2009

NSW YOUNG LAWYERS
INTERNATIONAL LAW COMMITTEE

[SUBMISSION TO THE REVIEW OF THE INTERNATIONAL ARBITRATION ACT 1974]

16 January 2009

Mr Stephen Bouwhuis,

Assistant Secretary,

Office of International Law,

Attorney General's Department,

BARTON ACT 2600

By Email: iaa.review@ag.gov.au

Dear Mr Bouwhuis,

Submission on the Review of the International Arbitration Act 1974 (Cth)

The New South Wales Young Lawyers International Law Committee appreciates the opportunity to make a submission.

New South Wales Young Lawyers is an Australian organisation based in Sydney whose membership consists of law students and legal practitioners in their first 5 years of practice or under the age of 36. Hundreds of members participate on a volunteer basis in committees specific to particular areas of law.

This submission was authored by members of the International Law Committee of New South Wales Young Lawyers. The International Law Committee seeks to promote informed discussion among its membership, Australian legal practitioners and the broader Australian community on international legal developments affecting Australia and Australia's distinctive contributions to contemporary international legal issues.

This submission may be treated as public, can be published on the Attorney General's Department's website and has not been marked confidential for the purposes of the *Freedom of Information Act 1982* (Cth).

If you have any questions in relation to the matters raised in this submission, please contact me through intlaw.chair@younglawyers.com.au.

Yours faithfully,

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Submissions

1. The New South Wales Young Lawyers International Law Committee ('**ILC**') considers that, whatever amendments are made to the *International Arbitration Act 1974* (Cth) ('**the Act**'), Australia must ensure compliance with its existing international legal obligations. These include the treaty instruments which form the basis for the description and analysis presented within this submission. Regard should also be had to other international materials and developments in other States. The ILC wishes to make four preliminary and independent points.

2. First, Australia is obliged to implement its international obligations in good faith, including to treaty obligations to which it has voluntarily subscribed, and demonstrate respect for the rules of international law, including those in the field of international trade. The applicable rules of treaty interpretation are as stated in the 1969 Vienna Convention on the Law of Treaties [1974] ATS 2 (ratified by Australia on 13 June 1974 and entering into force for Australia on 27 January 1980) to the extent that that instrument applies to the treaties the subject of this review in addition to rules of general international law. This includes the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ('**ICSID Convention**') [1991] ATS 23 (signed for Australia on 24 March 1975, instrument of ratification deposited on 2 May 1991 and entry into force for Australia on 1 June 1991). Reference should also be made to preparatory material which assists in the interpreting these treaties and other instruments where permissible and appropriate.

3. Second, in relation to the Model Law on International Commercial Arbitration ('**Model Law'**) of the United Nations Commission on International Trade Law ('**UNCITRAL**'), the ILC notes that General Assembly Resolution 40/72 (11 December 1985) recommends that all States including Australia give 'due consideration' to the Model Law 'in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice' (para 2). Regard may also be had to the UNCITRAL Secretariat's Explanatory Note on the 1985 Model Law on International Commercial Arbitration, as amended in 2006, which was provided by the Secretariat 'for informational purposes only'.

4. Third, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1975] ATS 25 (entry into force for Australia on 24 June 1975) ('**New York Convention**') Art 7(1) provides that its provisions shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by Contracting States, including Australia, nor deprive an interested party of any right they may have to avail themselves of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where the award is sought to be relied upon. In short, Australian law may design a regime that is more favourable to 'an interested party' than the New York Convention.

5. Finally, the current review seeks to ensure that the Act 'best supports international arbitration in Australia'. The ILC considers that the review must ensure that the Act 'best supports' international arbitration for Australia. The Discussion Paper at paragraph 4 identifies three objects of the current review. The ILC notes that these objects need not necessarily achieve several of the values identified in paragraph 4 of the Discussion Paper and listed under the sub-heading '[p]romoting Australia as a place for international arbitration'. The ILC considers that comprehensiveness, clarity, effectiveness and efficiency may be difficult to objectively verify. It also considers that the uniformity which may result from the adoption of 'best practice' developments, however defined, may not always be in Australia's national interest. Australia's capacity to distinguish itself from other jurisdictions could equally make Australia an attractive and specialist forum for conducting international arbitration.

