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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL ARBITRATION AMENDMENT BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Robert McClelland MP)

INTERNATIONAL ARBITRATION AMENDMENT BILL 2009

OUTLINE

The International Arbitration Act 1974

The *International Arbitration Act 1974* ('the Act') implements Australia's obligations to enforce and recognise foreign arbitration agreements and arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 (the New York Convention).

The Act also gives the force of law to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ('the Model Law') as the primary arbitral law that governs the conduct of international arbitrations taking place in Australia.

Finally, the Act also implements Australia's obligations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on 18 March 1965.

The International Arbitration Amendment Bill 2009

The International Arbitration Amendment Bill 2009 ('the Bill') was developed following a review of the Act announced by the Attorney-General, the Hon Robert McClelland MP, on 21 November 2008 (the Review).

The amendments to the Act contained in the Bill can be divided into four categories: amendments to the application of the Act and the Model Law; amendments concerning the interpretation of the Act; amendments to provide additional option provisions to assist the parties to a dispute; and miscellaneous amendments to improve the operation of the Act.

Application of the Act and the Model Law

In 2006, UNCITRAL adopted the first set of amendments to the Model Law since it was originally adopted in 1985. With one exception relating to *ex parte* orders, the Bill will apply these amendments to international commercial arbitration in Australia.

Section 21 of the Act allows the parties to an arbitration agreement to resolve their dispute under an arbitral law other than the Model Law (as given the force of law by the Act). For example, the parties could choose to resolve their dispute under State or Territory legislation. This creates significant legal difficulties and confusion concerning the interaction of the different laws. The Bill repeals section 21, removing the ability of the parties to an arbitration agreement to nominate an alternative arbitral law. The Bill also amends the Act to expressly provide that the Model Law covers the field with respect to international commercial arbitration. In doing so, the Bill retains jurisdiction for State and Territory Supreme Courts and confers jurisdiction on the Federal Court of Australia.

Interpretation of the Act

The Bill includes new provisions that are intended to confine the circumstances in which the courts can set aside an award made under the Model Law or refuse to enforce foreign awards under the New York Convention and the Model Law.

The Bill amends the Act to provide guidance to the courts when exercising powers and functions under the Act or the Model Law, exercising a power or function under an arbitration agreement or award, interpreting the Act or the Model Law or interpreting an arbitration agreement or award. For example, the Bill requires a court to have regard to the objects of the Act and to the fact that arbitration is an 'efficient, impartial, enforceable and timely' method of dispute resolution.

The Bill inserts an objects clause into the Act which emphasises the importance of international arbitration in facilitating international trade and commerce and is intended to guide the interpretation of the Act.

Optional Provisions

In addition to giving force to the Model Law as the primary arbitral law governing the conduct of international commercial arbitration in Australia, the Act also provides a range of provisions that the parties to an arbitration agreement may adopt on an 'opt in' basis and which are intended to help them resolve any disputes between them fairly and efficiently.

These provisions address issues such as the consolidation of arbitral proceedings, the awarding of interest and costs.

The Bill includes a number of additional optional provisions that will be made available to the parties to an arbitration agreement. These provisions cover issues such as the availability of subpoenas and court orders to support an arbitration, the disclosure of confidential information and the death of a party.

Other Amendments

The Bill includes a range of other measures directed at improving the general operation of the Act. These include providing a more expansive definition of what constitutes an agreement in writing for the purposes of the New York Convention and provisions to discourage adjournments during enforcement proceedings and to clarify the operation of the Model Law with respect to challenging the appointment of an arbitrator.

FINANCIAL IMPACT STATEMENT

The proposed amendments to the Act will not have any budgetary implications for the Australian Government.

NOTES ON CLAUSES

Clause 1: Short Title

1. This clause is a formal provision specifying that, once enacted, the short title of the Bill will be the *International Arbitration Amendment Act 2009*.

Clause 2: Commencement

2. Clauses 1 to 3 of the Bill will commence upon Royal Assent. The provisions of Schedule 1 also commence upon Royal Assent with the exception of Item 6, Item 8, Item 13 and Item 25. Item 6 and Item 25 can only commence after the commencement of the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*. Like that Act, these items confer jurisdiction on the Federal Court of Australia under Parts II and III of the Act. These items are included in this Bill to ensure consistency with other amendments to jurisdictional provisions contemplated in the Bill. Item 8 is a consequential amendment that needs to commence at the same time as either the provisions in schedule 2 of the Federal Justice System Amendment (Efficiency Measures) Act (No. 1) or Item 6 and Item 25 (whichever comes first).

Clause 3: Schedules

3. This clause provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule and that any other item in a Schedule has effect according to its terms. The Bill contains only one schedule – Schedule 1.

Schedule 1 – Encouraging International Arbitration

Part 1 – Amendments

International Arbitration Act 1974

Amendments to Part I of the Act

4. Item 1 amends Part I of the Act which sets out preliminary matters that apply throughout the legislation.

Item 1 After section 2C

5. This item amends Part 1 of the Act by inserting new subsection 2D setting out the objects of the Act.

6. Arbitration facilitates international trade and commerce, including international investment, by providing the parties to cross-border transactions with a widely understood and internationally enforceable means of resolving their disputes. Accordingly, the primary purpose of the Act is to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes. The Act does this by facilitating the use of arbitration agreements to manage disputes – particularly by giving force to the Model Law – and by facilitating the enforcement and recognition of foreign arbitration agreements and awards by giving effect to the New York Convention.

7. The Act also gives effect to Australia's obligations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which is also reflected in section 2D.

8. Item 26 amends the Act by inserting a new section 39 which provides that, amongst other things, the court must have regard to the objects of the Act when performing functions or exercising powers under the Act or the Model Law, when performing functions or exercising powers under an agreement or award to which the Act applies, interpreting the Act or the Model Law or interpreting an agreement or award to which the Act applies.

9. See also Item 26.

Amendments to Part II of the Act

10. The following items amend Part II of the Act which gives effect to Australia's obligations under the New York Convention to enforce and recognise foreign arbitration agreements and arbitral awards. Australia became a party to the New York Convention on 24 June 1975.

Item 2 Subsection 3(1)

11. See Item 4.

Item 3 Subsection 3(1)

12. See Item 4.

Item 4 At the end of section 3

13. Section 7 of the Act gives effect to Australia's obligations under Article II of the New York Convention to recognize and give effect to foreign arbitration agreements. Article II of the New York Convention provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

14. Subsection 3(1) of the Act provides that the phrase *arbitration agreement* means 'an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention'. Section 3(1) also provides that *agreement in writing* 'has the same meaning as in the Convention'. While these definitions are of particular relevance to section 7 of the Act they also have application to other provisions in Part II of the Act including section 8 which gives effect to Articles III to VI of the New York Convention concerning the recognition and enforcement of foreign arbitral awards.

