



**SUPPLEMENTARY SUBMISSION OF THE
VICTORIAN BAR IN RESPONSE TO THE
NOVEMBER 2008 DISCUSSION PAPER
OF THE REVIEW OF THE
INTERNATIONAL ARBITRATION ACT
1974**

1. On behalf of the Victorian Bar, the International Law Section of CommBar* makes the following supplementary submission to the Victorian Bar's principal submissions dated 24 December 2008 (the "*Principal Submissions*") in response to the November 2008 Discussion Paper proposing certain amendments to the Act.¹
2. Since the date of the Principal Submissions, a significant decision of the English Court of Appeal concerning the issue of confidentiality has been brought to our attention.² We believe the effect of that decision reinforces the correctness of the Victorian Bar's position on this issue, as reflected in the Principal Submissions. At the same time, we have made some minor revisions to the text of our response to Question I in order to appropriately bring the decision to the attention of the Attorney-General of the Commonwealth and to integrate the effect of that decision into our original analysis. Accordingly, the Victorian Bar respectfully requests that the response to Question I set forth in paragraphs 3 to 6 of this supplementary submission be substituted for the response to Question I set forth in paragraphs 44 and 45 of the Principal Submissions.

Question I

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

3. On issue not addressed in the Discussion Paper but which has evoked debate from time to time is the issue of confidentiality.³ While we acknowledge that

¹ Defined terms not otherwise defined in this supplementary submission have the meaning set forth in the Principal Submissions.

² See paragraph 5 below.

³ The issue has a tendency to be either oversimplified or exaggerated. As to the former, it has been observed that the principle that arbitrations are confidential as between the parties, in the absolute form in which it is generally understood, is more truism than truth. See "The Occasional Unwarranted Assumption of Confidentiality" (1999) 15 *Arbitration International* 1. As to exaggeration, the English Court of Appeal recently stressed that the limits of confidentiality in arbitration in certain circumstances should not obscure the fact that the overwhelming majority of arbitrations are conducted in private and with complete

the High Court's decision in *Esso Australia Resources Ltd v Plowman*⁴ has provoked lively debate⁵ and that the confidentiality of arbitral proceedings is one of its stated justifications, we are not convinced a legislative reversal of that decision is necessary or appropriate.

4. As with a relatively recent decision of the Swedish Supreme Court in *Bulgarian Foreign Trade v Al Trade Finance*,⁶ the High Court in that case drew a distinction between the undoubted privacy of the arbitral proceeding and the contended existence of a separate absolute duty of confidentiality in respect of the disclosure of documents and information provided in, and for the purpose of, the arbitration, including the award itself. It held that while a degree of confidentiality might arise in certain situations, it was not absolute and in the particular case before the Court the public's legitimate interest in obtaining information about the affairs of the public authorities prevailed. As Redfern & Hunter observe, this is not inconsistent with the current international trends.⁷ For example, in the US, neither the Federal Arbitration Act nor the Uniform Arbitration Act contains a provision requiring the parties or arbitrators to keep secret arbitration proceedings in which they are involved. The UNCITRAL Rules (Art 25(4)) provides for the proceedings to be held in private but contain no provisions as to confidentiality. It is true the English courts (most recently in *City of Moscow v Bankers Trust*⁸) have reaffirmed the classical position as to the confidentiality of arbitrations but they have also acknowledged the boundaries of the obligation of confidence have yet to be clearly delineated and that exceptions to any confidentiality obligation are best

confidentiality. See *Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184 at [114].

⁴ (1995) 183 CLR 10.

⁵ The debate is canvassed in an entire edition of *Arbitration International* (1995), Vol 11. See also Trakman, "Confidentiality in International Commercial Transactions" (2002) 18 *International Arbitration* 1.

⁶ NJA (2000).

⁷ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004, 4th ed), pp 34-36.

⁸ [2004] All ER 476.

worked out on a case-by-case basis by judicial exegesis and development of the common law.⁹

5. Indeed, very recently, in perhaps the most comprehensive judicial consideration of the vexed issue of confidentiality, the English Court of Appeal in *Emmott v Michael Wilson & Partners Limited*¹⁰ upheld a decision authorising disclosure of documents generated in English arbitration proceedings for the purposes of related court proceedings in New South Wales and the British Virgin Islands. The Court confirmed that the limits of confidentiality are still in the process of development on a case-by-case basis and clarified that the obligation of non-disclosure of documents generated in the course of arbitration depends on the nature of the information and the context in which it arises. Two recognised exceptions, however, are where disclosure is necessary in the interests of justice or in the public interest.¹¹
6. In summary, we are not convinced the High Court's decision, read in context, is so obviously incorrect or inconsistent with international trends as to warrant canvassing its reversal or modification by amendments to the Act. We believe (A) it is more appropriate to rely on an express provision of institutional procedural rules (eg, section 18 of the ACICA Rules) or the parties entering into a specific confidentiality agreement where the parties are concerned to safeguard the confidentiality of documents produced in connection with the arbitration, and (B) it is preferable, consistently with the position under English law, to leave it to the courts to develop the contours of and exceptions to any implied duty of confidentiality in the particular circumstances of each case rather than to adopt the potentially hazardous path of legislative

⁹ This can be contrasted with the approach in New Zealand where an attempt has been made to legislate a statutory default requirement of confidentiality. The difficulty of providing for all necessary exceptions in advance has recently necessitated repeal and replacement of the original statutory provision with a provision that purports to enumerate in greater detail the limits of confidentiality. See *Arbitration Amendment Act 2007* (NZ).

¹⁰ [2008] EWCA Civ 184.

¹¹ [2008] EWCA Civ 184 at [103]-[107].

prescription divorced from context, as in New Zealand.¹² We would note that the foregoing conclusion is consistent with the position adopted by Stockholm Chamber of Commerce in The 2007 Arbitration Rules, which comprehensively considered the issue after surveying the approach in a number of jurisdictions.

A handwritten signature in black ink, appearing to read 'G John Digby', with a stylized flourish at the end.

G JOHN DIGBY QC
Chairman
Victorian Bar Council

21 January 2009

¹² Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004, 4th ed), p 41.