IN THE HIGH COURT OF AUSTRALIA No S110/2010 and S290/2010
SYDNEY OFFICE OF THE REGISTRY

BETWEEN:

WESTPORT INSURANCE CORPORATION
(ABN 48 072 715 738)
First appellant

ORIGINAL

ASSETINSURE PTY LIMITED
(ABN 65 066 463 803)
Second appellant

MUNICH REINSURANCE COMPANY OF AUSTRALASIA (ABN 51 004 804 013)
Third appellant

XL RE LIMITED
(ABN 54 094 352 048)
Fourth appellant

SCOR SWITZERLAND LTD
(ABN 92 098 315 176)
Fifth appellant

AND

GORDIAN RUNOFF LIMITED
(ABN 11 052 179 647)
Respondent

JOINT SUBMISSIONS AS AMICI CURIAE BY

AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION LIMITED

AUSTRALIAN INTERNATIONAL DISPUTE CENTRE LIMITED

INSTITUTE OF ARBITRATORS AND MEDIATORS AUSTRALIA LIMITED

CHARTERED INSTITUTE OF ARBITRATORS (AUSTRALIA) LIMITED

Date of document: 25 January 2011
Filed on behalf of the *amici curiae*
Pursuant to Rule 44.04 of the High Court Rules

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PART I: Certification

1 These submissions are in a form suitable for publication on the Internet.

PART II: Basis of Intervention and Parties

2 The following parties seek leave to appear as amici curiae:

(a) the Australian Centre for International Commercial Arbitration Limited ("ACICA");

(b) the Australian International Disputes Centre Limited ("AIDC");

(c) the Institute of Arbitrators and Mediators Australia Limited ("IAMA");

(d) the Chartered Institute of Arbitrators (Australia) Limited ("CIArb Australia").

10 3 In seeking such leave, ACICA, AIDC, IAMA and CIArb Australia ("the amici") do so jointly.

PART III: Basis for Leave to Intervene as Amici Curiae

4 The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or fact which will assist the Court in a way in which the Court may not otherwise have been assisted by the parties.[1] One way in which the Court may be so assisted is where such a party can offer a broader perspective on the issue for resolution by the Court.[2]

5 In recent years the Court has granted leave to governmental and non-governmental organisations to provide submissions from a specialised viewpoint, an industry
20 perspective or in the public interest. Examples of industry associations being granted leave to be heard as amicus curiae include: *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited*[3] (leave granted to the Australian Consumers Association); *Garcia v National Australia Bank Ltd*[4] (leave granted to the Consumer Credit Legal Centre).

6 The issue of the appropriate extent of reasons required of an arbitrator is one of considerable general and practical importance. The requirement for reasons applies to arbitrations of varying size, length and complexity. It applies to arbitrators without legal training and experience and to arbitrators of varying degrees of legal training and

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1 *Levy v Victoria* (1997) 189 CLR 579, 604-605, 650-652.
2 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312.
3 (2006) 229 CLR 386 at 404.
4 (1998) 194 CLR 395 at 398.

experience. The ambit of the requirement to state reasons is the most important practical aspect of the writing of awards.

7 The ambit of the requirement to state reasons is also an important aspect of the appropriate training of arbitrators. If the requirement is not readily comprehensible to arbitrators it increases the likelihood of error thereby undermining confidence in the arbitral process as an efficient form of private alternative dispute resolution.

8 For the reasons described in the affidavit of Douglas Samuel Jones, and the supplementary affidavits of Alexander John Wakefield and David Scott Ellis, the amici believe they possess a range of experience which will assist the Court on these
10 practical aspects of the requirement for reasons in giving content to the statutory obligation in s. 29 of the *Commercial Arbitration Act 1984* (NSW)("the 1984 Act").

9 The Court's decision may also have a wider significance for international commercial arbitrations because of the tendency for decisions concerning domestic arbitration to influence international commercial arbitrations.[5]

10 In the United States,[6] the American Arbitration Association has been granted leave to appear as amicus curiae in respect of decisions of significance to the arbitration community: recently, for example, *Stolt-Nielsen v Animalfeeds International Corp* 559 US__ (2010) and *Hall Street Associates v Mattel Incorporated* 552 US 576 (2008).

PART IV: Legislation

20 11 The amici adopt paragraph 94 of the Appellant's Submissions.

PART V: Argument

12 The amici advance below a construction of the 1984 Act that they contend would promote the purpose or object underlying the Act, and in particular s.29(1)(c) in its wider statutory context.[7] It is submitted that the broader notion of the "context in which the statute was drafted and enacted"[8] is of particular significance in determining the content of the statutory obligation to state reasons for making an award. This consideration focuses on the state of the law when the statute was enacted, its known

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5 For example, the Court's decision in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 where the Court's reasoning in its decision on confidentiality in the context of a domestic arbitration was viewed as generally applicable to the issue of confidentiality in respect international arbitrations.

6 The Supreme Court of the United Kingdom has granted leave to appeal from the decision in *Jivraj v Hashwani* [2010] EWCA Civ 712, which is referred to in the submissions which follow. The ICC and the LCIA have announced an intention to seek leave to intervene as amici curiae in the appeal.