6. The submissions of the ILC follows the order of questions presented in the Attorney-General's Discussion Paper of November 2008.

Question A

(i) Should the meaning of the writing requirement for an arbitration agreement, in Part II of the International Arbitration Act (subsection 3(1)), be amended?

7. For the following reasons, the ILC considers that the meaning of the writing requirement specified in the Act does not necessarily have to be amended.

7.1. The cross-reference contained in the Act to the Convention is sufficient to incorporate the meaning attached to the writing requirement contained in the Convention into Australian law. Section 3 of the Act provides that an 'agreement in writing has the same meaning as in the Convention'. It also provides that an 'arbitration agreement means an agreement in writing of the kind referred to in sub article 1 of Article II of the Convention'. Subsection 15(2) provides that, except so far as the contrary intention appears, a word or expression that is used both in Part III and in the Model Law (whether or not a particular meaning is given to it by the Model Law) has, in Part III, the same meaning as it has in the Model Law.

7.2. The written requirement finds textual support in other treaties to which Australia is a party. These relevantly include the New York Convention and the ICSID Convention The New York Convention provides that each Contracting State, including Australia, 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 (Art 2(1)). The Convention further provides that 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 (Art 2(2)). The UNCITRAL Recommendation of 7 July 2006 at its 39th Session recommended that this provision 'be applied recognizing that the circumstances described therein are not exhaustive'. The Recommendation merely calls upon States to 'apply' Article 2(2) in the specified sense. The Recommendation does not call for legislative amendment and leaves it to States, including Australia, to determine how recognition of such a non-exhaustive interpretation can best be achieved. The ILC considers that this Recommendation is to be accorded such weight commensurate with the status of that instrument relative to the New York Convention and in view of the authoritative body from which that Recommendation emanates. The ILC also considers that regard should also be had as to how this Recommendation has been received by other States. The ICSID Convention provides in Article 25(1) that the jurisdiction of the Centre for the Settlement of Investment Disputes shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent 'in writing' to submit to the Centre. The expression 'in writing' is not defined by the ICSID Convention. If the writing requirement is to be amended, the ILC considers that the implications for other treaties to which Australia is a party should be considered.

7.3. The writing requirement within the Convention has already been interpreted broadly if, as indicated in the Discussion Paper at p.3, Australian courts have taken the approach described.

(ii) If so, should elements of the amended writing requirement in article 7 (option 1) of the UNCITRAL Model Law, as revised in 2006, be used in the amended definition?

7.4. The meaning of the writing requirement for an arbitration agreement contained in subsection 3(1) of the Act can be amended. It is open to Australia to adopt an amended definition which draws upon elements of Article 7

(Option 1). The Discussion Paper does not propose which specific elements of Article 7 may be used in an amended writing requirement. The ILC does not express a concluded view on this question at this time. However, the ILC considers that using elements of the amended writing requirement in Option 1 of Article 7 may also influence the approach which the current review takes in response to Question F.

Question B

Should the International Arbitration Act be amended to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in subsections 8(5), 8(7) or 8(8) is made out?

8.1. Section 8(5) identifies a number of specific grounds upon which a court may refuse to enforce an award at the request of a party against whom the award is invoked. Section 8(7) identifies a number of specific grounds upon which a court may refuse to enforce an award. Subsection 8(8) provides that a court may, if it considers it proper to do so, adjourn the proceedings and order security where satisfied that an application to set aside or suspend the award has been made to a competent authority of the country in which, or under the law of which, the award was made. These provisions reflect certain Articles of the New York Convention. Article V(1) provides that recognition and enforcement of an award may be refused, at the request of the party against whom it is invoked, where it furnishes proof of certain grounds to the competent authority. Article V(2) provides that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that certain grounds have been established. Article VI provides that the competent authority may, if it considers it proper, adjourn the decision and order security in an application for setting aside or suspending the award.

