

**COMMERCIAL ARBITRATION (AMENDMENT) ACT
1990 No. 100**

NEW SOUTH WALES



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**COMMERCIAL ARBITRATION (AMENDMENT) ACT
1990 No. 100**

NEW SOUTH WALES



Act No. 100, 1990

An Act to amend the Commercial Arbitration Act 1984 with respect to arbitration proceedings, international arbitrations, settlement of disputes otherwise than by arbitration and the judicial review of arbitral awards; to make other amendments to the Act for the purpose of promoting uniformity of Australian arbitration law; and for other purposes. [Assented to 13 December 1990]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Commercial Arbitration (Amendment) Act 1990.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Commercial Arbitration Act 1984 No. 160

3. The Commercial Arbitration Act 1984 is amended as set out in Schedule 1.

Further amendment of Commercial Arbitration Act 1984 No. 160

4. The Commercial Arbitration Act 1984 is further amended as set out in Schedule 2.

Savings and transitional provisions

5. (1) Subject to this section, the amendments made by this Act apply in relation to an arbitration agreement (whenever made) and an arbitration under such an agreement.

(2) The amendment made by Schedule 1 (2) does not apply in relation to arbitration proceedings that were commenced before the commencement of that amendment.

(3) Section 26 of the Commercial Arbitration Act 1984 as in force before the commencement of Schedule 1 (3) continues to apply in relation to:

- (a) an order made under that section before that commencement; or
 - (b) an application pending under that section immediately before that commencement.
-

SCHEDULE 1 - PRINCIPAL AMENDMENTS

(Sec. 3)

(1) Section 4 (**Definitions**):

Omit section 4 (3), insert instead:

(3) A reference in this Act to an arbitrator includes, in a case where there are 2 or more arbitrators, a reference to the arbitrators.

(2) Section 20:

Omit the section, insert instead:

Representation

20. (1) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a legal practitioner, but only in the following cases:

- (a) where a party to the proceedings is, or is represented by, a legally qualified person;
- (b) where all the parties agree;
- (c) where the amount or value of the claim subject to the proceedings exceeds \$20,000 or such other amount as is prescribed instead by regulation; or
- (d) where the arbitrator or umpire gives leave for such representation.

(2) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a representative who is not a legal practitioner, but only in the following cases:

- (a) where the party is an incorporated or unincorporated body and the representative is an officer, employee or agent of the body;
- (b) where all the parties agree; or
- (c) where the arbitrator or umpire gives leave for such representation.

(3) If a party applies for leave permitting representation by a legal practitioner or other representative, it shall be granted if the arbitrator or umpire is satisfied:

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

- (a) that the granting of leave is likely to shorten the proceedings or reduce costs; or
- (b) that the applicant would, if leave were not granted, be unfairly disadvantaged.

(4) A party is entitled to be represented by a legal practitioner or other representative on leave granted under subsection (3), notwithstanding any agreement to the contrary between the parties.

(5) A person not admitted to practise in New South Wales shall not be taken to have committed an offence under or breached the provisions of the Legal Profession Act 1987 or any other Act merely by representing a party in arbitration proceedings in New South Wales.

(6) A reference in this section to:

- (a) a legal practitioner shall be read as a reference to a person who is admitted or entitled to practise as a barrister, solicitor or legal practitioner in New South Wales or in any other place, whether within or outside Australia; and
- (b) a legally qualified person shall be read as a reference to:
 - (i) such a legal practitioner; or
 - (ii) a person who, though not such a legal practitioner, has such qualifications or experience in law (whether acquired in New South Wales or in any other place, whether within or outside Australia) as, in the opinion of the arbitrator or umpire, would be likely to afford an advantage in the proceedings.

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

(3) Section 26:

Omit the section, insert instead:

Consolidation of arbitration proceedings

26. (1) The following provisions of this subsection apply to arbitration proceedings all of which have the same arbitrator or umpire:

- (a) the arbitrator or umpire may, on the application of a party in each of the arbitration proceedings, order:
 - (i) those proceedings to be consolidated on such terms as the arbitrator or umpire thinks just;
 - (ii) those proceedings to be heard at the same time, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any of them;
- (b) if the arbitrator or umpire refuses or fails to make such an order, the Court may, on application by a party in any of the proceedings, make such an order as could have been made by the arbitrator or umpire.

(2) The following provisions of this subsection apply to arbitration proceedings not all of which have the same arbitrator or umpire:

- (a) the arbitrator or umpire for any one of the arbitration proceedings may, on the application of a party in the proceeding, provisionally order:
 - (i) the proceeding to be consolidated with other arbitration proceedings on such terms as the arbitrator or umpire thinks just;
 - (ii) the proceeding to be heard at the same time as other arbitration proceedings, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any of them;

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

- (b) an order ceases to be provisional when consistent provisional orders have been made for all of the arbitration proceedings concerned;
 - (c) the arbitrators or umpires for arbitration proceedings may communicate with each other for the purpose of conferring on the desirability of making orders under this subsection and of deciding on the terms of any such order;
 - (d) if a provisional order is made for at least one of the arbitration proceedings concerned, but the arbitrator or umpire for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subsection;
 - (e) if inconsistent provisional orders are made for the arbitration proceedings, the Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.
- (3) An order or a provisional order may not be made under this section unless it appears:
- (a) that some common question of law or fact arises in all of the arbitration proceedings;
 - (b) that the rights to relief claimed in all of the proceedings are in respect of or arise out of the same transaction or series of transactions; or
 - (c) that for some other reason it is desirable to make the order or provisional order.
- (4) When arbitration proceedings are to be consolidated under this section, the arbitrator or umpire for the consolidated proceedings shall be the person agreed on for the purpose by all the parties to the individual proceedings, but, failing any such agreement, the Court may appoint an arbitrator or umpire for the consolidated proceedings.

