Parliamentary Committees

Commercial Arbitration Bill 2012

Report No. 19
Legal Affairs and Community Safety Committee
February 2013

Legal Affairs and Community Safety Committee

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Acknowledgements

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Abbreviations

Attorney-General	The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bar Association	Bar Association of Queensland
Bill	Commercial Arbitration Bill 2012
CIArb	Chartered Institute of Arbitrators Australia
Committee	Legal Affairs and Community Safety Committee
Commonwealth Act	*International Arbitration Act 1974* (Cth)
Department	Department of Justice and Attorney-General
Former committee	Legal Affairs, Police, Corrective Services and Emergency Services Committee
2011 Bill	Commercial Arbitration Bill 2011
Model Bill	Model commercial arbitration bill as agreed by the former Standing Committee of Attorneys-General
SCAG	Standing Committee of Attorneys-General (now known as the SCLJ)
SCLJ	Standing Council on Law and Justice (formerly SCAG)
UNCITRAL Model Law	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, adopted in 1985 and amended in 2006

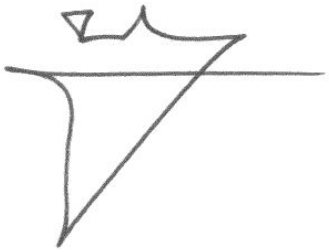
Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's (Committee) examination of the Commercial Arbitration Bill 2012 (Bill).

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those who lodged written submissions on this Bill. I also thank the Committee staff and the staff of the Department of Justice and Attorney-General for their assistance throughout the conduct of this inquiry.

I commend this Report to the House.



Mr Ian Berry MP

Chair

February 2013

Recommendations

1. Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2012 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Queensland Police Service; and
- Department of Community Safety.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles; and
- for subordinate legislation – its lawfulness.

The Commercial Arbitration Bill 2012 (Bill) was introduced into the Legislative Assembly and referred to the Committee on 30 October 2012. In accordance with the Standing Orders, the Committee was required to report to the Legislative Assembly by 4 February 2013.

1.2 Inquiry process

On 2 November 2012, the Committee wrote to the Department of Justice and Attorney-General (Department) seeking advice on the Bill, and on 5 November 2012, invited stakeholders and subscribers to lodge written submissions.

The Committee received written advice from the Department and received five submissions (see **Appendix A**).

1.3 Policy objectives of the Commercial Arbitration Bill 2012

The main objectives of the Bill are to:

- *govern Queensland domestic commercial arbitrations in a manner consistent with the national model Bill agreed to by the former Standing Committee of Attorneys-General (SCAG) (the Model Bill);*
- *replace the current Commercial Arbitration Act 1990 (Qld) (the existing Act);*
- *adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law), with supplemental domestic provisions for local commercial arbitration;*
- *maintain a high level of consistency between Queensland's commercial arbitration regime and similar legislation already adopted in other Australian jurisdictions;*
- *harmonise Queensland's domestic commercial arbitration regime with the Commonwealth International Arbitration Act 1974 (the Commonwealth Act);*

[1] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

- *provide more accessible, cost-effective and timely processes for the fair and impartial resolution of commercial disputes through arbitration; and*
- *ensure Queensland's adherence to world standards in commercial dispute resolution.*[2]

In essence, the Bill proposes to repeal the current *Commercial Arbitration Act 1990* and replace it with an Act which is consistent with the Model Bill agreed to by the former Standing Committee of Attorneys-General (SCAG), now known as the Standing Council on Law and Justice (SCLJ).[3]

The Model Bill itself was based on the UNCITRAL Model Law and aligned with the Commonwealth Act to promote national consistency in regulation and conduct of international and domestic commercial arbitration. The Model Bill includes additional provisions which supplement the UNCITRAL Model Law for domestic commercial arbitration.[4]

Save for two minor changes, this Bill replicates the Commercial Arbitration Bill 2011 that was introduced into the 53rd Parliament and, due to the dissolution of Parliament in 2012, lapsed.[5]

1.4 Background

In early 2010, SCAG agreed to introduce uniform arbitration legislation in all States and Territories based on the UNCITRAL Model Law.[6] This Bill will therefore implement Queensland's commitment to reform its domestic arbitration laws in line with that agreement.

At the time of writing this report, all States and Territories in Australia, bar the Australian Capital Territory, have introduced bills or passed legislation implementing the uniform legislation. In Queensland, this Bill represents the second attempt to pass the uniform legislation. On 15 November 2011, the then Government introduced the Commercial Arbitration Bill 2011 (2011 Bill). As noted above, the 2011 Bill lapsed when Parliament dissolved in February 2012.

