ATTORNEY–GENERAL ANNOUNCES REVIEW OF INTERNATIONAL ARBITRATION ACT

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HOW DOES IT AFFECT YOU?

• A Federal Government discussion paper flags certain reforms that may be made and invites submissions.

• Some of the reforms, if enacted, will remove certain problems experienced by users of arbitration in Australia and enhance the attractiveness of arbitration in Australia as a method of resolving disputes with a foreign element.

• Practitioners may find themselves conducting any disputes concerning international arbitration almost exclusively in the Federal Court.

INTRODUCTION

In what represents the most significant development in international arbitration in more than a decade, the Attorney–General, Robert McClelland, on 21 November 2008 announced the Government's intention to review the *International Arbitration Act 1974* (Cth) (the Act).

The Attorney–General has released a discussion paper with a view to addressing problems that might discourage parties to international disputes from choosing to resolve their disputes in an Australian jurisdiction. The consultation process and the likely reform of the Act will be welcomed by the arbitration community in Australia.

WHAT IS THE INTERNATIONAL ARBITRATION ACT?

The Act is the primary legislation that governs international arbitration in Australia. It gives effect to three important international instruments: the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the New York Convention), the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention). The Act was last amended more than 15 years ago and this is the first wholesale review of the legislation since its enactment.

THE PROPOSED CHANGES

The purpose of the review is to consider whether the Act should be amended to:

• ensure the Act provides a comprehensive and clear framework governing international arbitration in Australia;

• improve the effectiveness and efficiency of the arbitral process, while respecting the fundamental consensual basis of arbitration; and

• consider whether to adopt 'best–practice' developments in national arbitral law from overseas.

We have set out the significant areas of review and key themes of the proposals below.

EXPANDING FEDERAL COURT JURISDICTION

The discussion paper raises the proposal that the Federal Court be given exclusive jurisdiction for all matters arising under the Act, that is, removing jurisdiction from the state and territory Supreme Courts. Such a change could lead to more consistent jurisprudence in applying the Act.

In the meantime, the Attorney–General has signalled that a bill will shortly be introduced to parliament to ensure that the Federal Court has concurrent jurisdiction with the state Supreme Courts over all parts of the Act.

Correcting problems that may detract from international arbitration in Australia

Perhaps the most significant proposals in the discussion paper are directed at correcting problems created by specific state court decisions or the current wording of the legislation. These include:

• confirmation that courts may refuse recognition of an award only on New York Convention grounds, thereby removing the uncertainty caused by the *Resort Condominiums*[1] decision of the Queensland Supreme Court;

• provisions clarifying that adoption of rules by parties does not constitute 'opting out' of the Model Law, thereby reversing the effects of the *Eisenwerk*[2] decision; and

• the discussion paper raises for consideration an express provision that the Act exclusively governs international commercial arbitrations in Australia to which the Model Law applies. This would exclude any potential application of the State and Territory *Commercial Arbitration Acts* to such disputes. The existing wording is unsatisfactory

in that the enforcement provisions do not expressly apply to awards handed down in Australia, only to 'foreign awards'.

The above reforms, if enacted, are a step towards bringing Australia into line with arbitration friendly, pro–enforcement jurisdictions such as Singapore, Hong Kong and London.

BRINGING AUSTRALIA INTO LINE WITH RECENT AMENDMENTS TO INTERNATIONAL INSTRUMENTS

The discussion paper proposes adopting the 2006 amendments to the Model Law and other developments in international 'best practice'. These include recent developments relating to interim measures, the promotion of uniform interpretation of the Model Law and the requirement that arbitration agreements be in writing.

Progress on the writing requirement

While our judiciary has most recently favoured the liberal approach to the interpretation of the writing requirement[3] in keeping with current international trends,[4] the discussion paper suggests that amendment of the Act could make the common law position clearer. One option is to do away with the writing requirement altogether. Another option is to amend the Act to include Article 7 (Option 1) of the Model Law as revised in 2006, which attempts to define what is required by way of 'writing' in our current electronic society.

No adoption of preliminary measures

While the discussion paper proposes adopting most of the 2006 Model Law amendments, it does not propose adopting those amendments relating to preliminary measures. Those amendments allow a tribunal to make ex–parte orders on the application of one party, although such orders are not enforceable by any court and continue in force for only a very limited period. The Attorney–General considers that the ability to apply to an arbitral tribunal without the knowledge or consent of the other party conflicts with the consensual basis of arbitration. This position is consistent with other common law jurisdictions.

SHIFTING OF AUTHORITY AWAY FROM THE COURTS

The paper also suggests moving authority for functions such as appointment and challenge to arbitrators from the courts to an arbitral institution such as the Australian Centre for International Arbitration. If this authority is to be shifted to an arbitral institution, it will be essential that the institution has the appropriate resources and is seen to be independent.

ANY OTHER MATTERS?

Submissions on these and any other matters or recommendations for improving the Act are due by 16 January 2009. This opportunity is sure to be embraced by stake–holders. One matter not addressed by the discussion paper, which may invite comment, is the fact that arbitration in Australia is private but not necessarily confidential.[5] This issue is sometimes raised as a matter of concern by those reluctant to arbitrate in Australia, although it can largely be addressed by agreement between the parties. The reforms also do not, and cannot, without the agreement of the states and territories, address the difficulties caused by the parallel existence of the state commercial arbitration acts.

This review is a promising sign of the Federal Government's commitment to supporting and promoting international arbitration within Australia. Watch this space, as the review is sure to generate much discussion and debate within the arbitration community in the months ahead.

REFERENCES

1. *Resort Condominiums International Inc v Bolwell & Anor* [1995] 1 Qd R 406; (1993) 118 ALR 655

2. *Australian Granites Ltd v Eisenwerk Hensel* [2001] 1 Qd R 461

3. See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192

4. Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 (the 2006 UNCITRAL Recommendations)

5. *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)* (1995) 183 CLR 10

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