

3 May 2010

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JM;rp

The Honourable John Rau MP
Attorney-General
DX 336
ADELAIDE SA

Attn: Mr Andrew Thompson

Dear Mr Attorney

Re: Commercial Arbitration Bill 2009

The Law Society has, as requested in your email of 16 April 2010, through the Law Society's Alternative Dispute Resolution, Civil Litigation and Corporate and Tax Committees, reviewed the revised draft Commercial Arbitration Bill 2009.

Our review included consideration of the comments of the SA Government Officers, a letter from His Honour the Chief Justice of the SA Supreme Court dated 11 January 2010 and submissions by the Law Council of Australia. A copy of the Law Council of Australia's submission by its Standing Expert Committee on ADR dated 15 March 2010 is attached for your reference. It is not clear whether this submission (which is separate to the submission dated 5 March 2010 made by the Law Council's Construction and Infrastructure Law Committee of the Business Law Section) has been provided to you, and we found it helpful.

The Society supports the adoption of the UNCITRAL Model Law as the basis for a domestic commercial arbitration scheme Australia wide, as may be supplemented to address the specific requirements of domestic disputes, and supports both Law Council submissions, with some further commentary as indicated below.

The main area of concern we have identified is the absence of a right to apply to a court to set aside an award on the basis of a serious irregularity. An aggrieved party may suffer hardship and prejudice if unable to put right a serious irregularity which materially influences the consequences of an award.

Part 7 Recourse against award

The Society considers that the Commercial Arbitration Bill should preserve the right to judicial review by access to the courts. The Society supports the views of both Law Council submissions and His Honour the Chief Justice of the Supreme Court of South Australia:

1. to allow parties, by agreement before the commencement of arbitral proceedings, to bring appeals against an award;
2. to favour a right of appeal on the basis of error of law preferring the UK restricted model (s69 of the *Commercial Arbitration Act 1996* (UK)).

The Society's ADR Committee considered the recent decision of the NSW Court of Appeal *Gordion Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57 regarding the proper construction and operation of s38 of the *Commercial Arbitration Act 1984* (NSW). The court recognised that s38 should be construed in the context of the uniform national policy by which the legislation was enacted, which in part is to limit and restrict appeals against arbitral awards thereby promoting restricted interference by courts with awards. The policy of avoiding capricious or unjust results inherent in all aspects of the administration of justice was also a relevant consideration.

The NSW Court of Appeal found that s38 should be construed to further this purpose of restricted interference and that complaints about awards should be by way of application for leave to appeal on any question arising out of an award leaving legal questions not dealt with by the arbitrator as capable of being raised in an appeal. However, if the complaint arises out of the award (as distinct from about the award) leave should be sought and if refused the point should not be available in the appeal. This characterisation of the construction and operation of s38 underscores the importance of preserving, in the Commercial Arbitration Bill, the ability to hear leave applications separately and before any appeal.

The Civil Litigation Committee noted a concern of His Honour the Chief Justice of the SA Supreme Court that excluding appeals for errors of law might "tip the balance against the fair resolution of disputes" and "allow for the possible growth of an unhealthy culture among arbitral tribunals of arbitrary decisions where the rule of law need not prevail." The Civil Litigation Committee thought the development of any such culture, if it were to occur, could be controlled through the choice of the parties as to whether or not to arbitrate and as to who to appoint. That said, it is interesting to note that the NSW Court of Appeal in *Gordion Runoff Limited v Westport* held, in its consideration of s38 and the adequacy of the arbitrator's reasons, that there was no legal authority for the proposition that arbitrators must provide reasons to the standard equivalent to that of a judge. This observation underscores the importance of preserving judicial review of arbitral awards, albeit on a restricted and limited basis.

Setting arbitral awards aside for serious irregularity

The Society agrees with the submission by the Law Council of Australia's Standing Expert Committee on ADR dated 15 March 2010 to include in the Bill a right to a party to apply to a court to set aside an award on the basis of a serious irregularity. Section 34 of the Commercial Arbitration Bill as currently drafted does not allow recourse by a party to address serious irregularity in an arbitral award. If the parties have not agreed to preserve appeal rights before the commencement of the arbitral proceedings, a party may suffer hardship and prejudice if unable to put right a serious irregularity which materially influences the consequences of an award.

The Society respectfully submits that s34(2) ought to be further considered in the context of s68 of the *Commercial Arbitration Act 1996* (UK). Section 68 is set out in the attached Law Council submission.

Opt-in and opt-out mechanisms

We have not identified any particular reason for differentiating between the right to bring an appeal on either an opt-out or opt-in basis, and consider the issue is more one of practicality. The Law Council submissions diverge, one supporting an opt-in approach and the other an opt-out approach with regard to excluding a right of appeal. What the Society considers is important is, that it remains open to the parties, to either opt-in or opt-out before the commencement of the arbitral proceedings (as is currently the basis expressed in s34A(1)). It would be unfair to require parties to commit to excluding appeal rights at the time of entry into the arbitration agreement, before the parties have any knowledge of the

complexity of the issues raised by the dispute and what might be sought by way of appropriate remedies.