When it was introduced, the 2011 Bill was referred to the Committee's predecessor, the Legal Affairs, Police, Corrective Services and Emergency Services Committee (the former committee), for examination. The former committee reported on the 2011 Bill to the Legislative Assembly on 16 February 2012. A copy of the report is available on Parliament's website at http://www.parliament.qld.gov.au/documents/committees/LAPCSESC/2011/CommercialArbitration/rpt-009-16Feb12.pdf.

As set out in the Explanatory Notes, and confirmed by the Department,[7] this Bill is largely unchanged from the 2011 Bill. In particular:

> *Save for two minor amendments, the Bill remains unchanged from the lapsed Bill …*
>
> *The Schedule has been renamed as Schedule 1. A new clause 2(5) has been added and prior references to editor's notes changed to 'notes'. This has the effect of excluding all notes but one (the Model Law note to clause 1) from forming part of the Bill.*[8]

In its examination of the 2011 Bill, the former committee brought a number of clauses to the attention of the Legislative Assembly (clause 5: restriction on court intervention; clause 27D: power or arbitrator to act as mediator, conciliator or other non-arbitral intermediary and clause 39:

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2 Commercial Arbitration Bill 2012, *Explanatory Notes*, page 1.
3 See www.sclj.gov.au, downloaded 18 December 2012.
4 Commercial Arbitration Bill 2012, *Explanatory Notes*, page 2.
5 Commercial Arbitration Bill 2012, *Explanatory Notes*, page 4.
6 D Jones, *The Asia-Pacific Arbitration Review 2013*, Global Arbitration Review, 2012.
7 Email from Imelda Bradley, Director of Strategic Policy, Department of Justice and Attorney-General, received 27 November 2012.
8 Commercial Arbitration Bill 2012, *Explanatory Notes*, page 4.

immunity from proceedings) and also considered whether the 2011 Bill had sufficient regard to the institution of the Queensland Parliament.

The Committee is satisfied that the issues raised by the former committee on examination of the 2011 Bill have been addressed.[9] In particular, the Committee welcomes the Attorney-General and Minister for Justice's support to ensure relevant documents, such as any intergovernmental communication, model bill and model law, are tabled in the Legislative Assembly immediately following any agreement, or at the time of introduction of any relevant bill.[10]

On that basis, the Committee determined not to review again those issues which were raised and reported on by the former committee. Accordingly, this Report will only deal with any new issues raised during its examination of the Bill. Readers are also directed to the former committee's report to obtain further background information.

1.5 Should the Bill be passed?

After examination of the Bill and consideration of the policy objectives that are being pursued by the Bill, the Committee considers that the Bill ought to be passed. In making this recommendation, the Committee carefully considered the submissions it received, in particular the submissions made by the Bar Association of Queensland and the Chartered Institute of Arbitrators Australia and whether it would be preferable for the Government to attempt to remedy any issues now, or to proceed with the Bill as it is. At this stage, the Committee considers that, in the interest of uniformity, the Bill should be passed, with any amendments to be progressed through cooperation and agreement with the other jurisdictions at a later date.

Recommendation 1

The Commercial Arbitration Bill 2012 be passed.

9 See in particular: Letter from the Department of Justice and Attorney-General dated 12 November 2012; *Transcript of Proceedings*, 30 October 2012, page 2186; and Letter from the Department of Justice and Attorney-General dated 1 February 2012.

10 *Transcript of Proceedings*, 30 October 2012, page 2186.

2. Examination of the Commercial Arbitration Bill 2012

The Committee received five submissions on the Bill. All submissions received were in support of the Bill. Of these, only two submissions raised concerns regarding certain aspects of the Bill.

This section discusses issues raised in the submissions as well as any issues identified by the Committee.

2.1 Part 4A – interim measures

Part 4A (clauses 17-17J) of the Bill contains provisions regarding interim measures. Although the corresponding provisions in the UNCITRAL Model Law (Articles 17-17J) were adopted in the Bill (with some amendment),[11] the Committee noted that the provisions regarding preliminary orders (Articles 17B and 17C of the UNCITRAL Model Law) were omitted from the Bill.