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

(5) Any proceedings before an arbitrator or umpire for the purposes of this section shall be taken to be part of the arbitration proceedings concerned.

(6) Arbitration proceedings may be commenced or continued, notwithstanding that an application to consolidate them is pending under subsection (1) or (2) and notwithstanding that a provisional order has been made in relation to them under subsection (2).

(7) Subsections (1) and (2) apply in relation to arbitration proceedings whether or not all or any of the parties are common to some or all of the proceedings.

(8) Nothing in subsection (1) or (2) prevents the parties to 2 or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

(4) Section 27:

Omit the section, insert instead:

Settlement of disputes otherwise than by arbitration

27. (1) Parties to an arbitration agreement:

- (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or
- (b) may authorise an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire),

whether before or after proceeding to arbitration, and whether or not continuing-with the arbitration.

(2) Where:

- (a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and
- (b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute,

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

(3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1).

(4) Nothing in subsection (3) affects the application of the rules of natural justice to an arbitrator or umpire in other circumstances.

(5) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration is not affected by any action taken by an arbitrator or umpire under subsection (1).

(6) Nothing in subsection (5) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

(5) Section 34 (**Costs**):

Omit section 34 (6), insert instead:

(6) Where in accordance with rules of court an offer of compromise has been made in relation to a claim to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that the offer was made and the terms of the offer.

(6) Section 38 (**Judicial review of awards**):

Omit section 38 (5) and (6), insert instead:

(5) The Supreme Court shall not grant leave under subsection (4) (b) unless it considers that:

- (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

(b) there is:

- (i) a manifest error of law on the face of the award; or
- (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

(6) The Supreme Court may make any leave which it grants under subsection (4) (b) subject to the applicant complying with any conditions it considers appropriate.

(7) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

(7) Section 46:

Omit the section, insert instead:

Delay in prosecuting claims

46. (1) Unless a contrary intention is expressed in the arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in arbitration proceedings.

(2) Where there has been undue delay by a party, the Court may, on the application of any other party to the dispute or an arbitrator or umpire, make orders:

- (a) terminating the arbitration proceedings;
- (b) removing the dispute into Court; and
- (c) dealing with any incidental matters.

(3) The Court shall not make an order under subsection (2) unless it is satisfied that the delay:

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

- (a) has been inordinate and inexcusable; and
 - (b) will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings.
- (8) **Part VII (Recognition and Enforcement of Foreign Awards and Agreements):**
Omit the Part.
- (9) **Section 62 (Supreme Court rules):**
- (a) Section 62 (1) (c):
Omit "and" where secondly occurring.
 - (b) Section 62 (1) (c1):
After section 62 (1) (c), insert:
 - (c1) offers of compromise in relation to claims to which arbitration agreements apply; and
- (10) **Section 63 (District Court rules):**
- (a) Section 63 (1) (b):
Omit "and" where thirdly occurring;
 - (b) Section 63 (1) (b1):
After section 63 (1) (b), insert:
 - (b1) offers of compromise in relation to claims to which arbitration agreements apply; and
- (11) **Schedule 2 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards):**
Omit the Schedule.

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF UNIFORMITY

(Sec. 4)

- (1) **Section 3 (Repeal, transitional and application provisions):**
- (a) Section 3 (3):
Omit "this Act the law", insert instead "this Act, the law".

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF
UNIFORMITY - *continued*

(b) Omit section 3 (6), insert instead:

(6) Nothing in this Act applies to:

(a) an arbitration under the Supreme Court Act 1970, the District Court Act 1973 or the Arbitration (Civil Actions) Act 1983 (except to the extent that those Acts expressly provide for the application of this Act); or

(b) an arbitration, or class of arbitrations, prescribed as an arbitration, or class of arbitrations, to which this Act does not apply.

(2) Section 4 (**Definitions**):

Section 4 (1):

Omit the definitions of "District Court" and "Supreme Court".

(3) Section 5 (**Crown to be bound**):

Omit "shall be", insert instead "is".

(4) Section 6:

Omit the section, insert instead:

Presumption of single arbitrator

6. An arbitration agreement shall be taken to provide for the appointment of a single arbitrator unless:

(a) the agreement otherwise provides; or

(b) the parties otherwise agree in writing.

(5) Section 15:

Omit the section, insert instead:

Manner in which decisions are made

15. Unless a contrary intention is expressed in the arbitration agreement, where an arbitration agreement provides for the appointment of 3 or more arbitrators:

(a) the arbitrators may, by a majority, appoint one of their number to preside;

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF
UNIFORMITY - *continued*

- (b) any decision to be made in the course of the proceedings may be made by a majority; and
 - (c) if the arbitrators are equally divided in opinion, and one of the arbitrators has been appointed to preside (whether under this section or the agreement), the decision of the presiding arbitrator shall prevail.
- (6) Section 18 (**Refusal or failure to attend before arbitrator or umpire etc.**):
 - (a) Section 18 (1):
Omit "an" where firstly occurring, insert instead "the".
 - (b) Section 18 (2):
Omit "an order under subsection (1)" where secondly, thirdly and fourthly occurring, insert instead "the order".
- (7) Section 19 (**Evidence before arbitrator or umpire**):
Section 19 (3):
Omit "an" where firstly occurring, insert instead "the".
- (8) Section 21 (**Effect of appointment of new arbitrator or umpire on evidence previously given and awards and determinations previously made**):
Omit "an" where firstly occurring, insert instead "the".
- (9) Section 22 (**Determination to be made according to law or as amiable compositeur or ex aequo et bono (See UNCITRAL Arbitration Rules Article 33, paragraph 2)**):
 - (a) Section 22 (1):
Omit "an", insert instead "the".
 - (b) Section 22 (2):
Omit "*as amiable compositeur or ex aequo et bono*", insert instead "by reference to considerations of general justice and fairness".
- (10) Section 23 (**Interim awards**):
Omit "in an", insert instead "in the".
- (11) Section 24 (**Specific performance**):
Omit "an" where firstly occurring, insert instead "the".