15. While the meaning of *agreement in writing* in the New York Convention is inclusive, there has been growing concern amongst Contracting Parties to the Convention that Article II(2) is being construed too narrowly by legislators and domestic courts. This concern has arisen primarily in response to the growing reliance on electronic communications in international trade and commerce. Overly narrow interpretations of the writing requirement have the potential to undermine the ongoing effectiveness of the Convention.

16. This issue was considered by UNCITRAL at the same time as it was adopting the 2006 amendments to the Model Law (see Item 11). On 7 July 2006, UNCITRAL adopted a recommendation regarding the interpretation of the Convention encouraging Contracting Parties to apply Article II(2) 'recognizing that the circumstances described therein are not exhaustive'.[1] The recommendation was adopted in recognition of the wide use of electronic commerce and the 'need to promote the recognition and enforcement of arbitral awards'.[2]

17. This item inserts a new subsection 3(4) into the Act which clarifies that *agreement in writing* is to be given an expansive interpretation that takes into account modern means of communication. The provision is based on the definition of agreement in writing contained in Option 1 of Article 7 of the Model Law as amended in 2006 (see Item 11 and Item 12).

18. The new provision builds on the existing meaning of *agreement in writing* in the Convention and the Act by clarifying that an agreement will be in writing if 'its content is recorded in any form' regardless of whether the agreement or contract to which it related 'has been concluded orally, by conduct, or by other means'.

19. Further, an agreement is in writing if 'it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference'. A definition of *electronic communication* is inserted into subsection 3(1) of the Act by Item 3 which provides that 'electronic communication means any communication made by means of data messages'. A definition of *data message* is inserted into subsection 3(1) by Item 2. This definition applies to information 'generated, sent, received or stored by electronic, magnetic, optical or similar means'. While the definition includes a number of examples – for example email – it is not intended to be confined to these examples and should be interpreted to take account of new means of communication as they emerge.

20. New subsection 3(4) of the Act also clarifies that an agreement will be in writing if it is contained 'in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other'. This application of Article II(2) has long been accepted internationally and is reflected in the 1996 iteration of the Model Law. It is intended to facilitate the operation of Article II of the Convention by encouraging courts to refer matters to arbitration where this has previously been agreed by the parties.

21. This item also inserts a new subsection 3(5) which clarifies that 'a reference in a contract to any document containing an arbitration clause is an arbitration agreement, provided that the reference is such as to make the clause part of the contract'.

22. By adopting the approach taken in Option 1 of Article 7 of the Model Law, this item ensures consistency between the application of the enforcement and recognition provisions in the New York Convention and those in the Model Law as given force under the Act.

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1 UNCITRAL, Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session, 2006, (A/60/17), Annex II.

2 Ibid.

23. Item 2, Item 3 and Item 4 apply in relation to agreements entered into on or after the commencement of these items (the day of Royal Assent) – see Item 27.

24. See also Item 11, Item 12 and Item 27.

Item 5 Subsection 8(2)

25. Subsection 8(2) of the Act provides that 'a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory'.

26. Section 8(2) is typically interpreted to mean that an application for enforcement of a foreign award must be made under State or Territory arbitration legislation – for example, section 33 of the *Commercial Arbitration Act 1984* (NSW) – rather than directly under the Act. A concern raised during the Review of the Act is that the requirement to enforce an award through the law of a State and Territory might be seen to provide a Court with a basis to decline to enforce the award on any ground contained in that law in addition to those set out in the Act.

27. This item amends subsection 8(2) to provide that a foreign award may be enforced by a State or Territory court as if the award were a judgment or order of that court, removing references to State and Territory law. Enforcement would be by leave of the court concerned. In conjunction with Item 7, this amendment is intended to remove any application of the laws of the States and Territories in enforcing a foreign award.

28. Item 24 makes a similar amendment to subsection 35(2) of the Act which applies to the recognition of awards under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

29. The amendment in this item applies in relation to proceedings to enforce a foreign award brought on or after the item's commencement (the day of Royal Assent) – see Item 29.

30. See also Item 7, Item 24 and Item 29.

Item 6 Subsection 8(3)

31. Enforcement of foreign arbitral awards under the Act is currently confined to State and Territory courts. This provision would allow the Federal Court of Australia to enforce a foreign arbitral award 'as if the award were a judgment or order of that court'.

32. A similar amendment to the Act is contained in Schedule 2 of the Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008. To ensure consistency with the amendments contained in Item 5, this item will overwrite the amendment contained in the Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008.

33. Item 25 makes a similar amendment to subsection 35(4) of the Act which applies to the recognition of awards under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

34. The amendment in this item applies in relation to proceedings to enforce a foreign award brought on or after the item's commencement – see Item 29. This item commences after the commencement of Schedule 2 of the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*.

35. See also Item 25 and Item 29.

Item 7 Before subsection 8(4).

36. One of the key benefits of using arbitration to resolve disputes is the finality and enforceability of the resulting arbitral award. This is of particular importance with respect to international commercial arbitration.

37. Article V of the New York Convention sets out the grounds on which recognition and enforcement of a foreign arbitral award may be refused by the competent authority of a Contracting Party. Article V reflects the principle that arbitral awards should be enforced unless the award conflicts with fundamental principles of law and justice in the enforcing state.

38. The grounds of refusal set out in Article V are divided into two categories. The first category consists of matters that go to the circumstances in which the award was made and whether the award is, in fact, binding on the parties. For example, enforcement of an award may be refused where one of the parties was under some kind of incapacity or was not given notice of the arbitral proceedings or was otherwise unable to present their case. The second category goes to the nature of the award itself. A court may refuse to enforce an award that relates to a subject matter that is not capable of settlement under the law of that country. Further, enforcement may be refused if 'the award would be contrary to the public policy of that country'. An example that may fall in both of these categories would be an award relating to a criminal enterprise.

39. The grounds set out in Article V of the New York Convention are intended to be exhaustive. In other words, enforcement of an award may only be refused if one of the grounds in Article V is made out.

40. Subsections 8(5) and 8(7) set out the grounds on which a court can refuse to enforce a foreign arbitral award under the Act. These grounds mirror those in Article V of the New York Convention.

41. During the Review of the Act, concern was expressed that courts do not always treat the grounds for refusal in subsection 8(5) and 8(7) as exhaustive. For example, in *Resort Condominiums Inc v Bolwell and Another* [1995] 1 Qd R 406, the Supreme Court of Queensland found that the court retains a discretion to refuse to enforce a foreign arbitral award even if none of the grounds in section 8 of the Act are made out. Such an approach is inconsistent with the intention of the Convention.

42. Accordingly, this item amends section 8 to insert a new subsection 8(3A) that states that a court may only refuse to enforce a foreign award in the circumstances mentioned in subsections 8(5) and 8(7).

43. The amendment in this item applies in relation to proceedings to enforce a foreign award brought on or after the commencement of the item (the day of Royal Assent) – see Item 29.