Part 5 Conduct of arbitral proceedings

The Society favours the approach taken by the Law Council of Australia's Standing Expert Committee on ADR with regard to confidentiality (for the reasons stated in the attached copy of the Law Council's submission) and supports the inclusion of the confidentiality provisions as appearing in the current draft of the Commercial Arbitration Bill.

The Society suggests that further consideration be given to s27D(7) of Commercial Arbitration Bill. As presently drafted, s27D(7) requires so much of the confidential information obtained from a party during mediation proceedings which are terminated "as the arbitrator considers material to the arbitration proceedings" to be disclosed to all other parties to the arbitration proceedings. It would be desirable that the arbitrator consult with and obtain the consent of the relevant party before disclosure as views regarding the materiality of the information, are likely to differ.

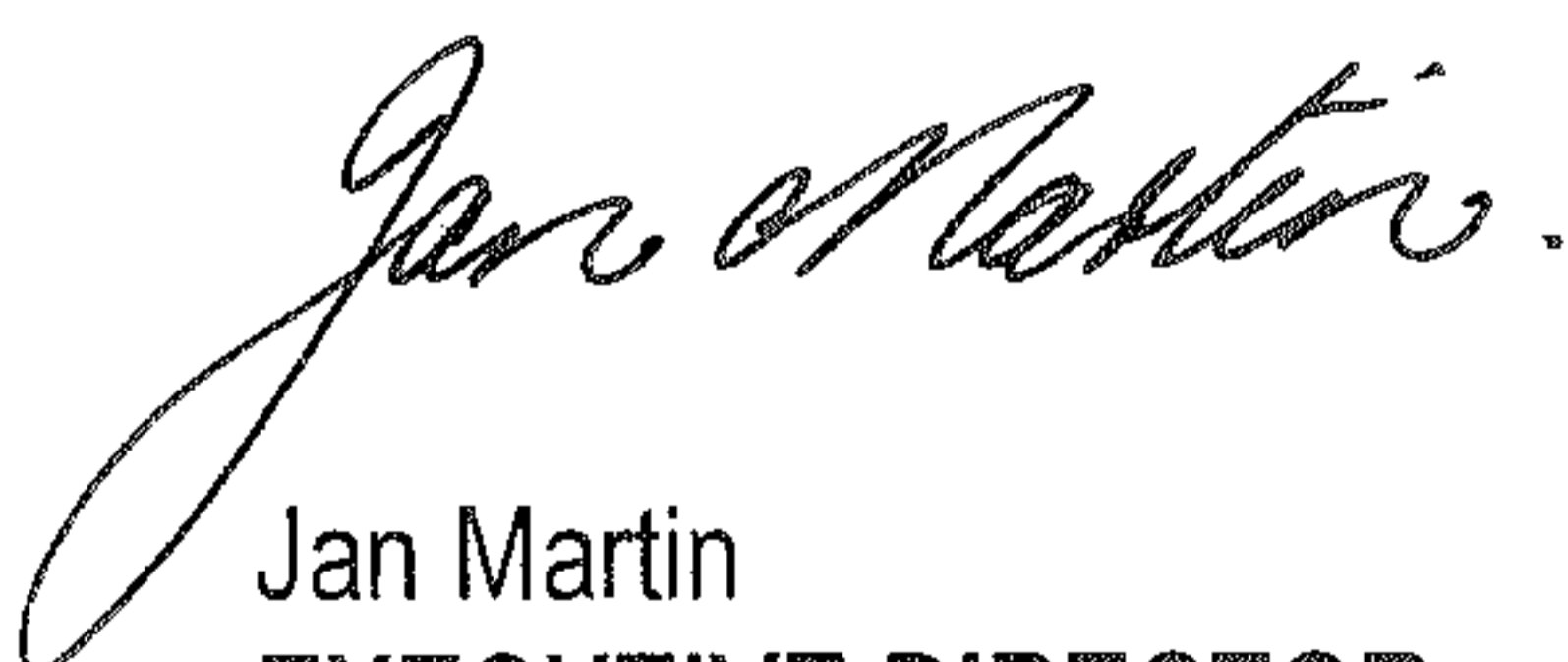
Part 2 Arbitration agreement and Part 4 Jurisdiction of arbitral tribunal

The Society notes that ss8(2) and 16(11) of the Commercial Arbitration Bill provide for arbitration proceedings to continue (including to the stage of making an award) where an action is brought to refer a dispute to court or action a plea that the arbitral tribunal does not have jurisdiction.

Expediency and costs are primary concerns in supporting access to arbitration as an alternative to litigation. Sub-sections 8(2) and 16(11) potentially put parties at risk of incurring unnecessary expense and wasting time by having to conduct concurrent dispute resolution processes. The Society respectfully submits that the proposed legislation should recognise a judicial discretion with regard to making an interim determination as to whether an arbitration or court action ought to be stayed pending the determination of a jurisdictional issue or other issue relevant to the validity of an arbitration agreement.

We trust our comments are helpful. Joanne Staugas, the Chair of our ADR Committee is available to clarify any aspects of our response or provide any additional detail you may require.

Yours sincerely



Jan Martin
EXECUTIVE DIRECTOR