The Committee queried this omission with the Department. In response, the Department stated:

> *Articles 17B (Applications for preliminary orders and conditions for granting preliminary orders) and 17C (Specific regime for preliminary orders) of the Model Law were introduced in 2006. They allow for a party to make an application (for a preliminary order) without notice to the other parties for an interim measure.*
>
> *These Articles were not adopted in the Model Bill which is consistent with the* Commonwealth International Arbitration Act 1974*. The following is an extract from the Revised Explanatory Memorandum for the International Commercial Arbitration Amendment Bill 2010 (Cwlth) which explains why these articles were not adopted:*
>
> *72 In addition to the new provisions on interim measures, new Articles 17B and 17C of the Model Law establish a regime for preliminary orders. These are the equivalent of* ex parte *orders made by a court in circumstances where there is a perceived risk that a party will attempt to frustrate interim measures. While this proposal received some support from stakeholders, it was extremely controversial when considered by UNCITRAL and opposed by key stakeholders in Australia during the Review.*
>
> *73 The primary objection to the provisions allowing for preliminary measures is that such measures are inconsistent with the consensual underpinning of arbitration. Accordingly, Item 14 amends the Act to provide that, despite Article 17B of the Model Law, preliminary orders are not available under the Act or the Model Law.*[12]

This part of the Bill also contains additional provisions. This means that there are some provisions in the Bill which have no equivalent provision in the UNCITRAL Model Law. An example of this is clause 17(3) which sets out the types of orders an arbitral tribunal may make. In its submission, the Bar Association of Queensland (Bar Association) suggested:

> *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.*

[11] See for example, the note to clause 17 which provides that there is no equivalent section 17(3) in the UNCITRAL Model Law.

[12] Letter from the Department of Justice and Attorney-General received 12 December 2012, pages 6-7.

> *The* [Bar 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).*[13]

The Department simply noted '*the submission is only that the relevant provision should be relocated within the Bill.*'[14]

Committee comment

The Bill implements Queensland's commitment to an intergovernmental agreement, an agreement which will provide national consistency. As noted above, the Bill differs from the UNCITRAL Model Law in order to account for domestic commercial arbitration. The examples cited above demonstrate this. In particular the Committee notes the new section 17(3) which is additional to the UNCITRAL Model Law is replicated in the other States and Territories of Australia. The Committee considers that national consistency is beneficial to Queensland. Accordingly, the Committee does not consider it necessary to recommend that these aspects of the Bill be amended. As noted above, the Committee considers that any future amendment should be made with the cooperation and agreement of the other States and Territories.

2.2 Terminology

The submission from the Bar Association includes a number of suggestions regarding the use of some words, including the replacement of 'superseded terminology'. The Bar Association suggested to:

- replace 'proceedings' in sub-sections 27D(3)(a), (b) and (c) with 'mediation proceedings'. The Bar Association submitted that this would '*make it clear that the intention is to refer to the defined "mediation proceedings" and not to any other proceedings*.';[15]
- replace 'settlement' in sub-sections 32(2)(a) and 34(b)(i) with 'resolution'. The reason given by the Bar Association is that it '*considers the use of the word 'settlement' … to be undesirable*'.;[16]
- replace the following superseded terminology: 'discovery' with 'disclosure'; 'tax' and 'taxed' with 'assess' and 'assessed'; 'settle' with 'fix'; and 'as between party and party or as between legal practitioner and client' with 'on a standard basis or on an indemnity basis'.[17]

In addition to commenting on some of the specific suggestions, the Department made the following general statement:

> … *the* [Department] *notes that each of the amendments proposed would represent a variation from the SCAG Model Commercial Arbitration Bill 2010 (Model Bill). The aim of the Model Bill is to achieve national uniformity. As a general rule, variations are to be avoided where the aim is to achieve national uniformity.*
>
> *Variations may diminish the benefits of uniformity and give rise to differing interpretations and practices.*[18]

With specific reference to the suggestion to replace 'proceedings' and 'settlement' the Department advised:

> *In accordance with ordinary drafting practice, 'proceedings' would be expected to take its meaning from the first mentioned 'mediation proceedings'.*
>
> *…*

13 Bar Association of Queensland, Submission 2, page 1.
14 Letter from the Department of Justice and Attorney-General received 12 December 2012, page 2.
15 Bar Association of Queensland, Submission No. 2, pages 1-2.
16 Bar Association of Queensland, Submission No. 2, page 2.
17 Bar Association of Queensland, Submission No. 2, page 2.
18 Letter from the Department of Justice and Attorney-General received 12 December 2012, pages 1-2.