44. Consideration was given to making a similar amendment to Part III of the Act with respect to the setting aside of an award under Article 34 of the Model Law or the recognition and enforcement of awards under Articles 35 and 36. These grounds mirror those in the New York Convention. However, Article 34(2) states that an arbitral award may be set aside 'only if' one of the grounds in the Article is made out. Similarly, Article 36(1) provides that recognition and enforcement of an award 'may be refused only' if one of the grounds in that Article is made out. Accordingly, it is clear on the face of the Model Law that the grounds in Articles 34 and 36 for setting aside or

refusing to enforce an award are intended to be exhaustive and consequently such an amendment would be superfluous.

45. See also Item 29.

Item 8 Subsection 8(4)

46. This item amends subsection 8(4) of the Act consequential to Item 6.

47. The amendment made by this item applies in relation to proceedings to enforce a foreign award brought on after the commencement of the item – see Item 29. This item commences at the same time as either the provisions in schedule 2 of the Federal Justice System Amendment (Efficiency Measures) Act (No. 1) or Item 6 and Item 25 (whichever comes first).

48. See also Item 6 and Item 29.

Item 9 After subsection 8(7)

49. Under subsection 8(7) of the Act, a court may refuse to enforce an award where to do so would be contrary to public policy. This ground reflects paragraph V(2)(b) of the New York Convention.

50. A similar ground for setting aside or refusing to enforce an award is found in Articles 34 and 36 of the Model Law. Section 19 of the Act clarifies the meaning of public policy under these articles of the Model Law. Section 19 of the Act states:

> Without limiting the generality of subparagraphs 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is hereby declared, for the avoidance of doubt, that, for the purposes of those subparagraphs, an award is in conflict with the public policy of Australia if:
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award.

51. At the time this provision was enacted – through the *International Arbitration Amendment Act 1989* – it was decided not to make an equivalent amendment with respect to the public policy ground of refusal in section 8 even though Articles 34 and 36 are based on Article V of the New York Convention. The Explanatory Memorandum to the 1989 legislation states that this decision was made 'so as to avoid any possible inference that the term 'public policy' which is referred to in the New York Convention does not contain those elements'. Despite this explanation, the application of section 19 has the potential to lead to the misinterpretation of the public policy ground in section 8. Accordingly, this item replicates the terms of section 19 and applies them to the public policy ground in subsection 8(7) of the Act.

52. The amendment in this item applies in relation to proceedings to enforce a foreign award brought on or after the item's commencement (the day of Royal Assent) – see Item 29.

53. See also Item 29.

Item 10 At the end of section 8

54. Subsection 8(8) of the Act provides a mechanism for adjourning enforcement proceedings where the court is satisfied that an application for the setting aside or suspension of an arbitral

award has been made in the country under the law of which the award was made. The provision gives effect to Article VI of the New York Convention.

55. The purpose behind Article VI of the Convention and hence subsection 8(8) is to ensure that enforcement of an award does not occur where that award, in time, may be unenforceable.

56. The application of this provision has the potential to be used to frustrate the enforcement of a foreign award in Australia where a party opposing enforcement commences action in the country where the award was made on spurious grounds or with the sole intention of delaying enforcement. Further, subsection 8(8) of the Act does not provide an adequate mechanism for a party seeking enforcement of an award to have an adjournment lifted where the proceedings in the other country have been resolved or have not been prosecuted in good faith and with due dispatch.

57. This item amends section 8 of the Act to insert new subsections 8(9) and 8(10). These provisions allow the court to order proceedings that have been adjourned under subsection 8(8) to be resumed where one of four circumstances occurs:

(a) the application for setting aside or suspension of the award in the foreign country is not being pursued in good faith

(b) the application for setting aside or suspension of the award in the foreign country is not being pursued with reasonable diligence

(c) the application for setting aside or suspension of the award in the foreign country has been withdrawn or dismissed, or

(d) the continued adjournment of the proceedings is, for any reason, not justified.

58. In addition, the court will be able to make orders for costs against the person who made the application for setting aside or suspension of the award in the foreign country and any other orders the court thinks appropriate in the circumstances.

59. The amendment made by this item applies whether the proceedings are adjourned under subsection 8(8) before or after the commencement of this item (the day of Royal Assent) – see Item 30).

60. See also Item 30.

Amendments to Part III of the Act

61. The following items amend Part III of the Act which gives the force of law to the Model Law as the primary arbitral law governing the conduct of international commercial arbitrations in Australia. Part III also provides a range of additional, optional, provisions that can be used by the parties to an arbitration agreement should a dispute arise between them.

Item 11 Subsection 15(1)

62. Section 15 provides for the interpretation of Part III of the Act. This item amends this section by repealing subsection 15(1) which sets out the meaning of *Model Law* and substituting a new subsection. This new provision inserts definitions for *confidential information*, *disclose* and *Model Law*. The meanings of *confidential information* and *disclose* are discussed at Item 18. The definition of *Model Law* is discussed below.

63. Subsection 16(1) of the Act provides that, subject to the other provisions of Part II, 'the Model Law has the force of law in Australia'. The Model Law was adopted by UNCITRAL on 21 June 1985. Subsection 15(1) provides that *Model Law* means:

> the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, the English text of which is set out in Schedule 2.

Schedule 2 to the Act duly replicates the Model Law as adopted by UNCITRAL in 1985.

64. On 7 July 2006, UNCITRAL adopted amendments to the Model Law. These amendments:

- insert a new Article 2A, which is intended to promote uniform interpretation of the Model Law
- amend the definition of 'arbitration agreement' in Article 7 to give parties the option of adopting a less prescriptive definition
- adopt more extensive provisions on 'interim measures and preliminary orders', and
- amend Article 35(2) to remove authentication requirements when seeking enforcement of an award through a court and to rationalise the requirements for translating awards.

Each of these amendments to the Model Law and the proposed approach to their implementation is dealt with in further detail below.

65. In conjunction with subsection 16(1) of the Act, and subject to the exceptions discussed below, this item will give the force of law to the Model Law including the amendments made in 2006. Schedule 2 of the Act has been updated to reflect the amendments to the Model Law.

Uniform Interpretation

66. Article 2A of the Model Law, as inserted in 2006, 'is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law'. The Article provides:

> (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
>
> (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

67. There was widespread support expressed during the Review of the Act for incorporating Article 2A through the Act. In order to ensure that Australia is an attractive venue for the conduct of international commercial arbitration, it is important that the Model Law is interpreted in a way that is consistent with approaches taken overseas. Novel or perverse interpretations by Australian courts have the potential to undermine confidence in Australia as a venue for conducting arbitration.