8.2. The ILC considers that Article V(1) essentially provides that recognition and enforcement of the award 'may be refused...only' if a party furnishes proof of certain matters. Article V(2) essentially provides that recognition and enforcement of an award 'may' be refused where the competent authority finds that one of two possible listed alternatives subsist (ie use of the word 'or'). The Act generally provides that an Australian court 'may' refuse to recognise or enforce an award in certain circumstances. It does not appear to preclude a court from refusing to recognise and enforce an award on other grounds not specified under s. 8. Nor does s. 8 purport to be an exhaustive list of the grounds upon which an award may not be recognised and enforced. However, the ILC also notes the tenor of other instruments. In particular, Article 5 of the UNCITRAL Model Law provides, under the heading 'Extent of court intervention', that '[i]n matters governed by this Law, no court shall intervene except where so provided in this Law'. The UNCITRAL Secretariat's Explanatory Note states that 'Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties)' (para 17). Finally, the UNCITRAL Secretariat's Explanatory Note suggests a preference for 'no more court involvement than appropriate' (para 7). The ILC considers that Australian courts retain a general discretion to recognise and enforce a foreign award under s. 8, which implements Articles V and VI of the New York Convention, only and to the same extent as permitted by those Articles.

Question C

Should the International Arbitration Act be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies?

9.1. Part III of the Act, entitled 'International Commercial Arbitration', specifies in section 16(1) that the Model Law 'has the force of law in Australia'. Article 1(3) of the UNCITRAL Model Law identifies when an arbitration is considered 'international'. The term 'commercial' is defined in a footnote to Article 1(1). Article 1(1) states that the Model Law is 'subject to any agreement in force between this State and any other State or States'. The UNCITRAL Secretariat's Explanatory Note states that 'the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law' (para 10).

9.2. The ILC does not express a concluded view on the appropriate balance between Commonwealth and State/Territory relations in the field of commercial arbitration. However, it considers that the Act could be amended to govern an 'international commercial arbitration' to which the UNCITRAL Model Law applies. However, consistent with Article 1(1) and the Explanatory Note, any amendments should ensure that any agreement in force between Australia and other States remains unaffected.

Question D

Should the International Arbitration Act be amended to reverse the Eisenwerk decision, by adopting a provision similar to subsection 15(2) of the Singaporean International Arbitration Act?

10.1. Section 21 of the Act envisages that disputes may be settled otherwise than in accordance with the Model Law. If the parties to an arbitration agreement have agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, then the Model Law does not apply.

10.2. The ICSID Convention provides that a Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties (Art 42(1)). It also provides that any arbitration proceeding shall be conducted, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which they consented to arbitration. The Tribunal shall decide the question if any question of procedure arises which is not covered by this Section, the Arbitration Rules or any rules agreed by the parties (Art 44).

10.3. The UNCITRAL Model Law provides that where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, this freedom includes the right of the parties to authorize a third party, including an institution, to make that determination (Art 2(d)). Article 28(1) provides that, in determining the rules applicable to the substance of dispute, an arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. In determining the procedural rules, the UNCITRAL Model Law provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (Art 19(1)). The UNCITRAL Secretariat's Explanatory Note states that the '[a]utonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise' (para 35). Furthermore, 'Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead

of "law", the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system' (para 39).

10.4. The New York Convention provides that each Contracting State shall recognize arbitral awards as binding and enforce them 'in accordance with the rules of procedure of the territory where the award is relied upon...' (Art 3) Furthermore, recognition and enforcement of an award may be refused inter alia if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (Art 5(1)(d)).

10.5. The ILC considers that, on the basis of these materials, arbitral courts, tribunals or institutions are obliged to determine a dispute in accordance with the procedural and substantive rules chosen by the parties. Under the UNCITRAL Model Law, the substantive law is that chosen by the parties as applicable to the substance of the dispute. The parties are also free to determine the procedural law and may authorise an institution to make that determination. The New York Convention provide that recognition and enforcement may be refused if the arbitral procedure does not reflect the parties agreement.

10.6. The ILC notes that one of the objects of the current review includes 'respecting the fundamental consensual basis of arbitration'. It considers that, if the Act is amended, any amendments should reflect the fundamental consensual basis of jurisdiction and respect the autonomy of the parties as reflected in treaties to which Australia is a party and other relevant international materials.