> *The word 'settlement' is not defined in the Bill. While it has a particular meaning in clause 30, it has a wider meaning in the clauses mentioned.*[19]

2.3 Place of arbitration

The Chartered Institute of Arbitrators Australia (CIArb) raised an issue regarding the place of arbitration:

> *Section 1(2) of the Bill provides that, subject to limited exceptions, the provisions of the proposed Act* "only apply if the place of arbitration is in Queensland"*. Section 20(1) of the Bill provides that* "the parties are free to agree on the place of arbitration"*. The difficulty arises where the parties in their arbitration agreement have not stated the place of the arbitration to be in Queensland. Until the arbitration is actually held there is no place of arbitration and arguably the domestic act would not apply. Even if the arbitral tribunal, after it has been formed and heard from the parties, makes a determination as to the place of arbitration (see Art 20(1) of the* [UNCITRAL] *Model Law), there is an issue as to which act applies until this occurs.*[20]

In order to resolve this issue, CIArb suggested that clause 1(2) be deleted from the Bill.[21]

This issue was considered by the Department, which responded:

> *These provisions of the Bill reflect the equivalent sections in the UNCITRAL Model Law, the SCAG Model Commercial Arbitration Bill 2010 (Model Bill) (and the equivalent legislation enacted by the other States and the Northern Territory).*
>
> *The Department of Justice and Attorney-General favours this issue be considered by the Standing Council on Law and Justice in the context of future amendments to the model legislation after consultation with key stakeholders.*[22]

2.4 Court authority

The Bar Association also identified a potential issue regarding the limits of the authority of the Court and the finality of its decision. Clauses 11(5), 13(5), 14(3), 27H(5) and 27I(4) of the Bill relate.

In its submission, the Bar Association stated:

> *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.*

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19 Letter from the Department of Justice and Attorney-General received 12 December 2012, pages 2-3.

20 Chartered Institute of Arbitrators Australia, Submission 5, pages 2-3.

21 Chartered Institute of Arbitrators Australia, Submission 5, page 3.

22 Letter from the Department of Justice and Attorney-General dated 20 December 2012, page 2.

> *(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.*[23]

The Department responded as follows:

> *There is a matter currently before the High Court of Australia* (TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor – *case S178/2012) which could bring clarity to this issue. The High Court reserved its judgment on 6 November 2012 after hearing argument from the parties, which included the Queensland Attorney-General (intervening).*[24]

Having considered the Bar Association's submission on this point, the Department's recommendation was for '*no amendment to the Bill but that the issue be raised for the consideration by Standing Council on Law and Justice in the context of future amendments to the model legislation, subject to the outcome of the matter before the High Court.'*[25]

2.5 'Legislative black hole'

CIArb raised an issue which it suggests will arise on the introduction of the Bill. This issue arises because of the operation of section 21 in the *International Arbitration Act 1974* (Cth) (which was amended in 2010), and the intended repeal of Queensland's current law, the *Commercial Arbitration Act 1990*. The following is an excerpt from the submission of CIArb:

> *The first issue is that concerning the "legislative black hole" which arises if section 21 of the* International Arbitration Act *(2010) (Com) (IAA) has a prospective effect. …*
>
> *The weakness identified is that the IAA does not make clear whether section 21 applies to arbitration agreements entered into before 6 July 2010. As you are aware, by reason of the new section 21 IAA, parties to an international arbitration agreement entered into after 6 July 2010 are not able to opt out of the* [UNCITRAL] *Model Law and choose a state/territory arbitration act (or indeed a foreign arbitral law) as* lex arbitri*. If the new section 21 only applies prospectively the parties choice to opt out of the* [UNCITRAL] *Model Law and any international arbitration agreements entered into before 6 July 2010 remains effective. However, if parties had before 6 July 2010 agreed to arbitrate pursuant to one of the state commercial arbitration acts which have now been repealed and replaced by the uniform domestic arbitration acts there would be no relevant arbitral law to regulate the arbitration.*[26]

In the absence of legislative change to the Commonwealth Act, CIArb has suggested '*legislative intervention at both state and federal level*'.[27] This would mean amending the Bill so that the current

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23 Bar Association of Queensland, Submission 2, pages 2-3.