Definition of Arbitration Agreement

68. Prior to its amendment in 2006, Article 7 of the Model Law set out the meaning of *arbitration agreement* and the formal requirements for such agreements. A key requirement of this Article was that an arbitration agreement must be in writing. The Article then set out a range of ways in which this requirement could be satisfied – for example an agreement is in writing if it is contained in an 'exchange of letters, telex, telegrams or other means of telecommunications which provide for a record of the agreement'. It was the intention of the drafters of the Model Law that Article 7 should

be consistent with the writing requirement in Article II(2) of the New York Convention (see Item 4).

69. The 2006 amendments to the Model Law offer States alternative versions of Article 7 referred to as 'options'. States must choose which version of Article 7 they wish to incorporate into their laws. Option I is in substantially the same terms as the 1985 iteration of Article 7, although there are two significant changes. First, Option I clarifies that an agreement may be concluded orally, through conduct or other means, provided that its content is recorded in some form. Secondly, the provision reflects the use of electronic communications to conclude commercial arrangements. Option II is less prescriptive than both the original iteration of Article 7 and Option I. It includes a definition of 'arbitration agreement' but excludes any formal requirements, including the requirement that an agreement be in writing.

70. During consultations conducted as part of the Review of the Act, there was widespread support for adopting Option I. This option is consistent with the approach taken originally in the Model Law but has been modernised to reflect contemporary arbitration practice. Option II, on the other hand, would involve a substantial departure from current practice in Australia. Further, Option I can be adapted to the interpretation of the writing requirement in the New York Convention (see Item 4). Accordingly, Item 12 amends section 16 of the Act to provide that 'arbitration agreement' has the same meaning as in Option I for Article 7 of the amended Model Law.

Interim measures and preliminary orders

71. Prior to 2006, Article 17 of the Model Law allowed an arbitral tribunal to 'order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute'. The primary purpose of the provision was to ensure that assets are preserved pending the completion of the arbitration process.

72. Article 17 was in the most basic terms and, significantly, did not provide for enforcement through a court, rendering many interim measures of little value. In Australia, this was overcome in part through section 23 of the Act which allows the parties to agree that such measures will be enforceable as if they were an award.

73. The 2006 amendments introduce a significantly more sophisticated regime for making and enforcing interim measures. These measures bring arbitration into line with the type of protection that could be obtained from a court during litigation. Significantly, the amendments also provide for interim measures to be made by a court and for the enforcement of such measures.

74. 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 was opposed by key stakeholders in Australia during the Review.

75. 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.

76. As a consequential amendment, Item 18 repeals current section 23 of the Act which is no longer required as the recognition and enforcement of interim measures is now dealt with in Articles 17H and 17I of the Model Law.

77. The 2006 amendments make a consequential amendment to Article 1(2) of the Model Law. In its original iteration, the Model Law provided that: 'the provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State'. To ensure the effective operation of interim measures and (for those States adopting them) preliminary orders, it is necessary to include Articles 17H to 17J to this list. These provisions relate to the recognition and enforcement of interim measures and, accordingly, need to apply to arbitrations conducted in a foreign state. This amendment is adopted accordingly, subject to the limitation set out in Item 14.

Authentication and translation requirements

78. The 2006 amendments to Article 35 of the Model Law are intended to reduce formality when seeking the recognition and enforcement of an award. They are relatively minor changes and received broad support from stakeholders.

79. See also Item 4, Item 12, Item 14, and Item 18.

Item 12 Subsection 16(2)

80. As noted under Item 11, the 2006 amendments to the Model Law provide two alternative provisions for defining *arbitration agreement* for the purposes of the Model Law. For the reasons set out under that item, the Bill amends the Act to insert a new definition into subsection 16(2) which provides that *arbitration agreement* has the meaning set out in Option 1 of Article 7 of the Model Law.

81. Item 4 clarifies the meaning of *agreement in writing* under Part II of the Act for the purposes of implementing the New York Convention consistently with Option 1 of Article 7 of the Model Law.

82. See also Item 4 and Item 11.

Item 13 Repeals section 18

83. Item 13 replaces the existing section 18 with a new provision which allows a court or an authority to be prescribed as a competent court or authority to perform various functions set out in the Model Law relating to the failure to appoint arbitrators.

84. A number of other functions under the Model Law are reserved to the Federal Court, as well as State and Territory Supreme Courts. These functions concern challenges to arbitrators (Article 13(3)), failure or impossibility to act (Article 14), challenges to jurisdiction (Article 16(3)) and appeals against awards (Article 34(2)).

Item 14 After section 18

85. Article 12 of the Model Law sets out the grounds on which the appointment of an arbitrator appointed in accordance with Article 11 may be challenged. Under Article 13, the parties are free to determine the procedure for challenging an arbitrator, subject only to the requirement in Article 13(3) that where a challenge has failed the party must be able to have recourse to a court to determine the matter.

86. The parties have a wide degree of discretion in choosing arbitrators to resolve their dispute. Article 11 of the Model Law allows them to determine the appointment procedure. Where no procedure is in place, Article 11 provides a default mechanism with ultimate recourse to a court where agreement cannot be reached.

87. Article 12(1) places an obligation on arbitrators to disclose 'any circumstances likely to give rise to justifiable doubts as to his impartiality or independence'. This obligation attaches from the moment they are approached about an appointment as an arbitrator and continues throughout their appointment. Article 12(2) provides that an arbitrator may be challenged 'only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties'.

88. In Australia the test for bias that is applied to arbitrators is the same as that applied to judges. The test is whether a fair minded lay observer might reasonably apprehend that the arbitrator might not bring an impartial mind to the resolution of the dispute (see for example *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWSC 77).

89. Equating arbitrators with judges is not consistent with the principles underpinning arbitration. While there is no doubt that an arbitrator should be impartial, arbitrators will be selected by the parties in some instances because of their specific knowledge of an industry or particular arrangements. More typically an arbitrator will be a senior member of an international law firm, barrister, expert in a particular field or an academic. Accordingly, it is appropriate to apply a standard different than that for judges to such persons.

90. One approach suggested during consultations for the Review was to adopt the approach taken to bias in the United Kingdom. In *R v Gough* [1993] AC 646, the House of Lords applied the following test for bias:

> having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was *a real danger of bias* on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him…[3] [emphasis added]

91. In his leading judgment, Lord Goff of Chieveley states expressly that this approach should apply to arbitrators, although this was not at issue in the decision.

92. This item inserts a new section 18A into the Act to provide that the test for whether there are justifiable doubts as to the impartiality or independence of an arbitrator is the real danger of bias test set out in *R v Gough*.

93. Section 18A will apply in relation to an approach to an arbitrator on or after the commencement of the item and to any challenge to an arbitrator made on or after the commencement of the item (the day of Royal Assent) - Item 31.

94. As discussed under Item 11, the 2006 amendments to the Model Law make provision for preliminary orders (Article 17B). For the reasons given earlier, this provision will not be given effect under the Act. This item inserts a new section 18B into the Act which provides that despite Article 18B of the Model Law, no party to an arbitration agreement may make an application for a preliminary order and no arbitral tribunal may grant such an order.