10.7. The ILC also considers that, in relation to section 15(2) of Singapore's International Arbitration Act, national courts need only identify a provision in an arbitration agreement containing a reference to or adoption of another source of arbitration rules, plus an additional but unspecified factor, which would be sufficient to exclude the application of the Model Law. In other words, adopting a provision similar to that adopted in Singapore may not be sufficient to address the prospect of an outcome such as that taken in *Eisenwork v Australian Granites Ltd* [2001] 1 Qd R 461.

Question E

(i) Should these drafting inconsistencies in Part III, Division 3 of the International Arbitration Act be remedied?

11.1. Section 22 provides that if the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that the other provisions, or any of the other provisions, of this Division are to apply in relation to the settlement of any dispute (being a dispute that is to be settled in accordance with the Model Law) that has arisen or may arise between them, those provisions apply in relation to the settlement of that dispute. Sections 25-27 are each prefaced with '[u]nless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed'. Section 22 essentially provides that if the parties agree that ss.23-27 are to apply, then those provisions apply, thereby reflecting the fundamental consensual basis of arbitration. The form of ss 25-27 (unless otherwise agreed, then) means that the content of these sections will be presumed to apply unless the parties 'opt out'.

11.2. The ILC notes that one of the objects of the current review is to provide a 'clear framework governing international arbitration in Australia'. It considers that drafting inconsistencies which confuse the parties or

frustrate their intentions are to be avoided. To the extent that the Act confuses the parties or frustrates their intentions then drafting inconsistencies are to be remedied.

(ii) If so, should it be clarified that sections 25 – 27 (relating to interest up to the making of the award, interest on the debt under the award, and costs) apply on an 'opt-out' basis (that is, applying unless the parties agree otherwise)?

11.3. The relevant instruments to which Australia is a party do not offer clear guidance in answering this question. That is, in respect of the issues of interest and cost, they generally do not indicate whether an 'opt-out' basis should apply. The New York Convention and the UNCITRAL Model Law do not address the issues of interest or costs. The UNCITRAL Secretariat's Explanatory Note states that '[t]he expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions found in national laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise' (para 7).

11.4. The ICSID Convention Article 16(2) only provides that, in the case of arbitration proceedings, the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Thus, on the question of expenses, including the fees and expenses of Tribunal members and charges for use of the Centre's facilities, the Tribunal shall decide 'except as the parties otherwise agree'. This suggests a presumption unless the parties choose to 'opt-out'.

11.5. There may have been, and continue to be, good reasons why, given the operation of the Act, the issues of costs and interest are presumed to apply whereas the issues of interim measures of protection and consolidation must be determined by the parties. The explanatory material to the Act may offer guidance.

11.6. The ILC considers that there are several possibilities for rectifying this drafting inconsistency. One option is clarifying that ss.25-27 apply on an 'opt-out' basis. Another is that ss. 25-27 could be stated to apply on an 'opt in' basis. A third possibility is that s.22, rather than ss.25-27, should be clarified. The ILC also considers that the heading of Part III, Division 3 - 'Application of optional provisions' – appears to be misleading in relation to ss. 25-7 since, for the reasons indicated above, only ss. 23 and 24 appear to be optional.

Question F

(i) Should the International Arbitration Act be amended to adopt recent amendments to the UNCITRAL Model Law?

12.1. The Preamble to the UNCITRAL Recommendation of 7 July 2006 adopted at its 39th Session mentions two points. First, United Nations General Assembly Resolution 2205 (XXI) (17 December 1966) established UNCITRAL

with 'the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade'. Second, the Preamble notes a Resolution of the Conference of Plenipotentiaries which considered that 'greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes'.

12.2. The General Assembly, by Resolution 61/33 (18 December 2006) on Revised articles of the Model Law on International Commercial Arbitration, believes that revised articles of the Model Law on the form of the arbitration agreement and interim measures 'will significantly enhance the operation of the Model Law' and 'would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes'. The General Assembly recommends in paragraph 1 that all States give 'favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice'. The ILC notes that, while General Assembly Resolutions are in most cases only recommendatory under Article 10 of the UN Charter [1945] ATS No 1, they may in certain circumstances be taken to reflect the views of States.