24 Letter from the Department of Justice and Attorney-General received 12 December 2012, page 4.

25 Letter from the Department of Justice and Attorney-General received 12 December 2012, page 4.

26 Chartered Institute of Arbitrators Australia, Submission 5, page 2.

27 Chartered Institute of Arbitrators Australia, Submission 5, page 2.

law, the *Commercial Arbitration Act 1990*, continues to apply to affected international arbitration agreements.[28] The Bill currently provides for the *Commercial Arbitration Act 1990* to be repealed.[29]

The Department responded to this submission in the following terms:

> *It is not yet clear whether this issue requires an amendment to the IAA and related State/Territory Acts.*
>
> *It is an issue under the IAA and not as a result of this Bill.*
>
> *It would be inappropriate and ineffective for Queensland to act unilaterally to address this issue. It will require the agreement of the Commonwealth should state/territory legislation be required to address the issue.*
>
> *The Department of Justice and Attorney-General favours this issue being considered by Standing Council on Law and Justice in the context of future amendments to the model legislation after consultation with key stakeholders.*[30]

Committee comment

The Committee considers the issues raised by the Bar Association and CIArb, particularly those discussed in Parts 2.4 and 2.5 above, warrant further consideration. At this stage however, the Committee is of the view that in the interests of uniformity, any changes are more appropriately made through cooperation and agreement with the other States and Territories and in the case of the matter discussed in Part 2.5, with the agreement of the Commonwealth. The Committee also agrees that any amendments should take into account the outcome of the matter before the High Court. On that basis, the Committee makes the following recommendation.

Recommendation 2

The Attorney-General and Minister for Justice consider the suggestions for amendment made to the Committee during its examination of the Commercial Arbitration Bill 2012 in the context of future amendments to the Model Bill.

2.6 Other issues

The Committee also considered a number of other issues during its examination of the Bill. The Committee was satisfied that no significant issues arose in relation to those issues, two of which are discussed briefly below.

Default of a party

The Committee also queried the origin of sub-clauses 25(2) and (3) with the Department. Clause 25 outlines the powers of an arbitral tribunal in the event of default of a party. Specifically, sub-clauses 25(2) and (3) outline the arbitral tribunal's powers where a party fails to do any other thing necessary for the proper and expeditious conduct of the arbitration or fails to comply with a peremptory order. The Committee notes that there is no equivalent in the UNCITRAL Model Law.

The Department advised that these sub-clauses originate from the Model Bill and suggested also that they are taken, or are based on, provisions in the UK *Arbitration Act 1996*.[31]

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28 Chartered Institute of Arbitrators Australia, Submission 5, page 2. This would also require changes to the uniform laws in the other States and Territories.

29 Commercial Arbitration Bill 2012, clause 41.

30 Letter from the Department of Justice and Attorney-General dated 20 December 2012, page 1.

31 Letter from the Department of Justice and Attorney-General received 12 December 2012, page 7.

Form and content of award

Clause 31 prescribes the form and content of an award, and includes provisions about the signing of an award by arbitrator or arbitrators. Where there is more than one arbitrator, clause 31(2) '*allows for the signing of the award by less than all arbitrators in certain circumstances.*'[32] The Bar Association submitted that the relaxation provided for in clause 31(2) '*is not carried through into s.31(6).*'[33]

The relevant sub-clauses are set out below:

> ***31 Form and contents of award***
>
> *(1) The award must be made in writing and must be signed by the arbitrator or arbitrators.*
>
> *(2) In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated.*
>
> *…*
>
> *(6) After the award is made, a copy signed by the arbitrators in accordance with subsection (1) must be delivered to each party.*

The Department provided the following response:

> *It is noted that in the Model Law the content of clauses 31(1) and (2) from the Model Bill are combined as one provision. If subclause (2) is read as providing for how the signing requirement under subsection (1) may be satisfied in the circumstance where not all arbitrators can sign, subclause (6) is adequate for its purpose.*[34]

[32] Bar Association of Queensland, Submission 2, page 2.

[33] Bar Association of Queensland, Submission 2, page 2.

[34] Letter from the Department of Justice and Attorney-General received 12 December 2012, pages 2-3.

3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Committee is satisfied that potential breaches of the fundamental legislative principles were addressed by the former committee. The Committee has not identified any new potential issues.

Appendices

Appendix A – List of Submissions

Sub #	Submitter
001	Australian Centre for International Commercial Arbitration
002	Bar Association of Queensland
003	The Institute of Arbitrators and Mediators Australia
004	Khory McCormick, Chair, Queensland Law Society Alternative Dispute Resolution Committee; Chair, Institute of Mediators and Arbitrators Australia (Queensland Chapter) and Vice President, Australian Centre for International Commercial Arbitration
005	Chartered Institute of Arbitrators Australia