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[3] [1993] AC 646 at 670 per Lord Goff of Chieveley.

95. Section 18B will apply from the commencement of this item (the day of Royal Assent) – Item 31.

96. See also Item 11 and Item 31.

Item 15 Section 19

97. As discussed under Item 9, one of the grounds under which a court may refuse to enforce or recognise a foreign arbitral award under the New York Convention and the Model Law (or set aside an award under Article 34 of the Model Law) is that to do so would be contrary to the public policy of the country in which enforcement is sought. Section 19 of the Act is an interpretative provision that clarifies that for the purposes of Articles 34 and 36 of the Model Law, an award is in conflict with the public policy of Australia if (a) the making of the award was induced or affected by fraud or corruption or (b) a breach of the rules of natural justice occurred in connection with the making of the award.

98. This item would repeal section 19 and re-state it with two small but significant changes.

99. First, the provision has been altered to take account of the new regime for interim measures in the Model Law. As discussed under Item 11, the 2006 amendments to the Model Law introduce a more sophisticated regime for interim measures. Article 17H of the Model Law provides for the recognition and enforcement of interim measures to ensure that the purpose of any such measure is not frustrated by the international aspect of the dispute.

100. Article 17H provides that subject to Article 17I, an interim measure must be enforced upon application to a court irrespective of the country in which the measure was issued. Article 17I sets out the grounds on which a court may refuse to recognise and enforce an interim measure. Amongst other matters, this Article incorporates the grounds of refusal that relate to the recognition and enforcement of awards in Article 36 which, in turn, reflect the grounds of refusal in Article V of the New York Convention.

101. Accordingly, it is necessary to apply section 19 to the recognition and enforcement of interim measures.

102. Secondly, this item also makes a minor technical change to section 19 as currently drafted to include the words ‘or is contrary to’ after the words ‘conflict with’. As already noted, this is an interpretive provision that applies to the public policy ground for setting aside an arbitral award or for refusing to recognise and enforce such an award under Articles 34 and 36 of the Model Law.

103. The drafting of the public policy ground varies slightly as between Articles 34 and 36. Article 34 provides that a court may set aside an award if the award ‘is in conflict with’ public policy. By way of contrast, Article 36 allows a court to refuse to recognise or enforce an award where it finds that to do so ‘would be contrary to’ public policy. This amendment ensures that section 19 reflects both constructions.

104. See also Item 9 and Item 11.

Item 16 Section 21

105. Section 21 of the Act currently provides that the parties to an arbitration agreement may agree that any dispute that arises between them may be settled ‘otherwise than in accordance with the

Model Law'. In such cases 'the Model Law does not apply in relation to the settlement of that dispute'.

106. The provision allows the parties to substitute an alternative law under which their dispute will be resolved. For example, they could choose to resolve their dispute under the Commercial Arbitration Act (NSW) or the law of a foreign country.

107. The Model Law gives the parties to an arbitration a wide degree of control over how their dispute is resolved. In particular, Article 19 provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings. Arbitration rules that can be used under Article 19 have been developed by a number of international organisations, including UNCITRAL and the International Chamber of Commerce and Australian institutions such as the Australian Centre for International Commercial Arbitration.

108. In addition to Article 19, Article 28 of the Model Law provides that 'the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'. For example, in an arbitration between a party from Australia and a party from New Zealand, the parties may select the law of a third country as the applicable law to the dispute.

109. It is important to distinguish between the arbitral law under which a dispute is resolved and the substantive law which is applied to the particular facts of the matter in question. Article 28 contemplates party choice as to the latter whereas section 21 of the Act provides for party choice as to the former. Section 21 allows the parties to exclude all the provisions of the Model Law including those that concern setting aside of awards and recognition and enforcement of awards (Articles 34 to 36).

110. The operation of section 21 causes considerable practical and interpretive problems. Firstly, section 21 allows the parties to 'opt-out' of using the Model Law but not the Act. Hence other provisions of the Act may continue to apply, even though these provisions are underpinned by the Model Law. Where an alternative law has been nominated – for example the law of Singapore – the provisions of the Act may conflict with those of the law nominated. Secondly, it is not necessary for the parties to nominate an alternative law under which their dispute is to be resolved. Unless the parties nominate another law under which the arbitration is to occur, it is not clear what law would apply. While there is an argument that State or Territory law would apply to an arbitration being conducted in Australia, this is not straightforward. Thirdly, even where a law is nominated, it will not always be clear that a court will have any power with respect to the arbitration. For example, simply nominating the Commercial Arbitration Act (NSW) will not necessarily give a court in NSW any jurisdiction over the arbitration proceedings should the need arise. Finally, should the law of a foreign country be nominated and the arbitration is conducted in Australia it is doubtful that there would be any court which could exercise jurisdiction if required and the agreement may be unenforceable both in Australia and overseas.

111. A further problem has arisen in the judicial application of section 21 of the Act. For example, in *Eisenwerk* v *Australian Granites Ltd* [2001] 1 Qld R 461, the Queensland Court of Appeal held that by adopting the International Chamber of Commerce Rules, the parties had opted out of the Model Law. This interpretation is unsatisfactory because parties nominating either the International Chamber of Commerce Rules or the Australian Centre for International Commercial Arbitration Rules (which are both procedural rules) would then be taken to have opted out of the Model Law in its entirety and be unable to pursue certain avenues of relief provided for in the Model Law. As already noted, Article 19 of the Model Law expressly contemplates the parties determining their

rules of procedure. The rationale for allowing the parties to choose their own procedural rules is that they may tailor the rules to suit their specific wishes. This should not amount to ousting the Model Law completely. For example, the Model Law accords the parties considerable freedom to tailor the procedural rules to suit their particular circumstances. However, there are fundamental requirements which may not be ousted, such as the requirement that the parties be treated with equality and that the rules provide overall fairness and justice.

112. While it is appropriate to give parties the flexibility to determine the procedures they want and the law that is applicable to the dispute, allowing parties to oust the arbitral law creates significant difficulties that cannot be easily remedied without complex litigation. Accordingly, this item repeals section 21. Consequently, while the parties will continue to have freedom to choose both the procedures and applicable substantive law, they will not be free to oust the Model Law as the applicable arbitral law.

113. Section 21 raises a broader question about the 'exclusivity' of the International Arbitration Act in governing international commercial arbitration in Australia. The legislative history of the Act suggests that it was Parliament's intention that the Act 'cover the field' and that State and Territory commercial arbitration acts would not apply (subject to the choice of the parties in accordance with section 21). Part III of the Act which implements the Model Law was inserted in the Act by the *International Arbitration Amendment Act 1989*. When originally introduced, this legislation would have preserved State and Territory legislation to the extent that it mirrored the Commonwealth Act. However, the relevant provision (proposed section 29) was removed by way of Government amendment. The explanatory memorandum for this amendment states:

> The deletion of proposed s.29 will ensure that a single Australian (Commonwealth) law will govern all international commercial arbitrations conducted in Australia, unless the parties themselves choose otherwise.