12.3. The UNCITRAL Secretariat's Explanatory Note states that the UNCITRAL Model Law has come to represent the accepted international legislative standard for a modern arbitration law (para 2). It moreover provides that States are encouraged 'to make as few changes as possible when incorporating the Model Law into their legal systems' so as to 'increase the visibility of harmonization' and enhance the confidence of foreign parties as the primary users of international arbitration (para 3).

12.4. The ILC considers that Australia need only give 'favourable consideration' to amending the Act for the purposes of adopting the recent amendments to the UNCITRAL Model Law as identified in the Discussion Paper. Whether or not amendments to the UNCITRAL Model Law are adopted, the ILC considers that Australia should consider the issues of (i) uniformity in national arbitration law; (ii) the needs of international commercial arbitration practice; and (iii) the effective settlement of private law disputes. The ILC notes that one of the objects of the current review is to 'consider whether to adopt 'best practice' developments in national arbitral law from overseas'. The ILC considers that, in determining whether recent amendments to the UNCITRAL Model Law should be adopted, one relevant consideration is 'best practice' developments in other jurisdictions. The ILC does not express a final view on the form, content or extent of possible amendments to the Act.

(ii) If article 7 of the revised Model Law (amending the definition of an 'arbitration agreement') is adopted, should option I (providing a broad interpretation of the writing requirement) or option II (removing the writing requirement) be adopted?

12.5. The ILC notes that, if Article 7 of the revised Model Law is adopted, the adoption of Option 1 would ensure textual consistency with existing instruments to which Australia is a party, namely, Article 2 of the New York Convention, as interpreted in light of the UNCITRAL Recommendation of 7 July 2006, and Article 25(1) of the ICSID Convention. The ILC also notes the interaction between Questions A and F.

12.6. Article 7 of the Model Law does not indicate a preference for Option 1 or Option 2. The UNCITRAL Secretariat's Explanatory Note states that '[n]o preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting

State... Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention' (para 19) The ILC also commends to the current review paragraph 19 of that Note which usefully outlines the respective rationales underlying Options 1 and 2.

12.7. Consistent with the view of the UNCITRAL Secretariat, the ILC considers that the question whether Option 1 or Option 2 is adopted is to be determined by Australia's 'particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law' of Australia.

Question G

(i) Should the International Arbitration Act be amended to allow regulations to be made designating an arbitral institution to perform the functions set out in articles 11(3) and 11(4) of the UNCITRAL Model Law?

(ii) Would it be appropriate for other functions referred to in article 6 of the UNCITRAL Model Law, such as hearing challenges to arbitrators under articles 13(3) and 14, to be performed by an arbitral institution similarly designated under the International Arbitration Act?

13.1. The UNCITRAL Model Law provides that arbitration means 'any arbitration whether or not administered by a permanent arbitral institution' (Art 2(a)). The UNCITRAL Secretariat's Explanatory Note states that 'the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36)' (para 16). The UNCITRAL Secretariat's Explanatory Note also states that '[w]here under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State' (para 24).

13.2. Article 6 of UNCITRAL Model Law provides as follows (emphasis added):

> Article 6: Court or other authority for *certain* functions of arbitration assistance and supervision.
>
> The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) *and* 34(2) *shall be performed by* ... [Each State enacting this model law specifies the *court, courts or, where referred to therein, other authority* competent to perform *these functions*.]

On one view, the identification of 'certain functions', the list of functions joined with the word 'and', the obligation to perform 'these functions' and institutions being listed as alternatives suggest that all of these identified functions should be performed by one institution. On another view, identifying alternative institutions suggests that these functions may be fragmented between different bodies and 'certain functions' may be performed by each provided that each function and institution is specifically enacted under national law.

13.3. The New York Convention provides that the term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case 'but also those made by permanent arbitral bodies to which the parties have submitted' (Art 1(2)). Recognition and enforcement of an award may be refused inter alia if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (Art 5(1)(d)).

