THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: SW:cl:Arbitration
Direct line: 9926 0214

9 May 2011

Mr Laurie Glanfield AM
Secretary, Standing Committee of Attorneys General
NSW Department of Justice and Attorney General
GPO Box 6
SYDNEY NSW 2000

Dear Mr Glanfield,

Comments in relation to section 27D of the Commercial Arbitration Bill 2010

Thank you for your letter dated 5 April 2011 inviting the Law Society to comment on section 27D of the *Model Commercial Arbitration Bill 2010*.

The Arbitration Liaison and the Dispute Resolution Committees of the Law Society (together, the Committees) welcome the opportunity to comment on the issues raised in the Consultation Paper.

General Comments

As a general observation, the Committees are concerned that the proposed amendments may have the unintended consequence of delaying the implementation of uniform domestic commercial arbitration legislation in all States and Territories, in particular Victoria.

The Committees are also of the view that it is likely that section 27D will not be utilised as much as its predecessor provision because of its "opt-in" nature.

It is also noted that in its earlier submission on this proposed amendment, dated 7 June 2010, the Arbitration Liaison Committee recognised that currently there is no similar provision to section 27D in the international arbitration legislation and consider that it is desirable that any mediation-arbitration provision in the Bill should be mirrored in the international arbitration legislation. The Committees confirm the desirability of that outcome.

Responses to Specific Questions

In response to your specific questions, the Committees respond as follows (adopting the numbering in the Consultation Paper):

1. No. Non-mediator intermediaries should be treated in the same way as mediators in the proposed provision. This is because "prejudicial" information may also be disclosed to these non-mediator intermediaries. The Committees do not favour dealing with non-mediator intermediaries differently, because that would involve a radical redrafting of section 27D, in particular subsection (2), which makes the section too complicated and problematical.

2. Yes. The provision should specify that the arbitrator is to obtain the written consent of the parties within a set time from the date of the termination of the mediation.

3. Yes. The Committees are of the view that the parties' consent should be obtained after the termination of the mediation and before the commencement of the arbitration. This approach is likely to ensure that parties divulge information during the mediation process more freely. However, the Committees have a more fundamental concern regarding the operation of the disclosure provision in section 27D. There is a real danger that an arbitrator may realise, during the course of the arbitration, that something said during the mediation that had seemed immaterial at the time (and therefore not disclosed to the relevant party before the commencement of the arbitration) has become material to the issues in the case. Such an eventuality may force the arbitrator to disqualify himself or herself to dispel an apprehension of bias after costs had been incurred by the parties in conducting the arbitration up to that time.

The Committees thank you again for the invitation to comment on the issues raised in the Consultation Paper.

Any queries in relation to this letter can be directed to Carina Lofaro, the Executive Officer for the Arbitration Liaison and Dispute Resolution Committees on 9926 0214 or via email carina.lofaro@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President