114. There have been a number of decisions in Australian courts that have undermined the exclusive application of the Act. Arguably the most far reaching example is the decision of Giles CJ in *American Diagnostica Inc v Gradipore Limited* (1998) 44 NSWLR 312 which held in effect that international commercial arbitration in Australia could continue to be regulated by State or Territory legislation.

115. There was strong support from stakeholders for making the Act the exclusive law governing international commercial arbitration in Australia. Dealing more broadly with section 21 of the Act was not addressed specifically during the consultation process but was raised in a number of submissions. A number of academic works also consider this issue.

116. One concern raised during consultations was that many practitioners consider the Model Law to be incomplete. In particular, there is a concern that provisions contained in State and Territory Acts that provide courts with powers to support arbitrators are absent from the Model Law. While it is preferable to minimise the involvement of courts in arbitration wherever possible, it is nonetheless desirable that parties are able to seek the courts support where another party or person is frustrating the arbitration proceedings.

117. In addition to repealing current section 21, this item inserts a new section 21 which makes it clear that the Model Law covers the field for the purposes of international commercial arbitration. Accordingly, State and Territory legislation would have no application to an international commercial arbitration covered by the Model Law. This item is complemented by the amendments in Item 6, Item 7 and Item 24 which remove any role for State and Territory law in enforcing and

recognising foreign arbitral awards under the New York Convention and awards under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

118. Acknowledging concerns about the completeness of the Model Law, Item 18 amends the Act to insert a range of additional tools that the parties can use in resolving their dispute satisfactorily, including allowing the courts to provide support to the arbitration.

119. See also Item 6, Item 7, Item 18 and Item 24.

Item 17 After section 22

120. This item provides that for the purposes of Division 3 of Part III of the Act, *court* means a State or Territory Supreme Court, or the Federal Court.

Item 18 Section 23

121. Division 3 of Part III of the Act provides a suite of optional provisions that can be adopted by the parties either as a package or individually (see section 22). These provisions are intended to support the parties to resolve their dispute as effectively and fairly as possible. These provisions deal with interim measures (section 23), consolidation of arbitral proceedings (section 24), interest up to making of award (section 25), interest on debt under award (section 26) and costs (section 27).

122. As noted under Item 11, the 2006 amendments to the Model Law introduce a more sophisticated regime for interim measures than previously provided for in the Model Law. This regime now addresses issues of enforcement which are also addressed in section 23. Accordingly, section 23 is no longer required and this item repeals the section.

123. In addition to repealing current section 23 of the Act, this item inserts new sections 23 to 23H. These new optional provisions address assistance from the court, confidentiality and the death of a party.

Assistance from the court

124. As noted under Item 16, one concern raised during the Review of the Act was that many practitioners consider the Model Law to be incomplete. In particular, there is a concern that provisions contained in State and Territory Acts that provide courts with powers to support arbitrators are absent from the model law, namely those found in common sections 17 and 18 of the Commercial Arbitration Acts (such as the Commercial Arbitration Act (NSW)).

125. Common section 17 of the Commercial Arbitration Acts allows the parties to obtain a subpoena from a court to require a person to (a) to attend for examination before an arbitrator (b) to produce to the arbitrator documents specified in the subpoena and (c) to do both these things. Section 17 protects the normal privileges that apply in legal proceedings. Common section 18 of those Acts provides for a person who refuses to appear before, or produce documents to, an arbitrator or fails to cooperate with the arbitrator to be examined by, or produce the relevant document to, the court.

126. While it is preferable to minimise the involvement of courts in arbitration wherever possible, it is nonetheless desirable that parties are able to seek the courts support where another party or person is frustrating the arbitration proceedings. Accordingly, this item amends the Act to include provisions equivalent to those in common sections 17 and 18 of the Commercial Arbitration Acts.

127. The Act will insert new section 23 which will allow a party to arbitral proceedings commenced in reliance on an arbitration agreement to apply to a court for a subpoena to require a person to (a) attend before the arbitral tribunal for examination or (b) to produce to the tribunal the documents specified in the subpoena.

128. This provision includes four important safeguards. First, the party may only approach the court with the permission of the arbitral tribunal. This is intended to prevent a party from using the process to draw out proceedings or compel attendance or the production of documents where the tribunal does not feel it is necessary for resolving the dispute. Secondly, the court may only issue a subpoena 'for the purposes of the arbitral proceedings' – this means the court must be satisfied that the subpoena is genuinely being sought for the purposes of resolving a dispute and not to support some secondary purpose.

129. The third safeguard in new section 23 is that before issuing a subpoena with respect to a person who is not a party to the dispute, the court must not do so unless it is satisfied that it is reasonable in all the circumstances to do so and unless the person to whom the subpoena relates has had the opportunity to make representations to the court. This provision is intended to protect the rights of third parties – particularly against the abuse of arbitral proceedings for some unrelated purpose such as obtaining sensitive commercial information.

130. Finally, new section 23 provides that a person must not be compelled under the subpoena to answer any question or produce any document which the person could not be compelled to answer or produce in a proceeding before that court. This provision is intended to protect privileges and immunities that would ordinarily be enjoyed in court proceedings such as legal professional privilege.

131. In addition to the subpoena power, this item inserts a new section 23A which allows a court to issue a range or orders where a person has failed to cooperate with an arbitral tribunal or has not complied with a subpoena issued under new subsection 23. Where this has occurred, a court may order the person to attend before the court for examination or to produce documents or order the person, or any other person, to transmit a record of evidence given, or documents produced to the arbitral tribunal.

132. Section 23A will contain the same four safeguards that apply to new section 23 with the exception that the consent of the arbitral tribunal will not be required before a party can seek an order as a result of a failure to comply with a subpoena. Subpoenas are exempted from this requirement as the permission of the tribunal is required before an application for a subpoena could be made under section 23.

133. Article 25 of the Model Law addresses the consequences of a failure by a party to the arbitral proceedings to communicate a statement of claim or a statement of defence or to appear at a hearing or produce documentary evidence. In the latter case, Article 25(3) provides that 'the arbitral tribunal may continue the proceedings and make the award of the evidence before it'. The Article applies unless otherwise agreed by the parties.

134. New section 23B of the Act sets out the consequences of failing to comply with a subpoena, an order from the court or a requirement of the arbitral tribunal. This provision supplements Article 25 of the Model Law. In all cases, default by a party allows the arbitral tribunal to continue with the arbitration proceedings and make an award on the evidence before it. The provision does not affect any other power which the tribunal or a court may have in relation to the default. For example, the provision is not intended to affect the power of a court to punish for contempt.