13.4. In answer to Question G, the ILC considers that, were an arbitral institution to be designated under the Act to perform certain functions as identified under the UNCITRAL Model Law, then the exercise of its powers under the Act should be consistent with that Model Law. The ILC considers that the UNCITRAL Model Law, as indicated by Article 2 and UNCITRAL Secretariat's Explanatory Note, suggests that certain functions may be administered by a 'permanent arbitral institution'. They moreover suggest that the performance of functions identified in Articles 11, 13 and 14 go hand in hand. However, in considering the question of propriety, Article 6 is unclear as to which function shall be performed by which body and could be construed as only requiring that whatever arrangements are chosen shall be specified under national law. Importantly, awards made by 'permanent arbitral bodies' may be recognised and enforced under the New York Convention. In determining whether an arbitral institution such as the Australian Centre for International Commercial Arbitration should be designated to perform certain functions under the UNCITRAL Model Law, the current review must be guided by what best supports international arbitration in Australia.

13.5. The ILC also considers that Australia would not be relieved of its international obligations under any treaty to which it is a party by permitting arbitral institutions to perform specific functions under the UNCITRAL Model Law. The ILC notes that the acts of a State organ, including those exercising judicial functions and having that status under national law, may be attributable to Australia. A private law arbitral tribunal is not necessarily a tribunal 'of the State' in which it sits and under the law of which it operates: see *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* [1985] ECR 1095. The ILC also notes that the actions of private actors will in certain circumstances also be attributable to Australia. Thus a decision of an arbitral institution which is contrary to Australia's treaty obligations may in certain circumstances engage the international responsibility of Australia. Consideration should accordingly be given to the possibility that, were an arbitral institution to be designated to perform certain functions as set out in the UNCITRAL Model Law, recommended for adoption by virtue of a non-treaty instrument (namely, a General Assembly Resolution), Australia should not be put in a position where implementation of its current and future treaty obligations could not be performed.

Question H

Should the Federal Court of Australia be given exclusive jurisdiction for all matters arising under the International Arbitration Act?

14.1. The New York Convention provides that recognition and enforcement of an arbitral award may be determined by 'the competent authority in the country" in which the award was made or where enforcement is sought (Art 5(1)(e) and (2)). A 'competent authority' is not defined in the Convention. Article 11 of the New York Convention also specifies certain provisions in the case of federal or non-unitary States. That Article also indicates that federal State Parties may have been requested to supply a statement of the law and practice of the federation and its constituent units concerning any particular provision of the Convention. Australia must ensure

compliance with Article 11 and have regard to any prior statements of law and practice previously supplied by it under Article 11 should the Federal Court of Australia be given exclusive jurisdiction.

14.2. The ICSID Convention provides that Contracting States with federal constitutions may enforce such awards in or through its federal courts and may provide that such courts shall treat these awards as if they were final judgments of the courts of a constituent state (Art 54(1)). Furthermore, a party seeking recognition or enforcement in the territories of Contracting States shall furnish to a competent court or other authority which such States have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in this designation (Art 54(2)). Pursuant to Articles 25 and 54 of the Convention, Australia issued a text of notification in a Letter dated 2 May 1991 from Mr Ian Govey, Legal Counsellor, Australian Embassy, to Mr Ibrahim F I Shihata, Secretary-General, International Centre for the Settlement of Investment Disputes. The notification stated inter alia that, for the purposes of Article 54(2) of the Convention, the Supreme Courts of all Australian States and Territories were competent for the recognition and enforcement of awards rendered pursuant to the Convention. Giving the Federal Court of Australia exclusive jurisdiction for all matters under the Act may obligate Australia to notify the Secretary General of the International Centre of a 'subsequent change' in the designation of 'competent court or other authority' for the purposes of the recognition and enforcement of ICSID awards under Article 54(2) of the ICSID Convention.

14.3. Article 2(1) of the UNCITRAL Model Law provides that, when interpreting the Model 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. The Model Law also provides that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Article and of Article 36 (Article 35(1)). Thus the UNCITRAL Model Law does not mandate any particular court as being competent for the recognition and enforcement of awards.

14.4. The ILC considers that giving the Federal Court of Australia exclusive jurisdiction for all matters arising under the Act would be permitted under the New York Convention, the ICSID Convention and the UNCITRAL Model Law which refer to a 'competent court' or 'competent authority' for the performance of specific functions. The ILC does not express a view on how jurisdiction should be delineated between the Federal and State/Territory courts or on the content of proposed legislative measures. However, the ILC notes that giving one court exclusive jurisdiction may not necessarily lead to more consistent jurisprudence. In determining whether the Federal Court should be given exclusive jurisdiction, the ILC considers that, consistent with one of the objects of the current review, the Act provides 'a comprehensive and clear framework governing international arbitration in Australia'.