7 See, section 33 of the *Interpretation Act 1987* (NSW). See also *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 206-207 [29]-[31].

8 *Weiss v R* (2005) 224 CLR 300 at 306 [11].

or supposed defects at that time, and the history of this branch of the law, including the legislative history of the statute.[9] The amici also submit that "extrinsic materials", and in particular the report of the Law Reform Commission of NSW (LRC 27, 1976),[10] are of assistance in this case in "throw[ing] light on the meaning that the legislature intended to give to the provision".[11]

13 When the general words of s.29(1)(c) are considered in their wider statutory context, it is submitted that those words should be "constrained by their context" [12] and that both the "inconvenience of" a more expansive construction which seeks to impose a high standard of reasons and the "improbability of" such an expansive construction being intended by the legislature, support the conclusion reached by CA. It is submitted that this construction is not only reasonably open, but is one which "more closely conforms to the legislative intent".[13]

The Text

14 Statutory interpretation, of course, should commence with the text itself.[14] The ordinary meaning of a "statement of the reasons for making the award" is a statement of the "ground or cause" of the action, a statement "in justification or explanation" of the action.[15] There is no legislative qualification or modification of the literal or ordinary and natural meaning of the words used. There is no requirement for "a statement" to be of a particular standard or in a particular form. Section 29(1)(c) does not in terms require the reasons to include findings of fact or law. Nor does it require the reasons to be factually or legally correct[16]. There is no requirement for the statement of reasons to address every argument (substantial or otherwise) advanced by the parties or to state the evidence from which findings of fact were made, or explain

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9 *Australian Finance Direct v Director of Consumer Affairs* (2008) 234 CLR 96 at 108 [19], 121 [63]-[64].

10 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 522 [53].

11 *Stevens* (supra) at 206-207 [30]-[31] and at 230 [124].

12 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

13 At 408.

14 *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331 at 361-362 [86]-[87].

15 See Macquarie Dictionary, although "the task of construing [the] section [of the statute] is not accomplished by simply taking the text of the statute in one hand and a dictionary in the other" *Weiss v R* (2005) 224 CLR 300 at 305 [10] referring to the words of Judge Learned Hand in *Cunard SS Co v Mellon*, 284 F 890 (1922) at 894.

16 If the arbitrator states matters which are factually or legally incorrect then the consequences are addressed elsewhere in the Act. For example does it amount to misconduct under s.42?

the reason for preferring certain evidence (including expert evidence) over other evidence.[17]

15 The arbitral panel may have jumped to a right or wrong conclusion in the reasoning followed by it in reaching its decision. But that does not result in a failure to comply with the requirement to "include in the award a statement of reasons for making the award." Put simply, the arbitrator only has to state his or her reasons "for" making the award. If the words used constitute a statement of the actual reasons which motivated the award, then their adequacy or extent or logic or compliance with judicial standards is irrelevant. Only in circumstances where the statement given was so illogical or irrational or so brief that it could not possibly be a statement of the arbitrator's reasons "for" making the award, would such matters be relevant.

Legislative Context

16 The law (both statutory and the common law) applying to arbitrations conducted in NSW prior to 1984 did not require any reasons to be given for the arbitrator's award. The provisions of the *Arbitration Act 1902* (NSW) adopted, with minor variations, those of the *Arbitration Act 1889* (UK). From 1902 to 1984, there was no change to the NSW Act and virtually none of the subsequent amendments[18] which were made to the UK Act during this period (which followed the reports of expert committees) were adopted in NSW.

17 In the period 1902 to 1984, a party could challenge an award if there was error of law on the face of the award. This was "a very narrow ground indeed, and the jurisdiction ha[d] to be administered with great care in order that extraneous considerations not appearing on the face of the award [were] not introduced."[19] Any reasons, if given, were usually not part of the award.

18 The law governing a commercial arbitration in NSW in the period 1902 to 1984, produced a proceeding which was not like an arbitral proceeding shaped by the legislation in force as at the date of the arbitration and award in the present proceedings. Arbitrators were bound by the laws of evidence[20] and parties had a right

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17 CA at [219]; AB 1992-1993.

18 *Arbitration Acts 1950, 1975 and 1979*. Although the LRC 27 stated that in England an arbitrator need not give reasons for his award, it should be noted that those arbitrators covered by the *Tribunals and Inquiries Act 1958* (UK) were under a statutory requirement, if requested, to "to furnish a statement, either written or oral, of the reasons for the decision ..." (s.12).

19 *In re Jones and Carter's Arbitration* [1922] 2 Ch 599 per Lord Sterndale MR at 606.

20 Under s.4 of the *Evidence Act 1898* (NSW), the act applied to "legal proceedings" which were defined by s.3 to include "an arbitration." Under s.23 of the *Arbitration Act 1902* (NSW) "all evidence taken

to request the arbitrators to state a case for the opinion of the Court on a question of law[21]. It was the formal process of an inferior tribunal subject to supervisory judicial control.