Confidentiality

135. One of the significant attractions of arbitration as a method of resolving disputes is that it is much easier to control the disclosure of confidential information as compared to litigation. Proceedings generally occur in private and the parties have a wide degree of control over how the proceedings are conducted. This is of significant concern to parties where sensitive commercial information is being considered.

136. Neither the Act nor the Model Law provide for the protection of confidential information relating to arbitral proceedings. However, confidentiality will often be addressed under the arbitration rules used in the proceedings – see for example the rules promulgated by the Australian Centre for International Commercial Arbitration. The way in which confidentiality can be addressed in arbitration rules is nonetheless limited.

137. Article 25(4) of the UNCITRAL Arbitration Rules provides that arbitration proceedings are to be held in private. This has been interpreted differently in different countries. In Australia, the High Court has held in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 that confidentiality is not an essential feature of 'private' arbitration. 'Private' was interpreted to mean that members of the public are not entitled to attend. Although it concluded that there is no implied duty of confidentiality in arbitral proceedings, the High Court did say that '[i]t would be inequitable if a party were compelled by court process to produce private documents for the purposes of the litigation yet be exposed to publication of them for other purposes'.

138. This item would insert a set of provisions that the parties may adopt for the protection of confidential information. The provisions have been adapted from similar provisions in the *Arbitration Act 1996* (NZ) though with some significant differences.

139. A definition of *confidential information* is inserted in subsection 15(1) by Item 11. This definition covers documents associated with the proceedings such as statements of claim and pleadings, evidence supplied to the tribunal, transcripts of evidence, submissions and the tribunal's award.

140. This item inserts a new section 23C which provides that the parties to arbitral proceedings and the arbitral tribunal must not disclose confidential information in relation to the arbitral proceedings unless:

(a) the disclosure is allowed under section 23D

(b) the disclosure is allowed under an order made by an arbitral tribunal under section 23E and no order is in force under section 23F prohibiting the disclosure, and

(c) the disclosure is allowed under a court order made under section 23G.

141. Item 11 inserts an interpretation provision in section 15(1) of the Act to clarify that *disclose*, in relation to confidential information, 'includes giving or communicating the information in any way'.

142. New section 23D sets out the general circumstances in which confidential information can be disclosed by a party to the proceedings or the arbitral tribunal. These circumstances include where all the parties to the tribunal have consented, it is necessary for the establishment or protection of the legal rights of a party, disclosure is required by a subpoena or an order of a court, or where

disclosure is authorised or required by another relevant law (including a law of the Commonwealth or a State or Territory and, in some circumstances, the law of a foreign country).

143. Importantly, disclosure is authorised for the purposes of enforcing an arbitral award. This is intended to include enforcing the award in a foreign country.

144. New section 23E allows an arbitral tribunal to authorise the disclosure of confidential information in circumstances other than those mentioned in section 23D. This can only occur at the request of one of the parties to the proceedings and only once the other parties have had the opportunity to be heard. Of course, section 23D allows disclosure with the consent of all the parties. Section 23G would deal with the situation where no consent was forthcoming. Where the mandate of the arbitral tribunal has been terminated or the tribunal rejects the application, the party may apply to the court for an order allowing disclosure under section 23G.

145. Where an arbitral tribunal has made an order authorising the disclosure of confidential information under section 23E, a party to the proceedings may apply to a court for an order prohibiting the disclosure. The court may make such an order if it is satisfied that the 'public interest in preserving the confidentiality of arbitral proceedings' outweighs considerations that make the disclosure desirable in the public interest or the disclosure is 'more than is reasonable for that purpose'. The court may make an interim order preventing disclosure while it considers whether to grant a final order on the matter.

146. Where the mandate of the arbitration tribunal has been terminated and, accordingly, it cannot make an order under section 23E or where the tribunal has declined to make an order under that provision, section 23G allows a party to the arbitral proceeding to apply to a court for an order allowing disclosure of confidential information. A court may authorise the disclosure if it is satisfied that the 'public interest in preserving the confidentiality of arbitral proceedings' is outweighed by considerations that make the disclosure desirable in the public interest and the disclosure is 'no more than is reasonable for that purpose'.

Death of a party to an arbitration agreement

147. This item inserts a new subsection 23H into the Act which would address the consequences of the death of a party to an arbitration agreement. This is a matter on which both the Act and the Model Law are silent. The effect of this provision is to provide that the death of a party does not discharge the agreement or revoke the authority of an arbitral tribunal and provides that the arbitration agreement is enforceable against the personal representative of the deceased. However, the provision does not affect the operation of any law which would extinguish a right of action as a result of the death of the party.

148. The amendments made by this item apply in relation to agreements entered into on or after the commencement of the item (the day of Royal Assent) – see Item 32. Item 32 also provides that nothing would prevent the parties to an agreement entered into before the commencement of this item from adopting these amendments to the Act by way of subsequent agreement.

149. See also Item 11, Item 16 and Item 32.

Item 19 Subsection 25(1)

150. Section 22 of the Act provides that any or all of sections 23 to 27 apply only if the parties to an arbitration agreement have agreed that they will apply to a dispute that has arisen or may arise between them. In other words, section 22 provides that these provisions apply on an 'opt-in' basis.

However, sections 25 to 27 are all prefaced with the words 'unless the parties to an arbitration have (whether in the agreement or in any other document in writing) otherwise agreed'. This suggests that these sections apply on an 'opt-out' basis in contradiction to section 22.

151. This item amends subsection 25(1) by omitting the words 'unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where' and substituting 'Where'. This means the application of the provision is now governed exclusively by section 22 and applies on an 'opt in' basis.

152. Item 20 and Item 21 make corresponding amendments to sections 26 and 27 respectively.

153. The amendment made by this item applies in relation to arbitration agreements entered into on or after the commencement of the item (the day of Royal Assent) – see Item 32. Item 32 also provides that nothing would prevent the parties to an agreement entered into before the commencement of this item from adopting this amendment to the Act by way of subsequent agreement.

154. See also Item 20, Item 21 and Item 32.

Item 20 Section 26

155. Section 26 of the Act allows the arbitral tribunal to direct that interest is payable on any amount payable under an arbitral award that is not paid from the day the award is made (or another date specified in the award).

156. This item repeals section 26 and substitutes a redrafted provision. While this provision is substantively similar there are three significant changes. First, as with Item 19 and Item 21, the words 'unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed' have been omitted so that the application of the provision is now governed exclusively by section 22 and applies on an 'opt in' basis. Secondly, the provision now allows the tribunal to direct the payment of compound interest. Thirdly, the provision has been restructured in the interests of clarity.

157. The amendment made by this item applies in relation to an award made on or after the commencement of the item (the day of Royal Assent) – see Item 32. Item 32 also provides that nothing would prevent the parties to an agreement entered into before the commencement of this item from adopting these amendments to the Act by way of subsequent agreement.

