Law Council
OF AUSTRALIA

27 October 2014

Mr Donald Speagle
Deputy Secretary Civil Justice
Department of Justice
Level 26 121 Exhibition Street
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By email: gabi.crafti@justice.vic.gov.au

Dear Mr Speagle

CONSULTATION ON THE DEFINITION OF 'COURT' IN THE COMMERCIAL ARBITRATION ACTS

Thank you for inviting comment on the Victorian Court of Appeal decision in *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142 and the effect upon the provisions of the uniform Commercial Arbitration Acts enacted in all jurisdictions except the Australian Capital Territory. Reference is made to the *Commercial Arbitration Act* 2011(Vic) (the "Act") in the comments below.

The Law Council's views are as follows:

1. Section 8 of the Commercial Arbitration Act 2011 (the Act) should be amended to explicitly require tribunals to enforce arbitration agreements, to reflect the decision in *Subway Systems Australia Pty Ltd v Ireland*

The Law Council considers that given the risk of confusion about whether a tribunal, such as the Victorian Civil and Appeal Tribunal (VCAT), is a "court" for the purpose of the supervisory functions set out in s 6(2), s 8 of the *Commercial Arbitration Act* 2011(Vic) should be amended to explicitly include tribunals among the entities required by s 8 to enforce arbitration agreements, reflecting the decision in *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142 (*Subway Systems*). Any amendment should be limited to s 8 and the definition of "the Court" in s 2 should not be amended. The rationale is to uphold agreements made to arbitrate disputes outside of the jurisdiction of the courts so that dispute resolution by private and alternative processes is not undermined.

How "tribunal" is defined in any amendment of s 8 should be carefully approached so that a tribunal deciding a civil dispute is required to adopt the same approach to the enforcement of arbitration agreements as a court.

The comments made in respect to 1. are subject to the matters raised below.

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2. Section 8 should be amended to explicitly exclude some tribunals, as the best way to achieve the purpose of allowing for certain disputes to be resolved quickly, inexpensively and efficiently outside of the arbitration process

Emphasis must be given to s 1AC(1) of the *Commercial Arbitration Act* 2011 (Vic)[1] which notes that the paramount object of the Act is: "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense", and to provide a process for the finalisation of disputes pursuant to s 1AC(2)(a) and (b) of the Act. The Act aims to achieve its paramount object by enabling parties to agree about how their commercial disputes are to be resolved and by providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.

The Law Council appreciates the public interest in having disputes dealt with efficiently and inexpensively, as well as the importance of parties being able to agree as to how their disputes are to be resolved. A tension will exist between the paramount object noted in the Act and access to systemised cost effective dispute resolution processes for small claims such as those provided by tribunals. Consideration may need to be given to the inclusion or exclusion of specific tribunals, for example, the Fair Work Commission and various state industrial tribunals in s 8, amongst others.

Generally the Law Council in weighing these public policy objectives regards the fact that parties who have agreed to resolve their disputes by private arbitration, ought not have their election of a private dispute resolution process negated.

The Law Council notes that as s 38 is a mirror provision to s 8, if s 8 is amended, consideration should be given to amending s 38 to specifically include tribunals. Section 5 may also require amendment.

3. The definition of "the Court" in s 2 and 6(2) should be amended to specifically include or exclude tribunals

Consideration has been given to the definition of "the Court" in s 2 of the Act and the Court's role to assist and supervise a range of arbitral functions set out in s 6(2) of the Act. The Law Council does not see any need to widen the scope of the Act to include tribunals as supervisory courts for the purpose of s 6(2) of the Act. Indeed, not all tribunals will necessarily have the statutory powers or otherwise be equipped to perform those functions.

4. Other amendments should be made to the Acts regarding the application of the legislation to smaller disputes or where legislation specifically recognises the special needs of particular parties, such as small business or retail tenants, or…

Arbitration is not always an inexpensive alternative to other dispute resolution processes. This is particularly so when dealing with small claims where the cost of arbitration may outweigh the economic benefit in pursuing a claim. If it is determined that access to justice for small claims could be improved through amendments to the Act, the Committee suggests that broader consultation with stakeholders dealing with these types of disputes is required.

5. Other references to "court" in the Act

The uniform commercial arbitration law employs the defined term "the Court" in a number of sections, and in a number of other sections employs the undefined term "court". The question whether tribunals should be included within the meaning of the undefined "court" arises in a number of sections of the Act, including: ss 3(2), 5, 9, 17I(1)(a)(iii), 17J(1), 27F(8), 36(1)(a)(v), 36(2), 38 and 41. Careful consideration of each of these sections is required.

[1] See also, equivalent sections in *Commercial Arbitration Act 2010*(NSW), *Commercial Arbitration Act 2011* (SA), *Commercial Arbitration Act 2011* (Vic), *Commercial Arbitration (National Uniform Legislation) Act* 2011 (NT), *Commercial Arbitration Act 2011* (Tas), *Commercial Arbitration Act 2012* (WA), *Commercial Arbitration Act* 2013 (Qld).

The Law Council's preliminary view is that s 5 should be amended to include tribunals as s 5 enshrines the principle of non-intervention in arbitrations (see 2. above).

Should you wish to discuss this matter further, in the first instance please contact the Section Administrator for the Federal Litigation and Dispute Resolution Section, Hanna Jaireth, T: 02 62463722 or mailto: fedls@lawcouncil.asn.au

Yours sincerely

MARTYN HAGAN
SECRETARY-GENERAL