19 The 1902 legislation was seen as outdated, however, and the NSW Law Reform Commission in 1973 published a Working Paper on Commercial Arbitration. In 1974 the concept of a uniform statute for the each of the States and territories dealing with commercial arbitration, was raised. The NSW LRC agreed that there should be a uniform law and presented its Report on Commercial Arbitration (LRC 27) in 1976. The LRC stated that "*it should be an objective of the law to uphold an arbitration agreement freely negotiated. And the parties should ... have the freedom to agree effectively to determination by arbitration in such mode as may commend itself to them*". [22] Further, the LRC, both in its working paper and in its final report, recommended against requiring an arbitrator to give reasons for the award.[23] These proposals were used as the basis for a uniform bill.

20 The LRC in its Report said in reaching the view that reasons should not be required, that it "*was much influenced by the remark of Barwick CJ*" in *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd*[24] that "*finality in arbitration in the award of a lay arbitrator is more significant than legal propriety in all his processes in reaching that award.*"[25] Nonetheless the LRC did there acknowledge that reasons would assist in showing that the award is "grossly wrong".

21 After much discussion and debate, the NSW Attorney-General introduced a Bill for a new law regulating commercial arbitration in 1982. The 1982 Bill introduced for the first time a requirement to include "*in the award a statement of the reasons for making the award*" and included cl.25 in substantially the same terms as ultimately became s.29(1) of the 1984 Act. The Bill, nonetheless, did not provide any rights of appeal but sought to re-enact provision for a "*statement of case*" on (a) "*question of law arising in the course of the arbitration*", or (b) "*on an award or a part of an award*" (see cl.33(1) of the Bill and s.19 of the 1902 Act). The 1982 Bill lapsed.

[from a person appearing in response to an order of the court] ..shall be received by the arbitrators ... in like manner as evidence taken under any order ... is received at the trial of such cause". Under s. 24 penalty for perjury applies to false evidence before an arbitrator as if the evidence had been given in open court.

21 Section 19 of *Arbitration Act 1902* (NSW).

22 (LRC 27, par 1.10(a)).

23 (LRC 27, par 9.4.1-.8).

24 (1972) 127 CLR 253 at 258.

25 (LRC 27, par 9.4.7).

22 When the Bill which became the 1984 Act was introduced into the Legislative Assembly on 18 October 1984, the history referred to above was noted and the new Bill was described as "*the settled uniform bill [which] provides a comprehensive set of rules and procedures for the appointment and replacement of arbitrators, the conduct of arbitration proceedings and the making of awards, orders for costs and appeals*"[26]. Six variations from the 1982 Bill (which was said to the uniform Bill) were specifically noted. Relevantly, the standing committee had "considered the former stated case procedure to be outdated and replaced those provisions with an appeal, by leave, to the Supreme Court, on questions of law". The Bill, which was described as
10 "*legislation [which] has already been introduced in other parliaments within the Commonwealth*" was passed unopposed.[27] There was no particular reference to the requirement to include a statement of reasons in the award.

23 The legislative history suggests that the legislative choice was between a statement of reasons or no requirement for any statement of reasons. There was not an issue about whether reasons should conform with a judicial, or some lesser, standard. The legislative background suggests that it is improbable that Parliament intended the requirement for reasons in s.29(1)(c) to be the more expansive requirement advanced by the appellants.

24 A comparison of the broader context which existed between 1902 and 1984 with that
20 created by the 1984 Act also points against an expansive interpretation of s. 29(1)(c). As mentioned above, during the period 1902 to 1984, arbitration was seen as the process of an inferior tribunal where the rules of evidence applied[28] and there was court supervision over the arbitrator's application of legal principles was strictly enforced. This view is epitomised in the decision in *Czarnikow v Roth Schmidt & Co*.[29] In that case the Court of Appeal held the right to request a special case stated or the right of an arbitrator to state a special case "on matters of law," was sufficiently sacrosanct that "*to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no Alsatia in England where the King's writ does not run*".[30] Bankes LJ (at 86) regarded an

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26 Legislative Assembly, 18 October 1984, Attorney General, Mr Landa, *Second Reading Speech*, Hansard, at 2160.

27 See, Hansard, Legislative Council, 31 October 1984 at 2938-2940, although particular mention was also made of the "outdated system of stating cases" being removed and the adoption of a right of appeal on question of law.

28 Under s.3 of the *Evidence Act 1898* (NSW) "legal" proceedings included "an arbitration".

29 [1922] 2 KB 478.

30 See Scrutton LJ at 488.

agreement not to apply for a stated case and to require all questions (of law) to be determined by the arbitrator as amounting to ousting the jurisdiction of the courts. Scrutton LJ said the agreement in so far as it purported to prevent a party from applying for a special case on matters of law "*is contrary to public policy and so unenforceable*".[31] Atkin LJ agreed and said "*the policy of the law has given to the High Court large powers over inferior Courts for the very purpose of maintaining a uniform standard of justice and one system of law*".[32] Significantly, Scrutton LJ referred to the arbitration process as "*proceedings of inferior tribunals without legal training*".[33]

10 25 The arbitration process contemplated under the 1984 Act was quite different from that required during the period from 1902 to 1984. Under the 1984 Act the arbitrator was no longer bound by the rules of evidence and could inform himself or herself "in relation to any matter in such manner as the arbitrator … thinks fit"[34]. Under the 1984 Act, the parties were free to enter exclusion agreements made under s.40 which could expressly exclude any review on any question of law, and even if the parties had not made an exclusion agreement, leave to appeal on a question of law was required.[35]