158. See also Item 19, Item 21 and Item 32.

Item 21 Subsection 27(1)

159. This item amends subsection 27(1) by omitting the words 'unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, the' and substituting 'The'. This means the application of the provision is now governed exclusively by section 22 and applies on an 'opt in' basis. The reasons for the amendment are discussed at Item 19.

160. The amendment made by this item applies in relation to arbitration agreements entered into on or after the commencement of the item (the day of Royal Assent) – see Item 32. Item 32 also provides that nothing would prevent the parties to an agreement entered into before the

commencement of this item from adopting this amendment to the Act by way of subsequent agreement.

161. See also Item 19, Item 20 and Item 32.

Item 22 At the end of subsection 27(2)

162. Controlling costs in arbitration proceedings is critical given that one of the main reasons parties choose arbitration to resolve their disputes is that it is less costly than litigation.

163. Section 27 of the Act allows the arbitral tribunal to determine costs at its discretion. Section 27(2) provides that in making an arbitral award, an arbitration tribunal may:

(a) direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards shall be paid;

(b) tax or settle the amount of costs to be so paid or any part of those costs; and

(c) award costs to be taxed or settled as between party and party or as between solicitor and client.

164. This item will insert a new paragraph in subsection 27(2) that will allow an arbitration tribunal, in making an award, to 'limit the amount of costs that a party is to pay to a specified amount'. Item 23 will insert a new subsection 27(2A) that provides that if the tribunal intends to make a direction limiting costs it must give the parties to the arbitration agreement sufficient notice so that they can take it into account in managing their own costs. The approach taken in these items derives from section 65 of the *Arbitration Act 1996* (UK).

165. The amendments in Item 22 and Item 23 apply in relation to arbitration agreements entered into on or after the commencement of these items (the day of Royal Assent) - see Item 32. Item 32 also provides that nothing would prevent the parties to an agreement entered into before the commencement of this item or Item 22 from adopting these amendments to the Act by way of subsequent agreement.

166. See also Item 22 and Item 32.

Item 23 After subsection 27(2)

167. See Item 22.

Amendments to Part IV of the Act

168. The following items amend Part IV of the Act which gives effect to Australia's obligations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on 18 March 1965. The Convention provides, amongst other things, for the recognition and enforcement of awards made by the Arbitral Tribunal of the International Centre for Settlement of Investment Disputes.

Item 24 Subsection 35(2)

169. Section 35 of the Act provides for the enforcement of awards made under the Convention. Subsection 35(2) provides that an award may be enforced in the Supreme Court of a State or Territory 'as if the award had been made in that State or Territory in accordance with the law of the State or Territory'. For the same reasons as outlined at Item 5, which amends subsection 8(2) of the

Act, this item amends subsection 35(2) of the Act to provide that an award may be enforced by a State or Territory court as if the award were a judgment or order of that court. Enforcement would be by leave of the court concerned.

170. The amendment made by this item applies in relation to proceedings to enforce an award brought on or after the commencement of the item (the day of Royal Assent) – see Item 33.

171. See also Item 5 and Item 33.

Item 25 Subsection 35(4)

172. Enforcement of awards made by the Arbitral Tribunal of the International Centre for Settlement of Investment Disputes is currently confined to State and Territory courts. This provision would allow the Federal Court of Australia to enforce an award 'as if the award were a judgment or order of that court'.

173. A similar amendment to the Act is contained in the Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008. To ensure consistency with the amendments contained in Item 24, this item will overwrite the amendment contained in the Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008.

174. The amendment in this item applies in relation to proceedings to enforce an award brought on or after the commencement of the item – see Item 33. This item commences after Schedule 2 of the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*.

175. See also Item 6, Item 24 and Item 33.

Part V of the Act

176. Item 26 inserts a new Part V into the Act which addresses matters to which courts must have regard when exercising powers or functions or interpreting provisions relevant to the Act.

Item 26 After Part V

177. A concern raised consistently during the Review of the Act was that courts did not have sufficient guidance when interpreting the Act – particularly with regard to the principles that underpin arbitration and the international aspect of the operation of the Act.

178. This item inserts a new section 39 into the Act which addresses matters to which courts must have regard when doing any of the following things:

(a) exercising a power or performing a function under the Act

(b) exercising a power or performing a function under the Model Law

(c) exercising a power or performing a function under an agreement or award to which the Act applies

(d) interpreting the Act or the Model Law, or

(e) interpreting an agreement or award to which the Act applies.

179. In doing any of these things a court must have regard to the objects of the Act in section 2D (see Item 1). These objects stress the importance of arbitration in facilitating international trade and commerce and the fact that the Act is giving effect to three international instruments. The court must also have regard to the fact that: (a) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and (b) awards are intended to provide certainty and finality.

180. The intention of this provision is to assist the courts in carrying out the important protective role they play with respect to international commercial arbitration while ensuring that this role is minimised to what is necessary in the circumstances.

181. For completeness, in interpreting the Model Law, courts must have regard to Article 2A which was inserted by the 2006 amendments (see Item 11). Article 2A(1) states that 'in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith'.

182. Ensuring that the Model Law is interpreted consistently with approaches taken internationally is important in ensuring that Australia is an attractive venue for the conduct of international arbitration. Divergent interpretations undermine the purpose behind the Law, which is to establish a common approach to arbitration throughout the world and hence promote international trade and commerce.

183. The amendments made by this item apply to the exercise of a power, the performance of a function, the interpretation of the Act, the interpretation of the Model Law or the interpretation of an agreement or award on or after the commencement of the item (the day of Royal Assent) – see Item 34.

184. See also Item 1, Item 11 and Item 34.

Item 27 Schedule 2

185. Schedule 2 to the Act sets out the Model Law. Currently, schedule 2 sets out the Model Law in the form it was originally adopted in 1985. This amendment repeals schedule 2 and inserts a new schedule 2 which sets out the Model Law as amended on 7 July 2006. The new schedule reflects the amendments discussed at Item 11.

186. See also Item 11.

Part 2 - Application

187. The items in Part 2 of Schedule 1 set out the application for items in Part 1. Substantive comments on the application of particular items are addressed under each substantive item and not in this part of the Memorandum.

Item 28 Application of items 2 to 4

188. See Item 2 to Item 4.

Item 29 Application of items 5 to 9

189. See Item 5 to Item 9.

Item 30 Application of item 10

190. See Item 10.

Item 31 Application of item 14

191. See 4.

Item 32 Application of items 18 to 23

192. See Item 18, Item 19, Item 20, Item 21, Item 22 and Item 23.

Item 33 Application of items 24 and 25

193. See Item 24 and Item 25.

Item 34 Application of item 26

194. See Item 26.

Item 35 Definitions

195. This item provides definitions for the use in this part of Schedule 1 providing that *foreign award* has the same meaning as in Part II of the Act and *Model Law* has the same meaning as in Part III of the Act.