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF
UNIFORMITY - *continued*

- (12) Section 28 (**Award to be final**):
Omit "an", insert instead "the".
- (13) Section 29 (**Form of award**):
Section 29 (1):
Omit "an", insert instead "the".
- (14) Section 31 (**Interest up to making of award**):
- (a) Section 31 (1) and (2):
Omit "an" where firstly occurring in each subsection, insert instead "the".
- (b) Section 31 (1) and (2):
Omit "prescribed for the purposes of section 95 of the Supreme Court Act, 1970" wherever occurring, insert instead "payable on a judgment debt of the Supreme Court".
- (15) Section 32 (**Interest on debt under award**):
- (a) Omit "an" where firstly occurring, insert instead "the".
- (b) Omit "prescribed for the purposes of section 95 of the Supreme Court Act, 1970", insert instead "payable on a judgment debt of the Supreme Court".
- (c) At the end of the section, insert:
- (2) If judgment is entered by the Court in terms of an award, interest shall cease to accrue in pursuance of a direction under this section on the date of the entry of the judgment.
- (16) Section 33 (**Enforcement of award**):
- (a) Section 33 (1):
Omit "(1)".
- (b) Section 33 (2):
Omit the subsection.

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF
UNIFORMITY - *continued*

- (17) Section 34 (**Costs**):
- (a) Section 34 (2):
Omit ", on application made by a party to the arbitration agreement".
- (b) Omit section 34 (3), insert instead:
- (3) A provision in an arbitration agreement (being an arbitration agreement that provides for the reference of future disputes to arbitration) is void if:
- (a) it is to the effect that a particular party, or the parties, to the agreement shall in any event pay their own costs of the arbitration or any part of those costs; or
- (b) except in so far as it relates to a right of indemnity or a right of subrogation - it is to the effect that a particular party to the agreement shall in any event pay the costs of any other party or any part of those costs.
- (c) Section 34 (5):
Omit "rules made for the purposes of this Act", insert instead "rules of court".
- (18) Section 38 (**Judicial review of awards**):
Section 38 (4):
Omit "the" where secondly occurring, insert instead "an".
- (19) Section 40 (**Exclusion agreements affecting rights under sections 38 and 39**):
Section 40 (1):
Omit "the following provisions of".

[*Minister's second reading speech made in -
Legislative Assembly on 22 November 1990
Legislative Council on 5 December 1990*]

FIRST PRINT

COMMERCIAL ARBITRATION (AMENDMENT) BILL 1990

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The Commercial Arbitration Act 1984 was enacted, following agreement of the Standing Committee of Attorneys-General, as part of a series of substantially uniform laws of the States and Territories dealing with the arbitration of disputes. The substance of this Bill has also been approved by the Standing Committee of Attorneys General, and corresponding legislation is expected to be enacted in the other States and Territories.

The object of the Bill is to amend the Commercial Arbitration Act 1984 by making:

- (a) a series of substantive amendments to the Act, which are set out in Schedule 1 to the Bill, dealing with:
 - * the conduct of arbitration proceedings;
 - * the representation of parties;
 - * the consolidation of proceedings;
 - * the use of mediation, conciliation or similar means of settlement;
 - * the awarding of costs;
 - * the judicial review of awards;
 - * the prevention of delay in prosecuting claims;
 - * the repeal of provisions dealing with the recognition and enforcement of foreign awards and agreements;
 - * the rule-making powers of certain courts; and
 - (b) a series of minor amendments to the Act, which are set out in Schedule 2 to the Bill, for the purpose of achieving uniformity of expression with the corresponding legislation of the other States and Territories.
-

Commercial Arbitration (Amendment) 1990

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act is to commence on a day or days to be appointed by proclamation.

Clauses 3 and 4 are formal provisions that give effect to the Schedules of amendments to the Commercial Arbitration Act 1984.

Clause 5 contains savings and transitional provisions.

SCHEDULE 1 - PRINCIPAL AMENDMENTS

Definition (section 4)

Schedule 1 (1) makes it clear that a reference to "an arbitrator" in the Act extends to all arbitrators in a particular case if there is more than one. This makes explicit in the Act what is probably already achieved by the Interpretation Act 1987, which provides that the singular includes the plural.

Representation of parties in arbitration proceedings (section 20)

Schedule 1 (2) proposes that the existing provision dealing with the representation of parties in arbitration proceedings be rephrased and extended.

Under the present section, a party may be represented by a legal practitioner or other representative if the arbitrator or umpire gives leave; additionally, an incorporated or unincorporated body may be represented by an officer, employee or agent.

The new section generally extends these provisions, so that a party may be legally represented also if another party is represented by a legally qualified person, or if all the parties agree, or if the value of the claim exceeds a certain amount; additionally, a party may be represented by a person who is not a legally qualified person if all the parties agree.