26 Further, the 1984 Act saw the introduction in NSW of s.22 which introduced the concept of, and right to have the dispute determined by, the arbitrator acting "as *amiable compositeur* or *ex acquo et bono*". This was noted in the detailed explanation
20 provided to the legislature as "by reference to considerations of general justice and fairness".[36]

27 Arbitration under the 1984 Act was no longer the formal process of an inferior tribunal subject to supervisory judicial. Public policy had changed. Arbitration was now a flexible informal process. In these circumstances it is unlikely that the legislature intended in 1984 that the arbitrator should state the reasons for the award in the expansive and legalistic manner approaching, if not equating to, that required of a judicial officer.

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31 At 487.
32 At 491.
33 At 489.
34 s.19(3)
35 See *Raguz v Sullivan* (2000) 50 NSWLR 236.
36 Hansard, Legislative Assembly, 18 October 1984 at 2162. It was cross referenced to Article 33, paragraph 2, of the Arbitration Rules of the United Nations *Commission* on International Trade Law ("UNCITRAL Arbitration Rules") which then provided: "The arbitral tribunal shall decide as amiable compositeur or ex acquo et bono only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration."

The 1990 Amendments

28 The 1984 Act was amended in 1990 by the *Commercial Arbitration (Amendment) Act 1990*. Section 29 (1) was amended by Schedule 2 in a minor manner "to secure greater uniformity of language among the" uniform Acts dealing with commercial arbitration, and the word "an" preceding the words "arbitration agreement" in the first line of s.29(1) was replaced by the word "the". [37] Importantly, under the 1990 amending legislation, the restrictions on appeal rights from an award (with or without reasons) were increased in line with the prevailing judicial trend in support of arbitration.[38] Sections 38(5) and 38(6) were replaced by provisions which imposed more stringent conditions on obtaining leave to appeal. The Second Reading Speech emphasised that:

> "one of the major objectives of this uniform legislation is to minimise judicial supervision and review [and] a more restrictive criterion for the granting of leave is desirable and the parties should be left to accept the decision of the arbitrator whom they have chosen to decide the matter in the first place."[39]

29 The new requirement under the replacement ss. 38(5) and 38(6) was for "a manifest error of law on the face of the award" or "strong evidence that the arbitrator .. made an error of law and that the determination of the question may add, or be likely to add, substantially to the certainty of commercial law."[40]

30 In the interests of the efficacy of arbitration as a viable system of private, flexible and informal alternative dispute resolution, the Act thus promoted the finality of arbitral awards by restricting review of awards for errors of law under s.38. Construing the Act as a whole,[41] this is an important legislative purpose that should properly inform any interpretation of s. 29(1)(c). An interpretation of s.29 which facilitates appeals from arbitral awards is not consistent with the legislative purpose.

English Authorities

31 In the period 1902 to 1979, there are some English authorities dealing with a statutory requirement for an arbitrator to provide reasons which, when considered in their proper context, do not assist in the construction of s.29(1)(c). The statutory obligation

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37 See Hansard, Legislative Assembly, 22 November 1990 at 10378 and Legislative Council, 5 December 1990 at 11874.

38 *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139 at [13]-[17]. See also *Raguz v Sullivan* (2000) 56 NSWLR 236 at 246-249 [42]-[54].

39 Hansard, Legislative Assembly, 22 November 1990 and Hansard, Legislative Council, 5 December 1990 at 11874.

40 See *Winter v Equuscorp Pty Ltd* (2010) VSC 419 (Croft J) at [15]-[17], explaining the stringency of these requirements for judicial review of arbitral awards.

41 *Ainslie v Ainslie* (1927) 39 CLR 381 at 390.

to give reasons analysed in those cases, arose only in the context of statute imposed schemes of dispute resolution by a process of arbitration. The parties were compelled to accept the process and the award as the resolution of their dispute. The dispute resolution mechanism was provided for by statute in contrast to a private process where the arbitrator's authority to decide was derived from the voluntary agreement of the parties to the dispute. The English context may be contrasted to the private commercial arbitration process envisaged by the legislature in the Act. The approach in these cases is shaped by a different legislative context and is in pursuit of a legislative objective different from that pursued by the 1984 Act.

32 The oft quoted decision of Megaw J *In re Poysner and Mills Arbitration*,[42] considered the statement of reasons required by s.12 of the *Tribunals and Inquiries Act 1958* which applied to arbitrations under the *Agricultural Holdings Act 1948*. In the context of a mandatory arbitration it is understandable that Megaw J took the view that:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."[43]

33 It was relevantly noted that the "whole purpose" of the obligation to provide reasons was to enable persons whose property, or whose interests, were being affected by some "administrative decision or some statutory arbitration" to know, if the decision was against them, the reasons for it. Up to then, "people's property and other interests might be gravely affected by a decision of some official."[44] This context contrasts markedly with the consensual party appointment process and autonomy in private commercial arbitration under the Act.

