

INTERNATIONAL ARBITRATION REGULATIONS 2020

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *International Arbitration Regulations 2020* (the new Regulations) address the sunset of the *International Arbitration Regulations 2011*.

The *International Arbitration Act 1974* (the Act) gives the force of law to the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration ('the Model Law') as the law governing the conduct of international commercial arbitrations in Australia.

Section 40 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Section 18 of the Act provides that a court or authority prescribed for the purposes of subsections 18(1) and (2) is taken to have been specified in Article 6 of the Model Law as an authority competent to perform the functions referred to in Articles 11(3) and (4) of the Model Law.

Article 11(3) of the Model Law sets out a default procedure for the appointment of an arbitrator or arbitrators where the parties have not agreed on an appointment process between themselves. Where this default procedure breaks down, a competent authority specified in Article 6 may be called upon, at the request of a party, to make the necessary appointment or appointments.

Article 11(4) of the Model Law applies where the parties have agreed on a procedure for the appointment of an arbitrator or arbitrators between themselves but this procedure has broken down. Where this occurs, Article 11(4) provides for a competent authority specified in Article 6 to make the necessary appointment or appointments, at the request of a party.

Prior to the enactment of the *International Arbitration Amendment Act 2010* (the Amendment Act), these functions were performed exclusively by the courts. The Amendment Act amended section 18 of the Act to allow for the appointment of bodies other than the courts to perform these functions either alongside or in substitution for the courts. That process for reform of the Act was the subject of an extensive consultation process involving public submissions.

The Regulations were then made to prescribe the Australian Centre for International Commercial Arbitration (ACICA) as the sole competent authority specified in the Regulations to perform these appointment functions following consultation with a number of stakeholders, including the federal judiciary. This was on the basis that these important, but largely administrative appointment functions, should be performed by an international arbitral institution in order to ensure speed and efficiency in this critical aspect of the arbitration process, and to apply the expertise and knowledge that an international arbitral institution has to appointments. ACICA is a national peak body for international commercial arbitrators in Australia.

The *International Arbitration Regulations 2011* sunset on 1 April 2021. The new Regulations remake the *International Arbitration Regulations 2011* and continue to prescribe ACICA as the sole competent authority to perform the appointment functions set out in Articles 11(3) and (4) of the Model law. The new Regulations also repeal the *International Arbitration Regulations 2011*.

CONSULTATION

The Attorney-General's Department conducted targeted consultation with key arbitration stakeholders including ACICA, the Chartered Institute of Arbitrators (Australia), the Australian Bar Association, the Law Council of Australia, and the Federal Court of Australia. The outcomes of the consultation process raised no concerns with the current arrangements and emphasised the importance and appropriateness for the appointment functions in Articles 11(3) and (4) of the Model Law to continue to sit with an international arbitral institution that has the expertise to deal with complex applications efficiently. It also emphasised that this continues to be appropriate given that industry bodies may have more direct knowledge of who would be a suitable arbitrator or arbitrators to resolve a particular dispute.

Details of the new Regulations are set out in **Attachment A**.

A Statement of Compatibility with Human Rights is at **Attachment B**.

Details of the proposed *International Arbitration Regulations 2020*

Section 1 – Name

This section provides that the title of the Regulations is the *International Arbitration Regulations 2020*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after the instrument is registered.

Section 3 – Authority

This section provides that the *International Arbitration Regulations 2020* are made under the *International Arbitration Act 1974*.

Section 4 – Schedules

This section provides each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Section 5 – Definitions

This section provides that the term ‘Act’ in this instrument means the *International Arbitration Act 1974*.

Section 6 – Prescribed Authorities

This section provides that for the purposes of subsections 18(1) and (2) of the Act, the Australian Centre for International Commercial Arbitration is prescribed.

Schedule 1 – Repeals

Item 1 repeals the *International Arbitration Regulations 2011*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

International Arbitration Regulations 2020

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulations

1. The purpose of the *International Arbitration Regulations 2020* (the Regulations) is to:
 - prescribe the Australian Centre for International Commercial Arbitration (ACICA) as the sole competent authority for the purposes of sections 18(1) and (2) of the *International Arbitration Act 1974* (the Act), so that ACICA can perform the specific appointment functions set out in articles 11(3) and (4) of the *UNCITRAL Model Law on International Commercial Arbitration 1985* in Australia. That function covers the appointment of arbitrators where the parties to an international arbitration (i) have not agreed on an appointment process, or (ii) where they have agreed on such a process but that process has broken down;
 - repeal the *International Arbitration Regulations 2011*.
2. ACICA is the most appropriate body in Australia to perform the appointment functions under the Act because:
 - as the appointment functions are largely administrative in nature, they are therefore best performed by an international arbitration institution rather than the courts for the purposes of ensuring speed and efficiency, which is a critical aspect of the arbitration process;
 - ACICA is Australia's international arbitration institution, governed by a board that includes some of Australia's leading arbitration practitioners. It has more than 30 years' experience assisting parties to effectively resolve disputes;
 - ACICA has developed and continues to apply a robust process to deal with appointment applications brought under the Act, including developing and maintaining its own Rules and appointment process under those Rules to appropriately fulfil its functions.

Human rights implications

3. The Disallowable Legislative Instrument engages the following human rights:
 - the right to a fair trial and fair hearing rights: Article 14 of the *International Covenant on Civil and Political Rights 1966 (ICCPR)*;
 - right to recognition and equality before the law: Articles 2, 16 and 26 of the *ICCPR*.

The right to a fair trial and fair hearing rights

4. The Disallowable Legislative Instrument engages the right to a fair trial and fair hearing rights. The Instrument promotes this right as it provides a framework for ensuring that arbitration proceedings can take place even where parties have not agreed on an arbitrator appointment process or where that process has broken down. This facilitates the parties' ability to have their dispute determined before a competent, independent and impartial tribunal, which in turn allows for the enforcement of foreign arbitration agreements and awards before domestic courts.

The right to recognition and equality before the law

5. The Disallowable Legislative Instrument engages the right to recognition and equality before the law, an absolute right. The Instrument promotes this right because it ensures the appointment of arbitrators for proceedings where the parties have been unable to do so themselves. This allows parties to proceed with arbitral proceedings for the purpose of resolving their dispute.
6. The Instrument therefore enhances access to justice and recognition before the law for parties involved in international commercial disputes.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of the right to a fair trial and fair hearing rights, and the right to recognition and equality before the law.