A legal practitioner from outside the State is brought within the provisions, and is protected from committing an offence under the Legal Profession Act 1987.

Consolidation of arbitration proceedings (section 26)

Schedule 1 (3) amends the existing provisions of the Act dealing with the consolidation of arbitration proceedings.

Whereas previously only the parties by agreement or the Court by order could consolidate proceedings, it is now proposed that arbitrators or umpires may themselves make orders for the consolidation of arbitration proceedings. Different procedures are prescribed, according to whether the proceedings have the same or different arbitrators or umpires.

Procedural directions are provided and the role of the Court becomes one of review. The grounds on which consolidation can be ordered remain substantially as in the existing provision and the parties to two or more arbitration proceedings remain free to agree on consolidation of these proceedings.

Settlement of disputes by means other than arbitration (section 27)

Schedule 1 (4) replaces a provision dealing with the settlement of disputes otherwise than by arbitration.

The existing section provides that, unless agreed by the parties in writing, an arbitrator or umpire may order the parties to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of a dispute, including attendance at a conference conducted by the arbitrator or umpire, either without proceeding to or while continuing with arbitration.

The new section provides for greater control by the parties in that they may seek settlement by mediation, conciliation or similar means or may authorise an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary, whether or not involving a conference and whether before or after proceeding to or continuing with arbitration. It is also proposed that an arbitrator or umpire be expressly bound by the rules of natural justice when proceeding under the section unless the parties otherwise agree.

Discretion to award costs (section 34)

Schedule 1 (5) deletes a provision which requires an arbitrator or umpire, when exercising the discretion to award costs, to take into account a refusal or failure to attend a conference ordered by the arbitrator or umpire. As section 27 of the Act as proposed to be amended will no longer confer power on the arbitrator or umpire to order attendance at a conference, the existing provision is inappropriate.

In its place, a provision is to be inserted which requires an arbitrator or umpire, when exercising the discretion to award costs, to take into account both the fact that an offer of compromise has been made and the terms of that offer. An offer of compromise system is now available in New South Wales in consequence of amendments to rules of court.

Judicial review of awards (section 38)

Schedule 1 (6) adds to the provision dealing with judicial review of awards by providing that the Court must not grant leave to a party to appeal on a question of law, unless the Court is satisfied that:

- * there has been a manifest error of law on the face of the award; or
 - * there is strong evidence that the arbitrator or umpire made an error of law and the determination of the question will add to the certainty of commercial law,
- in addition to being satisfied (under the current provisions) that determination of the question could substantially affect the rights of a party.

Delay in prosecuting claims (section 46)

Schedule 1 (7) re-enacts the provisions of section 46 with a number of alterations. The section deals with delay in prosecuting claims that are subject to arbitration.

The first alteration is to insert a requirement that each party to arbitration proceedings (in addition to the claimant as is presently the case) has a duty to exercise due diligence in the conduct of arbitration proceedings.

Commercial Arbitration (Amendment) 1990

The second alteration is to re-express the grounds on which the Court must be satisfied before exercising its powers following delay by a party: the Court must be satisfied that the delay is inordinate and inexcusable and will present a real risk to a fair trial or to the interests of other parties.

Recognition and enforcement of foreign awards and agreements (Part VII and Schedule 2)

Schedule 1 (8) and (11) repeal the provisions of the Act dealing with the recognition of foreign awards and agreements and Schedule 2 to the Act which sets out the text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The deletion of these provisions is proposed because the International Arbitration Act 1974 of the Commonwealth covers the field and the State provisions are inconsistent in terms of section 109 of the Commonwealth Constitution.

Rule making powers (sections 62 and 63)

Schedule 1 (9) and (10) amend existing provisions of the Act which deal with the making of rules of court by the Supreme Court and the District Court for the purposes of carrying the Act into effect. The amendments will enable rules to be made concerning offers of compromise in relation to claims to which arbitration agreements apply.

These provisions are among the miscellaneous provisions at the end of the Act which have never been uniform. Each jurisdiction is adopting its own approach in dealing with court rules.

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF UNIFORMITY

The amendments in this Schedule are, together with similar kinds of amendments proposed for the corresponding legislation of the other States and Territories, designed to secure greater uniformity of language among the corresponding Acts.

Schedule 2 (1) amends punctuation and substitutes a provision excluding the application of the Act to certain kinds of arbitrations. Exemptions will be able to be extended to non-statutory arbitrations.

Schedule 2 (2) omits definitions that are not uniform, and that are in any case now covered by the Interpretation Act 1987.

Schedule 2 (3) makes a change of wording merely for uniformity purposes.

Schedule 2 (4) provides that an arbitration agreement is to be taken to envisage appointment of a single arbitrator unless the agreement otherwise provides or the parties agree.

Schedule 2 (5) re-expresses section 15 merely for uniformity purposes.