34 In the particular context of such legislative provision, (where Parliament said "reasons shall be given") it is readily understandable that Megaw J in *In Re Poyser* said "*that must be read as meaning that proper, adequate reasons must be given*".[45] The reasons "*must not only be intelligible but ... deal with the substantial points that have been raised*". Megaw J went further and also said if it "*gives insufficient and incomplete information as to the grounds of the decision*" then there is "an error of law" on the

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42 [1964] 2 QB 467.
43 At 478.
44 At 477-478.
45 At 477.

face of the award". This dictum was later considered in *In Re Allen and Matthews Arbitration* with Mocatta J.observing:

> "the novelty of the decision is that the judge treated a defect in the reasons, being a defect of inadequacy or of insufficient or incomplete information and not a wrong statement of law on a point of law, as constituting an error of law on the face of the award by reason of the provisions of the *Tribunals and Inquiries Act 1958*".[46]

35 The Court in *Allen and Matthews* took a contrary view on this point and accepted that:

> "the mere absence of any reference in the reasons given by the arbitrator ... without there being either anything in the award itself or admissible evidence aliunde showing that these points had been raised, could [not] be a ground for saying that the award contained an error of law on its face".[47]

36 Nonetheless the reasoning *In Re Poyser and Mills' Arbitration* has become the accepted standard approach in the UK to a *statutory* obligation on a public body to provide reasons.

37 In *City of Edinburgh Council v Secretary of State for Scotland*,[48] the House of Lords considered the obligation on a "senior reporter" who was appointed to determine a planning appeal to state the reasons for a planning decision. Lord Clyde set out the authorities and concluded:

> "It is necessary that an account should be given of the reasoning on the main issues which were in dispute sufficient to enable the parties and the courts to understand that reasoning. If that degree of explanation was not achieved the parties might well be prejudiced. But elaboration is not to be looked for and a detailed consideration of every point which was raised is not to be expected. In the present case the reporter dealt concisely but clearly with the critical issues. Nothing more was to be expected of him."[49]

38 In *Curtis v London Rent Assessment Committee*[50] the Court of Appeal considered a challenge to a determination by the Rent Assessment Committee under the *Rent Act*, where one of the grounds concerned an allegation that the statement of reasons required under Tribunals and Inquiries Act was inadequate. Even in the mandatory and public context, Auld LJ said:

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46 [1971] 2 QB 518 at 524E-F.
47 At 526E.
48 [1997] 1 WLR 1447.
49 At 1464-1465 (emphasis added).
50 [1999] QB 92.

> "it is trite law that rent assessment committees, like other tribunals, are not required to articulate their reasons to the exacting standards and with the accuracy and precision required of a court".[51]

39 This decision is also of interest because the court recognised that the standard of reasons required of the assessment committees had increased (not by legislative change) over time.[52] Reference was made to the "early decisions" where decisions were accepted because the committees were not comprised of legally qualified individuals and that it would be wrong to expect too much of them by way of reasons which would stand up to judicial scrutiny. The change in the standard of reasons required was said to be influenced by such factors as:

> "(a) a jurisprudential need for such a tribunal to provide adequate and sufficient reasons for its decisions: In *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 and subsequent cases; (b) the increased training which is now afforded to all members of the tribunals under the auspices of the Judicial Studies Board, and (c) the qualifications of those who are now selected to become members of rent assessment committees. All those factors strongly point to the requirement that reasons should not merely pay lip service to the statutory umbrella under which the particular tribunal is operating, rather that they should condescend to articulate the actual process that has led to the decision which is, in this court, sought to be impugned. This is a natural and logical development of the decision in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498".[53]

40 These considerations are in marked contrast to a private commercial arbitration under the 1984 Act. In the present case there is not an equivalent influence of "jurisprudential need", of "increased training by [a] Judicial Studies Board"; of the "qualifications" and arbitrators are not a public "tribunal".

41 The majority of the UK authorities which have considered and applied Megaw J's reasoning *In re Poyser and Mills' Arbitration*, were not dealing with reasons in an award following a private arbitration but usually arose in the very different context of public administrative or planning decisions or mandatory quasi-judicial bodies. A further point of distinction is that the reasoning in these cases was influenced by considerations relating to the exercise of delegated powers arising in the administrative law context, considerations which do not arise in relation to arbitral

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51 At 119, citing *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 601, 603 per Danckwerts and Edmund Davies LJJ).

52 At 111.

53 *North Western Estates Development Ltd v Merseyside and Cheshire Rent Assessment Committee* (unreported) 27 November 1996, Turner J (quoted by Auld LJ at 111D-G).

awards.[54] It is submitted that in the circumstances outlined above, the English authorities considered in the *Oil Basins* and *Cypressvale* decisions[55] (discussed further below) are not relevant to the proper construction of s.29(1)(c).[56]

42 Those decisions also did not refer to other English authorities which have adopted a more flexible view of the requirement to give reasons, a view that is more consonant with the informal nature of arbitration and the fact that the arbitrator(s) is often not a lawyer.

