing the arbitration in light of potential issues around impartiality and bias which may arise from the arbitrator's awareness of confidential information obtained during the mediation.'

- In addition, the Technical Scrutiny of Legislation Secretariat's report notes (at page 3) that on balance, clause 27D(7) has sufficient regard to the rights and liabilities of individuals, and rights of corporations as disclosure of information can be averted by one or more of the parties withholding consent to disclosure. In addition, the report notes that retention of this provision will support consistency of legislation across Australian jurisdictions.

Clause 39

- Technical Scrutiny of Legislation Secretariat's report questioned the conferral of immunity on entities that in good faith appoint, or fails to appoint, an arbitrator (clause 39).

- This issue was a addressed in the Explanatory Notes, as follows:

> 'Secondly, clause 39 seeks to confer immunity on arbitrators for anything done or omitted to be done in good faith in his or her capacity as arbitrator. It confers similar immunity on an entity which in good faith appoints, or fails to appoint, a person as arbitrator. While it is the general position that legislation should not confer immunity from proceeding or prosecution without adequate justification, it has been accepted as appropriate for judges, magistrates and other people acting

judicially to be granted such immunity on the basis of illegal or negligent action when performing their roles. The former Scrutiny of Legislation Committee recognised the appropriateness of conferring such immunity on people exercising similar roles to arbitrators, such as conciliators and adjudicators and the *Commercial Arbitration Act 1990*, which this Bill replaces, currently confers immunity on arbitrators for negligent acts (but not fraud). Further, the actions of arbitrators are subject to court oversight in specified circumstances providing a mechanism for the review and correction of their decisions'.

- The extended liability is included so as to be consistent with the approach adopted in the model Bill. Failure to extend the immunity in Queensland may result in reluctance by industry bodies and other entities to be involved in the appointment of arbitrators for local arbitrations given their exposure to liability.

- The extension of immunity beyond quasi-judicial roles is not unprecedented with the former Scrutiny of Legislation Committee not objecting to the granting of immunity to adjudicators and approved nominating authorities in claims for progress payments under construction contracts (AD 2004/1, pp 5-6, paragraphs 30-38).

- The report notes at page 5 that 'The need for arbitral immunity being thus clearly established, the immunity granted by cl.39 appears justified within the scope of this legislation'.

Tabling of documents

- The report also calls on the Attorney-General to table the following documents in Parliament - the model Bill, the UNCITRAL Model Law and the relevant SCAG communiqués. This request will be brought to the Attorney-General's attention prior to the parliamentary debate on the Bill. It is noted, however, that these documents are publicly available utilising the following links:

Model Bill -
http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Model_Commercial_Arbitration_Bill_2010.pdf/$file/Model_Commercial_Arbitration_Bill_2010.pdf

UNCITRAL Model Law –
http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

SCAG Communiqués –

July 2011 -
http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_21-22_July_2011_FINAL.pdf/$file/SCAG_Communique_21-22_July_2011_FINAL.pdf

May 2010 -
http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communiqu%C3%A9_7_May_2010v2.pdf/$file/SCAG_Communiqu%C3%A9_7_May_2010v2.pdf

November 2009 -
http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communiqu%C3%A9_5-6November_2009v2.pdf/$file/SCAG_Communiqu%C3%A9_5-6November_2009v2.pdf

April 2009 –
http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAGApril2009Communique-versionCth2.doc/$file/SCAGApril2009Communique-versionCth2.doc

Regard to institution of Parliament and Explanatory Notes

The Technical Scrutiny of Legislation Secretariat's comments on the Bill's regard for the institution of Parliament and the Explanatory Notes are noted including the comment that 'Accordingly, it should be considered that the Bill on balance has sufficient regard to the institution of the Queensland Parliament.'.