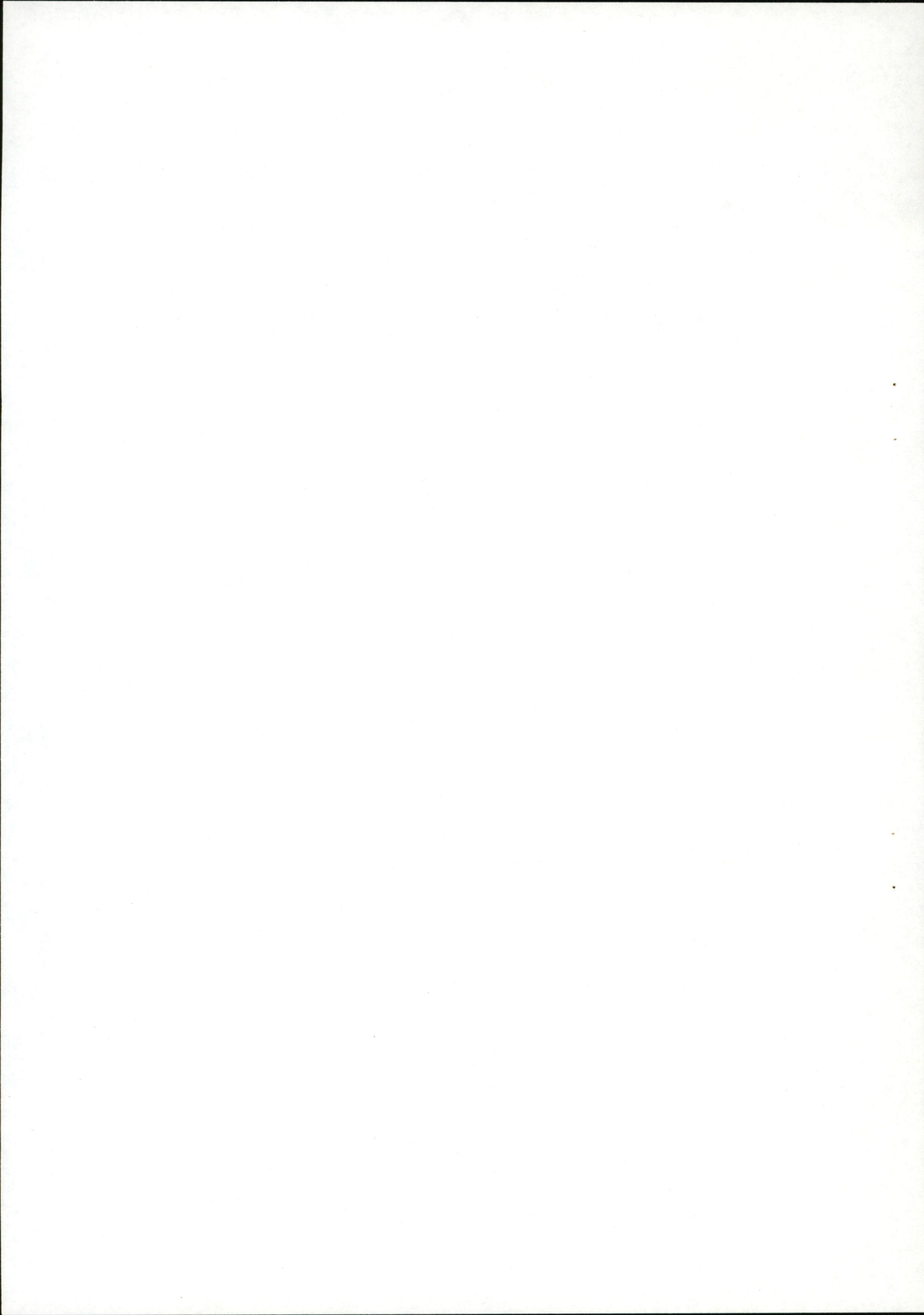
Schedule 2 (6)-(14) and (15) (a) and (b) make minor amendments to the wording of various sections to accord with usage in other Australian jurisdictions.

Schedule 2 (15) (c) and (16) merely reposition section 33 (2) to form part of section 32, for uniformity purposes.

Commercial Arbitration (Amendment) 1990

Schedule 2 (17) makes minor uniform amendments to wording. A revised provision declaring void arbitration agreements which contain requirements for parties to bear costs in certain circumstances is proposed.

Schedule 2 (18) and (19) make minor amendments to wording for uniformity purposes.