43 In *Metropolitan Properties Co (FGC) Ltd v Lannon*,[57] Danckwerts LJ considered a rent assessment committee challenge under the *Tribunals & Inquiries Act 1958*, for failure to give reasons, and said:

> "There are certainly criticisms that can be made in respect of lack of clarity and resulting obscurity in regard to the grounds on which the decision of the committee was based, but I think that there is force in the contention that the committee is not a formal body, and is not wholly composed of lawyers [chair was lawyer], so that the necessary skill which a trained judge would have exercised may not be found in the members of the committee."[58]

44 And Edmund Davies LJ in the same case said:

> "That the decision, expansively expressed though it was, leaves untied many loose ends is beyond doubt and, again has not been doubted. Nevertheless, it has constantly to be remembered that such tribunals are basically informal in character. Its members are not restricted to the evidence adduced before them; they are free to draw upon their cumulative knowledge and experience of the matter in hand and they are not expected to express their decisions with the formality and precision which is required in judicial proceedings. That there are several lacunae in the written decision of the committee is clear. It is equally clear that in some important requests they have omitted to give their reasons" and concluded (at 604); "Nevertheless, despite these unsatisfactory features, I am not prepared to hold that any error of law emerges from or appears on the face of the record, and upon this ground I should dismiss the appeal."[59]

***Arbitration Act 1979* (UK)**

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54 *Hope v Secretary of State for the Environment* (1975) 31 P. & C.R. 120 at 122-123; *Edwin Bradley and Sons Ltd v Secretary of State for the Environment* (1982) at 930 where the requirement was for "reasons which in the opinion of the [decision maker] justify …"; *Wordie Property Co Ltd v Secretary of State for Scotland* [1983] SLT 345 at 348,; *Bolton Metropolitan District Council v Secretary of State for the Environment* (1995) L.G.R. 387 at 394-395.

55 (2007) 18 VR 346 at 368-369 [62] and [1996] 2 Qd R 462 at 484.

56 More recent authority under s.12 of the *Tribunals and Inquiries Act* 1971 (UK), has held that "*the extent to which [the duty to give reasons] requires detailed reasons must vary with the nature of the decision and of the case generally.*" See *Spath Holme Ltd v Greater Manchester and Lancashire Rent Assessment Committee* [1995] 2 EGLR 80 at 86 per Morritt LJ.

57 [1969] 1 QB 577.

58 At 600.

59 At 603.

45 A further point of distinction between the English authorities and the position under the 1984 Act arises in the language used in the *Arbitration Act 1979* (UK) which refers to but does not define a "reasoned award". Section 1(5) of the 1979 Act enabled a party to an arbitration, where "*it appears to the High Court that the award does not or does not sufficiently set out the reasons for the award,*" to apply for an order directing "*the arbitrator or umpire concerned to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought under this section, to consider any question of law arising out of the award.*" In this context, a "reasoned award" has understandably been held to mean "one which states the reasons for the award in sufficient detail for the court to consider any question of law arising therefrom, if, of course, [the court] were to give leave to appeal."[60] This is what a party was entitled to expect in the context of the provisions of the 1979 Act which provided for review of questions of law on a broader basis than in the Act. The same considerations are not present in the 1984 Act.[61]

46 It is submitted that the approach taken in the English cases in this period (and by English legal writers[62]) is again shaped by a different legislative context surrounding, and is in pursuit of a different legislative objective to that pursued by, the Act. This different statutory context has continued in England under the *Arbitration Act 1996*. Under s.70(4) of that Act the court may order the arbitral tribunal to state the reasons for its award in support detail to enable the court properly to consider a challenge to, or an appeal against, the award.

The obligation on a judicial tribunal to give reasons

47 It is also submitted that the requirement in s. 29(1)(c) imposed on an arbitrator in a private commercial arbitration is fundamentally different from the obligation on a judicial tribunal to give reasons. The obligation or "duty" of a judicial tribunal to give reasons rests on "*the principle that justice must not only be done but must be seen to*

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60 *Trave Schiffahrtsgesellschaft m.b.H.& Co. K.G. v Ninemia Maritime Corporation* [1986] 1 QB 802 at 807D per Sir John Donaldson MR.

61 In contrast, at that time in NSW, a party to an arbitration had no such expectation or right. In *Askew v Fields* (1985) 156 CLR 268 at 272 it was held that even if the terms of the award raised "the possibility ... of an error of law" that was not of itself justification to enliven any judicial supervision or power to remit the award for reconsideration.

62 The influence of the different context is seen in "*Reasons and Reasons: Differences Between a Court Judgment and an Arbitration Award"* by Lord Bingham, (1988) 4 Arbitration International 141 at 152 – 154, and Johan Steyn in (1983) Vol VIII Yearbook of Commercial Arbitration 3 at 23 saw a change to encourage reasons in England as a way in which "difficulties relating to the enforceability of unmotivated awards in certain countries can be avoided".

be done".[63] This view (akin to the view that reasons are needed to accord with the "ordinary man's sense of justice"[64]) and an earlier view that it is "an incident of the judicial process."[65] Indeed, the requirement for a judicial tribunal to give reasons may have a constitutional dimension under Ch III as a defining feature of the judicial process implicit in an exercise of judicial power.[66]

48 Such notions - grounded as they are in the exercise of public power - are inconsistent with the nature of the arbitration process required or contemplated under the 1984 Act; viz, a freely negotiated contract based process characterised by party autonomy,[67] flexibility and privacy. Equally inapposite is an alternative view that judicial reasons are part of courts' formulation of rules for future cases which also enable "practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future.[68] So too is the view that reasons promote judicial accountability.[69]