Question I

Do you have any other comments or recommendations for improving the International Arbitration Act?

15.1. The current review of the Act affords an opportunity to clarify the status of the New York Convention, the ICSID Convention and the UNCITRAL Model Law under Australian law and the materials relevant to their interpretation.

15.2. The Act schedules the New York Convention (Schedule 1), the UNCITRAL Model Law (Schedule 2) and the ICSID Convention (Schedule 3). Scheduling the text of a treaty to national legislation suggests an intention to grant that instrument a privileged status. It is 'strongly arguable' that scheduling a treaty to an Act may render it a

source of Australian law, particularly where the exercise of discretion is contemplated: see the dicta of Nicholson CJ in *Re Jane* (1988) 94 FLR 1 and *Re Marion* (1990) 14 Fam LR 427, 451. See also *R v Stolpe* (1987) 10 AYBIL 512 (Robson J, NSW Dist Ct); *R v Carbone* (1995) 82 A Crim R 1, 17 (Legoe AJ); *Collins v South Australia* [1999] SASC 257 (Millhouse J). However, the prevailing view is that the effect of doing so does not create justiciable rights for individuals: *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ & McHugh J) & 359-360 (Toohey J); *Kioa v West* [1985] HCA 81, [40] (Brennan J); *Minogue v Williams* [2000] FCA 125, [21]-[25] (Ryan, Merkel & Goldberg JJ). The proposition that these scheduled instruments do not take effect under Australian law is confirmed by the Act which provides that a question of interpretation of both the New York Convention and the ICSID Convention is, for the purposes of section 38 of the *Judiciary Act 1903* (Cth), deemed not to be a matter arising directly under a treaty (ss.13 and 38). However, the UNCITRAL Model Law and certain Chapters of the ICSID Convention are stated to have the force of law in Australia (s. 16(1)) and 32). This is subject to s.20, which states that Part II of the Act prevails over Chapter VIII of the UNCITRAL Model Law when both would apply in relation to an award.

15.3. The interpretative approach to be taken to these three instruments, and the range of materials to which a court may have regard, could also be usefully clarified. The simplest approach, reflected in the Act, is that, unless a contrary intention appears, a word or expression used in a certain Part of the Act has the same meaning as it has in the ICSID Convention (s.31(2)). However, the Act also provides that, for the purposes of interpreting the UNCITRAL Model Law, reference may be made to UNCITRAL documents as well as its working group for the preparation of the Model Law (s.17). This is stated not to affect the application of section 15AB of the *Acts Interpretation Act 1901* (Cth). Section 15AB(1) provides that, when interpreting a legislative provision, if any material not forming part of the Act is capable of assisting in ascertaining the meaning of that provision, then consideration may be given to that material to confirm that the ordinary meaning of that provision is the ordinary meaning conveyed by the text, taking into account its context within the Act and the purpose or object underlying the Act, or to determine its meaning when the provision is ambiguous or obscure or where the ordinary meaning conveyed by the text leads to a manifestly absurd or unreasonable result. Extrinsic materials used in the process of statutory interpretation include explanatory memoranda and second reading speeches. However, second reading speeches may not always be sufficient to overcome statutory deficiencies: see further *Re Bolton; Ex Parte Douglas Beane* [1987] HCA 12, [6] (Mason CJ, Wilson & Dawson JJ), [6] (Deane J) & [24] (Toohey J). Extrinsic materials also include, under section 15AB(2) of the *Acts Interpretation Act 1901* (Cth), treaties and other international agreements referred to within an Act. It has been held sufficient to attract s.15AB that an agreement, whilst 'not referred to' in the legislation itself, is referred to in the Second Reading Speech: *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 124 (Gummow J) citing *ICI Australia Operations Pty Ltd v Fraser* (1992) 106 ALR 257, 262-3. See also *MIMIA v B* [2004] HCA 20, [222] (Callinan J). The interaction between the preparatory work of a Model Law commended by General Assembly Resolution, existing treaties and other agreements to which Australia is a party, and explanatory material to Australian legislation, could be usefully clarified during the current review.