FIRST PRINT

COMMERCIAL ARBITRATION (AMENDMENT) BILL 1990

NEW SOUTH WALES

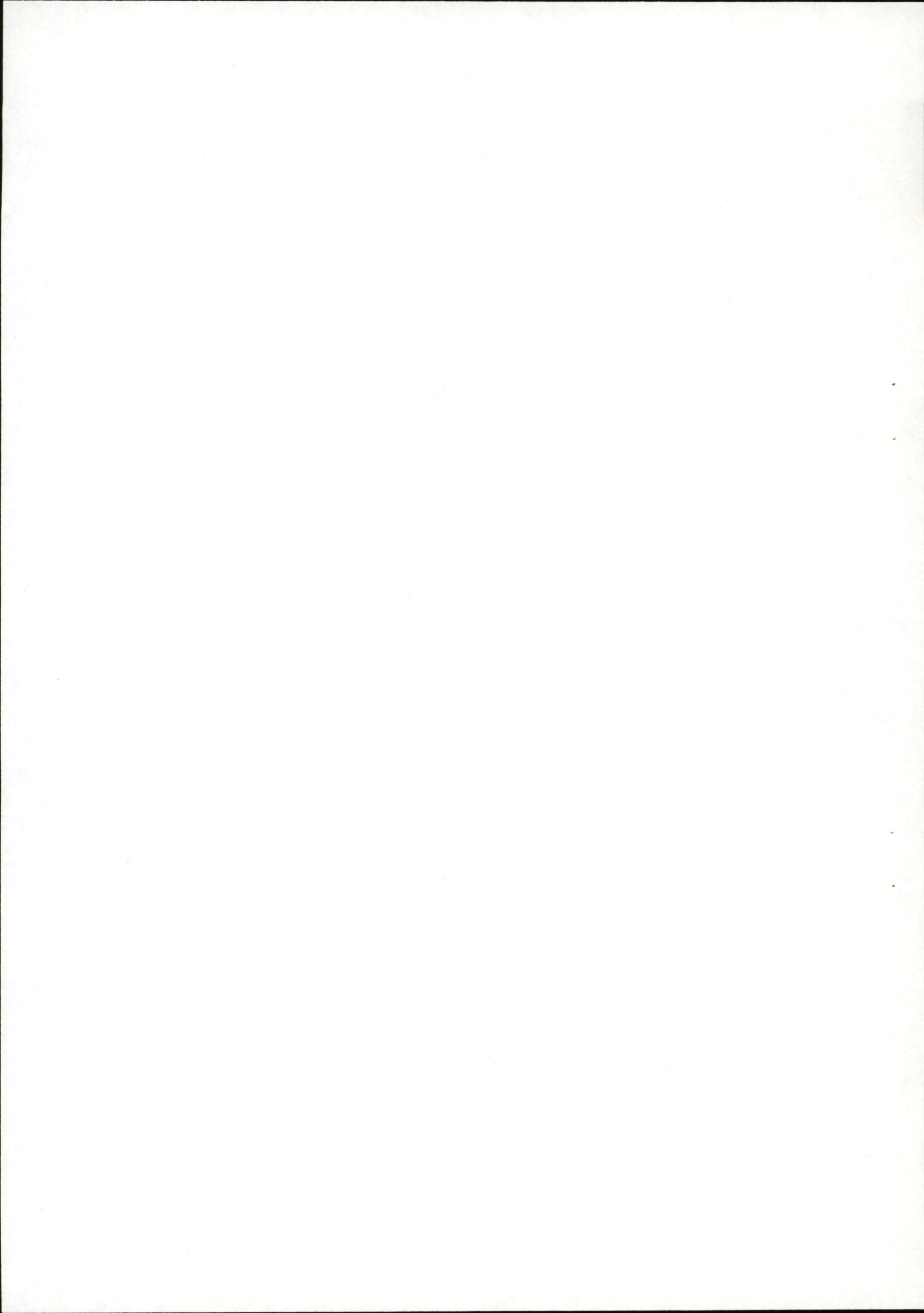


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SCHEDULE 1 - PRINCIPAL AMENDMENTS

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF UNIFORMITY



COMMERCIAL ARBITRATION (AMENDMENT) BILL 1990

NEW SOUTH WALES



No. , 1990

A BILL FOR

An Act to amend the Commercial Arbitration Act 1984 with respect to arbitration proceedings, international arbitrations, settlement of disputes otherwise than by arbitration and the judicial review of arbitral awards; to make other amendments to the Act for the purpose of promoting uniformity of Australian arbitration law; and for other purposes.

Commercial Arbitration (Amendment) 1990

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Commercial Arbitration (Amendment) Act 1990.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Commercial Arbitration Act 1984 No. 160

3. The Commercial Arbitration Act 1984 is amended as set out in Schedule 1.

Further amendment of Commercial Arbitration Act 1984 No. 160

4. The Commercial Arbitration Act 1984 is further amended as set out in Schedule 2.

Savings and transitional provisions

5. (1) Subject to this section, the amendments made by this Act apply in relation to an arbitration agreement (whenever made) and an arbitration under such an agreement.

(2) The amendment made by Schedule 1 (2) does not apply in relation to arbitration proceedings that were commenced before the commencement of that amendment.

(3) Section 26 of the Commercial Arbitration Act 1984 as in force before the commencement of Schedule 1 (3) continues to apply in relation to:

- (a) an order made under that section before that commencement;
or
 - (b) an application pending under that section immediately before that commencement.
-

SCHEDULE 1 - PRINCIPAL AMENDMENTS

(Sec. 3)

(1) Section 4 (**Definitions**):

Omit section 4 (3), insert instead:

(3) A reference in this Act to an arbitrator includes, in a case where there are 2 or more arbitrators, a reference to the arbitrators.

(2) Section 20:

Omit the section, insert instead:

Representation

20. (1) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a legal practitioner, but only in the following cases:

- (a) where a party to the proceedings is, or is represented by, a legally qualified person;
- (b) where all the parties agree;
- (c) where the amount or value of the claim subject to the proceedings exceeds \$20,000 or such other amount as is prescribed instead by regulation; or
- (d) where the arbitrator or umpire gives leave for such representation.

(2) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a representative who is not a legal practitioner, but only in the following cases:

- (a) where the party is an incorporated or unincorporated body and the representative is an officer, employee or agent of the body;
- (b) where all the parties agree; or
- (c) where the arbitrator or umpire gives leave for such representation.

(3) If a party applies for leave permitting representation by a legal practitioner or other representative, it shall be granted if the arbitrator or umpire is satisfied:

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

- (a) that the granting of leave is likely to shorten the proceedings or reduce costs; or
- (b) that the applicant would, if leave were not granted, be unfairly disadvantaged.

(4) A party is entitled to be represented by a legal practitioner or other representative on leave granted under subsection (3), notwithstanding any agreement to the contrary between the parties.

(5) A person not admitted to practise in New South Wales shall not be taken to have committed an offence under or breached the provisions of the Legal Profession Act 1987 or any other Act merely by representing a party in arbitration proceedings in New South Wales.