49 Yet another possible view that "*the judicial duty ... is directed to preserving and facilitating any rights of appeal ... which a party may have*"[70] is also at odds with the legislative intention for s.29(1)(c) reflected in the restricted bases for judicial review in s. 38 of the 1984 Act . In the arbitral context, an opportunity to appeal may not exist and if it exists, is not available as of right and requires the exercise of discretion and satisfaction of the high standards of "manifest error of law" or "strong evidence of an error of law". By contrast, the existence of an appeal from a court means a statement of reasons by the court requires "a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate court if there should be an appeal".[71]

50 If evidence or particular submissions play no part in the arbitrator's reasoning process, there is no obligation to refer to it in the reasons for the arbitrator making the award.[72]

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63 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 per McHugh JA at 278. See also *English v Emery Reimbold & Strick Ltd* [2002] 3 All ER 385 at 392-393 [15]-[17].

64 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 668.

65 *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Limited* [1983] 3 NSWLR 378 at 386, and noted in *Soulemezis* at 268G (supra).

66 *Grollo v Palmer* (1995) 184 CLR 348 at 394. *Gypsy Jokers Motor Cycle Club v The Commissioner of Police* (2008) 234 CLR 532 at [108] 580, [119]-[121] 583.

67 This is a matter recently emphasised by the United States Supreme Court in *Stolt-Nielsen v Animalfeeds International Corp* 559 US_ (2010) at 18-20.

68 *Soulemezis*, supra at 279.

69 Ibid.

70 *Pettit v Dunkley* [1971] 1 NSWLR 377 per Moffitt JA at 388.

71 *Carlson v King* (1947) SR (NSW) 1 at 4-5 (Jordan CJ).

72 Cf *Goodman Holdings v Hughes* [2009] NSWSC 682 at [40].

Any obligation to refer to such evidence or submissions would be an obligation to refer to something which was *not* part of the reasons for making the award.

51 Furthermore, s.29(1)(c) cannot be viewed as *necessary* to facilitate rights of appeal in s.38 because s.29(1) allows the parties to agree that no statement of reasons shall be given for making the award. Parliament has thus created a legislative scheme that severs any nexus between reasons and rights of appeal. The two are not logically interdependent.

Conclusion

52 The 1984 Act does not impose an obligation on an arbitrator to state reasons of a particular quality or of a particular standard (such as the judicial standard, as suggested by *Oil Basins* [at 54] and the Appellant's Submissions at [85]). The Act does not require that the reasons be "adequate". All that s. 29(1)(c) requires is a statement by the arbitrator of the reasons for acting as he/she did. This may reveal reasons which may be inadequate for others but that is beside the point if those "inadequate" reasons were the reasons which motivated the particular arbitrator. Nor does the statute require that the arbitrator state reasons "for" the conclusions which are mentioned in the arbitrator's statement of reasons. The statute requires reasons for making the award, not reasons for making each conclusions (or assumption or inference) referred to in the reasons "for" making the award.

53 Further, the issue of construction should not be clouded by broader notions of procedural fairness applicable to those exercising public power, administrative or judicial, which may view a duty to give reasons as an aspect of natural justice in certain exceptional statutory contexts[73]. Arguably, the requirement of procedural fairness encompasses the right to a hearing before action is taken and, by parity of reasoning in the arbitral context, a right to a hearing before the award is written.[74]

Oil Basins

54 At first instance in *BHP Billiton Limited v Oil Basins Limited*[75] the Court held that the arbitral panel, which was required by s.29(1)(c) of *Commercial Arbitration Act 1984* (Vic) to give reasons in its award, in the circumstances of that particular arbitration

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73 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 676. The competing views are discussed in Aronson & Dyer, *Judicial Review of Administrative Action* (2004, 3rd ed), pp 554-562.

74 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1 at 34 [105].

75 [2006] VSC 402 at [23].

was "*under a duty to give reasons of a standard which was equivalent to the reasons to be expected from a judge deciding a commercial case*".[76] On appeal, the Court of Appeal appeared to endorse this reasoning.[77] There are several difficulties with the Court of Appeal's reasoning.

55 For one thing, application of a judicial standard to an arbitration award is inconsistent with the parties' agreement to arbitrate their dispute rather than submit their dispute to the judicial process. It does not recognise the significant theoretical and practical differences between the arbitral process and the judicial process.[78]

56 At a practical level, a requirement to provide reasons to the standards expected of judicial officers is also likely to be more difficult for arbitrators without a legal background to meet. This may prevent or discourage persons with relevant technical experience or expertise (but without legal backgrounds) from acting as arbitrators. A requirement to conform with a judicial standard of reasons is also likely to add significantly to the cost of arbitration and to open up avenues for the judicial review of awards contrary to the Act's objective of promoting finality.

57 Significantly, the Court's reasoning appeared to be influenced by considerations that do not properly inform the content of the statutory obligation in s. 29(1)(c). At first instance the Court concluded that the following matters, amongst others, were relevant to the content of the arbitrators' obligation in that case to state the reasons their award:

(a) the conduct of the arbitration was attended with many of the formalities of a legal proceeding, including the exchange of points of claim and defence and of substantial and lengthy witness statements;

(b) the arbitrators were retired judges of superior courts;

(c) both sides were represented by large commercial law firms of solicitors and very experienced Queen's Counsel.

The Court of Appeal rejected the contention that the trial judge erred in taking these matters into account when determining the content of the statutory obligation to state the reasons for making the award in s.29(1)(c).[79]

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76 At [23].
77 (2007) 18 VR 346 at 366 [54].
78 See Keane, "Judicial Support for arbitration in Australia" (2010) 34 *Australian Bar Review* 1 at 4.
79 At [54].

58 As a matter of statutory construction, the matters referred to by the judge at first instance (and seemingly endorsed by the Court of Appeal) are not matters which properly inform the content of the obligation imposed by s. 29(1)(c) of the Act. They introduce a degree of variability into the requirement to state reasons not intended or contemplated by Parliament.

59 These matters are of questionable relevance when the question can be viewed as one of statutory construction. Is it not a question of what the legislature requires of an arbitrator rather than what expectations the arbitration process might subsequently create in the mind of the Court on an application for leave to appeal? Why should the fact that the arbitral panel, in the exercise of its powers under s.14 to conduct the arbitration as it sees fit, assimilated in part some civil trial techniques into the arbitration alter the content of the pre-existing statutory obligation in s.29(1)(c) to include a statement of reasons in its award? The statutory obligation rests on every arbitral panel under the Act and the Act contains no requirement for legal training or any other qualification to act as an arbitrator. Nor, of course, is there any statutory obligation to conduct the arbitration in the same manner as a judicial process. On the contrary, in enacting the Act in 1984 Parliament empowered the arbitrator under s.14 to conduct proceedings "*in such manner as the arbitrator or umpire thinks fit*" and authorised the arbitrator under s.19(3) "*to inform himself or herself in relation to any matter as the arbitrator ... thinks fit.*"

60 Further, if one asks what the parties contracted to receive from the arbitral tribunal,[80] this is determined at the time of[81] making the arbitration agreement, or perhaps at the later time of making the "trilateral" reference agreement between the parties and with the arbitral panel,[82] rather than subsequently. Subsequent conduct of the parties or of the arbitral panel in conducting the proceedings would be irrelevant.[83] Absent any contractual provision dealing with reasons, the content of the statutory obligation would inform the construction of any such contract.

61 The arbitral panel in the present case was a mixed (lay and retired legal) panel. Did the contracting parties intend to vary the statutory obligation to write an award with "a

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80 See *Cie Europeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Reports 301; *K/S/ Norjari A/S v Hyundai Heavy Industries Co Ltd* [1992] 1 QB 863.

81 *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44 at 58 [36].

82 See *Jivraj v Hashwani* [2010] EWCA Civ 712 at [14]. As noted above, the Supreme Court of the UK has granted leave to appeal from this decision.

83 See *Askew v Field* (1985) 156 CLR 268 at 271, where the Court held that the circumstances of the *panel's* conduct in adopting formal pleadings, particulars, discovery and a "formal hearing" did not impose a duty to make findings on the issues *litigated.*

statement of the reasons for making the award"? Did the parties agree that a particular member of the panel would write the award or determine the nature and extent of the statement of reasons? An active arbitrator whether retired from a former profession or not, writes as an arbitrator. When only one of three is legally qualified does that change the statutory obligation resting on the other members of the panel? As a "retired" judge, did the parties assume that the person still had access to the judicial resources previously at that person's disposal to utilise as an arbitrator and further, would act as if he/she had not been retired? If the legally qualified member was the presiding member of the panel, did the party appointed arbitrator members have authority to vary the obligations arising under the agreement between the parties in such manner as they thought fit by their choice of the presiding member. If they chose a non legally qualified person, would the statutory obligation resting on them be any different? Would they be under a lesser obligation? All these considerations suggest that the views in *Oil Basins* should not be accepted.

Other Australian Authorities

62 In *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd*[84] the Supreme Court of Queensland simply adopted the reasoning of Megaw J in *Re Poyser & Mills* without taking into account the English context that compelled the view taken in that case. The Court also considered itself bound by the reasoning in *Cypressvale Pty Ltd v Retail Shop Leases Tribunal*[85] even though that case did not concern a private arbitration under the *Commercial Arbitration Act 1990* (Qld) but judicial review of a statutory tribunal's decision under the *Retail Shop Leases Act 1984* (Qld). In that different context the Court of Appeal found it necessary to ask itself whether the reasons were "adequate" and concluded that this required assessment in terms of, inter alia, the "talents and attributes" of tribunal members. The statutory obligation imposed by s. 29(1)(c) of the Act does not fluctuate from arbitration to arbitration due to such imprecise factors. Nor does it require weighing of "considerations of the cost to litigants and the general public" as the court in *Cypressvale* asserted (at [40]); that would be to conflate impermissibly the requirement for reasons in the arbitral context with the judicial obligation considered in *Soulemezis*.

Dated: 25 January 2011

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84 [2010] QSC 94.

85 [1996] 2 Qd R 462.

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