(6) A reference in this section to:

- (a) a legal practitioner shall be read as a reference to a person who is admitted or entitled to practise as a barrister, solicitor or legal practitioner in New South Wales or in any other place, whether within or outside Australia; and
- (b) a legally qualified person shall be read as a reference to:
 - (i) such a legal practitioner; or
 - (ii) a person who, though not such a legal practitioner, has such qualifications or experience in law (whether acquired in New South Wales or in any other place, whether within or outside Australia) as, in the opinion of the arbitrator or umpire, would be likely to afford an advantage in the proceedings.

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

(3) Section 26:

Omit the section, insert instead:

Consolidation of arbitration proceedings

26. (1) The following provisions of this subsection apply to arbitration proceedings all of which have the same arbitrator or umpire:

- (a) the arbitrator or umpire may, on the application of a party in each of the arbitration proceedings, order:
 - (i) those proceedings to be consolidated on such terms as the arbitrator or umpire thinks just;
 - (ii) those proceedings to be heard at the same time, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any of them;
- (b) if the arbitrator or umpire refuses or fails to make such an order, the Court may, on application by a party in any of the proceedings, make such an order as could have been made by the arbitrator or umpire.

(2) The following provisions of this subsection apply to arbitration proceedings not all of which have the same arbitrator or umpire:

- (a) the arbitrator or umpire for any one of the arbitration proceedings may, on the application of a party in the proceeding, provisionally order:
 - (i) the proceeding to be consolidated with other arbitration proceedings on such terms as the arbitrator or umpire thinks just;
 - (ii) the proceeding to be heard at the same time as other arbitration proceedings, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any of them;

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

- (b) an order ceases to be provisional when consistent provisional orders have been made for all of the arbitration proceedings concerned;
 - (c) the arbitrators or umpires for arbitration proceedings may communicate with each other for the purpose of conferring on the desirability of making orders under this subsection and of deciding on the terms of any such order;
 - (d) if a provisional order is made for at least one of the arbitration proceedings concerned, but the arbitrator or umpire for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subsection;
 - (e) if inconsistent provisional orders are made for the arbitration proceedings, the Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.
- (3) An order or a provisional order may not be made under this section unless it appears:
- (a) that some common question of law or fact arises in all of the arbitration proceedings;
 - (b) that the rights to relief claimed in all of the proceedings are in respect of or arise out of the same transaction or series of transactions; or
 - (c) that for some other reason it is desirable to make the order or provisional order.
- (4) When arbitration proceedings are to be consolidated under this section, the arbitrator or umpire for the consolidated proceedings shall be the person agreed on for the purpose by all the parties to the individual proceedings, but, failing any such agreement, the Court may appoint an arbitrator or umpire for the consolidated proceedings.

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

(5) Any proceedings before an arbitrator or umpire for the purposes of this section shall be taken to be part of the arbitration proceedings concerned.

(6) Arbitration proceedings may be commenced or continued, notwithstanding that an application to consolidate them is pending under subsection (1) or (2) and notwithstanding that a provisional order has been made in relation to them under subsection (2).

(7) Subsections (1) and (2) apply in relation to arbitration proceedings whether or not all or any of the parties are common to some or all of the proceedings.

(8) Nothing in subsection (1) or (2) prevents the parties to 2 or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

(4) Section 27:

Omit the section, insert instead:

Settlement of disputes otherwise than by arbitration

27. (1) Parties to an arbitration agreement:

- (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or
- (b) may authorise an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire),

whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.

(2) Where:

- (a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and
- (b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute,

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

(3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1).

(4) Nothing in subsection (3) affects the application of the rules of natural justice to an arbitrator or umpire in other circumstances.

(5) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration is not affected by any action taken by an arbitrator or umpire under subsection (1).

(6) Nothing in subsection (5) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

(5) Section 34 (**Costs**):

Omit section 34 (6), insert instead:

(6) Where in accordance with rules of court an offer of compromise has been made in relation to a claim to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that the offer was made and the terms of the offer.

(6) Section 38 (**Judicial review of awards**):

Omit section 38 (5) and (6), insert instead:

(5) The Supreme Court shall not grant leave under subsection (4) (b) unless it considers that:

- (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

(b) there is:

- (i) a manifest error of law on the face of the award; or
- (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

(6) The Supreme Court may make any leave which it grants under subsection (4) (b) subject to the applicant complying with any conditions it considers appropriate.

(7) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

(7) Section 46:

Omit the section, insert instead:

Delay in prosecuting claims

46. (1) Unless a contrary intention is expressed in the arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in arbitration proceedings.

(2) Where there has been undue delay by a party, the Court may, on the application of any other party to the dispute or an arbitrator or umpire, make orders:

- (a) terminating the arbitration proceedings;
- (b) removing the dispute into Court; and
- (c) dealing with any incidental matters.

(3) The Court shall not make an order under subsection (2) unless it is satisfied that the delay:

SCHEDULE 1 - PRINCIPAL AMENDMENTS - *continued*

- (a) has been inordinate and inexcusable; and
 - (b) will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings.
- (8) **Part VII (Recognition and Enforcement of Foreign Awards and Agreements):**
 - Omit the Part.
- (9) **Section 62 (Supreme Court rules):**
 - (a) Section 62 (1) (c):
 - Omit "and" where secondly occurring.
 - (b) Section 62 (1) (c1):
 - After section 62 (1) (c), insert:
 - (c1) offers of compromise in relation to claims to which arbitration agreements apply; and
- (10) **Section 63 (District Court rules):**
 - (a) Section 63 (1) (b):
 - Omit "and" where thirdly occurring;
 - (b) Section 63 (1) (b1):
 - After section 63 (1) (b), insert:
 - (b1) offers of compromise in relation to claims to which arbitration agreements apply; and
- (11) **Schedule 2 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards):**
 - Omit the Schedule.

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF UNIFORMITY

(Sec. 4)

- (1) **Section 3 (Repeal, transitional and application provisions):**
 - (a) Section 3 (3):
 - Omit "this Act the law", insert instead "this Act, the law".

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF
UNIFORMITY - *continued*

- (b) Omit section 3 (6), insert instead:
- (6) Nothing in this Act applies to:
 - (a) an arbitration under the Supreme Court Act 1970, the District Court Act 1973 or the Arbitration (Civil Actions) Act 1983 (except to the extent that those Acts expressly provide for the application of this Act); or
 - (b) an arbitration, or class of arbitrations, prescribed as an arbitration, or class of arbitrations, to which this Act does not apply.
- (2) Section 4 (**Definitions**):
Section 4 (1):
Omit the definitions of "District Court" and "Supreme Court".
- (3) Section 5 (**Crown to be bound**):
Omit "shall be", insert instead "is".
- (4) Section 6:
Omit the section, insert instead:
Presumption of single arbitrator
6. An arbitration agreement shall be taken to provide for the appointment of a single arbitrator unless:
 - (a) the agreement otherwise provides; or
 - (b) the parties otherwise agree in writing.
- (5) Section 15:
Omit the section, insert instead:
Manner in which decisions are made
15. Unless a contrary intention is expressed in the arbitration agreement, where an arbitration agreement provides for the appointment of 3 or more arbitrators:
 - (a) the arbitrators may, by a majority, appoint one of their number to preside;

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF
UNIFORMITY - *continued*

- (b) any decision to be made in the course of the proceedings may be made by a majority; and
 - (c) if the arbitrators are equally divided in opinion, and one of the arbitrators has been appointed to preside (whether under this section or the agreement), the decision of the presiding arbitrator shall prevail.
- (6) Section 18 (**Refusal or failure to attend before arbitrator or umpire etc.**):
 - (a) Section 18 (1):
Omit "an" where firstly occurring, insert instead "the".
 - (b) Section 18 (2):
Omit "an order under subsection (1)" where secondly, thirdly and fourthly occurring, insert instead "the order".
- (7) Section 19 (**Evidence before arbitrator or umpire**):
Section 19 (3):
Omit "an" where firstly occurring, insert instead "the".
- (8) Section 21 (**Effect of appointment of new arbitrator or umpire on evidence previously given and awards and determinations previously made**):
Omit "an" where firstly occurring, insert instead "the".
- (9) Section 22 (**Determination to be made according to law or as amiable compositeur or ex aequo et bono (See UNCITRAL Arbitration Rules Article 33, paragraph 2)**):
 - (a) Section 22 (1):
Omit "an", insert instead "the".
 - (b) Section 22 (2):
Omit "*as amiable compositeur or ex aequo et bono*", insert instead "by reference to considerations of general justice and fairness".
- (10) Section 23 (**Interim awards**):
Omit "in an", insert instead "in the".
- (11) Section 24 (**Specific performance**):
Omit "an" where firstly occurring, insert instead "the".

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF
UNIFORMITY - *continued*

- (12) Section 28 (**Award to be final**):
Omit "an", insert instead "the".
- (13) Section 29 (**Form of award**):
Section 29 (1):
Omit "an", insert instead "the".
- (14) Section 31 (**Interest up to making of award**):
 - (a) Section 31 (1) and (2):
Omit "an" where firstly occurring in each subsection, insert instead "the".
 - (b) Section 31 (1) and (2):
Omit "prescribed for the purposes of section 95 of the Supreme Court Act, 1970" wherever occurring, insert instead "payable on a judgment debt of the Supreme Court".
- (15) Section 32 (**Interest on debt under award**):
 - (a) Omit "an" where firstly occurring, insert instead "the".
 - (b) Omit "prescribed for the purposes of section 95 of the Supreme Court Act, 1970", insert instead "payable on a judgment debt of the Supreme Court".
 - (c) At the end of the section, insert:
 - (2) If judgment is entered by the Court in terms of an award, interest shall cease to accrue in pursuance of a direction under this section on the date of the entry of the judgment.
- (16) Section 33 (**Enforcement of award**):
 - (a) Section 33 (1):
Omit "(1)".
 - (b) Section 33 (2):
Omit the subsection.

SCHEDULE 2 - AMENDMENTS FOR THE PURPOSES OF
UNIFORMITY - *continued*

- (17) Section 34 (**Costs**):
- (a) Section 34 (2):
Omit ", on application made by a party to the arbitration agreement".
 - (b) Omit section 34 (3), insert instead:
 - (3) A provision in an arbitration agreement (being an arbitration agreement that provides for the reference of future disputes to arbitration) is void if
 - (a) it is to the effect that a particular party, or the parties, to the agreement shall in any event pay their own costs of the arbitration or any part of those costs; or
 - (b) except in so far as it relates to a right of indemnity or a right of subrogation - it is to the effect that a particular party to the agreement shall in any event pay the costs of any other party or any part of those costs.
 - (c) Section 34 (5):
Omit "rules made for the purposes of this Act", insert instead "rules of court".
- (18) Section 38 (**Judicial review of awards**):
- Section 38 (4):
Omit "the" where secondly occurring, insert instead "an".
- (19) Section 40 (**Exclusion agreements affecting rights under sections 38 and 39**):
- Section 40 (1):
Omit "the following provisions of".
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